Criminal Claims in Civil Suits over Insults in the Dutch Republic (17th and 18th Centuries)

Ações penais em processos civis sobre insultos na República holandesa (séc. XVII-XVIII)

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Abstract: In the Early-Modern Age, concepts like honour and reputation were considered of great importance. When a person suffered a severe insult, he often was more than willing to go to court and sue the offender. The claims the victim filed in most cases, included an ancient penal action rooted in Roman law. The contents of this action consisted in a demand for a pecuniary fine, which the defendant had to pay to a good cause. The plaintiff combined this claim with a second claim, demanding rehabilitation and restoration of his good name by his adversary. However, in many cases the court tried to avoid a legal battle between the opponents and tried to achieve a settlement that would be satisfactory to both of them. If so, the court ordered both parties to appear before two examining judges, who would act as mediators and try to help the adversaries to settle their dispute.

Keywords: Insult; Criminal Claim and Civil Claim; Monetary Fine; Rehabilitation; Mediation and Conciliation.

Resumo: *Nos últimos séculos do Antigo Regime, conceitos como a honra e a reputação eram considerados muito importantes. Quando alguém era vítima de um insulto grave, não hesitava ir ao tribunal e começar um processo contra o ofensor. O requerimento da vítima, na maioria dos casos, incluía uma antiga ação penal, radicada no direito romano. Essa ação continha o pedido de uma*

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pena pecuniária, que o réu tinha de pagar a alguma boa causa. Este pedido era combinado com um segundo, requerendo a reabilitação e a restauração da boa fama pelo adversário. No entanto, em muitos casos o tribunal tentava evitar o processo, conduzindo as duas partes na direção de uma solução satisfatória para ambas. Em tal caso, o tribunal ordenava que ambas as partes se apresentassem perante dois juízes instrutores, que agiam como mediadores na tentativa de chegar a um compromisso.

Palavras-chave: *Insulto; Ação penal e ação civil; Pena pecuniária; Reabilitação; Mediação e Conciliação.*

1. Introduction

In 1631, the famous Dutch lawyer Hugo Grotius (1583-1645) published his *Introduction to the Jurisprudence of the Province Holland*[2] – Holland being the most influential province of the Northern Netherlands during the seventeenth and eighteenth centuries. In this treatise, he unfolds a system consisting of statute law, customary law as well as Roman law, canon law and natural law. Regarding natural law, paragraph 7 of chapter 32 of book III is most interesting. In that paragraph, Grotius observed that every illegal act could give rise to compensation as well as punishment. Both claims had their roots in natural law, i.e. the rationally based sense of justice that every human being has. Whereas compensation was a private matter that concerned the injured party, punishment was in the hands of the authorities who had the exclusive right to prosecute and sentence the offender.

However, Grotius continued, there were still remains of ancient rules of law that survived in the legal systems of the seventeenth century.

[2] DE GROOT, Hugo. *Inleidinge tot de Hollandsche recht-geleerdheid*, ed. F. DOVRING, H.F.W.D. FISCHER & E.M. MEIJERS. Leiden: Universitaire Pers, 1965.

The most striking example of such an ancient legal provision was the action – or rather, the combination of actions – a private person could launch in case of insult or defamation. In this essay, I will discuss the contents of this atypical action, which had its roots in mediaeval law and in Roman law as well. Furthermore, I will pay attention to the instruments the Dutch courts of law had at their disposal to prevent time-consuming lawsuits over insults, or at least to make such suits as brief as possible. However, first I would like to introduce the topic of this essay a bit closer by highlighting a prime example of a civil law suit over some foul words spoken on a fish market.[3]

The events that led to this civil law suit took place in 1678 in Breda, one of the district capitals of Brabant. On a market day in September a quarrel arose between some local women selling fish, being Stijntje Janssen and her daughter Catharina on the one side and Suzanne Merler on the other. Stijntje and Catharina accused Suzanne of cheating her customers by not giving them the amount of fish they payed for. Furthermore, in the heat of the moment, they called her a "fat whore".

