Towards a two-stage process?

On the pros and cons of criminal proceedings in two stages,
in relation to the positions of victim and defendant

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Summary

As the first chapter explains, this research, which was conducted for the Research and Documentation Centre at the request of the Sanctions and Prevention Policy Department of the Ministry of Security and Justice, was prompted by two discussions carried out in the House of Representatives. As part of the debate on the bill to expand the victims’ right to speak in court, an amendment was submitted which proposed no longer limiting the subject matter of that right to the consequences brought about by the criminal offence. During the discussion about the amendment (which was later withdrawn), the idea emerged that an unlimited right to speak could only be provided in the second stage of a two-stage process. In connection with discussions about issues related to involuntary commitment, the question arose whether a two-stage process might help solve or reduce the problem of non-cooperative suspects.

Meanwhile, academics also debated the pros and cons of a two-stage process. Groenhuijsen examined this debate in his preliminary advice to the Dutch Lawyers Association in 2012. He believed that a two-stage process might be fruitful where the accused denied the charges, because observation and reporting could still occur after a declaration that the charges had been proved. The situation concerning the new rights for crime victims was, in his view, the most difficult to assess. Bearing all of this in mind, Groenhuijsen opted to maintain the current law. A factor which he deemed important was that the victim would not be treated respectfully if victim rights could not be fully exercised until after a conviction.

The legislative discussion and Groenhuijsen’s analysis make clear that the introduction of the possibility of a two-stage process has been advocated on very diverse grounds. The primary task of this research is to properly weigh the various interests and arguments put forward for a two-stage process. The victims’ position and the manner of conducting criminal proceedings have been analysed from a legal perspective, interviews have been conducted with lawyers in this area and relevant aspects of the substantive and procedural criminal law in several countries have been identified.

The second chapter focuses on the victims’ position. Victims can act in various capacities in the Dutch criminal justice system. If an offence is not prosecuted or prosecution is discontinued, victims may, as directly interested parties, make a written complaint to the court of appeal. The complaint may not only pertain to the choice not to or no longer to prosecute a crime, but also to the basis selected for prosecution. If the Public Prosecution Service wishes to prosecute someone for involuntary manslaughter, the complaint may, for instance, assert that the person should be prosecuted for voluntary manslaughter as well. At the court hearing, however, the victim does not enjoy any status as a directly interested party. This could conceivably be changed, and directly interested parties might be given the right to speak after the public prosecutor, in order to advise the court.
Victims can also furnish information about a crime. In those instances, the victim will typically be examined as a witness by the police and perhaps the court. In addition, for several years now, the victim has been able to ask the public prosecutor to add to the file documents which he/she deems relevant to assess the case against the accused or his/her claim against the accused. It does not make sense to further accord the victim a right to provide a witness statement if the parties to the proceedings and the court do not need this. The drawbacks (emotional distress as a result of interrogation by the defence) are not outweighed by the benefits (expected informational value).

The victim may also have suffered injury on account of the criminal offence, in which instance he/she can intervene in the case as an aggrieved party. Substantively, the victim's position as an aggrieved party has been considerably boosted by the introduction of the damages order. Criminal courts granting the claims of aggrieved parties often impose a damages order up to the same amount. The State is responsible for collection in that case. And, if the convicted person has not or not fully satisfied his/her obligations under the damages order within eight months after this became final, the State will pay out an amount in some cases. Against this background, it has become critical for the victim as the aggrieved party whether the criminal court will hear and grant his/her claim. In that connection, affording the criminal court the opportunity to defer hearing the aggrieved party's claim and any associated imposition of a damages order until the main action has been tried could be considered.

Victims of the serious crimes described in the law have a right to speak, too. At the court hearing, they are allowed to provide a statement about the consequences which the crime has had for them. The State Secretary has announced that he wants to expand the victims’ speaking rights to enable them to say what they wish to say in court without limitation. It is questionable whether this proposal should be fleshed out by expanding the right to speak itself. The victim would thus be entitled to comment on the evidence and the punishment before the public prosecutor had made his/her demand. The victim’s desire to be heard will be taken seriously if a right to be consulted is incorporated properly into the statutory regulations. This can be accomplished through a right to consultation which may be exercised after the public prosecutor’s demand.

