prof. dr. Marc Groenhuijsen

RECENT DEVELOPMENTS IN THE DUTCH CRIMINAL JUSTICE SYSTEM CONCERNING VICTIMS OF CRIME

Paper submitted to the 6th international symposium on victimology,
Jerusalem, Israel, August 28 - September 1 1988

1. Introduction

The Dutch have a reputation for their relatively humane criminal justice system. This is due to several circumstances. For instance: the repressive power exerted by officials in the pretrial stages of the criminal procedure is comparably moderate, the level of punishment is lower than in many other countries, and the conditions for prisoners are a little less degrading and humiliating than elsewhere. Judging by these superficial characteristics in stead of actual practice, one could almost feel as if the Netherlands are a good place to be for criminals.

This projected image can easily lead to the question whether the Dutch care just as well for the victims of the crimes that are perpetrated on their territory. The answer is - according to many people - a clear and emphatic no. Research on this topic will show a sad and uninterrupted history of complaints about a lack of governmental receptivity to the wishes and the needs of victims. These complaints are certainly justified in so far as the victim never has been a focal point of attention in the criminal justice system. On the contrary, in stead of systematically benefitting from the system, there is a serious risk of secondary victimization in the existing legal framework. How is this possible ? What were the initial reasons for only marginally involving the victim in the criminal procedure ? How can it be explained that the legislature has ever since resisted a great number of recommendations by authoritative writers to improve this state of affairs ? On what grounds has the gouvernment recently changed its attitude towards this issue ? Is the current consensus to promote the emotional and financial interests of victims of crime some sort of vogue that will pass away unnoticed when another pressuregroup seizes the public mind ? Or will we be able to make some lasting impression by imposing fundamental changes in the concepts underlying the criminal procedure ?

These are the questions that will be adressed in this paper. I will first give a brief outline of the historical background of these issues in our country (§ 2). Then the recent improvements of the position of victims of crime will be described that have been achieved on a rather practical level (§ 3). In § 4 attention will be paid to the report by the Terwee Committee, in which quite a few proposals are made to amend the law in this respect. I will also discuss the - partly critical - reactions to this report from the academic community. A separate section is dedicated to the refunding of damages by the government (§ 5), and to the possible use that victims of crime can make of the civil law (§ 6). § 7 contains some concluding remarks.

2. The break with the French institution of the 'partie civile'

The French empire under Napoleon Bonaparte was not only imperialistic in its political objectives, it also dominated the judicial institutions in large parts of western Europe in the early years of the nineteenth century. Accordingly, the Code Pénal was in force in the Netherlands from 1809 until 1886, when the substantive criminal law was laid down in a comprehensive domestic code. The procedure was governed by the French Code of Criminal Procedure until 1838. In the latter year the first national code on this subject was

implemented, in which a radical break was undertaken with the notion of the 'partie civile' in the French system. The Dutch legislator did not want to see the victim in an independant - let alone a predominant - position in the criminal process.

There were three mayor arguments for this point of view.[12] Fistly, it was felt that the decision to instigate criminal proceedings could not be made by a private individual. The interests at stake for a citizen who suddenly begets the status of a defendent were deemed so important that the impartial judgement of a public prosecutor should be warranted in every case. The so-called 'action directe' was therefore abolished.

The second argument was based on considerations of fact finding. One of the most important objectives of the criminal trial is to find out what actually happened. We need reliable statements from, primarily, witnesses and the victim of the crime in order to get to the truth. The presence of a 'partie civile' was considered to be inconsistent with this aim, because his material and emotional interest in the outcome of the trial might easily color his statements. This might affect the fairness of the entire proceedings against the defendent. So, to gard against the vengeance of the victim diminishing his reliability as a witness, he was denied the possibility to exert a substantial influence in court.

The third argument has to do with the division of labour in the regular judicial organisation. The decision on criminal matters is entirely different from finding solutions for a civil claim for indemnification. The Dutch legislator in 1838 feared that a joint venture - in the sense of a decision on guilt, punishment and compensation in one verdict - might compromise the required concentration of the trial judge for the criminal case. Again, the French system of a 'partie civile' might have jeopardized the fairness of the public trial against the criminal.

In these circumstances the legislator allotted the victim only limited opportunities to play a role in the criminal procedure. It was decided that he could join the criminal case with a civil claim for compensation[3]. This claim, however, could only be dealt with as a corrolary of and a subsidiary to the criminal matter. This meant on the one hand that a financial benefit could only be accorded to the victim if the defendant was actualy convicted by the state for a criminal offence (i.e. not in case of an acquittal for technical reasons while there is uncontested liability for tort). And the civil conflict could on the other hand only be tolerated if it concerned a relatively small amount of money.

Later on, it was alleged that 'punishment' and 'restitution to victims' are so distinct in juridical meaning that they simply cannot be integrated in one correctional system. This line

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[1] According to the official documents of this period, there has not been much of a fundamental debate on the merits and demerits of the system of the 'partie civile'. The decision was apparantly based on the self-evident weight of the arguments that are set forward in the text.

[2] See J. De Bosch Kemper, Wetboek van Strafvordering, Amsterdam 1840 Volume I p.47 and Volume III p.51.

[3] Jan van Dijk has developed convincing arguments to prefer the term 'compensation' to 'restitution'. The original meaning of restitution, he says, is to give something back to its proper owner. It has retained this restricted meaning in some European laws. In ouw view compensation must also cover immaterial damages. See J.J.M. van Dijk, Victim rights: a right to better services or a right to active participation , in: Jan van Dijk et al (eds.), Criminal law in action. An overview of current issues in Western societies, Arnhem 1986, p. 353.

of reasoning of course corroborated the legislator's point of view and reinforced the official perspective on our subject.

