

**„Victim Protection
in Criminal Proceedings Legislation:
A pan-European Comparison“**

Country Report: The Netherlands

Author:

P. H. A. J. Cremers

Does your country's legal structure differentiate between the civil and criminal legal consequences of an offence?

Yes, there is a difference between civil law consequences and criminal law consequences of a deed.. A deed can be a punishable offence under criminal law, whilst the same act can be a wrongful act in civil law. According to civil law the person who commits a wrongful act must repay the damages caused.

What consequences are laid down by civil law (e.g. damages, compensation for pain and suffering)? What consequences are laid down by criminal law (e.g. fine, custodial punishment)? Are there mixed forms (e.g. higher damages, compensation ordered as a sanction, symbolic compensation)?

Under civil law, one must repay the damages, material as well as immaterial.

Under criminal law there is the possibility of the measure in 36f of the Dutch Penal Code. This measure means that a person who is convicted of a criminal offence is also required by the judge to pay an amount of compensation to the victim. Failure to pay results in default detention (Ersatzfreiheitsstrafe). The latter is a coercive measure to induce payment (as also takes place with a fine (Geldstrafe), but at the same time creates a problem. If the person convicted is of lesser means and can therefore not pay the damages this normally means that in the civil procedure the victim does not get compensation despite an order to pay by the civil judge. After measure 36f has been imposed it is no different. If one has no money one cannot pay. You can't pluck feathers from a bald chicken is a Dutch proverb (den Nackten kan man nichts ausziehen) It does not seem right to put a convicted person of lesser means into default detention.

The measure 36f is not very popular with Dutch criminal law judges.

Incidentally in the same judgment the criminal judge can impose measure 36f as well as pronounce a civil law conviction if the victim has joined the criminal proceedings as a civil party.

I do not know of any combinations.

What form do the procedural means of enforcing civil and criminal legal consequences take? What are the decisive differences for instance in the procedural position of the victim or in the courts duty to discover the facts? Are there mixed forms? If so: what procedural model do they have?

See the enclosure. In the criminal proceedings a small civil law procedure is worked in. If the victim joins the criminal proceedings as a civil law party, the judge is only required to handle the claims

contents if they are simple. This means simple as far as establishment of the facts goes as well as as far as legal aspects are concerned.

Does your country's legal order take efforts by the perpetrator which aim to provide personal conciliation with the victim (mediation) or compensation for the material or immaterial damage done to the victim into account? Will it acknowledge symbolic acts of compensation?

No. We do not have something like TOA in Germany or ATA in Austria in the Netherlands.

However a defendant who compensates the damages of his criminal deed or has reconciled (made peace) with the victim in the meantime may hope for a lesser punishment from the criminal judge.

The rehabilitation (the Dutch Gerichts- und Bewaehrungshilfe [probation office], what means one centralized organisation) can of course claim damages. However there are no (legal) regulations.

General Questions

Which perpetrator efforts to mediate or compensate will be considered (please give an overview in key-words)?

See here above.

Does it make a difference whether the legal rights of a natural person or those of another holder of legal rights (e.g. a company, the general public, the state) are concerned?

No.

Does your country's legal system support a perpetrators efforts which are aimed at providing conciliation with the victim (mediation) or compensation for the damage caused,

before formal criminal investigation is initiated (e.g. in mediation or restitution proceedings initiated or accompanied by the state),

before the formal criminal court procedure begins

as part of the formal criminal court procedure

as part of the execution of punishment stage?

No, there are no formal regulations.

What consequences do the perpetrator's efforts to provide for personal conciliation with the victim (mediation) or compensation for the damage caused have in relation to criminal proceedings in general and in particular to the criminal sanction?

Do mediation or compensation efforts negate criminal culpability (always or only as long as other conditions are fulfilled)?

No.

Is it possible for the investigative authorities to (finally) drop criminal proceedings after successful mediation or compensation efforts? Does the failure of such efforts act as an impediment to proceedings being dropped by the investigative authorities?

