

CHAPTER IX

A 'NATURAL RIGHT' TO REVENGE?

Victim Impact Statements and Penal Populism

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1. INTRODUCTION

In a classic study on vengeance published in 1983, Susan Jacoby claimed that revenge had become a taboo in Western culture: 'We prefer to avert our eyes from those who persist reminding us of the wrongs they have suffered [...] Such people are disturbers of the peace; we wish they would take their memories away to church, a cemetery, psychotherapist's office...'¹ In recent years, the taboo of revenge has been considerably weakened. Since the 1990s efforts have been made to rehabilitate vengeance by stripping it of its usual pejorative connotations. We are witnessing a striking resurgence in feelings of revenge, not only in popular masculine products and sports, but also in political oratory and the legal professions. Anger, rancour and vindictiveness seem to have been awakened from their dormant state; they are praised and – like any other emotion – are commercially exploited.²

In a populist climate ideas such as 'victims have a right to revenge' have gained influence. There seems to be considerable political and cultural pressure to reassess the feelings of revenge of victims. In a punitive climate, it is believed that harsher penalties would enhance the well-being of victims and would achieve 'closure'. In the USA, 'closure' has become the buzzword of the victims' rights movement, and has even become an independent justification for harsh

¹ S. Jacoby, *Wild Justice. The Evolution of Revenge* (New York: Harper & Row, 1983), at p. 2-3.

² B. van Stokkom, 'Victim Needs, Self-Respect and 'Closure': Does Revenge Satisfy?', in E. Erez, M. Kilchling and I.-A. Wemmers (eds.), *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives* (Durham: Carolina Academic Press, 2011).

penalties;³ only severe penalties will show victims that they are being taken seriously by the criminal justice system. The failure to sentence a particular offender to a long prison term is often regarded as a devaluation of the worth of the victim's life, and an infliction of pain on the victim's family.⁴

The rise of penal populism and the advance of victim's rights have occurred concurrently. Of course, victimologists do not ask for harsh sentences, but some say that the natural urge of victims to express feelings of revenge is in need of more attention. One of those victimologists is Jan van Dijk. Van Dijk is a well-known criminologist, an architect of Dutch prevention policies, and one of the leading advocates of victim's rights. In his Tilburg lecture *The Mark of Abel*⁵ – and related studies – he pleaded for full victim rights, criticising incomprehensive and related studies which still marginalise the victim. He argued that the criminal justice policies which should be absorbed into the criminal procedure, victim's need to express revenge should be absorbed into the criminal procedure, so that injured persons may give vent to their anger. Feelings of rage, he asserted, should be taken seriously and acknowledged as a psychological reality. The criminal procedure should transform and sublimate these feelings of revenge in the humane, functional punishment of the offender. Only when this function is recognised, Van Dijk added, the victim can be viewed as a full and mature party, and not as an intruder in the procedure who, as a matter of courtesy, should have the opportunity to say a few words about his or her situation. At the same time, Van Dijk rejected the criticism of many criminologists, who fear that giving free scope to victim's needs could enhance penal populism and sustain malicious ideas about offenders. Criminologists tend to exaggerate the dangers of 'the political manipulation of crime victims'.⁶

I think Van Dijk is on the right track when he stresses that the 'natural' urge of victims to feel angry and to express vindictive feelings should be taken seriously. In this chapter I will explore these thoughts, but I will also raise some criticisms. Van Dijk does not work out his ideas in terms of criminal justice adaptations. The possibilities for reform and for giving the victim a fully-fledged position in the criminal justice process are far more restricted than Van Dijk suggests.⁷ Besides, he assumes that victims are generally reasonable and do not

want disproportionate sentences for offenders. But is the victim really always in control of his or her emotions?

The argument below runs as follows: Firstly, I will argue that the simultaneous rise of victim's rights and penal populism is more problematic than victimologists such as Van Dijk believe. Many victims of crime who have been seriously injured have a desire for punitive measures to be taken, and expect that expressing such opinions in victim impact schemes will result in tougher sentences being passed down. Secondly, I will deal with Van Dijk's reevaluation of feelings of revenge. Although I agree with him that feelings of revenge should be expressed and absorbed in the process, I doubt whether it is correct that expressing these feelings really satisfies victims. In the last section I will argue that victims could function as denunciatory agents in the trial, although they have the responsibility to express vengeful feelings in reasonable ways. I will argue that victims – having obtained a mature communicative position in the aftermath of a crime – also have to comply with legal and moral duties. Empowering victims should occur in the context of public justice, responding to public wrongs.

2. A 'NATURAL RIGHT' TO BE ENRAGED?

In his lecture, *The Mark of Abel*, Van Dijk argued that victims have been marginalised from the criminal procedure.⁸ The Christian tradition in particular would have contributed to the fact that aggrieved persons are deemed to be 'victims' – a term that stigmatises and confirms the vulnerable position of injured persons. While the victim label, with its Christian connotations, elicits compassion, it also implies forgiveness of the offender: 'In the context of Christian culture the label of the victim offers both a carrot and a stick. It offers compassion on condition of meekness'.⁹ For that reason, if the victim takes an activist stance, it often raises suspicion. Deviations from the role of the passive victim may trigger negative value judgements. Victims openly contesting their expected roles of passive sufferers may even become the target of scapegoating. Often, the aggressive emotions raised by the offender's crime are redirected against the victims, especially when they show resilience and criticise their treatment.

According to Van Dijk, victim blaming helps to prevent the victim from becoming a potential avenger: 'By receiving part of the blame, the victim becomes in fact a potential co-defendant'.¹⁰ The victim label brings connotations

3. F.E. ZIMRING, *The Contradictions of American Capital Punishment* (Oxford: Oxford University Press, 2003); J. PRAKTY, *Penal Populism* (London/New York: Routledge, 2007).

