

Editorial

Liability, Responsibility and Accountability: Crossing Borders

Ivo Giesen
François G.H. Kristen*

1. Introduction

This special issue of the *Utrecht Law Review* is entirely devoted to a set of topical issues and questions concerning liability, responsibility and accountability, within private, criminal and administrative law. This issue is the academic result of one of the research initiatives which marked the start of a new research group, the Utrecht Centre for Accountability and Liability Law (hereafter: UCALL). Some contributions were presented as a paper at a research seminar organized by UCALL in July 2013 at the Utrecht University School of Law.

The connecting factor of the different contributions to this special issue is that they all aim at crossing some of the traditional borders imposed by legal domains and doctrine. Principles, concepts, doctrines, and rules from both the public law and private law fields are studied and analyzed with the use of a multidimensional approach. We will explain the multidimensional approach later on (Section 2.5).

In this editorial we will briefly introduce UCALL, and especially its research orientation, research questions and its chosen methodology, the multidimensional approach (Section 2), followed by Section 3 in which we show how some of our research topics and questions have been dealt with in the six following contributions that are collected in this special issue. In so doing, this section also provides an overview of the topics that are covered hereafter and illustrates how the multidimensional methodology is applied in several contributions. In Section 4 we identify three common denominators between the contributions. These denominators can be considered as general issues of liability law, regardless of whether it concerns liability rules belonging to the domain of private, criminal or administrative law. These issues of liability law bind the contributions together. And, in turn, they are related to one general issue: the enforcement function of liability law, which is, not quite coincidentally, reflected in the first theme of the UCALL research programme of 'Controlling Society'. We will explain this final observation in Section 5.

* Prof. Dr. I. Giesen (e-mail: i.giesen@uu.nl) is Professor of Private Law at the Molengraaff Institute for Private Law, and the programme leader of the *Utrecht Centre for Accountability and Liability Law*, Utrecht University School of Law (the Netherlands). Prof. Dr. F.G.H. Kristen (e-mail: F.G.H.Kristen@uu.nl) is Professor of Criminal Law and Criminal Procedure at the Willem Pompe Institute for Criminal Law and Criminology, and the programme leader of the *Utrecht Centre for Accountability and Liability Law*, Utrecht University School of Law (the Netherlands).

2. The UCALL research group and programme

2.1. Who are we?

The Utrecht Centre for Accountability and Liability Law is a group of academic researchers within Utrecht University's School of Law who have set out to conduct multidimensional research on the boundaries of liability, responsibility and accountability in the Netherlands, in Europe, and beyond. The research group currently consists of eleven professors, two associate professors, eight assistant professors, a postdoc. and nine PhD students, all employed at the Utrecht University School of Law. UCALL also has one research fellow, employed at Cambridge University. All members are lawyers and specialized in tort law, corporate law, criminal law, administrative law, legal theory, European law, or public international law. See the UCALL website, <www.uu.nl/ucall>, for the various names, positions and expertise. We, Ivo Giesen and François Kristen, are UCALL's programme leaders. Together with the associate professors Esther Engelhard and Renée Kool and the postdoc Liesbeth Enneking we form UCALL's executive board.

In order to realize innovative, creative and relevant legal research which contributes to answering the research questions implied in the UCALL research programme (Sections 2.2-2.4) together with making use of the multidimensional approach (Section 2.5), the UCALL philosophy is to combine forces and bring together knowledge of private law, criminal law, administrative law, legal theory, European law and public international law by close cooperation between the UCALL members in small research groups as well as organized research activities for the group as a whole. In principle, all the small research groups consist of lawyers from the different legal domains. So, a small research group can consist of two private law lawyers, one criminal law lawyer, one administrative law lawyer and one public international lawyer. This approach is rather new in the Netherlands,¹ where academic research at many law faculties is traditionally organized along the lines of the legal domains. With this approach lawyers from the different legal domains will learn from each other's legal domain and learn to 'talk the talk' of those legal domains, which is inspiring, contributes to a reflection on their own legal domain, and enriches legal discussion with new arguments, insights and perspectives. By this means the application of the multidimensional methodology (see Section 2.5) is facilitated.

2.2. What are we doing? UCALL research programme: in search of the boundaries of liability

The orientation of UCALL's research programme can be described as follows. We aim to uncover the legal foundations and key questions surrounding liability, responsibility and accountability, particularly with respect to the question of what limits, if any, there are as regards liability, responsibility and accountability. What is it that society wants to achieve by invoking liability rules and allocating accountability (both in the Netherlands as well as in Europe)? When something has gone wrong, with detrimental effects, there is a recurring demand for the use of legal instruments to be able to hold a natural person and legal entities like companies, corporations, governments or other institutions accountable for that event. That usually happens by establishing the liability of that person or legal entity. In this process the boundaries of liability law are often explored and tested: who can be held liable for the damage that occurred? Can two or more persons and/or legal entities held liable for the same conduct or for their involvement in the conduct that caused the damage? And can they be held liable according to different areas of the law, and if so, under which conditions? Such liabilities can be based on private law (through the law of tort or contractual liability), criminal law, administrative law, and/or even European law and public international law. This may result in an obligation to pay damages to the victim, the imposition of criminal sanctions, or the attribution of administrative sanctions and measures, possibly also in combination with each other.

