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(Crime) Victims' Compensation: The Emergence of Convergence

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1. Introduction

From the mid-1980s onwards the image and the position of the victim has changed; as a result an extra layer has been added to the concept of crime: 'crime' nowadays represents a violation of the public interest, as well as a violation of the individual victim's interest.[1] In its wake, victims' compensation has become a major issue. Traditionally presented as a subsidiary claim, brought forward in the context of the adhesion procedure, redress for crime-related tort has become a focal point within Dutch criminal policy.[2] Indeed, to date, victims' compensation relates to elements of procedural justice and 'sanctioning', implying a link with the topic of enforcement. To phrase it differently: to date, victims' compensation relates to the legitimacy of 'the law'.[3]

These topical developments beg the question whether tort and crime are merging,[4] and if so, in what shape and to what extent. Concentrating on the victim's claim for compensation as deposited in the context of the adhesion procedure (Article 51f Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, Sv), the question I set out to answer is whether the topical convergence between tort and crime does affect the core concepts of responsibility, accountability and liability, and how this relates to the theme of enforcement. Does the topical focus on victims' compensation affect the underlying concepts of tort law and criminal law? If so, is there a common ground that might serve as a basis to legitimize the crossover that appears to underlie the Dutch victims' policy, and are there implications with regard to the legal procedures and the related topic of enforcement?[5]

The paper proceeds as follows. Firstly, in order to stress the range and nature of contemporary political developments, a brief overview is provided of the recent developments with regard to the issue of victims' compensation (Section 2). Next, the core concepts of responsibility, accountability and liability

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1 Terwee Committee, *Wettelijke voorzieningen slachtoffers in het strafproces* [*Legal provisions with regard to compensation for crime victims*], 1988, p. 28.

2 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, 'Recht doen aan slachtoffers' ['Doing Justice to Victims'].

3 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, pp. 8-9.

4 A.M. Hol & C.J.C. Stolker, *Over de grenzen van het strafrecht en het burgerlijk recht* [*Over the boundaries of criminal law and civil law*], 1995; N.J.M. Kwakman, 'Privatisering van het strafrecht' ['Privatisation of the criminal law'], 2013 *Ars Aequi*, no. 7/8, pp. 528-537.

5 I do want to emphasise that this 'convergence' is a strongly debated issue within academic circles. Indeed, the intended analysis is of a complex nature, relating to an internal comparison of the civil law and the criminal law, on the one hand (an internal perspective), and a comparison of fundamental concepts based upon an external comparison with legal philosophy, on the other hand. I will not, however, extensively refer to terminological differences but work my way around them.

are elaborated upon; both preliminary observations and a more detailed analysis will be presented (Sections 3 to 5). Such an exercise is necessary to develop an overview of the (legal) consequences of the topical political focus on victims' compensation with regard to the civil law and the criminal law. Concerning the image of responsibility, accountability and liability being reflected in the outcome of adjudication, Section 6 deals with the topic of enforcement. Finally, conclusions are presented (Section 7). This paper represents 'work in progress' from my field of expertise, criminal law, but because the victims' need for compensation is a moral issue, I will also relate to legal philosophy. My aspiration, however, is only to make a crossover in order to graze unknown meadows.

2. The changing image of tort and crime: 'shifting responsibilities'

Modern society features individualization, giving way to an expansion of (legal) claims towards State authorities to protect its citizens against the risks and dangers that inextricably flow from social intercourse. This address to the law exceeds the limited field of criminal law; claims for compensation are widespread nowadays, addressing civil law and administrative law as well. However, due to the symbolic function of the criminal law, being the ultimate forum for the public acknowledgment of unrighteous victimisation, the appeal to the criminal law is intense.[6]

Traditionally, criminal law serves as a last resort. However, in its pursuit to provide for victims' compensation the Dutch Government nowadays starts from a different perspective, portraying the use of criminal law as a necessary element to back up the civil law in order to successfully provide for victims' compensation.[7] Moreover, the Dutch Government shows a willingness to adapt the rules, putting the classic differences between civil and criminal law into perspective. Indeed, this tendency is the outcome of political developments starting in the mid-1980s, indicating a historical change of the criminal law paradigm with regard to the position of victims.[8] In the context of this paper, however, it suffices to mention the most recent initiatives to illustrate the nature of Dutch victims' policy with regard to the topic of compensation.

Firstly, the criterion for the admissibility of compensation in the context of the adhesion procedure was extended: the criterion that the civil claim must be of a 'simple nature' was replaced by the qualification that the claim should not represent 'an undue burden' to the criminal trial.[9] Second, the Council for the Judiciary (*Raad voor de rechtspraak*) suggested the introduction of a so-called 'folding mechanism', indicating an automatic referral to the civil procedure in case the victim's claim for compensation was ruled (partially) inadmissible by the criminal judge.[10] In line with this, the legislature has also announced that it seeks a simplification of the procedures.[11] Third, related to the proposal by the Council for the Judiciary, the Ministry of Security and Justice has started a project to simplify the legal procedure, e.g. by introducing a central information desk.[12] In order to map the caveats with regard to victims' compensation, specifically with regard to the 'civil route' (bringing a tort claim before the civil court), extended research was ordered.[13] Fourth, the recent extension of the right to apply for State

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6 J.H.J. Boutellier, *De Veiligheidsutopie* [*Safety's Utopia*], 2006; J.J.M. van Dijk, 'Free the victim. A critique of the Western conception of victimhood', 2009 *The International Review of Victimology* 16, no. 1, pp. 1-33. Also: Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, p. 13; stating that the previous focus on the perpetrator's rehabilitation had led to neglecting the victims' interests.

7 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, pp. 9, 18-19.

8 For an overview: R.S.B. Kool, 'Inleidende opmerkingen op art. 51a-h' ('Introductory remarks concerning Art. 51a-h'), in Melai/Groenhuijsen, *Wetboek van Strafvordering* [*Code of Criminal Procedure*], suppl. 178, 2009.

9 *Staatsblad* 2010, 1. Also: M.E. ten Brinke et al., 'Iets nieuws onder de zon? Het nieuwe ontvankelijkheidscriterium in de praktijk' ['Something new under the sun? The effect of the renewed admisibility criterion'], 2014 *Trema*, no. 3, pp. 83-88.

10 E. van den Emster, *Proef met opsplitsen strafproces* [*Pilot programme concerning the bifurcation of the criminal procedure*], <www.rechtspraak.nl/Actualiteiten/Nieuws/Pages/Rechtspraaklegtomgangmetslachtoffervanmisdrijfvast.aspx> (last visited 19 June 2014). Note that the proposal is still pending: Rechtspraak.nl, <http://www.rechtspraak.nl/Actualiteiten/Nieuws/Pages/Rechtspraak-geen-voorstander-opknippen-strafproces.aspx> (last visited 23 June 2014). For a negative review: S. van der Aa & M.S. Groenhuijsen, 'Slachtofferrechten in het strafprocesrecht: drie stappen naar voren en een stapje terug?', ['Victims'rights: three steps forward, one step backwards?'], 2012 *Ars Aequi*, no. 9. pp. 603-611.

