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## The (Political) Pursuit of Victim Voice: (Comparative) Observations on the Dutch Draft on the *Adviesrecht*

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### 1. Introduction

In the past decades, many nations have taken measures to increase victim participation in their criminal justice systems. One of the main challenges for policymakers has been to determine to what extent crime victims should be included in criminal trials. Criminal proceedings representing a delicate balance, implementing victim voice within trial proceedings is no sinecure. Indeed, one can spell out the dilemma of how to balance the victim's interest with the standards of a fair trial.<sup>1</sup> Nevertheless, the need to protect victims' interest is widely acknowledged. Indeed, temporary criminal policy is strongly associated with procedural justice, emphasising the need for victim voice. In pursuit of positive evaluations of (the outcomes of) legal proceedings procedural arrangements were introduced.<sup>2</sup> In this paper we will discuss three of these arrangements: the Victim Impact Statement (hereafter: VIS), the Victim Statement of Opinion (hereafter: VSO) and the 'new kid on the block': the Dutch *adviesrecht*.<sup>3</sup>

The immediate cause is the recent amendment to incorporate an *adviesrecht* into trial proceedings in the Netherlands.<sup>4</sup> Since all three instruments relate to victims' needs we will relate to victimological findings. Moreover, since procedural justice relates to the design of trial proceedings, we will fit in a comparative legal element by referring to applications of the VIS and the VSO at the federal level in the US.<sup>5</sup> Since US procedures use bifurcated proceedings, we will refer to the recent research of Keulen et al. with regard to the advisability of the bifurcation of Dutch trial proceedings.<sup>6</sup>

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1 In this paper the concept of fair trial is applied to the defendant's position only.

2 T.R. Tyler, *Why people obey the law: Procedural justice, legitimacy, and compliance*, 2006.

3 In order not to complicate things we will refer to the general concept of the VIS (in Dutch: *schriftelijke slachtofferverklaring*), using the term VSO only if the comments relate directly and solely to the VSO. The *adviesrecht* is a legal figure *sui generis* (see Section 4.2, *infra*) and will be addressed as such. In the perspective of resemblance, the *adviesrecht* is most closely linked to the VSO. If necessary for clarification, we will use the Dutch terminology.

4 The amendment was formally introduced in October 2013 and is currently under review: *Wetsvoorstel ter aanvulling van het spreekrecht van slachtoffers en nabestaanden in het strafproces* (Draft on the Expansion of the Victim Impact Statement on behalf of Victims and Relatives in Trial Proceedings); <<http://www.rijksoverheid.nl/documenten-en-publicaties/wetsvoorstellen/2014/04/16/wijziging-strafvordering-ivm-verdere-verbetering-positie-slachtoffer-o-a-uitbreiding-sprekrecht>>, last visited 31 October 2014.

5 The choice to limit ourselves to the federal level rests upon the complicated nature of the US scheme of criminal justice. Because procedural rules with regard to victim voice differ substantially at a state level and the comparison aims at analysing the relevance of bifurcated proceedings on a general level, a limited comparison suffices.

6 B.F. Keulen et al., *Naar een twee fasen proces?*, 2013 (also: <[http://wodc.nl/images/2292-volledige-tekst\\_tcm44-505694.PDF](http://wodc.nl/images/2292-volledige-tekst_tcm44-505694.PDF)>, last visited 31 October 2014).

The paper goes as follows. Firstly, we will look into the concept of procedural justice (Section 2); subsequently, we will provide an overview of the differences with regard to trial proceedings between the Netherlands and the USA (Section 3). Section 4 gives a description of the Dutch amendment, followed by an overview of the application of the VIS and the VSO in the USA (Section 5). Section 6 provides a (comparative) analysis and a conclusion completes the paper (Section 7).

## 2. Procedural justice and the heterogeneity of victims' needs

Providing procedural justice to victims is a core business within contemporary Dutch criminal policy. Indeed, the 2012 policy plan *Recht doen aan slachtoffers (Doing Justice to Victims)*, states:

‘In order to do justice to victims it is important to both punish the perpetrators and to ensure that the punishment enforced is accepted as appropriate. The outcome and punishment being of importance, the appreciation of the results of trial proceedings also depends on the extent to which proceedings are felt to be fair (procedural justice).’<sup>7</sup>

Clearly, the topical focus on procedural justice comes as no surprise. Since its introduction by Thibaut and Walker in 1975,<sup>8</sup> the concept of procedural justice has become one of the ‘darlings’ of the proponents of victims’ rights. Driven by a fear of a decline in legitimacy, policy makers welcomed the idea that people’s evaluations of the law and its applications relate to the way in which authorities respond to the arguments presented by the parties involved.<sup>9</sup> In the rise of victimology, scholars also started to study the significance of procedural justice for crime victims. The idea that compliance with the law directly relates to the perception of the fairness of legal proceedings was applied to victims’ experiences, the outcomes providing the turmoil for contemporary governmental victims’ policy.

The focus on crime victims, however, altered the original lens of procedural justice. Since procedural justice became a non-contested concept, both procedural justice theorists and victimologists appeared receptive to the idea that expectations of procedural justice must be individualised, instead of accepting the homogeneous interpretations of victims’ needs that were provided by previous studies.<sup>10</sup> Indeed, contemporary Dutch findings with regard to the right to make an oral statement in court (*spreekrecht*, hereafter: oral VIS) show that victims’ perceptions relate to psychological characteristics, the impact of the offence providing a good prediction of the victim’s willingness to make use of the oral VIS.<sup>11</sup> Next, Dutch studies indicate that we should not overlook the possibility that victims might abscond from the right to activate voice, preferring to be passive participants.<sup>12</sup>

The general idea underlying procedural law, that is to say that there is a correlation between peoples’ willingness to obey the law and the apparent responsiveness of the authorities towards the participants’ arguments and needs is, however, undisputed. Opportunities to participate indicate a reaffirmation of people’s sense of their standing in the community and is, according to Tyler, as important as ‘solving’ their problems.<sup>13</sup> Where both ends intertwine, it is difficult to get a clear picture of which aim prevails.

7 *Kamerstukken II 2012/13*, 33552, no. 2, p. 16.

8 J. Thibaut & L. Walker, *Procedural Justice. A psychological analysis*, 1975.

9 T.R. Tyler, ‘What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures’, 1988 *Law & Society Review* 22, no. 1, pp. 103-135. Tyler distinguishes seven variables determining procedural justice: ‘the effort of the authorities to be fair; their honesty; whether their behavior is consistent with ethical standards; whether opportunities for representation were given; the quality of the decisions made; whether opportunities to appeal exist; and whether the behavior of the authorities shows bias’ (p. 121).

10 *Ibid.*, pp. 130-131. In early work Tyler found that personal differences were not of influence on the criteria used to assess the fairness of legal procedures. However, in his later work he admits that there is a need to doubt this uniform victim profile, stating this to be an issue to be explored; Tyler, *supra* note 2, pp. 82-83.

11 K. Lens et al., *Het spreekrecht in Nederland: een bijdrage aan het emotioneel herstel van slachtoffers?*, 2010.

12 M. Laxminarayan, *The Heterogeneity of Crime Victims: Variations in Procedural and Outcome Preferences*, 2012, p. 50; K. Lens et al., ‘Heterogeneity in victim participation: A new perspective on delivering a Victim Impact Statement’, 2013 *European Journal of Criminology* 10, no. 4, pp. 479-495. Note that this heterogeneous profile of the victim is reflected within victim advocacy; B. van Stokkom, ‘Victim needs, wellbeing and ‘closure’: is revenge therapeutic?’, in E. Erez et al., *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives*, 2011, p. 213; V. Barker, ‘The politics of Pain: A Political Institutional Analysis of Crime Victims’, 2007 *Law & Society Review* 41, no. 3, pp. 619-663.

