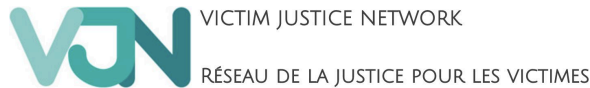


## Abstract

*In 2015, the Canadian Victims' Bill of Rights, promised to recognize the rights of victims in the criminal justice system and introduced the right to restitution. Restitution, which consists of an amount of money paid by the offender to the victim in order to make redress for the harm suffered, involves numerous advantages, as well as significant disadvantages or limitations for victims. According to the Bill of Rights, "Every victim has the right to have the court consider making a restitution order against the offender," and, in order to facilitate the victims' restitution requests, together with the Victims' Bill of Rights a standard form has been developed. As such, it is important to examine the implementation of restitution orders within the criminal justice system in Canada and to question their effectiveness for victims. In this article, we delve into the concept of restitution in order to better understand its use, its function, and its reach in the Canadian criminal justice system. We examine how restitution orders are applied, their advantages and limitations for victims, and we present several alternatives from other justice systems.*

## Research in Brief



# Restitution in the context of criminal justice

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## Introduction

In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. According to this Magna Carta on victims' rights, a person is considered a "victim" when they have suffered, individually or collectively, from harm, such as physical or mental injury, emotional suffering, material loss, or a serious attack on fundamental rights (Article 1). The Declaration provides international norms and standards regarding victims and highlights the importance of reparation for victims of crime, including restitution. Restitution consists of an amount paid by the offender to the victim in order to make redress for the harm suffered. According to the Declaration, the offenders, or third parties responsible for their behaviour, must make fair restitution for the harm caused to victims, their families or dependants (Article 8). In Canada, it is estimated that victims assume nearly 70% of the costs associated with crime (CCRVC, 2009). Restitution helps lighten the financial burden that is imposed on victims of crime and improves public perceptions of the criminal justice system (Geiss, 1977; Ruback, Cares & Hoskins, 2008). Thus, restitution is very important.



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Following the adoption of the UN Declaration, Canada adopted a series of declarations regarding victims of criminal acts. First, in 1988, the Federal-Provincial-Territorial Working Group adopted the *Canadian Statement of Basic Principles of Justice for Victims of Crime*. This statement of principles stipulates that victims should be treated courteously and compassionately; they should obtain rapid and fair restitution for the harm suffered; they should receive information on available services as well as information on the judicial system and the evolution of the trial; their opinions should be considered; and that the victims should cooperate with judicial authorities. Fifteen years later, in 2003, this statement was replaced by the *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003*. Neither the 1988 nor the 2003 Statements gave victims rights, but the 2003 Statement removed victims' obligation to cooperate with authorities.

Then, in 2015, the federal government introduced the *Canadian Victims' Bill of Rights* (L.C 2015, ch. 13, art. 2). The Bill of Rights gives an important place to restitution for victims. It specifies that, "every victim has the right to have the court consider making a restitution order against the offender" (Article 16). When restitution is ordered by the court, "every victim in whose favour a restitution order is made has the right, if they are not paid, to have the order entered as a civil court judgement that is enforceable against the offender" (Article 17). Together with the Bill of Rights, the federal government introduced a standard form in order to help victims present a request for restitution to the court (Form 34.1, s.737.1(4)). As such, victims are encouraged to ask for restitution from the offender at sentencing.

The present article examines the effectiveness of restitution orders in the Canadian criminal justice system. In so doing, we will first consider of restitution in the context of criminal law and then expand on the different advantages and limitations that influence its application and usefulness to victims. This is followed by a discussion of other models for restitution that are found outside of Canada.

## Restitution in the Canadian criminal justice system

In Canada, restitution orders are a measure provided for in the Criminal Code that allows the victim of a criminal act to obtain restitution from the offender. This measure is discretionary and can be issued by the court charged with sentencing. When an offender pleads guilty or is deemed guilty of an offence, the sentencing or discharging court can, in addition to other measures, order the offender to pay restitution to the victim (Cr.C. Article 738(1)a)). Restitution represents an amount for pecuniary losses that are quantifiable and consist of damaged property or a loss of income following bodily harm resulting from a crime (Article 738 (1)b). According to Canadian law, a restitution order can be autonomous and can target several persons (Cr. C.: s 738(1), 739.3). It can also be imposed together with a sanction, included as a condition with probation (Cr. C.: s 732.1 (3.1) (a)), or added to a conditional sentence (C. Cr.: s 742.3 (2) (f)).