The third chapter talks about criminal procedure. How the introduction of a possible two-stage process would relate to the existing criminal procedural regulations is looked at from a number of angles. To a certain extent, various stages may already be distinguished under the current regulations concerning the inquiry by the court. The decision to split up proceedings could be situated in the preparatory stage, akin to a management decision. If this option is chosen, information which solely concerns the punishment to be meted out will be included in the pleadings from the start. If introduction of the option of a two-stage process were partly based on the notion that this is undesirable, enabling proceedings to be split up before the hearing (at the time of scheduling by the president, for instance) would be logical. In the information collection phase, the accused, witnesses and experts will be questioned, and the documents will be read out. It is also inevitable during a two-stage process that judgments will be formed about the accused’s person during the initial stage (with respect to, say, evidence of intent and guilt, or the existence of exculpatory grounds). Forensic reports can be critical here. Upon the
A summary of the introduction of the right to speak, which is exercised during this stage, an argument was made for implementing a two-stage process; supposedly, allowing the victim to speak about the consequences of a criminal offence if the perpetrator has denied committing this (and his/her guilt has not been established yet) is undesirable. Groenhuijsen has a different opinion about this, it appears. A right for the victim to give advice (as a directly interested party) to the court concerning the resolution of the guilt and/or punishment issue could be inserted into the assessment stage. For instance, it might be determined that this right could only be exercised through a lawyer.

After the court inquiry is finished, the final verdict is deliberated on. In the past, though, the Dutch Supreme Court has contemplated the articles which state which decisions and supporting reasons the judgment must contain, and discovered an argument there against the two-stage process. The Court has held that, in one and the same decision – the final judgment – there must be a ruling on the points mentioned in Article 350 Dutch Code of Criminal Procedure. Given this state of affairs, change might be effected (if this is considered desirable with an eye to the introduction of a two-stage process) through a provision setting forth which rulings (the declaration that the charges have been proved and the finding that the offence and perpetrator are punishable) remain intact in principle after resumption in a different composition. Inspiration could be derived from the current Article 322.4 Dutch Code of Criminal Procedure. The availability of legal remedies constitutes an argument, however, for not introducing a two-stage process, insofar as splitting up the proceedings ought to result in information becoming available (after the conviction) which is more relevant to the sentence to be imposed. An accused individual denying the charges will not admit guilt after a conviction in the first instance (and will therefore presumably not cooperate in the forensic reports, either) if the accused wishes to challenge the conviction on appeal. The same will hold true after a conviction on appeal if the accused wishes to appeal this to the Supreme Court.

Confiscation proceedings can already be regarded as a kind of second stage in the criminal proceedings. The arguments which led to splitting up the decision on the demand for a confiscation order support fashioning this splitting-up solely as an option. If the possibility of hearing the aggrieved party’s claim and the damages order separately were to be created, this possibility might be linked to these regulations.

The fourth chapter reports the results of face-to-face interviews, based on a semi-structured questionnaire. The questionnaire was given to 15 people, specifically, 5 public prosecutors, 5 lawyers and 5 judges. The victim’s right to speak was the first topic addressed in these interviews. It was apparent from these interviews that the interviewees did not perceive much added value in giving victims the opportunity to render an opinion regarding the evidence. Several arguments were raised for not providing victims this opportunity, such as the fact that this issue is already discussed in the victim interviews between the victim and the Public Prosecution Service, that the victim can already comment in writing on the evidence, and that the victim does not have the legal knowledge or familiarity with the file necessary to be able to say anything about this. The last argument was also mentioned in connection with the victim’s evaluation of the sentencing.
The second topic which came up had to do with the demand for a confiscation order and the aggrieved party’s claim. The interviewees seemed satisfied about the possibility of dealing with the confiscation demand separately from the main action. A small minority indicated that the option of detaching the decision on the aggrieved party’s claim from the imposition of the damages order in the same way was undesirable. Arguments were put forward for both positions. Detachment of the issues might be advisable, for example, if the damage is not entirely clear yet at the time of the criminal proceedings and if, more generally, unnecessary delays in the criminal case can be avoided. The time burden would no longer constitute an argument for referring the action to the civil court. A few respondents further mentioned the argument that the accused sometimes does not feel free to raise a defence during the criminal proceedings.

