

ENGLISH SUMMARY

1. Introduction

At this moment, articles 316 and 900cc of the Dutch Criminal Code prohibit criminal prosecution for property crimes within marriage and registered partnership. This exemption from criminal prosecution is based on the special property law regime applicable to the parties involved and respect for their intimate relationship.

Recent developments, however, such as the growing number of marriages in which prenuptial agreements are made, increased divorce rates, the acknowledgement of (economic) private violence as a public matter, and the introduction of the 'limited marital property' as default choice (Law of 24 April 2017, Governmental Gazette 2017, 177) warrant further study of whether the exemption from criminal prosecution is still necessary and legitimate nowadays.

The *primary* goal of this research is to: a) provide an approximate (rough) estimation of the nature and prevalence of property crimes within marriage; b) make an inventory of the private law options to tackle property crimes within marriage; c) map the opinions of professionals and academics on the exemption from prosecution; and d) describe how foreign legislators have dealt with this problem in their national criminal laws.

The *secondary* goal is to pay attention to the overarching concept of 'economic violence', a form of violence that property crimes can form part of.

In this study, fourteen research questions were formulated, subdivided into three categories:

- Questions related to the nature and prevalence of the problem (§ 2)
- Questions related to law (private and criminal law) (§ 3)
- Questions related to foreign criminal law (§ 4)

2. Questions related to the nature and prevalence of the problem

1. What is the nature of the problem?
 - a. What is the nature of the problem regarding the different types of property crimes between married and registered partners that are exempted from prosecution (according to professionals)? And what of the other forms of economic violence?
 - b. What can we learn from case law related to article 316 CC about the nature of this problem/situation involving divorced partners and to what extent did these crimes take place during marriage?
 - c. What does private (case) law suggest on the nature of the problem involving married and registered partners?

2. What are the circumstances and situations in which this problem surfaces according to professionals?
3. Can a rough estimation as to the prevalence of the problem between married and registered partners be made?

The first three research questions were addressed with the help of different research methods:

1. An extensive literature review on the nature and prevalence of the phenomenon
2. An analysis of criminal and private case law via www.rechtspraak.nl
3. Interviews with professionals

2.1. Literature review

Foreign studies often report high prevalence rates. However, due to the lack of quantitative studies into this phenomenon, and due to the fact that the few studies found employ different research design and definitions, it was considered too premature to extrapolate foreign results to the Dutch situation in order to come up with a basic estimation of the nature and prevalence of the phenomenon in the Netherlands.

2.2. Case law

An analysis of criminal cases published on www.rechtspraak.nl brought examples of all five property crimes to light, before and after divorce. There were also civil cases revolving around behaviors that *may* qualify as property crimes, such as “securing” large sums of money in the wake of a divorce. Behaviors without a clear link to criminal law, but that could, under circumstances, be seen as forms of economic misbehavior/violence – e.g., taking important financial decisions without consulting the other – were also found in the cases under study. Economic violence in the sense of (protractedly and repeatedly) ‘intentionally undermining another person’s financial autonomy’ could not be established with the help of the cases.

2.3. Professionals

A total of 33 professionals with relevant expertise were interviewed on the nature and prevalence of the phenomenon. These professionals included divorce lawyers/mediators, persons working for *Veilig Thuis*, persons working for women’s shelters, deputy prosecutors, and guardians.

All interviewees recognized certain forms of economic misbehavior/violence from their own practical experience. However, estimations of the respondents related to the prevalence of the problem varied considerably, and should therefore be interpreted with care.

Of the five property crimes, vandalism was most often encountered by the professionals, espe-

cially in the context of a divorce or domestic fight. Most professionals encountered the other property crimes 'sometimes' or 'regularly', but there were also professionals who had never heard of these crimes in their daily work.

Certain economic misbehaviors enlisted in the *Scale of Economic Abuse* also rang a bell with the professionals, especially the items concerning the appropriation of money or the coercion of the other to hand over money. Forcing the other to ask for money, withholding financial information and building up a debt in the name of the other by using his or her credit cards were also more frequently mentioned by the respondents.

Property crimes or economic misbehavior/violence happens regardless of social class. Both young and old persons, persons with high and low educational background are affected, but for victims with a (certain generation) migrant background other factors sometimes play a role as well: the money is transferred abroad or the spouse is reclaiming a dowry.

Both men and women can fall victim to property crimes within marriage or economic misbehavior/violence, but the current sample had more experience with female victims. These women are often vulnerable and dependent on their partner, for instance because of an insecure residence status, financial dependence or limited social network.

The offenders, on the other hand, were mostly male, according to the respondents. Additional relevant characteristics were related to the personality of the offender (aggressive, dominant or narcissistic), to not accepting that the other wants to leave the relationships, and to substance abuse. The most frequently mentioned motives for committing property crimes or other forms of economic abuse were 'greed' and 'revenge'.

According to the experts, the odds of experiencing property crimes or economic abuse is highest in the case of a(n) (imminent) divorce, but possibly the divorce only brings to light what had already been lurking under the surface.

