Victims' Fundamental Need for Safety and Privacy and the Role of Legislation and Empirical Evidence

Marijke Malsch*

Abstract

Various laws, guidelines and other types of regulation have been created that introduced new rights worldwide for victims of crime. Many of these rights focus on active victims who wish to step into the open and to orally express their views and experiences in court. Rights and wishes to remain in the background and to preserve one's privacy received less attention. This article focuses primarily on the wishes of victims that reveal their intention to not play an active role in the criminal process, and on victims who fear an invasion of their safety and privacy. According to the literature, such wishes and needs can be considered to be fundamental. The article questions the empirical basis for the present victim legislation: are the new laws that have been created over the decades founded on empirically established victim needs, or on presumed victim needs? The article concludes with a plea for a more extensive use of empirical findings that shed light on victim wishes in the legislation and the criminal process.

Keywords: needs for safety, victim impact statements, legislation, Empirical Legal Studies, privacy protection.

1 Introduction

Victims of crime have become increasingly visible within the criminal justice process. In the course of recent decades, the rights of victims have earned greater recognition in many countries. New international and national legislation and guidelines have accompanied these developments.[1] For instance, victims can report a crime, act as a witness, claim damages, submit a written victim impact statement or speak in open court about the crime. In doing so, victims reveal information about themselves to others and may make themselves visible to the outside world.

Empirical and legal research into the role and position of the victim within the criminal justice system has increased as well. Although a great deal of research in the field of victimology has addressed the rights accorded to victims within the criminal justice process, how victims' increased participation in the criminal process affects their private life has remained a relatively unchartered research terrain. Infringements of victims' privacy and safety throughout the criminal proceedings can be significant. A general assumption, which seems to underlie regulation and law-making on the one hand and research on the other, is that victims feel a need for further and stronger rights, and continually strive for an ever-increasing dominant and visible position within the legal system.[2]

This article challenges the general assumption discussing the findings of several studies of victims' privacy and safety needs. It appears that some victims want to come forward and relate what has happened to them in open court, but other victims are reluctant to do so. This divergence calls for legislators and policymakers to translate victims' wishes into a range of options in the legal system: not only should they create opportunities for victims to play an active role and recount their views, experiences and claims; they should also recognise in law other types of needs and wishes that reveal a need for safety and privacy, focusing more on maintaining a distance and *not* participating in the system.

This article focuses primarily on the wishes of victims that reveal an intention to not play an active role in the criminal process, especially the stage where the defendant's guilt is being established. In addition, it pays attention to the victim role that manifests an explicit wish to step into the open by speaking in open court, and examining how this has been translated into legislation. First, we elaborate on the concept of 'privacy' and relate this to the situation of crime victims and their needs for safety. We then discuss relevant empirical research related to such needs and wishes. Thereafter, we pay attention to a number of Dutch laws pertaining to victims' rights to speak in court. The article scrutinises the empirical basis for these laws: are they founded on empirically established victim needs or on *presumed* victim wishes? Has sufficient attention been paid to the variability of victim wishes and to the empirically demonstrated effects of victim rights that have been introduced? The article concludes with a plea for legislation

* Marijke Malsch is Professor of Empirical Legal Studies at Open Universiteit Netherlands.

1 References to such legislation and guidelines will be given below.

2 Investigating the role of assumptions underlying legislation is a key focus of Empirical Legal Studies, see M. Malsch, *Law Is Too Important to Leave to Lawyers* (2021).

doi: 10.5553/ELR.000203

and the criminal process to make more extensive use of empirical findings that shed light on victim wishes.

2 Privacy and the Victim of Crime

2.1 What Is Privacy?

Definitions and descriptions of privacy vary greatly.[3] This elusiveness is due, in part, to the way the concept has evolved. Whereas initially the notion of privacy was limited to what happened within the walls of peoples' own homes, over the years the concept has gained a much broader meaning.[4] The increasing use of the Internet has accelerated this widening of the scope of privacy; it has now extended to the protection of private information as well. This development has also changed the role of the government in guaranteeing privacy.

Today, the concept of privacy not only refers to what goes on in the physical world, it also bears a strong relation to the online world. Personal data are now often stored automatically, which may limit individuals' possibilities to choose freely which information they would like to keep private.[5] The use of online (social) media has exacerbated this problem, as people may not always be fully aware that what is published online can be traced and stored by other Internet users. This has resulted in an increased need for measures to protect personal data, which has been associated with the right to privacy.[6] Developments in privacy issues have also given rise to government obligations to actively guarantee the right to a private life and to prevent invasion, not only by government agencies themselves but also by third parties.

Victims of crime almost by definition suffer from invasion of their privacy: through the crime itself, and also due to actions by law enforcement professionals.[7] That happens when victims report the crime to the police, who store and share this private information with others. But private life is also invaded in courts, where victims may be confronted with the defendant, where they become visible to the law enforcement professionals, the media and the public, and where personal information is read aloud.