11 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, p. 25.

12 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, p. 19.

13 W.M. Schrama & T. Geurts, *Civiel schadeverhaal door slachtoffers van strafbare feiten. De rol van de civiele procedure: gebruik, knelpunten en oplossingsrichtingen* [*Civil compensation for victims of crime. The role of the civil procedure: use, bottlenecks and solutions*], WODC 2012; J.D.M. van Dongen et al., *'Je hebt geluk als je van een pauw mag plukken', Ervaringen van slachtoffers van strafbare feiten met het*

refunding can be mentioned: victims of serious crime who, due to the insolvency of the perpetrator, are not able to execute the compensation awarded by the criminal judge can request payment from the State.[14] This scheme will be extended to apply to all crime victims in 2016, albeit with a more limited range of refunding (€ 5,000), however. Next, the possibility to order (advanced) seizure to enable the execution of a compensation order needs to be mentioned.[15] Illustrative of the willingness to deal with compensation issues are also the Temporary Regulation with regard to Compensation for Sexual Abuse (established in the aftermath of the scandal regarding sexual abuse within Dutch foster care)[16] and the Regulation on Compensation for Damages for Public Violence.[17] Furthermore, the State Secretary for Security and Justice has recently established a programme to train advocates to assist victims of serious crimes (violence and/or sexual offences) in court, specifically with a view to claiming compensation and to improve legal assistance for victims.[18] Moreover, a second course has been developed which is also obligatory for lawyers.[19] Finally, it is important to stress that this active victim policy, although not without criticism, is supported by the judiciary.[20]

As mentioned, these developments are merely the latest exponents of an intensive and extended long-term political programme being executed by the Dutch Government. The focus in contemporary Dutch law – be it of a civil or criminal nature – clearly rests upon the duty to act in a diligent manner, as well as upon retrospective compensation and servitude towards victims. Being in pursuit of distributive justice, the compensation of harm and wrong has become an essential element of justice.

3. Responsibility

3.1. Preliminary observations: coherence between responsibility, accountability and liability

Starting from a legal philosophical perspective, *responsibility* primarily refers to the substantive aspect of having to act with due diligence; non-compliance implying that the community is entitled to call upon the perpetrator to accept the consequences of his irresponsible behaviour.[21] In a legal context, this leads towards *liability*: attaching legal consequences to unlawful behaviour, thereby implying a legal obligation to provide for redress.[22] *Accountability*, on the other hand, primarily refers to the procedural aspect, symbolizing the ritual of being 'placed in the dock'. There is a specific sequence within this threesome: accountability follows responsibility, whereas accountability aims at establishing liability. Nevertheless, accountability and liability are not synonymous with responsibility. Indeed, one may be held accountable without having committed a wrong or having harmed someone. For the sake of equity, for instance, we may decide that someone is vicariously liable (e.g. parents being held accountable and liable for harm caused by their child).[23]

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verhalen van hun schade [*'You are lucky if you can pluck a peacock'. Crime victims' experiences with regard to compensation*], WODC 2013 and R.S.B. Kool et al., *Schadeverhaal na strafbaar feit via de kantonrechter* [*Crime victims' compensation via the subdistrict court*], WODC Report, forthcoming (Summer 2014).

14 For the original Decree: *Staatscourant* 2011, 21994. The State is entitled to have recourse against the perpetrator.

15 Act of 26 June 2013, *Staatscourant* 2013, 278. Also: E. Gijselaar & S. Meijer, 'Conservatoir beslag ten behoeve van het slachtoffer' ['Seizure in the victim's interest'], 2014 *Delikt & Delinkwent*, no. 3, pp. 180-199.

16 *Tijdelijke regeling uitkeringen seksueel misbruik minderjarigen in instellingen en pleeggezinnen*, *Staatscourant* 2013, 20303. Valid until 1 January 2016.

17 *Regeling tegemoetkoming schade openlijk geweld (project X)*, *Staatscourant* 2013, 5426. The Regulation was introduced in the aftermath of 'Project X', a (media) hype caused by a youngster who accidently posted an open birthday invitation on Facebook. In the chain of events that followed, the (small) village of Haren was inundated with (unidentified) youngsters who caused substantial damage.

18 Ministry of Security & Justice (*Ministerie van Veiligheid en Justitie*), 'Verplichte basisopleiding voor advocaten van slachtoffers van criminaliteit' ['Obligatory Training for Lawyers Representing Crime Victims'], <http://www.rijksoverheid.nl/nieuws/2014/02/26/verplichte-basisopleiding-voor-advocaten-van-slachtoffers-van-criminaliteit.html> (last visited 20 June 2014).

19 Council for Legal Assistance (*Raad voor de Rechtsbijstand*), 'Specialisatie slachtofferzaken' [Specialisation inVictims criminal cases], <http://www.rvr.org/nl/subhome_rbv/inschrijven_rbv/specialisaties,Specialisatie-Slachtofferzaken.html> (last visited 20 June 2014).

20 J. Candido et al., *Slachtoffer en de Rechtspraak* [*The Victim and the Administration of Justice*], 2013, <http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Documents/Slachtoffer-en-de-Rechtspraak.pdf> (last visited 20 June 2014).

21 R. Dworkin, *Justice for Hegdehogs*, 2011, pp. 102-103.

22 R.A. Duff, 'Who's Responsible, for What, to Whom?, 2005 *Ohio State Journal of Criminal Law*, no. 2, pp. 441-442.

23 Moreover, Dutch civil law acknowledges strict liability (Art. 6:169 Dutch Civil Code (*Burgerlijk Wetboek*, BW)). However, as Bovens mentions, the acceptance of both vicarious and strict liability as legal categories as such imply a moral decision; M.A.P. Bovens, *Verantwoordelijkheid en organisatie*, 1990, pp. 6 and 64.

3.2. Responsibility

Within legal philosophy, responsibility is defined as a predominantly moral issue.[24] According to Cane, Dworkin and Duff, responsibility implies an individual, yet reciprocal ethical assignment to subscribe to the project of living together, acting with due diligence. The nerve of responsibility lying within the individual's integrity,[25] responsibility expects individuals to live 'a life to be lived'.[26] As the law serves as an instrument of social engineering, the link with morality is sometimes only remotely present or even somewhat 'depersonalized' (e.g. the legal accountability of legal persons). Indeed, the judicial decision to call someone to account may rest upon a concept of responsibility utilized in terms of reasonableness and fairness,[27] rather than in terms of genuine immoral behaviour on the part of the addressee. However, this does not contradict the fact that a legal claim is ultimately based upon a moral concept of responsibility.[28] Framed in terms of legal rules, responsibility always indicates a moral claim, but does not coincide with morality as such.

