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“Victims’ participation rights in the post-sentencing phase: The Netherlands in comparative perspective”

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Abstract

Victims’ rights have proliferated rapidly over the past decades. However, the development of rights in the post-sentencing phase has lagged behind. In this article, we argue that victims’ rights may contribute to the acknowledgement of victims, something that victimological research suggests is important for victims’ well-being at every stage of criminal proceedings. We review a new Dutch law and a legislative proposal aiming to improve victims’ rights in the post-sentencing phase in relation to conditional release from prison and conditional discharge from forensic psychiatric hospital. More specifically, we compare these (proposed) victims’ participatory rights with those existing in the Canadian, Belgian and German framework. We argue for a strengthened position of the victim in the post-sentencing phase. We close by showing that the practical effectiveness of these proposed rights is put at risk by COVID-19 and states’ response to the same.

Keywords

victims’ rights, post-sentencing phase, participation, acknowledgement

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Introduction

Victims' rights have proliferated rapidly over the past decades. In the European context, the so-called Victims' Rights Directive¹ required Member States to enact and implement a broad range of victims' rights.² These rights seek to realise varying degrees³ of participation: from what have been called *service rights*, such as the right to passively receive information, to active participation. Irrespective of the degree of direct involvement of the victim in the criminal justice system, the common denominator of all these rights is that they are designed to acknowledge victims. The idea is that by hearing the victim, secondary victimisation – that is, a negative reaction that is experienced as a further violation of legitimate rights following from the primary victimisation (the alleged offence itself) – can be avoided, enhancing not only the victims' dignity, but also their perception of trust and legitimacy towards the criminal justice authorities.⁴

In the Netherlands in particular, the development of victims' rights⁵ has been characterized by two related trends since their first formal introduction in the 1980s. First, victims have been granted more and more agency. Second, victims' rights have been gradually and chronologically embedded in the course of the criminal proceedings. This trend began with the so-called 'first generation' of victims' rights: guidelines addressed to police and public prosecutors in pre-trial investigations.⁶ These criminal justice officials were instructed to avoid secondary victimisation by providing information and by treating victims correctly and respectfully. Victims themselves were not granted any power to invoke or enforce these rights. Evaluations showed that these guidelines were poorly implemented.⁷ In the 1990s, the so-called Terwee Act reinforced the victim's position in the criminal justice system by introducing the 'injured party' (*benadeelde partij*) in the Code of Criminal Procedure ('CCP'). The goal of victim acknowledgement was still pursued through obligations of respectful treatment, but, in addition, victims could now play a more visible and active role in the trial phase of the criminal proceedings, most notably by claiming damages.⁸ Several steps to make

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1. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.
 2. Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Pelgrave Macmillan, London 2019); MEI Brien and EH Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, Oisterwijk 2000); J Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of Third Parties* (Hart, Oxford 2008).
 3. Daniel Pascoe and Marie Manikis, 'Making sense of the victim's role in clemency decision making' (2020) 26 IRV 3.
 4. Ulrich Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15 Social Justice Research 313.
 5. MS Groenhuijsen, 'Van de regen in de drup. Van een kennisgestuurde slachtofferemancipatie in het strafrecht naar een "goede bedoelingen slachtofferpolitiek" anno 2018' [2018] DD 169. For a recent summary of these developments in English, see Nieke A Elbers and others, 'The role of victims' lawyers in criminal proceedings in the Netherlands' [2020] E.J.C. <<https://journals.sagepub.com/doi/full/10.1177/1477370820931851>> accessed 23 October 2020.
 6. Richtlijnen De Beaufort [1986] and Richtlijn Vaillant [1987]. For a discussion of these guidelines, see J-A M Wemmers, *Victims in the criminal Justice System. A Study into the Treatment of Victims and its Effects on their Attitudes and Behaviour* (Kugler Publications, Wayne 1996).
 7. Even before their entry into force, Steinmetz and others argued that practical implementation was not sufficiently discussed in the guidelines: CHD Steinmetz, ET van Buuren and HG van Andel, 'De slachtoffercirculaires: enkele suggesties voor nieuw beleid op basis van een onderzoek voor de invoering van de circulaires' [1987] DD 952. See further: S Leenders, *Zolang de klant maar geen slachtoffer is; onderzoek naar de implementatie van de richtlijnen 'Vaillant' bij de Nederlandse politie* (Nederlandse Politieacademie 1990); A Slotboom and J Wemmers, *Evaluatie Terwee. Tevree met Terwee?* (WODC 1994).
 8. Prior to the implementation of the Terwee Act in 1995, it was already possible to claim damages within the criminal proceedings, but only up to a relatively low maximum amount of 1500 Dutch guilders (approximately €680).

victims even more visible and in charge of their own rights followed. In 2005, victim impact statements were introduced; in 2011, the legislature introduced into the CCP a new title dedicated to victims, addressing the victim as such – *victim*, rather than ‘injured party’ or ‘complainant’. Since 2011, the state executes court-awarded compensation from the offender, and in serious cases, the state even makes advance payments to the victim. This development has thus introduced victims’ rights into the last stage of criminal justice proceedings: the post-sentencing phase.

This last advance is, however, an exception. Victims now enjoy extensive rights in the pre-trial, trial and sentencing phases, but few rights in the post-sentencing one. During the former stages, victims have a right to receive (or not to receive) information, provide information (via a victim impact statement or otherwise), receive victim support, receive protective measures, be represented during the proceedings and receive legal aid, claim compensation and challenge any decision not to prosecute. In the post-sentencing phase, however, rights are sparse: protection orders and compensation via advance payments out, but other rights are either poorly implemented or do not exist at all.

This is not unlike developments in other European countries.⁹ In the Netherlands, two legislative proposals relating victim participation, both dating to 2018, have sparked public debate. Each sought to introduce one of the most controversial forms of victim participation, namely the victim impact statement, into that phase. First, the Punishment and Protection Act (*Wet straffen en beschermen*) was adopted by the Dutch Senate (*Eerste Kamer*) and will take effect from July 2021. It enables victims to express their views – albeit indirectly, via the public prosecutor – where an offender is considered for conditional release. Second, the Extension of Victims’ Rights Act (*Wet uitbreiding slachtofferrechten*) is currently being debated in the Dutch Senate and would introduce victim impact statements (of limited scope) during hearings considering conditional discharge from a forensic psychiatric hospital (*TBS*).