4. R. ELIAS, *Victims Still: The Political Manipulation of Crime Victims* (London: Sage, 1993); R. ELIAS, 'Paradigms and Paradoxes of Victimology', in C. Sumner, M. Israel, M. O'Connell and R. Sarre (eds.), *International Victimology: Selected Papers from the 8th International Symposium* (Canberra: Australian Institute of Criminology, 1996), available at <http://aic.gov.au/publications/proceedings/27/eliass.html>, last accessed June 2011.

5. J. VAN DIJK, *The Mark of Abel: Reflections on the Social Labelling of Victims of Crimes* (inaugural lecture) (Tilburg: Tilburg University, 2006).

6. ELIAS, *Victims Still: The Political Manipulation of Crime Victims*.

7. T. CLAREN, 2009, 'Het Sprekrecht in het Nederlands Strafrechtsproces getoetst aan een Emancipatoir Slachtofferperspectief', *Tijdschrift voor Herstelrecht* 9/1 (2009), p. 40–51; R. Kool, 'Slachtofferemancipatie in Maatschappelijk Perspectief', *Tijdschrift voor Herstelrecht* 9/1

(2009), p. 52–57; H. BOUTELLIER, 'Het Onbekende Slachtoffer' (review of Van Dijk's *The Mark of Abel*), *Tijdschrift voor Criminologie* 49/2 (2007), p. 194–199.

8. VAN DIJK, *The Mark of Abel: Reflections on the Social Labelling of Victims of Crimes*.

9. J. VAN DIJK, 'Free the Victim: A Critique of the Western Conception of Victimhood', *International Review of Criminology* 16/1 (2009), p. 1–33 at p. 18.

10. VAN DIJK, *The Mark of Abel: Reflections on the Social Labelling of Victims of Crimes* at p. 15.

of passivity, frailty, and also guilt. For that reason, victims are given the cold shoulder by the justice system, and are often treated with suspicion, disrespect, and even animosity. Nowadays the victim is still labelled as a passive and weak sufferer in need of help. Feelings of revenge are ignored altogether.¹¹

Van Dijk argues that since Christianity became the dominant culture, the notion of 'justified revenge' has been erased from Western collective memory. Criminal justice has the task of avoiding vigilantism by absorbing the urge for revenge into the state's monopoly for violence. So, in the context of criminal justice, the victim is reconstructed as someone whose right to retaliation is dubious from the start.

Van Dijk states that victims still have little to gain from their marginal participation in the criminal justice system. For example, in the Netherlands victims are not allowed to express opinions on the appropriate punishment of the offender; they are forced into the role of the 'good victim'. Van Dijk also believes that the censored participation of the victim in criminal proceedings does little to reduce their anger. The victim's feelings of vengefulness persist, and their natural desire to confront the offender during formal procedure is denied. In this respect, Van Dijk asserts, restorative justice programmes offer more opportunities to channel feelings of anger and indignation.

Injured persons, Van Dijk stresses, deserve to hold a much stronger position in criminal justice proceedings. Victims should have the opportunity to speak freely about the blameworthiness of offenders and their indignation. The criminal justice system should take the need for revenge seriously, and should try to include it in its proceedings. Van Dijk pleads for a full right for victims to state their views, including strong opinions about the harm the offender caused, and the blame they feel should be bestowed upon him.¹²

In sum, Van Dijk calls for victim empowerment, which stresses the agency and autonomy of crime victims, including their potential to stand up to their victimisers in court or in restorative justice meetings. Victims need more space to express their true feelings and needs, and they should be allowed to show their 'true faces'. A 'controlled expression of vindictiveness' could perform an important social function.

At the same time, Van Dijk recognises that politicians and prosecutors repeatedly advocate stiffer sentencing, thereby referring rhetorically to the interests of victims. However he tries to reassure the reader that victims generally distance themselves publicly from one-dimensional campaigns, that many victims are lobbying for better preventive measures or better victim support, and that victims are surprisingly modest in their expectations and attitudes towards sentencing. Feelings of vengefulness may be fairly common, but they are usually

not expressed in excessive sentencing demands. 'In fact, a majority of victims, however angry, have moderate views on appropriate sentences for their offenders.'¹³ But still, Van Dijk laments that 'the stereotypical victim is deemed too mad to partake in a rational discourse on the offender's guilt and "just desert".'¹⁴ In this context, he argues, detractors of victim rights typically refer to Medea, the Greek tragic hero who killed her own children to punish their father for his unfaithfulness: 'Medea symbolises the supposedly intrinsic destructiveness of victim revenge.'¹⁵

Reacting to these ideas Lode Walgrave¹⁶ expressed surprise that Van Dijk supposes that victims are marginalised nowadays, and are even viewed as scapegoats. In reality, he argued, victims' rights are recognised more than ever, among other things, thanks to the persistent efforts and activities of the victim movement and victim research.

Van Dijk's response – in the same discussion volume – was one of annoyance: critical thinkers as Fattah and Elias, but also Walgrave, Garland and many others, blame the victim movement for ending up in the hot waters of penal populism. Their perspective is thoroughly Christian: they regard pleas for victims' rights as 'an unacceptable attack on the tacit morality of forgiveness'. The views of these Christian scholars are 'an ideological manifestation of reactive victim condemnation.' Of course, Van Dijk added, this view is mistaken: 'there is, especially in Europe, no relation between the victim movement and campaigns for tougher punishments.'¹⁷

After reading Van Dijk's plea we are left with many questions. Are victims' needs always acceptable? Do we have to end the tabooing of vindictiveness? Are victims always as reasonable as he suggests? How can we prevent victims from being pulled into 'heart of darkness' media stories? How can we prevent victimologists from doing the dirty job for populists?

Although the ideological overtones weaken his argumentation, I think Van Dijk's ideas deserve attention, but we have to take the unfortunate intertwining of expressing victims' needs and penal populism (including the image of the malicious offender), and the possible exploitation of victims' emotions, seriously. More insight into this unpalatable relationship is needed, and it cannot be dealt with in just a few words.

¹³ VAN DIJK, *The Mark of Abel: Reflections on the Social Labelling of Victims of Crimes* at p. 20, citing E. FAZZ, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice', *Criminal Law Review*, July (1999), p. 545–556.

