

Privacyrecht en slachtoffers

*Een studie naar de grondslagen en juridische
kaders van privacy van slachtoffers*

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SUMMARY

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Alle rechten voorbehouden. Niets uit deze uitgave mag worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevens bestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van het WODC.

Summary

1. Introduction

The focus on the position of the victim in criminal proceedings has greatly increased since the 1980's. This has led to an improvement of the rights of victims within the criminal justice process. The legal status improvement, however, comes with a drawback. This can lead to situations within and outside criminal proceedings in which the privacy of the victim is breached, for example by (further) disclosure of their identity to the general public. This can be experienced by the victim as a (great) burden.

However, violations of victims' privacy are not limited to disclosures of their identity for example by the press. Even within the criminal proceedings, victims may face violations of their privacy. Due to continuing technological developments, increasingly sophisticated detection methods are used, thereby increasing the likelihood of privacy violations of victims. The Dutch Minister of Security and Justice maintains the view that victim privacy should be protected against the suspect, the offender and the community at large. According to the minister asking to protect the privacy of victims also means that a balance must be struck between the different interests of the various parties in and outside criminal proceedings. The present study addresses the question of what the legal frameworks are regarding the protection of privacy and identity within the criminal process and the use of personal data of victims and their families in and around the criminal proceedings.

In an effort to determine where victims stand with regards to their own privacy, this study initially intended to merge knowledge concerning the position of crime victims in criminal proceedings with principles of privacy. As it appeared, victims' privacy is generally not a topic of interest in the literature concerning victims' position in criminal proceedings. and the literature on privacy in turn, does not appear to pay special attention to the interests of victims as a special group. As a result, I chose to broaden the scope of the study to include the protection of privacy of citizens in general, and more specifically in the relationship between the government and private citizens.

2. What is privacy?

There appears to be little consensus in the literature as to what is meant by privacy, despite the growing attention for it among international researchers. Definitions and descriptions of privacy vary greatly. This elusiveness is due, in part, to the evolution of the concept. Where initially the notion of privacy was (and for some still is) limited to the goings on within the walls of peoples' own homes, in recent years the concept has gained a much broader meaning. This development has also changed the role of government. Although governments should generally refrain from interference, in some cases, developments in the definition of privacy

have brought governments obligations, enabling them to act accordingly to guarantee the right to privacy.

Moreover, developments in information technology have also influenced the conceptualization of privacy. The use of new information technologies to facilitate governmental registration of personal data doesn't come without risk, however. Personal data are often stored, leaving the individuals concerned with less input options, and thus limiting their possibilities to choose freely how to live their lives. As a result, there is a need to protect personal data. This protection has been associated with the right to privacy from the start and has led to a considerable broadening of the concept of privacy. By linking the protection of personal data to the right to privacy, the right to privacy can be applied applies to all possible areas of an individual's life.

3. Right to privacy

The development of privacy law in the Dutch legal culture has (partly) had its own course, independent of the development of this right at the European level. European developments in the area of privacy law are important for the Netherlands because treaties such as the European Convention on Human Rights (European Convention) have a direct effect in the Dutch legal system (Article 94 of the Constitution). This means that the judge checks decisions and regulations directly against relevant provisions of treaties and resolutions of international organizations. In the Dutch Constitution this is different. There, the judge will not enter into the assessment of the constitutionality of laws and treaties (Article 120 of the Constitution).

The protection of private life has evolved from being limited to the home and (personal) correspondence to now including an broader range of areas to which protection of privacy can be applied. At present, in addition to the general provision that everyone is entitled to respect, except by or restrictions under the law couples, are entitled to respect for privacy, the Dutch Constitution includes specific articles on the inviolability of the body, the home, privacy of correspondence, telegraph - and telephone, as well as a number of instructions pertaining to the use of personal data. This appears to cover the full spectrum of privacy protection as covered by the Dutch Constitution. At first glance, the Dutch Constitution appears to provide more protection than Article 8 of the European Convention. Any restrictions on the right to privacy under the Dutch Constitution must have a formal legal basis. The same does not hold true for Article 8 of the European Convention. Nonetheless, the practical implications of the provisions to protect victims' privacy under the Dutch Constitution are remote. Due to these restrictions imposed on judges, prohibiting them from evaluating formal laws against the Dutch Constitution, coupled with the direct applicability of international treaties in the Dutch legal system, standardizations and implementations of the protection of victim privacy will generally be derived from the interpretation of the provisions stipulated in the European Convention. The interpretation of those provisions are in turn, strongly influenced by the rulings of the European Court of Human Rights.