13 T.R. Tyler, ‘Procedural Fairness and Compliance with the Law’, 2000 *Swiss Journal of Economics and Statistics*, no. 2, p. 231. According to Tyler the core business of procedural justice is about ‘the ability of organizations to design systems of management that are sensitive to

Findings show that providing room to participate furthers the acceptance of negative legal outcomes.<sup>14</sup> Notwithstanding that outcome favourability is found to influence the acceptance of legal outcomes, people do gain desirable outcomes from voice itself.<sup>15</sup> Nevertheless, there is debate as to what end is valued most highly: outcome-control or expressive aims, to be accompanied by respectful treatment. Some victimologists suggest that the treatment leading up to the decision-making stage prevails,<sup>16</sup> whereas others claim that victims are (also) in support of outcome control.<sup>17</sup> While it is clear that victims pursue participation from the early stages onwards, this should not be interpreted as a synonym for outcome-control.<sup>18</sup> The correct position appears to be the one taken by Wemmers, who states that victims prefer an ‘in-between role’: they do not favour full exclusion, nor full control.<sup>19</sup>

Nevertheless, in light of the Dutch amendment there is good cause to take a closer look at victims’ preferences with regard to outcome-control. Obviously, one of the aims of the *adviesrecht* is to provide victims with the opportunity to influence the outcome of trial proceedings. The governmental paper *Recht doen aan slachtoffers (Doing Justice to Victims)* explicitly refers to this aim, stating that in order to provide procedural justice to victims of crime, it is ‘(...) of importance that victims are informed and are able to *influence the outcomes* [emphasis added].’<sup>20</sup> Taking into account the highly professionalized nature of the Dutch administration of justice, such an explicit promise for outcome-control may, however, result in reverse effects, causing harm to the authorities’ trustworthiness, thus causing a loss of procedural justice.<sup>21</sup>

### 3. The significance of the procedural design

Besides the nature of victims’ needs with regard to procedural justice, the fundamental differences amongst the style of trial proceedings must be taken into account. While the concept of victims’ needs used within the political debate may be featured as a homogeneous concept, the legal traditions that need to host victim-oriented arrangements differ. Indeed, the apparent political consensus with regard to the victims’ need for procedural justice is not synonymous with uniform (legal) solutions.<sup>22</sup> Obviously, the victim’s pursuit for procedural justice affects the law’s systemic design. Since trial proceedings established within the past era were not designed to provide for victim participation, national authorities are confronted with inherent limitations, causing them to contemplate over changes that need to be introduced.<sup>23</sup> The law being a slow instrument, such changes will not – and indeed must not – come overnight.

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procedural concerns, even when they cannot or do not provide those within the organization with the outcomes they desire’; T.R. Tyler, *Why people cooperate*, 2011, p. 162.

14 Tyler 2000, supra note 13, p. 225; Tyler supra note 2, pp. 78-81; A. ten Boom & K.F. Kuijpers, *Behoeften van slachtoffers van delicten*, Den Haag, 2007; J.-A. Wemmers & K. Cyr, ‘Victim’s Perceptions on Restorative Justice: How Much Involvement are Victims Looking for’, 2004 *International Journal of Victimology* 11, no. 2-3, pp. 259-274.

15 Tyler 2011, supra note 13, p. 139.

16 Laxminaryan, supra note 12, pp. 180-181; Tyler, supra note 9, p. 127; J. Roberts & M. Manikis, *Victim Personal Statements. A Review of Empirical Research*, 2011, p. 24; J. Roberts & E. Erez, ‘Communication in sentencing: Exploring the Expressive Function of Victim Impact Statements’, 2004 *International Review of Victimology* 10, no. 3, pp. 223-245.

17 E. Erez & P. Tontodonato, ‘Victim participation in sentencing and satisfaction with justice’, 1992 *Justice Quarterly*, no. 3, pp. 393-419; C. Hoyle et al., *Evaluation of the ‘One stop shop’ and victim statement pilot projects*, 1998; Lens et al., supra note, 11, p. 89; S. Leferink & K. Vos, *Spreekrecht en schriftelijke slachtofferverklaring: recht of kans?*, 2008.

18 J. Shapland et al., *Victims in the Criminal Justice Process*, 2005; J.-A. Wemmers, ‘Where do they belong? Giving victims a place in the criminal justice process’, 2009 *Criminal Law Forum* 20, no. 4, pp. 405-406; P. Cassell & E. Erez, ‘Victim Impact Statements and Ancillary Harm: The American Perspective’, 2011 *Canadian Criminal Law Review* 15, pp. 169-172.

19 Wemmers, supra note 18, p. 412. Also: C. Englebrecht, ‘The struggle for ownership of conflict’, 2011 *Criminal Justice Review*, no. 2, pp. 129-151 and I. Edwards, ‘An ambiguous participant’, 2004 *British Journal of Criminology*, May, pp. 967-982.

20 *Kamerstukken II* 2012/13, 33552, no. 2, p. 16. Also: *Kamerstukken II* 2013/14, 33552, no. 7, p. 9, stating that the aim is to realise a strong victim position, anchored within the law.

21 Tyler 2000, supra note 13, pp. 231-232; V. de Mesmaecker, ‘Antidotes to Injustice? Victim Statements Impact on Victims’ Sense of Security’, 2012 *International Review of Victimology*, no. 1, pp. 133-153.

22 J. van Dijk, *Slachtoffers als zondebokken*, 2008. Van Dijk observes fundamental differences in the theoretical scope on victim rights in the Netherlands and the US; the same is true for the United Kingdom. For a brief overview: Canadian Department of Justice, *The role of the Victim in the Criminal Process. A Literature Review – 1989-1999*, <[http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr00\\_vic20/p422.html#a42](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr00_vic20/p422.html#a42)>, last visited 31 October 2014.

23 E.g. C.P.M. Cleiren, ‘Preadvies. Het opstandige slachtoffer. Genoegdoening aan slachtoffers in het strafrecht’, in Nederlandse Juristenvereniging, *Het opstandige slachtoffer*, 2003, pp. 33-104.

Some scholars argue that the civil law system is better suited to deal with victim participation than common law. Due to the quasi-judicial nature of the trial proceedings, implicitly guaranteeing a fair balance between victim participation and fair trial, civil law systems appear to be better equipped to respond to victims' needs with regard to procedural justice.<sup>24</sup> Providing victims with respectful treatment, including the right to make use of the oral VIS is a feasible target in such a setting since it (apparently) does not (seriously) infringe the defendant's rights. Nevertheless, victims' rights are subject to dispute. For example, the introduction of the oral VIS in 2005 provoked substantive resistance amongst the Dutch judiciary; the courts found that the oral VIS could cause an imagery of prejudice. One can, however, observe such systemic changes to have been adapted adequately over the course of time. To date, the oral VIS is generally accepted by the courts, being evaluated as a meaningful addition to the trial proceedings.<sup>25</sup> In fact, if needed to address the victim's needs adequately, some Dutch courts are willing to accept transgressions of the legal restrictions related to the oral VIS.<sup>26</sup> Since the *adviesrecht* relates to the full scheme of judicial decision-making this will provoke many reactions (see Section 4). Indeed, the negative reception by the Council for the Judiciary (*Raad voor de rechtspraak*) speaks volumes.<sup>27</sup> Taking into account that 'justice needs to be seen to be done',<sup>28</sup> the use of the *adviesrecht* (or for that matter any equally far-stretching form of victim voice) in the context of non-bifurcated trial proceedings appears to imply too extensive an appeal on the trustworthiness of the courts, evoking an imagery of bias from the defendant's perspective.<sup>29</sup>

With regard to the common law context, the use of a VIS and even the VSO appears to be less problematic due to the use of bifurcated proceedings. Both the VIS and the VSO relate exclusively to the sentencing proceedings, having different authorities decide over guilt and sentencing in subsequent proceedings. There are, however, other systemic obstacles that make the common law system even less suitable for victim participation than the civil law system: a system that uses a procedural design that represents a 'clash between parties' leaves no room for a third participant (the victim).<sup>30</sup> Indeed, there are strong opinions against the use of VIS and VSO among common law academics, especially in the UK.<sup>31</sup> Notwithstanding that English authorities have introduced a so-called Victim Personal Statement (VPS, 2001), there remains strong resistance against the introduction of an oral contribution by the victim at trial proceedings. Indeed, the authorities are instructed to inform the victim who wants to make a VPS that the court 'will not take into account any opinion the victim expresses as to how the offender, if convicted, should be punished'.<sup>32</sup> As for the US, Australia and Canada, representing the 'juniors' of the common law family, opinions with regard to the use of the VIS appear to be more nuanced. Some authors, such as Erez, Cassell and Roberts, argue in favour of its use.<sup>33</sup> These positive evaluations of victim voice, however, relate to a context of bifurcated procedures; there is no room for an oral statement

24 M. Joutsen, 'Victim Participation in Procedures and Sentencing in Europe', 1994 *International Review of Victimology*, no. 3, pp. 57-67; J. Bednarova, 'The heart of the criminal justice system: a critical analysis of the position of the victim', 2011 *Internet Journal of Criminology*, <[http://www.internetjournalofcriminology.com/Bednarova\\_The\\_Heart\\_of\\_the\\_Criminal\\_Justice\\_System.pdf](http://www.internetjournalofcriminology.com/Bednarova_The_Heart_of_the_Criminal_Justice_System.pdf)>, last visited 31 October 2014; B.N. McGonigle, *Procedural justice? Victim participation in international criminal proceedings*, 2011, pp. 73-75; J. Gillis & D. Beloof, 'The Next Step for Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts', 2012 *McGeorge Law Review* 33, p. 693; Keulen et al., supra note 6.