But should all of this be in fact possible? Are there no limits to the possibility of invoking someone's liability? Is there a need for a control mechanism of any kind? Or is the imputation of liability, whether or not by private, criminal, administrative and/or European and international law, in certain cases still too limited in order to offer proper redress, thereby making it necessary to have other mechanisms or instruments for making individuals, governments or other legal entities accountable? Does the nature of

¹ But this is not exclusive to UCALL. Other research groups at the Utrecht University School of Law are similarly organized. Tilburg University and Leiden University also have research groups in which lawyers with expertise in different legal domains work together.

the violation in question (human rights, violations of a national, European or international standard) play a part? Are separate rules required for different juridical instruments for the imputation of liability and their potential and effects? Who determines on a normative and factual level the (limits to) accountability and who should be attributed the responsibility to do so from the perspective of the rule of law? What is the relationship (or: boundary) between accountability, responsibility and liability?

Thinking about these and other fundamental questions focuses attention especially on the possibilities and arguments to reset, if so desired, the previously mostly normatively determined limits on liability by changing, expanding or diminishing that liability, both at a systematic level as well as in specific cases. Given the inherent dynamic nature of the law, as it is constantly evolving and subject to change, through social and legal developments (individualization, secularization, Europeanization, globalization, and so on), and given the natural urge of liability law to expand, it is the ambition of UCALL to research and analyze whether there are in fact also limits to liability, responsibility and accountability, and if so, what those limits should be and where the opportunities for development lie.

Within this approach, the term 'limits' is understood in a broad sense. This term does not solely concern domestic legal limits ('how far does a person's legal liability extend?'). It also and especially concerns the exploration of the following: the boundaries between the various sub-areas of the law (private law, criminal law, administrative law, and European and international law); the boundaries between different legal systems (in Europe and beyond); the limits in these systems and their institutional design (as can be identified from the operation and effects of the actors that determine the limits, such as the courts, the legislature, the Government, supervisory authorities and other 'regulators'); the limits on liability, responsibility and accountability in light of other disciplines (economics, psychology, sociology, etc.); and the boundaries between liability, responsibility and accountability. This way of analyzing, exploring and elaborating on issues of liability, responsibility and accountability is a rather innovative research methodology for lawyers. We call it the multidimensional approach (see below at 2.5). Its main feature is to increasingly include external perspectives on the limits on liability, responsibility and accountability. Liability law is not only studied from within, but in combination with one or more external perspectives. Those perspectives are obtained from internal and external comparative law as well as insights derived from other disciplines.

2.3. UCALL's main research question

The central research question underlying the aforementioned developments and questions can be defined as follows.

What are the limits to liability in the main areas of the law, given the intended objectives and functions, the institutional context and the legal and extra-legal arguments for determining those limits?

Are those limits adequate, and if not, where should they lie given what society wants to achieve with liability and accountability when it comes to redress, influencing behaviour and standard setting?

Understood from the state of the art in a specific field of the law – including criminal liability, contractual and extra-contractual (tort) civil liability, the law of damages, state liability, the law of administrative liability, European law, public international law – the pertinent question, on a domestic, European and international level, is thus: are there limits to liability? This mostly descriptive research question is of relevance from two points of view. First, it should provide a systematic overview of the main areas of liability law. Such an overarching approach of liability law is currently lacking in at least the Dutch discourse on liability law. Second, the descriptive research question should offer the necessary ingredients for posing and answering the second research question. This is a normative research question, aimed at evaluating the state of the art in liability law, identifying needs, developments and trends with respect to liability and accountability, and drawing up new limits, underlying principles, norms and rules of liability law. To put it differently: if the answer to the question whether there are limits to liability is affirmative, some important follow-up questions arise: why have the existing boundaries been drawn where they are

now currently located? Can or ought these boundaries be reset? And if so, when, how and under which conditions? When is a sanction due and when is immunity in order?

2.4. Several specific research questions

In order to answer the central research question other more conceptual issues and questions must be dealt with. These are:

- 1) *Controlling society*: What are the limits to the aspirations and the (regulatory) possibilities of liability, responsibility and accountability? And what is the social objective, i.e. what is it that society wants to achieve with the imputation of liability, the attribution of responsibility and the allocation of accountability as regards redress, influencing behaviour and standard setting?
- 2) *Layering*: Which levels and boundaries must be distinguished? Here, one can think of, inter alia, the levels between individuals vs. companies (including insurers), individuals vs. governments, individuals vs. transnational corporations, and so on.
- 3) *Limits*: When we speak of limits to liability, responsibility and accountability, what does this actually mean? Are boundaries rigid or flexible when viewed from various external perspectives and from an internal legal system? How can the aforementioned limits be determined and, if necessary, reset?
- 4) *Coherence*: What is the relationship between private law, criminal law, administrative law and European and international law when it comes to liability, responsibility and accountability, considering the objectives and functions of the allocation of liability, responsibility and accountability?
- 5) *Dynamics*: What arguments explain the tendency to explore boundaries, to shift or stretch them, to extend or limit liability, both at the systematic level (linked to methodological insights) and in specific cases? Is there a need or even a necessity for mechanisms that limit liability, particularly in relation to the requirements of legality and legal certainty, the need for 'de-legalization' in public law, and the channelling of social unrest (an anti-compensation culture)?