It must be noted that the terminology used in Canada is slightly different than that used in international criminal law. In Canada, *restitution* by the offender differs from *compensation*, which is an amount paid to the victim by a third party, such as the state or an insurance company, for quantifiable and non-quantifiable losses incurred. In international criminal law as well as in the national law of several European countries, *restitution* refers to the return of property to the victim, while *compensation* refers to the financial reparation of the victim regardless of who pays (Doak, 2005; Portelli, 2008; Wemmers, 2014). As such, in Canada we speak of a *restitution order*, while this is called a *compensation order* in England (Brienen and Hoegen, 2000). This distinction is relevant in the context of comparative research.

As mentioned, the *Canadian Bill of Victims' Rights* specifies that any victim has the right to present a request for restitution against their offender and that this request be considered by the court. This request will not necessarily be accepted, but the court must consider it. If the court studies the possibility of imposing a fine (C. Cr. 740 b) or of handing down an order of forfeiture (C. Cr. 740 a), the Criminal Code indicates that priority must be given to paying restitution to the victim.

However, restitution is strictly for pecuniary losses and should not be issued when the amount is difficult to quantify (see Chief Justice Laskin's decision in judgements *R v.*

*Fitzgibbon*, 1990; *R v. Castro*, 2010: par. 26 and 43; Bill C-32, 2015; *R v. Zelensky*, 1978). This order can, therefore, not be issued to compensate for emotional or psychological injury resulting from a criminal act, unless a pecuniary loss is shown, including a loss of salary following psychological harm resulting from an offence (Article 738 (1) b). According to this jurisprudence, criminal courts are not the appropriate place to determine damages for pain and suffering, nor for taking positions on complex questions concerning the evaluation of damages. These points should instead be addressed in civil court (McDonald, 2009). Hence, a restitution order does not remove the victim's right to present a request for compensation for non-pecuniary losses before a civil court (Cr. C. 741.2).

### Objectives

Reparation is a fundamental objective of sentencing in Canada (Cr. C. 718(e), 738(1)). Restitution, which is a specific form of reparation, proactively involves both the victim and offender as the offender provides financial reparation for harm caused to the victim. This order can, therefore, target objectives regarding the offender as well as the victim. With respect to victims, restitution has the potential to remedy financial and relational repercussions resulting from criminal act (Hoskins, Care, & Ruback, 2015).

Regarding offenders, several objectives of restitution are identified in the jurisprudence. To begin with, restitution makes the offender directly responsible for the harm caused to the victim and its reparation. Furthermore, its use can reduce the term of imprisonment imposed on the offender and allow for a more rapid rehabilitation of the offender (*R v. Fitzgibbon*, 1990). Thus, restitution can promote offender rehabilitation and have a dissuasive effect by discouraging the offender from committing other crimes (CRDC, 1974; *R v. Yates*, 2002).

However, according to Canadian law, the objective of the restitution order is not to compensate for damages caused to the victim, but to be part of the larger sentence (Chief justice Laskin in *R v. Yates*, 2002: para 10). Its goal is centred on offenders and targets their rehabilitation and reintegration into society. In the judgement *R v. Zelensky* (1978: 2 RCS 940), the Court clarified the criteria that must be used in court to determine

if a restitution order is applicable, including the offender's ability to pay the amount and the impact of the restitution order on the offender's rehabilitation. More specifically, if the offender risks not being able to pay restitution, the court must consider the negative effect that this could have on his rehabilitation. A failure to pay can lead to non-compliance with a probation order, which could exacerbate the punishment of the offender or lead to a new conviction (*R v. Siemens*, 1999).

If an offender does not have the means, the court can, however, still impose a restitution order to the extent that it would contribute to the offender's reintegration into society. In the judgement *R v. Fitzgibbon* (1990), the Supreme Court reiterated the importance of the offender's ability to pay restitution and that the court must consider this in its evaluation, but that it is not the determining factor in every case. In this decision, the offender, Mr. Fitzgibbon, was a lawyer convicted of fraud of his clients. The Court highlighted the importance of restitution for the offender's rehabilitation. The decision whether to impose a restitution order for the victim must take into consideration the offender's situation, including his capacity to pay and the impact that this ruling will have on him, and must not only focus on the victim's need to receive a restitution. It is, therefore, well established in Canadian jurisprudence that the means and the needs of the offender must be given priority over the needs of the victim when considering a request for restitution.

In practice, it is often the defence lawyer that proposes that the court issue a restitution order (*R v. Fitzgibbon*, 1990), since this decision depends less on the victim's financial means than on those of the offender. The introduction of the Victims' Bill of Rights and the standard form to request restitution could contribute to an increase in the number of requests for restitution orders presented to courts. However, in order to make a request, victims must first know their rights, which is not always the case (Wemmers & Cyr, 2006; McDonald, 2010), and they must have their rights recognized in a system that is not meant to take their needs into consideration. Satisfying victims' needs is not the criminal justice system's priority and, consequently, victims' needs risk not being addressed (Hoskins et al 2015).