Because of these insults, the husband of Suzanne Merler, Anthonie Segers, initiated a civil law suit for the city court of Breda and brought two actions against Stijntje and Catharina Janssen. First, the defendants had to retract their words, they had to ask God, Justice and Suzanne Merler for forgiveness and they had to declare that their colleague was a respectable and honest woman. Second, the defendants should be sentenced to pay a monetary fine of 600 guilders to the city's poor fund. By means of the first action, the plaintiff tried to get compensation for the damage to the reputation of his wife. With the second action, he aimed for penal satisfaction for the wrongful act the defendants had committed against her.

This combination of two actions – one of which having a punitive nature – is typical for most civil law suits over insults instituted before Dutch courts of justice in the seventeenth and eighteenth centuries. In the next paragraph, I will discuss these two legal actions and explain

[3] 's Hertogenbosch (The Netherlands), Brabants Historisch Informatie Centrum, Archives of the Council of Brabant, inventory 788, Collection of dossiers, n° 2188.

their origins.[4] First, I would like to reveal the verdict in the given case of Suzanne Merler. On October 8 1678, the court of Breda passed sentence and rejected the claims of the plaintiff. Before the French Revolution a judge was not obliged to present the motives for whatever decision he made, so it is unclear on which grounds he decided not to sentence the defendants to give compensation and satisfaction to their colleague However, one might presume that their advocate found a willing ear when he held his plea and put forward that fishwives were used to call names at one another and affront each other. It was in their blood, he argued, because persons working in this trade belonged to the lowest classes of society.

2. Compensation and rehabilitation

Let us now look a bit closer at the two claims the plaintiff brought against the scolding fishwives of Breda. The first of these claims had to do with getting compensation for the damage done to one's reputation. Because the damage was mental – one's reputation being immaterial by nature – the compensation had to be mental as well. In those days judicial officials were quite reluctant to grant someone financial indemnification when he had suffered mere immaterial damage. Therefore, in case someone had harmed the reputation of another person by insulting him, the victim could only demand a rehabilitation and a restoration of his good name. He could sue the culprit for his wrongdoing and demand that his opponent made some specific statements. In most civil suits, these statements included a retraction of words, a begging for forgiveness and a confirmation of the decency and virtue of the plaintiff.

Hugo Grotius inserted these remedies in his *Introduction* and regarded them most suitable to take away the damage done to one's reputation. Studying actual process files, which are preserved in the

[4] Cf. BROERS, E.J.M.F.C. *Beledigingszaken voor de Staatse Raad van Brabant, 1586-1795*. Assen: Van Gorcum, 1996, p. 160-168. This essay is largely based on information from this Dutch thesis, which comprehend an extensive bibliography of studies on the subject of criminal and civil law, especially regarding insults.

judicial archives, one may also find remedies comparable with the ones Grotius mentioned, like taking the blame for what has happened, or expressing one's sincere regrets. The same kind of remedies were often part of the punishment the judge imposed on the culprit in minor criminal suits over insults.[5]

It was up to the plaintiff to choose those exact remedies he saw most fit to repair his damaged reputation. He often demanded that his adversary, while offering him the satisfaction he desired, adopted a most humble attitude, for instance, by kneeling down and folding his hands. Humility befitted the one who had humiliated another.

The claims for rehabilitation the plaintiff could demand had their roots for a major part in mediaeval moral philosophy.[6] Theologians like Albertus Magnus (1193-1280) and Thomas Aquinas (1225-1274) developed the doctrine of the *restitutio*: whenever a person had committed a sin, he had a moral obligation "to restitute what he had taken away". Only if he did so, he could be forgiven for what he had done. In case of verbal abuse, someone "took away" the honour or reputation of another person and therefore he had the moral obligation to restitute to the victim his fame, his reputation. He could accomplish this *restitutio famae* by means of a retraction of the offensive words, an expression of respect and a prayer for forgiveness.[7] These remedies found their way from the *forum internum* of the ecclesiastic confessors to the *forum externum* of the canon lawyers. In the fifteenth and sixteenth centuries, they were introduced in the jurisprudence of the secular law courts, where they were mingled with concepts developed in customary law, such as the confirmation of the decency and virtue of the victim. The ideal

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5 Cf. BROERS, *Beledigingszaken*, p. 239-243.