In this article, we review the new law and the legislative proposal in two lights: first, normatively, what extent of victims’ rights is desirable in the post-sentencing phase; second, comparatively, how the legislation compares with various existing national frameworks. As to the latter, we compare the proposed and existing victims’ participatory rights (in relation to conditional release from forensic psychiatric hospitals and prison, respectively) in the Netherlands with the Canadian, Belgian and German frameworks. The Belgian and German examples have been selected as the Netherlands’ immediate neighbours, yet with very different approaches to this issue. The Canadian system is reviewed because it has been explicitly named as an example during the parliamentary debates on the Punishment and Protection Act. We close this article with some remarks related to the limited attention to victims in the light of the COVID-19 crisis.

The importance of victim acknowledgement

When we discuss victims’ experiences and victims’ rights, we need to be aware that we are talking about a heterogenous group of individuals and that these individuals have greatly varying (legally

9. See the special issue in the journal *Sancties*, issue 4 [2015] on victims’ rights. Also, S van der Aa, ‘Post-Trial Victims’ Rights in the EU: Do Law Enforcement Motives Still Reign Supreme?’ (2015) 21 *ELJ* 239. It is particularly striking that the chapter about post-trial victim participation in a recent book on participatory rights mainly focuses on the initiation of appeal – a phase that we would rather describe as a second trial phase, not as *post*-trial. See Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Pelgrave Macmillan, London 2019).

relevant) needs.¹⁰ However, the need to be heard and acknowledged is one of the most basic needs shared by a large group of victims.¹¹ In this section, we will discuss what it means to be acknowledged, how acknowledgement is currently ensured to different degrees in different phases of criminal proceedings and why acknowledgement is equally important in all stages of the proceedings, including the post-sentencing phase.

Acknowledgement by being heard

Acknowledgement is important for victims' well-being. A lack of acknowledgement may increase rather than alleviate the experience of harm.¹² In order to ensure acknowledgement, it is important that the victim is heard, meaning that the victim as a person and the victim's narrative are respected as such.¹³ The victim can be heard through direct participation in the criminal proceedings, for example via a victim impact statement. By giving the statement, the victim narrates their experience of victimisation which may, quite literally, be heard by the judge, prosecutor, defendant and wider public. Note that we say *may* rather than *will*. Actual acknowledgement depends on feedback: the victim should be aware that his or her narrative was indeed heard and understood.¹⁴ Leferink describes the process of speaking and giving feedback as a 'reciprocal responsibility',¹⁵ highlighting the need for dialogue.

This dialogical understanding of being heard implies that other forms of participation, including more passive ones, can contribute to the proceedings adequately acknowledging the victim.¹⁶ For example, providing the victim with accurate and timely information, for instance as to the offender's ongoing sentence, demonstrates acknowledgement of and insight into the victims' need for information. It thus responds to and respects the victim's visibility and needs.

At this point, it is important to underline that hearing the victim does not equate to taking side with the victim. The victim's input can still be disputed and balanced against other views and perspectives, such as the defendant's. However, the victim should remain the owner of the

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10. MS Laxminarayan, *The Heterogeneity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, Oisterwijk 2012); Simon Green and Antony Pemberton, 'The impact of crime: victimisation, harm and resilience' in S Walklate (ed), *Handbook of Victims and Victimology* (second edition, Routledge, Abingdon 2018).
 11. Annemarie ten Boom and Karlijn F Kuijpers, 'Victims' needs as basic human needs' (2012) 18 IRV 155.
 12. Susan J Brison, *Aftermath: Violence and the Remaking of a Self* (Princeton UP, Princeton 2002); Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (CUP, Cambridge 2006).
 13. Ian James Kidd, José Medina and Gaile Pohlhaus Jr (eds), *Routledge Handbook of Epistemic Injustice* (Routledge 2017); Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia UP 2008).
 14. Tracey Booth, Alice K Bosma and Kim ME Lens, 'Accommodating the expressive function of victim impact statements: the scope for victims' voices in Dutch courtrooms' (2018) 58 Brit J Criminol 1480.
 15. Sonja Leferink, 'Baas in eigen zaak? De emancipatie van het slachtoffer in het strafrecht' in Bas van Stokkom (ed), *Genoegdoening & redelijkheid. Over de grenzen van slachtofferemancipatie* (Boom Criminologie 2019).
 16. Tracey Booth, Alice K Bosma and Kim ME Lens, 'Accommodating the expressive function of victim impact statements: the scope for victims' voices in Dutch courtrooms' (2018) 58 Brit.J.Criminol. 1480; UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims* (UN 1999).

experience and the way in which they narrate this experience,¹⁷ and they should receive signals that their story is heard.¹⁸

Acknowledgement in various phases of the criminal justice system

At first glance, the definition of ‘victim’ – and thus who can access these rights – may seem obvious. In this sense, art. 2(1)(a) of the Victims’ Rights Directive defines a victim as the person ‘who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence’. The onset of harm marks the start of victimisation,¹⁹ and the ensuing course of the criminal proceedings does not change this. Indeed, recital 19 of the preamble states that the label does not depend on whether an offender is identified, apprehended, prosecuted or convicted.

Despite this uniform definition, victims’ rights vary with the various stages of criminal proceedings in the Directive and in Dutch legislation alike. Compensation through advance payments and protection orders are the exceptions that prove the rule that, at the post-sentencing stage, victims’ rights are poorly secured. Direct participation is not possible, and other service rights are poorly implemented. This lack of rights entails, at least possibly, a lack of acknowledgement.

Introduced in 2020, art. 6:1:3 CCP provides that in the post-sentencing phase, the interests of the convicted person’s rehabilitation, the public security and the victims will be considered. However, this responsibility is poorly implemented in respect of the practicalities of detention. The ‘selection officer’ (*selectiefunctionaris*) who is responsible for selecting the prison and prison regime – which could be important to the victim in terms of safety and closeness to the offender – lacks, in practice, any information about the victim’s views.²⁰

Another example is the information provided to victims regarding the progress of a custodial sentence or other restriction on liberty. Art. 51ac CCP grants the right to be informed about the (conditional) release, parole or escape of the offender and about measures taken to protect the victim’s interests. This information is provided by the *Informatiepunt Detentieverloop* (IDV), a central agency of the Dutch public prosecutor. In practice, however, victims often do not receive

17. See also Antony Pemberton, Eva Mulder and Pauline GM Aarten, ‘Stories of injustice: towards a narrative victimology’ (2019) 16 E.J.C. 391.

18. There are many well-documented practices in law that hinder this dialogical process, such as *filtering* (meaning that the statement of a victim is reviewed, edited and amended before the victim speaks) and *reconstructing* (whereby a certain meaning is imposed on the narrative). For an overview, see Alice Bosma, *Emotive Justice: Laypersons’ and legal professionals’ evaluations of emotional victims within the just world paradigm* (Wolf Legal Publishers 2019).