25 Lens et al., supra note 11; Leferink & Vos, supra note 17.

26 Lens et al., supra note 11.

27 Raad voor de rechtspraak, *Advies Concept wetsvoorstel uitbreiding spreekrecht*, 19 December 2013, <<http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadviesing/Wetgevingsadviezen2013/2013-49-Advies-Conceptwetsvoorstel-Wijziging-van-het-Wetboek-van-Strafvordering-ter-aanvulling-van-het-spreekrecht.pdf>>, last visited 31 October 2014. Also: Raad voor de rechtspraak, *Jaarverslag Rechtspraak 2013*, <<http://jaarverslagrechtspraak.nl/>>, last visited 31 October 2014.

28 T.R. Tyler, 'Procedural Justice and the Courts', 2007 *Court Review*, no. 1-2, pp. 6-31; L. van Lent, 'Procedural Justice Seen to Be Done: The Judiciary's Press Guidelines in the Light of Publicity and Procedural Justice', 2014 *Utrecht Law Review* 10, no. 4, pp. 131-146.

29 F. Fernhout & T. Spronken, 'Spreekrecht voor slachtoffers. Aspirientjes voor de rest', 2005 *Nederlands Juristenblad*, no. 3, pp. 15-156.

30 McGonigle, supra note 24; Gillis & Beloof, supra note 24; Bednarova, supra note 24; Keulen et al., supra note 6, p. 337.

31 A. Ashworth, 'Responsibilities, Rights and Restorative Justice', 2007 *British Journal of Criminology*, no. 3, pp. 578-595; J. Doak, 'Victims Rights in Criminal Trials: Prospects for Participation', 2005 *Journal of Law and Society*, no. 2, pp. 294-318; J. Doak et al., 'Victims and the sentencing process: developing participatory rights?', 2009 *Legal Studies*, no. 4, pp. 651-677; Edwards, supra note 19. Also: Keulen et al., supra note 6, Chapter 6.

32 Keulen et al, supra note 6, p. 347. There are, however, two exceptions to the rule. Firstly, the VPS will be of relevance to sentencing in case the perpetrator aggravated the victim's distress; second, a lower sentence can be assessed in case the victim's forgiveness or unwillingness to press charges provided evidence that his or her psychological or mental suffering are very much less than would normally be the case.

33 Roberts & Erez, supra note 16; Cassell & Erez, supra note 18. Also: R. Davies & C. Mulford, 'Victims' Rights and The Remedies: Finally Getting Victims their Due', 2008 *Journal of Contemporary Criminal Justice*, no. 2, pp. 198-208.

with regard to truth finding, and certainly no support for a ‘full-scheme victim voice’ as represented by the *adviesrecht*. Indeed, the cross-examination of victims – representing a real consequence of extended victim voice – is a no-go area for US victim rights scholars.

#### 4. The Dutch amendment

Having provided a short overview of the victimological and procedural settings that underlie the applications of victim voice, we will now turn to the Dutch amendment. As the amendment provides an extension of existing practices with regard to victim voice, we will first provide a brief overview of the present Dutch practices.

##### 4.1. The introduction of the VIS

Within the Dutch system, a VIS stands for a written victim statement (*schriftelijke slachtofferverklaring*). The Dutch started to experiment with the VIS in 2004, organising regional pilot schemes. Due to an MP initiative the oral version was introduced in 2005.<sup>34</sup> The drawing up of a written VIS is now part of the pre-trial investigation and can be drawn up by the victim himself, or with the assistance of the Dutch Victim Support (*Slachtofferhulp Nederland*).<sup>35</sup> Either way, it is added to the dossier (Article 51b Dutch Code of Criminal Procedure (*Wetboek van Strafvordering, Sv*)).<sup>36</sup> The aim of a VIS is to inform the judge, the prosecutor and the defendant about the impact of the (alleged) offence on the victim. The oral VIS, the so-called *spreekrecht* (Article 51e Sv), consists of the right to make an oral statement at trial. Both Article 51b and 51e are part of a catalogue of victim rights, introduced in 2010 (Title IIIA Sv).<sup>37</sup> Since then, the oral VIS has been amended, leading towards an extension of the persons qualified to make an oral statement.<sup>38</sup>

The law explicitly limits the scope of the (written and oral) VIS to the consequences of the offence; the victim cannot (yet) address evidentiary or sentencing issues. Because the information provided is irrelevant to the (substantive) truth finding, the victim is not classified as a witness. Hence, s/he does not fall within the ambit of Article 6(3) ECHR, providing the defendant with a right to question the victim. Indeed, the defence may put forward questions, but only via the bench. It is then up to the bench to decide whether the victim should be required to answer; if the question is feared to cause a risk for repeated victimisation, it will be barred. In practice, the defence seldom questions the victim’s (written or) oral statement. However, one avoids this right rather reluctantly. Defence lawyers feel that questioning the victim’s statement could harm the defendant’s position, as this could be interpreted as hostility towards the victim.

Recent evaluations of the use of the oral VIS revealed, however, that in most cases victims went beyond the scope of an impact statement. They also address issues related to sentencing, the defendant’s personality and the facts of the case.<sup>39</sup> Indeed, differences were observed in the way courts handled the restrictions set by Article 51e Sv. Moreover, contrary to the use of written statements, the actual use of the oral VIS was found to be rather low.<sup>40</sup> In fact, the majority of victim respondents preferred the use of a written statement. Victims dreaded the public appearance that comes with the use of the oral VIS

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34 *Staatsblad* 2004, 382.

35 *Slachtofferhulp Nederland* is an NGO financed by the Department of Security and Justice. This NGO executes multiple tasks, with regard to assistance to draw up a written VIS; victim-assistants in the service of *Slachtofferhulp Nederland* are detached at the office of the local Prosecution Service.

36 Only documents that are relevant for the case (decision-making, sentencing or for the victim’s claim for compensation) can be added. Where the Prosecution Service composes the dossier, the decision to accept is theirs; a refusal can be appealed against. If the request is made at the trial session it is the court that decides.

37 *Staatsblad* 2010, 1.

38 *Staatsblad* 2012, 45.

39 Lens et al., supra note 11; Leferink & Vos, supra note 17. Where written statements (as a rule) are formulated with the assistance of a victim-assistant, such transgressions are prevented.