¹⁴ VAN DIJK, *The Mark of Abel: Reflections on the Social Labelling of Victims of Crimes* at p. 21.

¹⁵ *Ibid.* at p. 21.

¹⁶ L. WALGRAVE, 'Welke Weg volgen voor de Ontvoeging van Slachtoffers?', *Tijdschrift voor Herstelrecht* 9/1 (2009), p. 58–63.

¹⁷ J. VAN DIJK, 'De Herrijzenis van het Slachtoffer in het Strafproces: Een Dupliek', *Tijdschrift voor Herstelrecht* 9/1 (2009), p. 70–76 at p. 71–72.

¹¹ *Ibid.* at p. 18.

¹² J. VAN DIJK, *Slachtoffers als Zondebokken* (Apeldoorn-Antwerpen: Maklu, 2008), at p. 162–165.

Van Dijk reassures us that victims are reasonable, but many victims willingly or unwillingly figure in media drama, all the more so because vindictive stories fascinate the public. Many populist politicians are eager to exploit these cases.

3. PENAL POPULISM AND USING VICTIMS

Victimisation assumes an iconic status in populist discourse. Victimisation has come to be regarded as a particularly authentic expression, especially when there is an 'ideal victim' (one who is completely innocent and defenceless) who is victimised by criminals who can only be utterly malevolent and irredeemable.¹⁸ At the same time, punishment has become more or less a 'victim service gesture'. It is assumed that the well-being of the victim depends on inflicting pain on the offender. Many crime fighters and victim advocates argue that only severe penalties will show victims that they are being taken seriously by the criminal justice system.¹⁹ The failure to sentence a particular offender to a long prison term is often regarded as a devaluation of the worth of the victim's life, and an infliction of pain on the victim's family.

In the Netherlands, the so-called *Burgercomité tegen Onrecht* (Citizen Committee Against Injustice) acts as a major populist victim organisation, led by politician, Joost Eerdmans. The slogan of this organisation is clear: 'Who is merciful to the wolves, does wrong to the sheep.' The committee's pamphlet contains many populist claims, such as: 'crime is a conscious choice', and 'parliament messes about the position of victims and survivors.'

A victim-centred discourse that refers to the public's preferred image of 'harmless' victims (not mentioning 'ugly' victims like prostitutes) takes the focus off the blameworthiness and individuation of the offender, and is centred around the victim's troubles and painful emotions.²⁰ Invited to talk about their suffering, victims and the public may be disappointed when offenders turn out to be humane, and victimised themselves. In the rhetoric surrounding law and order policies, it may be more accurate to view the invocation of victim images as a tool for highlighting the malice of the offender, rather than for eliciting sympathy for the victim. Many victimologists may not be comfortable with this development, but victims are indeed politically manipulated, as Elias asserted in the 1980s.²¹

In this context, it is instructive to recall some core ideas of David Garland's work. In *The Culture of Control* he argues that victims are brought back into full

public view by politicians and media executives who routinely exploit the victim's experience for their own purposes. The sanctified persona of the suffering victim has become a valued commodity in the circuits of political and media exchange. The sanctification of victims tends to nullify concern for offenders. The zero-sum relationship that is now assumed to exist between the one and the other ensures that compassion for offenders and efforts to humanise their punishments can easily be represented as an insult to victims and their families.

'The symbolic figure of the victim has taken on a life of its own, and plays a key role in political and policy argument. The crime victim is no longer represented as an unfortunate citizen who has been on the receiving end of a criminal harm. His or her concerns are no longer subsumed within 'the public interest' that guides prosecution and penal decisions. Instead, the crime victim is now, in a certain sense, a *representative character* whose experience is assumed to be common and collective, rather than individual and atypical.'²²

Thus, the victim and his or her feelings – and its political projections – are at the centre of contemporary penal discourse. Political discourse about crime is pushed in the direction of emotivism: the visceral emotions of righteous indignation. Current populist rhetoric contains the following assumptions, claims and emotionalised ideas, which I have arranged in three groups:

- a.
 - Criminals have 'chosen' crime, even if they are 'wicked'.
 - Punishments are far too lenient.
 - Criminals leave prison early (or evade it altogether) and engage in further criminal activity. The state is often an accomplice in crime.
- b.
 - The rights of victims must take precedence over the rights of criminals.
 - The state acts to the detriment of the interests of victims; the criminal justice system over-identifies with the criminal and subjects the victim to her own 'trial by ordeal'. The innocent are prosecuted, and the guilty protected.
 - The interests of victim and offender are diametrically opposed. For example, the expression of concern for the offender signals a disregard for the victim and her suffering (the zero-sum logic).
- c.
 - Victims want revenge and severe punishment.
 - Severe punishment would bring closure and inner peace to the victims (satisfying feelings of revenge).

¹⁸ PRATT, *Penal Populism* at p. 86.

¹⁹ ELIAS, 'Paradigms and Paradoxes of Victimology'.

²⁰ V. KANWAR, 'Capital Punishment as "Closure"', *The Limits of a Victim-Centered Jurisprudence*, *New York University Review of Law and Social Change* 27 (2001), p. 215–255.

²¹ See also A. PEMBERTON in this volume.

²² D. GARLAND, *The Culture of Control. Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001), at p. 144.

Below, I will concentrate on the last group of assumptions: that relating to the desire for punishment and revenge. But before discussing these desires, I want to comment briefly on the zero-sum assumption.

As stated, the rights of victims and offenders are posited as being diametrically opposed and situated within a zero-sum game, in which you are either for or against victims. Now, contrary to what Van Dijk claims (that there is no relation between the victim movement and populist reasoning), some victim supporters seem to be encouraging a polarised perception of victims and criminals. American research shows that victim advocates/counsellors often speak of victims' rights and opportunities in comparison to the rights retained by offenders. In their view, historically, victims' rights always fall short in comparison.²³ Thus, victim advocates, especially service providers who work outside the district attorneys' offices, may have a tendency towards the 'zero-sum' logic.