19. Many national legal systems, including the Dutch (art. 51a CCP), define victimisation in a similar way.

20. The selection officer takes necessary measures on behalf of the Minister of Justice and Security (art. 15 *Penitentiaire beginselenwet*, Custodial Institutions Act). The officer is informed of the decision of the court through a so-called *execution extract*, which summarises the verdict insofar it is relevant to the execution, which often excludes relevant information on the victim’s interests. The public prosecution service could additionally send information, but in practice this does not happen. See also R Robroek, *Executie na de Wet tenuitvoerlegging strafrechtelijke beslissingen* (Boom juridisch 2018); Sonja Meijer, *Openbaar Ministerie en tenuitvoerlegging. De taak van het openbaar ministerie tot tenuitvoerlegging van door de rechter opgelegde strafrechtelijke sancties vanuit constitutioneel en strafrechtsdogmatisch perspectief bezien* (Wolf Legal Publishers 2012).

relevant information. For example, they only receive information when the modality of parole changes, but no details are provided when the detention plan (e.g. location and conditions) is altered.²¹

Examples like these show that the construction of the victim status is less clear-cut than one would expect given the legal definition. Victims' rights are weaker in the post-sentencing phase, something that casts doubt on the temporal continuity of the label itself. If the status of 'victim' ceases fully to ensure entitlement to acknowledgement – the core aim of that status – then it arguably ceases fully to exist.

Many (pre-)trial victims' rights do not aim for acknowledgement alone. They are also shaped to achieve closure, according to which victims and their support system should aspire to move beyond victimhood. Instruments that are at least partly therapeutic, such as the victim impact statement,²² were designed to help victims overcome harm. Leaving aside whether they succeed in that aim,²³ we underline that we approve of any initiatives to help victims recover. Nevertheless, this emphasis on closure may weaken the immediacy of victim acknowledgement. Elsewhere, we have suggested why this may be one of the reasons why the victim still appears to be the 'forgotten party' in the post-sentencing phase. Indeed, respondents in an empirical study thought that the victim did not need as much support in the post-sentencing phase as in the (pre-)trial phase.²⁴

Recently, attention has seemed to shift toward resilience rather than closure.²⁵ As resilience leaves more room for reparation without 'forgetting' the victimisation – after all, a resilient victim is autonomous despite, or even due to, the experience of harm – we trust that this will help keep victim acknowledgement in focus.

The importance of victim acknowledgement

We have argued above that victims enjoy few rights in the post-sentencing phase in the Netherlands, as in most European countries, despite the Victims' Rights Directive applying prima facie throughout 'criminal proceedings'. Now, Van der Aa has provided one possible explanation: she has argued that this phase falls outside of the term 'criminal proceedings' within the meaning of the Directive.²⁶ However, other academic writers – including ourselves – disagree. Wieczorek contrasted the Directive with its predecessor, the Framework Decision. The latter is characterised, she

21. M van Denderen and others, *Handreiking slachtofferbewust werken voor forensisch maatschappelijk werkers* (KFZ 2019); M van Denderen and others, 'Contact between victims and offenders in forensic mental health settings: an exploratory study' (2020) 73 *Int'l J.L. & Psychiatry* 101630 <<https://doi.org/10.1016/j.ijlp.2020.101630>> accessed 23 October 2020.

22. Antony Pemberton and Sandra Reynaers, 'The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Publishing 2011).

23. For this discussion, see Kim Lens and others, 'Delivering a Victim Impact Statement: Emotionally effective or counter-productive?' (2015) 12 *E.J.C.* 17.

24. AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer aan de voorkant van de executiefase' [2020] *DD* 68.

25. Joëlle Milquet, *Strengthening victims' rights: from compensation to reparation. For a new EU Victims' rights strategy 2020-2025* (European Commission 2019).

26. Suzan van der Aa, 'Post-Trial Victims' Rights in the EU: Do Law Enforcement Motives Still Reign Supreme?' (2015) 21 *ELJ* 239.

argued, by ‘tame’ language with regard to support outside of the trial; by contrast, the broader language in the Directive calls for a broader interpretation.²⁷ Victims’ rights touch upon core fundamental freedoms of the European Union²⁸ and, more generally, relate to the rule of law itself.²⁹ In the Dutch context specifically, we hold that it is self-evident that the legal framework requires attention to the victim in the post-sentencing phase. Project *Strafvordering 2001* [Criminal Proceedings 2001] described the core goal of the criminal proceedings as follows: to ensure that the response to a(n alleged) criminal offence is, in all respects, adequate.³⁰ But a response in which victims were structurally ignored in the final phase of criminal proceedings could never, in our submission, be adequate. This conclusion is confirmed by the consensus in the literature that all phases, including post-sentencing, are included in the concept of criminal proceedings.

Apart from these descriptive arguments, there are various normative arguments that call for the implementation of victims’ rights in the post-sentencing phase. First, calling on the principle of human dignity, states should protect victims from further harm. Secondly, we would like to put forward two instrumentalist reasons: effectiveness of the criminal justice procedure as a whole and the punishment in a specific case in particular.

Acknowledgement and being heard are positively correlated with victims’ reported experience of procedural justice and of the criminal justice authorities’ perceived legitimacy.³¹ Even though most research has been conducted on the (pre-)trial phases, empirical evidence does show that experiencing procedural justice and possibilities for dialogue are important predictors of victim satisfaction as to the settlement of criminal law conflicts via mediation.³² This suggests that the correlation may also hold post-sentencing. By contrast, a lack of experienced procedural justice could harm perceptions of legitimacy and so future cooperation with the authorities, including for example in willingness to report crime. As repeat victimisation is a serious problem,³³ it is important to give attention to victims’ rights in every phase of the criminal justice proceedings to enhance future cooperation with the police and so the effectiveness of future criminal investigations.

Furthermore, the victim’s narrative could help – alongside other information incorporating different perspectives – to balance the different goals of punishment and parole, including retribution, deterrence, rehabilitation and incapacitation.³⁴ The victim’s narrative could shed light on the

27. Irene Wiecezorek, ‘A Needed Balance Between Security, Liberty and Justice: Positive Signals Arrive From the Field of Victims’ Rights’ (2012) 2 EuCLR 141.

28. Irene Wiecezorek, ‘A Needed Balance Between Security, Liberty and Justice: Positive Signals Arrive From the Field of Victims’ Rights’ (2012) 2 EuCLR 141.

29. Willem van Genugten and others, ‘Loopholes, risks and ambivalences in international law making; the case of a framework convention on victims’ rights’ in Frans Willem Winkel and others (eds), *Victimization in a multi-disciplinary key: Recent advances in victimology* (Wolf Legal Publishers 2009).