In order to be able to determine responsibility, Duff makes a distinction between *prospective responsibilities* and *retrospective responsibilities*.[29] *Prospective responsibilities* are those that one has before the event, the duty to act diligently. They are related to *virtue*, representing the relation element that bonds individuals within a social context: being part of society one is expected to act in compliance with the social norms, and by violating these, one has to answer for the consequences. However, prospective responsibilities also have an ex ante aspect: they help to establish the retrospective responsibilities one has towards one's fellow citizens.[30] As a rule two categories of prospective responsibilities are mentioned: *productive responsibilities* (directed towards the production of good outcomes) and *preventive responsibilities* (aiming at the prevention of bad outcomes).[31]

Non-compliance with prospective responsibilities ends in *retrospective responsibility*: the obligation to restore the social equilibrium. Here the law comes into play, for generally moral obligations to restore the social equilibrium, flowing from the non-compliance of prospective responsibility, need to be enforced. Indeed, the law's ethic of responsibility is one of obligation and not one of mere aspiration.[32]

The assessment of responsibility

However, in order to enforce, one needs to have legal provisions at one's disposal. The law has to make up for 'the morality's institutional poverty'[33] by serving as a 'moral educator'.[34] Indeed, other than morality, the law is of an intrusive nature. Notwithstanding the nature and types of sanctions within the civil law to differ from the ones used in the criminal law, both the civil law and the criminal law provide opportunities to enforce substantive legal rules expressing (prospective and retrospective) responsibility. With regard to the criminal law, this punitive dimension is captured by the legality principle, requiring accessible and foreseeable legal provisions. However, for the civil law the issue of legality is less outspoken; indeed,

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24 P. Cane, *Accountability in Law and Morality*, 2000, pp. 11-12, arguing that opposite to morality, the law has 'a richness of detail' providing an institutionalized frame by which responsibility can be operated.

25 Dworkin 2011, supra note 21, pp. 100-110. Other than Cane and Duff, Dworkin explicitly refers to the Kantian principle, stressing the obligation to live a good life, implying an ethical assignment for oneself, not an ethical obligation owed towards others (e.g. p. 265). He interprets responsibility in terms of self-respect and authenticity (e.g. pp. 210-211). Also: W.H. van Boom, *Efficacious enforcement in contract and tort*, inaugural lecture Erasmus University Rotterdam, 2006, p. 18.

26 Cane 2000, supra note 24, p. 6.

27 Dworkin characterizes 'fairness' as a category of modified utilitarianism, stating that altruism should not be requested. Nevertheless, an act can only be justified – and thus be fair – if the actor has weighed the beneficial individual effect of the act against the impact on the group interest. Given the (expected) negative impact for the group, the individual must be answerable; Dworkin 2011, supra note 21, pp. 270-275.

28 Dworkin 2011, supra note 21, pp. 38-39. According to Dworkin, moral reasoning needs to be seen as a form of interpretive reasoning, therefore there is no epimistological version of either a moral or a legal truth.

29 R.A. Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law*, 2009, pp. 30-36. Also: Bovens 1990, supra note 23, p. 34 and Dworkin 2011, supra note 21, pp. 102-103.

30 With regard to the distinction between prospective versus retrospective responsibilities also: Bovens 1990, supra note 23, p. 34 and Dworkin 2011, supra note 21, pp. 102-103.

31 Cane 2000, supra note 24, p. 31.

32 Cane 2000, supra note 24, pp. 34-35. Cf. Dworkin 2011, supra note 21, p. 288; arguing that legal responsibilities are the product of political arrangements.

33 Dworkin 2011, supra note 21, pp. 400-415; Dworkin refers to the law as 'a branch of political morality'.

34 Dworkin 2011, supra note 21, pp. 13-15. Also: Cane 2000, supra note 24, pp. 187-188.

the value of tort law rules lies within their generality and flexibility. Nevertheless, if one agrees with Van Boom that tort law is to be recognized as an instrument for prevention, these traditional features need to be reconsidered (see further Section 6).[35]

The finding that both the civil and the criminal law recognize responsibilities does not, however, provide us with clear answers as to what exactly constitutes responsibility with regard to tort and crime. Indeed, legal provisions containing responsibilities are generally framed in open terms; especially those that refer to prospective responsibilities. Compare, for instance, the offence of abandoning a helpless person (Article 255 Dutch Penal Code (*Wetboek van Strafrecht*, Sr)) and the civil obligation to provide for means sustaining life, implying tort (Article 1:392 in conjunction with Article 6:162 Dutch Civil Code (*Burgerlijk Wetboek*, BW)). As a result, the adjudication of responsibility in civil and criminal law is more or less a 'open project', in need of criteria to determine responsibility based on casuistry, preluding on the assessment of accountability and liability.

One can argue that this open-natured assessment is not a cause of concern; legal responsibility being inextricably linked to morality, this indicates a need for a 'open assessment'.[36] This is, however, but partially true as we need to be aware of the repercussions that can flow from moral pressure. Today's strong focus on victims' compensation carries a risk of tort and crime being assessed according to the standard of 'objectivity' which implies an extension of legal and moral standards.[37] Such an effect can be observed with regard to the appreciation of the agent's capacities to live up to legal and social obligations that underlie responsibility. The current standard of 'a responsible agent', for instance, presumes the perpetrator to be in possession of the capacities and the autonomy to act in compliance with social standards. This threshold of 'reasonableness', however, inevitably represents a reduction of human agency, urging the assessor to be aware of the inherent reduction of individual capacities that flow from such a fictitious agency.[38] Simultaneously, one has to be careful not to use too strictly individualized standards of agency, as this can also cause a reduction of human agency due to determinism.[39]

Concluding observations

As I am not in pursuit of an in-depth exploration, I will refrain from a further analysis of the meaning of responsibility. The argument that I wish to make is clear: the concept of responsibility with regard to tort and crime, as addressed by the civil and criminal law, features a political dimension as it relates to the social obligation to prevent a violation of the social equilibrium. The (alleged) perpetrator failing to prevent such a violation is addressed by the law retrospectively in order to establish his responsibility. At the backdrop of the tenure of contemporary criminal policy, such a retrospective legal address is to be executed by both the civil and the criminal law.[40]

4. Accountability

4.1. Preliminary observations

Similar to responsibility, accountability is ultimately rooted in the obligation to act diligently, representing a reciprocal commitment. The latter is demonstrated by Duff, who addresses this type of accountability as the *active type* and relates this to a violation of *prospective responsibilities*, lying within a presumption of

35 Van Boom 2006, supra note 25, pp. 9, 14, 27. Also: Spier et.al.; these authors state that contemporary civil accountability law serves both prevention and retrospective accountability; J. Spier et.al., *Verbintenissen uit de wet en Schadevergoeding* [*Legal Obligations and Compensation*], 2009, Chapter 2.