The right to the protection of privacy is ensured at the European level in the European Charter of Fundamental Rights and the European Convention. Leading the way in the implementation of the right to privacy is Article 8 of the European Convention and the

interpretation given to it by the European Court. As yet, there doesn't appear to be any specific case-law concerning the protection of *victims'* privacy, but Article 8 paragraph 1 of the European Convention is aimed at all individuals, including victims and their families. The first paragraph of Article 8 of the European Convention concerns the right to respect for private and family life, home and correspondence. These are not considered four strictly separate rights. Rather it seems that the European Court assumes a more general concept, namely the respect of private life in general, and in addition, family life, home and correspondence. All four of these rights are extensively interpreted by the European Court. Both the protection of the 'classic' privacy as well as the protection of personal data falls within the scope of private life. That broad interpretation makes it possible for the Court to regulate much government intervention, which the court does on the basis of the requisites stipulated in Article 8 of the European Convention. The European Court does so firstly, by assessing whether there has been an infringement of the rights as mentioned in the first paragraph of Article 8 of the European Convention. Subsequently, the Court assesses whether the interference can be justified under Article 8 paragraph 2 of the European Convention. If not, then it can be determined that a particular case constitutes a violation of Article 8 of the European Convention.

In principle, there must be no infringement of the main rule in the first paragraph of Article 8 of the European Convention, unless in accordance with the requirements mentioned in the second paragraph. These exceptions must be interpreted restrictively so that the main rule of the first paragraph remains the most important. A public authority is allowed, under specific circumstances, to infringe upon the privacy rights of citizens. Only when they have been authorized by government can third parties be included in the exceptions as described in the second paragraph. Any infringement of the exercise of the right to privacy must have a legal basis.

The first condition of a legitimate infringement on the privacy of citizens is that it must be in accordance with the law. Not only does this requirement imply that the law should be accessible and foreseeable to citizens, it also stipulates that legal proceedings are designated by which control can be exercised. This brings the procedural safeguards of Article 6 of the European Convention within the scope of Article 8 of the European Convention. The exceptions to Article 8 paragraph 1 of the European Convention must also provide such procedural control features. In this way, the requirements of Article 6 and Article 8 can complement each other. In addition, the right to privacy of a victim can also conflict with the right to a fair trial of the accused. In this case, an assessment needs to be made on the basis of Article 8 paragraph 2 as to whether or not priority need be given to Article 6 of the European Convention. In other words, there are (rare) circumstances where certain parts of a (criminal) file, are exempt from being made visible to the defendant, for example, due to the confidential nature thereof. The right to a fair trial can, however, be violated when documents that are essential for the resolution of the dispute are not shared with the parties involved.

The second requirement in Article 8 paragraph 2 of the European Convention is that the infringement of privacy by a public authority must be in the interest of some legitimate aim. The government may also infringe upon the privacy of citizens in the interest of rights and freedoms of others. Protecting the rights of victims can be such an interest. The European

Court initially allows Member States themselves to decide how those rights should be protected.

The third and final requirement is that the infringement must be necessary in a democratic society. This is only the case when there is a pressing social need and the infringement is proportional to the objective pursued. Member States are given a margin of appreciation to achieve their own balance between the privacy rights of the first paragraph and the need for relevant purpose in the second paragraph. This margin is, however, not always the same, depending on several factors, including the kind of privacy law that is at stake and the relevant purpose as addressed in the second paragraph. The margin is generally narrower if the relevant law is crucial for the effective exercise of 'intimate or key rights' of individuals. If there is an important facet of the existence or identity of an individual at risk than this margin will be limited.