30. MS Groenhuijsen and G Knigge (eds), *Het onderzoek ter terechtzitting. Eerste interimrapport onderzoeksproject Strafvordering 2001* (RUG 1999) 15–16; MS Groenhuijsen and G Knigge (eds), *Het vooronderzoek in strafzaken. Tweede interimrapport onderzoeksproject Strafvordering 2001* (Gouda Quint 2001).

31. Nathalie-Sharon N Koster, ‘Victims’ perceptions of the police response as a predictor of victim cooperation in the Netherlands: a prospective analysis’ (2016) 23 P.C. & L. 201; Jo-Anne M Wemmers, *Victims in the criminal justice system. A study into the treatment of victims and its effects on their attitudes and behaviour* (Kugler Publications 1996).

32. Tinneke Van Camp and Jo-Anne Wemmers, ‘Victim satisfaction with restorative justice: More than simply procedural justice’ (2013) 19 IRV 117.

33. Niels Raaijmakers and others, ‘Developing and validating ProVict: A risk assessment instrument to classify repeat victims in the Netherlands’ (forthcoming).

34. For a similar argument in the context of clemency in common law countries, see Daniel Pascoe and Marie Manikis, ‘Making sense of the victim’s role in clemency decision making’ (2020) 26 IRV 3; Julian V Roberts, ‘Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole’ (2009) 38 Crime & Just. 347.

extent to which the crime continues to cause them harm or the extent to which the harm has diminished since the verdict. This information may help determine, amongst other things, whether the retributive aim of the prison sentence is still there. It is worth noting that victims' narratives may not be as vindictive as populist portrayals of victims might want us to believe.³⁵ Additionally, the victim's narrative could point to fruitful avenues for rehabilitation and help open a dialogue between the victim and offender and/or inform the criminal justice authorities about protective measures that could be put in place to keep the victim safe during the offender's parole or (conditional) release.

In sum, there are various reasons to listen to and take into consideration victims' views, whether in a direct or indirect way. At the very least, it is worth investing in acknowledging the victim because it may help make the victim feel heard, diminish secondary victimisation and enhance victims' perceptions of legitimacy.

Victims' rights in the post-sentencing phase: A comparative perspective

In this section, we will discuss how the Dutch legislature has proposed to shape victims' rights in the post-sentencing phase in relation to conditional release from prison and conditional discharge from a forensic psychiatric hospital. As mentioned in the introduction, the discussion about strengthening victim acknowledgement in the post-sentencing phase flared up in the Netherlands when the proposals for the Punishment and Protection Act and the Extension of Victims' Rights Act were published in 2018. In this section, we will explain the Dutch legal system in more detail and subsequently compare the Dutch (proposed) provisions with their Canadian,³⁶ Belgian and German counterparts. First, we discuss conditional release from prison in these four jurisdictions. Second, we turn our attention to conditional discharge from a forensic psychiatric hospital.

Conditional release from prison

The Netherlands

In the Netherlands, prisoners sentenced to more than 1 year can be granted conditional release (art. 6:2:10 CCP). They are eligible after 1 year and one-third of the remaining length of their prison sentence when their sentence is 2 years or shorter and after two-thirds of their prison sentence when their sentence is longer than 2 years. By law, conditional release is granted automatically to all eligible prisoners. Thus, a prisoner does not need to file a request for conditional release or appear before a parole board. The public prosecution service determines the conditions of the probation (art. 6:2:11 CCP). However, the public prosecution service may also object to the conditional release on a number of grounds, including misbehaviour of the prisoner or a high risk of recidivism.

35. Jonathan Doak and David O'Mahony, 'The Vengeful Victim? Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing' (2006) 13 IRV 157.

36. It is important to note that Canada is a federal State, consisting of a federal government and 13 provinces and territories. The execution of prison sentences involves both the federal government and the provinces and territories. The federal government is responsible for prisoners sentenced to 2 years imprisonment or more, whereas the provinces and territories are responsible for those with prison sentences of less than 2 years. Criminal law is a competence of the federal government (section 91(27) Constitution Act 1867), but the provinces and territories have some freedom regarding the procedures related to the execution of criminal sentences. Consequently, there are differences between the federal government and the provinces and territories, including as to the treatment and rights of victims.

Victims' interests are not amongst the bases for such an objection (art. 6:2:12 CCP). The District Court must decide on the merits of the objections raised by the prosecutor.

In such conditional release proceedings, victims do not have any standing other than the aforementioned right to be informed about the release (art. 51ac(4) CCP). In practice, however, victims of serious violent or sexual offences can exert some influence on the conditions of the probation through their right to be informed. The IDV conducts a questionnaire as the perpetrator's conditional release date approaches. In this questionnaire, the victim is asked about any conditions that they wish to be attached to probation: for example, whether the victim seeks any protection orders. These preferences are then passed on to the public prosecutor who is in charge of the decision on these conditions.³⁷ This arrangement for victims of serious violent or sexual offences is not, however, codified.

As of July 2021, the Punishment and Protection Act will make the execution of prison sentences significantly stricter. Access to prison furloughs, rehabilitation programmes and conditional release will be restricted. Prisoners will have to serve a larger part of their prison sentence before they become eligible for release. In particular, the maximum duration of conditional release will be limited to 2 years (art. 6:2:10(1)(b) CCP, as it will be amended). This means that a convict sentenced to, for example, 18 years' imprisonment will have to serve at least 16 instead of 12 years. According to the Dutch government, this is necessary to do justice to victims, surviving relatives and society as a whole, all of whose sense of justice is violated when convicts do not fully serve their prison sentences.³⁸ In the Netherlands, many have criticised this reliance on victims' interests as a justification for restricting policies and programmes that play a key role in the prisoners' rehabilitation.³⁹

Moreover, conditional release will no longer be automatic. Instead, it will become subject to a discretionary power of the public prosecution service (art. 6:2:10(1) CCP, as it will be amended). The prosecutor will determine the prisoner's eligibility and probation conditions. In judging this, they must take into account various factors: in addition to the existing factors of (mis)behaviour of the prisoner and the risk of recidivism, the Act adds the interests of victims, surviving relatives and other persons affected by the conditional release as factors (art. 6:2:10(3) CCP, as it will be amended).⁴⁰ Hence, based on the perceived interests of the victim(s), the public prosecutor can refuse conditional release or impose additional conditions such as protection orders. The prisoner may appeal against this decision before the District Court, but the grounds and scope of review are limited (art. 6:6:9(1) CCP, as it will be amended).