36 Dworkin 2011, supra note 21, Chapter 19.

37 M. Groenhuijsen, 'The development of international policy in relation to victims of crime', 2014 *International Review of Victimology* 20, no. 1, pp. 31-48. Also: Van der Aa & Groenhuijsen 2012, supra note 10.

38 N. Lacey, 'Space, time and function: intersecting principles of responsibility across the terrain of criminal justice', 2007 *Criminal Law and Philosophy*, no. 1, pp. 241-242 and J. Gardner, 'Relations of Responsibility', *Oxford Legal Research Paper Series no. 15/2011*, available at SSRN: <http://ssrn.com/abstract=1837370>. Also Dworkin 2011, supra note 21, pp. 100-101, pp. 267-270; Duff, 2009, supra note 29, pp. 39-40.

39 Cane 2000, supra note 24, pp. 95, 204; Dworkin 2011, supra note 21, pp. 224-225.

40 Spier et.al. arguing that contemporary civil accountability law serves both prevention and retrospective accountability; Spier et al. 2009, supra note 35, Chapter 2.

foresight, providing the context in which *active accountability* is established.[41] He illustrates his argument by referring to an individual who starts a fire in his backyard to get rid of garden waste. However, by situating the fire just a few metres from his neighbour's wooden garage and not taking any precautionary measures he violates his prospective responsibilities. If, as is to be expected, the neighbour's garage burns down, this implies retrospective responsibility. Being held accountable leads towards liability with regard to tort and maybe crime (e.g. the destruction of property or arson). Duff refers to *responsibility* as 'answerability', and states 'that to be held liable is to be called to an answer for something by and to somebody'.[42] Thus, *active accountability* relates to morality.[43]

My interpretation, however, is somewhat different, or phrased otherwise: it is a more formal one. In my opinion, notwithstanding that there is an intrinsic link to morality, accountability primarily stands for the procedural obligation to 'answer'. Nevertheless, I do acknowledge that accountability comes to bear within a substantive dimension, specifically with regard to agency.

4.2. Accountability

Accountability stands for the 'procedural' obligation to be subject to a public assessment of social issues of responsibility and liability.[44] The latter provides the 'substantive' outcome, representing the legal consequences of the evaluation of the facts that follows from the positive assessment of the perpetrator's accountability. The procedural rules to establish accountability with regard to tort and crime, however, differ (e.g. the trial scene, the rules of evidence, the legal consequences at stake).[45] Notwithstanding that both civil and criminal proceedings need to comply with the standard of a 'fair trial' (Article 6(1) ECHR), due to its far-reaching consequences a criminal ruling calls for more demanding legal safeguards than a civil ruling.[46]

These differences relate, amongst other things, to the standards of proof: whereas for the civil law the balance of probabilities suffices, the criminal law requires the demanding standard of proof beyond reasonable doubt. Moreover, there is an interplay with the standards of liability, manifested in terms of proof. The so-called *Savannah* case illustrates this: a Dutch professional family guardian was acquitted after being prosecuted for negligence in the case of the death of a toddler caused by (step-)parental child abuse. The District Court of The Hague was of the opinion that the threshold for criminal negligence as required in Article 307 Sr had not been proven beyond reasonable doubt.[47] Nevertheless, there were clear signs of insufficient supervision, which – if civil proceedings would have been initiated – could have constituted accountability and in its wake liability with regard to tort.

Despite these procedural differences, one can argue that both the civil law and the criminal law serve the public interest. Indeed, one can be of the opinion that 'crime' refers to a kind of 'overqualified' category of tort, the civil and the criminal law both pursuing – albeit on different conditions – distributive justice.[48] One can hear an echo, albeit remotely, within the topical criminal policy, stating that a violation of the law includes both a violation of the victim's interest and the public interest.[49] Indeed, according to the policymakers, victims need to be supported in their pursuit of compensation.[50] This position reflects a revaluation of the 'public nature' of the victim's claim for compensation, affecting accountability. Indeed, it furthers convergence as is shown in the change with regard to the admissibility criterion lowering the thresholds with regard to accountability (Article 51f Sv).[51]

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41 In similar terms: Van Boom 2006, supra note 25, p. 15.
42 Duff 2009, supra note 29, p. 442.
43 Duff 2009, supra note 29, pp. 51-52. Also: R.A. Duff, 'Towards a Modest Legal Moralism', 2014 *Criminal Law and Philosophy* 8, no. 1, pp. 217-235.
44 Cane 2000, supra note 24, pp. 61-62.
45 For an overview of the characteristics with regard to tort and crime in the Dutch legal discourse: I. Giesen, F. Kristen, R. Kool, 'The Dutch Crush on Compensating Victims', in M. Dyson, *Tort and Crime*, Cambridge, 2015, forthcoming. This section partially relies upon this text.
46 With regard to Art. 6 ECHR and the civil law: J. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* [*Enforcement of ECHR rights via liability law*], 2013. Also: R. Rijnhout & J. Emaus, 'Damages in Wrongful Death Cases in the Light of European Human Rights law: Towards a Rights-Based Approach to the Law of Damages', 2014 *Utrecht Law Review* 10, no. 3, pp. 91-106.
47 District Court (*Rechtbank*) The Hague 16 November 2011, *LJN* BB8016.
48 Van Boom 2006, supra note 25, p. 51, referring to the work of the penal abolitionist Louk Hulsman.
49 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, Para. 3.2.1.
50 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, Para. 3.2.4.
51 *Staatsblad* 2010, 1.

Agency

The argument to address accountability in terms of agency lies within the present tendency to objectify agency; as we shall see this is also true for liability (see Section 5). Accountability implies that the perpetrator is addressed as 'a responsible agent'. The latter refers to the agent's capacities to act according to social standards. However, the law being inherently normative and in pursuit of distributive justice, the assessment of accountability necessarily bears within a normative dimension, evoking a risk of agency being assessed 'objectively'. With regard to the civil law, the absence of the capacity to act as a responsible agent does not, however, necessarily block accountability or, in its wake, liability.[52] Despite a total absence of an adequate mental capacity, attribution is still possible if the harm caused should, according to social opinion, be attributed to the perpetrator (Article 6:165 BW).[53]

The criminal law, on the other hand, does not provide for such a 'de-personalized' assessment of agency. On the contrary, given the nature of the penalties imposed, agency based upon an actual presence of individual mental capacity is a prerequisite for imputation; perpetrators who are not sound of mind are not accountable (Article 37 Sr).[54] With regard to the civil law, being in pursuit of a fair reallocation of costs, such a focus would be too strict. One can however observe a tendency within the criminal law to emphasise the consequences of the perpetrator's act or omission in the assessment of accountability, rather than his/her individual agency.[55] One may wonder whether the concurrence of proceedings with regard to tort and crime in the context of Article 51f Sv fortify this tendency, leading towards a more lenient concept of agency as applied in the civil law.[56]

Concluding observations

Interpreting accountability as a predominantly procedural element, the procedural differences with regard to the civil law and the criminal law are evident. Indeed, they represent the historical outcomes with regard to procedural regimes that have shaped the way in which legal disputes with regard to tort and crime are settled in Dutch society.[57] Due to victims' emancipation, however, the manifestation of accountability is subject to change, implying that the procedural regimes of the civil and criminal law with regard to victims' compensation are converging. Indeed, as I shall argue in Section 6, in view of the current focus in procedural justice, accountability has become a key issue.