Also, victims themselves seem open to zero-sum arguments. Comparing one's own subsequent experiences with those of the person who caused the suffering is a common reaction to crime amongst victims. If offenders have 'rights' and privileges and get support, so should victims. Such arguments seem self-evident, because it appears intuitively appropriate to ease suffering and to alleviate the hardship experienced.²⁴ But in reality, there is seldom a duality of opposite positions: generally the interests and values of the parties are incongruent and are not polar opposites. Sometimes victims and offenders even express the same values ('repair', 'penance', etc.). Hereafter, when discussing revenge, I will return to the zero-sum logic.

4. VICTIM IMPACT SCHEMES AND PUNITIVE DESIRES

Research findings point out that the experience of victimisation does not automatically increase support for punitive responses. Intuitive beliefs that victims are most likely to seek retributive or harsh penalties for offenders are obviously inaccurate.²⁵ Many victims do indeed seem to want revenge, but revenge certainly is not the only response of people who have been victimised. Many victims prefer to deal with their experience and to move on; joining a

punitive single-issue organisation does not strike them as a particularly productive way to do so. Apparently, victims are not a monolithic group with similar preferences and needs.²⁶ Victims' responses about how to achieve closure and deal with grief vary widely.

But there is no 'overwhelming evidence refuting the assumed punitiveness of the victim', as Van Dijk states.²⁷ In the context of victim impact research, Pemberton states – in this volume – that victims of more serious crimes do react in more punitive ways, especially in the immediate aftermath of victimisation.²⁸ Victims suffering from high levels of post-traumatic stress also show signs of increased punitiveness; for these victims, influencing the sentencing outcome is an important consideration. The more serious the crime, the more important the sentencing outcome becomes. These victims tend to have harsher opinions, both concerning criminal justice policy, and political attitudes.

It is a fact that punishment functions as an important message to victims of serious crime. Pemberton states that – although the claim that severe sentences may have positive effects such as 'closure' is highly suspect – insufficient punishment has a negative impact, due to what it signals to, and about, the victim. A failure to punish, or punishing offences too leniently, is indicative of indifference to the victim, and perhaps even disdain.

In many common law jurisdictions that have introduced victim impact statements (VIS), victims are encouraged to recommend a sentence. As most citizens are not familiar with sentencing practices, victims assume that courts have greater powers to punish than is, in fact, the case.²⁹ In an extensive review, Julian Roberts³⁰ specifies that victims are likely to recommend a sentence that is disproportionate to the perceived seriousness of the crime, and that

²³ C.M. ENGLEBERT, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System', *Criminal Justice Review* 36/2 (2011), p. 129–151.

²⁴ I. EDWARDS, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making', *British Journal of Criminology* 44/6 (2004), p. 967–982.

²⁵ See, for instance, S. MARUNA and A. KING, 'Public Opinion and Community Penalties', in A.E. BOTTOMS, S.A. REX and G. ROBINSON (eds.), *Alternatives to Prisons* (Callompton: Willan, 2004), p. 83–112.

²⁶ As it is often stressed, the connection between the impact of crime and needs is problematic. 'Those suffering the worst harm or loss do not necessarily have correspondingly high needs. They may enjoy a supportive environment, be innately resilient, or otherwise able to overcome the effects of victimization. Victims suffering objectively less serious crimes may require greater support if they are vulnerable or isolated' (see L. ZEDNER, 'Victims', in M. MARGURE, R. MORGAN and R. REINER (eds.), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002), 419–456 at p. 431).

²⁷ VAN DIJK, 'Free the Victim: A Critique of the Western Conception of Victimhood' at p. 21.

²⁸ PEMBERTON, *The Cross-Over: An Interdisciplinary Approach to the Study of Victims in Crime*.

²⁹ Public opinion research (Roberts and Hough: Chapter 4) makes clear that people tend to assume that unprincipled leniency – rather than conformity to sentencing guidelines and judicial precedents – accounts for the sentences imposed in court. See J. ROBERTS and M. HOUGH, *Understanding Public Attitudes to Criminal Justice* (Maldenhead: Open University Press, 2005).

³⁰ J. ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole', in M. TOMY (ed.), *Crime, Punishment and Politics in Comparative Perspective* (Crime and Justice: A Review of research, 38) University of Chicago, 2009), at p. 359; C. HAYLE, 'Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence', in E. EREZ, M. KLITCHING and J.-A. WEMMERS (eds.), *Therapeutic Jurisprudence and Victim Participation in Criminal Justice: International Perspectives* (Durham: Carolina Academic Press, 2011), p. 249–283 at p. 257.

disappointment will ensue when the court imposes a significantly less punitive sanction. One of the most robust findings in the victim impact literature is that victims who expect their statement to have a direct influence on sentencing react with disappointment and anger once it becomes clear that their sentencing "submission" will not be followed.³¹ Most victims, Roberts says, have unrealistic expectations of the role an impact statement will play in sentencing; they simply expect that submitting a statement will result in a harsher sentence. Victims assume that because they were given an opportunity to say something, to be heard and have a voice, their words will make a difference. Many feel frustrated at the lack of any real control they have over the process.³²

On the other hand, it is clear that VIS seldom influence sentencing decisions handed down by the courts. Researchers – both advocates and critics – agree that aggregate sentencing practices appear to have been unaffected by the introduction of victim impact statement regimes.³³ Judges appear to be unaffected by any appeals by the victims of crime for the severity of sentences to be increased. According to Roberts, the most likely reason for this is that criminal justice professionals are able to protect the sentencing process.

Thus, victims who make impact statements are likely to believe that their statements will make a difference to sentencing. The results of a recent Dutch evaluation of Victim Impact Statements – aimed at the question of the extent to which VIS might contribute to the victim's emotional recovery – confirm these findings.³⁴ One of the findings is that nearly 50% of the participating victims (in the Oral VIS group) want to influence the sentencing decision. Although sentencing recommendations are not permitted, Dutch victims did, in fact, give their opinions on the length of sentences, often unconsciously. As Roberts says, victims intuitively expect to make a recommendation.