40 Lens et al., supra note 11, Chapter 4. Although an annual growth in the use of VIS is anticipated, the use of the instrument is still relatively low, the estimated use lies within the range of 230 to 260 cases annually. There are similar findings for England & Wales: Roberts & Manikis, supra note 16; Ministry of Justice, *Breaking the circle. Effective punishment, rehabilitation and sentencing of offenders*, London: HMO 2010, Para. 75-77. Note that statistics show that the written VIS has been used about 3,000 times in the past few years.

since they feared that this would provoke stress and emotions. The process of drawing up a VIS with the assistance of the Dutch Victim Support was, however, felt to be beneficial.<sup>41</sup>

Nevertheless, the expansion of the oral VIS remained a contentious issue within the Dutch debate. In the wake of the political debate with regard to the Law of 2012,<sup>42</sup> suggestions were made to extend the victim's right by granting him the right to provide an opinion with regard to evidence and sanctioning, the so-called *verruimde spreekrecht*.<sup>43</sup> At that time, both the Secretary of State and the majority of the MPs objected. It was feared that the regime of non-bifurcated procedures would cause repeated victimisation, as the standard of fair trial would imply that the defence had the right to question the victim.<sup>44</sup> Nevertheless, the Secretary of State did not principally object. Indeed, the introduction of an *adviesrecht* had been previously announced in the political agreement underlying the Rutten II (coalition) cabinet.<sup>45</sup> At the time, however, the Secretary of State decided to await the results of an evaluation of the various interests and arguments suggested for bifurcated procedures. Comparative legal research was ordered, focussing on the court's impartiality, the risk of repeated victimisation and the potential adverse impact on the practicality of trial proceedings. The outcome of the research, that there is no cause for the introduction of bifurcated proceedings, was accepted by the legislature.<sup>46</sup>

#### 4.2. Draft extension VIS 2013

Subsequently a draft amendment to introduce an *adviesrecht* was introduced.<sup>47</sup> At the time of writing, the draft is pending. The reactions from the advisory councils are, however, not (undividedly) positive.<sup>48</sup> The 2013 draft proposes a fundamental extension of victim voice. The starting point, however, is still that the victim must not become a 'party' on an equal footing with the defendant.<sup>49</sup> Nevertheless, the *adviesrecht* grants the victim – or his representative – the right to make recommendations with regard to the questions raised in the context of Article 350 Sv. The latter represents the legal framework that constitutes the courts' decision-making, addressing conditions of proof, as well as conditions of guilt and related sentencing. According to the Explanatory Notes, the draft is in pursuit of granting victims an opportunity to 'put forward their opinion with regard to the range of the parts of the indictment proven, the judicial qualification of the latter, the guilt of the defendant and the appropriate sentence'.<sup>50</sup>

The victim will be entitled to use the right to put forward a VIS and use both the oral VIS and the *adviesrecht*. Like the oral VIS, the *adviesrecht* is scheduled before the prosecutor's closing address. Because both rights are scheduled as subsequent procedural provisions, the court bench can allow them to be used consecutively. Such a sequence may result in the lines between the oral VIS and the *adviesrecht* becoming blurred, leaving the judge to decide whether the victim using his oral VIS did cross the line, and as a result may be questioned by the defence. With regard to the *adviesrecht*, the opportunity to submit the victim to questioning is fully acknowledged.<sup>51</sup> A request can be put forward by the defence,

41 For an evaluation of the VIS: R. Kool et al., *Evaluatie implementatie schriftelijke slachtofferverklaring*, 2006.

42 The Law of 2012 relates to the extension of the range of persons entitled to make use of the oral VIS; *Staatsblad* 2012, 45.

43 *Kamerstukken II* 2011/12, 33176, no. 8.

44 *Kamerstukken II* 2011/12, 33176, no. 6, pp. 10-11; *Kamerstukken II* 2011/12, 33176, no. 9, p. 31, with reference to the Dutch Supreme Court (*Hoge Raad*, HR) 6 March 2012, *ECLI:NL:HR:BR1149* (NJ 2012, 367).

45 *Bruggen slaan*, Coalition Agreement VVD (People's Party for Freedom and Liberty) – PvdA (Labour Party), 29 October 2012, p. 27, <<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/10/29/regeerakkoord.html>>, last visited 31 October 2014. Also: Ministerie van Veiligheid & Justitie, *Beleidsrapportage inzake de slachtofferzorg*, 2014, p. 4, stating the aim of topical Dutch victim policy being, amongst others, to award victims a strong legal position, providing those who suffered from serious crime opportunities to accomplish a participative position.

46 Note that Keulen et al. do not exclude future bifurcation. Indeed, suggestions are put forward to facilitate such a bifurcated scheme; Keulen et al., supra note 6. For a concurring opinion: M.S. Groenhuijsen, 'Waarheidsvinding in het strafrecht', in *Nederlandse Juristen Vereniging, Waarheid en waarheidsvinding in het recht*, 2013, pp. 231-305.

47 Amendment 2013, supra note 4.

48 *Slachtofferhulp Nederland* has put forward a positive advice; <<https://www.slachtofferhulp.nl/Actueel/20111/Uitbreiding-spreekrecht/>>, last visited 31 October 2014. The advice of the Council for the Judiciary and the Victim Fund, however, are both negative. See: Raad voor de rechtspraak, supra note 27 respectively Fonds Slachtofferhulp, *Advies concept wetsvoorstel uitbreiding spreekrecht*, <<http://www.fondsslachtofferhulp.nl/home/slider-2/advies-fonds-slachtofferhulp-concept-wetsvoorstel-uitbreiding-spreekrecht-en-schadefonds/>>, last visited 31 October 2014.

49 Amendment 2013, supra note 4, Explanatory Notes, p. 22.

50 Amendment 2013, supra note 4, Explanatory Notes, p. 5.

51 Note that 'interrogation' in the context of Dutch criminal proceedings is not a synonym for 'cross-examination'; the latter representing more intrusive questioning.

the public prosecutor or can be determined by the court ex officio in case the victim's statement provided in the context of the *adviesrecht* produces new, incriminating evidence. Indeed, such an interrogation is of another nature than the one with regard to the oral VIS, the latter pursuing clarification as to the impact of the offence. With regard to the interrogation related to the *adviesrecht*, the victim is under oath and is treated as a witness (Article 302 Sv). To avoid repeated victimisation, this questioning, too, is executed via the court's bench; improper or irrelevant questions can be barred.

As previously stated, the amended *adviesrecht* also provides a right to make recommendations to the court with regard to additional investigative activities. The court is not obliged to follow such a recommendation, its decision will depend on whether the court is of the opinion that the (substantive) truth finding will benefit from such an additional investigation and whether it is strictly necessary. Given the extended pre-trial investigation which is a feature of the Dutch system, one can expect such a recommendation to be rejected.<sup>52</sup>

Last, but not least, the draft introduces an obligation for the courts to provide for extended reasoning in case the sentence imposed differs substantially from the one recommended by the victim. In view of the need for transparency, underlined within procedural justice theory, this would further legitimacy.<sup>53</sup> Being bound by the 'secrecy of the chamber',<sup>54</sup> such reasoning is relatively limited. Moreover, Dutch criminal sentencing practices represent a system of tariffs, to be applied by repeat players. A sentencing recommendation put forward by the victim can be expected to be of limited influence only. Indeed, the victim who wants to execute the *adviesrecht* is not entitled to State-funded legal assistance;<sup>55</sup> according to the legislature there is no need for this.<sup>56</sup> Whether this means that the *adviesrecht* is primarily meant to serve expressive ends, instead of 'real world' outcome-control, is not clear. As mentioned, the policy paper *Recht doen aan slachtoffers (Doing Justice to Victims)* does make an explicit reference to the actual influence with regard to the outcome of trial proceedings.<sup>57</sup>

## 5. The US: victim voice in a common law perspective

Since the US is a front runner with regard to both the VIS and the VSO, we will explore the US practices in order to learn about the practical implications that flow from victim participation. The US representing a federal system, victims' legislation is present at both the federal and state level.<sup>58</sup> As mentioned earlier, we will limit ourselves to federal practice, state legislation only being mentioned additionally. Moreover, we will not discuss the use of the VSO in capital cases. Since there is no capital punishment in the Netherlands, this would provide for a lame comparison.<sup>59</sup>

As noted, US trial proceedings feature bifurcation: guilt and sentencing are established in distinct, subsequent procedures, the VIS or VSO only being allowed at sentencing hearings.<sup>60</sup> Bifurcation, however,

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52 This causes the Council for the Judiciary to fear for secondary victimisation; Raad voor de rechtspraak, supra note 27.

53 Tyler 2011, supra note 13, p. 167.

54 In the Dutch criminal systemic, judges are expected to rule unanimously; there are no dissenting opinions. Moreover, although judges have to provide for written reasoning, one is not allowed to discuss the contemplations in public (Art. 7 Law on the Judicial Organisation (*Wet op de Rechterlijke Organisatie*)); G.J.M. Corstens & M.J. Borgers, *Het Nederlandse strafprocesrecht*, 2014, Para. 16.1.

55 Only those who have become a victim of serious offences have such a right (Art. 44(4) Dutch Code on Legal Assistance (*Wet op de Rechtsbijstand*)).