5. Liability

5.1. Preliminary observations

Liability assumes the presence of responsibility and accountability. Liability is a (re)construction of the facts in order to evaluate whether there are legal consequences to be attached to acts or omissions. Liability arises when one violates the (active, prospective and protective) responsibility one has to uphold. Similar to responsibility and accountability, liability is ultimately linked with morality. Bearing in mind the serious consequences (penalties, obligations) of assessing liability, however, more detailed, sophisticated discriminations are required than those that are applied in the moral domain.[58] Nevertheless, in view of the need for interpretation, judicial reasoning no doubt shows similarities to moral reasoning as both the law and morality use methods of evaluative reasoning based upon open norms.[59]

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52 Cane 2000, supra note 24, pp. 202-205.

53 Another exception to the rule of agency is Art. 6:169 BW, constituting parental accountability and liability for tort committed by their children.

54 Cane 2000, supra note 24, p. 202. Note that in Dutch criminal law misdemeanours do not require a mens rea element. This category of crime, relating to minor offences, will not be discussed.

55 Y. Buruma, 'Grenzen aan strafrechtelijke aansprakelijkheid' ['Limitations with regard to criminal liability'], in M.S. Groenhuijsen & J.B.H.M. Simmelink (eds.), *Glijdende schalen* [*Sliding scales*], 2003, pp. 71-93; Y. Buruma. 'Een al te responsief strafrecht' ['A too responsive criminal law'], 2008 *Delikt & Delinkwent*, no. 2, pp. 105-120.

56 M. Dyson, 'Tort and Crime', *University of Cambridge Faculty of Law Research Paper no. 48/2013*, available at SSRN: <http://ssrn.com/abstract=2341578>.

57 For a comparative perspective: Dyson 2015 (forthcoming), supra note 45.

58 Cane 2000, supra note 24, p. 89.

59 Cane 2000, supra note 24, p. 89. Also C.E. du Perron, 'Genoegdoening in het civiele aansprakelijkheidsrecht' ['Compensation within civil liability law'], in Nederlandse Juristenvereniging, *Het opstandige slachtoffer* [*The Rebellious Victim*], 2003, p. 113.

5.2. Liability

Compared to criminal law, tort law sets less demanding standards and liability does not usually indicate gross culpability. Based upon notions of fairness, liability is related to a broad range of behaviour, including violating someone's right, negligence concerning one's own legal obligations or acting (or not acting) in violation of (non-legalised) social obligations. Moreover, the less demanding standards of proof used within the civil law (the balance of probabilities), in coherence with the open character of the standards of liability, gives the judiciary a certain room for manoeuvre to assess the liability, providing typical and specific duties that have to be complied with in order to avoid liability with regard to tort.[60] With regard to the criminal law, due to the explicit wrongdoing to be assessed and the intrusive legal consequences, the application of liability follows a strict scheme, featuring fixed provisions and a strict standard of proof (beyond reasonable doubt).[61]

The mens rea element

A first element of liability that draws attention is the difference with regard to the assessment of blameworthiness. Whereas civil law suffices with the general standard of 'fault', criminal law uses stricter standards. The maximum variant required in Dutch criminal law is unconditional intent (knowingly and willingly committing a crime), the minimum variant is negligence (being unaware of the evidentiary risk of causing harm to others; the so-called '*onbewuste schuld*' (unconscious guilt)). In the majority of crimes requiring intent ('*opzetdelicten*' (intentional offences)), the strict standard applied flows from the explicit public wrongfulness of a crime, expressing intentional harm, or at least the willingness to show gross indifference as to the harm that one can cause.[62] Phrased otherwise: the imposition of punishment is only justifiable if we are able to establish the presence of (serious) blameworthiness indicating (conditional) intent, recklessness or – as a bottom line – negligence.

Civil liability, however, flows from the general rule of fault (Article 6:162 BW), or contractual liability (Article 6:74 BW). Specific types of torts (pockets of wrongdoings) have evolved within civil law case law, imposing different standards of mens rea. Moreover, civil liability can flow from 'impersonal grounds' such as social opinion, or even the mere presence of a specific legal provision (Article 6:162(3) BW).[63] Indeed, tort law being in pursuit of a fair reallocation of costs, a low level of responsibility can give way to substantial liability. Other than for criminal law, proportionality is not strictly related to the perpetrator's intent, or to the nature of the social norm violated.

These differences can affect the assessment of liability with regard to tort and crime. A reference to the case law of the Dutch Supreme Court (*Hoge Raad*, HR) dealing with conditional intent can illustrate the difference. In several rulings regarding unprotected, consensual homosexual contacts by men who deliberately did not inform their partners about their HIV status, the (alleged) victims applied for compensation. The HR however ruled that the infection that followed from these sexual contacts could not be qualified as an act of manslaughter (Article 287 Sr) because the standard of criminal intent had not been proven.[64] If the case would have been tried by a civil court, a positive assessment with regard to fault would have been plausible given the less demanding standards of blameworthiness present within the

60 For an analysis of the differences with regard to the standards of liability: E. Engelhard et al., 'Let's Think Twice before We Revise! '*Égalité*' as the Foundation of Liability for Lawful Public Sector Acts', 2014 *Utrecht Law Review* 10, no. 3, pp. 55-76.

61 De Jong, however, rightly points at the fading role of doctrine within the criminal law; F. de Jong, 'The End of Doctrine? On the Symbolic Function of Doctrine in Substantive Criminal Law', 2011 *Utrecht Law Review* 7, no. 3, pp. 8-45.

62 The latter contains two categories of mens rea. The first is the so-called '*voorwaardelijk opzet*' (the perpetrator is aware of a non-pursued risk, but showing indifference with regard to its manifestation). E.g. HR 24 February 2004, *NJ* 2004, 375 (hitting someone on the head with a loaded gun, causing another person's death). The defence of non-intentional killing, the pepetrator not being aware of the risk, was rejected: a responsible agent would have been aware. The second category is the so-called '*bewuste schuld*' or recklessness (the perpetrator is aware of a non-pursued risk but is too optimistic as to its non-manifestation. E.g. HR 15 October 1996, *NJ* 1997, 199 (dangerous driving with a Porsche, causing the death of multiple victims in the resulting car crash).

63 Spier et al. 2009, supra note 35. Nevertheless, if fault is required it needs to be related to capacity and, if indicated, to professional standards.