So it was not negligence or lazyness on the part of the legislator that caused the lamentable position of the victim in the criminal justice system. It was a deliberate choice, that met with no serious oppposition at the time it was made.

The criticism came later on. From the last quarter of the 19th century onward, many distinguished writers published dissenting views.[4] In 1904 the prestigeous meeting of the Dutch Lawyers Association appealed to the legislator to promote the principle that the criminal should be compelled to compensate his victim financially.[5] The arguments used in 1838 to exclude the victim from participation in the procedure were easily refuted. The emphasis on the monopoly of public prosecution to the exclusion of any private initiative in this respect, should not necessarily in any way interfere with the prospects of a solid merging of the civil claim for damages in an actual criminal trial. The second argument - the danger for the fact finding process - was also considered spurious. The victim does have a (financial and emotional) stake in the outcome of the trial anyway.[6] So it's better to bring the reason for his potential bias out in the open: in this way the judge could probe him with questions to scrutinize the contents of his statement. As far as the third argument is concerned, it was quickly pointed out that we should not have excluded all the claims for large sums of money, but only the legally complicated ones. Only the difficult civil disputes could possibly distract the judge from his duties in the criminal case. The dogmatic argument on the supposedly sharp distinction between punishment and compensation is as valid for the law in the books as it is useless for the law in action. I will get back to this point in section 4 below.

The reasons for limiting the rights of victims to participate in the criminal procedure were thus easily met by more convincing observations that pointed in the opposite direction. Yet it took the better part of the 20th century until the widespread dissatisfaction lead to concrete amelioration. How come ? Without claiming waterproof scientific support for this thesis, three factors can be singled out as having contributed to the recent effectiveness of the plea for the interests of victims of crime.[7] First there is the rising crime-rate. The more people get to be victimised, the more important it is that there are adequate facilities to deal with their problems. Simple. We might add that in the last decade many policemen, prosecutors and magistrates have themselves experienced the consequences of theft, robbery, battery and the like. This appears to be very instructive and to make them more sensitive to the anxieties of others in the same unfortunate situation. Secondly, the population as a whole has become more articulate and less shy in directing complaints to the government. The support of the

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[4] One of the most detailed propositions was set forward in the doctoral dissertation on this subject by J. Slingenberg, De strafbare daad en de schadeloosstelling van den benadeelde, Amsterdam 1896.

[5] See the records of these meetings (the so-called 'Handelingen'), N.J.V. 1904, part II and 1905, part I.

[6] This is self-evident as far as the emotional side is concerned (the Germans use the appropriate term Genugtuungsinteresse). For the financial consequences one should take into account that the Dutch Civil Code (art. 1955 BW) holds that a conviction by a criminal court is admissable as powerful evidence of liability in a later civil lawsuit.

[7] These sociological observations have been elaborated in various articles by J.J.M. van Dijk.

'silent majority' can no longer be taken for granted. And thirdly the role of the so-called feminist movement should be mentioned. These ladies have been able to attract a lot of attention for the deplorable treatment that some victims of sexual crimes were receiving. The remedies they have succesfully exacted from the policymakers have also benefitted many other categories of victims.

3. A better attitude, better services.

Good intentions are not enough to support victims of crime. People with the best of intentions but without proper knowledge can even cause of lot of harm. In our case-law we have a notorious example of this phenomenon. The district court in Leeuwarden once convicted two offenders for sexually harassing a young woman whose car they had stopped. The woman had put up a real fight with her attackers and had lost her necklace in the process. The court sentenced the offenders to a partly conditional prison term, and ordered them to buy a new necklace for their victim.[8] Of course the woman could never accept such a gesture. It doesn't take much sensitivity or imagination to realize that a necklace is an object with emotional value. If such an ornament is lost in a physical struggle with some unknown hooligans, you only make matters worse when you oblige them to buy the victim 'another' necklace of some specified monetary value. That is the difference between jewelry and a shoelace.

Although good intentions on the part of the officials in the criminal justice system are not sufficient to yield good results, they can certainly contribute tremendously to minimise the misery for victims of crime. There is no doubt in my mind that many problems for victims could have been solved to a large extent within the existing legal framework.

The current Penal Code and the Code of Criminal Procedure contain many provisions that can be used in favour of the aggrieved persons. Let me give some examples. The police and the prosecutor have the power to settle a case out of court. In doing so, they may impose the condition that the defendant compensates the injured party financially. This power is still not used very frequently to the benefit of victims.[9] The same holds true for the legal right of the magistrates to deliver conditional sentences in which the damages of the victim are taken

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[8] Rechtbank Leeuwarden february 16th 1983, Nederlandse Jurisprudentie 1983, nr. 507.

[9] The right of the public prosecutor to offer an offender a settlement out of court on condition that he pays restitution to the victim, was confirmed explicitly in the Penal Code in 1983 (art. 74). The impact of this provision was not encouraging: in only 1.3 % of these settlements in felony-cases some money was awarded the victim. See M.M. Kommer, J.J.A.Essers, W.A.F.Damen, De transactie in misdrijfzaken, WODC-reeks no.8, The Hague 1986.

into account in a responsible way.[10] And the available facility for merging the civil claim for damages in the criminal trial could also be used more often than is being done nowadays.[11]

These observations amount to two conclusions. The first one is that the position of victims of crime can be improved substantially without any legislative interference. This has been confirmed in the last couple of years, when many magistrates and other officials have spontaniously created new and unexpected applications of the law so as to benefit certain victims.[12] In all the relevant cases the good intentions of individuals have indeed been indispensable and the practical impact of these initiatives can hardly be overrated. Defence lawyers also have exerted some influence by persuading their clients to make restitutional payments, of course most of the times in the hope of leniency by the court. And last but not least the voluntary and the (semi-) professional aid-centers for victims of crime deserve credit for the progress that has been made lately, because they have systematically educated victims on their legal standing. This leads me to the second conclusion.