### *A seldom-used measure*

In Canada, restitution orders are generally seldom used. To begin with, since they are a discretionary measure authorized by the Court, they are not available to all victims. We must bear in mind that restitution orders require that the victim must have reported their victimization to the police and the offender must have been identified, charged and convicted of the alleged offence, which is often not the case. Two out of three victims do not report their victimization to the police (Perreault, 2015). Even if the victim reported their victimization to the police, the clearance rate by Canadian police is below 40% (Hotton-Mahony & Turner, 2012).

Furthermore, even when the victim reports the crime and the offender is convicted by a court, restitution is often not imposed. According to Canadian government statistics, in 2014-2015, (before the introduction of the Victims' Bill of Rights) of all Canadian court files pertaining to adult offenders, the court ordered restitution in only 2.3% of cases (Maxwell, 2017). In these cases, this measure was most often ordered for crimes against property, which represented 80% of all requests (Maxwell, 2017). However, the number of restitution orders granted in 1994-1995 was 4.6% (McDonald, 2009). Thus, despite the introduction of the UN Declaration and the Statement of Basic Principles of Justice for Victims of Crime in the 1980s, the use of restitution orders has not increased with respect to sentences imposed by criminal courts in Canada. Instead, their number has decreased during the last 20 years. Statistics on sentences after the introduction of the Bill of Rights are not yet available. It is important to closely follow the evolution of the use of restitution orders by criminal courts following the formal recognition of victims' rights in order to evaluate the extent to which the Bill of Rights has truly given victims rights in the criminal justice system.

Although restitution is seldom used in Canada, certain provinces nevertheless use it more often than others. At the provincial level, the highest rate of use of restitution orders<sup>1</sup> for the 2014-2015 year was in Nova Scotia (6.2%), and the lowest was in Manitoba (0.01%). More specifically, the rates of each province and territory for the

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<sup>1</sup> Rates represent the number of restitution orders issued versus the total number of sentences, converted into percentages

2014-2015 year are the following: Saskatchewan (4.07%), Ontario (3.77%), Prince Edward Island (3.67%), Newfoundland and Labrador (3.08%), Yukon (2.69%), Northwest Territories (2.66%), Alberta (2.07%), British Columbia (1.36%), Nunavut (1.70%), New Brunswick (0,65%) and Quebec (0,12%) (Statistics Canada 2016).

In practice, restitution has many important limitations. As we have seen, the dollar value of the damages must be easy to determine and the offender must be financially solvent. According to victim support services and advocacy groups for victims' rights, offender insolvency is the largest obstacle with respect to the use of restitution (Prairie Research Associates, 2004). Offenders generally have few means and are often not able to pay the full amount that the victim requires in order to repair the harm suffered. Another important obstacle for victims is the lack of information regarding restitution. Victims do not always know about the existence of restitution orders and, if they are not informed about them, they will not know that they can request them. Other obstacles are overly strict eligibility criteria, the cumbersome nature of the application process and the judges' or crown prosecutors' reluctance to request or order them (Prairie Research Associates, 2004).

A few programs exist in Canada that offer information and support to victims in order to obtain restitution. For example, the Adult Restitution Program (ARP) in Saskatchewan. The ARP provides information to victims on the process and state of their restitution order and acts like a contact-person and liaison agent regarding probation officers, court and victims' services from the police and other related organizations (Hala, 2015).

The way in which information and aid regarding restitution are provided to victims, can influence their level of satisfaction. In a Canadian study, McDonald (2010) analyzed data from an online survey completed by 50 victims for whom their offender received a restitution order, and 67 in-person interviews with diverse actors in the criminal justice system (probation officers, crown prosecutors, offenders) including 23 victims. According to the researcher, victims need to receive information regarding restitution in general, and with respect to their situation in particular, in order to be able to better understand the law, the objectives of restitution and its limitations. This can play

an important role in helping them have more realistic expectations (McDonald, 2010).

Information on restitution given to victims can also influence their confidence and cooperation with the criminal justice system. Ruback, Cares and Hoskins (2008) surveyed 238 victims of criminal acts in the state of Pennsylvania. The offenders in these files were ordered to pay restitution to the victims. According to the researchers, both victims' level of understanding of the restitution process and of the result of restitution are positively correlated with their desire to report victimization to police in the future. Thus, it is as important for the functioning of the criminal justice system as it is for victims of crime that criminal justice authorities implement measures in order to inform victims of the restitution process and encourage offenders to respect restitution orders.