64 E.g. HR 28 March 2003, *NJ* 552 (*HIV-I*) and HR 27 March 2012, *NJ* 2012, 301. Note that these rulings were influenced by the difficulty in proving causality. In the Dutch regime the intent required to prove manslaughter requires the perpetrator to have – at least – knowingly and willingly accepted the considerable possibility that his activities would cause the victim to die (so-called conditional intent). The causality of contamination with HIV being not predictable to this extent, such intent could not be proven beyond reasonable doubt.

civil law case law on HIV infection.[65] The victims in the HIV cases heard by the criminal court, however, did not benefit from this: a criminal conviction being a prerequisite for admissibility, their tort claims were thereby ruled inadmissible.

The standard of relativity

A second element applied to assess liability is the standard of relativity: the victim's alleged violated interest needs to fall within the ambit of the legal interest that is protected by the law. The standard of relativity with regard to the criminal law lies within the definition of the offence. With regard to the civil law, Article 6:163 BW provides a general standard. The victim who claims compensation in the context of an adhesion procedure will not however benefit from this lenient standard unless the perpetrator is convicted. Moreover, the victim's claim must relate to an offence mentioned in the indictment. A conviction, however, implies an assessment of relativity according to the stricter standard of the criminal law: if this assessment is negative, the victim's claim for compensation will be rejected.

The case decided by the HR on 15 February 2011 can serve as an illustration: the defendant was convicted of the illegal manufacturing of drugs; in the wake of this criminal conviction he was held liable for the damage suffered by his landlord due to water caused by the illegal manufacturing of the drugs. The perpetrator successfully appealed against the awarding of victim compensation, claiming that the legal interest served by the Dutch Opium Act did not protect the landlord's interest.[66]

Causality

A third element of liability that needs our attention is causality. Both the civil law and the criminal law apply the standard of reasonable imputation ('*redelijke toerekening*'). Indeed, with regard to the criminal law, the legislature has not opted for a fixed criterion leaving the imputation of causation to be set by the judiciary. The Dutch Supreme Court subsequently decided that the criterion of reasonable imputation applies to both civil and criminal cases.[67] Nevertheless, the results of applying this criterion differ due to the differences with regard to the burden of proof and the standards of proof. Within the setting of criminal proceedings stricter rules are applied, requiring – amongst other things – a solid, reasoned opinion as to why causation has been proved. Problems in living up to this strict standard of reasoning can block criminal liability, whereas causation in the context of civil law can be determined.[68]

Indeed, notwithstanding the apparently open nature of the criterion, the assessment of causality is felt to be a major obstacle with regard to victims' compensation in the context of an adhesion procedure. This is, however, not solely due to the complexity of the assessment of causality. Indeed, tort claims are not always presented adequately, demonstrating insufficient evidence to assess causality. This indicates that the assessment of the tort claim would present an undue burden to the criminal proceedings, therefore the claim will be ruled inadmissible.[69] Indeed, one would expect the claim to be rejected, the latter indicating a ruling with regard to the contents. This would, however, deprive the victim of an opportunity to subsequently pursue compensation via the civil court, as the latter implies double jeopardy. To prevent this, the Dutch judiciary has been instructed to rule that the claim is inadmissible.[70] Moreover, albeit that this is not a hard and fast rule, notwithstanding the assessment of causality being hampered sometimes

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65 E.g. HR 8 July 1992, *NJ* 1992, 714 (*AMC v. O.*); discussed in: S.D. Lindenberg, *Smartengeld, tien jaar later* [*Immaterial Damages, ten years after*], 2008; C.J.J.M. Stolker, 'Aansprakelijkheid voor bloedproducten en bloedtransfusies' ['Liability with regard to blood products and blood transfusions'], 1995 *Nederlands Juristenblad*, no. 19, pp. 685-695. With regard to a non-HIV case: HR 25 November 2005, *RvdW* 2005, 132 (*Skeeler*), relating to the liability of an instructor for a headinjury suffered by a pupil (who was not instructed to wear a helmet) due to a fall.

66 HR 15 February 2011, ECLI:NL:HR:2011:BP0095.

67 HR 20 March 1970, *NJ* 1970, 251 and HR 12 September 1978, *NJ* 1979, 60.

68 As follows from a comparison of the *HIV* case law.

69 About one third of the claims are – for various reasons – ruled inadmissible; S. van Wingerden et al., *De praktijk van de schadevergoeding voor slachtoffers van misdrijven* [*Crime victims' compensation in practice*], 2007; Ten Brinke et al. 2014, supra note 9. For a positive ruling: District Court (*Rechtbank*) The Hague 4 March 2014, ECLI:NL:GHDHA2014:621 (the perpetrator was held liable for the damage which resulted from the suicide of a woman whom he had previously seriously injured with intent (throwing acid in her face)).

70 National Forum of Chairpersons of the Criminal Law Section of the Judiciary (*Landelijk Overleg Voorzitters Strafsecties*, LOVS), *Aanbeveling civiele vordering en schadevergoedingsmaatregel* [*Recommendation relating to a civil claim and a compensation order*], October 2011, <www.rechtspraak.nl/procedures/landelijke-regelingen/sector-strafrecht/documents/wet-terwee.pdf> (last visited 20 June 2014).

compensation is awarded in advance ('*voorschot*'; see Section 6).[71] Both outcomes show that the judiciary does not (always) opt for strict solutions with regard to causality – and therefore with regard to liability –, but shows compassion concerning the victims' pursuit of compensation.

Concluding observations

Notwithstanding that the standards by which to assess liability within tort law and criminal law differ for good reason, similar to responsibility and accountability one can observe that liability is subject to convergence. Holding on to the standards of liability on the one hand, the Dutch judiciary shows a willingness to accommodate the victims' interest on the other. One is generally, albeit not unanimously, willing to 'bend' the standards of liability in favour of the victim. Although this provides some food for thought, it does not provide support for strong conclusions with regard to a potential convergence with regard to liability. Indeed, in comparison with responsibility and accountability, the convergence observed with regard to liability is less substantial due to the subordinate nature of an adhesion procedure. As the regime of the criminal procedure with regard to liability prevails, a crossover between the civil law and the criminal law with regard to the standards of liability is hindered.

6. The issue of enforcement

6.1. Preliminary observations

Having engaged in an analysis of responsibility, accountability and liability, I will subsequently elaborate upon the issue of enforcement. Indeed, morality being 'purely a matter of values',[72] its application within the law frames these moral values with authority.[73] The observation is that there is a reciprocal relationship between the *because* (the substantive aspect) and the *how* (the procedural aspect) of tort law's application as operated within the context of the Dutch adhesion procedure (Article 51 Sv). As we shall see, the concurrence of procedural regimes creates a specific chemistry affecting the dialogue between the civil and the criminal law with regard to the interpretation of responsibility, accountability and liability related to victims' compensation.