Among the aspects examined during the discussion of the third topic (the two-stage process in relation to the victim) was whether it is difficult for the court to combine its impartial role at the hearing with a sufficiently empathetic attitude towards the victim. The interviewees had different ideas about this. About half of them (7 of the 15) thought this was not difficult, while the other half (8 of the 15) felt that this was sometimes a problem for the court. The interviewees were asked as well whether their answer would change if the victim or the victim’s lawyer were entitled to comment on the evidence and/or punishment at the court inquiry. Several interviewees (5 of the 15) thought that this would make matters more difficult; a few more interviewees (7 of the 15) did not think so.

The fourth topic concerned the two-stage process in relation to the accused individual. The assertions made by the respondents suggest that they distinguished several groups of accused individuals. The first group was made up of suspects refusing to cooperate in the investigation relevant to the sentencing, so as to avoid involuntary commitment or repeat offender institutionalization measures from being ordered. The interviewees expected that this group would probably not cooperate either, after a conviction. A second group consisted of suspects refusing to cooperate in an investigation relevant to the sentencing, because the results might be a factor in the court’s opinion or might otherwise undermine the defence strategy. In principle, these suspects might be convinced to cooperate after a conviction, but probably not before the case was appealed to the court of appeal or Supreme Court. Many interviewees (11 of the 15), however, believed that allowing an appeal to the court of appeal (and then the Supreme Court) immediately after a conviction in the trial court was not expedient. Finally, according to several interviewees, there was a group of suspects who would never admit guilt or cooperate.

As regards what form a two-stage process might take (the fifth topic), many of the respondents (11 of the 15) preferred giving courts discretionary authority. The reasons mentioned were that the legislature cannot sufficiently predict when a staged approach will specifically be advantageous and that the court can guard against abuse. Several respondents also felt that strict criteria should be laid down in the law, because the parties will then know beforehand how they stand, and legal inequality can be avoided, too. In the end, a slim majority of the interviewees (8 of the 15) answered the ultimate question (all in all, is a two-stage process desirable?) with a ‘yes’.
The fifth chapter contains an analysis of aspects of Belgian criminal procedural law which are relevant to this research. A basic principle of Belgian criminal procedural law is the ‘unity of the criminal proceedings’ and the related principle of the ‘unity of the decision’. Under these principles, criminal courts must normally decide both the guilt and punishment issue in a single judgment or ruling. Nonetheless, there are exceptions to this rule.

Several of these exceptions are bound up with the idea that a distinction can be made between criminal proceedings in the broad sense and criminal proceedings in the narrow sense. The prohibition on splitting up a criminal case only applies to criminal proceedings in the narrow sense. It may be inferred from this that an exception has been made for the ‘special assets investigation’. This investigation may pertain to the financial benefits in connection with the offence which the perpetrator has been convicted of and to the presumed financial benefits obtained from any interest from identical crimes during a period of at most five years prior to the indictment. The Public Prosecution Service may, as a result, file a demand for a confiscation order with the court which convicted the offender in the main action. The distinction between criminal proceedings in the broad sense and criminal proceedings in the narrow sense also implies that an exception has been made for claims by civil parties. Back in 1970, it was already decided that the principle that the verdict on punishment and damages must be pronounced in one and the same judgment or ruling was not subject to being declared void. The law now explicitly gives the court the option of staying the decision on the civil interests on its own initiative.

Another exception has to do with proceedings before the Court of Assizes, which handles the most egregious criminal cases. Those proceedings are divided up into two and sometimes even three phases. The first stage pertains to the question of guilt. The civil party is entitled to speak during this stage, too. The jury deliberates and ultimately decides the guilt question. If the accused is found guilty, the hearing is reopened. During the second phase, the Public Prosecution Service and the defence may set forth their positions on the punishment to be ordered. The civil party is not involved in this stage. In many cases, this phase is followed by a third stage in which the civil claim is dealt with.