3. Questions related to law (private and criminal law)

Questions related to criminal law

4. What are the professionals' opinions on the exemption from prosecution?
5. To what extent would victims be willing to report the crime to the police?
 - a. To what extent would victims be prepared to enter a criminal justice procedure keeping in mind the civil law options?
6. According to the professionals, what is the added value of criminal justice involve

ment?

7. How would they appreciate a complaint offense versus the (unrestricted) right to report the crime?
8. What are the chances of false allegations in the case of a high-conflict divorce and how could these be prevented?
9. What would be the consequence of the changes to marital property law as a result of the Law of 24 April 2017 regarding the extent of the problem within the criminal justice system?

Questions related to civil law

10. Which civil law provisions could be useful for victims in case of property crimes and in what situations?
11. For which property crimes does civil law not provide a solution?
12. How do professionals view a civil law procedure?
 - a. What do they consider (dis)advantages in comparison to a criminal law procedure?
 - b. Do they promote a civil procedure?
13. What would be the consequence of the changes to marital property law as a result of the Law of 24 April 2017 regarding the extent of the problem within the civil justice system?

The legal questions were researched with the help of interviews with (associate) professors and other professionals (optionally) and information found in handbooks, legal comments and other academic literature.

3.1. Criminal law academics (and other professionals) on criminal law

The exemption from criminal prosecution does not meet with much enthusiasm. Only one academic wants to maintain the exemption, but only in the case of joint marital property. The other two academics prefer to have the exemption completely abolished, albeit that criminal prosecution should be used with restraint, because of privacy considerations. This restraint is best expressed by turning property crimes within marriage into a complaint offense or via the discretionary powers of the public prosecution service in combination with prosecution guidelines and careful consideration of the needs and wishes of the victim.

All interviewees agree that the criminal procedure offers various important advantages to vi-

ctims in comparison to the civil procedure. In general, criminal procedures are shorter, they are free of charge and the verdict is executed by government officials instead of the victims themselves. In addition, it offers a ‘public forum’, and it might have a larger impact on special (recidivism) and general prevention. The abolishment of the exemption of criminal prosecution furthermore shows that society no longer accepts this type of behavior and it would end the unequal treatment of married and unmarried persons. There is, however, a risk that criminal law involvement might lead to escalation of the violence, there may be evidentiary difficulties and problems with victims’ willingness to report these crimes to the police. The police and the public prosecution service also have to be aware of the risk of false reports, especially in the case of high-conflict divorces.

3.2. Private law professors (and other professionals) on civil law alternatives

Based on interviews with three civil law professors and academic literature, an overview was made of all civil law provisions that victims of property crimes within marriage or registered partnership could use as an alternative to criminal prosecution. The results are presented in the table below.

Table. Civil law alternatives

Civil provisions (Civil Code)	Legal qualification	Property crimes	Context	Additional circumstances
1:88 en 1:89	<i>Annulment of a legal act without permission of the spouse</i>	Theft and embezzlement	No contextual requirements	Only applicable to legal acts
1:107	<i>No renunciation of embezzled or stolen goods</i>	Theft and embezzlement	Dissolution of joint marital property	Only useful in case of debts on the side of the victim before dissolution
1:109, 1:111 and 1:139	<i>Dissolution of joint marital property or dissolution of the obligation to ‘exchange current net worth’ (‘verrekeningsplicht’) and compensation in the case of reckless incurring of debts and squander</i>	All crimes	Dissolution of joint marital property or dissolution of obligation to exchange current net worth (‘verrekeningsplicht’)	Reckless incurring of debts or squander < 6 months before the start of the trial
1:164 and 1:174	<i>Compensation in case of disadvantage to marital property through reckless incurring of debts or squander</i>	All crimes	Divorce or legal separation in combination with dissolution of marital property	Reckless incurring of debts or squander < 6 months before the start of the trial

3:44	<i>Annulment legal acts entered into as the result of coercion, fraud or abuse of circumstances</i>	Extortion and fraud	No contextual requirements	Only applicable to legal acts entered into by the victim
3:194(2)	<i>Forfeiture share in marital property in case of concealing, misplacing or hiding property</i>	Theft and embezzlement	Dissolved marital property	No additional circumstances
1:135(3)	<i>Compensation because of concealment of assets in the case of obligation to exchange current net worth ('verrekening')</i>	Theft and embezzlement	Obligation to exchange current net worth ('verrekening') in the case of prenuptial agreements	No additional circumstances
6:162	<i>Compensation based on tort</i>	All crimes	No contextual requirements	No additional requirements
4:3 and 3:166	<i>Analogous application of 'unworthiness' under inheritance laws to dissolved marital property on the basis of 'reasonableness and fairness'</i>	Theft, extortion and fraud	Dissolved marital property	No additional requirements
1:157(1)	<i>Expiration of alimony rights because of misbehavior</i>	(Possibly) all property crimes	Divorce or legal separation	Every form of solidarity between the spouses must have disappeared

The overview shows that *all property crimes in every situation* are covered by at least one civil provision, mainly because of generic article 6:162 Civil Code (tort). This means that civil law provides 100% 'coverage' in case of property crimes within marriage or registered partnership, at least in theory. For some interviewees think that in practice, the protection provided by civil law is substandard. This has to do with evidentiary difficulties, practical objections against initiating civil procedures, the fact that victims may only receive 50% of the compensation after dissolution of the marital property (depending on whether courts consider this money 'connected' to the victim or not), and the fact that compensation for damage as a result of property crimes committed before the 'reference date' is difficult to claim in practice.