56 Amendment 2013, supra note 4, Explanatory Notes, p. 19.

57 *Kamerstukken II 2012/13*, 33552, no. 2, p. 16.

58 In the US system, criminal law is predominantly a state responsibility; federal criminal prosecution is reserved for cases in which a national interest is at stake; R. Mosteller, 'The Sixth Amendment Right to Fairness: The Touchstone of Effectiveness and Pragmatism', 2012 *Texas Tech Law Review* 45, pp. 1-31.

59 Due to the controversial nature of the punishment at stake the debate with regard to victim's input has been most heated in this area. E.g. T. Hill, 'Victim Impact Statements: A Modified Perspective', 2005 *Law & Psychology Review* 29, pp. 211-221; J. Ochoa Sanchez, *The rights of victims in criminal justice proceedings for serious human rights violations*, 2013, pp. 194-199. Note that the findings by Myer and Greene show the impact of the VIS/VSO on capital jury sentencing to be varied; B. Myer & E. Greene, 'The preliminary nature of victim impact statements. Implications for capital sentencing policy', 2004 *Psychology, Public Policy and Law*, no. 4, pp. 492-515. For a critical perspective with regard to the use of VIS/VSO in capital cases T. Kirchengast, 'Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial', 2013 *New Criminal Law Review* 16 pp. 568-594.

60 No legislative efforts have been undertaken for allowing for a VIS or VSO during the pre-conviction phase of trials, see: D. Beloof et al., *Victims in Criminal Procedure*, 2010, p. 495; P. Cassel, 'The Victims' Rights Amendment: A Sympathetic, Clause-by-clause Analysis', 2012 *Phoenix Law Review* 5, pp. 301-339.

is not always the rule.<sup>61</sup> Indeed, there is no federal provision for criminal trial bifurcation in non-capital cases, leaving the issue up to the federal courts.<sup>62</sup> Since bifurcation is the cause for legal comparison in this paper, we will assume bifurcation to be applied.

Prosecution is the prerogative of the Public Prosecutor's Office.<sup>63</sup> Dissatisfaction amongst crime victims with criminal procedure emerged throughout the 1960s.<sup>64</sup> Since then, victim advocates have attempted to raise awareness about the damaging impact of the marginalisation of the victim's role in the criminal justice process.<sup>65</sup> Victims' rights gained national prominence in 1982, when the Report of the President's Task Force on Victims of Crime was published.<sup>66</sup> This report featured a wide range of recommendations to include victims' rights in federal and state legislation and grant them specific support services. Soon afterwards, major federal victims' rights laws emerged, granting victims the right to participate in sentencing procedures through a VIS.<sup>67</sup> With these developments, the US set the stage internationally for its use.<sup>68</sup>

The most recent major federal victims' rights reform was implemented through the Crime Victims' Rights Act (hereafter: CVRA), a federal statute passed by Congress in 2004.<sup>69</sup> Under the CVRA, victims have the 'right to be reasonably heard at any public proceeding involving release, plea, sentencing, or any parole proceeding'.<sup>70</sup> The intention was to introduce a mechanism that would provide the victim a means to inform the sentencing authority on the impact of the crime, including the issue of restitution.<sup>71</sup> Federal courts have interpreted the right to be heard at sentencing in disparate ways<sup>72</sup>, ranging from interpretation as an unqualified right to address the court – equal to the defence and prosecution – to a right to be heard in a manner that the court finds appropriate.

For example, in *Kenna v. District Court* the federal court held that victims have an irrepressible right to speak.<sup>73</sup> In fact, it found that the CVRA causes victims to become 'full participants' in the criminal justice system.<sup>74</sup> Note, however, that the *Kenna* Court did not explicitly phrase the right to orally address the court in terms of a VSO; it merely specified the manner in which victims should be heard, holding that victims have a right to allocution.<sup>75</sup> The right to allocution was traditionally reserved

61 According to the Federal Death Penalty Act, 18 U.S.C. § 3593 (1998) bifurcation must be applied in capital cases. See also the US Supreme Court decision *Gregg v. Georgia*, 428 U.S. 153 (1976).

62 Civil cases, on the contrary, may be bifurcated according to Rule 42(b) of the Federal Code of Civil Procedure.

63 P. Cassell & S. Joffe, 'The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act', 2011 *Northwestern University Law Review* 105, pp. 164-183.

64 D. Aaronson, 'New Rights and Remedies: the Federal Crime Victims' Rights Act of 2004', 2008 *Pace Law Review* 28, pp. 624-682.

65 P. Tobolowsky, 'Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime', 1999 *New England Journal on Criminal and Civil Confinement* 25, pp. 21-105; E. Erez et al., 'Outsiders inside: Victim management in an era of participatory reforms', 2014 *International Review of Victimology*, no. 1, pp. 169-188; E. Villmoare & V. Neto, *Victim Appearances at Sentencing Hearings Under the Victims' Bill of Rights*, 1987, p. 3.

66 L. Herrington et al., *President's Task Force on Victims of Crime – Final Report*, 1982.

67 At the federal level the VIS was introduced through the Victim and Witness Protection Act of 1982, *Pub. L. no. 97-291*, 96 Stat. 1248 (1982).

68 To date, all fifty states have victims' rights statutory legislation, while thirty-two have adopted victims' bill of rights constitutional amendments. Each US jurisdiction allows for some kind of victim input at sentencing via a VIS or VSO; J. Balson, 'Therapeutic Jurisprudence: Facilitating Healing in Crime Victims', 2013 *Phoenix Law Review* 6, pp. 1017-1039; J. Roberts, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole', 2009 *Crime and Justice* 38, p. 349.

69 Because a proposed federal constitutional victims' rights amendment from 1996 onward repeatedly did not have enough votes for being considered too controversial for granting the victim party rights, the CVRA instead granted victims statutory rights of a more discretionary nature. Under the proposed amendment, victims would have been granted an absolute right to speak at the sentencing stage, see: C. Doyle, 'Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771', *Congressional Research Service*, 2012; A. Baron-Evans, 'Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure', 2009, <<http://www.fd.org/docs/select-topics/rules/rights-and-procedures-under-the-crime-victims-rights-act-and-new-federal-rules-of-criminal-procedure-for-victims.pdf>>, last visited 31 October 2014. Currently, a proposal from 2013 is pending (H.R.J. Res. 40, 113th Cong. (2013)).

70 18 U.S.C. § 3771(a)(4). While designed as a federal statute, congressional sponsors of the CVRA held that it was 'designed to affect the states also' so that their laws would be 'substantially equivalent' to the CVRA, see Aaronson, supra note 64.

71 Herrington et al., supra note 66. Unlike the case of the Netherlands, victims cannot receive restitution in the status of a civil party, see A. Pemberton & S. Reynaers, 'The controversial nature of victim participation', in E. Erez et al., *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives*, 2011, pp. 229-249.

72 R. Bierschbach, 'Allocation and the Purpose of Victim Participation Under the CVRA', 2006 *Federal Sentencing Reporter* 19, pp. 44-48.

73 435 F.3d 1011, 1016 (9th Cir. 2006).

74 *Ibid.*, p. 1016.

75 *Ibid.* This was already held in *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1346 (D. Utah 2005). Cassell has noted the 'backward' character of the CVRA, noting that prior to the enactment of the CVRA, victims had a 'right to speak' at sentencing, under Rule 32(i) of the Federal Rules of Criminal Procedure; P. Cassell, 'Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure', 2007 *Utah Law Review*, pp. 860-970.

for a convicted defendant, enabling him to make a personal statement regarding any reason he wished to offer for deserving a reduced sentence.<sup>76</sup> The CRVA, in conjunction with the *Kenna* decision, sparked a widespread debate about whether the underlying theories for defendant and victim allocution should be equated.<sup>77</sup>

In a subsequent *Kenna* decision, the court held that victims cannot infer a right to the full disclosure of presentencing reports from the CVRA.<sup>78</sup> Victim advocates argued that disclosure is required for victims to make a meaningful sentence recommendation.<sup>79</sup> The Court was unwilling to accept this argument due to a lack of textual basis in the CVRA. Furthermore, a federal district court held that while judges should consider victim interests when sentencing a defendant,<sup>80</sup> this does not imply that a victim's sentence recommendation should affect a judge's sentencing determination. Again, the Court pointed to a lack of support in the CVRA's text. Furthermore, critics of full victim rights argue that these decisions are caused by the fact that federal judges need to take into account the system of public prosecution along with factors such as rehabilitation.<sup>81</sup> It is worth noting that the US Supreme Court held that courts may depart from the Guidelines' recommendations, as long as they provide sufficient justification for their departure.<sup>82</sup> This holding implies that victim needs may be balanced against other interests.