2.5 Multidimensionality as methodology

In addition to analyzing the substantive legal limits on key liability issues, beginning with a thorough analysis of the laws and regulations, the *travaux préparatoires* thereof, case law and the jurisprudence, and so on, we will not only explore but even surpass the methodological boundaries of the study of law. By means of the method that is known as the multidimensional approach to liability law, our group of researchers will search for arguments for and against certain solutions both within and outside the law, explore new ways of thinking, as well as desired objectives, outcomes, costs and benefits, etc. We will do this by using the traditional methodology for conducting legal research, which provides the necessary legal reasoning, supplemented and enriched by using insights we have gained elsewhere (economics, psychology, sociology, and so on). These insights provide external perspectives which will be used to look at the relevant research questions and the research field from different angles. This multidimensional image is derived from and consists of multiple dimensions. This multidimensional approach to the study of law is introduced in private law by Van Boom and elaborated upon by Giesen.² It is now the leading approach in the study of law at the Utrecht University School of Law.

First of all, one can look at the research question from an angle beyond the borders of one's own area of law. By making an internal legal comparison between, for example, private law and criminal law or criminal law and administrative law, parallels can be drawn that uncover larger trends within Dutch law. That can be inspiring, it can lead to new arguments and insights and can also contribute to solutions to issues concerning liability, responsibility and accountability. It can also be used for reaching a uniform

² See W.H. van Boom, *Structurele fouten in het aansprakelijkheidsrecht*, 2003, p. 36, and I. Giesen, *Handle with care*, 2005, pp. 17-24.

and more systematic approach for a rule, norm, doctrine and/or procedure in the different legal domains. The method of internal legal comparison is then used for the purpose of harmonization.

Secondly, one can step outside the boundaries of one's own legal system in order to answer the research question. A legal comparison between different legal systems can provide inspiration, explanatory insights, contribute to a better understanding of domestic law as well as provide arguments for addressing issues and problems in the field of liability law as well as the concepts of responsibility and accountability.³ It can also provide solutions as the approach to a particular issue in a different legal system. In some cases a foreign rule or doctrine might also lend itself to be used in Dutch law (i.e. legal transplants), but then one should be very careful not to introduce a disrupting alien in the domestic legal system.⁴ Finally, the comparative law method can be used for purposes of the harmonization of rules, norms, doctrines, and/or procedures, which can be of particular interest in case of the implementation of legal instruments of the European Union or international treaties and conventions.⁵

Last, but certainly not least, the multidimensional approach means gaining knowledge of and deriving insights from other disciplines. That knowledge and those insights, when applied to the legal domain, can be used to open the classical conceptual frameworks or ways of thinking within the legal domain. Such external perspectives can give rise to discussions about assumptions and conventional starting points and provide new arguments for or against the deployment of a new trend in liability, responsibility and accountability. By other disciplines one must especially think of (behavioural) law & economics, psychology, economics, sociology, etc. The objective is to translate (empirical) outcomes achieved elsewhere into legal issues and to calculate the possible influence and effects thereof. Within the specific confines of the field of private law this way of working has also become known in the last few years as 'civilology'.⁶ Within 'civilology' the focus is on how private law works in real life. Rather than analysing private law from a strictly legal doctrinal perspective, use is made of (the combined) insights from social sciences – ranging from economics to psychology and sociology – in order to analyse the behavioural assumptions underlying private law, to understand the effects it has on individuals, organisations and businesses and to appreciate the impact of both assumptions and effects on policymakers, legislatures and courts.

3. The contributions, their research questions and multidimensional methodology

In this section we will try to show how some of our research topics, themes and questions as explained above have been dealt with in the six contributions that have been grouped together in this special issue. We also mention how the multidimensional methodology is applied in each contribution.

As follows from Sections 2.2-2.3 the concepts of liability, accountability and responsibility play a pivotal role in the UCALL research programme and thus in the research projects of members of UCALL. The meaning of these concepts is, however, not crystal clear. They have a more or less core meaning which everyone can understand, but when it comes to drawing a definition, one will stumble across many different views with respect to the application, interpretation and operationalization of these concepts. The variety and ambiguity of views also differs between liability, on the one hand, and accountability and responsibility, on the other. Lawyers do have concrete ideas about a definition of liability, but that will be a legal definition. Things become more complicated with accountability and responsibility, concepts with which legal systems and lawyers are familiar with, but not uniformly defined. So, there is no generally accepted view or common understanding with regard to the meaning of liability, accountability and

3 F.G.H. Kristen, 'Reflecties over strafrechtsvergelijking', in C. Kelk et al. (eds.), *Veelzijdige gedachten. Liber amicorum prof.dr. Chrisje Brants*, 2013, pp. 430-431, 434-436.

4 See Kristen, supra note 3, p. 436; C.H. Brants, 'Legal Culture and Legal Transplants', in J.H.M. Erp & L.P.W. Vliet (eds.), *Netherlands Reports to the Eighteenth International Congress of Comparative Law*, 2010, pp. 8-9, 100.