37. AS Koek, 'Recht doen aan slachtoffers, recht doen aan de TBS-behandeling' [2020] *Sancties* 218. See further AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer aan de voorkant van de executiefase' [2020] *DD* 68, 75–76.

38. See the Dutch parliamentary records, *Kamerstukken II* 2018/19, 35122, No. 3, 6–7 (Explanatory Memorandum).

39. See e.g. P Schuyt, 'Voorwaardelijke invrijheidstelling: het beeld en de werkelijkheid' [2019] *Sancties* 5, 10–11; AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer bij de voorwaardelijke invrijheidstelling en de voorwaardelijke beëindiging van de dwangverpleging in rechtsvergelijkend perspectief' [2020] *DD* 187, 189–190; S Struijk, 'Wetsvoorstel Straffen en beschermen: wordt het kind met het badwater weggegooid?' [2020] *Sancties* 56.

40. According to the Explanatory Memorandum, whether the prisoner has compensated the victim's damages can be considered under this criterion, although the prisoner's inability to pay would not be a valid reason to refuse the conditional release. See *Kamerstukken II* 2018/19, 35122, No. 3, 31–34.

The new legislation will not change victims' standing in any of these procedures. Several political parties and victims' rights organisations have called for the introduction of a participatory right, such as a victim impact statement.⁴¹ This idea was rejected, however, on the grounds that the victims' point of view was sufficiently expressed through the IDV.⁴² Now that the only way for the victim to express their views in the light of conditional release is through the IDV; at a minimum, the IDV should greatly improve its communication.

Canada

In Canada, there are three main forms of conditional release: temporary absence (prison furloughs), parole (conditional release on request of the prisoner) and statutory release (conditional release by operation of law). Different forms of parole exist, namely day parole and full parole. Only full parole and statutory release allow for the prisoner's indefinite conditional release from prison. Prisoners can request full parole after serving 7 years or one-third of their sentence (section 120(1) Corrections and Conditional Release Act, 'CCRA'). A parole board decides whether to grant full parole and, if so, what conditions to attach to it. In general, full parole is only granted to inmates who have exhibited good behaviour during their detention and who are working on their reintegration into society. Prisoners not released on full parole are statutorily released after serving two-thirds of their sentence, except in two cases where different rules apply (namely those convicted of specifically exempted offences and those serving a life or indeterminate sentence) (section 127(3) CCRA). Statutory release can still be refused following a review on referral by the Correctional Service of Canada to the parole board, based on reasonable grounds to suspect that the prisoner will reoffend committing a serious felony.

It follows that parole boards play an important role in granting conditional release in Canada. There are three such boards: the Parole Board of Canada (the federal parole board), the Ontario Parole Board and the Quebec Commission on Conditional Releases (*Commission Québécoise des libérations conditionnelles*). The Parole Board of Canada is responsible for prisoners in federal prisons. The two largest provinces of Canada, Ontario and Quebec, each has a provincial parole board that is competent to decide on prisoners in their provincial prisons. Prisoners in provinces and territories without a regional parole board can apply directly to the Parole Board of Canada.

The three parole boards have different rules for victims. At the Parole Board of Canada, victims can participate in several ways.⁴³ First, a victim is allowed to submit a written or an audio-visual statement. In this statement, the victim may elaborate on the impact of the crime on his or her life, family and environment, on any concerns for his or her personal security when the perpetrator is released, and on the risk that the perpetrator will reoffend. In addition, the victim can comment on the conditions of the probation. In essence, this victim statement is very similar to the ones used in criminal trials in Canada. The victim may also attend and speak during the hearing of the Parole Board of Canada. Moreover, there is a fund to assist victims who could otherwise not attend the

41. See further AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer bij de voorwaardelijke invrijheidstelling en de voorwaardelijke beëindiging van de dwangverpleging in rechtsvergelijkend perspectief' [2020] DD 187, 193.

42. Kamerstukken II 2018/19, 35122, No. 6, 15–16.

43. See also the victims' section on the website of the Parole Board of Canada, <<https://www.canada.ca/en/parole-board/services/victims.html>> accessed 23 October 2020.

hearing of the parole board for lack of financial means: Canada is a very large country, and the parole board hearings are only held in a limited number of places.

At the Ontario Parole Board, victims have similar standing.⁴⁴ Victims may make a written victim submission or give an oral statement during the hearing at the Ontario Parole Board. In the victim submission, the victim may discuss 'the physical, financial and emotional impact the offence has had on them, their family and their community'. The victim may also make recommendations to the parole board on whether conditional release should be granted and if so, subject to what conditions. Victims may also attend the hearing without making a statement. Like the Parole Board of Canada, the Ontario Parole Board has a fund to support victims who would otherwise be unable to attend the hearing for financial reasons.

At the Quebec Commission on Conditional Releases, victims' rights are limited compared to the other two Parole Boards.⁴⁵ In Quebec, victims may only submit a written victim statement. This statement must be limited to the impact of the offence on their lives, as well as any recommendations on the conditions of the probation. The hearings of the Quebec Commission on Conditional Releases are closed to the public, with no exception for victims. The victim is informed afterwards of the Commission's decision.

Belgium

In Belgium, a prisoner may request conditional release upon serving one-third of the prison sentence, or two-thirds in the case of recidivists (art. 25 Lejeune Act; LA). Different rules apply to sentences of 30 years or more and to life sentences. A Sentence Enforcement Court (*straf-uitvoeringsrechtbank*; *Tribunal de l'application des peines*) decides on the prisoner's request. In principle, the request will be granted unless there is a 'contra-indication'. Art. 28(1) and 47(1) LA exhaustively list the criteria in this respect. In this list, three standards are related to the victim's interests, namely (a) the risk that the prisoner would harass the victim; (b) the prisoner's attitude towards the victim and (c) the prisoner's efforts to compensate the victim, considering his or her financial situation. If conditional release is granted, the Sentence Enforcement Court determines the conditions of the probation. In addition to the general conditions of the probation and any conditions related to the criteria listed in art. 28(1) and 47(1) LA, the court can also impose other individualised special conditions in order to protect the victim (art. 50 and 56 LA).

Victims may play a role during the proceedings at the Sentence Enforcement Court. The victim must be informed of the prisoner's request for conditional release as well as the date and time of the court hearing (art. 34(1) and 52(1) LA) and, once the Sentence Enforcement Court has taken a decision, the victim must be informed of the outcome within 24 h (art. 46(1) and 58(1) LA). The victim(s) and or their representative(s) are allowed to attend the hearing to deliver an oral statement on the conditions of the probation. However, it should be noted that the victim may *only* be present when the relevant conditions are discussed, as the other parts of the hearing take place behind closed doors.