Indeed, the CVRA's text arguably leaves judges with some discretion to determine whether the right to be heard is meaningfully applied and if it complies with defendants' fair trial rights.<sup>83</sup> When making this assessment, courts will likely take into account the stage of the criminal process. The presumption of innocence being a primarily pre-conviction criterion, the VIS or VSO comes into play when defendants have a diminished due process interest.<sup>84</sup> This has implications not only for victims' right to be heard, but also for defendants' right to cross-examination after a VIS or VSO. A broad interpretation of the CVRA is likely to place defendants in a difficult position, having to battle a non-party with opposite interests.<sup>85</sup>

The Due Process Clause or the Sixth Amendment's Confrontation Clause may compensate a lack of a constitutional right to cross-examine a victim. However, some federal courts as well as victim rights scholars have argued that victims may not be subject to cross-examination because of their overarching CVRA right to be treated 'with fairness and with respect for dignity and privacy.'<sup>86</sup> This being a statutory right, it is not as far-reaching as defendants' due process right. Moreover, those in support of victim cross-examination point to the adversarial principle that all information relevant to sentencing must be subjected to thorough adversarial testing as an argument.<sup>87</sup>

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76 Villmoare & Neto, *supra* note 65.

77 M. Giannini, 'Equal Rights for Equal Rites? Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act', 2008 *Yale Law and Policy Review* 26, pp. 431-495. In *United States v. Marcella*, the Court held that courts are not required to accept victim allocution in all situations: 370 F. Supp. 2d 745,748.

78 M. Riley, 'Victim Participation in the Criminal Justice System: In re *Kenna* and Victim Access to Presentence Reports', 2007 *Utah Law Review*, no. 1, pp. 235-254. Presentence reports (PSR) are prepared by a federal probation officer and used by judges when determining an appropriate sentence. According to the Federal Rules of Criminal Procedure, a PSR should contain information concerning the 'financial, social, psychological, and medical impact' of the defendant's crime on the victims. Therefore, it may also contain a VIS.

79 R. Butler, 'What practitioners and judges need to know regarding crime victims' participatory right in federal sentencing proceedings', 2006 *Federal Sentencing Reporter*, no. 19-1, pp. 21-29; A. Baron-Evans, 'Traps for the Unwary under the Crime Victims' Rights Act: Lessons from the *Kenna* cases', 2006 *Federal Sentencing Reporter* 19, pp. 49-54. Note that the CVRA does not directly grant victims access to private counsel during sentencing proceedings, implying that victims are viewed as participants with a right to inform the court, rather than a party with litigation power.

80 Aaronson, *supra* note 64. The federal Sentencing Guidelines provide that 'in any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described [in the CVRA]'. Furthermore, these guidelines contain additional factors for judges to take into consideration, such as whether the victim was vulnerable.

81 D. Levine, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution', 2010 *Northwestern University Law Review* 104, pp. 335-361.

82 *Ibid*, see *Gall v. United States*, 552 U.S. 38, 41 (2007). Although the holding did not relate to the use of a VIS/VSO, there is no reason to assume it does not apply to the CVRA.

83 Baron-Evans, *supra* note 69.

84 Doyle, *supra* note 69.

85 Riley, *supra* note 78.

86 Cassell & Erez, *supra* note 18.

87 See L. Curry, 'The Elusive right to cross-examine individuals presenting victim impact statements in Arizona capital sentencing procedures', *Arizona State Law Journal* 43, pp. 563-589; M. Manikis & J. Roberts, *Victim Impact Statements: Recent Guidance from the Courts of Appeal*, <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd5-rr5/rd5-rr5.pdf>> (on Canada), last visited 31 October 2014. For a US Supreme Court decision on adversarial sentencing procedures, see: *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

Critics such as Blondel have noted that, since victims have not officially acquired a party status under the CVRA, courts should refrain from an overly broad reading of the statute, since this would disrupt the adversarial process.<sup>88</sup> It is argued that a narrower interpretation of the rights would still serve the victim's 'outsider' interests.<sup>89</sup> Indeed, scholars and courts have noted the lack of legislators' debate and judicial input accompanying the implementation of the CVRA and, in light of this, the danger of focusing on statements of a single legislator.<sup>90</sup> Furthermore, it has been held that interpreting the CVRA to construe victims as full participants tends to overlook the legislative history of the previously failed constitutional amendment, which indicates that there was not enough support for absolute victim rights.<sup>91</sup> Apparently, Congress has placed most of the burden of serving victim needs on the courts, forcing them to consider the interests of a non-party.<sup>92</sup> Indeed, one can argue that courts such as *Kenna* do not take into account that given the fact that US trial proceedings represent a 'battle between equal parties', the lack of such a party status with regard to the victim should also come with less outcome-control than that of direct parties. Regardless of this, the CVRA was clear on one issue: federal prosecutorial discretion may not be impaired by the enforcement of victims' rights.<sup>93</sup>

In sum, the adversary nature of US trial proceedings, leaving the courts with no room to act in a quasi-judicial manner, appear to throw another light on the practice of sentence recommendation by victims. Indeed, one could question whether victims should be accorded such a right.<sup>94</sup> Instead, one could opt for the position taken by Blondel, who argues that in order to procure procedural justice, the judicial authorities, especially the courts, should show courtesy and respect to crime victims by allowing them to communicate with the court.<sup>95</sup>

With regard to victims' needs, a substantial body of evidence-based findings on the benefits of implementing the CVRA from the victim's perspective appears to be lacking. Apparently, other than the studies mentioned in Section 2, there has been but limited research on the effects of a VIS/VSO executed on a federal level.<sup>96</sup> The issue whether the use of a VIS or VSO does effectively influence sentencing has, however, been the subject of study. Research shows that multiple variables in diverse combinations influence the impact of a VIS on sentencing authorities. In fact, the most consistent predictive variable that serves as a threshold to adjust the sentencing is the personal expectation of a juror or judge. Moreover, findings show that there is little evidence of 'expectation manipulation' as a result of the VIS.<sup>97</sup> This 'lack' of specific effects leads Weidemann to conclude that the VIS 'does not do what it is supposed to do'.<sup>98</sup> The latter suggests outcome-control to be the primary aim of the VIS/VSO; however, as mentioned in Section 2, findings do not show such victim's preference. Victim advocates, having praised the CVRA for its ground-breaking 'inclusive' effect, emphasise the expressive aim. They state that the CRVA has incorporated procedural justice principles into the federal criminal process.<sup>99</sup> Regardless of this, due to a lack of party status to be asserted under the CVRA, naming victims full participants is as far as *Kenna* courts and their followers can currently go.

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88 E. Blondel, 'Victims' Rights in an Adversary System', 2008 *Duke Law Journal* 58, pp. 237-274.

89 *Ibid.*

90 Riley, *supra* note 78; Aaronson, *supra* note 64.

91 *Ibid.*

92 Blondel, *supra* note 88.

93 Aaronson, *supra* note 64.

94 Pemberton & Reynaers, *supra* note 71.

95 *Ibid.*

96 For an early evaluation of the VIS: J. Lord & E. Alexander, 'Victim Impact: A Victim's Right to Speak, a Nation's Responsibility to Listen', 1994, <[https://www.ncjrs.gov/ovc\\_archives/reports/impact/impact.htm#Satisfaction](https://www.ncjrs.gov/ovc_archives/reports/impact/impact.htm#Satisfaction)>, last visited 31 October 2014. According to Weidemann, the academic debate with regard to the VIS in the US is highly a-theoretical and disconnected; E. Weidemann, *Victim Impact Statements: The Role of Expectations in Juror Judgments*, 2008, <<http://dl.uncw.edu/etd/2009-1/r1/weidemanne/emaleeweidemann.pdf>>, last visited 31 October 2014.