Efficacious enforcement

Due to the topical focus on procedural justice enforcement becomes subject to convergence. In order to determine in what way and to what extent, an overview of the traditional differences is needed. With regard to the criminal law, compliance is traditionally actively pursued, in order to achieve (general and specific) prevention.[74] Nevertheless, the impracticability of full enforcement is (unwillingly) accepted nowadays. Influenced by 'penal populism', contemporary criminal policy features an instrumental approach, indicating that criminal law provisions are multiplying and becoming more open and more symbolic in nature. Notwithstanding that adequate enforcement is still highly valued, the criminal law tends to take on the role of a 'legal educator'.[75]

A somewhat similar, but reversed, trend can be observed with regard to the civil law. Traditionally enforcement is not a predominant issue within tort law. Indeed, civil law traditionally aims at the reallocation of costs, based upon arguments of equity. Other than the criminal law, there is no explicit moral rejection of a specific type of behaviour that justifies the enforcement of civil law as such. To date, however, Dutch scholars like Van Boom,[76] Giesen[77] and Engelhard[78] support efficacious enforcement,

71 A ruling of 'compensation in advance', however, contains a legal contradiction: the ruling on this part of the tort claim is of a definite nature.
72 Cane 2000, supra note 24, p. 11.
73 Cane 2000, supra note 24, p. 104 and Dworkin 2011, supra note 21, Chapter 19.
74 Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, appendix p. 16.
75 Cane 2000, supra note 24, pp. 61-63; Dworkin 2011, supra note 21, pp. 13-15.
76 Van Boom 2006, supra note 25; W.H. van Boom, 'Effectuerend handhaven in het privaatrecht' ['Efficacious enforcement of the civil law'], 2007 *Nederlands Juristenblad*, no. 16, pp. 982-991. Also: Emaus 2013, supra note 46, Para. 3.4; Rijnhout & Emaus 2014, supra note 46.
77 I. Giesen, 'Handhaving in, via door en met het privaatrecht: waar staan we nu?' ['Enforcement in, via, by and with the civil law: where do we stand today?'], in E.F.D. Engelhard et al. (eds.) *Handhaving van en door het privaatrecht* [*Enforcement of and by the civil law*], 2009, pp. 310-312.
78 E.F.D. Engelhard, 'Handhaven van en door het privaatrecht' ['Enforcement of and by the civil law'], in Engelhard et al. (eds.) 2009, supra

arguing that compliance serves the prevention of tort. According to Van Boom, tort law should pursue 'efficacious compensation',[79] indicating the pursuit of a specific and general deterrence.[80] To effectuate compensation, Van Boom proposes to support self-help, implying that the State authorities should provide a civil law mechanism to enforce claims by victims. Indeed, he proposes a '*joint use* [original emphasis] of public law regulation and private law'.[81]

It should be noted, however, that Van Boom, like Giesen and Engelhard, is conscious not to 'penalise' civil law.[82] Indeed, the common denominator amongst the proponents of efficacious enforcement is the argument that the shortcomings with regard to enforcement cause the civil law to be short of 'public authority'. Similar to the profile of criminal law, civil law should function as a moral educator. Others, however, (strongly) argue against this, stating that the aim of tort law should not serve as an instrument of social engineering.[83]

Without wanting to overestimate the extent of the debate, being aware that the proponents of efficacious enforcement do not relate to the theme of tort and crime specifically, the observation that civil law is short of enforcement is relevant for the issue of tort and crime.[84] After all, bringing a tort claim to the criminal court in the context of an adhesion procedure implies that the victim participates – albeit as a 'guest' – in the criminal proceedings. The public nature of these proceedings, as well as the specific nature of crime-related tort might influence the victim's perception with regard to both the way he is treated and the outcome of the procedure. The victim fosters, to phrase it otherwise, an expectation of 'publicness'. This relates to the subject of procedural justice, referring to the psychological effects of legal proceedings in terms of (public) acceptance of the legitimacy of the proceedings and the outcomes.[85] Against the background of the topical focus on procedural justice, this aspect of accountability is of predominant importance.

Indeed, in view of the pursuit of the efficacious enforcement of tort law, the adhesion procedure under Article 51f Sv holds promises as it provides a procedural device to the victim to hold the perpetrator (publicly) accountable. Moreover, a positive civil ruling with regard to tort implies the imposition of a '*schadevergoedingsmaatregel*' (a compensation order under Article 36f Sr).[86] The latter implies that the State authorities execute the claim on behalf of the victim, the possibilities for seizure having been recently extended.[87] What is more, if the defendant has been convicted of a serious offence, the victim who can deliver proof that the perpetrator did not provide the full amount of compensation

note 77, pp. 36-37.

79 Van Boom 2007, supra note 76, p. 988.

80 Van Boom 2006, supra note 25, p. 9: '(…) the rules in private law have discernable goals which cannot merely be of a corrective nature. Correctiveness by definition implies making right the wrong after it has happened (…) My admittedly rather simplistic approach to private law is that most rules are made with a distinction in mind (…) between right behavior and wrong behavior. What is considered right should be encouraged and what is considered wrong should be discouraged. This simple distinction is the basis for most rules governing human and corporate behavior in private law.'

81 Van Boom 2006, supra note 25, p. 27. Also p. 16, referring to the enforcement of tort law in terms of 'risk reduction'. Furthermore, Van Boom 2007, supra note 76 and Giesen 2009, supra note 77, Para. 2.2.3. Note that this form of tort theory has found favour predominantly in the Anglo-American discourse; e.g. Duff 2009, supra note 29; M.L. Rustad, 'Tort as Public Wrongs', 2011 *Pepperdine Law Review* 38, no. 2, pp. 433-550.

82 Giesen 2009, supra note 77, p. 325; Engelhard 2009, supra note 78, p. 36; Engelhard argues that civil 'penalties' need to comply with Art. 6 ECHR, assuming there is a need for a criminal charge.

83 J. Kortman, *The Tort Law Industry*, inaugural lecture University of Amsterdam, 2009; T. Hartlief, 'Gij zult handhaven', 2007 *Nederlands Juristenblad*, no. 15, p. 915. Both emphasize the need to be cautious not to penalise civil law.

84 Note Van Boom's plea for efficacious enforcement to relate to the category of collective claims. Nevertheless, such 'collective' claims can follow from criminal law cases, as can be illustrated by the so-called Amsterdam Sexual Abuse case (Court of Appeal (*Gerechtshof*) Amsterdam 26 April 2013, ECLI:NL:GHAMS:2013:BZ8885). Moreover, the ECtHR requires adequate legal protection with regard to sexual abuse, thus a lack of enforcement can result in a violation of Art. 3 ECHR, giving rise to the State's civil liability; e.g. ECtHR 28 January 2014, appl. no. 35810/09 (*O'Keeffe v. Ireland*).

