CIVIL JUSTICE AS AN ALTERNATIVE TO CRIMINAL JUSTICE.

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Introduction.

This paper consists of three parts. In the first part Hulsman develops in a very condensed way his view on some developments in industrial and post-industrial societies in order to be able to formulate criteria according to which we can judge under which conditions and in which respect civil justice is to be preferred to criminal justice. In this part he recalls also briefly the conceptual frame in which we are both working and the terminology which we are using (Report on Decriminalisation of the Council of Europe 1980; Hulsman and Bernat de Célis 1982; Hulsman 1986). In addition he formulates a certain number of "caveats" against errors which are often made in discussions about alternatives and which we should try to avoid.

Part two of this paper contains a discussion of civil justice as an alternative to criminal justice based on a qualitative and empirical research into the actual use and development of a particular type of summary proceedings (Kort Geding) in Holland with respect to a specific problem field (sexual violence). This research is part of a wider research in which also other types of civil proceedings and other problem fields are dealt with.

In the third part we discuss some points related to a possible action programme in this field.

Part I. Generalities.

1. Analysis of the societal context and the direction of change.

Typical for (post) industrial societies (and for the development of other societies in that direction) are the processes of professionalisation, bureaucratisation (and their related proliferation of formal rules) and fragmentation. These developments lead to a deep rift between the life worlds and system worlds. Every human being lives in a life world in which he communicates directly with his fellows and his surrounding environment in general and in which this communication has in itself a meaning (is considered as a "value" in itself) independant of its instrumentality in relation with an external aim. Every human being lives also in system worlds. In system worlds the interaction with "the other" and "the environment" is predominantly seen as a "means" to a certain aim, the other is not any more considered as a "subject" but as an "object" in the interaction. Specific for (post) industrial societies is that the part of life which takes place in

the key of the system worlds increases and the part of life in the key of the life worlds decreases. The professionalisation and bureaucratisation provoke always increasing forms of division of labour (fragmentation); each new segment in this bureaucratic and professional division of labour developes its own "artificial language" which is not easily accessable to (and still less testable on the "truth" of its content by) other segments of the bureaucratic and professional world. This is still more so for people without bureaucratic and professional training and they are most often the "clients" or "targets" of these professional and bureaucratic activities.

"Normal" language develops from the life worlds. The artificial languages are often grafted on normal language. Thus, the artificial one can give the impression to refer to the communicative sphere of the life world. Words and concepts like "responsability", "guilt" and "punishment" originate in the communicative sphere of the life worlds. When they are used in the criminal justice context, they seem to refer to a life world reality. They are however used in an organisational context in which the life world communication they seem to refer to, is not or only in a very incomplete sense, possible. In that organisational context, the functionaries communicate in reality not in the first place with the direct involved (like the "perpetrator" and the "victim") as "living persons" (as "subjects"), but with the decision network of which they are part.

Bureaucracies and professions contribute in (post) industrial societies also in an other sense to a mystified image of social reality. The arguments around policy making and the account of policy outcomes cover seldom the reality which functionaries of the "first line" (those who are in direct contact with the "clients") experience. The context of work makes it very difficult to give a realistic account of "first line experiences". Within the system world there is however a tendency to attribute a higher value to information derived from the system world than to information derived directly from the life world. This has as a consequence that the images not only in the system world, but also in the life worlds, about what is going on in society are predominantly derived from "public knowledge". In many areas of social life in (post) industrial societies, this "public knowledge" is developed in a close interaction between bureaucracies and academic professions on the basis of quantitative data, assembled in a conceptual frame which underlies the practice of those bureaucracies. This information is distributed by the mass media on the basis of the fragmented political and academic discourses. Its relevance and validity can generally not be tested by the "consumers" (J. Gusfield 1981).

In several areas of the system world, the bureaucracies and professions

deal with people "as individuals". Often their "targets" or "clients" are in this instance not "real" individuals as they perceive themselves in their life world, but "fictitious" individuals, constructed by the professions and bureaucracies involved. The bureaucracies and professions are in a certain way forced to create "fictitious" individuals, because the conditions under which people are working in the professions and the bureaucracies make it impossible or at least very difficult for them to perceive and to take into account the diversity of the life worlds. This focus on (fictitious) individuals obscures the role which cooperative and collective action by the directly involved plays and can play in dealing with problematic situations in a micro and macro context.

This wrong image of social life depicted in public knowledge (and the practice of many bureaucracies and professions which underly this knowledge) has real consequences. It has a tendency to make people feel powerless and disinterested to deal with the problematic situations they face and to rely on bureaucratic and professional answers which are under those conditions of no real use to them. Bureaucratic and professional activities are only usefull when they are guided by an active participation of the direct involved in which the reality of their life worlds is represented and taken into account. On the basis of this analysis of the societal context in (post) industrial societies, inspired by Habermas' distinction between system worlds and life worlds and Foucault's idea about the production of knowledge and his approach to the concept of power, we are able to formulate criteria which are helpfull to develop and to judge project of change. These criteria we will use to judge the possibility of civil justice as an alternative to criminal justice. For us, the overriding criterion is emancipation. Does a certain practice under examination (a practice which can be new or already existing, but uptill now invisible in public knowledge) serve (or does it not) the emancipation of the persons or groups involved in certain problematic situations.