5 See, among others, C.J.C.F. Fijnaut, *Rechtsvergelijking en strafrecht(swetenschap): enkele methodologische beschouwingen, Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*, no. 61, 2000, pp. 71, 80-81; Kristen, supra note 3, p. 437.

6 Cf. W.H. van Boom et al., *Capita Civilologie*, 2013. This book is the sixth volume in the Civilologie | Civilology series. The series is edited by Willem van Boom (Erasmus Law School) and Ivo Giesen (Utrecht University School of Law).

responsibility. Therefore, UCALL has to search for a definition of these concepts. *Kool* is the first UCALL researcher who took up the challenge of drawing a definition of liability, accountability and responsibility.⁷

In her contribution '(Crime) Victims' Compensation: The Emergence of Convergence' *Kool* explores the concepts of liability, accountability and responsibility as such as well as their mutual relationship.⁸ She starts with defining responsibility from a legal philosophical perspective and thereby framing responsibility in terms of a duty to act with due diligence. Accountability is defined from a procedural perspective. It is the process aimed at a subsequent public assessment of a person's conduct in a given case in order to evaluate whether this conduct was required and/or justified by this person's responsibility and, once this evaluation is executed, to establish who can be held liable for all consequences of the conduct, or only a reduced or limited liability due to (the degree of) the involvement, position, and function of the perpetrator. This process can eventually amount to a procedure before a court, in which procedure liability is established (finally). Liability is then defined as the attachment of legal consequences to the conduct.

With this very brief and simplified summary (see *Kool's* contribution for a much more detailed and elaborate description) the mutual relationship of responsibility, accountability and liability is also demonstrated. In our view, responsibility needs accountability to 'translate' the breach of the duty to act with due diligence (thus: responsibility) into a liability, which in turn must lead to redress for the person(s) who suffered damage and/or society as a whole. We use redress as an overarching concept (see Section 4) that encompasses a variety of legal consequences, starting with the sole recognition of the claim and/or damage, and ending with the obligation to pay damages to the victim and the imposition of the most severe sanction the state has in relation to its citizens, namely deprivation of a person's liberty by means of incarceration (like imprisonment in criminal law). In this approach to the concepts of responsibility, accountability and liability the research theme of 'Controlling Society' as mentioned in Section 2.4 can be easily recognized. It also shows that lawyers are more familiar with liability issues than with responsibility and non-legal forms of accountability. It is for this reason that the focus in the description of the UCALL research programme in Section 2 as well as in the central research question of the research programme and in UCALL research projects lies with liability (law).

Kool's contribution also describes the changing discourse on the position of victims of crime in the Dutch legal system, particularly the criminal justice system, and points to the political attention to effective compensation of victims of crime, particularly by using criminal law to effectuate compensation, which, however, does not necessarily mean that all damage is paid for. We add that the current Dutch Government has explicitly committed itself to a crime victims policy. This policy aims at improving the position and the rights of victims of crime before, during and after the criminal trial.⁹ One of the five objectives of the policy is to simplify and enhance the possibilities for victims of crime to actually receive financial compensation and other forms of redress for crimes of which they are the victims. Or to put it differently, according to the Dutch Government: 'The victim's damage is to be paid by the perpetrator.'¹⁰ To achieve this objective, enforcement is an essential issue. *Kool* elaborates on this issue, particularly with respect to the application of tort law in the Dutch adhesion procedure in the criminal trial and the use of tort law for enforcement purposes (*Kool* qualifies it as efficacious enforcement, see Section 6.1 of her contribution). In this discussion the UCALL themes of 'Controlling society' and 'Coherence' can be identified. We will return to the topic of enforcement as a function of liability rules in tort law in our conclusion.

For now we move on to the contribution by *Hebly, Van Dongen and Lindenbergh*, who report their results of an exploratory qualitative study of the experiences of victims of crime in having their damage paid for

7 The diligent reader would remark that we, the authors of this contribution and the programme leaders of UCALL, who wrote the UCALL research programme and Section 2.2 of this contribution, also have a definition in mind. That is true, but we did not make our view explicit, to give room for a creative, multidimensional search for definitions. We can however endorse the definitions proposed by *Kool*.

8 R.S.B. *Kool*, '(Crime) Victims' Compensation: The Emergence of Convergence', 2014 *Utrecht Law Review* 10, no. 3, pp. 14-26.

9 *Kamerstukken II (Parliamentary Papers) 2012-13*, 33410, no. 15, p. 25.