85 E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice*, 1988; Giesen 2009, supra note 77, p. 318; A.J. Akkermans, 'De emotionele kosten van het geschil' ['The dispute's emotional cost'], in P. Langstraat, *De kosten van het geschil* [*The dispute's cost*], 2008, pp. 93-131. Although I will not elaborate upon this theme, I do want to mention the topical debate with regard to the so-called civil recourse mode. This model indicates a reorientation concerning both the nature of tort and crime, the procedure and the sanctions; e.g. B.J. Zipursky, 'Civil Recourse not Corrective Justice', 2003 *Georgetown Law Journal* 91, pp. 695-756, Duff 2009, supra note 29 and Duff 2014, supra note 43.

86 This obligation flows from an internal Directive provided by the LOVS; LOVS 2011, supra note 70. Note that the Dutch term for 'compensation order' is not synonymous with the compensation order applied within the English legal system. Within the Dutch legal system a compensation order implies a criminal 'sanction', that can only be applied jointly with a criminal conviction.

87 The enforcement service lies within the Central Judicial Debt-Collecting Agency (*Centraal Jusitieel Incassobureau*, CJIB); Gijselaar & Meijer 2014, supra note 15.

within eight months from the ruling can request compensation in advance, to be provided by the State (Article 36f(6) Sr). Indeed, such a regime furthers both the efficacious enforcement of tort, and the victim's need for procedural justice.

The (legal) truth, however, is that a substantive cohort of the tort claims is ruled (partially) inadmissible,[88] leaving crime victims with no option but to start a civil procedure. Although they can still benefit from the criminal ruling, because a criminal conviction is considered to be compelling evidence in civil proceedings as regards the unlawfulness of the act (Article 161 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, Rv)),[89] this is not the outcome preferred by the crime victim. Indeed, there is a realistic possibility that victims will feel repeatedly victimized and abscond from further legal proceedings. Moreover, even if they do decide to start a civil procedure, they cannot benefit from the public enforcement services granted by the criminal justice system.

As mentioned, the Dutch judiciary is well aware of the risk of victims' deception. Albeit not unanimously, one tries to prevent this by ruling the tort claim partially admissible, awarding the victim some compensation 'in advance', providing for a joint compensation order.[90] Moreover, one has been instructed not to apply the admissibility criterion too strictly.[91] This reflects a willingness, although to be put into perspective, to consider leniency with regard to the (legal) assessment of responsibility, accountability and liability, thereby effectuating an efficacious enforcement of victims' compensation based upon tort law.

Concluding observations

Notwithstanding the differences between the civil law and the criminal law with regard to enforcement, one can observe a convergence. Indeed, the academic debate with regard to the deficit of the public authority of tort law runs parallel with the pursuit of victims' compensation in the discourse of the criminal law. Scholars, as well as the judiciary and the legislature, are in search of ways to serve the victims' pursuit of compensation and simultaneously search for ways to serve the victims' need for procedural justice. This supports the estimation that convergence will emerge, leading towards future (legal) changes.[92]

One can question, however, whether and to what extent these changes will suffice to solve the problem. Indeed, lowering the thresholds will not take away the lack of enforcement experienced by crime victims, nor will it satisfy the underlying notions of retribution that accompany crime-related tort.[93] Bearing in mind that tort law is in pursuit of restoring social order, serving the public interest, one can question whether there is a need for a more fundamental change to the civil paradigm in terms of recognizing the need for 'civil publicness'.

7. Conclusion

Starting from a multidimensional perspective necessarily implies that the outcomes are rather of an exploratory nature. Indeed, one can be of the opinion that my observation that convergence is emerging with regard to crime-related tort is already overworked within the academic debate, the presence of a broad spectrum of responsibility, accountability and liability being applied with regard to tort and crime having already been generally accepted. Indeed, the law being a slow instrument, convergence enables the law to adapt gradually. Based upon my observations, however, I do believe that there is more at stake.

As one is inclined to be sympathetic to victims' interest it comes as no surprise that there is broad social support for contemporary developments. Indeed, one can hardly object to the legitimacy of the victims' interest to be allowed compensation for crime-related tort. Politicians, academics and practitioners from

88 Van Wingerden et al. 2007, supra note 69; Ten Brinke et al. 2014, supra note 9.

89 Such evidence can, however, be rebutted by adducing counterevidence (Art. 151(2) Rv).

90 Such an advance is often granted in the assumption that the victim will abscond from a civil procedure. See M. Hebly et al., 'Crime Victims' Experiences with Seeking Compensation: A Qualitative Exploration', 2014 *Utrecht Law Review* 10, no. 3, pp. 27-36.

91 LOVS 2011, supra note 70, p. 15.

92 For an overview: Parliamentary Papers (*Kamerstukken II*) 2012/13, 33552, no. 2, Para. 4.

93 Engelhard rightly points to the victim's right to an *effective* remedy as prescribed in Art. 13 ECHR; Engelhard 2009, supra note 78, p. 33.

different (legal(-philosophical)) backgrounds subscribing to the legitimacy of the pursuit of victims' compensation and the related need for procedural justice has resulted in the fact that the interpretation and application of the concepts of responsibility, accountability and liability with regard to crime-related tort are – albeit within a certain perspective – converging. Such an apparently legitimate victims' policy, however, can lead towards a penalization of the civil law, or in reverse, to a civilization of the criminal law. Indeed, such an effect is hard to avoid, given the close relationship between crime and crime-related tort.

Leaving aside the pros and cons of such a convergence, there is a need to be aware of these consequences and to discuss them openly, as we need to preserve the delicate balance that flows from the use of the law as an instrument to preserve social order.[94] Against the backdrop of the Dutch victim policy being based upon penal populism, one may wonder whether the contemporary convergence between the civil law and the criminal law with regard to tort and crime carries potential risks of disrupting this delicate balance. Indeed, the ways of the law being gradual in nature, active policy can stir up rapid changes. The topical question is therefore *how* to progress.

As we cannot deny the legitimacy of the victims' interest in being allowed compensation, being receptive to the notion to make a restrained use of the criminal law, the civil route appears to be the preferable option.[95] The latter, however, implies that civil law is becoming 'public', having to adjust the traditional aims it pursues. There are, as illustrated, indeed promises within the contemporary debate of such an extension of the public authority of the civil law. Nevertheless, similar to criminal law, one needs to be careful what to wish for in order not be hijacked into a public law discourse. Indeed, we cannot stop the convergence between tort and crime, nor should we want to. This leaves us, however, with the academic assignment to theoretically safeguard these developments and to decide how far down the road we need to go to find a (new) equilibrium between the public interest and the interest of the individual who has experienced a harmful wrong. ¶

94 Giesen 2009, supra note 77, p. 325.

95 Food for thought lies in the civil recourse model; e.g. Zipursky 2003, supra note 85, Duff 2009, supra note 29 and Duff 2014, supra note 43.