A new perspective on crime victims' rights to participate in the Dutch criminal justice system
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Crime Victims’ Right to Participate in the Dutch Criminal Procedure

Introduction

1926 Code of Criminal Procedure:

very limited role for the victim:

report the crime
act as a witness

like elsewhere: the victim as ‘the forgotten party’

‘adhesion procedure’: file a claim for damages
Maximum of € 700
Very little empirical information on success rate
Problems:
No information on investigation/trial
In case of court order: victim responsible for execution stage

2. 1985: the UN Declaration and the Council of Europe Recommendation

Two important international protocols on victims’ rights were virtually simultaneously adopted in 1985:
The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
The Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure

These documents reflect an international consensus on the extent of victims’ rights. They can be summarised as follows. Victims should have the right to:

- be treated with compassion & respect for their dignity
- receive information
- allow the views of the victim to be presented & considered
- proper assistance throughout the legal process
- protection of privacy and physical safety
- informal dispute resolution
- social assistance
- restitution by the offender
- State compensation
- Building partnerships between government agencies, NGO’s & civil society

3. First wave of reform: administrative guidelines

In 1985/1987 some administrative guidelines were introduced. The objective was to improve the position of the victim during the pre-trial stages of the proceedings.

The “police” was instructed:

1. to treat victims in a correct way and to record their crime reports carefully; this duty includes referral, if necessary, of the victim to assistance agencies, in particular in cases of serious crime;
2. to give the victim general information on the procedure following the crime report; to ask the victim explicitly whether he wants to claim damages and whether or not he wants to be kept informed about the progress in the investigating procedures; to inform the
victim about means and ways for the settlement of damages, to promote and -if appropriate- to mediate in the settlement;
3. to make an official record of relevant information about the victim and of the police's dealings with him.

The duties of the "public prosecutor• were defined as follows:
1. to write the victim a letter in which he is invited to declare whether or not he:
   -wants to be kept informed of the progress in the procedure;
   -would like to be financially compensated in the course of the pending process;
   -would appreciate a conversation with the prosecutor in charge, preceding the trial in open court (only in cases of serious crime) 2. to give the victim all the information he might ask for(within the limits of existing legislative boundaries, of course):
3. if the report by the police indicates serious injury or a heavy loss, to express his sympathy to the victim or to the deceased victims relatives;
4. the prosecutor is furthermore instructed to bear the interests of the victim in mind "whenever he has to make a decision in the case•; since this official holds wide discretionary powers in the Dutch criminal procedure, this is a farreaching order.

Hard to tell how effective these guidelines have been. Five years after their introduction 25% of the police forces indicated not to be aware of their existence at all!

It should be noted, though, that for instance the provision of information through letters proved to be very difficult. Over the years, more than 30 draft letters were tried and not approved completely. Very hard to explain legal matters in wording which is accessible for lay people (often with limited education).
Further proof of how tough it is to convey the information victims are entitled to is the research by Brienen/Hoegen (2000): the best performing countries reached a success rate of 70 %. And finally, when we speak with bereaved families, the complaint which is most commonly heard is that they were not kept informed of developments to an adequate extent.

This led to the second wave of reform.


Major legislative initiative. Terwee-Act introduced several innovations:

- Removal of cap (maximum € 700 abolished); replaced by a qualitative criterion: 'clear case'
- Opportunity to claim only part of the damages in criminal trial, and still have standing to claim additional amount in civil litigation
- Power to file the claim for damages during the pre-trial stages
- Introduction of a compensation order: forced reparation as a sentencing option
- Introduction of a separate chapter in the CCP dedicated to the rights of a victim who wants to claim damages ('the aggrieved party'). Large symbolic implications
- Gradual introduction of the Act. Two pilot districts in 1992, the remaining parts of the country in 1995

It must be observed that the content of the Act is entirely focused on the trial stage of the proceedings. Yet the objective behind the Act is to also improve the state of affairs during the preliminary stages of the proceedings. Hence the introduction of new guidelines.