6 Cf. ZIMMERMANN, Reinhard. *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Cape Town: Clarendon, 1991, p. 1070-1073; RANCHOD, Bhadra. *Foundations of the South African Law of Defamation*. Leiden: University Press, 1972, p. 65-66.

7 Cf. BROERS, *Beledigingszaken*, p. 56-61; SCHRAGE, Eltjo & NICHOLAS, Barry. Unjust enrichment and the law of restitution. In: E.J.H. SCHRAGE (ed.). *Unjust Enrichment. The Comparative Legal History of the Law of Restitution*. Berlin: Duncker & Humblot, 1995, p. 12.

compensation of damages inflicted by verbal abuse came to be known as the *amende honorable*, or in Dutch *eerlijke betering*.[8]

3. Revival of Roman law

In most cases, the plaintiff combined his demand for an *amende honorable* with a second claim, called *amende profitable* or *profijtelijke betering*. This claim consisted in a monetary fine, which the defendant had to pay to some good cause, like a poor fund, a church or a school. Whereas the *amende honorable* should restore the reputation of the victim, the *amende profitable* should bring him satisfaction for the unlawful act the perpetrator had committed against him. Contrary to the first action, this second action had a penal character. Hugo Grotius considered the *amende profitable* a relic of ancient, private penal law that survived in later times. In his *Introduction,* he named the amount of money the detractor had to pay explicitly a pecuniary penalty.

This private penalty – private because a non-official could claim this punishment – was able to survive in the seventeenth and eighteenth centuries because the authorities were not interested in insults among private parties. When one individual insulted another, like in the case of the fish sellers of Breda, the public prosecutor was not easily inclined to initiate a criminal procedure. The authorities considered foul language and defamation to be private conflicts, for which the injured party could sue his opponent if he wanted him to stand trial. Therefore, abusive language amongst citizens did not belong to the public domain of criminal justice.

The contents of the profitable satisfaction had its roots in Roman law. In the third century, the Roman *praetor* designed a provision suitable for the victim of whatever form of abusive language to summon the detractor before court and claim a monetary fine for the injustice this person had done to him. In order to get this fine he had to start a civil procedure, estimate the impact of the spoken words on his reputation,

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[8] DE WIN, Paul. Analyse van een merkwaardige straf: de openbare bede om vergiffenis, 'eerlijke betering' of 'amende honorable'. *Handelingen van de Koninklijke Kring voor Oudheidkunde, Letteren en Kunst van Mechelen*, Mechelen, v. 107, p. 117-232, 2003.

and name a certain sum of money. The judge could mitigate this amount according to the social status of both the plaintiff and the defendant, the contents of the verbal abuse, the number of persons that were present when the event took place and so on. Because the plaintiff was the victim of the offence, he was entitled to collect the fine the judge eventually imposed on the defendant. The Romans called this action the *actio iniuriarum aestimatoria*, "the action for estimated injuries and insults".

The lawyers of the Modern Age considered this praetorian provision an appropriate solution to fill in the gap in the existing legal system, now the criminal prosecutors did not undertake any action against a private person who had insulted another private person. They created the option of an *amende profitable* and grafted this claim on the reanimated *actio iniuriarum aestimatoria*. However, because a private party was no longer entitled to collect a monetary fine – this fine being a penal measure by nature – the plaintiff had to designate the money to a good cause. The plaintiff himself had to settle for rehabilitation by means of the private *amende honorable*.

In most civil suits over private insults, the plaintiff claimed a considerable *amende profitable*. In the seventeenth century, the desired sum of money could vary from several hundred guilders up to one thousand guilders. In the century thereafter, this amount could easily rise to the sum of five thousand guilders or even more. In all cases I have studied however, the judge made extensively use of his mitigating powers and diminished the fine to the amount of a few guilders, or a couple of dozen at the most.