Perhaps the single most influential factor in our field of inquiry is the lack of information for too many victims. People who are not aware of their rights are for all practical purposes the equals of people without any rights. In developing a strategy to improve the lot of victims, we should constantly bear in mind that effective communication is absolutely essential for succes.

The theoretical implications of this thesis can be outlined as follows. By communicating with a victim in the course of the criminal procedure, an official not only enables him to

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[10] According to a survey conducted by the Research Centre of the Ministry of Justice this power is used in 3.2 % of the cases tried by a district court. This figure corresponds to 3.7 % of the files in which a victim was involved. See the report by M. Junger and T. van Hecke, Schadevergoeding binnen het strafrecht. Daders en slachtoffers van misdrijven, W.O.D.C.-rapport no. 82, Den Haag 1988, p.72. I must add that the prosecutor does not petition the use of this punishment to often, for reasons that are set forward in an annex to the annual report by the 'Openbaar Ministerie' (the prosecutors office) of 1986, p.23-24.

[11] It has always been difficult to attain reliable figures on this subject. Yet the available documents indicate that we are talking about a small percentage of the cases in which this merger could have taken place. See for instance G.J.A. Smale, Slachtoffers van ernstige vermogens- en geweldsmisdrijven, part I (Groningen 1977) p. 107 and p. 147-148. In the above mentioned report by the Research Centre of the Ministry of Justice it was found that merging occurred in 4.2% of the files that were studied. In 14% of the cases the victim had expressed a desire to make use of this facility (Report p. 77-78).

[12] These creative applications of the law have also benefitted certain groups or categories of victims indirectly. The district court of The Hague convicted a 78-year old defendant for having commited many incestuous acts with his grandchildren. In the verdict the court reasoned that the age of the man, his poor health and his physical handicap precluded unconditional incarceration; to confront him with the uglyness of his crimes and with the farreaching impact thereof for the victims, the court consequently ordered him to pay a large sum of money to the Association against sexual abuse of children within families (decision of may 21st, 1987). In Rotterdam, the district court sentenced a couple of young offenders who had caused terrible havoc on Christmas night in 1983 to pay money to the Salvation Army, earmarked for the collective victims of the riots of the night of december 25 th in Rotterdam and Schiedam (decision of april 26th, 1984).

reclaim some damages, but also creates an opportunity to convey a sense of care, a spirit of compassion. In this way the conceptual gap between compensation on the one hand and psycho-social assistance on the other, can be narrowed.

The paramount meaning that is in my view attached to the transmission of intelligence to victims has yet another corrolary. Jan J.M. van Dijk has analysed the efforts on behalf of victims in terms of a 'procedural rights model' and a 'services model'.[13] The former approach is that the victim should be able to play a more active role in the criminal process or in alternative judicial procedures; it sees the victim as a subject who must be given an extended set of legal rights to pursue his or her own interests. The services model is described as follows: "Examples of the second option are official standards for the treatment of victims by the police, guidelines for the notification of victims by the police and/or prosecutor of decisions on their cases, compensation orders as penal sanctions (restitutive fines collected by the prosecutors or courts) and victim impact statements in pre-sentencing reports. The latter approach sees the victims as a special target group for the services or activities of the police and criminal justice authorities."

There may be compelling reasons for this distinction in the international victimological debate. In the Dutch situation, however, it is my impression that the 'procedural rights model' and the 'services model' are integrated in the mainstream movement to improve the position of victims of crime. The right to pursue your own interest is worthless unless you are afforded with adequate facilities, call them services, like reliable information on the developments in the criminal procedure et alia. And many of the 'services' that are mentioned in the second approach are impossible to administer effectively without converting them into enforcable rights for victims in the course of the criminal procedure. So as far as the actual Dutch situation is concerned, I would rather not think in terms of two competing sets of objectives, based on incommensurable images of the victim. In my opinion the two 'models' are both recognised as valid points of view; depending on the topic under discussion, however, it can be appropriate to accord greater weight to the one than the other, or vice versa.

Against this background it is of great importance that the Dutch Minister of Justice in 1986 and 1987 issued some directives to the police and the prosecutors, in which he laid down new rules of conduct that are to be observed in dealing with victims of crime.[14] 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.

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[13] J.J.M. van Dijk, see footnote 3 supra, p.352-353.

[14] In writing the upcoming paragraphs I made use of the paper by Lex Penders, Guidelines for police and prosecutors; an interest of victims; a matter of justice, prepared for an International Conference on Victim Assistance Schemes, in Eerbeek, The Netherlands, in december 1987.

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, preceeding 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.

Let me add some evaluating remarks to these rules of conduct governing the relation between the police, the prosecutor and the victim of crime.