Consideration has also been given in Belgium to introducing the possibility of trying the case in two stages during normal criminal proceedings. Yet the proposals to do this have received criticism from many quarters. Further, mention has been made of the potential delay and prolongation, and associated higher costs, of the proceedings, the fear that the option of splitting up the proceedings may be used as a delay tactic by the defence, and the risk of inconsistency and incoherence in decisions about punishment and guilt. Likewise, it has been noted that ‘lining up the same members again’ would be exceptionally difficult. The notion of introducing an optional two-stage process seems to have faded away in the meantime.

With regard to the victim’s position, the aggrieved party’s position under Belgian criminal procedural law is particularly striking. The victim derives his/her legal position in Belgium almost exclusively from his/her status as a civil party. This legal position is strong, as the victim can as such institute criminal proceedings and may, to support his/her claim, opine on evidentiary issues and the claim at the hearing, and, if the court cannot include the claim in the decision in the main action, a decision will be taken later (which was already clear). These days, there is a lot of discussion about the victim’s nearly limitless right to initiate a criminal case. It
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Summary

Thwarts the Public Prosecution Service’s strategy, makes a huge demand on the limited hearing capacity available and is often abused, with a view towards the victim’s position in any subsequent civil proceedings.

The sixth chapter lays out an analysis of aspects of English and Welsh criminal procedural law which are relevant to this research. English criminal procedure includes a clear two-stage structure. The first stage – the trial – consists of an investigation into the merits of the indictment. If the trial ends with a conviction, the court will address the sentencing in the second phase. Yet, in by far the majority of the cases, the first stage is skipped, because, under English criminal procedural law, the merits of the indictment are not examined if the accused, by entering a guilty plea, has admitted committing the offence with which he/she has been charged. The conviction which may be the result of the first stage of the trial under English law is therefore somewhat different than the Dutch declaration that the charges have been proved and the statement and particulars of the offence; it concerns a finding of guilt. The presence or absence of exculpatory grounds is largely determined in the first stage as well.

Consequently, conviction and sentencing are rather strictly separated from one another in the English criminal justice system. That is shown, too, by the fact that the Magistrates’ Court may refer some cases to the Crown Court for sentencing. Offences triable only on indictment are solely tried by the Crown Court. Offences triable only summarily are tried by a Magistrates’ Court. Offences triable either way are brought before the Magistrates’ Court, but the case can be referred on to the Crown Court. These are cases meriting heavier punishment than the Magistrates’ Court can impose.

Therefore, if a trial has been held, the court has learned about the circumstances of the case. If there has been a guilty plea, the court remains unaware of the material which would otherwise have been produced at the hearing. The punishment in that case will be based on the indictment (which the accused has admitted), the material to be found in the case papers (such as witness statements furnished to a police officer), the statement about the facts which the prosecuting party must submit during the sentencing phase and the summary of the convicted individual’s prior history which the prosecuting party must furnish. Insofar as there is a dispute in the case of a guilty plea about the facts relevant to the sentencing, a ‘Newton hearing’ will be conducted, based on which the court will determine the ultimate factual basis for the sentencing. Information about the accused’s person will be given through reports which were previously drawn up and placed in the case file. The court may suspend the hearing to have additional reports drawn up or to investigate the extent to which the accused is suffering from a mental disorder.

During the sentencing phase, the court can also impose a ‘hospital order’. This is intended for persons with mental disorders and may be imposed for a six-month period. It can be extended repeatedly, with no limit on the number of extensions. The hospital order can be supplemented with a restriction order, which is intended for convicted persons who are regarded as a threat to society. There is no indication that non-cooperative suspects are a problem under English law. This may be related to the fact that the hospital order is viewed by suspects as an alternative preferable to imprisonment.
The victim’s position under English criminal procedural law has grown stronger over the years. The Victim Personal Statement (‘VPS’) was introduced in 2001. This written statement is included in the criminal file. Victims are not entitled to speak at the hearing. There also seems to be a certain reluctance to accord victims more far reaching procedural rights. Apparently, a factor in this regard is that the adversarial system, even apart from the fact that it presumes a legal contest between two parties, is not considered the most suitable ‘arena’ for the victim, due to the principle of cross-examination.

