

Het zichtbare slachtoffer: privacy van slachtoffers binnen het strafproces

Summary

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Introduction

Over the past decades, victims of crime have played a more prominent role in Dutch criminal proceedings. Victims can assume the role of a witness, but they can also draw up a written victim statement or speak at the hearing of the criminal case. On top of that, they can act as a claimant of damages during the criminal proceedings. This more prominent role may exert a negative influence on victims' private life. Once a victim officially reports a crime to the police, his personal information, including name and residential address, are automatically included in the criminal file. These and other data, such as recordings of phone tapping and other information gathered through the pre-trial investigation, can then be shared with the accused and others. Certain sensitive information may be read aloud during public court hearings that a victim might prefer not to be disclosed. Victims and relatives of victims who attend the hearing and make victim statements are visible for the accused, the public, and the press, and they may be recognized or contacted afterwards. Personal information that is uncovered during the hearing of the case may be disseminated or forwarded to others.

Violation of privacy of victims is inherent to criminal investigations when information is gathered and processed for the purposes of the prosecution. However, some privacy breaches can be prevented by protection measures. Laws and policy guidelines that strengthen the rights of victims may offer victims of crime protection of their private life. The EU Directive on minimum standards for victims (2012/29/EU) provides that European countries take additional measures to prevent secondary victimization of victims, including the protection of privacy. The Directive points towards measures that should be made available to victims of crime to prevent distress during court proceedings, in particular as a result of visual contact with the offender, his family, associates, or members of the public. In view of this Directive, the Research and Documentation Centre of the Dutch Ministry of Justice and Security commissioned the undertaking of research into the legal and practical aspects of privacy protection of victims in the Netherlands. The findings are presented in this report.

A separate study was conducted on the legal rules regarding privacy of victims. This study discusses the legal frameworks of the right to privacy for the Netherlands, Belgium, and England (Van der Leij, 2015). The Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), together with VU University, have undertaken empirical research, which is presented in this report, into the practical implications of privacy protection of victims. Privacy is thereby defined as relating to: (a) information or data that may identify a person ('informational privacy') and (b) the physical exposure that may lead to recognition of the victim and undesirable contacts with, among others, the defendant ('spatial privacy'). These definitions of privacy amount to the basic concept of *shielding* (of appearance, identity, activities). 'Shielding off' thus appears to be a concept that may cover all kinds of privacy protection measures.

Research questions and methods

The central question in this research reads:

How is the privacy and identity of victims and their relatives protected within the criminal process and how are personal data of victims and their relatives being dealt with in and around the Dutch criminal procedure?

The central question is divided into the following sub questions:

1. What is the *policy* of the police, prosecutors and courts/judges regarding the protection of the privacy of victims and their relatives in terms of the informational privacy and the spatial privacy, as arising from their involvement in a criminal case?

2. How do officials protect the privacy of victims and their relatives in *practice* in terms of the informational privacy and the spatial privacy, as arising from their involvement in a criminal case? Is this consistent with the policy?
3. What are the *experiences of victims* and their relatives with the protection of privacy in terms of informational privacy and spatial privacy, as arising from their involvement in a criminal case? How do they define their interests at this point?
4. How do *organizations and companies* outside the criminal justice system (but related to it), deal with data about victims and their relatives?

The methods of research used in order to answer these questions are *desk research*, *semi-structured interviews* and the distribution of a *survey* among victims. To answer Question 2, 15 officers from the police, the prosecution, and the judiciary were interviewed about their experiences. To answer Question 4, interviews were held with two lawyers (one for defendants and one for victims), two representatives of the (National and Amsterdam) Bar Association, two officials of Victim Support Netherlands, a representative of the Dutch Association of Insurance Companies, a policy advisor at the Criminal Injuries Compensation Fund, and five journalists. The victim survey was distributed to a large number of victims via Victim Support Netherlands and lawyers who support victims. In total 43 respondents (victims and relatives) completed the survey. The respondents were victims and relatives of victims of various violent crimes, sexual offenses, stalking/threats, (attempted) murder and burglaries. Following the completion of the questionnaire, additional telephone interviews were held with 11 victims.