This orientation on emancipation has two sides:
(1) Do the activities support the involved persons or groups to develop a "realistic" insight in their situation based on their own feelings and experiences and the diversity of their life worlds.
(2) Do they increase the possibilities of the involved persons or groups to influence their position - where usefull collectively or in co-operation - in a way which may be considered by all the involved as positive and just, taking into account the diversity of their life worlds.

2. Criminal justice and civil justice.

When we talk about civil justice as an alternative to criminal justice, it is important to reflect a moment on the social phenomena which we are referring to by this terminology.

In the first place it is important to be aware that we are not talking about civil sanctions as an alternative to criminal sanctions, but of processes of civil justice as an alternative to the processes of criminal justice.

What is criminal justice? For us, criminal justice is a specific form of co-operation between a certain number of agencies such as the police, the courts (in the broadest sense i.e. not just the judges, but also the public prosecutor, sollicitors etc.), the probation and the prison service, law- and criminology departments in the academic world, the Minister of Justice and Parliament. None of these organisations is in itself married to criminal justice; they have (even if they are so married to an extent) a life of their own. Most of the activities of the police for example, do not take place within the framework of that special form of co-operation. Similarly, most of the activities of the courts do not take place within a criminal justice framework. Often they act in the frame of civil or administrative justice. So, when we talk of alternatives to criminal justice, it does not mean that we want to exclude the activities of the police, of the courts, etcetera. Rather it means that we do not want to have these organisations working in that specific context and that we are seeking different ways of functioning of those found within the criminal justice frame of reference, a specific form of cultural and social organisation of their activities (J. Gusfield 1981).

What then is that specific form of cultural and social organisation? I will be very brief and only highlight a certain number of aspects which seem to me important for our immediate topic. The first specific thing of the cultural organisation is that criminal justice is the act of constructing (or re-constructing) reality in a very specific way. It produces a construction of reality in the sense that it focusses on an incident, narrowly defined in time and place and it freezes the action there and looks in respect to that incident to a person, an individual, to whom instrumentality (causality) and blame can be attributed. The result is that the individual then becomes separated out. He is in certain important ways isolated in respect of that incident from his environment, his friends, his family, the material substratum of his life world. He is also separated from those people who feel victimised in a situation which may be attributed to his action. Those "victims" are separated in a comparable way. So, the cul-

tural organisation of reference artificially sets certain individuals apart from their distinctive environment and it separates people who feel victimised from people who are considered in this specific setting as "perpetrators". In this sense the cultural organisation of criminal justice creates "fictitious individuals". And a "fictitious" interaction between them.

Another feature of the cultural organisation of criminal justice is its focus on "blame allocation". There is a strong tendency within criminal justice to assemble events and behaviour dealt with and sanctions applied in a consistent and coherent pattern around a hierarchy of "gravity". This hierarchy of gravity is mainly built on experience of a limited range of events within the actual (or considered) competence of the system. In this pyramid practically no comparison is made with events and behaviour outside that range. Grading takes place to a large extent in a separate universe determined by the structure of criminal justice itself. Consistency of the scale within the system necessarily leads to inconsistencies with the scales of those directly concerned outside the system in sofar as values and perceptions in society are not uniform. The "program" for blame allocation typical for criminal justice is a true copy of the doctrine of "the last judgement" and "purgatory" developed in certain varieties of western theology. It is marked also by the features of "centrality" and "totalitarianism", specific for those doctrines. Naturally, those origins - this "old" rationality - is hidden behind new words: "God" is replaced by the "Law" and the "consensus of the people". As Wilkins (Wilkins 1984) pointed out: "Blame allocation does not provide data, usefull for control or remedial activity ... (with respect to the types of events it is dealing with)". A system, culturally organised in a way which is mainly focussed on blame allocation, is not able to serve in a rational way controlling or remedial objectives. I come now to the special features of the social organisation of criminal justice. I mention two: the first feature of the social organisation of criminal justice is the very weak position which "victims", and by victims I mean the person or persons who feel troubled by an event or a sequence of events, have in its frame of reference. Earlier we argued that the activities of professions and bureaucracies can be only usefull to clients when they are guided by an active participation by all the people in whose behalf they are working. In a criminal justice frame of reference, there is - in principle - no room for such an active participation and guidance. When the police is working within a criminal justice frame they tend not to be any more directed by the wishes and desires of the complainant, but by the requirements of the legal procedure which they are preparing. The complainant - the person who asked for action from the side of the police - becomes in stead of a guide for their activities a "witness". A

witness is mainly a "tool" to bring legal proceedings to a succesfull end. In a comparable way the frame of court proceedings precludes - or makes it anyway specially difficult - that the victim expresses freely his view on the situation or enters in an interaction with the person who is standing as a supposed offender before the court. Also in that situation he is in the first place a "witness", even in those legal systems in which a special position has been created for victims. The evaluation studies which have uptill now been done into the result of changes in legal procedures which tend to reinforce the position of victims within a criminal justice frame have uptill now shown a very disappointing result.