4. The victim in Dutch criminal proceedings

The victim has a right to proper treatment (Article 51a paragraph 2 Code of Criminal Procedure). This right is only partially made concrete under Dutch law, for example as in the obligation to provide relevant information to the victim. Providing any information is only obligatory if the victim expressly requests that information. A victim also has the right to claim damages and to make a victim impact statement. Furthermore, victims may make a request to view certain documents from the file, to the extent it is appropriate in exercising his/her rights. With the victim's right to access the legal dossier, the principle of internal full disclosure is stretched in favor of the victim, who, in fact, legally is not a party. Internal full disclosure ensures the accessibility of the criminal investigation by all parties. Victims also have the legal opportunity to add documents to the criminal dossier (Article 51b paragraph 2 CCP). Though this requires the consent of the prosecutor, under those conditions it does provide the victim with the possibility to influence the composition and content of the criminal dossier. The prosecutor may refuse to honor the victim's request. The grounds for refusal are the same as those for granting access to documents, namely: in the interest of the (ongoing) investigation, in the interest the privacy (of the accused), in the interest of detection or prosecution of criminal offenses and/or in the interest of serious grounds derived from general public interest (Article 51b paragraph 3 CCP).

The Code of Criminal Procedure does not prescribe a systematic description of detection methods. Investigative methods that pose a risk to the integrity and/or manageability of the investigation, or methods that may infringe on citizens' fundamental rights, including the right to privacy, are called coercive measures and must always have a formal legal basis. Many of these coercive measures can not only be used against the accused, but also against third parties, including the victim. According to the legislator, the extent to which an infringement is thus made on the privacy of citizens depends very much on the nature of the right to privacy and on the specific circumstances of the case and the privacy expectations of the persons concerned. In this way, the legislator approach seems to be consistent with that of the European Court.

If the prosecutor decides to take the case to court, then basically the criminal case will be tried in full by the court at the hearing. The summons contains information pertaining to the

names and other data of witnesses to be heard (Article 260 paragraph 3 CCP). In this way the defendant is kept informed by the public prosecutor as to who will be summoned. In addition, the subpoena also contains information pertaining to the victims' right, or that of his/her survivor, to make a victim impact statement.

A victim of a crime can appear in court in various capacities, namely as an injured party, as a speaker and/or as a witness. Generally, the court hearing is public (Article 121 of the Constitution), though the legislature has made some exceptions. One circumstance where the limiting of public access to the trial (Article 269 CCP) may be in the privacy interest of the defendant or the victim. In order to avoid too many cases to be tried 'behind closed doors', which would negatively impact possibilities for external control, judges must exercise restraint in limiting public access.

The press gives substance to the external publicity of the hearing. Public hearings are always accessible to journalists. The press are allowed to make drawings during the hearing but they are prohibited from making audio or video recordings inside a courthouse without the explicit consent. Journalists who wish to make any recordings must apply for permission in advance. The press is further prohibited from making video and audio recordings of victims, witnesses, experts and the public audience. However, journalists may request victims for permission to make video and audio recordings, though under exceptional circumstances, the court may even prohibit that. In the case of a hearing behind closed doors (with limited public access), presence at the hearing may, under certain conditions, be granted to some journalists.

5. Provision and use of personal data

In order to facilitate victim support, employees of the Dutch Victim Support organization need to be able to contact victims. For this, they need access to victims' personal data. For the purpose of this objective, the police can provide the appropriate relevant police information, which includes identity data, description of the crime or traffic accident, the date and the circumstances of the crime or accident, the severity of the injuries and the damages suffered. This structural provision is based on Article 18 paragraph 1 of the Police data Act. The provision of victim data by the police to Victim Support is done on the grounds of Article 4.2 paragraph 1 section *b* of the Police data Order.

6. Protection of privacy in Belgium

In Belgium, constitutional norms interfere much more with the process of criminal justice than it does in The Netherlands. This is because the Constitutional Court can nullify, declare unconstitutional, and suspend laws. The Constitutional legislator in Belgium has primarily aligned itself with Article 8 of the European Convention when it comes to the protection of privacy.