10 See *Kamerstukken II (Parliamentary Papers) 2012-13*, 33552, no. 2, pp. 6-7 respectively *Kamerstukken II (Parliamentary Papers) 2012-13*, 33410, no. 15, p. 25.

and reflect on these results.¹¹ They also give a description of the increased attention to the possibilities for compensating victims of crime. However, where *Kool* focuses on the change in discourse on the position of victims of crime in the Dutch legal system, *Hebly et al.* provide a brief road map of the legal pathways to compensation. In this sense both contributions are complementary and we have already briefly mentioned the policy of the Dutch Government. In this context, the multidimensional approach of *Hebly et al.* by presenting and discussing the results of their empirical study adds a new dimension in the debate on the position of victims of crime. An important finding is that most victims of crime use the pathway of filing a claim for damages in the criminal proceedings in order to have their damage (partially) paid for. The route of a civil action before a civil court is only rarely used. The reasons for this choice by the victims of crimes vary:

- i) they were pointed towards the possibility to join the criminal proceedings as an injured party by *Slachtofferhulp Nederland* (the national victim support organisation), while sometimes the victim does not know about the possibilities before the civil courts,
- ii) it is a relatively simple procedure, with lower costs, less formalistic, lower evidentiary standards and thus a higher success rate than civil proceedings,
- iii) it is not an extra procedure after the criminal proceedings with unexpected outcomes and, if the tort claim is granted, there is the real risk that the perpetrator cannot pay while the claimant bears the execution costs (which is not the case when the criminal court imposes a compensation order (Article 36f Criminal Code)),
- iv) the perpetrator must not be allowed get away with it easily, thus victims have a principal incentive in joining the criminal proceedings as an injured party,
- v) another principal reason to join is recognition as a victim and/or the satisfaction of receiving compensation.

These findings show that victims of crime are in search of redress, both financially and emotionally. They mostly find it in the possibility to join criminal proceedings as an injured party, notwithstanding the fact that the victim only plays a secondary part in the criminal proceedings. *Hebly et al.* then discuss some topics which could improve the possibilities for obtaining compensation, like better information about the possibilities in civil proceedings, a 'sidecar' to the personal liability insurance of individuals which should provide for compensation in case of damage due to crime, and better communication between the public prosecutor and the victims of crime. With these results of the empirical study and the discussion of the mentioned topics, *Hebly et al.*'s contribution is in the middle of the theme of 'Controlling society', which encompasses the topic of offering redress as a societal objective of liability law (see Section 2.4).

Another multidimensional approach is applied in the contribution by *Meyer, Van Roomen and Sikkema*.¹² They employ the comparative law method to investigate the criteria on which corporate criminal liability in the United Kingdom and the Netherlands is based and whether the fact that a corporation has an anti-bribery compliance scheme can prevent a corporation from being held criminally liable. The contribution shows how functional, inspiring and reflective the comparative law method can be. Both the UK and the Netherlands must provide for the criminal liability of corporations to prevent corruption; this duty stems from the international legal instruments that are discussed in the contribution, like the United Nations Convention Against Corruption and the EU Framework Decision on combating corruption in the private sector.¹³ It is functional to investigate how other legal systems have implemented the obligation to penalize corporations, because particularly the Framework Decision strives for a minimum harmonization of the possibilities to hold corporations criminally liable for corruption offences.¹⁴ This means that the way and the criteria on which criminal liability is established should not deviate too much; minor differences due to the characteristics of legal systems are allowed, but differences which

11 M.R. Hebly et al., 'Crime Victims' Experiences with Seeking Compensation: A Qualitative Exploration', 2014 *Utrecht Law Review* 10, no. 3, pp. 27-36.

12 B. Meyer et al., 'Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence. A Comparison of the Dutch and English Legal Frameworks', 2014 *Utrecht Law Review* 10, no. 3, pp. 37-54.

13 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, pp. 54-56.

14 See recital 7 of the Framework Decision's preamble: '(...) corruption is an area of particular relevance in establishing minimum rules on what constitutes a criminal offence in Member States and the penalties applicable'.

could hamper judicial cooperation in transnational cases of corruption should be avoided. In this respect, *Meyer et al.* show that the UK has opted for a unique and different approach when it comes to the criminal liability of corporations for failing to prevent bribery. Article 7 of the Bribery Act 2010 is an example of strict liability in criminal law. At the same time, this research result is also inspiring; we can learn from the UK approach. *Meyer et al.* propose to introduce in the Netherlands a duty-of-care provision with an explicit exculpation scheme as an adequate due diligence defence like the one which is provided in Article 7(2) Bribery Act 2010 and the Ministry of Justice Guidance that offers a kind of compliance scheme. By doing so, they aim at introducing a less complex system for establishing corporate criminal liability, which offers more legal certainty and provides corporations with more guidance as to what is expected from them to prevent corruption. This proposal also shows that the contribution relates to the themes of 'Controlling Society' and 'Dynamics' of the UCALL research programme. Finally, the legal comparison with the UK conducted by *Meyer et al.* allows us to reflect on how corporate criminal liability is established in the Netherlands. In particular, the meaning of the extension of the 'acceptance' criterion with the reasonable diligence standard is discussed. How should this standard be interpreted? Is it an exculpation which overrides the other criteria? What is necessary to meet this standard?