### Obtaining payment

Once the restitution order is issued, it is victims' responsibility to ensure that they receive the amount that is owed to them. A restitution order is civil in nature and therefore, the criminal courts do not interfere in its execution. If the criminal court accepts the request and indeed issues a restitution order, the victim can then receive an amount from the offender. The offender must pay the amount directly to their victim.

If the offender fails to pay, the victim can have the order entered as a civil court judgment that is enforceable against the offender in order to recover their money (CCDV, 2015: arts 16-17). This step can nevertheless be arduous for the victim, since they often find themselves in a fragile state due to their victimization and the procedure for a civil claim is complicated and expensive. The personal costs incurred by the civil procedures, and particularly the legal costs, can be a significant obstacle for victims' desire or their ability to recover their money. Furthermore, when the offender fails to pay, victims find themselves forced to gather information on the offender in order to be able to access civil recourse and obtain payment (McDonald, 2009). Hence, this procedure can prove to be complex and burdensome for victims.

The absence of execution mechanisms constitutes a considerable obstacle and can be explained by the fact that most jurisdictions have not developed a tradition of granting



these orders. Furthermore, mechanisms to ensure the execution of these orders are seldom put in place and even more rarely completed (Prairie Research Associates, 2004). However, in Saskatchewan, the government has implemented a Restitution Civil Enforcement Program (RCEP). This program aims to ease the burden on victims of obtaining payment of restitution, without additional cost. For the year 2014-2015, this program registered 980 restitution orders for 1,208 victims of crime. The majority of these orders (729/ 74%) were respected and the program was able to distribute 1.2 million dollars to the victims (Hala, 2015). However, 251 restitution orders (26%) were not respected by the offenders, which was equivalent to 2.2 million dollars that were not paid to victims. According to Hala (2015), the ability of a victim to access payment depends, among other things, on having sufficient access to information about the offender in order to identify and seize their property and revenue.

In another Canadian study, Bonta, Boyle, Motiuk and Sonnichsen (1983) examined the payment of restitution by offenders involved in a restitution program in Ottawa. According to the researchers, 43% of the 139 victims involved in this program reported having received the full payment of the restitution from the offender and 31% reported having received partial payment. Thus, 74% of victims received some restitution from their offender.

### Summary

In summary, the new Victims' Bill of Rights gives an important place to restitution orders with the creation of a standard form (Form 34.1, s. 737.1 (4)), in order to make requesting restitution more accessible. Even though the Bill of Rights favours restitution for victims, it is not evident whether they will receive restitution within the criminal justice process. The Bill of Rights could improve victim information pertaining to restitution orders and facilitate the application process, but it does not eliminate the other obstacles that victims face. Despite the importance of restitution to the victims, the criminal justice system prioritizes the offender's social reintegration. As such, if the offender does not have the means to pay a restitution order, or if it may hinder the offender's rehabilitation, the victim's request for restitution will not be granted. While it

is useless to impose a restitution order when it is obvious that the offender cannot pay, it is important to ask whether there is more that can be done when the offender has the means to pay so that the victims obtain restitution. The Bill of Rights does not offer any avenues to victims in order to help them overcome the difficulties tied to the enforcement of restitution orders. In the following section, we will present several alternatives from other judicial systems in order to explore how the criminal justice system might better serve victims.

### **Other restitution models**

Restitution is an ancient practice that can be found in several criminal justice systems. Furthermore, several European jurisdictions were inspired by the UN Declaration to introduce provisions on victims' rights in terms of restitution. Hence, internationally, a number of different restitution models have been developed in order to increase the effectiveness of the criminal justice system for victims of crime. In the following section, we will present various models for restitution and contrast them with Canadian restitution orders.

#### *Compensation orders in England and Wales*

Compensation orders greatly resemble restitution orders in Canada. Introduced in 1973, they are a measure imposed by the judge at the time of sentencing (Ashworth, 2010). The court has the legislative authority to, upon request by the Crown prosecutor, issue an order against an offender for the restitution of any bodily harm, of all losses resulting from the criminal act, or of any other criminal act that is considered by the court in determining the sentence (Powers of Criminal Courts (Sentencing) Act (R-U), 2000: art 130(1)). Compensation orders can, however, only be requested for losses, damages and injury that directly result from the criminal acts for which the offender has been found guilty (*R v Cruche & Tonks* (1994) 15 Cr App R (S) 627). Although the amount may include non-pecuniary damages, this amount must only include losses incurred up to the sentencing date, and, therefore, does not include restitution for future loss (Doak, 2008). The court may impose an order for a maximum of £5,000 but the court must

consider the offender's ability to pay (Ashworth 2010). Hence, the amounts imposed are often relatively small (Shapland, Wilmore & Duff 1985; Doak 2008).