A second feature of the social organisation of criminal justice is its extreme division of labour oriented on a centralised criminal law (written law or common law). This makes it very difficult for the functionaries to gear their activities to the problems as the direct involved experience them in their diversity. And make it extremely difficult for them to assume personal responsability for their activities in this respect. One of the main characteristics of criminal justice is that it preaches in its discourse "personal responsability" for "offenders" and that it suppresses "personal responsability" for the persons which work in its frame of reference.

The cultural and social organisation of many civil proceedings is profoundly different. With respect to its social organisation, the parties have a predominant place. The division of labour in the organisations which underly the field is considerably less. I refer for a more detailed review of those differences to a chapter from the report on decriminalisation of the Council of Europe which is annexed to this paper.

3. Discussions about alternatives to criminal justice. A "caveat" against errors which are often been made.

(1) When we are talking about alternatives to criminal justice, we are not talking about alternative sanctions, but about alternatives to the processes of criminal justice. Those alternatives may be of a predominantly legal or of a predominantly non-legal nature.

Nearly all events problematic to someone (a person, an organisation, a movement) may be "legalised" (approached in a legal process) in one way or another (criminal justice, civil justice or administrative justice), but very few are. Most of the alternatives to criminal justice are of a predominantly non-legal nature. Those alternatives are predominantly not "inventions" of people involved in crime policy or legal policy in general, but daily applied by those involved directly or indirectly in problematic

events. Non-legal approaches are "statistical" and "normatively" (in the normativity of the people involved) the rule; "legalisation" is a rare exception. This has always been so, is so now and will be in the future. This reality is obscured when we take as a starting point the "normativity" implied in the traditional criminal justice debate, because only there we find a normativity in which criminal justice is the rule and is often (unconsciously) supposed to be - contrary to all scientific knowledge - a statistical fact.

When we take this into account, the topic "civil justice as an alternative to criminal justice" means:
"To which degree is it possible to replace the exceptional use of criminal justice processes by the exceptional use of civil law processes and what are the advantages and disadvantages, the possibilities and risks of such a replacement for the different persons or different groups involved.
2. Very often, alternatives to criminal justice are seen as an alternative answer to criminal behaviour. When we take that view, we do not take into account that every legal approach is in the first place a way of constructing (or, if you want, re-constructing) an event. Looking for alternatives to criminal justice is in the first place looking for alternative definitions of events which could trigger criminalisation processes. The alternative answer, given in an alternative to criminal justice is therefore an answer to a situation which has a different "shape" and different "dynamics" from the events as they appear in a criminal justice context. With respect to terminology: we call dealing with an event in criminal justice: criminalisation. And dealing with an event in civil justice: civilisation.

Notes.

Report on decriminalisation (1980), Council of Europe, Straatsburg.
L. Hulsman et Jacqueline Bernat de Célis (1982), Peines perdues, Paris. See also: Sistema penal y seguridad cuidadena: haia una alternatíva (1984), Barcelona: Ariel.
Hulsman (1986), Critical criminology and the concept of crime, Contemporary Crisis 10: 63 - 80.
J. Gusfield (1981), The culture of public problems. Drinking and driving and the symbolic order. Chicago/London.
L. Wilkins (1984), Rationality and morality in criminal justice. In: Effective, rational and humane criminal justice, HEUNI publications series no. 3, Helsinki.

Abstract: Civil justice (and more specific summary proceedings) are under certain conditions able to meet reality in its complexity and to answer in a flexible way to societal needs and developments. Criminal justice however is as a cultural organisation[1] based on moral disapproval and focussed on "blame allocation". This brings along with it negation and "screening" of societal complexity. Compared to civil justice it is a fixed system, not susceptible to societal change except governmental pressure. Civil justice and more specific summary proceedings becomes more and more an instrument in the hands of powerless people to stand up against the violation of their right of self-determination, whereas criminal justice offers lesser and lesser opportunity to resist the superior power by the system, influenced by the growing pressure of the government. It also means that civil justice acquires an emancipating function for those people who are dependant on legal proceedings to protect their own rights in sharp contrast to their repression by the criminal justice system. In this respect empirical findings contradict the juridical discours in which criminal justice is still legitimated by its so called legal protection function on the behalf of the powerless.

Introduction

Since March 1984 I have been studying a development in the Netherlands in the direction of making more use of civil justice in cases where a certain type of criminal justice may be applied. An example of this development is the use of summary proceedings, by victims of sexual violence, called a court injunction on entering certain areas. Women who are continually troubled or threatened by the ex-partner, but also more recently victims of assault or rape can request for a court order which prohibits the man to enter the area where she lives [2].