4. An early form of mediation

The problem with many civil suits over insults was that it was not clear what had actually happened. In many cases, the defendant pleaded that the plaintiff had provoked him, or that the other had started a quarrel, or called him names in the first place. Witnesses to the actual conflict were often on the hand of either the plaintiff or the defendant without exactly knowing what had happened. This made it difficult for the judge to decide in whose favour he should pass verdict. Moreover, the defendant had often spoken the offensive words in the heat of the

moment and he had come to himself afterwards, realizing that things had got totally out of control.

Because of reasons like these, a court might prefer a swift solution of the conflict to a difficult and time-consuming lawsuit. If so, the judges could try to achieve a settlement between both parties. From the jurisprudence of – especially – the higher courts of justice in the Dutch Republic appears that these courts often ordered the parties to make an effort to settle their conflict by means of mediation.[9] When an offended person wanted to sue the wrongdoer and filed a request to get permission to do so, a court of justice often commanded both parties to appear before two examining judges who would try to help them to settle their dispute. If this meeting was successful, the examining judges made up an agreement and handed over a written report to the court in a plenary session. Otherwise, they notified the court that their efforts were in vain, after which the court allowed the complainant to initiate a procedure against his opponent.

However, there was still a second opportunity for the court to order the litigants to make an effort to achieve a peaceful solution of their conflict. After the plaintiff and the offender had fought out their legal battle and handed over their documents to the judges in order to get a verdict, the court could once again order them to appear before two examining judges and try to settle their dispute. In this meeting, the solicitors of the litigants could take part as well. If the mediators were successful this time, the court passed sentence and ratified the agreement between the parties. If the mediation had failed once more, the court had no other option but to pass sentence in favor of either the plaintiff or the defendant.

In general, the contents of the agreements the parties achieved with the help of the mediators, consisted of two sets of declarations. On the one hand, the offender declared that the words he had spoken were inappropriate, that he was sorry that he had offended his opponent and that he considered him a righteous person. On the other hand, the

[9] BROERS, E.J.M.F.C. De comparitie ter fine van accoord. Mediation in de zeventiende en achttiende eeuw. *Rechtsgeleerd Magazijn Themis*. Zutphen, v. 176, n. 6, p. 239-243, 2015.

offended party declared that he would not initiate a lawsuit against the other, or that he would stop the legal action he had already taken. The outcome of the mediated agreement was that the offended party obtained the rehabilitation he desired, while the offender escaped a possible monetary fine.

There is not much information about the actual procedure the examining judges applied during their meeting with the opposite parties. In most cases, a single meeting was sufficient to investigate the willingness of both the victim and the offender to come to a peaceful solution of their conflict. However, there were also conflicts that took the mediators several days of negotiations to achieve an agreement. Most difficult were the ones in which one of the parties – or both – made use of a self-made draft agreement, which the opposite party and the mediators just had to sign.

For instance, in 1758 the Council of Brabant, the Supreme Court of Justice of Brabant, received a petition from one Johan den Doren to grant him permission to sue some members of the local church council who had offended him.[10] The Court decided that the petitioner and his adversaries had to appear before two examining judges who would act as mediators. During the negotiations, Johan den Doren presented a rather extensive draft agreement holding several statements that his adversaries had to make. They had to declare that they did not have had the intention to affront him, that they did hold him for an honest person and that the offensive words they had spoken were untrue. Next, the members of the local church council presented a contra-concept-agreement, in which they only declared that they did not have had the slightest intention to harm their opponent. Considering these proposals, the mediators tried to come to a settlement that would be acceptable to both parties, but they failed. Now the Supreme Court granted Johan den Doren permission to sue the members of the church council. The plaintiff claimed an *amende honorable*, holding the same statements as the ones in the concept-agreement, and an *amende profitable*, consisting in a monetary fine of 500 guilders for each member of the church council in behalf of the poor. The Supreme

[10] 's Hertogenbosch (The Netherlands), Brabants Historisch Informatie Centrum, Archives of the Council of Brabant, inventory 788, Collection of civil causes, n° 3642; inventory 100, Minutes of the council meetings, folio 25 and 41.