The Dutch Public Prosecutor (Staatsanwalt) is authorised to decide whether to prosecute someone or not for a criminal offence. (Opportunitätsprinzip). There are many more possibilities (at least in theory) than there are according to the German 153, 153a etc. StPO.

Successful compensation or peace restoration can give the public prosecutor cause to dismiss the criminal case (einstellen). However he is never required to.

After successful mediation or compensation efforts can the courts drop proceedings without a judgement, can it refrain from punishment within a judgement or give a milder sentence? Does, on the other hand, a failure of such efforts act as an impediment to the procedural possibilities described or can it even lead to the perpetrator being punished more severely?

The court cannot dismiss the case. However the criminal judge indicate that the damages have already been compensated by the extent of punishment. The judge can even determine that no punishment be given at all, but under our law that is no different to dismissal.

Can successful mediation and compensation efforts by the perpetrator have an effect on the actual form of punishment (e.g. priority given to restitution rather than a fine, early release from penal custody, more relaxed or „open“ execution of a custodial sentence e.g. the prisoner is permitted to leave the prison during daytime to go to work)?

No.

Can the investigative authorities or the criminal courts require personal conciliation between victim and perpetrator (mediation) or compensation for the material and immaterial damage done?

A reconciliation (Ausgleich, Konfliktschlichtung) cannot be enforced by the police, public prosecutor or judge. Attempts can be made to have the damages compensated as appears here below.

1. Is it possible to (preliminarily) drop proceedings on condition that the perpetrator attempts to achieve personal conciliation with the victim or that he (completely or in part or symbolically or excessively) compensates for the damage caused?

The public prosecutor can dismiss a case under the condition that compensation will be paid. If the compensation is not paid the defendant will be summoned before the criminal judge.

2. If a punishment is put out on probation can this be done with the condition that the perpetrator is required to attempt to achieve personal conciliation with the victim or that he compensates (completely, in part, symbolically, excessively) for the damage caused?

The judge can impose a suspended sentence under the condition that damages will be paid. If the condition is not met the suspended sentence will be converted into a non-suspended sentence.

3. Can personal conciliation between the perpetrator and victim or (complete, partial, symbolic, excessive) compensation for damage caused be ordered as part of a criminal court's judgement?

No.

4. Can the victim require the investigative authorities or the courts to make an order as described in questions 1-3?

No.

5. What consequences does a failure on the perpetrators part to fulfil the conditions and orders described in questions 1-3 lead to?

Already answered. Then he will be criminally charged anyway, or the suspended sentence will be converted into a non-suspended sentence after all.

6. Can criminal legal or criminal procedural mechanisms be used to secure a claim against the perpetrator's assets for the victim's benefit? If so: does the victim have a right to such mechanisms?

In civil law conviction the victim can recover the damages according to the normal rules of civil law, also by seizure of the possessions.

Under the measure 36f the state can carry out the measure in the victim's favour by seizing the possessions of the convicted person.

What consequences do the conciliatory or compensatory efforts a perpetrator makes have on the rights of the victim under civil law (e.g. on damages or compensation for pain and suffering) or on potential civil law litigation?

Under civil law a reconciliation has no effect at all on the requirement of paying damages.

1. Do successful conciliatory or compensatory efforts on the perpetrators part nullify the victim's rights under civil law (automatically or under particular conditions, completely or in part)? Do unsuccessful conciliatory or compensatory efforts on the perpetrators part have consequences for the victim's rights under civil law?

No. A failed reconciliation also has no effect.

2. Do successful conciliatory or compensatory efforts on the perpetrators part settle (i.e. end) civil law litigation?

No.

3. Do successful conciliatory or compensatory efforts on the perpetrators part have consequences for the execution of judgements already made under civil law or for the execution of other declarations (e.g. documents providing for immediate rights, in-court agreements)? Do unsuccessful conciliatory or compensatory efforts on the perpetrators part have consequences for the execution?

No.

Failed reconciliation under civil law has no effect on enforcement (Volstreckunt) of a judgment.

Which position does the legal system in your country grant victims?