First of all, the instructions are laid down in a ministerial directive (technically called a 'circular'). A directive like this one does not have the force of statutory law. For some writers, like Penders, this status of 'pseudo-law' is reason enough to label the directives as 'a first, modest step'; they consider it a major handicap that the victims right is still derived from the duty or the obligation of someone else. Others, including myself, feel that this matter of formal status is of minor importance.[15] The decisive point is that the government has set well defined standards for dealing with victims in the criminal procedure and has thereby accepted responsibility for failing to meet these standards. This is enough to establish civil liability in case of violations and could be more than enough to warrant disciplinary corrective action within the offending organisation.[16]

My second remark can be a short one. If you consider it with due sobriety, it is in fact a shame that it is apparently neccessary to instruct the police force in 1987 'to treat victims in a correct way'. Since ministerial directives are usually not filled with self-evident descriptions of standard behaviour, this is in itself a disturbing thing to observe.

On the other hand it is encouraging to witness that the government not only prescribes a wave of attention for victims, but matches this with the allocation of funds to make this feasible. In each of the 19 judicial districts a job has been created for a civil servant who is responsible for providing the victims with the required information.

It is always a matter of some speculation whether the new directives will actually have a great impact on the daily routine of the criminal law system. Research on this subject confirms the validity of most of the assumptions underlying the ministerial circular: a correct treatment of victims spares them a lot of additional grief and suffering; and victims do indeed feel

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[15] The matter is of minor importance: this means that I would support adopting the same standards in the Code of Criminal Procedure, without expecting that it would make that great a difference.

[16] The idea of 'enforcable rights' for victims hinges on the sanctions that are foreseen in case of violation of these rights. Apart from civil liability and disciplinary action one could suggest to seek redress within the criminal procedure. But is it feasible to nullify a trial in which the offender is convicted because the victim was not treated correctly ? Or should we exclude evidence on this ground ? In my opinion, there is no more satisfactory remedy for the victim than a claim for damages against the government.

happier - at least less annoyed - when they are promptly and punctually informed about the progress in the criminal procedure.[17] Yet the ultimate succes of this policy will depend on the communicative skills of the officials, i.e. on the degree in which they will be able to get through to the victims. Professional education from this particular point of view is probably more conducive to the interests of victims than the most farfetched legislative reforms.

4. The Terwee Committee-report and its aftermath

In August of 1985 the Minister of Justice appointed a committee to study the feasability and advisability of changing the Penal Code and the Code of Criminal Procedure in order to improve the position of the victim. The committee was chaired by Mrs. Terwee-Van Hilten, vice-president of the district court of Haarlem, and issued her report in March 1988. The report contains a draft Bill in which the position of the victim in the criminal justice system is restated fundamentally. The most important proposals can be arranged into four categories.

a. The Committee recommends the introduction of a new mode of punishment: compensation orders, to be enforced by the state. Up until now, there has been a sharp distinction between civil and penal sanctions in the legal doctrine. The quintessence of restitution and compensation (the civil sanction) is, according to conventional wisdom, to benefit the injured party, while punishment aims to harm the convict. Civil sanctions are inherently favourable, i.e. for the recipients, while penal sanctions are by definition directed against someone, i.e. the criminal. This contradistinction is superseded in the report of the Terwee-Committee.[18] Compensation of victims of crime is considered a highly appropriate penal sanction for practical as well as fundamental reasons. Practical arguments are: diminishing or redressing the financial loss of the victim and lifting the burden of being the one that is designated to enforce a court-order against the criminal. The more fundamental - theoretical - argument is that a compensation order is a penal sanction in which a public recognition can be expressed of the harmed interests of the victim. On top of this it is argued by the Committee that all the classical objectives of punishment can be pursued at least with the same vigor and succes by imposing compensation orders. The notion of prevention is served well by this sanction: if the offender and the public at large know that pecuniary consequences of a crime will have to be accounted for in the criminal process, this could have at least the same preventive effect as the knowledge of the risk to have to pay a fine to the state. The same holds true for retribution. If justice demands punishment of a voluntary violation of the law, it a fortiori calls for unloading the damages on the perpetrator thereof. Even if we look at the more general aims of a criminal justice system - to appease the

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[17] See Carl. H.D. Steinmetz, Elsenoor T. van Buuren, Henk. G. van Andel, De slachtoffercirculaires: enkele suggesties voor nieuw beleid op basis van een onderzoek voor de invoering van de circulaires, in: Delikt en Delinkwent 1987, p. 952-971. These researchers could not find a statistically significant relation between the variables 'content about the police and the prosecution' and 'confidence in police and the prosecution' (p.966).

[18] This move was prepared in the arguments developed by J.J.M. van Dijk, Victimologie in theorie en praktijk; een kritische reflectie op de bestaande en nog te creëren voorzieningen voor slachtoffers van delicten, in: Justitiële Verkenningen 6/1983, p.28; and M.S. Groenhuijsen, Schadevergoeding voor slachtoffers van delicten in het strafgeding, Nijmegen 1985, p. 144-146, 169-171 and 292-294.

community and to restore the legal order after a shocking event - it is clear that compensation of the victim should be an integral part of the penal reaction to the crime.

The compensation order covers material as well as immaterial damages. The total amount cannot exceed the limit set for the maximum fine for a certain offence. Technically, the Committee-report classifies the proposed compensation order in the Penal Code as an 'additional', not as a 'principal' punishment. The effect of this classification is that the new sanction can be imposed beside a fine or a prison term in one sentence. As far as enforcement is concerned, the report proposes an active role of the government. The public prosecutor should first try to obtain the money from the convict directly; if this effort is unsuccesful he should impound the man's bank-account or confiscate some of his movable goods; and if all these measures fail the debtor can be incarcerated. Incarceration does not absorb the claim of the victim: if the criminal were to increase his solvency in later years, the victim still has the right to enforce the compensation order.