Another finding is that most victims – all victims of serious crimes, with strong aggrieved feelings – believe that the sentences are much too lenient and are never actually harsh enough.³⁵ The opinions about sentencing decisions are strongly related to outcome satisfaction: 64% of those who find the punishment to be 'very lenient' are very dissatisfied.³⁶ Likewise, other researchers have found

³¹ ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' at p. 360.

³² See also EDWARDS, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making'.

³³ ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' at p. 373; ERBEZ, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice'.

³⁴ K. LENS, A. PEEMERTON and M. GROENHUIJSEN, *Het sprektrecht in Nederland: een bijdrage aan het emotioneel herstel van slachtoffers* (Universiteit van Tilburg: Intervict, 2010).

³⁵ *Ibid.* at p. 85.

³⁶ *Ibid.* at p. 61.

that victims expecting that the statement will have a perceptible impact on the sentence, report lower levels of satisfaction.³⁷

In sum, a considerable proportion of victims of serious personal injury offences expect lengthy sentences. These victims might not be as reasonable as Van Dijk presumes. This group in fact has aims that can be easily exploited by penal populist politicians, and they function – often unwillingly – as *Fundgrube* of punitive crusaders. No doubt, within this group the motivation of revenge plays a dominant role.

5. IS REVENGE HELPFUL?

Jan van Dijk argues that victims have a 'right' to express vindictive feelings: they have a 'natural right' to be enraged.³⁸ The criminal justice system should take this need for revenge seriously and should try to include it in its proceedings. An expression of vengeful feelings would reduce their anger and would contribute to a regained social standing.

Does expressing revenge augment self-esteem? Let me first discuss some moral functions of revenge. Retaliation represents a form of self-defence that is regarded as necessary to preserve one's image and honour; it serves to restore the victim's self-image. 'The failure to respond to a perceived injustice can actually further diminish the victim, both in his or her own eyes, as the eyes of others.'³⁹ In a similar way, Trudy Govier⁴⁰ defines revenge as a way of reasserting ourselves, an attempt to get relief from the hurt and humiliation of being wronged. It is a desire to 'get even' and to seek (anticipatory) satisfaction in attempting to harm the transgressor or offender. We expect to feel better if we can somehow express our negative feelings in actions intended to 'get back' at those who have harmed us.

Three moral goals are often mentioned that may potentially underlie motivations of revenge.⁴¹ First, revenge is the desire to 'get even', or to 'balance the scales'. Revenge is intended to re-equilibrate the gains and losses caused by

³⁷ ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' at p. 371.

³⁸ VAN DIJK, 'Free the Victim. A Critique of the Western Conception of Victimhood'.

³⁹ D.T. MILLER, 'Disrespect and the Experience of Injustice', *Annual Review of Psychology* 52 (2001), p. 552–553.

⁴⁰ T. GOVIER, *Forgiveness and Revenge* (New York: Routledge, 2002).

⁴¹ T.M. TRAPP and R.J. BRES, 'What's good about Revenge?', in R.J. Lewicki, B.H. Sheppard and R. Bies (eds.), *Research on Negotiation in Organizations*, vol. 6 (Greenwich, CT: JAI Press, 1997); U. ORTT, 'Does Perpetrator Punishment Satisfy Victims' Feelings of Revenge?', *Aggressive Behavior* 30 (2004), p. 62–70; MILLER, 'Disrespect and the Experience of Injustice'; M.E. MCCULLOUGH, C.J. BELLAH, S.D. KILPATRICK and J.L. JOHNSON, 'Vengefulness: Relationships with forgiveness, Rumination, Well-being, and the Big Five', *Personality and Social Psychology Bulletin* 27 (2001), p. 145–160.

the assault, or to re-equilibrate power. It is linked to the norm of reciprocity expressed by the *lex talionis*. Thus, in the eyes of the vengeful person, vengeance might be understood as truly moral. Second, revenge is intended to restore the victim's self-esteem; through revenge one can present oneself as a strong person who does not tolerate unjust treatment by others. Revenge is 'saving face': an attempt to change the belief of the offender and others that the victim is not worthy of better treatment. Third, revenge can have an educative mission: the desire to teach the offender a lesson. Vengeance in this way is moral instruction, designed to convince the offender that his behaviour will not be tolerated or go unpunished. This preventive motivation may also have a purely instrumental aim: deterrence.

Psychologist Nico Frijda explained that feelings of vengeance can help to restore ego strength and self-esteem, and can deter potential offenders. In his view, the repression of these feelings is therapeutically counterproductive. According to Frijda, revenge may restore 'the balance of suffering'. This means that hurting someone who has hurt us can diminish our own suffering. Our feelings, he states, depend on how one's fortunes or misfortunes compare with the fortunes or misfortunes of others.⁴² It is the contrast between happiness and sorrow that matters: 'he is happy and I am suffering'. This contrast is what vengeance is meant to remedy. Frijda's explanation is of special interest because it resembles the zero-sum expectations within the logic of penal populism (put simply: 'his suffering is my healing').

Psychological research does not confirm this thesis.⁴³ Revenge is not so much directed at rebalancing pleasure and pain (getting even by inflicting suffering), nor is revenge merely about payback. Revenge has more to do with delivering a message. Vengeful victims want to make offenders feel bad because they want them to learn a lesson. The latent goal is delivering a message, such as 'never do that to me again'. Revenge is a means to achieve higher order goals such as demonstrating power and asserting the victim's identity/affirming his or her status.⁴⁴

Although the hedonistic zero-sum logic only plays a minimal role, the rebalancing of moral respect remains important: meting out the punishment signals a reevaluation of the victim (in terms of social standing and worth).

⁴² N.H. Frijda, 'The Lex Talionis: On Vengeance', in S.H.M. van Goozen, N.E. van de Poll and J.A. Sergeant (eds.), *Emotions: Essays on Emotion Theory* (Hillsdale, NJ: Erlbaum, 1994), p. 263–289 at p. 274.