44. See also the website of the Ontario Parole Board, <<https://slasto-tsapno.gov.on.ca/opb-colc/en/victim-support/>> accessed 23 October 2020.

45. See also the website of the Quebec Commission on Conditional Releases, <<https://www.cqlc.gouv.qc.ca/contenu-des-capsules/quels-sont-les-droits-des-victimes.html>> accessed 23 October 2020.

Germany

In Germany, a prisoner has the right to request conditional release upon serving half or two-thirds of the prison sentence. The exact moment depends on the length of the sentence, whether the prisoner is a recidivist and whether there are special circumstances that could justify early release or an extended stay in prison (section 57 Strafgesetzbuch (Criminal Code), hereinafter StGB). The request for conditional release is assessed by the Criminal Division responsible for sentence execution (*Strafvollstreckungskammer*) of a Regional Court (*Landgericht*, see section 78a(1) Gerichtsverfassungsgesetz, Courts Constitution Act). The court holds a hearing with the public prosecutor, a representative of the prison and the prisoner present (section 454 Strafprozeßordnung (CCP), hereinafter StPO). After the hearing, the court decides whether the prisoner qualifies for conditional release and, if so, subject to what conditions. A decision may be taken without a hearing if the public prosecutor and the prison support the prisoner's request for conditional release and the court concurs. In these procedures, neither the victim nor the victim's interests are in any way considered. In fact, not a single provision of the StGB or the StPO on conditional release refers in any way to the victim.

Conditional Discharge from a Forensic Psychiatric Hospital

The Netherlands

The Netherlands operates the so-called *TBS system*⁴⁶ for dangerous offenders with mental disorders. Instead of – or in addition to – a prison sentence, the judge may sentence such an offender to a TBS order with compulsory treatment, meaning that the offender is involuntarily admitted to a forensic psychiatric centre or clinic. A TBS order of this kind could last indefinitely, but the court must review and extend the order every year or 2 years, depending on the court's original decision (art. 38d(2) Criminal Code, hereinafter CC). Instead of extending the TBS order, the court may also decide to (conditionally) terminate the order. The court may do so *ex officio* or on request of the public prosecutor or the patient's legal representative (art. 38g CC). The court determines the conditions of the conditional termination of the TBS order. It may unconditionally terminate a TBS order only if the order has first been conditionally terminated for a period of at least 1 year (art. 6:6:10(4) CC).

Currently, victims do not have standing during TBS order reviews. As the extension of a TBS order solely depends on the mental health of the patient (and the danger they still pose to society), it was reasoned that victims' interests cannot play a role in the court's decision to either extend or conditionally terminate the order. Nevertheless, the court may take the victim's interest into account when determining the conditions of any conditional termination. Bearing this in mind, the victim must be contacted by the IDV in a manner similar to the conditional release of prisoners.⁴⁷

The standing of the victim in these procedures will be strengthened in the near future if the Extension of Victims' Rights Act is adopted.⁴⁸ This Act would provide the victim with a restricted participatory right, allowing them to give an oral statement during the court hearing (art. 6:6:13(4) CCP, as it will be amended). However, this statement is limited in its scope: it may only relate to the conditions attached to the termination of the TBS order. Furthermore, the statement may only be delivered if the conditional termination of the TBS order is at issue within the proceedings. This

46. TBS is short for *terbeschikkingstelling*, detainment at the government's pleasure.

47. AS Koek, 'Recht doen aan slachtoffers, recht doen aan de TBS-behandeling' [2020] Sancties 218.

48. See Kamerstukken II 2019/20, 35349, No. 2 (Law Proposal).

requirement raises an important practical obstacle. As it is impossible for the victim to know before the hearing whether or not the conditional termination of the TBS order will actually be in issue, victims run a high risk of either leaving the court empty-handed every (two) year(s) if the conditional termination turns out not to be an issue during the hearing, or missing the opportunity to speak in case the conditional termination of the order is unexpectedly addressed.⁴⁹

Canada

In Canada, a defendant with mental disorders cannot be criminally convicted if the judge finds the accused 'not criminally responsible on account of a mental disorder' (section 672.34 Canadian CC) or 'unfit to stand trial' (section 672.31 Canadian CC). In these cases, the accused is transferred to a provincial or territorial Mental Health Review Board, with slightly different names in each province and territory. The Review Board decides on one of the following course of actions: (a) an absolute discharge; (b) a conditional discharge or (c) detention in a psychiatric hospital (section 672.54 Canadian CC). In the latter two cases, the Review Board must review its decision annually (section 672.81 Canadian CC). In addition, interim reassessments can take place upon a request by the accused or any other party, such as the prosecution or the psychiatric hospital (section 672.82 Canadian CC). The Review Board's decisions may be appealed to the provincial or territorial Court of Appeal (section 672.72 Canadian CC).

Victims have several rights when a case is brought before the Review Board. As these rights are enshrined in the Criminal Code of Canada, they apply uniformly in every Canadian province and territory, although minor procedural differences exist. The victim has the right to be kept informed throughout the proceedings at the Review Board (section 672.5(5.1) Canadian CC). They are also entitled to submit a written victim impact statement (section 672.5(14) Canadian CC). The statement offers room to elaborate on 'the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim'. In addition, the victim can request the Review Board to read this statement aloud at the hearing (section 672.5(15.1) Canadian CC). The victim also has the opportunity to attend the hearing if no statement is presented, unless the Review Board orders the hearing to be held *in camera*. If there is insufficient time to prepare and submit a victim impact statement, they can request the Review Board to adjourn the hearing (section 672.5(15.3) CC). If the victim has submitted a victim impact statement, the Review Board must take this statement into account when making its decision. Nevertheless, it is free to determine how to do so and what weight to attach to the statement (section 672.541 CC).

Belgium

For a long time, Belgium detained most offenders with a mental disorder in ordinary prisons – albeit on a different legal basis – due to a lack of specialised forensic psychiatric care facilities. The Law of 5 May 2014, known as the Internment Act, which entered into force on 1 October 2016, created an entirely new regime for these offenders which has strong resemblances with the Dutch TBS system. Where it is suspected that a defendant is or was suffering from a mental disorder, the public prosecutor or the investigative judge can order a forensic psychiatric examination (art. 5(1) Internment Act, 'IA').

49. See further AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer bij de voorwaardelijke invrijheidstelling en de voorwaardelijke beëindiging van de dwangverpleging in rechtsvergelijkend perspectief' [2020] DD 187, 198–199.

Based on this examination and after submissions by the public prosecutor and the defence, the trial judge may order the internment of the accused (art. 9 and 15 IA). Because such an order entails the termination of the criminal trial, the victim cannot play a role at this stage of the proceedings.