In 1982, the *Criminal Justice Act* was modified to give priority to compensation orders when a judge considers possibly imposing a non-institutional sentence and when the offender has the means to pay (Ashworth 2010). Furthermore, since 1988, the courts *must* always consider the option of paying restitution to the victim in cases involving death, injuries, losses, or damages. If the judge decides not to issue such an order, they must justify their decision (Powers of Criminal Courts (Sentencing) Act (R-U), 2000: art 130(2A)). Nevertheless, compensation orders may only be requested by court initiative, contrary to Canada where the victim can initiate a request in court for a restitution order (Doak, 2008).

Fundamental principles regarding compensation orders have been identified in *R v Stapylton* [2012] EWCA Crim 728. First, the victim must have suffered damages and these damages must be easily quantifiable. When these damages are difficult to quantify, the court should not try to calculate them and instead transfer the case to a civil court. However, when the court issues an order, it must also ensure that the offender is able to pay the amount imposed. As such, it is possible that the amount imposed does not match the victim's losses and that the amount ordered represents only a fraction of the damages claimed by the victim.

#### *Rarely used*

The use of compensation orders for adult offenders varies according to the category of offence: offences punishable by summary proceedings and offences punishable by indictment (generally more serious than summary crimes). The use of compensation orders for offences punishable by indictment decreased between 1989 and 2010. Although 21% of offenders received a compensation order in 1989-1990, this percentage fell to 7% between 2002 and 2007 (Ashworth, 2010). This decrease could be due to an increase in prison sentences in England (Doak, 2008; Ashworth, 2010). Judges are less inclined to issue a compensation order when the offender receives a prison sentence (Softely, 1978).

However, for offences punishable by summary proceeding, the use of compensation orders has increased. Between 1997 and 2007, the number of compensation orders issued by courts doubled from 48,000 to 113,000 (Ashworth, 2010).

Judges are reluctant to issue compensation orders and feel uncomfortable with the mixture of civil law and criminal law that these orders represent (Doak, 2008). Despite the legal requirement that judges always consider issuing a compensation order and, if they choose to not order compensation, they should motivate their decision, this obligation is not always respected. A British study by Flood-Page and Mackie (1998) found that in 70% of cases where an order was not issued, the judge did not justify this decision.

Among the reasons invoked by judges in order to justify their refusal to issue an order, some stated that they had not ordered compensation because “the victim had not asked for it”. However, it is the Crown prosecutor's responsibility to request it and not the victim's. Furthermore, as Ashworth (2010) highlights, the law requires that judges always consider it when the offence caused damages and, thus, they must consider such an order even when no request has been made. Other reasons often provided by judges in order to justify their refusal to order compensation are that the stolen goods were returned to the victim and that the offender was financially insolvent. Furthermore, certain judges did not want to issue a compensation order when the victim and offender lived in the same household (Flood-Page & Mackie, 1998).

#### *Obtaining payment*

Enforcement of the compensation order goes through the court. As such, the offender pays the amount to the court, which then transfers it to the victim. Depending on the offender's financial means, the court can allow the offender to pay the amount in instalments. As a result, the victim will receive smaller amounts at a time, which does not always meet the immediate and financial needs of the victim. While it is important to consider the offender's financial needs, this is also an important source of dissatisfaction for victims, as they often remain with losses for which they do not receive compensation (Reeves & Mulley, 2000).

Despite this reality, the fact that the court is responsible for the enforcement of orders lifts a considerable burden from the shoulders of the victim. As such, victims are not responsible for collecting their money and it falls upon the state to contact offenders if they are late or miss a payment. Furthermore, under the state's authority, the execution of the order takes on importance, thus favouring offender cooperation and the collection of money for victims (Doak, 2008).

According to *Victim Support* in England, it would be even better if the state reimbursed the victim immediately after judgement, and then sought the money afterwards from the offender. In this way, victims would not be forced to wait to receive their money and, if offenders did not respect their obligation to pay, the state would incur the loss instead of the victim (Reeves & Mulley, 2000).

#### *Restitution through the "civil party" in France*

In several criminal justice systems based on the civil or inquisitorial legal tradition, such as France, the Netherlands, Portugal and Belgium, it is possible for the victim become a civil party in the criminal proceedings (Doak, 2005). A civil party is defined as a person or group of persons who consider themselves victims of a criminal offence, for which criminal proceedings have already been initiated by the state, and who want to obtain compensation for the harm incurred. This procedure combines civil law and criminal justice law, since, if the offender is convicted by a criminal court, the same court can then award compensation for damages (Frase, 1990; Wemmers 2005; Fortin 2006).