⁴³ H. CROMBAG, E. RASSIN and R. HORSELENBERG, 'On Vengeance', *Psychology, Crime & Law* 9/4 (2003), p. 333–344; M. GOLLWITZER, M. MILENA and M. SCHMITT, 'What gives Victims Satisfaction when they seek Revenge?', *European Journal of Social Psychology* 41/3 (2011), p. 364–74; K.M. CARLSMITH, T.D. WILSON and D.T. GILBERG, 'The Paradoxical Consequences of Revenge', *Journal of Personality and Social Psychology* 95/6 (2008), p. 1316–1324.

⁴⁴ GOLLWITZER, MILENA and SCHMITT, 'What gives Victims Satisfaction when they seek Revenge?'; CROMBAG, RASSIN and HORSELENBERG, 'On Vengeance'.

Ulrich Orth and colleagues found that feelings of revenge are significantly linked to post-traumatic stress reactions in crime victims.⁴⁵ It is not the retaliation motive implied in feelings of revenge that explains this connection, though; most likely it is the ruminative nature of feelings of revenge. The authors conclude that revenge must presumably be regarded as a maladaptive coping mechanism in the face of experienced injustice, but not in the first period after victimisation.⁴⁶ In another study, Orth found that punishment does satisfy feelings of revenge among victims of violent crimes, but only partially, and, moreover, only temporarily, and that in the long run feelings of revenge are not influenced by the severity of punishment.⁴⁷ The length of time since victimisation had no influence on the intensity of feelings of revenge. In this study, anger rumination is again considered to be the crucial factor.⁴⁸

As long as rumination continues, doing justice – the infliction of pain – is not enough. Persons preoccupied by ruminative feelings of revenge do not seem to be susceptible to mitigating factors (such as convincing excuses, sincere apologies, or compensation).⁴⁹

In sum, revenge only brings temporary satisfaction, but even if vengeful statements do not succeed in unburdening the victim or contributing to victim satisfaction, I think controlled expressions of vengeful feelings could have a legitimate place in the criminal proceedings, because they communicate the victim's worth ('not deserving to be harmed'). The victim's justified resentment and the reasons for it provide significant information to both the community and the wrongdoer, especially about the human impact of the crime. The victim needs to defy, openly and publicly, the wrongdoer's attack on her value as a person. In other words, victims may function as powerful denunciatory agents. Through communicating 'private' harms and feelings of indignation, victims may contribute to public norm confirmation.⁵⁰

6. VICTIM DUTIES

Victim impact statements represent a 're-emotionalisation of law' – an increased willingness to admit emotional responses into the criminal process, and into

⁴⁵ U. ORTH, L. MONTADA and A. MAERCKER, 'Feelings of Revenge, Retaliation Motive, and Posttraumatic Stress Reactions in Crime Victims', *Journal of Interpersonal Violence* 21/2 (2006), p. 229–243.

⁴⁶ See also CROMBAG, RASSIN and HORSELENBERG, 'On Vengeance'.

⁴⁷ ORTH, 'Does Perpetrator Punishment Satisfy Victims' Feelings of Revenge?'

⁴⁸ In Orth's study: four years.

⁴⁹ For these factors see MILLER, 'Disrespect and the Experience of Injustice'.

⁵⁰ B. VAN STOKKOM, 'The Expressive Function of Restorative Punishment. A Public Interest Perspective', in R. Mackay, M. Bosnjak, J. Deklerck, B. van Stokkom and M. Wright (eds.), *Images of Restorative Justice Theory* (Frankfurt am Main: Verlag für Polizei und Wissenschaft, 2007), p. 151–167.

decision making. Often victims are allowed to speak out rowdily, to denigrate the offender, or to make allegations of other, unproven misconduct.⁵¹ Emotional conviction is often the only weapon victims have available to them to fight back, but this engenders a reluctance to engage with them in debate and it can be a serious impediment to moderating victims' demands.⁵²

For these reasons, revenge needs stylisation. Vengeful victims must adhere to a set of conditions: they must respond proportionally and with deservingness in mind. Their performance should not be an ill-considered blazing attack. Articulating the urge to hurt or to enjoy the offender's distress is understandable, but how would these emotional expressions serve the victim? How would 'shouting' contribute to the healing process? If victims scream in unworthy ways, it may confirm the victim's powerless position. As 'expressors' victims may disqualify themselves (come across as childish, uncontrolled, unstable, etc.). The public would probably interpret it as a helpless performance. Emotionalised speech gives the impression that a 'weak victim' is speaking out. Therefore, expecting therapeutic benefits from uncontrolled expression seems unreal; rather, the therapeutic effect will occur when procedures are viewed as fair and victims are taken seriously. Ideally, the victim's message should sensitise the offender to the effects of his or her conduct on other people.⁵³ In that case the victim will also get on the right side of the public. Also, the decorum of public proceedings requires that vengeful feelings give way to reasonable ways of testifying and calling to account.

As Roberts says, victims should receive adequate direction regarding the purpose and nature of victim impact statements, and the aims and functions of sentencing as coherent public justice.⁵⁴ This means that victims should be aware that they are performing as citizens in a public forum, having rights, but also complying with legal and moral duties.

Victims' duties is a theme that is generally neglected in victimology and criminology. In much of the talk of victim's rights, it is not apparent that victims have any duties. Participation as citizens does not seem to be reflected in current victim statement schemes. The language of private interests seems to dominate these schemes, I think mistakenly, because victims participate in a public ritual that aims to restore violated norms.

⁵¹ ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' at p. 350.

⁵² H. STRANG, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Oxford University Press 2002), at p. 31.

⁵³ ROBERTS, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' at p. 356.

⁵⁴ See also J. DOAK, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society* 32/2 (2005), p. 294–316; J. DOAK, R. HENNAW and B. MITCHELL, 'Victims and the Sentencing Process: Developing Participatory Rights?', *Legal Studies* 29/4 (2009), p. 651–677.