A general dichotomy can be created in the conceptualisation of possible types of victim privacy, consisting of (a) privacy relating to information or data that may identify a person or reveal sensitive information ('informational privacy') and (b) privacy relating to the physical exposure of an individual which may lead to recognition or safety concerns ('spatial privacy').[8] We speak of invasion of *informational privacy* in situations involving, for example, the inclusion, actual use and dissemination of identifying and other personal information about victims.[9] Invasion of *spatial privacy* concerns situations where the victim is exposed physically and/or becomes visible to the defendant and the defendant's friends (i.e. in court, in the street or near a victim's home), to journalists, to the public or to professional process participants during the hearing in open court. In particular, confrontations with the defendant and his or her friends can lead to privacy breaches, with safety concerns at stake here too.

It can be argued that the two types of privacy mentioned earlier do not encompass all conceivable forms of privacy.[10] On top of that, boundaries between the two types are blurred by the increasing use of modern information technology. Online information, including photographs, affects both informational privacy and spatial privacy, by offering opportunities to recognise and approach victims in the street or in court. The two types of privacy proposed thus primarily serve heuristic purposes.

2.2 The Relationship Between Privacy and Safety

Safety needs are closely related to privacy issues, especially privacy of a 'spatial' nature. Being physically approached by a defendant may lead to serious safety concerns. Attending court to witness the criminal case hearing may therefore not be an attractive option for victims, because unwanted confrontations with the defendant may occur there.

It may happen that a defendant – who was previously unaware of the victim's personal, identifying information -comes to know about it due to certain actions of law enforcement agencies, such as sharing the case file including such information. If a defendant visits a victim's home uninvited, having found out the victim's address, then tries to enter the dwelling, this may lead to serious safety and privacy breaches. Law enforcement may therefore inadvertently help defendants invade both victim privacy (informational, spatial or both) and

3 A.T. Kenyon and M. Richardson, *New Dimensions in Privacy Law - International and Comparative Perspectives* (2006); R. Wacks, *Privacy and Media Freedom* (2013).

4 S.D. Warren and L.D. Brandeis, 'The Right to Privacy', 1 *Harvard Law Review* 193-220 (1890).

5 H.R. Kranenburg, *Toegang tot documenten en bescherming van persoonsgegevens in de Europese Unie: over de openbaarheid van persoonsgegevens* (2007).

6 P.H. Blok, *Het recht op privacy* (2002).

7 Y. Jordaan, 'Privacy Concerns and Kinds of Protective Behaviour of Victims of Information Privacy Violation', 1 *South African Journal of Economic and Management Sciences* 348-56 (2013); A. van der Merwe and L.-M. Mitchell, 'The Use of Impact Statements, Minimum Sentences and Victims' Privacy Interests: A Therapeutic Exploration', 53 *De Jure Law Journal* 1-18 (2020); S. Phipps-Yonas, 'Making the Case for Victims' Privacy in Civil Sexual Abuse Lawsuits', 14 *Psychological Injury and Law* 71-76 (2021). https://doi-org.ezproxy.elib11.ub.unimaas.nl/10.1007/s12207-021-09401-5.

8 M. Malsch, N.E.J. Dijkman & A. Akkermans, *Bescherming van de privacy van slachtoffers van criminaliteit* (2015); J.B.J. Van der Leij, *Privacyrecht en slachtoffers - Een studie naar de grondslagen en juridische kaders van privacy van slachtoffers* (2015).

9 For example, when personal information related to a victim or witness is recorded in the police report, which may then be forwarded to (among others) the defendant.

10 For instance, information about a victim that does not necessarily identify the victim but consists of intimate details, such as information about relationships (so-called 'relational privacy'). It could be argued that this type of privacy may also be categorised as informational privacy.

doi: 10.5553/ELR.000203

their safety. Such a situation emphasises the importance of strict measures to prevent this happening. There is thus an overlap between privacy and safety. Where relevant, safety issues will be addressed in the following sections, on top of the issues pertaining to privacy.

3 Measures to Protect the Privacy of Victims of Crime

The criminal justice systems of many countries have implemented various measures to help protect victim privacy, which may be of an informational nature, a spatial nature or both. Measures to conceal the identity of a victim or witness may vary greatly from case to case, ranging from omitting a name and/or address from the case file, providing face-concealing facilities and voice distortion, or limiting the questioning by the defence to written questions asked via the magistrate, who submits them to the witness (victim) outside the presence of the defendant. As will be shown in the following sections, such measures seem pertinent for victims – especially during the police investigation (not including the victim's personal information in the file and/or not forwarding this information to the suspect) and at the trial in open court, where personal information is read aloud and the victim is visible to all present.

In the Netherlands, four options are available to shield the identity of victims during criminal proceedings: testifying to the police using a different address,[11] testifying to the police using a number,[12] testifying to the investigating judge as a partially anonymous witness[13] and testifying to the investigating judges as a 'threatened witness'.[14] These four possibilities ensure partial or full anonymity. All four options appear to be offered to a very limited group of victims only, because Dutch law and policy require 'legitimate reasons' for these measures to be applied.[15]

Additional privacy protection measures that are sometimes taken in high-profile cases include anonymising victims' written testimonies, censoring intimate photo/video footage, shielding off the press or making it possible for victims to follow the court hearings from a different room via live video streaming. Such measures are aimed at protecting both the victim's privacy and his or her safety. In one case where dozens of children had fallen victim of sexual assault by one defendant, separate court sessions were held so that the multiple victims also had their identities shielded from each other. In a case that involved about 120 women who had been victim of botched plastic surgery with serious resulting injuries, police officers decided to include the names and the photos of the victims in separate case files. As a result, apart from victims themselves, only the professional process participants could view images of the injuries.[16]

In practice, all the privacy protection measures presented here amount to a form of *shielding* – of appearance, identity and activities. 'Shielding off' thus appears to be a concept that may cover all or most kinds of privacy protection measures, often of importance to, or motivated by, safety concerns at the same time.