In a truly 'interlegal' collaboration *Engelhard, Van den Broek, De Jong, Keirse & De Kezel* have joined forces to combine private law, criminal law, administrative law and European law with comparative observations to tackle the multidimensional issue of state liability for *lawful* acts commissioned within the public sector by public authorities.¹⁵ This combination of legal domains seems in fact to be needed because each domain of the law has developed its own set of specific rules in this regard. More important, however, is the fact that the question of what could justify the imposition of state liability if in fact no unlawful act has been committed should preferably be answered alike in all domains. A sound justification for doing so is currently found in the so-called 'égalité' principle (i.e. public burdens should be equally shared) but how this idea is then translated back to the specific legal domains, and how those domains then interrelate, is not yet entirely clear. The analysis thereof as presented in this contribution falls squarely within the research ambit of UCALL, since it deals with the 'Controlling Society' theme as explained above. Firstly, the question of what ground or justification for liability might be present is one that is directly relevant here. Secondly, regulation through the use of liability law as a means to control society, for example by using rules on state liability, runs into certain boundaries at some point, and regulating behaviour by awarding compensation for acts that are not even unlawful seems to be at least nearing such a crossroads. Further research was thus warranted. Of course, the theme of 'Coherence' is also involved in this contribution, since striving for more coherence was one of the aims of the internal comparison carried out in this study.

Van den Broek & Enneking mix administrative law, tort law and civil procedure in their multidimensional contribution on the promotion of public interests by private parties that initiate civil proceedings in national civil courts, the instances of so-called 'public interest litigation'.¹⁶ Public interest litigation in environmental matters is characterized by the attempt to influence governmental policies, their future-oriented nature, the concern for interests broader than the private interests of the parties involved, their focus on idealistic interests and their orientation towards changing the societal status quo. Both administrative channels as well as the civil courts can be used to exert influence on the policy decisions that are to be taken in certain areas (such as environmental issues), but there seems to be a growing use of civil courts in this regard, which raises a number of questions. What position do public interest-related claims have within the Dutch system of civil procedure? Do environmental NGOs in practice have access to the Dutch courts that is required by international obligations? Should room for improvement be sought in the civil law rather than the administrative law domain? The UCALL research programme clearly has room for (answering) such questions, most notably under the heading of 'Layering'. This

15 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.

16 B. van den Broek & L. Enneking, 'Public Interest Litigation in the Netherlands. A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts', 2014 *Utrecht Law Review* 10, no. 3, pp. 77-90.

theme encompasses the concept of public interest litigation since this concept uses private law rules to regulate issues that are in essence public in nature, thereby mixing the traditional layers of regulation and using private law in a much more instrumental manner, and it places (groups of) individuals against larger corporate organizations or governmental organizations, trying to reach certain policy issues.

In the contribution by *Rijnhout & Emaus* on damages in wrongful death cases attention is shifted towards the possible role that human rights law, most notably the European Convention on Human Rights (ECHR), can and will play in private law debates on the boundaries of tort liability.¹⁷ More specifically, one can ask whether and under what conditions that Convention might necessitate that some of the existing boundaries in national tort law systems are to be expanded, regardless of what and how a national legislator might want to regulate certain legal issues. The central issue is whether and how the national law (of damages, in this case) can be adjusted to remain durable and consistent when confronted with the state of the art and the legal developments in the field of human rights. This issue, which is then focused on claims for non-pecuniary losses by certain family members (of the primary victim of a tortious conduct), ties in very well with the UCALL research programme, most notably within the specific issue of ‘Limits’, on the one hand, but also with the theme of ‘Dynamics’, on the other. The possible extension of the law of damages by including third party claims on the ground that treaty obligations oblige a national state to do so, certainly touches on the core concept of damage as such, as well as the normative boundaries and limits attached to it. Such a possible (mandatory) extension, however, also touches on the question of the systematic possibilities of extending liabilities, for instance due to treaty obligations, which is certainly a question that squares well with the theme of ‘Dynamics’. That human rights obligations might supersede national limitations to liability is well known, but how far this may go remains a path that is less well trodden. With good reason, and with interesting results as the reader will find out hereafter in this special issue, *Rijnhout & Emaus* decided to take precisely that road.

4. Common denominators: testing and crossing the boundaries, the role of the Government and in search for redress

In this section we will tie together some of the core issues, questions and themes that connect the foregoing contributions. First of all, not surprisingly of course, all contributions deal with questions of (criminal or tortious) liability and the procedural rules surrounding those liabilities, but much more important is the fact that they all look for the boundaries of our current state of knowledge about questions of liability. In this regard, *Kool* defines the concepts of responsibility, accountability and liability and shows how these concepts are related. Drawing these definitions comes down to scanning different meanings and interpretations of these concepts, thus establishing their scope, and therefore the boundaries of the concepts, particularly with respect to the mutual relationship of the concepts. With her definitions she provides guidance for future (UCALL) researchers in this domain as to the concepts and terminology which can be used. This was indeed a necessary endeavour because people, including lawyers amongst themselves, from different (legal) backgrounds do not necessarily speak the same language or use the same terms in the same situations (see Section 3). *Kool* is also crossing another border. As a criminal lawyer familiar with the concept of enforcement, she raises the issue of efficacious enforcement as a function of tort law. It is not meant as a ‘penalisation’ of private law, but to call attention to a possible function of tort law in relation to controlling society and, with regard to the specific topic of compensation for victims of crime, to improve their position and possibilities to have their damage caused by the crime compensated.