The interviewees consider as an advantage of a civil procedure over a criminal procedure the fact that the procedure does not result in a criminal record and problems with obtaining a 'declaration of good conduct' for the offender, which could, in turn, be disadvantageous for the victim and his or her chances of receiving compensation or alimony. Also, a criminal procedure might increase feelings of revenge and induce escalation of the conflict. Criminal law, on the other hand, offers better possibilities for factual execution of the verdict (e.g., the 'advance payment' rule) and the victim can profit from the efforts of the public prosecutor. The interviewees

wees hold different opinions on whether or not criminal law has a greater preventative effect. As a consequence of the Law of 24 April 2017 more assets will remain private property. One professor predicts that the Law will result in *an increase* in property crimes within marriage and (as a consequence) more civil actions. After all, spouses will always try to get their hands on the private property of the other. While previously this did not result in civil accountability – in the case of marital property a clear legal basis was often lacking – this may lead to more civil law suits in the future.

4. Questions related to foreign criminal law

14. Do other countries also apply an exemption for criminal prosecution in the case of property crimes within marriage or registered partnership?
 - a. If so, does this exemption apply to the same property crimes?
 - b. If so, what is their rationale for justifying this exemption?
 - c. If not, did they have an exemption for prosecution in the past and why was the exemption abolished?
 - d. If not, how is criminalization and criminal prosecution of property crimes within marriage and registered partnership arranged in these other countries?

With the help of a quickscan of online sources and a short survey (filled out by 24 respondents with expertise in national criminal law) an inventory was made of the manner in which the EU Member States are dealing with property crimes within marriage and registered partnership.

First, there are countries that make *no distinction* between property crimes committed within marriage and property crimes committed outside the marital context (Cyprus, Denmark, Estonia, Ireland, Latvia and the UK). In some of these countries the similar treatment is the result of recent legislative changes – as a consequence of increased attention for domestic violence – whereas other countries have always treated property crimes in the two contexts similarly.

Second, there are Member States that *do distinguish* between property crimes within and outside marriage. In four countries the marital status of the parties involved results in complete impunity of the behavior. This is the case in Spain, Belgium, Italy, and France. In the Czech Republic, Lithuania, and Slovakia prosecution is exempted in the case of *marital property*. Because of the joint property – the offender is co-owner of the property – there is no crime or criminal liability in the first place.

In Hungary, Slovenia, and Portugal property crimes within marriage can only be addressed via *(semi) private prosecution*. In these countries the victim needs to take care of criminal prosecution him or herself, while in Portugal the victim has to assume the role of assistant prosecutor.

The most popular solution, however, is to turn property crimes within marriage into *complaint offenses*. This is the situation in Austria, Romania, Poland, Bulgaria, Finland, Sweden, and Germany. Only after the victim has filed a complaint and explicitly requested the prosecution

of the offender, the public prosecution service can come into action.

Countries that distinguish between property crimes inside and outside marriage justify this distinction on the grounds of the interrelatedness of property of the parties involved, respect for their privacy and their intimate relation.

Countries vary as to the types of property crimes they place under a special regime, but non-qualified forms of theft, fraud, vandalism and embezzlement are usually included. Furthermore, the distinctive approach is not only applicable to property crimes within marriage, but also to other relationships, so that family members and co-habitants, for instance, are also required to file a formal complaint. As soon as parties are divorced, the special regime ceases to exist. In that case, the victim is usually not even required to file a formal complaint anymore.

5. Discussion and recommendations

At this moment, property crimes within marriage (and other intimate relationships) are seriously underresearched. It is still unclear how often property crimes or other forms of economic misbehavior/violence are committed within marriage and registered partnership. On the basis of the current study we were only able to come to a first tentative conclusion. A victimization survey – involving a random sample of the population – could yield more reliable information on the nature and prevalence of the phenomenon. If the high prevalence and impact rates from foreign studies are also found in the Netherlands, we may have to change our national policy against domestic violence.

However, this quantitative study should be preceded by a qualitative exploration of the definition and conceptualization of concepts such as ‘economic violence’ and ‘economic misbehavior’. Apparently researchers hold different opinions on this.

Although civil law provides sufficient options to claim for compensation in theory, in practice, there seem to be important disadvantages to the civil procedure that prevent the injured party to go to civil court (costs, duration, limited possibilities for execution). The criminal procedure does not have these disadvantages and could therefore provide a better solution for some victims. An interesting factor in this regard is that foreign legislators have allowed for the possibility of criminal prosecution and the fact that most of our respondents have a preference for abolishment of the exemption as well. The current Dutch approach is no longer self-evident. Therefore, the abolishment of the exemption from criminal prosecution warrants further study.