The policy of the police, prosecutors and courts/judges

Policy guidelines that may provide protection of privacy for victims vary greatly. The rules that they contain do not guarantee a full privacy protection of victims; on the one hand because it would restrict the rights of the accused to a fair trial, on the other hand because the current policy may not (yet) sufficiently take into account all privacy interests of victims. The guidelines provide individual officers with a lot of freedom to decide whether or not to offer/apply protective measures for victims.

There are currently four options to shield the identity of victims during criminal proceedings: reporting/testifying under a different address (residential address is shielded); reporting/testifying under a number (name is shielded, as well as the victim's address); testifying as a partially anonymous witness (an option included in the law whereby identifying information is shielded); and testifying as a threatened witness (an option included in the law whereby all information is shielded; the victim is not present at the hearing of the case). All four possibilities are made available to only a very limited group of victims, because they require "legitimate reasons" for being applicable. Reporting a crime while using a number instead of a name is almost exclusively available to victims who are employees in the public sector. There are, however, special guidelines of the Public Prosecution Office for specific victims, such as of domestic violence, human trafficking, and sexual abuse, which require that the address of those victims should always be shielded.

There are no specific policy guidelines or instructions on how to deal with the privacy of victims and other third parties when (special) investigative techniques, such as telephone taps, are conducted. Article 126bb of Dutch Code of Criminal Procedure requires notification of *users* of, for example, telephones, from which information was collected via special investigative techniques.

In issuing press releases on a crime, officials must take into account the privacy interests of victims: they must inform the victim (if possible) of the press release, and the coverage usually cannot contain identifying information. Current policy guidelines allow for some information about victims, in certain instances, to be shared with third parties such as football organizations, transport companies, or government agencies. If support is to be offered to victims, their

information can be provided to medical doctors, Victim Support, the Youth Welfare Office or the Child Protection Board. A careful balancing of the relevant interests is always required in such situations.

Policy guidelines of the Council for the Judiciary instruct that all national courts provide for a separate room where victims can wait for the trial without being confronted by the defendant. Moreover, victims should be offered the possibility to make use of a different entrance to the courthouse on request in order to avoid meeting the accused before or after court hearings. Since 2013, the possibilities for press to take photos or video footage during public hearings in Dutch courts have been expanded. However, the policy guidelines do not allow for photos, video or audio recordings to be taken of witnesses, experts, victims, or the public. Names of those involved (accused, victim, witness) mentioned in recordings should be deleted or replaced by a beep.

The practice of privacy protection within criminal proceedings

Even though almost all interviewed officials have indicated that they are familiar with the mentioned policy guidelines and that they endorse them in principle, most of them rarely explicitly rely on them in practice. The results of the interviews suggest that the protection of victims' privacy greatly depends on the commitment of individual processing officials. For more voluminous cases including large numbers of victims, more protection measures appear to become possible, while for cases with less serious crime, victims do not receive the same protection.

Most interviewed law enforcement officials have never dealt with or offered any of the four mentioned victim/witness identity protection measures. It would be very difficult, if not impossible, to effectively shield the identity of victims during the criminal proceedings. Anonymous statements by victims are more likely to be subject to requests for cross-examination by the defence counsel. Moreover, personal information about victims appears to be readily available on (semi)public internet websites, causing anonymity to be threatened. In larger cases, police regularly tap phones of victims and their families. The practice of informing victims about whether their telephone has been tapped is indistinct: some police officers state that victims are always notified, while others say they never inform them. Sensitive information gathered through phone tapping a victim may later appear in the criminal file.

Sometimes, the victim's identity is initially shielded, but is then unintentionally revealed during or after the criminal trial. The more processing officials are involved in the case, the harder it becomes for this information to remain shielded. If the residential address is shielded, it may nevertheless appear in the criminal file if it is mentioned in, for instance, a claim for damages (i.e., medical bills or communication with insurance companies) that is included in the case file. Prosecution officials sometimes make an effort to censor certain information (e.g., name, address) that is found on documents in the file with a black marker. Additional privacy protection measures such as anonymizing testimonies of victims, censoring intimate photo/video footage, shielding off the press or making it possible for victims to follow the court hearings from a different room via a live-video streaming, all have occurred according to the interviewed officials. However, these additional efforts are only made in certain high profile cases.