In our empirical study we found that the possibility of a court injunction was a far better answer to the needs of the women victims than the very limited role they ever could play within the criminal justice system. Three elements made the court injunction very useful as a (strategic) way of handling cases of sexual violence by feminist lawyers and their clients. In the first place this specific kind of summary proceedings appears to be highly attractive and accessible to people who have not means left to solve their problems. To women who are dependent upon social welfare for instance it is a low cost[3], easy understandable, quick and flexible procedure with a relatively high successrate. At the same time it does support the victim's definition of threat in her daily life[4]. She also remains the master of the procedure from the beginning to the end. At any time she can decide to withdraw from the proceedings to bargain with the other party, to execute or not to execute the sentence of the judge. Until now she is not

at all dependent on other institutions as for instance in the case of a criminal justice affair.
She only needs an attorney and the kind of attorneys who are specialized in these proceedings are highly motivated and supporting to their clients.
This brings me to the second reason that makes the court injunction so suitable for handling sexual violence cases. From a victim of sexual violence and from a pityful dehumilated, dependent state of being a woman who starts of court injunction on entering certain areas becomes an active party, a claimant in a civil law case[5]. She shows by doing this not only the one who treatened her but also herself and the outside world that she has her own life and her own identity and that she is able to draw her own line. And this alone increases her defensibility. Therefore being a claimant in civil proceedings means personal growth and brings along an individually emancipating function[6].
The third element we want to refer to is publicity. Not only victims of sexual violence but also journalists find summary proceedings and in specific the court injunction an accessible law suit. This means a lot of publicity[7]. Feminist lawyers made deliberately use of this publicity to bring attention to the problem of sexual violence and also to show the world and other women that it is really possible to make an end to this problem and to draw a line[8]. We can call this a structurally emancipating effect, whereas the combination of the first and the second element to which we referred brought along with it an individually emancipating effect.
In this paper we will now look more closely at the civil justice system from a client's perspective[9], wondering if the court injunction and its characteristics can be called representative for civil justice in a broader sense.

The importance of the use of summary proceedings as an actual development in the civil justice system.

Civil justice in the Netherlands cannot be looked upon any longer without viewing the substantial part in both qualitative and quantitative way that is nowadays to be taken by summary proceedings. In the years I studied law (1964-1971) I learned that summary proceedings could be used as an exception in cases which demanded a special urgency. In those cases the judge would then only give a provisional judgement and would further refer to the ground proceedings. There were also other formal conditions one has to fulfill as for instance the condition of direct interest, before one could start summary proceedings. Since those years however summary proceedings became more and more a fullfledged substitute of the complicated lengthy and expensive ground proceedings.

Bijlsma and Tjoen Tak Sen who did research in this area in the period 1977-1982 ascertain in their report that formal obstacles have become less and less important throughout the years[10].

Recently even a type of group action has become one of the possibilities under the condition as formulated by the Dutch supreme court that individualizing the interests would in fact mean an obstruction to efficient legal protection[11].

According to Asscher, president of the Amsterdam court this judgement has an important meaning for the future of summary proceedings in the Netherlands[12]. It could mean that dutch civil justice is evoluating in the direction of american civil justice with its explicit group action. Also in other ways dutch civil justice is growing in this direction. For instance the possibility and height of compensationclaims. In this field there is a development from formulating these claims in advance (of the ground proceedings) to formulating them as final (and at the same time higher)[13].

Another example of the development meant above is the Kaya case, described by Hondius in an interesting article about private remedies against radical discrimination[14]. In this case a Turkish immigrant Suleyman Kaya sued a housing corporation called the Rooms-Katholieke Woningbouwvereninging Binderen because of their discriminative allotment policy (compared to other housing corporations in the city). In the first instance, the president of the court 's-Hertogenbosch dismissed Kaya's claim, which had been brought in summary proceedings. However on appeal Kaya won his case in essence. The court of appeal considered the discrimination proven (on the basis of statistical figures). Upon appeal in cassation by the housing corporation, the "Hoge Raad" refused to reverse the judgement of the court of appeal, considering among others that no rule of law forbids a court to accept numeral, statistical differences as the ones in question as sufficient evidence for the existence of discrimination or to reverse the burden of proof in such a case. Hondius compares this judgement with the legal practice in the United States, where "it has been held that statistical evidence alone is (only) sufficient to establish a prima facie case of discrimination. If a plaintiff establishes his prima facie case in this way, the burden of proof shifts to the defendant to establish that plaintiff's statistics are either inaccurate or insignificant" (p. 107). This reverse of the burden of proof means in fact a great deal of support to the individual claimant and his experiences, because the institution then has to proof that the claimant's view is not the right one. In this case Hondius finds another resemblance with the americal legal practice, namely the use of the so called fair share approach. Hondius states that this approach meaning that radical discrimination has to be seen as a structural problem which should be solved by the society as a whole, "has been introduced for the first time in a Dutch private law suit which has gone all the way to the supreme

court" (p. 108).
In fact he finds that in this case there has been a combination of two methods - the fair share approach on the general level by the reverse of the burden of proof by the court of appeal and the equal opportunity approach on the individual level, in the sense that the possibility of awarding immaterial damages and of allowing compensatory damages in the form of a claim to a dwelling are not only helpful to the individual plaintiff but also to the class to which he belongs, since the two remedies in the individual case may wellbe a deterrent against further discrimination.
Hondius' conclusion is however that "still two essential instruments are lacking in the dutch case: the group(class) action and affirmative action". But since he wrote his article at least the possibility of group action is coming nearer (see above).