It is also this aspect that *Hebly et al.* elaborate upon. Starting from the implicit assumption that the position of victims of crime should be improved, they are crossing the borders between civil proceedings, insurance and criminal proceedings in order to show, on the basis of the results of their empirical study, how victims of crime experience the different pathways to compensation and which problems they face in effectuating their claim for damage. It is then interesting to see that the combination of tort law

17 R. Rijnhout & J.M. 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.

within the framework of criminal proceedings (the joinder as an injured party in criminal proceedings) is mostly used and for which reasons (summarized in Section 3), and that civil law remedies are hardly ever used and why this is the case. It also shows how empirical studies can add new perspectives to the debate amongst lawyers about compensation for victims of crime.

In their contribution on corporate criminal liability and the due diligence defence *Meyer et al.* are crossing the borders of the legal systems by using the comparative law method and on that basis proposing a new way of establishing corporate criminal liability in the Netherlands. This proposal is really shifting the boundaries of criminal liability law, because they advocate a strict liability duty-of-care provision complemented with an explicit and explicated due diligence defence as a part of the Dutch corporate anti-corruption rules. Bear in mind here that in Dutch criminal law strict liability has so far not been accepted.

Engelhard et al. are also crossing borders, but on another level. They critically discuss various liability rules concerning lawful public sector acts in administrative law, criminal law and private law, thereby crossing the legal domains on a specific doctrine. They detect many differences and conclude, amongst other things, that liability law has a 'patchwork' character as it concerns the liability for lawful public sector acts, although in every domain this liability is based on the public law principle of '*égalité devant les charges publiques*'. Why then not cancel out the borders between the legal domains and come to a more integrated and uniform account of state liability for lawful acts? This allows, amongst other things, as *Engelhard et al.* advocate, at the same time offering more guidance on how to interpret and apply core elements of the *égalité* principle in all legal domains.

Van den Broek & Enneking compare the possibilities and limitations of public interest litigation before Dutch administrative courts with those before Dutch civil courts by means of juxtapositioning the two legal domains. It allows them to draw the conclusion that private parties which are of the opinion that public interests are not adequately protected by the Government should follow the avenue to the administrative courts. Due to more facilitating and lenient procedural rules those courts can offer a better protection than civil courts. However, civil courts can provide a safety net in case there is no remedy in administrative law.

In the final contribution, *Rijnhout & Emaus* combine human rights law and private law, mixed with constitutional law insights and comparative law insights, when dealing with claims for non-pecuniary losses by certain family members (of the primary victim of tortious conduct). In doing so, they are setting new limits to the outer parts of private law thinking, beyond the traditional (Dutch) tort law boundaries in fact, based on human rights reasoning.

All of this cross-border thinking is in most cases supplemented by crossing borders in the comparative law sense: most of the contributions have taken in ideas, concepts, rules and so on from other jurisdictions and legal systems (the ECHR, the EU). All this border crossing is of course not done purely for academic purposes. It serves the much wider goal of finding, or at least trying to find, more coherence within legal systems and possibly also novel solutions for old and existing problems by seeking inspiration elsewhere, be it in a neighbouring legal field or in empirical data that may shed new light. Just as travelling abroad, this is also what makes researching across borders in essence so exciting and inspiring.

Another common feature of all the contributions is the fact that in some way or another, the Government (or the public dimension) seems to play a central role. This was not something we set out for when we started this project, but in the end the position and role of the Government turns out to be something that pops up in many contributions. The intermingling of tort and crime, with lots of attention devoted to the position of victims of crime in criminal cases, as well as their private law rights, in recent times is fuelled by the debates in Dutch Parliament to strengthen that position in criminal proceedings. The Dutch Government has stepped in to improve and enhance the possibilities for victims of crime to obtain compensation for damage caused by crime. By doing so, the Government provides itself with a new role, next to the supply of a prosecutor and a judiciary to handle the cases. Both the contributions by *Kool* and by *Hebly et al.* – next to the connection these contributions have because of the topic they share – show this development and role change (or: enhancement) by the Government.

The proposal by *Meyer et al.* implies a new role for the Government in combating corruption. A strict liability of corporations in corruption cases in criminal law, complemented with a more detailed elaboration of a due diligence defence in guidelines from the Ministry of Security and Justice, will have the effect that it is the Government and not the judiciary that is providing more guidance to private parties like corporations. And this is prospective guidance instead of the retrospective guidance that the courts (can) provide in the current system with only a general, open standard of a duty of care developed in the case law of the Dutch Supreme Court.

The role played by the Government is also central to the paper by *Rijnhout & Emaus* because the Government is the entity that is addressed by human rights treaties. The obligations from those treaties have to be met by governments. Only because this is the case, the question whether our (private) law of damage is, in a sense, sufficiently 'responsive' to human rights issues, comes up. Human rights influence and decide claims against government agencies and thus the question is raised whether the same outcomes should also be attainable in disputes between private parties.

Public interest litigation arises, as discussed by *Van den Broek & Enneking*, first because the Government does not of itself solve the issues that are raised in the litigation. However, they conclude that primacy lies with the Government as it comes to the protection or promotion of public interests. Furthermore, the Government is often involved in public interest litigation as a defendant.

Last but not least, the contribution by *Engelhard et al.* is of course completely focused on the Government. After all, the Government is the defendant in tort claims based on lawful acts. The Government is held liable for the damage to private parties caused by governmental (policy) decisions. This liability is considered to be justified on the basis of the so-called 'égalité' principle.