Council, passing sentence, awarded both claims, albeit that it mitigated the fine to an amount of 6 guilders per person.[11]

This case also illustrates that a person who had suffered an insult, in general claimed a large sum of money on behalf of a good cause, but that the court mitigated that amount considerably.

5. Conclusion and final remarks

Concepts like honour, fame and reputation were of great importance in former times. The advocate and scholar Simon van Leeuwen (1626-1682), a contemporary of Hugo Grotius, stressed the value of these immaterial goods in his book *Roman Dutch Law* (1664), where he stated that except for life itself, one's honour and good name are the most important objects one possessed.[12]

Whenever someone damaged these objects on purpose, the injured party often did not hesitate to summon that person before court. Hugo Grotius gave an accurate description of the claims the victim brought against the offender and pointed out that one of these claims had a penal nature, being a relic of former times. Before a court, the plaintiff could combine this penal action with an action to restore his damaged reputation, consisting of several declarations to be given by the defendant. This was not only the case in Holland, but also in the other provinces and regions of the Dutch Republic, as well as in France and Germany.[13]

In many cases, the judge who had to deal with a case of verbal abuse did not immediately allow the victim to bring forward his claims.

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[11] 's Hertogenbosch (The Netherlands), Brabants Historisch Informatie Centrum, Archives of the Council of Brabant, inventory 826, Register of civil sentences, n° 7029.

[12] VAN LEEUWEN, Simon. *Roomsch Hollandsch Recht*. 2 vols. Amsterdam: Ten Houten, 1780-1783. Chapter IV, paragraph 37.

[13] Cf. CHEVRIER, Georges. Composition pécuniaire et réparation civile du délit dans la Bourgogne ducale du XIVe au XVIe siècle. *Mémoires de la Sociéte du droit et des institutions des anciens pays bourguignons, comtois et romands*. Dijon, v. 21, p. 127-137, 1960, in particular p. 132, footnote 2 ; MOOSHEIMER, Thomas. *Die Actio Injuriarum Aestimatoria im 18. Und 19. Jahrhundert*. Tübingen: Mohr Siebeck, 1997, p. 3-4.

Instead, he would order the opposing parties to try to achieve a settlement that was satisfactory for both of them. In such a case, two examining judges acted as mediators and reported the outcome of their efforts to the court. If the mediation was not successful and had not resulted in a mutual agreement, the legal battle between the plaintiff and his opponent began. However, just before he had to pass sentence the judge could once more order the litigants to make use of the help of mediators to come to a peaceful solution.

If one studies the actual court files in the judicial archives, one will notice that only in a modest number of cases the examining judges did accomplish an agreement between the parties. In many of the remaining suits, one does not find a verdict in the judicial files. In those cases, it is even unclear if the judges have passed sentence at all. In many civil suits over verbal abuse, one can only guess how the conflict ended. For instance, it might very well be that the injured party lost interest, or lacked enough money to continue the procedure. Maybe he stopped the suit because he came to an agreement with the offender out of court, or maybe he just died before the law had taken its course.

To illustrate these possible reasons for litigants to end a civil law suit, I would like to return for a brief moment to the conflict between the fishwives of Breda. After the court had passed sentence and rejected the claims of the plaintiff, the conflict between Suzanne Merler and Stijntje and Catharina Janssen lingered on. On behalf of his wife, Anthonie Segers appealed to the Council of Brabant and demanded that the councillors should nullify the verdict of the city court and do justice in a proper manner. During this second procedure, first Stijntje Janssen died, which meant that her daughter Catharina had to continue the legal fight not only as a defendant but also as an heir of her mother. Next, the actual victim of the offence, Suzanne Merler, also died. Nevertheless, her husband proceeded with the suit against – now – Catharina Janssen and the other heirs of Stijntje. He aimed at a posthumous rehabilitation of his wife and a satisfaction for the wrong that was done to her.

Three years later the litigants had performed and produced all the necessary acts and the Council only had to make up a verdict. At that moment, the case disappeared from sight and did not leave a single trace in the judicial files. However, this open end does not detract from the fact

that this case perfectly illustrates the high value of a person's reputation in those days, and the willingness of that person to go to court when this reputation was harmed by someone else.

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