4 European Norms on the Right to Privacy

The right to privacy is enshrined in several international human rights documents.[17] In addition, the constitutions of most countries include a section on privacy that may or may not have been derived from these international human rights documents.[18] These treaties and constitutions were the basis for a range of national and international laws and policy regulations that introduced measures to protect the privacy of citizens in general.[19] The national laws and policies on victims' rights and the role of victims in criminal proceedings may differ considerably from one national legal system to another. In general, the right to privacy is not absolute and may under certain circumstances be subject to interference. According to the European Convention of Human Rights (ECHR; Art. 8.2), this is only possible if the interference is in accordance with law and necessary in a democratic society in pursuit of a legitimate aim.

Article 8 paragraph 1 ECHR aims at protecting all individuals, which evidently includes victims and their families. The first paragraph of Article 8 concerns the right to respect for private and family life, home and correspondence. The Court has interpreted Article 8 in the face of new technologies and nowadays the protection of personal data falls within the scope of private life.[20] This broad interpretation makes it possible for the Court to regulate most government intervention, which it does on the basis of the requisites stipulated in Article 8 ECHR. A public authority is allowed, under specific circumstances, to infringe upon the privacy rights of citizens. For any interference in private life, the Court assesses whether the interference can be justified under Article 8 paragraph 2 ECHR. Moreover, any infringement

11 Residential address is replaced by the address of the agency, for example that of the police station or the law office. This type of protection appears to be relatively most often applied in practice, see Malsch, Dijkman and Akkermans, above n. 8.

12 Name and residential address are shielded.

13 Certain identifying information is shielded.

14 All identifying information is shielded, including the physical appearance of the witness. The witness will not be summoned to testify in open court.

15 Malsch, Dijkman & Akkermans, above n. 8.

16 *Ibid.*

17 Most importantly, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Arts. 7 and 8 of the Charter of Fundamental Rights of the European Union.

18 E.g. Art. 10 of the Dutch Constitution.

19 At European level, see e.g. EU Directives with regard to privacy and electronic communications (2002/58/EG, 2009/136/EG), data protection (95/46/EG), data retention (2006/24/EG).

20 See, for instance the cases of *Malone* v. *UK* (1984) and *S and Marper* v. *UK* (2008).

of the exercise of the right to privacy must have a legal basis.[21] It is a significant development that the right to privacy has obliged states not only to *respect* the private life of victims, or not interfere with it disproportionately, but also increasingly to adhere to positive obligations that require effort to *actively protect* the private life of persons from third party intrusions.[22] The link with spatial privacy and safety issues seems obvious here.

Regulations originating from the EU are also of relevance to the privacy of victims of crime. Directive 2012/29 of the EU, establishing minimum standards on the rights, support and protection of victims of crime ensures that persons who have fallen victim to crime are recognised, treated with respect and offered proper protection, support and access to justice. Importantly, the Directive includes a section on private life protection under Article 21, which reads that authorities should take appropriate measures during criminal proceedings to protect the privacy of victims and their family members. The rationale of such protection measures is explained in the preamble:

Protecting the privacy of the victim can be an important means of preventing secondary and repeat victimisation, intimidation and retaliation and can be achieved through a range of measures including non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of the victim. (para. 54, Directive 2012/29).

Article 53 of the Directive also indicates measures that should be made available to victims of crime to prevent distress during court proceedings, in particular as a result of visual contact with the offender, his or her family, associates or members of the public. Article 22 of Directive 2012/29 proposes a so-called 'individual assessment' of victims. States should ensure that victims receive an individual assessment to determine whether they have specific protection needs. It should be determined to what extent victims should be offered special protection measures in view of their particular vulnerability during the criminal proceedings.

It can be concluded that international treaties and regulations pay due attention to victims' privacy and safety. The proposed measures focus on both the informational and the spatial types of privacy as discussed earlier.

5 Empirical Research Into Victim Wishes and Privacy Needs

Becoming a victim of crime already implies a serious breach of this person's privacy.[23] Any additional infringements of victim privacy throughout the criminal proceedings should therefore be avoided where possible. Secondary victimisation refers to the possibility that victims of crime can feel once more victimised as a result of participating in the criminal justice process. It is an indirect result of how institutions and individuals respond to the victim.

A review of thirty-three empirical studies from around the world on crime victims' wishes showed great diversity in the needs and expectations of victims of crime when involved in criminal proceedings.[24] Most crime victims prioritise the need for emotional support/someone to talk to, information, security and protection, as well as the need to be heard in criminal proceedings. The review focused primarily on needs that were expressed by victims themselves. Notably, victims generally do not spontaneously articulate a wish to speak in court. Neither do they do so with respect to making a statement in open court about the defendant's guilt nor the punishment the defendant should receive. Other needs seem more important.