After the judge orders internment, the case must be referred to the Chamber for the Protection of Society (*Kamer voor de Bescherming van de Maatschappij*; *Chambre de protection sociale*, ‘CPS’) within 2 months, which is part of the Sentence Enforcement Court. The CPS determines the means of execution of the internment. Unlike the Dutch TBS system, the CPS can choose from a wide variety of execution modalities, ranging from electronic tagging with day care to involuntary admission to a forensic psychiatric centre (art. 19-28 IA).

Victims have several rights in CPS proceedings. They must be informed within 1 month of the internment order and given the opportunity to submit a victim statement (art. 29(1) IA). They may request to speak at the CPS hearing. However, the victim is only allowed to make representations as to any conditions that should be imposed on the accused (art. 30 IA). The other parts of the hearing take place behind closed doors (art. 31 IA). The victim can also be represented by a legal representative or by a representative of a victim support organisation. If the CPS decides to conditionally terminate the internment order or to execute it in a way entailing the release of the accused, the CPS may impose individualised special conditions on the accused to protect the victim (art. 37 IA). The latter must be informed of the CPS’s decision within 24 hours (art. 44(1) IA). The CPS must review its decision at certain fixed intervals, the interval depending on the means of execution as is determined by the IA. Furthermore, the prosecution or accused may request an interim reassessment of the decision. The CPS carries out such reviews, with the same rights for victims as during the first session.

Germany

Germany deals with dangerous offenders with mental disorders in several ways. A first possibility is admission to a psychiatric hospital (section 63 StGB). The court can issue an order requiring such admission if the accused is found not – or not entirely – criminally responsible for the offence. In case of diminished criminal liability, the admission to a psychiatric hospital may be combined with a prison sentence. The convict will then be sent to the psychiatric hospital first (section 67 StGB). The order of admission to a psychiatric hospital is indefinite, with the court reviewing it at least annually (section 67e(2) StGB). The threshold for this annual review is raised (i.e., the review becomes more intensive) after 6 years and then again after 10 years. If the applicable standard is no longer met, the order must be terminated. When this occurs, the former patient must be placed under supervision subject to conditions determined by the court (section 67d(6) StGB). The Criminal Division responsible for sentence execution of the relevant Regional Court has jurisdiction for all of these proceedings. The judges receive advice on the patient from psychiatrists and psychologists (section 463(4) StPO). However, the victim has no standing in these proceedings. Victims cannot attend the hearing, deliver a victim impact statement or comment on the former patient’s supervision conditions. Consequently, the victim’s views remain unknown to the court and are not considered in the court’s decision-making.

A second possibility for dangerous offenders with mental disorders is preventive detention (section 66 StGB). If the accused reoffends for a serious violent, sexual or drug-related crime and poses a threat to society, the judge may order preventive detention in addition to a prison sentence. This order can also be made conditionally (section 66a StGB) or retroactively (section 66b StGB). In these two situations, a second procedure takes place at the end of the prison sentence to determine (respectively) whether the conditional preventive detention should be brought into effect or whether preventive

detention should be ordered retroactively. All of these proceedings take the form of full criminal trials that take place at the court which has heard the original criminal case (section 275a StPO). Because these procedures are fully fledged criminal trials, victims enjoy the same rights as during ordinary trials. These rights, which are laid down in sections 406d–406h StPO, include informational rights and the right to victim assistance. Moreover, in certain circumstances the victim may become a co-applicant (*Nebenkläger*) along the public prosecutor in seeking execution of the conditional preventive detention order (section 395 StPO). No equivalent victim's right exists in proceedings for retroactive preventive detention orders.⁵⁰ A preventive detention order is indefinite, but the measure must be reviewed at least annually (section 67e(2) StGB). After 10 years, the threshold for continued detention is raised, and from that moment on, these reviews must be held at least every 9 months. Again, the Criminal Division responsible for sentence execution of the relevant Regional Court has jurisdiction for such reviews. The same rules apply as in connection with the order of admission to a psychiatric hospital, meaning that the victim does not have any standing in the reviews.

The Victims' rights in the post-sentencing phase in the Netherlands, Canada, Belgium and Germany Compared

Despite the importance of acknowledging the victim in the post-sentencing phase, a comparison between the Netherlands, Canada, Belgium and Germany soon reveals gaps as to such acknowledgement in conditional release and discharge proceedings concerning prison and forensic psychiatric hospital. Regarding conditional release from prison, the Netherlands, Canada and Belgium offer victims the possibility to participate in the procedure. The relevant provisions vary from an unfettered right to be heard for victims in Canada (only with the Parole Board of Canada and the Ontario Parole Board), through a scope-limited right to be heard in Belgium (and, albeit not orally, at the Quebec Commission on Conditional Releases), to the unwritten Dutch practice of allowing victims to comment on the conditions that should attach to the conditional release. In Germany, the victim plays no role in conditional release proceedings. With respect to conditional discharge from a forensic psychiatric hospital, only Canada and Belgium allow victims to participate in such proceedings. Again, this consists of a full right to be heard in Canada and a restricted one in Belgium. In the Netherlands (for the time being) and Germany, victims do not have any standing in such proceedings.

Overall, victims have the strongest participatory rights in the post-sentencing phase in Canada, followed by Belgium. Germany is clearly at the other end of the spectrum as it completely ignores the victim during these proceedings. Currently, the situation in the Netherlands is akin to that in Germany. Although some victims in the Netherlands can potentially influence the conditions of a conditional release or discharge through the IDV (which has no equivalent in Germany), this practice is ineffective due to persistent communication problems.⁵¹ However, as indicated, the position of victims in the post-sentencing phase in the Netherlands will soon be reinforced. This development will lead to more acknowledgement of the victim. We support these steps. As a major downside, however, it has to be pointed out that these reforms are coupled with measures that will curb prisoners' access to conditional release. Two restrictions stand out: the duration of the conditional release is limited to 2 years, and the public prosecution service becomes the authority

50. OLG Brandenburg 13 September 2005, NStZ 2006, 183.

51. AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer aan de voorkant van de executiefase' [2020] DD 68, 75–76.

deciding whether or not the conditional release is granted, subject to limited judicial review. This brings the Netherlands out of step with the other examined countries. Canada, Belgium and Germany do not set a temporal ceiling for conditional release, and in each, a judge or independent parole board takes the decision. It is concerning that the Dutch government argues for these limitations by appealing to victims' interests, particularly their alleged desire for revenge. There simply is no empirical evidence supporting the government's claim⁵² that granting conditional release in itself hurts the victims' sense of justice and that victims and society as a whole desire that custodial sentences are served in full in prison.