97 *Ibid.*, p. 37; E. Erez & L. Rogers, 'Victim Impact Statements and sentencing outcomes and processes', 1999 *British Journal of Criminology*, no. 2, pp. 216-239; Roberts & Erez, *supra* note 16; Cassell and Erez, *supra* note 18, pp. 153-154; Roberts & Manikis *supra* note 16, p. 32.

98 Weidemann, *supra* note 96, p. 41.

99 M. Giannini, 'Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused', 2010 *Tennessee Law Review* 78, pp. 47-103.

## 6. Lessons to be learned?

What lessons can we draw from the findings presented and how do they relate to the Dutch amendment? Obviously, both the Dutch and US authorities are in pursuit of procedural justice, facing the challenge of how to integrate the victim's perspective into the criminal law's systemic design. Since legal traditions diverge, the avenues to pursue procedural justice differ. There are, however, communalities. Firstly, both the Dutch and the US legislature abstain from attaching victim voice to the prerogative to prosecute; the public prosecutor's right to prosecute remains unimpaired. Nevertheless, the Dutch discourse shows ambivalence. The starting point is that the victim is to be qualified as a participant (*procesdeelnemer*) and not as a party (*procespartij*). As a result the victim is granted a position *sui generis*: s/he is entitled to statutory rights, including the right to be heard at the trial proceedings (*spreekrecht*), but does not have a say with regard to the prosecution.<sup>100</sup>

This starting point is affirmed by the Explanatory Notes accompanying the amendment: 'The victim, not being a party, is not entitled to give an opinion with regard to the nature and extent of the investigation.' The aim of the *adviesrecht* is to provide for limited victim voice (*beperkte stem*).<sup>101</sup> A preceding passage however mentions that the introduction of the *adviesrecht* will cause the nature of trial proceedings to become more adversarial. Remarkably, the legislature explicitly addresses the relationship between the defendant and the victim, leaving the public prosecutor aside.<sup>102</sup>

Obviously, the legislative developments within the US discourse are of a less encompassing nature. Recent attempts to construe constitutional basic victims' rights have failed. While statutory rules are present (the CRVA), they do not provide for a solid legal framework to implement victim voice. Indeed, the US federal discourse (but also on a state level) appears to maintain a heterogeneous interpretation. In the absence of legislative and case law incentives providing guidance on how to pursue full victim participation, construing a 'reasonable' opportunity to be heard is as far as the courts can take it. Whether this is because of the 'clash between parties' design is not ultimately clear, but one can assume this to be of influence.

The Dutch willingness to adjust the law's systemic in order to pursue victim voice may, however, have serious repercussions. Making amends to pursue procedural justice for crime victims can arouse false expectations. This touches upon the heterogeneous nature of victims' needs, as discussed in Section 2. Indeed, the assumption underlying the Dutch amendment is that victims favour an extension of the present oral VIS. Based on victimological findings this appears to be a realistic observation, at least at first sight. The majority of the respondents involved in the recent evaluation of the oral VIS express the wish to expand the communication with the courts with regard to the impact of the offence. However, a closer look reveals that while a substantive cohort of the respondents are in support of having the opportunity to influence the sentencing, they also state that this would not have contributed significantly towards their satisfaction.<sup>103</sup> Indeed, the evaluation shows that the willingness to present an oral VIS correlates with the impact of the offence.<sup>104</sup> Those who have been strongly affected by the offence are most willing to make use of the oral VIS. The impact of the offence, however, does not imply the offence to be of a serious nature per se. These findings do not, however, relate to the issue whether extended victim voice would still be desired when this would come at the price of being interrogated, as will be the case for the *adviesrecht*.<sup>105</sup> Besides, the legislature apparently neglects other victimological findings that show that victims' needs are of a heterogeneous nature, implying a need for a differentiated approach.<sup>106</sup> The suggestion of the Council for the Judiciary that the draft is prompted by the political wish to serve

100 There is but one exclusion to this rule: the complaint procedure under Art. 12 Sv. We will not elaborate upon this procedure. Note, however, that the procedure is subject to evaluation due to political discontent with regard to the level of procedural justice achieved.

101 Amendment 2013, supra note 4, p. 22 subsequently p. 17.

102 Amendment 2013, supra note 4, p. 21; the assumption is that the victim is in pursuit of a 'devaluation of the defendant's statements'. With regard to the ambivalence noted: Raad voor de rechtspraak, supra note 27, p. 4.

103 Lens et al., supra note 11, pp. 80-81 and 86-89.

104 Also: Shapland et al., supra note 18; Wemmers, supra note 18.

105 Raad voor de rechtspraak, supra note 27; Fonds Slachtofferhulp, supra note 48. Also: R. Kool, 'Alles naar wens? Observaties naar aanleiding van het wetsvoorstel aanvulling spreekrecht', 2014 *Tijdschrift voor Herstelrecht*, no. 3 (forthcoming).

106 M. Groenhuijsen, 'Aanvulling van het spreekrecht van slachtoffers en nabestaanden in het strafproces', 2014 *Delikt & Delinkwent*, no. 3, pp. 171-180.

the needs of a specific group of victims seems plausible.<sup>107</sup> Nevertheless, both proponents and opponents of the *adviesrecht* agree that the present regime of the oral VIS is too strict and needs to be adjusted.

A next point of comparison is the risk of repeated victimisation ensuing from extended victim voice. Both the Council for the Judiciary and the Victim Fund (*Fonds Slachtofferhulp*) express concern that the *adviesrecht* will result in repeated victimization.<sup>108</sup> The concern that the *adviesrecht* can result in victims' deception appears realistic given the present managerial approach underlying Dutch trial proceedings. Indeed, when the oral VIS may, as a rule, not take more than ten to fifteen minutes, one may wonder what complications lie ahead with regard to the execution of the *adviesrecht* encompassing the full scheme of Article 350 Sv. Taking into account the present European incentives to avoid repeated victimization, one may wonder how the Dutch authorities are planning to manage these risks.<sup>109</sup> The Dutch Victim Support, however, does not anticipate such negative effects. According to the Dutch Victim Support, victims are capable of coping with the responsibilities and restrictions accompanying the use of the *adviesrecht*.<sup>110</sup> This position appears to contradict the opinion of (other) victimologists and victim organisations (e.g. Victim Support Europe) that have voiced objections against victims having to bear major responsibilities.<sup>111</sup> Although these objections relate to the right to prosecute, the *adviesrecht* indicates similar (public) responsibilities.<sup>112</sup>

Obviously, the burden shouldered by the victims in the context of the VIS and VSO in the US scheme is of a less intrusive nature. The VIS and VSO were introduced to pursue procedural justice, providing the courts with an opportunity 'to craft an appropriate sentence'.<sup>113</sup> While a therapeutic dimension is acknowledged, it is of a subsidiary nature. Indeed, proponents such as Cassell and Erez state that the VIS must not imply a victim's right to censure the offender.<sup>114</sup> Thus the outcome that the effect of victim voice is modified by professionalism and rationalism has not attracted substantial criticism.<sup>115</sup> Due to the rather limited range of the VIS and the VSO, in conjunction with the interrogation of the victim being a no-go area, the risks for repeated victimization appear to be less prominently present. The argument that the VIS and VSO do not create a 'real-world' effect has not aroused substantial support.<sup>116</sup>

A final aspect that needs to be taken into account is the role of the courts. The procedural dilemmas underlying pursuit of procedural justice by means of (extended) victim voice will demonstrate itself at the level of adjudication. Indeed, it is up to the courts to reconcile conflicting interests, while avoiding an imagery of prejudice, by adequately executing the guarantees for a fair trial. Obviously, the legal traditions will influence the application of victim voice within criminal trial proceedings. As mentioned, the setting of bifurcated trial proceedings used in US criminal trial proceedings appears to hold better guarantees to prevent an imagery of prejudice. In contrast, the opportunities for victim voice are rather limited, as victims are merely sentencing participants. Indeed, compared to the Dutch discourse, the US approach might be evaluated as rather 'poor'. Nevertheless, there is less risk of repeated victimisation since no 'false expectations' are raised. This design does not appear to result in a loss of procedural justice; it may be safe to say that the US legal tradition influences victims' evaluations of procedural justice arrangements.