The most important source of victim rights is the Code of Practice for Victims of Crime. This Code requires the police, for instance, to inform the victim if a suspect has been arrested and been released on bail. If the police take statements from the victim, the victim must additionally be informed of the right to submit a VPS. Victims are free to decide what to include in a VPS. Victims may not only comment on how the crime has harmed them, but also on the suspect possibly being released on bail and any fear of reprisals by or because of the suspect.

At the same time, the ‘Guidance to inspectors taking a VPS’ makes clear that these inspectors must explain to the victim that the court ‘will not take into account any opinion the victim expresses as to how the offender, if convicted, should be punished’.

Hence, the VPS is not intended to enable the victim to comment on the punishment to be ordered. Nonetheless, the Court of Appeal has accepted two exceptions to the general rule that the English criminal court may not consider the victim’s suggestions in meting out the punishment. The first exception involves the situation in which the punishment imposed on the offender has the effect of ‘aggravating the victim’s distress’. The sentence may ‘be moderated to some degree’ in that instance. The second exception pertains to the situation in which ‘the victim’s forgiveness or unwillingness to press charges provided evidence that his or her psychological or mental suffering must be very much less than would normally be the case’.

Further, the institution of private prosecution still exists in English, although a system has been developed surrounding this right which makes it possible for the government to intervene. The Director of Public Prosecutions can take over or terminate a prosecutorial action brought by a private individual. Private prosecution still occurs in practice, though.

The seventh chapter contains an analysis of aspects of German criminal procedural law which are relevant to this research. As in the Netherlands, Germany does not have any two-stage structure for an inquiry by the court. The potential introduction of such a structure has been discussed a lot, however. Among the arguments which have been adduced for a two-stage structure are the accused’s privacy, which deserves protection as long as the accused has not been found guilty yet, the presumption of innocence necessitating caution in the treatment of the accused not found guilty yet in the criminal case, and the court’s impartiality, which would be endangered by premature awareness of unfavourable personal characteristics and judicial documents. Arguments against such a structure include judicial efficiency and the indivisibility of the offence and offender inquiry. In the 1970s, an empirical study looked at an informal two-stage process. In terms of protection of the accused’s privacy, there turned out to be a major difference primarily with acquittals: with the non-participating judges, the judicial documents had already entered into the equation in the vast majority of cases, but in the two-stage processes, in only a small percentage of the cases resulting in acquittal. According to the
researchers, the two-stage process also clearly caused the sentencing issue to be addressed in more depth. The research could not corroborate the other advantages which a two-stage process supposedly had. As for the presumed drawbacks, two-stage processes in the more egregious criminal cases did not, the research showed, make the cases take longer. In less serious criminal cases, the result was different; as a rule, two-stage processes in these cases prolonged the cases by a third. In the end, Germany did not adopt a two-stage process.

Victims in Germany had long had the right to act as a ‘Privatkläger’. The victim acts as the sole prosecutor then. This option is only available for a few, lighter offences. A ‘Privatklage’ entails financial risks. The Privatkläger must in principle pay an advance on the legal costs, which he/she only receives back if there is a conviction. This has sharply diminished the significance of the Privatklage. The ‘Nebenklage’ was originally a derivative of the Privatklage. Its purpose was to prevent a Privatkläger from being left empty-handed if the public prosecutor initiated or took over the prosecution. Yet, in 1986, the Nebenklage modality was used to widen victims’ rights under German criminal procedural law. The victim may join the proceedings as a ‘Nebenkläger’ if the public prosecutor has commenced prosecution. The Nebenkläger is an independent party in the criminal action. If the Nebenkläger is allowed to join the proceedings, he/she has extensive rights in that capacity. The Nebenkläger, for example, has the right to be heard on possible decisions during the proceedings, to seek recusal of judges, to oppose the use of certain experts, to object to decisions and actions by the president, to adduce evidence, to ask that evidence be collected and, finally, to submit statements at the hearing. Thus, the Nebenkläger can comment on the punishment for the accused as well. What’s more, he/she can appeal the judgment and lay claim to legal aid.