Next, the Bill contains a new provision pertaining to conditional sentences. The report sets forth the power of the court to impose the condition: to pay a certain amount of money (not exceeding the maximum of the fine for that offence) to the state fund for the compensation of victims of crime or to another organisation aiming to protect the interests of victims of crime.

b. The Terwee-committee proposes a new chapter in the Code of Criminal Procedure under the heading "The aggrieved party". This part of the Code should contain a catalogue of the more prominent rights of victims in the criminal procedure. In so far as these rights pertain to the possibility of a civil claim for damages, they will be discussed below. My point now is that the proposed new chapter has a symbolic value, that should not be overlooked or underestimated. Traditionally, the Code of Criminal Procedure dedicated a specific sector to the various persons who can play a vital part in the trial. Of course the defendant deserved this kind of attention, but the same was true for the defence council and various officials like the investigating judge. Now in a sense the victim is being placed on the same level in this proposal of the Terwee-committee. This implies the recognition of the victim as an insider in the criminal process, whose interests must be protected by law.

c. The third set of proposals concern the possibility to file a civil suit for damages in the criminal trial (the so-called 'partie civile'). As we have seen before (in § 2), the Dutch legislator has only allowed the injured party to put his claim forward within strict limits, in order to assure the preponderance (and thus the fairness) of the criminal procedure. The Terwee-committee suggests three farreaching ways to expand the opportunities for merging, without jeopardizing the fairness of the trial as a whole.[19]

According to the report, the financial ceilings of the admissible claims for damages should be abolished.[20] Abolished, not raised. In my opinion this is one of the most important victories for the victim movement so far. Over and over it has been explained in the past (but until now in vain) that the danger of a civil lawsuit in a criminal case does not depend on its magnitude. The danger of overshadowing the criminal case can only originate in the complexity of the claim for damages. Now there are quite substantial claims that are relatively easy to decide, and some minor cases that can cause a lot of judicial trouble. The Terwee-

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[19] These issues have been discussed at length in my book Schadevergoeding voor slachtoffers van delicten in het strafgeding, Nijmegen 1985, passim.

[20] The limits currently in force are *f* 600 (approximately US $ 300) in a cantonal court and *f* 1500 (appr. US $ 750) in a district court, a court of appeals and the supreme court.

committee rightly observed that the former claims should be admissable in a criminal court while the latter should be excluded. So in stead of a quantitative criterion the report sets forward a qualitative measure. If a civil suit by a victim would - in the opinion of the trial-judge - delay or otherwise hamper the criminal case too much, the judge can rule that the suit should be brought before a civil court. Otherwise, he is competent to give a verdict. Provided the legislator adopts this proposal, we could finally be spared the absurd situation that theft of a wallet with *f* 500 can, but theft of the same wallet with *f* 5000 cannot be handled comprehensively by the criminal court.

The second innovation of this part of the procedure is that the merging of a claim for damages can take place by notifying the prosecutor's office in the preliminary stages of the trial. The advantages for the victim are obvious: he is no longer obliged (but still has the right) to appear in open court, which can save him trouble, agony and money.

Then there is the proposal to give the victim the right to divide his claim for damages up into two portions. Under the current legislation he is faced with an 'all or nothing' proposition: either the criminal court is competent, or the civil chamber delivers a judgement. If and when the criminal court has given a verdict on the case, there is no way to try again elsewhere. According to the Terwee-committee this should change. There are many cases in which part of the damages can easily be proved and calculated (e.g. the broken glasses in a case of assault and battery), while another part of the damage (e.g. the cost of medical care in the same case) could only be estimated later on. The victim should have the right to present the easy part of his claim to the criminal court, and follow the regular civil channels later on for the remaining amount.

d. The last category of proposed reforms concerns the law on the State Compensation Fund for Victims of Violent Crime. As the name of this fund suggests, there is only a restricted category of victims entitled to some financial support by the government after they have suffered grave effects of crime. The authorities do not accept legal liability for the misdeeds that take place in the country; the payments are voluntary, their ratio iuris lies in equity. For all these reasons - and to keep the budget of the fund within reasonable boundaries - the state has elected to hand out financial support only in the most forlorn cases.

The Terwee-committee was compelled to leave the above mentioned outer limits intact. As a result, the proposed changes on this topic are not very impressive. Some of the new provisions only confirm the manner in which the existing articles are being interpreted by the executive bodies. Examples of this concern the legal definition of 'serious bodily or mental harm' and the circumstances in which the endowment can be cut back because the victim himself is partly responsible for the crime. A real improvement is foreseen in so far as not only Dutch citizens, but also foreigners residing in the Netherlands will in the future be able to get compensation from the state. Then there are procedural changes, like the possibility to file an additional request within a certain period of time. And finally there is an administrative innovation: the menbers of the executive body should be eligible for reappointment only one time, so as to promote some periodical influx of new ideas.

The reception of the Terwee committee-report in the writings of the academics has been generally supportive. The report is hailed as a useful piece of work, mainly because of the pragmatic approach to its subject matter. Everybody agrees that victims could really benefit if the above mentioned proposals were implemented straight away. Hence the call for swift legislation on the basis of the report is unanimous.

Nevertheless there is also dissatisfaction with the committee's ideas. The main criticism concerns the fundamental perspective on the position of victims of crime and the dogmatically poor elaboration of the proposed compensation order.