Since this time the government has become more aware that introducing new legal rules does not automatically affect the 'law in action'. In order to achieve real compliance, several conditions have to be met:
-attitude
-knowledge
-resources
-network of key players
-senior official in relevant ministry

5. Intermezzo: mediation

Since the middle 90ties, victim-offender-mediation has been developed in three different modalities:

-diversion
-part of the penal process
-after the process (during incarceration)

Carefully balancing potential benefits and potential risks:

-full policy of free consent
-admission of guilt admissable as evidence in subsequent legal procedures
-offender’s behaviour during and after mediation
-the role of victim support organisations

6. 2005: the introduction of victim impact statements

The next main reform came with the introduction of the oral victim impact statement in 2005.

Two significant limitations:

-only in case of very serious crime (8 years +; stalking, sexual crime and some crimes of negligence – art. 6 WVW)
-limited to actual consequences of the crime; no statement of opinion allowed (this is very controversial: Van Dijk vs me)

Judiciary was very reluctant in this area:

-emotionalising the trial (strange argument: criminal law is full of emotion anyway – think of negligence in traffic accidents; serious sexual crime in general)

-delays (easy to limit time allowed to speak)

-unequality in sentencing (mixed evidence on actual influence on sentencing) (on the other hand, there are cases where it is evident that the impact should be a determining factor in sentencing: burglary in old women’s home causing fatal heart attack; rape of Muslim girl affecting chances of marriage or even leading to expulsion)

-revictimisation of the victim (can for a large part be prevented by careful preparation by a member of a victim support organisation)

These drawbacks have not materialised.


Bill is still pending in parliament, but will be adopted later this year.

This Act is the final step in a process that was started some 25 years ago.
1. A separate chapter of the CCP dedicated to the rights of the victim as such. Not in a derived capacity (civil claimant), but as a ‘victim’ (first time the word ‘victim’ appears in the CCP). (Major symbolic significance)

2. Art. 51a section 2/art.288a CCP:
   “the prosecutor makes sure the victim is treated in a correct way”
   “the presiding judge makes sure the victim is treated in a correct way”

3. Various informational rights (inspired by CoE R(2006)8, which is state of the art in this – and in many other – respects)

4. Inspecting the case file. Right to request to have additional documents included in the file.

5. Right to legal counsel and representation.

6. Right to translation (and interpreter)(This is increasingly important in our region because of the great number of cross border-victimisation)

7. Right to claim damages from parents of offender under age of 14.

8. Right to hear about release of incarcerated perpetrator in serious cases. (Has been controversial for a long time)

9. Parents of juvenile offender can be obliged to attend trial (I doubt wether this is seriously desirable).

10. Claim for damages in cases which are not included in the indictment but are being ‘taken into account’ (ad informandum). Doubtful how meaningful this is, since it will usually involve situations where many crimes have taken place, so that the means of the offender will be insufficient to be able to pay some reasonable level of reparation.

11. In case of a compensation order being part of the sentence, the government will pay the sum up front to the victim. This is revolutionary.

12. Clarification of ‘clear case criterion’ to allow more claims for damages to be acceptable within the criminal trial. The claim can only be dismissed if it would lead to a ‘disproportionate burden’ for the criminal procedure.

8. Conclusion

We have achieved tremendous progress over the past 25 years.

How about the future? What developments are to be expected?

I would like to warn against ‘the victimologists fallacy’, which holds that the more victims’ rights there are, the better it is.¹ This is a mistaken way of thinking.

I urge for some restraint. Three limits to the establishment of new rights must be observed:

1. Victims’ rights must never compromise the right to a fair trial for the defendant.

¹ Groenhuijsen 1999
2. The victim is a participant, not a third party in the trial. So the victim is not to be awarded offensive rights of his own. No private prosecution. This would lead to counterattack and a situation where the victim could easily turn out to be the vulnerable person.

3. No veto-rights. No final say in decisions on pretrial detention, the use of the expediency principle, sentencing or parole.²

Instead, the future of victims’ rights is better served when we focus on better implementation of the kind of rights we have just discussed.

² No’s 2 and 3 are closely linked. See position paper by EFVS.