The abuse of power and summary proceedings as ultimum remedium.

Summary proceedings have become more and more accepted as as independent civil lawsuit with farreaching influence on society. At the same time summary proceedings appear to be a meaningful way (sometimes the only or ultimate way) for powerless minorities to stand up against all kind of abuse of power and violation of their right of selfdetermination. In our research we found that the court injunction appeared to be a kind of "ultimum remedium" to the women who were constantly threatened and maltreated, but in a way the same can be said of the Turkish migrant worker who had settled in the Netherlands in 1973 and "when he sued the housing corporation in 1981 had been living at least at 8 different addresses and at the time had but one room at his disposal for his family and himself" (p. 104). He also stood up against violation of his fundamental right to a reasonable living accomodation and an equal and just allocation of dwellings. And what should be said of the psychiatric patient who after several coercive hospitalizations didn't have any means left to resist coercive medication and asks for a court injunction on further medication?[15]
His claim also became admitted, even without any appeal.
In the cases above abuse of power was a result of the inequal relationship between two parties in the conflict, for instance men against women, patient versus hospital, immigrant versus housing corporation.
The same kind of inequality can be found in a relationship between an individual and a bureaucratic organisation for instance a welfare institution, or an alien registration office[16].
In the Edam case[17] for instance an assistant director of the local welfare service spied on his neighbour and informed the organisation about her private life. This practice resulted in a lot of trouble with her payment. In summary proceedings she requested a stop of these practices with the

threat of a recognizance and she succeeded at the (lower) court in Amsterdam. Also this case reached the Dutch Supreme Court. Leyten, the advocate general of the "Hoge Raad" is citing Milan Kundera in his conclusion: "A man who loses his privacy loses everything..... And a man who gives it up of his own free will is a monster". But in fact the social security system in the Netherlands is moving into that direction taking the privacy off the people who want to live their own live not constantly spied by functionaries or other people around them. Especially women living on social welfare have to suffer a lot from a controling bureaucracy which as we cite Passchier[18] penetrates into the most intimate details fo their lives. She states that those women nowadays practically get the burden of proof of not having an economic unity with a man because of the fact that statements of controlers who have their own way of looking at things an easily lead to the end of a payment. The private life of people is going to be an instrument of control she states since governmental control thank to the unemployment cannot longer be continued through work that is paid for. In her article she discusses the "Leeuwarder" case, as a unique case of civil justice. The civil judge found on civil justice grounds that a man and woman living together cannot be held to foresee in eachothers cost of maintenance. This emancipating judgement is directly in contradiction to the ruling political and governmental view of the economic unity as the sole reason to end a social security payment to one of them.
In all the cases referred to we now see that civil justice and in specific summary proceedings correspond with and give support to people who are treated inequally or are even the "victims" of abuse of power. Also by using summary proceedings they stand up against the violation of their right of living their own life. Their resistance does have two emancipating functions, individually in the sense of growing into a state of autonomy[19], drawing one's own line and structurally because starting summary proceedings in such a case with a lot of publicity means to critisize openly the kind of social injustice[20], that injured them.

Bargaining as an essential part of civil justice.

When we are looking closer at civil justice we find some very important characteristics in its cultural organisation that make this legal system much more open to complex reality than criminal justice. In fact it doesn't fix reality or some aspects but it seeks ways to operate with it. It is a highly operative system. This also means that it is open to questions as how to deal with differences in power between people (or between individuals and organisations and how to distribute the means (of power). This implies for instance that bargaining is an essential part of civil justice, it also gives the bargaining instruments. This is the case in the field I