As could be expected, there are writers who point to the danger that a less awkward position for victims could contribute to the justification and expansion of a system that isn't really worth saving in the first place.[21] Of course this point of view - shared by most of the so-called abolitionist movement - is practically killing for any form of constructive debate on the question of how to solve the every-day-problems of victims of crime. I cannot share this perspective, since it symply redefines each and every advantage for victims as a drawback for the forces that want to get rid of the existing criminal justice system. Philosophycally speaking, these kinds of objections are not very sophisticated.

Then there are quite a few reservations as to how the compensation order has to be shaped exactly. Shortly before the report was issued, Peter de Beer warned for two dangers that confront us if the compensation order were to be implemented in a sloppy way.[22] First, he says, it is possible that a better treatment of victims would lead to many more crime reports, which in turn would lead to congestion in the processing of all these files by the police and the prosecutors, which could then again prejudice their relation with the victims after all. In that case, the exact opposite would have been achieved of what was intended. Secondly, the compensation order could increase the attention for victim precipitation and other forms of victim participation.[23] It is impossible for me to refute these allegations in some brief paragraphs. Suffice it to say that the first criticism is of such a general nature that it can again be used to block any proposal to benefit victims of crime. The second objection is based on partly legal and partly victimological considerations.[24] I am not convinced that the implementation of the new compensation order would all of a sudden have the deplorable effects that De Beer predicts. Why would the victim participation issue play a lesser role in the 'partie civile-situations' that we are familiar with ? And for what reasons do people like De Beer fear that defence lawyers will increasingly try to blame the victim ? I would expect the opposite to be true: there are many reasons why a defendant and his attorney can gain from a generous (and not a bellicose) attitude towards his victim in court. And in so far as civil liability is a condition for the imposition of a compensation order, I can see no serious obstacle in the obligation for a trial-judge to take the demeanour of the victim into account. De Beer probably has transferred the observations on the Anglo-American system to easily on his own legal environment. The facts that we do not operate under a jury-system and that trial

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[21] See Erna Kok, Nieuwe (trek?)pleisters voor slachtoffers van delicten. Het rapport van de Commissie Terwee, in: Proces 1988, p. 123-134.

[22] P.de Beer, De schadevergoedingsstraf: twee mogelijke nadelen, in: Delikt en Delinkwent 1988, p. 205-218.

[23] This point is supported by references to research by Matti Joutsen, The role of the victim of crime in European criminal justice systems. A crossnational study of the role of the victim, Helsinki 1987; D. Landy, E.Aronson, The influence of the character of the criminal and his victim in the decision of simulated jurors, in: I. Drapkin, E. Viano (eds.), Victimology, London 1974, p. 195-295; J. Shapland, The criminal justice system and the victim, in: Victimology 1985, p. 585-599.

[24] For the legal point of view, see T. Hillenkamp, The influence of victim behaviour on the dogmatic judgementof the offence: some remarks on the relation between victimology and the dogmatics of penal law, in : K.Miyazawa, M. Ohya (eds.), Victimology in comparative perspective, Tokyo 1986, p. 111-125.

by laymen is unknown in the Netherlands, diminish the dangers discussed in the international literature.

Two serious commentaries have been written in the first months after the Committee-report was released. The first one is by the National Organisation for Victim-assistance (hereafter: the L.O.S.) in an extensive letter to the Minister of Justice; the second one is drafted by Mrs. Hanneke van Soest and Mrs. Sylvia Walther.[25]

In both these commentaries there is criticism of the proposed way to initiate the procedure that could lead to the imposition of a compensation order in a certain case. In order to evade the famous objection that victims should not be embarrassed by an undesired compensation order, the Terwee-committee suggested that the victim should notify the prosecutor of his wishes in this respect. The academic writers now object to this precondition. They all claim that the prosecutor could easily ask the victim (in the letter he has to send him anyway, according to the above mentioned ministerial directives) whether he would object to any appropriate efforts by the prosecutor to obtain compensation for his damages. The arguments for this opinion are convincing; the objective of the committee-report could have been achieved in this easier way.

The compensation order should be limited to the level of the maximum fine that is prescribed by law. The L.O.S. agrees with this restriction, Van Soest and Walther are vigorously opposed to it. They label this limit as a sign of the weak coherence of the dogmatic structure that is erected in the committee-report. The compensation order is based on the concept of civil liability, they argue, and now the penal character of the sanction is invoked by the committee only to establish a monetary ceiling. They propose a more fundamentally penal orientation for this new sanction. The compensation order should be classified as a principal punishment; its advisability in a given case should not depend on criteria for civil liability and consequently the judge should also be competent to award money to people and organisations who would never have legal standing as a 'partie civile'; and the judge should be obliged to specify his reasons in the verdict if and when he prefers to impose a fine over a compensation order.

These writers observe correctly that the proposed compensation order is not a model in dogmatic purity. Of course this penal sanction has some civil elements, and of course this dual or mixed character is a handicap for easy legislative reform. In my opinion, however, the Terwee-committee acted wisely by adopting a pragmatic approach to these problems. If we should wait until all the dogmatic obstacles are eliminated, it is highly probable that we could never start doing something for the victims. In important matters of criminal law, there has never been a consensus and there never will be one. Let us not forget that, for instance, there is plenty of room for disagreements on the priorities within the catalogue of objectives of punishment. Every individual judge can pick and choose from this well known list and mould his decision accordingly. The upshot of these reflections is that Van Soest and Walther ask too much. It is just impossible to label the compensation order as a penal sanction and then expect that all the legislative choices can be decided clearly and conclusively on the basis of this characteristic. Lets take the proposed ceiling as an example. I agree with these writers that the limit advocated in the committee-report is not a very good idea; in my opinion, however, this objection can better be substantiated by referring to the civil component of the compensation order than by emphasizing its penal character. And as far as the applicability of the criteria for civil liability is concerned, I doubt very much whether there are pressing examples of inequity

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[25] The letter of the L.O.S. will not be published separately; the other commentary will appear shortly in the Nederlands Juristenblad (The Dutch Law Review).

if we were to adopt the position of the committee. In short: I think that Van Soest and Walther attach too much weight to the formal classification of the compensation order, and their insistence on dogmatic purity will sooner lead to stagnation in the legislative process than to constructive reforms benefitting large numbers of victims.