In the French system, "any person who claims to have been injured by a crime or an offence" can be designated a civil party (Code de procédure pénale: article 85). In principle, the damage must result from a criminal offence. The victim of a criminal act has the option, by claiming the status of civil party, to either initiate criminal proceedings by way of a public action or be associated to one by way of intervention (Brienen & Hoegen, 2000; Cario, 2012). In order for the victim to initiate criminal proceedings, the damages resulting from their victimization must be due to a criminal offence for which the statute of limitations has not yet expired. If these criteria are not met, the claim will

not be considered valid and the civil action will not be successful. If the public prosecutor has initiated proceedings, the victim can join the public action at any time during the criminal justice process by claiming the status of civil party (Code de procédure pénale: article 87).

When criminal proceedings have been initiated by the public prosecutor, victims must choose whether they wish to remain simple witnesses or if they prefer to claim the civil party status. Being a simple witness gives the victim few rights. For example, the public prosecutor cannot ask for restitution for a victim who is not a civil party (Brienen & Hoegen, 2000). Being a civil party gives victims several rights, making them a legitimate actor in the proceedings.

At its origin, the objective of the civil party was to allow the injured party (i.e. victim) to obtain financial redress from the offender for the harm suffered as a result of the criminal offence (Wemmers, 2005). To facilitate victims' request for restitution, the civil party process provides victims with a number of procedural rights in the criminal trial (Lopez, Portelli & Clément, 2003). The victim who is a civil party can be present from the beginning to the end of the trial (Fortin, 2006). They have procedural rights such as the right to information, the right to access the criminal file, as well as the right to request restitution. As a civil party, they can seek assistance from a lawyer. They, or their lawyer, can even appeal if their civil interests are affected (Art. 186; in the Code de procédure pénale). Since 2000, a victim is no longer obligated to request restitution in order to present themselves as a civil party (Wemmers, 2005; Fortin, 2006). As such, a victim can benefit from the procedural rights of a civil party without necessarily requesting financial damages from the offender (Lopez, Portelli & Clément, 2003).

As a civil action, the civil party is initiated by the victim and allows them to approach either the investigating judge or the competent court with a request for restitution. However, it is possible that the criminal court is unable to award damages to the victim, such as when the damages are too complex and require an expertise, which lies outside of the competency of the criminal court. In this case, the court must transfer the request to a civil court (Lopez, Portelli & Clément, 2003).

### *Practice*

The civil party is rarely used to initiate criminal proceedings (Doak, 2005). According to Portelli (2008), although this constitutes a fundamental right, initiating proceedings can be heavy and long and, therefore, few victims use the civil party to trigger public action. Furthermore, exercising this right is expensive and the victim must pay a consignment fee, the amount of which is determined by their resources. This fee can, however, be waived if the victim benefits from legal aid. Hence, in practice, victims generally claim civil party status only when the state has launched criminal proceedings (Doak, 2005; Portelli, 2008).

At the investigation and prosecution stages of the criminal justice process, victims who are civil parties have important procedural rights and are sometimes very active. However, most investigations are done by police and, as such, there is no civil party at this stage (Portelli, 2008). Hence, in the majority of cases, victims' rights are reduced to their most simple expression.

More often, it is at the judgement stage that victims will be able to express their point of view, assert their rights and obtain restitution. As civil party, they can request reimbursement for objects or money seized during the investigation, as damages. Except for a study cited by Sebba (1997) that finds that one of three victims present themselves as a civil party, we have found few empirical studies on the use of the civil party in France.

### *Obtaining payment*

If awarded, the victim who is a civil party receives a civil judgement and it is the victim who is responsible for the collection of their money. It normally falls upon the civil party to recover their restitution by being paid directly or indirectly (by, for example, the intermediary of the parties' lawyers) the fixed amount or by appealing to a bailiff to enforce the judgement.

However, sentences can also serve to compensate civil parties in order to motivate offenders to pay restitution to their victims. For example, an adjournment may be pronounced (132-60 and subsequent articles of the Criminal Code) and this delay allows

for verification that the offender has paid or continues to make payments for the harm done. After this period, the court considers the payments already made. According to Portelli (2008), the most commonly used procedure is a sentence with probation. The probation can be from 18 months to 3 years. If an offender does not respect their obligation to pay restitution to the victim, the sentencing judge can revoke, fully or in part, the sentence.

When the offender is incarcerated, the victim's need for restitution does not necessarily disappear. Although imprisonment prevents the detainee from holding a normally remunerated job, and, therefore, from providing restitution to the victim, up to 10% of the convicted prisoner's income may be reserved for making restitution to victims (Article 728, Code de procédure pénale). If the victim is a civil party, the public prosecutor can request that restitution be paid directly to the victim by the correctional institution.