am researching now, the private law of dismissal and the relation between it's functioning and criminalisiable events inside companies. An employee who takes something of the company which doesn't belong to him could be dismissed on the ground of 1639 p BW but he can also effectively defend himself by referring to the private lawsuit at the cantonal court. He can state for instance that according to the company culture it was not extraordinary what he did, so it was not his fault, but the fault of the company itself that accepted these things happening. Or he can state that he had worked 10 years for the company and always behaved as expected but now he was faced with some personal problems and therefore .... Or what he took was absolutely minor compared to what he had to loose. With these arguments he has a good chance to succeed at the cantonal court.
He can also deny what they said he did. Or he can refer to the bad publicity for the company if they should dismiss him and he would release some details about how this company is in fact working etc. etc...
In fact he can cause the employer (who seems to be the mighty one in such a case) a lot of trouble and this means that bargaining in such questions has been accepted as a not exceptional way to conflictsolution.
It also means that the employer has to deal (willing or not) with the interests of the employee and with his of her definition of and feelings about the situation. This brings us into the middle of bargaining theory. "If negotiation of lawsuits takes place in the shadow of the law, what establishes the parameters for other kinds of transactions? In getting to Yes (1981) Roger Fisher and William Ury identify the importance of a negotiater's BATNS-his on her "best alternative to a negotiated agreement." In each case, the consequences of settling are compared with the implications of not accepting the deal"[21]. The consequence may be for instance a frustrative and lenghty civil law suit or publicity or both.
From a bargaining theory point of view a civil law suit or the possibility of such a law suit may strenghten the position of the weakest party in a bargaining process (that is to say under certain conditions)[22].
Summarizing we found that civil justice stands open to daily life reality, it seeks ways to deal with this reality and with the inequality of power which is part of it. In supplying the least powerfull party with means to strenghthen his position civil justice reestablishes a balance of power which is essential to its bargaining function.

Comparing civil justice with criminal justice.

When we compare some characteristics of civil justice with those of criminal justice we find a contrast.
Civil justice derives from reality whereas criminal justice derives from moral disapproval or "blame allocation". The latter is like religion, de-

claring some behaviour or aspects of reality as sins. Sins must not exist and sinners have to be exiled[23].

Whereas civil justice offers an operative way of dealing with reality, criminal justice offers a highly symbolic (even mystical) way of darkening reality. This also makes it highly attractive too for instance to a part of the feminist movement. By criminalizing rape inside marriage a lot of feminists think that rape inside marriage will be banished. But on the contrary, declaring some aspects of reality forbidden can make them flourish like hidden territory[24]. In such a criminalized field the rule of the powerfull group is dominating and abuse of power is taken for granted, because there is no (legal) way left for the people who are dependent in this way and who are systematically hold dependent. Take for instance "prostitution" as a criminalized field[25]. It is interesting to see that for instance the Dutch Emancipation council wants to continue the pimp's prohibition from a structuralistic moral disapproval point of view (men must not use women to satisfy their own lust). In the subjective point of view however the experiences of the prostitutes are essential as a base for feminist policy. Therefore it is important to improve the social (and legal) position of the prostitute. This view chooses a policy which deals with social reality and it is not at all surprising (see above) that it prefers private law and in specific the law of labour as "a legal shelve to offer the opportunity to give prostitution a professional status". In such a way prostitution could become integrated in the societal process[26].

Criminalizing some aspects of reality also means legitimizing the state to interfere in private lives and even to use violence as monopolist of this instrument. So criminalizing means legitimizing inequality between (the power of) the state and the prosecuted individual.

In a juridical debate however there are always professionals defending the criminal justice system by referring to it's legal protection function. But legal protection to whom? To the victim protecting him or her against his of her offender(s)? In my emperical research I found on the contrary, that the women victims of sexual violence, felt "not heared" and even "used" by the system in the same way as the offenders felt themselves[27].

Or to the accused individual? In fact we refer to the law of evidence, the law of litigation, to due process as a principle and fair trial etc, but what we in fact are talking about is to what degree does the accused get the opportunity to mobilize a (real) countervailing power? The possibility of having such a countervailing power at one's disposal is far more important in criminal justice than in civil justice because in criminal justice inequality of arms is fundamental to social organisation of the system[28]. Moreover the role of the state as guarantor and protector of rights on the one hand and prosecutor on the other hand is at least ambiguous.

Peters[29] showed us that the last century the development is clearly into

the direction of more instrumentality instead of guaranting rights. At this moment we see that the state itself is one of the biggest abusers of power, infiltrating in the personal lives of more and more people (see above), so we are confessing to the devil when we expect any legal protection from this side. To put it more strongly, efficiency and productivity which means catching as many "criminals" as possible and lock them up in bright new prisons seems to be the credo of the government at this moment. The machinery must be smoothened, no stand in the ways will be tolerated (as for instance critical attorneys), and the administration gets more and more power without any possibility of interference by a judge or an attorney (as is the case for instance with actual rules for aliens[30].