5.1 Fundamental Needs

Needs as expressed by crime victims generally start with the fundamental need for safety. According to Staub (2004), the need for safety (security) takes precedence over other needs, including those relating to effectiveness and control, positive identity, positive connection (to others), etcetera.[25] The central position of the need for safety is reflected in other studies reviewed by ten Boom and Kuijpers (2012), who categorise this as a 'primary need'.[26] If personal safety is threatened because of an offence, the fundamental human need for safety is impacted. By contrast, ten Boom and Kuijpers' (2012) review did not identify the need for self-realisation or autonomy as a primary need – 'basic needs' like the need for physical safety seem to play a more dominant role. The wish to submit an oral victim impact statement can therefore be expected not to feature among the 'fundamental needs'.[27]

5.2 Legal Practice

How do these fundamental needs for safety work out in legal practice? What is their relationship with privacy wishes? Research into individuals' preparedness to report crimes to the police suggests that victims would be more willing to make an accusation if they were able to shield at least some of their personal information.[28] Victim safety concerns play an important role in deciding

21 R.C.A. White, C. Ovey & F.G. Jacobs, *The European Convention on Human Rights* (2010).

22 As was also explained by the European Court in *Hatton and Others* v. *UK* (2003).

23 Jordaan, above n. 7; van der Merwe and Mitchell, above n. 7; Phipps-Yonas, above n. 7.

24 A. Ten Boom and K.F. Kuijpers, 'Victims' Needs as Basic Human Needs', 18(2) *International Review of Victimology* 155-79 (2012).

25 E. Staub, 'Basic Human Needs, Altruism, and Aggression', in A.G. Miller (ed.), *The Social Psychology of Good and Evil* (2004), at 51-84.

26 Ten Boom and Kuijpers, above n. 24.

27 *Ibid.*

28 J. Tolsma, 'Aangiftebereidheid: Welke overwegingen spelen een rol bij de beslissing om wel of niet aangifte te doen?' in L. Smets, J. De Kinder & L.G. Moor (eds.), 'Proces-verbaal, aangifte en forensisch onderzoek', 4 *Cahiers Politiestudies* 21, at 11-32 (2011).

doi: 10.5553/ELR.000203

whether or not to make a victim impact statement.[29] Most victims prefer to submit a *written* impact statement and to do so *before* the actual hearing of the case, electing to remain in the background during the hearing of the case in open court.[30] Some victims deliberately avoid attending court sessions from fear of being confronted with the defendant.[31] As a consequence of these victim concerns and wishes, far fewer *oral* statements are delivered in open court than *written* statements, which supports the general finding that a substantial population of crime victims attaches great value to ways of shielding personal information and conserving their spatial privacy and safety during criminal proceedings.[32] In sum, these studies reveal that victims have pertinent safety and privacy wishes in criminal proceedings against the suspect and that these wishes are of a fundamental nature. The findings suggest that victims' wishes and expectations of their wishes being taken into account can play an important role in victims' preparedness to participate in the criminal justice system or to refrain from taking part.

To what extent does the legal system respect the victim's wishes to feel safe, *not* to participate and to shield one's identifying data? This article takes the case of the Netherlands as an example, but findings may also apply to other countries.[33] Most criminal investigations start when a victim reports a crime to the police. The victim will be asked questions about the alleged crime and his or her identity will be verified. Following the official notification of the crime to the police, the victim may serve the role of a 'witness' and may, once again, be questioned as such. The victim's name and contact details, such as address and phone number, are generally automatically noted in the written report or the electronic file of these testimonies. The accused person and his or her lawyer will receive the police file containing all victim (witness) statements, including information about the witness's identity, like their name and address. Three-quarters of the victims taking part in the study, who had all notified the police, appeared not to have been told that such personal information is included in the case file. An opportunity exists to shield this information from the defendant but the victim was regularly not informed of this either.[34] Some victims wrote that they found it 'slightly shocking' to discover that their names and addresses were noted in the police file that was then directly passed to the defendant, while they would have preferred these personal data to be shielded. Officials from the Prosecution Office sometimes make an effort to censor identifying information, for example by using a black marker to redact information in documents included in the file, such as name and address. However, documents are not anonymised in a systematic and regulated way. Moreover, in spite of these initiatives, the victim's identity may still be unintentionally revealed later in the criminal trial, as interviews with the professionals indicated. The more the number of processing officials who are involved in the case, the harder it becomes for the identifying information to remain shielded.[35]

Privacy and safety concerns may also arise while the criminal case is being handled in open court. If no special measures are applied, victims and defendants access the courthouse through the same entrance and may find themselves next to each other in line for the security check. When waiting for the case to begin, victims often sit opposite defendants in the waiting area. Two victims made it clear during the interviews that they had not expected to have to wait together with the defendant in the same waiting area before the start of the hearing. Because the previous hearing had taken longer than scheduled, a victim of stalking ended up sitting in the waiting room next to the defendant for one hour, 'not knowing where to look'.[36] Such a situation may result in an invasion of victims' spatial privacy, engendering the feeling of being unsafe.