107 Moreover, this is admitted by the legislature; Amendment 2013, supra note 4, Explanatory Notes, Para. 2. Also: Ministerie van Veiligheid & Justitie, supra note 45, p. 14, assuming there is a causal link between the enforcement of the victim's position and the raising of public trust in the criminal justice system.

108 Also: Groenhuijsen, supra note 106 and C.P.M. Cleiren, 'Waarheid in het Strafrecht: niet tot elke prijs', in C.P.M. Cleiren et al., *Het procesrecht en de waarheidsvinding*, 2001, pp. 9-32.

109 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, OJ L 315, 14.11.2012, pp. 57-73; Council of Europe, *Recommendation on assistance to crime victims*, Rec (2006)8.

110 Slachtofferhulp Nederland, supra note 48; A. Sas, 'Het belang van het adviesrecht voor slachtoffers', *NJB-blog*, <<http://njb.nl/blog/het-belang-van-het-adviesrecht-voor-slachtoffers.12359.lynkx>>, last visited 31 October 2014.

111 Victim Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe*, Para. 2.2, <[http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/51.1.1374573250handbookforimplementationandbestpracticeforvictimsofcrimeineurope\\_23713\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/51.1.1374573250handbookforimplementationandbestpracticeforvictimsofcrimeineurope_23713_en.pdf)>, last visited 31 October 2014. Also: Fonds Slachtofferhulp, supra note 48.

112 This relates to the debate on 'victims' duties'; Van Stokkom, supra note 12.

113 Cassell & Erez, supra note 18, p. 168. Note, however, that Roberts and Erez mention the physical presence of victims at the sentencing hearing to be of little value where these sessions will last only a few minutes; Roberts & Erez, supra note 16, pp. 234-235.

114 Ibid.

115 With regard to professional sentencing: E. Erez & L. Rogers, 'Victim Impact Statements, Outcomes and Processes', 1999 *British Journal of Criminology* 39, pp. 216-239; Roberts & Erez, supra note 16; Cassell & Erez, supra note 18, pp. 153-154; Roberts & Manikis supra note 16, p. 32. With regard to jury sentencing: Weidemann, supra note 96; Myer & Greene, supra note 59.

116 Cassell & Erez, supra note 18, p. 168; for this reason these authors reject the introduction of an oral VIS.

With regard to the Dutch discourse, the incentive to further procedural justice, issued by the Dutch Government, puts an obvious burden on the Dutch courts. The quasi-judicial design leaving room for manoeuvre, the Dutch courts have been able to manage the political and social expectations that flow from victim participation adequately. The introduction of an *adviesrecht*, however, represents a major challenge to the courts. Since the *adviesrecht* affects the full scheme of issues addressed by the courts, the courts' responsibility to uphold the threshold of a fair trial increases. Indeed, allowing the defence to question the victim is but one of the thresholds that must be taken into account to avoid an imagery of prejudice.<sup>117</sup> Next, the amendment also contains an obligation for the court to provide for extended reasoning in case the sentence imposed differs substantially from the victim's recommendation. Although such a clarification can increase transparency, one can foresee the efforts the courts will have to take to provide for a balanced reasoning and the challenge this implies for procedural justice. It comes as no surprise that judicial authorities expect the introduction of an *adviesrecht* to complicate their 'impartial role at the hearing with a sufficiently empathetic attitude towards the victim'.<sup>118</sup>

The need to extend the opportunities for victim voice is, however, generally agreed upon in the Netherlands. Nevertheless, the objections raised represent a warning that even the apparently suitable Dutch design features inherent limitations to extended victim voice. Taking into account the major implications for the law's systemic design caused by the introduction of an *adviesrecht* as well as the heterogeneous nature of victims' needs, a more modest change is preferable. The suggestion by the Council for the Judiciary to loosen the regime of the oral VIS, providing the courts with room for manoeuvre, having them to decide how to handle the right to be heard and the limitations that go along with this on a case-by-case basis provides an acceptable alternative. In order to prevent unequal treatment, such an extension of the courts' discretionary power should be accompanied by a clear instruction on how to interpret the right to make use of the oral VIS.<sup>119</sup>

## 7. Conclusion

The Dutch amendment to introduce an *adviesrecht* being the cause for this paper, we analysed the Dutch policy from a procedural justice perspective, relating this to victimological findings and legal tradition. Studies show that victims appreciate extended opportunities to communicate; they do not, however, support a univocal and strong pursuit of outcome-control as envisaged in the Dutch amendment. On the contrary, contemporary victimologists emphasise the need to acknowledge the heterogeneous nature of victims' needs. What victims wish for in terms of procedural justice is to be acknowledged from the early stages onwards, enabling them to be heard during the pre-trial and trial proceedings.

In the absence of such clear evidence-based victim support for an *adviesrecht*, one may wonder what instigated the amendment. Although traditionally maintaining a discourse designed to exclude victim participation, it appears the Dutch are becoming front runners with regard to victim voice. Paradoxically, the traditional setting orientated towards the exclusion of victims' participation is now used to host extended victim voice. Such a change did not come overnight. Indeed not, some fundamental changes have been introduced within the past decades, illustrating that the Dutch are open to the victims' needs with regard to procedural justice showing the presence of 'procedural flexibility' within Dutch criminal trial proceedings. Public trust in the judicial authorities being a traditional benchmark of Dutch society, the quasi-judicial procedural setting flows from having accommodated a social and political change with regard to the position of the victim within trial proceedings.<sup>120</sup>

This change, however, is not without repercussions. Indeed, if we fail to take the inherent limitations of the criminal justice discourse into account, the pursuit of victim voice might turn out to have reverse effects; it could result in a disturbance of the delicate balance underlying the criminal law, simultaneously

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117 Fernhout & Spronken, *supra* note 29.

118 Keulen et al., *supra* note 6, p. 350.

119 Raad voor de rechtspraak, *supra* note 27. Also: Keulen et al., *supra* note 6, p. 344.

120 H. Elffers & J.W. de Keijser, 'De strafrechter en de burger. Zij konden bijeen niet komen', 2007 *Rechtstreeks*, no.2. Note that Dutch society represents a high trust society; G. van den Brink, *Mondig of moeilijker?*, WRR report, 2002; E.R. Engelen & M. Sie Dhian Ho (eds.), *De staat van de democratie*, 2000; Van Lent, *supra* note 28.

generating victims' deception. Victimologists already express concern that an overly eager appeal towards victim voice can result in 'victim fatigueness'.<sup>121</sup> Indeed, symptoms of 'victim fatigueness' have already been noticed within the Dutch discourse.<sup>122</sup> According to (critical) victimologists, the proponents of victim rights need to develop a critical internal perspective on procedural justice, addressing questions as to *what* works for *which victim* and under *what conditions*.<sup>123</sup> We need to seriously consider the possibility that the introduction of the *adviesrecht* will not enhance procedural justice, but instead will result in a double loss, harming the perception of procedural justice from both the victim's and the defendant's perspective. ¶

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121 Pemberton uses the term 'victimagogy' to address these risks; A. Pemberton, *The cross-over: An interdisciplinary approach to the study of victims of crime*, 2010, p. 234: 'the absence of a critical stance also leaves criticism open to those academics who are more generally antagonistic towards the advance of the victim's position and who can use the charge of victimagogy against those attempting to improve the victim's position.' Also: M. Groenhuijsen, 'The development of international policy in relation to victims of crime', 2014 *International Review of Victimology*, no. 1, pp. 31-48 and I. Edwards, 'Victim Participation in sentencing: the problems of incoherence', 2001 *The Howard Journal*, no. 1, pp. 39-54. For a fundamental critique: Van Dijk, supra note 22.

122 M.S. Groenhuijsen, 'Deetman, Samsom, Korver en Brenninkmeijer: 'Umwertung der Werte'', 2013 *Delikt en Delinkwent*, no. 1, pp. 1-13; M. Groenhuijsen & R. Letschert, 'Over spreekrecht plus en een twee fasenproces', in M. Groenhuijsen et.al., *KLM Van Dijk*, 2012, pp. 137-152.

123 Pemberton, supra note 121; Laxminarayan, supra note 12; Lens et al., supra note 12; Lens et al., supra note 11, pp. 89-90; Van Stokkom, supra note 12; Bednarova, supra note 24. Also, for a fundamental critique: F. Furedi, *Therapy Culture. Cultivating Vulnerability in an Uncertain Age*, 2004.