In the eighth chapter, an analysis is provided of aspects of Swedish criminal procedural law which are relevant to this research. Victims in Sweden can participate in the criminal proceedings in three capacities: as a private prosecutor; as an aggrieved party and as an accessory prosecutor. A unique element of the general status of victim is that the victim is ordinarily required to appear at the hearing, but may not be examined under oath nor be forced to answer questions. Victims in Sweden therefore appear to be less vulnerable to aggressive interrogation by the defence. Victims are also entitled to protest decisions by the public prosecutor not to prosecute suspects. After an objection has been made to the public prosecutor who took the decision, an appeal may be lodged with a higher-level public prosecutor. The opportunity for the victim himself/herself to initiate prosecution is similar to the German option of acting as a Privatkläger.

If the victim does not wish to act as an aggrieved party at the hearing, the public prosecutor must institute and defend the claim on the victim’s behalf, unless this is patently unfounded. If the victim decides to act as an aggrieved party, the victim will formally be a party to the case and have several rights. The victim may attend the hearing, pose questions to the accused, inspect the file, submit evidence, request additional investigative actions and deliver a closing argument regarding his/her claim. In exercising these rights, the victim or the victim’s lawyer must limit himself/herself to matters relevant to the claim. If he/she goes beyond this context, say by delving into the punishment to be imposed, the court can intervene. It can state then that such actions are reserved to the victim as an accessory prosecutor and ask the
victim whether he/she wants to assume this status. As an accessory prosecutor, the victim has the rights accorded to the aggrieved party, but the exercise thereof is no longer limited to matters relating to the damages claim. Generally speaking, an accessory prosecutor enjoys the same rights as the public prosecutor. The accessory prosecutor may request that the charges be modified or supplemented, may put forward evidence and may ask for investigative actions to be taken. Moreover, in the closing argument, the accessory prosecutor may talk about the evidence and punishment.

Regarding the structure of the forensic-psychiatric examination, it may be stated at the outset that the fact that the perpetrator committed the crime while under the influence of a disorder will not preclude a conviction. The disorder merely comes into play in the sentencing. A choice must be made as well with the sentencing. The offender may be sentenced to imprisonment or to placement and treatment in a psychiatric institution, but not to a combination of both. Sentencing to the aforementioned psychiatric care implies a mandatory committal of six months, which may repeatedly be extended by six months. The average stay in an institution is currently around five years. Clinical observation may only occur if the accused has confessed to the offence charged or if convincing evidence is deemed to exist that the accused committed the crime. If convincing evidence is deemed present, the inquiry by the court will be suspended to allow clinical observation to occur. A separate appeal cannot be filed against this interim decision.

Experts say that the phenomenon of non-cooperating suspects during clinical observation is very rare. One of the explanations given is that all of these situations involve a suspect who has confessed or has already been found guilty (to a certain degree). Another explanation is that suspects believe that they are better off with a sentence of psychiatric treatment, not only in connection with the setting, but in light of the expected duration of the deprivation of liberty, too. A seemingly inherent aspect of the system is that cooperation in a forensic-psychiatric examination may be attractive to some accused individuals.

In the closing ninth chapter, the research questions are finally answered systematically. With respect to the pros and cons of allowing victims to render an opinion about the accused’s guilt and the desirability of imposing a punishment or order, the victim’s exercise of the right of consultation is not expected to significantly foster proper application of the substantive criminal law. Still, under certain circumstances, the result may be different. The victim’s need for retribution is not irrelevant under Dutch criminal procedural law. Redress is seen as one of the acknowledged objectives of punishment, and the victim’s views may be important, for example, in imposing restraining orders. From the accused’s perspective, the introduction of a right of consultation for the victim mainly has disadvantages; the accused is now faced with one or more additional opposing parties. The major advantage of such a right is that the victim can participate in the criminal proceedings to a greater extent. The introduction of a two-stage process is not a prerequisite to implementing an option for victims to make their positions known concerning guilt and punishment.