Policy guidelines instruct that all courts in the Netherlands should provide for a separate entrance, as well as a separate room where victims can wait without being confronted with the defendants before and after public hearings.[37] However, in practice, it seems that officials regularly fail to offer these conveniences. In some courts, the victim room is tucked away somewhere in the building, without adequate basic facilities for victims to feel comfortable. A judge who was interviewed recounted that court officials had once forgotten to notify the victim in the victim room that the hearing was starting, which led to the victim missing the trial altogether.[38]

Victims are not always aware that their name or address will be read out in public during court hearings. Hearing their names and/or addresses being read aloud made some of them feel 'exposed' or 'vulnerable'. Other vic-

29 V. De Mesmaecker, 'Antidotes to Injustice? Victim Statements' Impact on Victims' Sense of Security', 18(2) *International Review of Victimology* 133-53 (2012).

30 K. Lens, A. Pemberton & M. Groenhuijsen, *Het spreekrecht in Nederland: een bijdrage aan emotioneel herstel van slachtoffers?* (2010); K. Lens, *Do these Words Give Rise to Doubts? Unraveling the Effects of Delivering a Victim Impact Statement* (2014); Malsch, Dijkman & Akkermans, above n. 8.

31 Malsch, Dijkman & Akkermans, above n. 8.

32 Lens, Pemberton & Groenhuijsen, above n. 30; Lens, above n. 30.

33 The results discussed here originate from an empirical study of privacy wishes conducted in the Netherlands. A survey (n = 43) and oral, semi-structured interviews (n = 11) were conducted with victims of crime and relatives. Respondents of the survey (n = 43) were victims of different kinds of crime, including burglaries, domestic violence, stalking, sex offenses and homicide/murder or attempted homicide/murder. Of all respondents, 62% were female and most respondents were between 45 and 55 years of age (23%) or older than 65 (20%). Thirteen of the 43 respondents knew the defendant personally; the others did not know the defendant. On top of that, 28 officials from a variety of organisations (police, prosecution, courts, lawyers, victim organisations, insurance companies and journalists) participated in an interview about measures to protect victim privacy. The sample for this study was not large, but the findings provide a good insight in experiences and views of victims with respect to privacy and safety. For more details, see Malsch, Dijkman & Akkermans, above n. 8.

34 Malsch, Dijkman & Akkermans, above n. 8.

35 *Ibid.*

36 *Ibid.*

37 *Modelregeling passende verblijfsomgeving slachtoffers* (2012). Programma Strafsector, Raad voor de Rechtspraak, at 9 and 13.

38 Malsch, Dijkman & Akkermans, above n. 8.

tims had arranged that their personal details would not be mentioned. A victim of stalking who had her address shielded during the police interrogations wrote that she appreciated how the judges did not disclose her address during the public hearing either. A victim of violent robbery had asked the court before commencement of the hearing not to mention her name and she was satisfied that the court had complied with her request.[39] Preserving anonymity in such situations thus seems to require special interventions on the part of the victim, rather than it being self-evident.

Several victims felt the public hearing to be 'confrontational' or even 'intimidating'. A couple of victims wrote that they felt as if they were being watched 'as if *I* were the defendant'. A victim of domestic violence noted that she found it incredibly confrontational to find out that the defendant (her husband) had brought friends and colleagues along to the hearing of the case, while intimate details about their relationship and the alleged assault on her were discussed in public. Some victims said they were happy to take a seat in the back of the public gallery, in order to avoid visibility and confrontations.[40] These victims' experiences and views highlight their desire to remain at a distance, to shield themselves and not to play an active role in the criminal process.

6 Victim Impact Statements (VIS)

Speaking in open court is the victim's role in a criminal process which most obviously reveals the act of stepping into the open, bringing with it serious risk of invasion of the victim's privacy and feelings of insecurity. Not every victim would therefore like to play such a role. This section of the article focuses on victim impact statements, the way they have been introduced in Dutch legislation, how laws on this subject have been substantiated and the role of empirical evidence in this process. Other than, for example the victim's right to receive compensation, victim impact statements almost by definition go together with serious, direct risks for privacy invasion – not only of an informational nature but also of a spatial nature. A legislator creating rights to speak in open court, for instance regarding the defendant's guilt and penalty, should be aware of such risks and can be expected to take a protective stance: preventing such risks from becoming reality.

In the following sections, attention is paid to what empirical knowledge on victim wishes and victim roles was available at which specific moment during the legislative process. We relate these findings to legislative acts regarding the victim's right to speak in open court: to what extent did empirical research influence legislation? Next, we analyse the parliamentary process that took place regarding the drafts for laws, the comments forwarded in relation to these drafts, the extent to which these comments were based on empirical findings, and how they were dealt with.