Victims participating in impact schemes express their views in a public forum, in a public language, and referring to rights and responsibilities. In Garland's terms, victims' concerns have to be subsumed into the 'public interest' that guides the proceedings. If we are to take victims seriously, we have to conceive of them as citizens. If we deny that victims share in the responsibilities that citizens have, we would patronise them as mere passive sufferers, instead of respecting them as active citizens.⁵⁵ The perspective of duties invigorates the view of victims as 'empowered persons'. Not assuming any duties would, in Van Dijk's terms, be a typical Christian reflex: overprotecting the victim.

Philosophers Duff and Marshall have developed a communitarian account of victims' duties.⁵⁶ All citizens have a duty to report crimes and to bear witness, because they have a responsibility to the political community, a responsibility to protect and enhance its shared values. Victims participate not only as individuals with grievances, but also as members of the political community, which shares in the wrong. Thus, if victims take part in impact schemes, they have the responsibility to articulate not only their own individual interpretation of the crime, but also to articulate a suitable interpretation that could count as 'ours'.⁵⁷ They are engaged in a public – not a private – process, which addresses the wrong as a public wrong committed by one citizen against another. They must strive to speak not merely as an 'I' ('what has been done to me?'), but also as a 'we' ('in which ways have our values been violated?').⁵⁸ According to Marshall, the victim represents 'us' in calling some other 'one of us' to account for their wrongdoing. We owe it to one another to confront wrongdoings openly.⁵⁹

With respect to victim impact statements, also specific (moral) duties arise. For example, when victims highlight other effects that the criminal wrongdoing has had on them, and add new incriminating information that could play a role in the determination of the sentence, then we need to have a clear idea of what a reasonable and truthful response is. But it is often difficult to assess whether

⁵⁵ R. A. DUFF and S. E. MARSHALL, 'Communicative Punishment and the Role of the Victim', *Criminal Justice Ethics* 23/2 (2004), p. 39–50.

⁵⁶ *Ibid.*

⁵⁷ The authors speak about post-conviction discussions, not victim impact schemes.

⁵⁸ DUFF and MARSHALL, 'Communicative Punishment and the Role of the Victim' at p. 47. Duff and Marshall sketch the contours of a legal duty on victims to be prepared to respond to the wrongs done to them. This means that victims, as citizens, have a duty to take part in victim impact discussions, because they usually are well-placed to discuss the wrong and its impact. Victims have a special responsibility to assist in the law's response to 'their' crimes: precisely as victims can they give an authentic account of the wrong and bear witness to the nature and implications of the wrong done to them. This is probably too demanding, so the authors build in a suitable 'conscience' clause into any such legal duty. The law could allow the victim to refuse to take part in a victim impact discussion, should the victim have a conscientious objection to doing so. I think Jan van Dijk would welcome such a duty to engage in the process, because it would grant the victim a fully fledged position in court.

⁵⁹ S. E. MARSHALL, 'Victims of Crime: Their Station and Its Duties', *Critical Review of International Social and Political Philosophy* 7/2 (2004), p. 104–117.

what victims say about the effect the crime has had on them, is reasonable and true. As mentioned previously, victims vary considerably in their subjective responses to crime. Some claim that their lives have been entirely destroyed, and depict the offender as a malicious and horrible individual. How can we assess whether this is a reasonable response? Are they exaggerating? It is also a sensitive issue: the victims of serious crimes have surely suffered enough.⁶⁰

Still, responding reasonably and telling the truth is what we may expect. Suppose new information about the context of crime and the motives of the offender decrease his guilt considerably. In that case, victims would have the moral duty to revise their image of the offender – it would, of course, also be in their own interests. In sum, victims should recognise the facts and they should represent their views and interests in reasonable and honest ways. Not only because they are acting as responsible citizens in a public forum, but also to prevent self-deception (excessive claims, distorted views, hang onto the past, etc.). I think these responsibilities are part of a mature victim performance in a criminal trial.

So, in court victims should ideally speak as citizens, in terms of public values. This principled view is actually practiced in some continental jurisdictions. In Germany for example victims have the legal opportunity to participate as accessory prosecutors (*Nebenkläger*). This institute gives alleged victims of serious crimes legal rights and a chair of their own right beside the public prosecutor, and face-to-face to the defense desk. They have full access to all case files at the pre-procedural stage, including all pieces of evidence, and they have the right to be present throughout trial, to ask questions during the examination of the accused, witnesses and experts, make their own final pleading and they even have a right to a final reply to the defense plea.⁶¹ In short, they function as a full-blown legal party, acting and speaking in terms of public justice.

Nebenkläger also have a right to propose concrete sentences. Although most of them give high priority to harsh punishment, evaluation studies did not find any verifiable influence of the accessory prosecution on the outcome of the trials.⁶² There is no evidence of aggressive prosecution strategies by victim attorneys that could lead to polarization or attacks by the defense to blame the victim. On the contrary, Kury and Kilchling found in their study that the treatment of victims within the accessory prosecution has become more

respectful. Nowadays the significance of the *Nebenklage* has risen substantially, especially in the range of serious crimes. Nonetheless, this legal provision seems laborious and is definitively time consuming. Many public prosecutors view it as a factor of delay and additional workload.

The *Nebenklage* entails a certain basic exchange between diverse needs: the victim becomes a serious party within the trial, but forfeits his or her role as a wild expressor of private feelings. Acting as an accessory prosecutor may be far more satisfying for victims than making a written statement or an oral expression which risks to be only an inserted and short-lived ritual. Functioning as a serious party in trial is constitutive to regaining self-respect as a citizen, someone who deserves to be treated worthily, having equal rights, and who is owed a public censure of the unlawful behaviour of the offender.