In Belgium, victims may even initiate criminal proceedings, though only in the pursuit of claiming damages from their perpetrators. Victims appearances in court are also predominantly in the service of claiming damages from the accused as opposed to making a victim impact statement. Victims who claim to have suffered damages as a result of the crime,

acquires the status of a civil party, thereby becoming a party in the criminal proceedings. The civil party may also request the court to limit public access. For victims of certain sexual offenses, such as rape or indecent assault, limited public access is expressly provided for by law in order to protect their privacy.

The attention and support that the victim is entitled to in the form of proper treatment, restorative justice, and help with settlement agreements, appears to be primarily focused on activities outside criminal proceedings. Magistrates and employees of prosecutor's offices and courts are obliged to ensure that victims are referred to specialist services like victim support, if victims so desire. Every police officer has the duty to provide appropriate initial support to victims, to give them first aid, and to provide them with any relevant information. In light of these duties, the police must always show discretion in their dealings with third parties and the press.

Apart from reporting a crime to the police, victims in Belgium also have the opportunity to report a crime in writing directly to the public prosecutor. Moreover, victims in Belgium can file a report of a crime anonymously. In effect this means that the police officer who takes the minutes of the crime report, may refuse disclosure of the victim's name.

A legal provision also allows statements to the press to be issued during the preliminary investigation period. With the consent of the investigative judge, the prosecutor can provide information to the press. Moreover, the prosecutor supervises the interests and rights, such as privacy and personal dignity, of individuals involved (e.g. victims). In as far as possible, the identity of persons named in the criminal dossier are not released as a general rule.

7. Protection of privacy in England and Wales

U.K. Citizens who believe that their rights as protected by the European Convention have been violated, were, until recently, unable to address this in the courts of the United Kingdom, instead having to apply directly to the court in Strasbourg. That situation ended with the enactment of the Human Rights Act in 1998. Though the Human Rights Act doesn't target individuals, rather public bodies that are obliged to act in accordance with the rules and regulations of the European Convention, private citizens can still go through the Human Rights Act to make a direct appeal to rights consigned by the British court to the European Convention. This includes the right to privacy. The reason that the Human Rights Act also deals with individual appeals is because this act stipulates that British courts must also be deemed as public bodies, thereby obliging British judges to act in accordance with the European Convention, even when it concerns a case between two individuals.

There seems to be a degree of reluctance vis-à-vis the granting of procedural rights to victims of crime in England and Wales. The literature generally relies on the argument that there is limited space for a formal role for the victim within the adversarial model. Nevertheless, there are also initiatives to strengthen the legal position of the victim. Though victims can only be heard in the capacity as a witness during the trial, safeguards have been implemented to ensure their safety and their privacy. These may be screens or curtains that shield the witness from the accused or from the public gallery, interrogation through a video link to another room where the victim is located, or interrogation behind closed doors. Furthermore, the prosecutor at the hearing is responsible for ensuring that victims and witnesses are treated

with respect. The premise is that witnesses have to testify orally before the jury at the hearing such that the jury can form a judgment based on the witness statement the cross-examination. Pictures or images of witnesses (or victims) are disallowed from being made during the hearing and the use of audio equipment in the courtroom is only permitted with the explicit permission of the court.

In the U.K., a crime can be reported in several ways, including anonymously. If a victim reports a crime to the police, he must be informed about what he can further expect from the criminal justice system as well as about decisions to be made or taken by judicial authorities involved in the criminal case. In addition, the police is obliged to inform victims making a witness statement, that doing so may entail that they will at a later date be required to give their testimony at the hearing. Along with making a witness statement to the police, a victim may also issue a Victim Personal Statement (VPS), which is then put in writing. The Code of Practice for Victims of Crime was brought in line with the provisions of the Directive 2012/29/EU of the European Union in 2013. The Code of Practice requires specified entities to provide certain services to anyone who declares to the police that he was the 'direct' victim of criminal behavior. The Code of Practice is in its present form not legally enforceable.

In the past decade, the British press has on several occasions been brought in connection with (alleged) violations of the privacy of individual citizens, including victims and survivors of serious crimes. The phone hacking scandal of 'News of the World' was reason for the British government to in 2011 commission a two-part public investigation regarding the role that both the press and the police played in that affair. The investigation has to date been partially completed and is known as the Leveson Inquiry.