What sort of means does the accused then have at his disposal? For instance when the administration offers him a transaction[31]? What is there to choose from? What is his (best) alternative? He certainly doesn't look forward to a criminal lawsuit nor does he want any publicity because both possibilities are not really in his interest. It would be wiser to cooperate and they will also tell him that. Cooperating means perhaps less trouble but it also means less right less "drawing one's own line" less autonomy, less selfrespect. The only elements that perhaps count to a public prosecutor is time and prestige. He doesn't want to loose his case before a judge and he doesn't want to invest too much time in one case otherwise his production will last. So these reasons cause avoidance behaviour towards very complicated cases which are difficult to prove as for instance environmental crimes. But this doesn't give any advantage to the immediately arrested people or to the powerless individual in general[32].
So from a bargaining theory point of view there is no transaction, there is only one action and this action can be seen as an one dimensional penal sanction.
Also rules according to evidence may turn against the interest of the accused. For instance when someone states in court that he drank only three beers that night, it is permitted in the official report to quote "he drank beer that night" because leaving out is permitted not to fill up, a rule meant to be in favour of the accused but in fact working out as a way to legitimate decisions of the court.
The social organisation of the system works out clearly against the interests of the accused. On the one hand the judge has to test and to judge independently, on the other hand he has to reckon with the public ministry and the police, he can't ignore them, on the contrary, he has to rely on them.
A frustrating relationship woulw only be a disadvantage to him. It is for instance difficult for a judge to critisize the testimony of a policeman, this will be highly reproached to him. So he will mostly follow these

statements although policemen can make mistakes like everyone else and policemen have their own interest in a case as for instance some prestige to loose in the face of his colleages[33].
So how can an accused individual really mobilize a countervailing power outside court in a transaction but also inside court? Only perhaps when he has to his disposal some really ingenuous attorneys who find some tiny little mistake in the charge or some lack of proof, but these things are the speciality of the professionals and this goes mostly behind the back of the client, at least it has not really something to do with the way he looks at reality.
To summarize: criminal justice system "screens" reality, not accepting its variety from a moral disapproval point of view. This means in fact making aspects of reality hidden and forbidden territory where power abuse and inequalities can flourish, are accepted and deliberately continued. Also by criminalizing elements of life, the State is legitimated to infiltrate strongly in private lives and even use violence.
Certainly at this very moment the development of the state into the direction of more and more infiltration in personal lives makes the state discutable as the (only) instrument to continue "peace" and therefore also democracy in our society. Moreover, the state is not able to combine the two functions: production (of criminality) and efficiency with the protection of legal rights. The accent lies politically clearly on the first issue. From a bargaining point of view the criminal justice system doesn't provide the client of enough countervailing power, on the contrary, it looks as if countervailing power will be seen more and more as a stand in the way of an efficient "catch policy".

Conclusion.
When we compare civil justice to criminal justice there doesn't seem to be much reason except an ideological one to legitimate the continuing of criminal justice from a legal protection point of view. On the contrary, at this moment it looks as if civil justice and in specific summary proceedings answers the needs formulated by more and more groups and individuals to support, protect and stimulate them to have their own lives and their own autonomy against all kinds of power abuse not at least by the State itself and its institutions.

Joyce Hes

Part III Abolitionist action programme.

In our programme we want wo make a difference between (1) the official (professional) circuit of lawyers, bureaucrats, criminologists, policy makers, etc. and (2) the "lay" public and (3) all kind of professional or

voluntary assistancy, standing in between (1) and (2). So when you are dealing with number one (the official circuit) then:

- Defend a good and socially acceptable legal aid system with low entrance to civil court.
- In Holland there is a tendency to underestimate the importance of the function of the judge in proceedings as "a village eldest". They, that is to say some lawyers and bureaucrats consider this not a task for a judge, they find it not juridical enough and state that a judge is too expensive to solve conflicts on such a way.
  Challenge these people, who have a strange idea of what might be "juridical". Refer to their fragmentated view on reality and show them that reality and the needs of people are prior to bureaucratic fragmentation and organisation.

When you are dealing with number two:

- Accentuate the independency of the private lawsuit in specific summary proceedings. A lot of people think for instance that in order to make a good chance at the civil court they should have an official criminal report, which is in Holland certainly in summary proceedings not the case.
- People sometimes have difficulties in seeing the differences between the two legal systems because much of the social organisation seems to be the same: a judge, an attorney, legal language, etc. ...
  Inform them as much as possible about those differences.

When you are dealing with number three (and number two):

- In criminological and juridical discourses about civil justice as an alternative to criminal justice the audience tends to become irritated when they feel they have to choose between both systems. They prefer to have both systems at their disposal. In the first place you can inform them better about the abolitionist way of thinking for instance that we don't want to abolish the police (see note 1), only to change their orientation in the direction of a service institute to the public.
  Secondly we think that it is important to keep on about civil justice as an alternative in this kind of discourses. At the same time when we are confronted with individual victims we can show them as many ways as possible to deal with their problem. To them it is essential that they can choose themselves which way to go, not "indoctrinated" by any professionals but only "informed".. Respect and follow in these cases people's own feelings and needs (this can mean that they turn to criminal justice).

And finally this central rule is important in all cases:

- Civil justice is only one way of dealing with conflicts. Do compare it with other ways also in your own life. Let this way of answering problems not be ideological like the criminal justice approach!

* Thanks to Jacqui Collington for her correction in the English translation.

Notes.