In practice, victims are not always given the possibility to use another entrance to the court building. Although almost all courts in the Netherlands have a separate waiting room for victims, in some courts this room is tucked away somewhere in the building with inadequate facilities for victims to feel comfortable. In most cases, identifying information (e.g., name, address, date of birth) of the victims is read aloud during the public hearing. Some victims do request for their name not to be mentioned during the proceedings, and judges are free to decide whether to give effect to this request. In some cases, the reading aloud of a victim statement can happen without mentioning the victim's name. Efforts to shield identifying information about the victim during public hearings will require vigilance of all parties, since there is a risk that the victim's name may (unintentionally) be mentioned by the prosecutor or the lawyer.

Experiences of victims with the protection of their private life

Many victims contend that privacy protection is particularly important with regards to the accused. Most respondents of the survey indicate that they are afraid of reprisals or retaliation by the accused, his family, or his friends. Others find it a matter of principle that the accused should not know their personal information. A small number of victims are of the opinion that no one should have access to their personal information.

Almost all respondents of the survey mention having reported the crime and/or testified without their name or other identifying information being shielded. Two victims had been offered the opportunity to shield their residential address throughout the criminal proceedings. Three quarters of respondents did not know that reporting/testifying while shielding information (address, name) was possible. Almost half of the respondents did not know that their personal information (name, address) would be in the criminal file after reporting a crime. More than a quarter of the respondents indicated that they would rather have had their personal information shielded from the accused. When asked which information they would like to have shielded, they most often mentioned their name, address, telephone number, or the entire testimony. A third of respondents felt that there were enough possibilities to shield their name and/or address during the criminal proceedings.

Most victims have attended the public hearings, but there were a substantial number of victims who deliberately did not attend court to avoid confrontations with either the accused or the public. In the vast majority of cases, the name and/or address of the victim was mentioned aloud at the public hearing. One third of the respondents did not expect that this information would be read out and experienced this as a kind of intrusion on their privacy. The presentation of the written victim statement happened in a small number of cases without mentioning the name of the victim.

One third of all respondents who attended the court hearings experienced this as emotionally heavy, because they were, sometimes unexpectedly, confronted with the accused. A number of victims experienced this confrontation already prior to the public hearings, in the corridors of the courthouse.

The needs of victims with regards to media attention differ. Some victims prefer to be shielded off from journalists, while other victims prefer having media attention for what had happened to them. Some negative experiences with media publications show that (full) names of victims are being published in newspapers, or photos of victims may be published which were taken from social media. Half of the victims said that police, prosecution, or victim support workers have helped them to prepare for, or shield off, media attention.

In general, victims are positive about the protection of their privacy that is offered by the police, prosecution officials, and judges. Two thirds of the victims and relatives felt, looking back at the criminal procedures, that their private life has been sufficiently 'protected'. Some victims however point towards being poorly informed about their personal information being disclosed to the accused or read out during public hearings. Others would rather not have been confronted with the accused in the courthouse, and had expected some physical shielding before or after the hearing. In addition, being correctly informed about the criminal proceedings, among which the trial date, the sentence, and the whereabouts of the defendant, appear to be of great importance for victims. Being informed about these subjects makes victims feel more secure and protected, which is associated with the enjoyment of private life.

Organizations and companies outside the criminal justice system

Insurance companies, compensation funds for victims, victim support units, lawyers, and journalists seem to deal confidentially with the (private) information they receive about victims of crime. Their internal guidelines and policies play a role in respecting the right to privacy, although

guidelines appear more important for insurance companies and lawyers than for journalists. The interviews and the victim survey did not indicate that victims rate these external organizations negatively with regards to respecting their privacy, with the exception of some negative experiences with media.

Insurance companies have no special privacy guidelines tailored to clients who are victims of crime. However, it is not possible to make anonymous claims, since insurers require the identity of the claimant for judging the claim. With regard to data of victims, an internal code of conduct is handled by all insurance companies in the Netherlands, which inter alia requires the consent of the client (victim) if information is shared externally. The use of medical data is subject to additional safeguards. According to the Association of Insurers, there is much attention for the privacy of clients (victims) within the insurance companies and there are minimum, if any, privacy complaints on this point.