We argued it makes sense to give victims a voice in the post-sentencing phase. The legal comparison shows that the Netherlands, Canada and Belgium each shape the legal position of the victim in different ways. Broadly speaking, two approaches can be distinguished. One is direct participation, which can either amount to an unfettered right to be heard (Canada, with the exception of the Quebec Commission on Conditional Releases) or a scope-limited right to be heard (Belgium). The second is indirect participation, as occurs in the Netherlands. Both have advantages and drawbacks. Direct participation more firmly anchors the position of the victim in the procedure, and the victim can play a more active role in the decision-making than with indirect participation. As a result, the victim may feel more acknowledged. On the other hand, direct participation could raise expectations that cannot be fulfilled, which may lead to disappointment and misunderstandings. The victim's perspective is only one among several other elements that are considered in the decision-making process. This is particularly true in respect of conditional discharge from a forensic psychiatric hospital, which predominantly rests on an assessment of the danger that the patient continues to pose to society. In this evaluation of these dangers and the suggested treatment to diminish the danger, the victim's interests play a subordinate role. These victim's interests should primarily be reflected in the conditions attached to the conditional discharge of the patient.⁵³ From this point of view, it can be argued that victims should have the right to be indirect participants in the proceedings, this being more in line with the nature and the corresponding relative weight of their interests.

All in all, we cannot express a general preference for either direct or indirect participation. The decisive factor should be whether the law is actually enabling the victim to express his or her views on the conditional release from prison or the conditional discharge from a forensic psychiatric hospital before the decision is taken. This can be achieved both through direct and indirect participation in the procedure. However, we do stress the importance of including the post-sentencing phase in the term 'criminal proceedings' within the meaning of the Victims' Rights Directive. We recommend that future iterations of the Directive clarify expressly that this is the case in the definition of the word 'victim'. With victim participation in the post-sentencing phase becoming more common, we are confident that the future successor of the current Directive will include more detailed provisions on the implementation of specific rights in the post-sentencing phase. For example, clarifications on the right to information (art. 6(5)) or additions to art. 10 (being heard) could be made, thereby ensuring a level playing field of victim acknowledgement throughout Europe.

52. Kamerstukken II 2018/19, 35122, No. 3, 1–7 (Explanatory Memorandum). See further AK Bosma, MS Groenhuijsen and GM de Vries, 'De positie van het slachtoffer bij de voorwaardelijke invrijheidstelling en de voorwaardelijke beëindiging van de dwangverpleging in rechtsvergelijkend perspectief' [2020] DD 187, 189–190.

53. In relation to the TBS-system, see RW van Spaendonck, 'Overwegingen bij de verlenging van de tbs-maatregel' [2017] Strafbld 555.

Final remarks: Worries for the Netherlands

In this article, we have argued that there is a need for victim acknowledgement in the post-sentencing phase. Empirical victimological studies, discussed in the section on the importance of victim acknowledgement, evidence the relationship between victim acknowledgement and victims' well-being. Legal definitions of victimhood and the goals of the criminal procedure justify victim acknowledgement in all phases of the criminal procedure. However, having reviewed Dutch law, we find a noticeable absence of victims' rights in the post-sentencing phase. This can be explained by the course of the development of victims' rights over the last decades, which started in the pre-trial phase and only slowly (if surely) extended into later stages of the criminal procedural timeline. A wide variety of rights have now been established in the trial phase. It is long overdue we start codifying and pursuing the implementation of these rights in the post-sentencing phase.

In this spirit, we have reviewed a law and a legislative proposal which will introduce the right for victims to express their views in proceedings concerning the conditional release or discharge of a convicted offender. We concluded our analysis by arguing that victim acknowledgement can be achieved through either direct or indirect participation. In this sense, both strengthen the victim's position in the post-sentencing phase. However, we also have concerns. Two of these have already been discussed: we worry that communication with victims is currently far from perfect, and we are afraid that calls for victim participation are misused to justify harsher punishment for offenders. The alleged relationship between the postponement of the offender's release date and victim satisfaction – a core justification for this aspect of the new law – has not been empirically substantiated.

There is one final observation we would like to share, even though it is not directly related to the legislation discussed in this article. It concerns the COVID-19 pandemic. Most people are worried about the virus, and rightly so. But the measures taken to combat it also have implications. Theoretical implementation of victims' rights does not ensure that these are real and effective, and those measures have frequently compromised access to justice in practice. The first to notice this may be victims of crime. This could be particularly relevant for the phases of the criminal procedure in which victims' rights have not yet been strongly established.

There are many examples to substantiate our concern. The Parole Board of Canada has temporarily denied victims access to their hearings in response to governmental measures restricting the number of people in public spaces.⁵⁴ In Belgium, Sentence Enforcement Courts limit the number of people present at hearings by relying on written statements as far as possible.⁵⁵ In the Netherlands, the fact that victims and their representatives are often not consulted when physical hearings are cancelled or converted to video-hearings due to COVID-19 measures has been criticised by several victim support services.⁵⁶ Additionally, limited access to the public gallery in courthouses by nature leads to limited support for the victim.⁵⁷ Insiders operating in the criminal justice system have

54. See the notification on the website of the Office of the Federal Ombudsman for Victims of Crime <<https://www.victimsfirst.gc.ca/media/news-nouv/nr-cp/2020/20200324.html>> accessed 23 October 2020.

55. <<https://legalworld.wolterskluwer.be/nl/nieuws/in-het-staatsblad/covid-19-tijdelijke-oplossingen-voor-dringende-problemen-binnen-straftprocedure-straftuitvoering-en-veiligheid/>> accessed 23 October 2020.

56. <<https://langzs.nl/wp-content/uploads/2020/05/Open-brief-LANGZS-t.a.v.-de-heer-Naves-coronamaatregelen.pdf>> accessed 23 October 2020; <<https://fondsslachtofferhulp.nl/nieuws/slachtofferrechten-in-de-knel-door-coronacrisis-en-vertraagde-rechtspraak/>> accessed 23 October 2020. Their comments refer to all types of hearings in the criminal procedure.

57. <<https://www.slachtofferhulp.nl/nieuws/2020/blog-rosa-jansen-corona-legt-kwetsbare-positie-van-slachtoffers-bloot/>> accessed 23 October 2020. Again, these comments are not limited to problems in the post-sentencing phase, but also apply to the criminal procedure in general.

candidly admitted that in times of adversity, it is the victims again who are the first to be excluded from the courtroom. The fight for victims' rights is far from over. We hope this current tide will reverse soon.

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