1. See Part I: Louk Hulsman's explanation.
2. See: "From victim of (sexual) violance to claimant in a civil law case", paper for "The fifth international symposion on victimology", Zagreb, 18 - 23 of August, 1985.
3. In Dutch guilders, the minimum costs are Fl.62,50. See: Blijf uit mijn buurt. Mr Joyce Hes and Mr Karin van Ringen. It is further more important to know that we (Still) have a legal aid system in Holland which allows people with very little money to entry the court on a low cost basis.
4. So when for instance the ex-husband who threatened her all the time so that she flew away from him sends her flowers on her new adress letting her know by sending these flowers that he knows where she lives, this may well be found a threat to her according to the judgements of the court. See also: Blijf uit mijn buurt (Note 2; p. 93).
5. See the title of my paper in note 1.
6. In fact this emancipating function begins by giving support to the claimant's vision, hereby strengthening her self respect. See for an explanation of this process of becoming more autonomous my paper: "You have to learn to litigate", for the Dutch congress: Women and criminality, April 1987 in Amsterdam.
7. On the basis of the publicity they get you get the impression that the number of summary proceedings is higher than it really is.
8. It looks as if this function of summary proceedings to get attention in the media becomes more and more important and is in this respect to compare with a demonstration or other kind of political action. See about this subject also the study of Jos Bijlsma and K. Tjoen Tak Sen (department of sociology of law, Leiden University).
9. See for a broader explanation of this perspective my theeses: Between shore and ship; between justice and help, Van Loghum Slaterus, 1981.
10. See note 7.
11. It is called the "Oeverlanden-arrest".
12. See for a discussion about the implications of this "arrest" by Asscher: Nemesis, Magazine about women and law, number 6, November/December 1986.
13. For instance in the sphere of violation of the privacy of individuals by the press.
14. E.H. Hondius: Private remedies against Racial Discrimination - Some Comparative Observations with regard to R.K. Woningbouwvereniging Binderen v. Kaya, in Unification, Liber Amicorum, Jean Georges Sauveplan-

ne, Kluwer, 1984.

15. 22 September 1986, The Court of Middelburg, KG 110/1986.
16. Bijlsma and Tjoen Tak Sen refer in their report to the great amount of summary proceedings according to aliens, who want to prevent expelsion. Also they ascertain that so many individuals start summary proceedings against institutions. This could reinforce our opinion that these proceedings are to those individuals an accessible means to stand up against the (abuse of) power of institutions. See also in this respect: C. Schuyt and others: The way to law, 1976.
17. See for this case: Heikelien Verrijn Stuart, Nemesis, jrg. 2 nr. 6, November/December 1986 and especially the conclusion of the advocate general Leyten (p. 274 - 283). See also: Nemesis, jrg. 3 nr. 2, March/April 1987. This number discusses the consequences of the judgement of the Supreme Court which formulates criteria for a more careful way to control clients of the social welfare service.
18. C.E. Passchier: Van eenheid tot oneindigheid (from unity to conflict), in Nemesis, jrg. 1 no. 6, July/August 1986, p. 262 ff.
19. See note 6.
20. See in this sense also Heikelien Verrijn Stuart (note 17, p. 275).
21. See Lawrence S. Bacon and Michael Wheeler: Environmental Dispute Resolution, Phenum Press, New York/London, 1984, p. 45.
22. I think that at the moment for instance the employee, who is not organized, young and unaware of his rights still runs in such a case a great risk to be dismissed at once. But I think that there also lies a task for the Dutch union to make these employees more aware of their richts and possibilities.
23. see note 1 (Hulsman's explanation).
24. I use the word here as a metaphor. See for instance: Metaphors we live by, George Lakoff and Mark Johnson, Chicago and London, 1980.
    The fact that a territory is hidden, not accessible to the public, not pen to visitors, can mean neglection and overgrowing of small flowers by weeds etc., but there are some advantages, for instance the fact that such a territory will not become overorganized or unnaturally cleaned etc.
    That is the risk we take when we open up some fields for instance prostitution, authanasia etc. These people will then be registered and administration could mean perhaps a certain threat to their privacy.
25. See Justitiële Verkenningen, jrg. 13 nr. 1, 1987, Mr J.T.I. Scholtes: Recent developments according to prostitution, p. 45 - 69.
26. Scholtes, p. 48.
27. See note 6.
28. See Part I.
29. See A.A.G. Peters: Main currence in criminal law theory, in Criminal

Law in Action, Arnhem 1986.

30. At the moment in Holland aliens have to be immediately "screened" in a very fast way by special officers of the aline registration office and they only have recourse to summary proceedings to escape administrative discretion.
31. For instance in Leiden en delft there are experiments now with transition in cases of shoplifting and use of alcohol during driving. When we are speaking however about (minor) road offences there in fact appears to be some alternative: asking for a cantonal court decision, which often means a lower fine and such proceedings don't have the stigmatizing effect of other criminal justice proceedings.
32. On the contrary in an analysis of profits and losses it would seem more attractive to pay time and attention to the "easy" cases.
33. So important is also the kind of (hierarchic) organisation of the police. How much freedom has the individual policeman? Is he allowed to withdraw his statement or tone down an earlier statement without loosing his face in his organisation?