According to Portelli (2008), the payment of restitution to the victim is considered a reflection of a desire for reintegration and a serious effort toward social rehabilitation. As such, the payment of restitution to the victim is formally taken into consideration by the judge when deciding additional sentence reductions (Article 721-1, Code de procédure pénale), conditional releases (Article 729), work releases, day paroles, unescorted temporary absences, etc.

### *Restitution orders in the Netherlands*

Although the civil party has long existed in the Netherlands, in 1995, the government introduced restitution orders (*schadevergoedingsmaatregel*) into the Criminal Code in order to facilitate the compensation of victims. As discussed, the civil party is a tool from civil law and, therefore, it places a considerable burden on the shoulders of victims who are responsible for the collection of their money. Restitution orders are a penal measure, imposed by criminal courts and, therefore, the state is responsible for collection of the money.

Restitution orders function like a fine where the money is collected for the victim instead of the state. As such, the state is responsible for obtaining payment from the



offender and this is done by the same organization that takes care of the collection of fines. If an offender does not respect the order, they risk being detained. However, detention does not remove the offender's civil responsibility and the civil obligation of making restitution to the victim does not disappear following detention of an offender for non-payment (Wemmers, 1996; Lindenbergh & Hebly, 2016).

The focus of criminal proceedings is always the offence and not the damages to the victim. Originally, when the law was introduced, the request for restitution had to be "simple," as complex requests risked disturbing criminal proceedings, shifting the focus from the crime to the damages suffered by the victim. In 2011, the law was modified in order to allow for a greater number of requests for restitution to be handled in criminal court. Rather than being "simple," requests should now be "not unreasonable" with respect to the administrative burden that it places on the criminal proceedings (Van Dongen; Helby & Lindenbergh, 2013). Hence, it remains that the focus of criminal proceedings must be on the criminal act and this should not shift to an evaluation of the damages suffered by the victim.

Furthermore, modification to the law in 2011 introduced the possibility that the state advance money to victims. If the offender is late in paying the money owed, the state can advance the money to the victim, up to a maximum of €5,000, and then recover their money from the offender (Lindenbergh & Hebly, 2016).

The Dutch government has also added other services to help victims make requests before criminal courts. Victims' services offices are now tasked with monitoring requests for restitution. They actively help victims complete the forms required to prepare a request for restitution. Victims of serious violent crimes and sexual assault also have free access to legal aid (Lindenbergh & Hebly, 2016).

### *Practice*

Victims who have made a request for restitution in criminal proceedings are not always satisfied with the results. According to a qualitative study of 36 victims of criminal acts in the Netherlands, victims are disappointed because they occupy a marginal role in the criminal proceedings. The complaints from victims are: the lack of

information from the public prosecutor; the difficulty of obtaining restitution when the offender is financially insolvent; the emotional burden of the process; the slowness of criminal proceedings; and the absence of information on the proceedings. Furthermore, the distinction between civil law (the civil obligation of the offender) and criminal law (the crime), which is fundamental for lawyers, is rather artificial for victims, who often do not understand it (Helby, Van Dongen & Lindenburg, 2014).

Regarding judges, they seem gradually more open to the idea of restitution, which is traditionally an important element in civil law, in their criminal courts. Nevertheless, qualitative research conducted with judges shows that, despite recent modifications to legal criteria, they often continue to send restitution requests to civil court because they find them too complex for their criminal jurisdiction (Lindenbergh & Helby, 2016).

A general lack of empirical data on victim restitution can be observed. Indeed, we do not know the following information: the number of restitution requests presented before criminal courts, the number of requests allocated, the number of offenders respecting the orders, the number of victims obtaining restitution, the number of times the state advances money to a victim, and the number of times the state recovered its money from an offender (Lindenbergh & Helby, 2016).

### Restorative justice

In addition to methods of obtaining restitution within the criminal justice process, there are also, in Canada and elsewhere, programs for restorative justice. Restorative justice consists of a process in which the victim, the offender and the community come together to resolve collectively how to deal with the aftermath of the offence and its implications (Marshall, 1996). As such, restitution is coherent with restorative justice as it aims to help an offender to gain awareness of the wrong committed and to take responsibility for repairing the harm caused, which includes compensating the victim for any losses (Hoskins et al., 2015). According to a meta-analysis by Umbreit, Coates and Vos (2001) examining 20 years of research on restorative justice, restitution as a concept is often inseparable from victim-offender mediation, which consists of a meeting between the offender and the victim in the presence of a professional mediator.

In Canada, restorative justice is generally used as an alternative to prosecution or after conviction in court. It allows victims to obtain reparation from offenders outside of the criminal process. For example, the Correctional Service of Canada offers victims the possibility of participating in mediation sessions with their offender. In this context, reparation is much larger than restitution and instead, the accent is placed on other forms of reparation such as acknowledgement of the wrong committed by the offender and recognition of the victim's suffering (Van Camp, 2015). As such, restorative justice is not limited by offenders' financial insolvency and it can offer reparation to victims when restitution is impossible (Van Camp & Wemmers, 2011).