Empirical research suggests that victims entertain certain concerns about making an impact statement. They indicate that feelings of insecurity or 'being uncomfortable' play an important role in deciding whether or not to make such a statement.[41] Other studies reveal that most victims prefer to submit a *written* impact statement and to do so *before* the actual hearing of the case. This statement is then read aloud by the presiding judge in open court, while the victim remains in the background or even does not attend the trial.[42] Some victims deliberately avoid attending the court session from fear of being confronted with the defendant and so do not speak in court.[43] There is thus a group of crime victims who attach great value to possibilities for shielding personal information and conserving their spatial privacy and safety during criminal proceedings.[44]

6.1 Introduction of Victim Impact Statements Into Dutch Law

In 2005, the option for victims to speak in open court about the consequences of crime was introduced into Dutch law.[45] One of the main incentives for the law was the expectation that it would induce therapeutic effects in the victim, as a consequence of speaking in open court to the judge and other process participants. At the time of the parliamentary debates on the law, only a small number of empirical studies on the effects of victim impact statements were available. However, these studies were not mentioned or barely mentioned during the legislative process. The empirical studies published then did not unequivocally indicate the presumed therapeutic effects of speaking in open court; instead, they showed more mixed results.[46] The empirical basis for the victim deriving therapeutic effects from speaking in open court was therefore tenuous at the time.

The legislator who initiated the legal option for the victim to speak in court founded the law primarily on anecdotal arguments. He had been a practising judge before becoming a Member of Parliament and, as such, had encountered the parents of murdered children who wished to speak in court but were not always allowed to do so. He had experienced judges who sometimes did allow victims or relatives to speak about the consequences of a crime and sometimes did not, and his aim with the law was to create greater legal equality in this respect.

39 *Ibid.*
40 *Ibid.*
41 De Mesmaecker, above n. 29.
42 Lens, Pemberton & Groenhuijsen, above n. 30; Lens, above n. 30; Malsch, Dijkman & Akkermans, above n. 8.
43 Malsch, Dijkman & Akkermans, above n. 8.
44 Lens, Pemberton & Groenhuijsen, above n. 30; Lens, above n. 30.
45 Wet van 21 juli 2004 ter invoering van spreekrecht voor slachtoffers en nabestaanden (*Stb.* 2004, 382).
46 N. Doornbos, N. Elbers, M. Kragting & M. Malsch, 'Laat wetgever empirische kennis beter benutten!' 43 *Nederlands Juristenblad* 3298-3304 (2020a); N. Doornbos, N. Elbers, M. Kragting & M. Malsch, *Wetgeving over spreekrecht voor slachtoffers: een 'voortdenderende trein'? Over de benutting van empirisch onderzoek bij de totstandkoming van wetgeving* (2020b).

doi: 10.5553/ELR.000203

Moreover, this Member of Parliament had close contacts with organised groups of parents of murdered children, who had lobbied to promote creation of the new law.[47]
A meta-analysis of existing empirical studies on pertinent issues related to victim impact statements could have supported the debate in Parliament, but none was available. As a consequence, the exchange of arguments pro and contra oral victim impact statements was sometimes nebulous and confused, and there was a significant lack of clarity with regard to central issues like the potential effects of victim impact statements on both the victim's well-being and the court's decision. Members of Parliament regularly referred to the risk of secondary traumatisation as a result of further confrontation with the crime and with the defendant in open court when submitting a victim impact statement. Several Members of Parliament objected to the possibility of emotions playing an increased role in the generally dispassionate Dutch case hearings, as a consequence of victim impact statements. Moreover, the fear was expressed that speaking in court would undermine the presumption of innocence, the request that the defendant should be treated as innocent until a court has proven his or her guilt. At the other end of the spectrum, mention was made of positive effects such as more information being provided to the court through the victim statement, increased opportunities for victims to participate, as well as the earlier-mentioned anticipated therapeutic effects.[48]
To summarise, the introduction of oral victim impact statements lacked a solid empirical foundation with respect to its various presumed effects. After the first law came into force, however, new empirical research started to emerge. New drafts for laws expanding victims' rights to speak in court were also created. What was the relationship between this empirical research and these new laws?

6.2 Unlimited Victim Right to Speak in Open Court

After a number of relatively minor legal extensions, the Dutch law of 2016 substantially increased victims' opportunities to speak in open court.[49] From that moment on, victims of crime were not only allowed to speak about the crime's consequences for themselves, they were also permitted to express their opinions in open court on the defendant's guilt and the penalty he or she should receive. This law made the victim's right to speak in open court unlimited. To what extent was this new law based on empirical findings? Did victims wish to play such a role? How did Parliament conduct the debate on this law and how well-founded was the argumentation pro and contra this extension of the right to speak in court?

47 Doornbos et al., above n. 46.
48 *Ibid.*
49 Wet van 14 april 2016 ter aanvulling van het spreekrecht van slachtoffers en nabestaanden in het strafproces (*Stb.* 2016, 160).