The proposals concerning the enforcement of the compensation order have attracted the attention of all the writers thus far. The L.O.S. recommends - on solid grounds - an additional provision in which priority is established for the compensation order over the execution of a fine. Payments by the convicted criminal should only be allotted the government when the victim has gotten his full share. The L.O.S. commentary further stipulates that incarceration after futile attempts to enforce the compensation order should be employed as little as possible, because this doesn't help the victim. Nobody will disagree with this obvious recommendation. Van Soest and Walther attack the idea of this detention from quite another angle. Since this temporary imprisonment is not in actual fact a substitute for the liability for damages (remember: the verdict can be enforced by the victim later on), they feel that the committee-proposal amounts to punishing twice for the same offence.[26] Although it cannot be denied that there is a slight problem here, in my view it is way too drastic to compare this situation to an unacceptable double jeopardy. I think the convicted defendant must face the fact that he is liable for the damages anyway: if there existed no such thing as a penal compensation order, nobody would be surprised when the victim filed a civil lawsuit after the prison sentence or the fine had been executed, so why should we have another opinion if this compensation order does exist, but can unfortunately not be enforced ? This is, incidently, another advantage of adhering to the criteria for civil liability in the compensation order.

The reform in the provisions on conditional sentences is hailed in the present commentaries as a highly desirable addition to the powers of the trial-judge. Payments to the state fund for the compensation of victims of violent crime and to agencies with corresponding objectives, could serve a usefull function in a modern system of criminal law.

The committee-proposals concerning the 'partie civile' merging are also generally approved by the writers. Every one of them assents to the withdrawal of the financial limits in this institution, and concurs in the committee-opinion that we should only allow the so-called 'clear cases' in the criminal courts. Criticism is directed at the interpretation of the clear case-criterion by the committee-report: the L.O.S. disagrees with the observation that bodily injuries will often be outside the scope of this criterion. In the same line of reasoning, Van Soest and Walther think that the committee should have awarded the victim the right to call witnesses and experts, because these informants could establish the relative clearness of a given case. The next point is about notifying the victim of the time and place of the trial in open court: all the writers regret that the relevant obligations of the prosecutor are not laid down in a written law. The L.O.S. additionally calls for the legal duty to send the victim a copy of the verdict in which his claim for damages has been decided. All of these amends to the committee-report are quite reasonable. They offer valuable technical improvements that should in my opinion be adopted by the legislator. Only one proposition by the L.O.S. has a distinctly more controversial character: it is the idea to offer the victim the right to appeal a disappointing verdict. This question has been debated many times in the past; in my

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[26] This is considered to be a violation of general principles of national and international law. See for instance par. 35-37 of the European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, may 15th 1972).

judgement it is neither probable nor desirable that the legislator will suddenly chime in with this latest plea by the L.O.S..[27]

The general approval that has befallen the ideas expressed in the report on the 'partie civile' should not blind us for some 'loose ends' that can be extremely detrimental for many people. One of these is that the committee has elected not to acknowledge the same rights for the parents of a murdered child, for the wife of a maimed husband, etcetera, etcetera.[28] These aggrieved persons can be helped out in the pre-trial stages by the police and the prosecutor, they can furthermore be supported emotionally, but they are not allowed to file a claim for damages at the criminal court. On this score the dogmatically sound position should have given way to the point of view of equity, which clearly indicates a different solution.

5. Compensation by the state

In section 4 I have described the reasons why the Terwee-committee could only propose limited changes in the law concerning the compensation of victims of violent crimes by public funding. This subject is too complicated to deal with in a few short paragraphs. Therefore, I will not try to give a detailed account of the pending discussions on potential ameliorations in this respect, but focus on three rather general points instead.

a. In the current system, only damages caused by bodily injury can lead to restitution by the state. Emotional as well as material losses can be financially compensated, but the link to the human being is a strictly enforced precondition. For victims it is very hard to understand why they cannot get any allowance for their possessions that have been demolished in the course of the violent crime. For instance: the car that broke down when a hostage was forced to drive at maximum speed after an armed robbery, could not in any way be paid for by the state compensation fund. The same holds true for the door that has been trampled down in order to enter a house and consequently rape its occupant.[29] I think it would be unwise to continue this unsatisfactory state of affairs in the future.

b. The attempts to enlarge the operational reach of the state compensation fund have so far been blocked by referring to its character as a remedy for only the most forlorn cases. Although most of us will agree that we should not use the government (i.e. the taxpayer) as an insurance-company whose task is to cover every mishap in our lives, it is my impression that the concept of the 'forlorn cases' is being used in an unacceptable way to cut off all debate on this subject. This criterion should be the starting point of a material discussion, not the final argument to resist any enlargement of the public compensation fund. First we should recognise the tactics employed by the politicians for what they are - a money-saving stratagem to evade an honest exchange of views - and then we could commence with an open discussion to determine monetary priorities in this field.

c. If a victim applies for an allowance, it can easily take over two years before he finally gets any money. This delay has been criticised frequently, many times for good reasons, sometimes unjustly. The point I want to make here, is that insufficient administrative

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[27] See on the right to appeal the more extensive reflections in my book Schadevergoeding voor slachtoffers van delicten in het strafgeding (Nijmegen 1985), p. 30-31, p. 164-165, p. 301-305.