The answer to whether the introduction of a two-stage process is likely to lead to extra information which is relevant to the sentencing becoming available in good time, for instance through expert reports, is ‘no’. Some suspects will refuse to cooperate in a forensic investiga-
tion to avoid involuntary commitment. The imposition of punishments and orders would only come into play during the second stage. Other suspects will refuse to cooperate in an investigation relevant to the sentencing because the results might be a factor in the court’s opinion or might otherwise undermine the defence strategy. In principle, these suspects might be persuaded to cooperate after a conviction, but not if the suspect seeks to appeal the conviction to the court of appeal or Supreme Court.

Nor can it be concluded from the research that information which is relevant to the sentencing now leads to substantively incorrect evidentiary decisions. It may be inferred from the interviews, however, that the opposite is sometimes true: suspects who deny guilt or refuse to talk to the police sometimes spill the beans to probation officers. Perhaps, in a number of cases, the availability of information gathered for purposes of the sentencing may mean that the court’s judgment is not based merely on the selected lawful evidence.

This research cannot provide a simple ‘yes’ or ‘no’ answer to the question whether legal practitioners and victims see it as a problem that the discussion about punishments and orders to be imposed or not on the accused is conducted at present with an accused person who has not yet been convicted. As indicated above, a substantial number of interviewees felt that it is difficult for the court to combine its impartial role at the hearing with a sufficiently empathetic attitude towards the victim. The interviewees seemed to have fewer problems with the fact that the investigation into the accused’s mental state takes place and is discussed before the accused has been convicted. Victims were not questioned as part of this study, since an evaluation of the right to speak was performed by Lens, Pemberton and Groenhuijsen in 2010, which included data relevant to this. Nothing in the investigation suggests that the fact that the accused had not been found guilty yet when the speaking rights were exercised caused any consternation among victims. Victim Support Netherlands has also said that it does not agree with the assertion that victims find it difficult to exercise their speaking rights in situations in which the accused has not yet been convicted.

In terms of the possible design of a two-stage process in the Netherlands, it may be observed that this will depend on the intended goals of such a process. It is stated that, if a two stage process is adopted, it makes the most sense to pursue two objectives: designing the inquiry at the hearing such that, until there has been a conviction, the accused is treated more as an innocent party, and improving the informational position of the court when it takes decisions on imposing punishments and orders. The statutory regulations might facilitate such a scheme by expanding the decisions which would remain intact (in principle) after resumption in a different composition. The statutory regulations would become less constraining if one or two judges could also be replaced during the sentencing phase if there is a lack of consent by either party, without the entire trial having to be repeated. The effects of such a modification of Dutch criminal procedural law cannot be predicted in advance. That is also true for the associated loss of time and capacity. Given the large number of variables on which this loss will depend, the Council for the Judiciary has not – with the supervisory committee’s approval – been asked to describe the consequences of a proposed change to the law.

To a major extent, the foregoing already furnishes an answer to the final research question regarding the benefits and drawbacks of a two-stage process and potential alternatives. The two goals to be pursued with this bifurcation reflect the benefits; the loss of hearing ca-
capacity and the adverse impact on the workload and processing time are major drawbacks. Another drawback is that conducting proceedings in two stages probably cannot be achieved without creating the possibility of replacing at least one or two of the three judges comprising the multi-judge division which established the accused's guilt. At the same time, the interviews disclosed that the respondents considered it important for the sentencing to be done by the judges who had decided the evidentiary issues.

As for the alternatives, it is noted first that a right of consultation for the victim could also be part of a concentrated criminal action. With regard to suspects who refuse to cooperate to avoid involuntary commitment, the problem might be tackled at the root, if involuntary commitment became a preferable alternative to the suspect instead of imprisonment. If the refusal to cooperate stems from a case strategy directed at acquittal, this will not be a solution. One idea might then be to have observation occur to a larger extent after conviction, as part of the further implementation of the prison sentence. Finally, consideration might be given to creating the option of detaching the decision on the aggrieved party's claim and the decision to impose a damages order from the trial of the main action.