In the time period between the introduction of the option to speak in court and this new law, several empirical studies appeared. These studies revealed new information on the variety of victim needs,[50] actual use of the right to speak in court and victims' preferences for submitting either a written or an oral impact statement.[51] The – potential – effects on the court decision of (often emotional) victim impact statements was studied too, with no unambiguous effect found.[52] Importantly, a review was carried out of studies on the potential therapeutic effects on victims from speaking in court, which was highly relevant to the general assumption underlying the various laws.[53] In addition, the previously mentioned study of privacy wishes and protection measures was published in that period.[54] Therefore, in contrast to when the first law came into force, this new law could actually be based on a considerable number of empirical studies that shed light on victim needs and the effects of victim impact statements.
What did these empirical studies say about victim wishes and the effects of speaking in court? With regard to presumed therapeutic effects, the literature review by Kunst (2015) showed no unambiguous evidence for such effects to be engendered by speaking in open court. Exercising this right does not seem to clearly result in either therapeutic or traumatic effects, nor in their absence. The research reviewed did not demonstrate that speaking in court influenced general feelings of fear, anger and control over emotional recovery after the crime. And if speaking in court does lead to detrimental effects, these seem to disappear relatively quickly.[55] So the central argument for instituting the right to speak in court appeared not to be supported by empirical evidence.
The studies by Lens et al. (2010) and Lens (2014) showed a general victim preference for *written* statements, drawn up before the case hearing and read aloud by the presiding judge rather than by the victim himself or herself.[56] Unsurprisingly, written statements appear to be used far more frequently than oral statements, as these studies also demonstrated. Some victims do indeed entertain a wish to speak in court and express their views on the defendant's guilt and the penalty, but this does not seem to be a dominant wish among all or most victims. This finding was confirmed by the study by Malsch et al. (2015); about a third of the victims explicitly stated that they did not want to attend the court session from fear of confrontation with the defendant.[57] A number of important assumed effects and victim wishes re-

50 E.g. Ten Boom and Kuijpers, above n. 24.
51 E.g. Lens, Pemberton & Groenhuijsen, above n. 30; Lens, above n. 30.
52 For an overview of this research, see Lens, above n. 30.
53 M. Kunst, 'De therapeutische werking van slachtofferdeelname aan het strafproces, Een kritische beschouwing vanuit een psychotraumaperspectief', 42(1) *Beleid en Maatschappij* 32-45 (2015).
54 Malsch, Dijkman & Akkermans, above n. 8.
55 Kunst, above n. 53.
56 Lens, Pemberton & Groenhuijsen, above n. 30; Lens, above n. 30.
57 Malsch, Dijkman & Akkermans, above n. 8.

doi: 10.5553/ELR.000203

lated to speaking in open court were therefore not supported by empirical evidence.

6.3 Parliamentary Debates

During Parliamentary debates on the laws pertaining to victim impact statements in the Netherlands (the 2005 and 2016 laws, and also later laws), various arguments supporting or opposing the right to speak in open court were continually addressed. One such argument related to the assumed therapeutic effects of speaking in open court. Although empirical evidence on this issue was available when the later drafts were debated,[58] the invalid argument continued to be presented that considerable therapeutic effects could be expected from exercising the right to speak in court.[59]

With regard to the assumed wish to speak about the defendant's guilt and the punishment he or she should receive, a heated debate took place in Parliament, in which the Minister repeatedly referred to specific percentages of victims who would entertain such a need. However, he failed to mention the original source of the empirical study that was supposed to have revealed these percentages. Members of Parliament noticed this lack of clarity but were unable to obtain more precise information from the Minister about the sources of the percentages.[60]

Moreover, Members of Parliament persisted in questioning the necessity of legislation for introducing and extending the right to oral victim impact statements. Such legislation would be unnecessary because courts in the past had already admitted that few victims wanted to play such a role, as was apparent from interviews.[61] Even before the first law, some courts had tacitly permitted victims to express views on the defendant's guilt and punishment. The necessity of a new law was questioned once again in respect of the most recent draft for a law requiring the defendant to be present at their case hearing. This draft was submitted with the aim of the victim then being able to look the defendant in the eye when speaking in open court.[62] Such a law would be equally superfluous, some Members of Parliament argued, because most defendants do attend their case trial of their own accord.[63]

During the debates on all drafts, Members of Parliament also continued to address the risk of the presumption of innocence being undermined by the victim speaking in court – the more vehemently with respect to the law permitting the victim to express opinions on the defendant's guilt and punishment. In Parliament, the option was proposed to split the case hearing in court into two parts in order to prevent the presumption of innocence being undermined: the first part to establish the defendant's guilt; and the second part to decide on the punishment and enable victims to exercise their right to speak. This option was subject to recurring debate too but the Minister dismissed any such proposals, arguing that other countries do not have such a system either.[64]

Reflecting on the parliamentary debates on the various laws, it may be concluded that they were conducted in a rather unsystematic way: some empirical studies regarding victim needs and the effects of speaking in court were largely neglected, while others were overstated. On the side of the government, victim needs and wishes to speak in court were continuously emphasised and actively supported, while wishes to remain in the background and to preserve one's privacy and safety received far less attention.[65]

7 Conclusions

Empirical evidence shows that victims have wishes that emanate from their needs for safety and for privacy. In view of the fundamental character of these needs, their fulfilment should come first; other needs should be pursued after these are fulfilled.[66]

Privacy as a concept is closely related to safety. Out of concern for their safety, victims may want to refrain from participating in criminal proceedings, prefer to remain invisible, avoid visiting court sessions and attempt to shield their personal information, thereby protecting their privacy. Studying the case of the Netherlands, it appears that measures have been created to protect such wishes. However, empirical research also suggests that these measures have a largely ad hoc character, are not used in a systematic way and are regularly not applied at all. The result is that victims may unnecessarily be confronted with the defendant, become visible despite preferring to remain incognito or have their personal data revealed while they actually wish it to be shielded. Since the study of Dutch measures to protect privacy and safety and their application made use of a restricted number of respondents, the magnitude of non-compliance with privacy measures cannot be assessed with certainty. However, in view of the types of non-compliance and their invasiveness, law enforcement officials could do more to act in alignment with the rules that have been created.[67] In particular, the Dutch police and the courts could be more active in this respect.