[28] See J.J.M. van Dijk, footnote 3 supra, p. 356 on the same subject.

[29] Examples like this have been forwarded with great ingenuity by Lex Penders of the L.O.S.

resources can never be tolerated as a convincing excuse for operating slower than at the desired pace. For an international audience this might sound as a trivial statement, but in the Netherlands it is definitely not irrelevant: the lack of adequate secretarial assistence has been invoked for many years as the bottleneck, responsible for large parts of the delays. This explanation should be examined carefully, and if it turns out to be true, the government should assign some additional secretaries forthwith.

6. The regular civil lawsuit

The most prominent advantage for a victim to prefer the civil court-route is that he can operate completely independently. He makes all the decisions by himself: he determines what procedural tactics best fit the case, what claim should be filed, which witnesses should be called to testify, which documents should be produced to convince the judge, etcetera, etcetera.

Other advantages pertain to the chances of succes when the victim hopes for farreaching measures against his opponent. In the Netherlands there have been several cases in which a civil court has ordered injunctions that can be very ominous for the offender. Examples of these are court-orders not to contact the victim or even to come in the vicinity of the victim's house (if the criminal lives in the same neighbourhood this is tantamount to being forced to move to another house). Particularly in cases of sexual harassment these sanctions can be effective and reassuring for the victim. And then there is the possibility of a larger claim for damages. The ceiling of *f* 1500 in criminal courts of course can be bypassed by taking the civil route. Last year the district court of Alkmaar awarded the victim of rape an exeptionally generous sum of *f* 15000 for immaterial damages.[30]

On the other hand there are major disadvantages connected to this way of filing a lawsuit. Firstly, it can take a lot of time. Secondly, it can be expensive. You always need to hire a lawyer, you have to pay all kinds of legal charges, and all this with the ever present chance that you don't win the case or that you don't get reimbursed for all the procedural expenses you have had. On top of this, the victim has to be able to endure a direct confrontation with the offender.

Balancing these advantages and potential drawbacks, I do not see a bright future for the civil court involvement in the aftermath of every-day-crime. Injunctions and civil compensation orders are already possible in criminal courts without the connected financial risks for the plaintiff. As far as large sums of money are concerned, that problem will probably be solved in the years ahead; if not, it still only affects a very small minority of cases in which there is any chance of enforcing such a grand gesture by the court.

7. Conclusion

We have seen that a lot of work has been done lately in favour of victims of crime. The question remains to be answered whether these efforts will have the intended effects. In my mind there is no doubt that the succes of all these initiatives will ultimately depend on two factors: communication and enforcement.

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[30] The sentence attracted a lot of attention, but was not published in law journals. Foreigners may have difficulties to understand that a court order to pay this amount of money is very exeptional in the Netherlands. The huge sums that are litigated in some other countries, like the United States, are unknown in the Dutch judicial culture.

As has been said before, being unaware of ones rights is almost as bad as having no rights at all. So it is imperative to inform every victim of his position in the legal system. Effective communication is more than only passing on detailed knowledge about regulations and administrative practices; it will probably entail some reassurance of the victim and then it could contribute to the restoration of his sense of justice.

The second vital factor is enforcement. International experience shows that it is possible to garantee a fair number of sentences in which compensation for the victim is ordered. The same experience indicates that it is much harder to exact any money from the offender later on. In view of this repeatedly neglected situation, we should pay more attention to simple and rational rules concerning enforcement, in stead of concentrating on still more substantive rights for victims to reclaim their damages.

And then we still have to overcome the almost silent, creeping opposition. I mean the writers who are not opposed to compensation, but who are conspicuously cautious when this issue is debated. Among them are the most distinguished Dutch scholars in criminal law, like prof. Jan Remmelink and prof.em. Thijs van Veen. These eminent lawyers never did detailed studies on the position of the victim, but their opinions on this topic could nevertheless be very influential. So when Remmelink expresses the expectation that a lot of discussion will commence before the compensation order ("which threatens to disturb our thinking about the task of the prosecution in criminal cases and the relation between the civil and the criminal court") will be adopted in the law of the land, it would be careless to think that this legislative battle is already won by the victim movement.[31] Van Veen has adopted the more familiar line of arguing that too many criminals don't have the money to pay compensation to the victim. From this he infers that the energy of the legislative body should not be dedicated to this hopeless enterprise, but preferably to more urgent matters where some positive results can be expected.[32] It would almost be a futile effort to try to rebuke this kind of reasoning. What matters most, in my opinion, is the point of departure that one chooses for his argument: do you focus on the number of victims that could benefit from a certain innovation or do you count the victims that could not be helped in this way ? For me and many others, the first approach is without doubt the better one.

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[31] J. Remmelink, in the classical volume first written by D. Hazewinkel-Suringa, Inleiding tot de studie van het Nederlandse strafrecht, 10th edition, Alphen aan de Rijn 1987, p. 547-548.

[32] Th.W.van Veen, Over samenleving en criminaliteit, in: Delikt en Delinkwent 1985, p.608-609.