On the other hand, articulating victims' interests could contribute to a broadened discourse in court: not only the concept of culpability is central, but also harm and its consequences. May be criminal justice actors get more receptive to the moral and communitarian language of the victims and their stakeholders (harm, violation, restoration, etc.). This broadened discourse implicates a certain 'privatization' of criminal justice. The provision of *Nebenklage* injects civil interests into the somewhat elusive concept of the 'public interest', and it could lend additional legitimacy to the outcome of the case.⁶³

7. CONCLUDING THOUGHTS

How can we evaluate Van Dijk's plea for a 'natural right' to revenge? First, vengeful feelings are a psychological reality, and there are good reasons for channelling and including these feelings in criminal proceedings (as well as in mediation settings and in everyday conflict management).⁶⁴ I agree with Van Dijk that emancipated victims should have the opportunity to vent vindictive feelings, but they should not express their fury unhindered, without the regulation of impulses and emotional experiences. If victims take the opportunity to speak out, they should recognise and phrase these experiences also from the 'we' point of view (the violated common values). They have to adjust to the decorum of a public forum in which they are supposed to behave as responsible citizens. It is also in their own interest to do so, because when they speak reasonably about their resentment, the other participants may empathise and gain a full understanding of the harm done.

⁶⁰ Ibid.

⁶¹ H. Kury and M. Kilchling, 'Assessorij Prosecution in Germany: Legislation and Implementation', in E. Erez, M. Kilchling and J.-A. Wemmers (eds.), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Durham: Carolina Academic Press, 2011); J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society* 32/2 (2005), p. 294–316; J.-A. Wemmers, 'Victim Policy Transfer: Learning from each other', *European Journal on Criminal Policy and Research* 11 (2005), p. 121–133.

⁶² H. Kury and M. Kilchling, 'Assessorij Prosecution in Germany: Legislation and Implementation', p. 49–52.

⁶³ J. Doak, R. Neman and B. Mitchell, 'Victims and the sentencing process: developing participatory rights?', *Legal Studies* 29/4 (2009), p. 651–677.

⁶⁴ Van Stokkom, 'The Expressive Function of Restorative Punishment: A Public Interest Perspective'.

With Van Dijk we could strive for further emancipation of the victim and undo his or her passivity. Still, there are many obstacles to overcome. Prosecutors often favour a limited role for the victim in the justice process. Victims should not have any real influence over the decision-making process.⁶⁵ Many German legal professionals are reluctant to assign an accessory prosecuting role to victims. Most judges and prosecutors still regard the victim predominantly in his or her role as a witness. Victims are perceived as outsiders to the criminal hearing.⁶⁶

On the other hand, Van Dijk resorts to a curious rhetorical strategy: victims remain in the margins, and scholars that express doubts regarding full victim rights are blamed. Whether this strategy originates from impatience or frustration, the fact is that it does not contribute to the disentanglement of legitimate victim needs and penal populism. Of course, victimology did not contribute to unduly punitive criminal policies, nor did victimology fuel a political move towards more repressive criminal justice, but victimologists and victim support organisations have to deal with penal populism and the tendency to 'use victims'. Contrary to what Van Dijk argues, the claims of victims, the victim movement, and punitive populism, are, in many ways, intermingled. In the same way as punitive crusaders, victims and victim advocates often reason in zero-sum terms. Many victims of serious crimes do have substantial feelings of revenge, expecting lengthy sentences. Giving victims the opportunity to express their views on sentencing freely, as Van Dijk light-heartedly claims, is risky, and will boost false expectations.

Although there is a risk that victim frustration with criminal justice may rise, I think that realising full victim participation is a good idea. The formula of accessory prosecution does meet victim interests (getting recognition and being taken seriously) and may benefit the sentencing process. The emancipated victim should ideally act as a responsible citizen, within the boundaries of public justice. It is possible that Van Dijk would, again, call this 'Christian', and would criticise the idea of victim duties as imposing the role of the 'good victim', but, as argued, when expressing vindictive emotions, the victim's acts become potentially harmful. Therefore, we need to underscore responsibilities.

CHAPTER X

LAY PARTICIPATION IN THE DUTCH CRIMINAL PROCEDURE WILL NOT RESULT IN HIGHER PUBLIC SATISFACTION

Henk ELFERS

1. INTRODUCTION

The Netherlands has seen, in recent years, a debate about a lack of public satisfaction with the administration of criminal law in general, and especially with the punishment meted out by criminal judges.¹ Some proponents have proposed to remedy a supposedly threatening state of affairs by introducing laws that diminish the discretion of judges to choose punishment as they see fit, by narrowing the legal band width that is given to the judge, either by introducing obligatory minimum punishment, or by an obligation to punish certain cases of recidivism more heavily. Indeed, the government has sent law proposals to Parliament. I will not address this issue in the present paper, however.

Other contributors to the debate have proposed the introduction of lay participation in criminal trials as a remedy against mistrust in the judiciary.² The underlying thought here is that judges are alienated from what goes on in the world outside their isolated courtrooms. Bringing in people from that outside world would introduce the public perspective into the courts' deliberations, which then would change the courts' decisions in a way that would make them more in line with what the public wants, especially in terms of more severe

1 J.W. DE KROMER and H. ELFERS, 'Public Punitive Attitudes: A Threat to the Legitimacy of the Criminal Justice System?', in M.E. Oswald, S. Bieneck and J. Hupfeld (eds.), *Social Psychology of Punishment of Crime* (Chichester: John Wiley & Sons 2009); for a review on this topic outside the Netherlands see J. ROBERTS and M. HOUGH, *Understanding Public Attitudes to Criminal Justice* (Berkshire: Open University Press, 2005).

2 See for example J. EERDMANS, 'Het Debat over Lekenrechtspraak: De Politieke Opmaat', *Rechtspraak* 1 (2007), p.9-12; M. MAJSCHE, 'Lekenrechtspraak: Snelle Oplossing voor Onduidelijk Problemen', *Recht der Werkelijkheid* 2 (2007), p. 51-58.

65 DOAK, HENHAM and MITCHELL, 'Victims and the Sentencing Process: Developing Participatory Rights?', *ENGLISHER* 2011.

66 DOAK, 'Victims' Rights in Criminal Trials: Prospects for Participation.'