Participation in restorative justice programs is voluntary. As a result, offenders often comply with restitution agreements when they have followed a restorative justice program (Van Hecke & Wemmers, 1992). Offenders who do not accept their responsibility and who are not open to the idea of reparation will not enter a program. Thus, once admitted into a restorative justice program, offenders are prone to accept responsibility for their behaviour and repair the harm caused to the victim and, as a result, the victims of these offenders are likely to receive reparation. In their meta-analysis, Umbreit, Coates and Vos (2001) found that 90% of cases that are addressed through mediation end in an agreement. In most cases, these agreements consisted of a monetary sum, community service, or services rendered directly to the victim, and around 80-90% of the agreements were respected.

Several researchers studying restorative justice have also observed a very high rate of satisfaction among participants in victim-offender mediation who frequently perceive the process and the result as fair (Umbreit, Coates & Vos 2001; Wemmers & Canuto 2002; Strang 2002; Wemmers & Cyr 2005; Van Camp 2016). According to Carriere, Malsch, Vermunt and De Keijser (1998), victims are generally more satisfied with restitution when they suffer less psychological damages and when their damages are primarily material. In contrast, other researchers find that restorative justice is particularly satisfying for victims of serious violent crimes and that when these victims participate in restorative justice programs they are usually satisfied with mediation, and the restorative justice process often has a positive impact on their well-being (Strang

2002; Strang et al 2006; Van Camp 2015; Wemmers 2016). Besides financial needs, other needs often expressed by victims of crime are the need for recognition and validation (Wemmers, 2017). Victims of serious violent crime generally seek other forms of reparation besides compensation, such as recognition of the wrong done by the offender, which is often very important to the victims (Van Camp & Wemmers 2015; Van Camp 2016). In restorative justice, victims' needs are important and reparation aims to address the consequences of victimization (Wemmers, 2014; 2017). As such, restorative justice is more flexible than restitution orders and, for this reason, it is better able to adapt to the specific needs of the victim.

## **Conclusion**

Restitution is an integral part of victim reparation, and its necessity is well recognized by the UN as well as in the Canadian Victims' Bill of Rights. In Canada, the Criminal Code highlights restitution orders and their application. However, before the introduction of the Victims' Bill of Rights, restitution orders were a seldom-used measure in the Canadian criminal justice system: Only 2.3% of cases where the offender was found guilty included a restitution order. In order to encourage and facilitate requests by victims for restitution, a standard form was introduced in 2015.

Restitution includes numerous advantages, but also has important limitations. It lessens the consequences of the crime for the victim, can reinstate their confidence in the criminal justice system, and can increase denunciation (Hoskins, Care & Ruback, 2015). Nevertheless, Canadian criminal law gives priority to the offender's rehabilitation and social reintegration. As such, the needs of the victim are secondary.

An important obstacle observed across the different models presented, is the conflict between criminal law and civil law. This legal distinction makes it so that judges are often reluctant to issue a restitution order and, if they do so, damages must be easy to determine, which leads to the inapplicability of restitution for emotional or psychological injury. Although lawyers place great importance on this distinction, it is perceived by victims as artificial and is often misunderstood (Helby, Van Dongen & Lindenberg, 2014).

Even if restitution is ordered by a criminal court, it is the offender's civil obligation. The restitution order as well as the civil party pose difficulties for victims with regards to the collection of their money. Civil law is complex and victims lack information on the procedures to undertake in order to obtain restitution. We have seen that the state can implement services to facilitate the collection of restitution. For example, the state can treat the order as a fine and take responsibility for its collection. The state can even advance money to the victim and then use subrogation in order to recover the money from the offender. Studies are nevertheless necessary to evaluate the effects of these types of services on victims and their impact on the effectiveness of restitution.

Victim reparation is wider than restitution. Restorative justice programs do not suffer from the same limitations as restitution orders. They give an important place to the victim and can recognize all their needs including recognition, validation, as well as their financial needs. Hence, they are not limited by the offender's financial insolvency.

Restitution remains, after all, a right clearly defined in the Canadian Victims' Bill of Rights, and significant effort must be deployed in order to ensure its effective application. The information presented in this article clearly points to a lack of data on the implementation and effectiveness of restitution orders. It also highlights the necessity to give more attention to the needs of victims of crime, as well as address the obstacles that hinder the satisfaction of victims' needs, in order to maximize the benefits of this penal measure for victims, offenders and society as a whole.

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