The other type of victim wishes, namely to step forward and express one's wishes and views in open court, has received far more attention from the legislature and the

58 See Kunst, above n. 53.
59 Doornbos et al., above n. 46.
60 *Ibid.*
61 Lens, Pemberton & Groenhuijsen, above n. 30.
62 Wetsvoorstel van 26 november 2019 over o.m. verplichte aanwezigheid van de verdachte op de strafzitting, mede met het oog op de uitoefening van het spreekrecht door slachtoffers en nabestaanden, Kamerstukken II 20`19-2020, 35 349, nr. 2 (*Stb.* 2021, 220).
63 Doornbos et al., above n. 46.
64 *Ibid.*
65 See for questions asked in Parliament about victims' privacy wishes: www.rijksoverheid.nl/documenten/kamerstukken/2020/03/30/antwoorden-kamervragen-over-het-bericht-slachtoffers-misdrijven-willen-meer-privacy-angst-voor-wraak-daders.
66 Staub, above n. 25; Ten Boom and Kuijpers, above n. 24.
67 Malsch, Dijkman & Akkermans, above n. 8.

doi: 10.5553/ELR.000203

legal system: oral victim impact statements have been enabled on an increasing scale. The execution of this right may feature in media coverage, thereby drawing still more attention to the victim. In creating and extending these rights, the legislature adopted arguments and assumptions that were insufficiently based on empirical evidence. Empirical studies showing that victim impact statements do not have undisputable therapeutic effects were largely neglected and the same applies for evidence that many victims prefer writing impact statements over speaking out in court – or not participating in the criminal proceedings at all.[68] The 2021 law that mandates defendants' presence at the hearing of their cases, which was motivated by the victim then being able to look in the defendant's eyes while speaking, was not introduced in tandem with measures to further protect victim privacy and safety, despite the pleas of several Members of Parliament who advocated this. Potentially stricter measures on the issue of victim privacy were – again – postponed.[69] The situation with respect to victim privacy and safety is thus still rather poor; there has been little improvement on these issues.

The question may be asked whether the situation where some victims entertain the wish to speak in open court[70] while others do not is sufficient for a legislator to create such a right. Such a question cannot be answered here in general terms. Our thesis in this article, however, is that the legislator can be expected to explicitly balance all arguments pro and against creating a new right, including those of an empirical and normative nature, and that pertinent, fundamental needs should not be ignored.[71] The analysis has demonstrated that such an in-depth, explicit balancing of arguments and giving of reasons by the legislator has not taken place to a sufficient degree.

The legislature's decision-making as examined in this article suggests that other motives play a more dominant role than the wish to defend fundamental victim needs. According to Roberts et al. (2002), 'penal populists' allow the electoral advantage of a certain policy to take precedence over its penal effectiveness.[72] In other words: if law makers expect certain electoral advantages to result from paying more attention to particular – assumed – victim wishes above actual, empirically proven needs, unbalanced legislation may follow. This has probably been the case with the creation of ever-expanding rights to speak in court. Since the effects of penal populism are almost certainly evident in every country, findings as discussed in this article thus extend to other countries as well. Politicians' advocacy for harsh punishments often goes together with unlimited support for victim rights – this situation is not typical of the Netherlands and it does not seem related to a specific (type of) legal system. Attention being paid to victims pleases the media and the public, and may attract voters during elections, at least more than attention paid to the rights of suspects. But this lack of balance may ultimately be at the expense of the *fundamental* needs of a substantial group of victims, namely those who prefer to remain in the background and who have serious concerns for their safety and their privacy; these needs risk being forgotten.

Funding

The study by Malsch et al., 2015, was supported by the Netherlands Ministry of Security and Justice: WODC [grant number 2473B].

68 The reviews of empirical research by ten Boom and Kuijpers (2012) and Kunst (2015), and the empirical study by Malsch et al. (2015) were all commissioned by the Dutch Ministry of Justice and Safety. However, the outcomes of these three studies seem to have had hardly any influence on the Ministry's policy and regulatory initiatives, perhaps because they were not aligned with the Ministry's general preferences and policy focus. See Doornbos et al., above n. 46; Malsch, Dijkman & Akkermans, above n. 8.

69 Tweede Kamer der Staten-Generaal, Vergaderjaar, 2020/21, 35349, nr. 18, *Stb*. 2021, 220.

70 A publication by Pemberton (2005), regularly referred to during Parliamentary debates, indicates that the number of victims wishing to speak in court would increase if victims could speak out on the defendant's guilt and the penalty. This study, however, is not publicly available and its methods and conclusions cannot therefore be assessed. Other studies have different outcomes, as this article has made clear.

71 Like the presumption of innocence and the risk of imbalance in the legal system.

72 J.V. Roberts, L.J. Stalans, D. Indermaur & M. Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (2002).

doi: 10.5553/ELR.000203