1. What informational rights do they have?

A victim can request information. He has no enforceable right to information, but based on service orders, the police and the public prosecutor are required to give the information if the victim asks for it.

2. What opportunities do they have to influence the development of criminal proceedings or to actively participate in them?

The victim has no right to influence the criminal law proceedings. He can file his civil law claim with the criminal court in case criminal

proceedings are instituted. If the public prosecutor does not press charges, the victim can lodge a complaint with the Court of Appeal (Oberlandsgericht). The Court of Appeal can order the public prosecutor to press charges anyway. This possibility is not used much. Last year at my OLG 300 such complaints were filed. Only in 11 of the 300 cases did the OLG order the prosecutor to press charges.

Do crime victims have the opportunity to use the assistance of a lawyer and to be represented by one? Do they have a right to have a lawyer paid for by the state?

The victim can obtain legal aid from a lawyer (Rechtsanwalt). The lawyer can also represent the victim. The victim is entitled to a state paid lawyer in the same way that he would have a lawyer free of charge in civil law. This depends on the financial position of the victim. This is comparable with health insurance (Krankenkasse), only for health insurance a contribution must be paid and for free legal aid nothing is paid.

In how far is the position of the „victimised witness" different to that of other witnesses?

The procedural position of the victim as a witness is the same as the position of other witnesses. I must remark that in the Netherlands far fewer witnesses are heard during a criminal procedure than in Germany. Our criminal proceedings are different.

3. What further legal and practical mechanisms are used to help protect the victim or reduce the stress caused to him / her by criminal proceedings?

A victim that files his civil law claim during the criminal proceedings has the right to question the witnesses and experts (Sachverstaendiger). I repeat however that we hear far fewer witnesses during criminal trials than the German courts do. The civil law claim can only be dealt with before the public. If the victim is a witness he does not have a different position to the normal witnesses. In special circumstances he can be heard outside of the presence of the defendant and/or with exclusion of the public. Witnesses do not have a right to legal aid from a lawyer. The right to refuse to give evidence (Zeugenweigerungsrecht) is the same as for the other witnesses. The witness is never entitled to "Ablehnung von Untersuchungen und Begutachtungen", he is required to tell the truth. It must be considered that the criminal law proceedings must always meet the requirements of 6EMRK.

4. On the other hand: what obligations are placed on crime victims?

As a victim the victim has no obligation to do anything, But if he is called as a witness by the judge, the public prosecutor or the defendant, then he has every obligation that every witness always has.

Are there state or private institutions in your country that grant crime victims compensation for damage caused and support independent of efforts on the perpetrators part?

There are private institutions that help and advise victims. They are called "Bureau slachtofferhulp" and are financed by the government (state and council).

What is the current factual situation regarding the use, acceptance and success of the possibilities your country's legal system offers for personal conciliation between victim and perpetrator (mediation), compensation of the damage caused to the victim and symbolic compensatory acts on the perpetrator's part?

None. Such Western regulations are not known in our law. I must also remark that the attempted goal of these regulations (TOA or ATA) can be achieved in our legal system by the conditional dismissal of a criminal case by the public prosecutor. Because the public prosecutor has many possibilities to dismiss, we have had no need in practice for specific regulations such as TOA or ATA.

Which particular aims are part of the legal political debate in your country to improve and increase victim protection?

There is currently a discussion going on about victims, that even if they do not file a civil claim during the criminal procedure they should have the right to speak during the criminal proceedings.

A bill to arrange this has already been accepted by the Lower House (Bundestag) of our parliament. The question is if the Upper House (Bundesrat?) shall also approve this suggestion. Within the circle of criminal judges and public prosecutors there is very little positive regard for this bill.

Is there a desire to provide for simpler and faster means of satisfying crime victims' interest in mediation or compensation?

No.

Is there a desire to provide for or to further develop a unitary process which simultaneously satisfies the states interest in punishment as well as the victim's conciliatory and compensatory interest?

We already have the combination of the criminal law proceedings and the civil law proceedings.