In order to apply for financial compensation from the *Criminal Injuries Compensation Fund (Schadefond Geweldsmisdrijven)*, victims or relatives must give their personal information and attach various pieces of evidence to the application. When handling personal data, the Fund is bound by the Dutch Data Protection Act, whereby all employees have a duty of confidentiality and information will not be disclosed to the accused or third parties unless the victim gives consent. However, the Fund is allowed to request information about the victim from the police, the prosecution, and the Central Judicial Collection Agency (*Centraal Justitiaal Incasso Bureau*), without the victim's consent.

Victim Support Netherlands (Slachtofferhulp Nederland) collects personal information about victims, which not only includes names and addresses, but often also information about injuries, psychosocial problems, therapy, the family situation, and the financial situation of the victim. The internal Privacy Regulation of Victim Support Netherlands contains rules for the handling and protection of the victim data. In addition, every employee of the Victim Support Organization is bound by a duty of confidentiality. If data on the victim by the Victim Support Organization are provided to other organizations, the victim first needs to sign a consent form.

The *Dutch Bar Association (Nederlandse Orde van Advocaten)* publishes Rules of Conduct, which are binding for all Dutch lawyers. Some of the rules state that lawyers may not provide court documents to the media, and have to treat such documents confidentially (also in cases where the victim is not the lawyer's client). When this rule is not adhered to, the lawyer may be required to account for this behaviour in front of the disciplinary court. According to representatives of the National and Amsterdam Bar Associations, the Rules of Conduct adequately protect the legitimate interests of victims with regards to their privacy. Lawyers who were interviewed, note that they carefully handle victim information.

Guidelines for journalists regarding victim privacy exist, but they are not binding. Some rules have been developed by the national *Association of Journalists (Raad voor de Journalistiek)*, providing standards for journalists in respecting the privacy of victims. According to the interviews, journalists determine themselves how they approach victims. The journalists often describe themselves as quite cautious; they are careful in taking into account the private life of a victim. Discussions about privacy are held at various media organizations and among journalists, but particular conduct still depends on the individual journalist. According to the interviewed journalists, it appears that nowadays it has become easier to make publications, because victims more readily place information about themselves online and are more easily approachable and prepared to tell their story to journalists.

Conclusions

Measures to protect the private life of victims are available but they are not always (effectively) implemented. Whether or not this happens depends largely on the individual officers processing the case, but also on the type of case/victim and the phase of the criminal process.

Criminal procedures necessarily entail a breach of private life for those involved, among which victims of crime and their relatives. Apart from the need to expand measures, such as offering possibilities to shield name or address during testimonies, it is important that there are no *unnecessary* breaches of the private life of victims. Victims should be adequately informed about the (progress of the) case, about what they can expect in terms of the procedures infringing on their private life, and which protection measures are available to them. They can then make an educated decision about whether and how to participate in the criminal proceedings against the defendant.

Officials in the criminal justice process do recognize victim wishes with regards to privacy protection, but they are not always prepared to provide them with the relevant measures, or they feel that this would be unnecessary. Requesting identifying data of victims and noting them in registrations and data banks is standard in the various steps taken by law enforcement officials. However, such identifying data generally are not strictly necessary for proceeding with a case. Victims are not always aware that such data become visible for the defendant, and they are often not being told so. Police and other officials in the criminal justice system should make an effort to better inform victims on this point and to shield these data when their use is not necessary.

Victims of less serious crime generally have to do without the special measures that are being provided for victims of highly serious crime, although these victims also prefer to be given such protection. Thus, such measures should also be available for victims of less serious crime.

In courts, victims should be offered the opportunity to make use of a separate room as well as a special entrance of the court building, to prevent a confrontation with the defendant and his/her friends and family. When not necessary, victims' names and other identifying information should not be read aloud during the hearing of the case.

Policy guidelines are available on a large scale, but their implementation is defective at present. Sometimes a victim is simply 'forgotten', even on moments where due attention would be strictly required, for example when the case is dealt with in open court and the victim wishes to attend. A correct implementation of the EU Directive on minimum standards for victims (2012/29/EU) requires a more effective implementation in practice of the relevant policy guidelines for making possible an adequate protection of victim privacy.