Third and lastly, all contributors seem to be in search of redress, in one way or another. We define redress according to its linguistic meaning as the restoration of the situation as it was before the incident or improvement of the current situation via taking away certain consequences and/or shortcomings.¹⁸ This can be achieved in several ways, depending on the concrete circumstances. In the case of a continuous violation of a right, redress means to put an end to this violation. In the case of an already occurred violation, redress implies reparation. Reparation encompasses three forms. First, *restitution in integrum*, or full reparation, which is generally to be understood as re-establishing the situation which existed before the incident. Second, financial compensation of the damage caused by the incident. Third, satisfaction, which includes, amongst other things, the sanctioning of the perpetrator, preventive measures, the payment of symbolic or fixed compensation, official apologies, the recognition of the incident as unlawful behaviour and recognition as a victim, the declaratory decision of a court that the incident was unlawful.

This definition of redress can be found in the literature¹⁹ and the distinction between ending a violation and reparation in its three forms can be found in international documents,²⁰ but can also be derived from the contributions in this special issue by means of induction.

The contributions by *Kool* and *Hebly et al.* show that victims of crime are in search of several forms of redress: (i) all damages caused by the crime to be paid by the perpetrator, (ii) a part of the damages caused by the crime to be paid by the perpetrator, as a kind of compensation, (iii) a fixed compensation paid by a third party (the Government, funds, insurance companies), (iv) filing a claim against the perpetrator (in criminal proceedings as an injured party, in civil proceedings, settlement), thus using a remedy to prevent the perpetrator from getting away with his crime, (v) (official) recognition as a victim of crime. So, it concerns reparation in the sense of *restitution in integrum*, compensation and satisfaction.

In the case of the liability of the state for lawful public sector acts as discussed by *Engelhard et al.* this liability amounts to the obligation to pay a certain amount of money to the claimant, not being *restitution in integrum* or compensation, but a fair amount (in tort law and administrative law) or a standardized amount (in criminal law) of money and therefore only providing satisfaction. The public interest litigation

18 *Woordenboek der Nederlandsche Taal*, also available at <<http://gtb.inl.nl/>>.

19 See, with many references, P.H.P.H.M.C. van Kempen, *Heropening van procedures na veroordelingen door het EHRM*, 2003, pp. 65-71.

20 Like the Annex to Resolution 56/83 adopted by the General Assembly on Responsibility of States for internationally wrongful acts, 2002, UN-doc. A/RES/56/83, with Art. 30 on cessation and non-repetition, Art. 31 on full reparation, Art. 34 defining the forms of reparation (restitution, compensation and satisfaction), which are elaborated in Art. 35-37.

as described by *Van den Broek & Enneking* typically aims at having correcting or preventive measures imposed. Public interest litigation is then offering satisfaction. That is also the objective of the European Court of Human Rights as *Rijnhout & Emaus* demonstrate with their referral to Article 41 ECHR. This provision only provides for ‘just satisfaction’.

Finally, *Meyer et al.* have a different angle in their contribution, because they discuss the criteria for the criminal liability of corporations and whether and how corporations can put forward a due diligence defence to avoid criminal liability. But in the end this is also related to redress: if the criminal liability of a corporation can be established, redress can be offered by imposing criminal sanctions, particularly those with (elements of) reparation as an objective, like the compensation order (Article 36f Criminal Code, see *Kool*). This also means that a due diligence defence is an exception to liability, which advocates clarity and preciseness as to the conditions for invoking this defence. This perspective supports the line of reasoning of *Meyer et al.* who advocate the same position, but then from the perspective of the corporation (as the suspected person) and the principle of legality.

5. Final observation and conclusion

The contributions to this special issue deal with a variety of topics. However, they also have three characteristics in common: finding and crossing borders, the role of the Government and searching for redress. The latter two are obviously pointing in the direction of the – accepted, perceived or desired – functions of liability rules within a legal system, and most notably the enforcement function. Also the characteristic of crossing borders is in a sense linked with enforcement. When the borders of a legal domain, whether it is private law, criminal law and/or administrative law, are tested or even crossed in the contributions then it is often for reasons that the legal domain concerned cannot offer an adequate response to the issue at stake. Another legal domain or another legal system might provide insights and/or arguments for improvement or even solutions, like harmonization. Here the purposes and benefits of the multidimensional methodology (see Section 2.5) come into play. Thus, the possibilities of using (private law) rules and regulations, and thus also using private party actions instead of Government interventions, to reach and/or enforce certain desired outcomes, are at the centre, or at least lurking in the background, of most of the contributions.

Van den Broek & Enneking’s exploration of the concept of ‘public interest litigation’ and the possibilities to that end in administrative and civil proceedings is of course focused on the enforcement possibilities (and issues) that such a form of litigation brings (and tries to solve). They show that civil proceedings can provide for a ‘safety net’ in case the administrative law avenue is not responsive. *Rijnhout & Emaus* use the human rights angle to – in essence – search for an expansion (the ‘rights-based approach’ as they call it) of the private law concept of wrongful death actions, thus trying to enhance the enforcement of those liability rules that aim to protect third party victims. *Engelhard et al.* seek to clarify the concept of ‘*égalité*’ as a foundation for state liability in distinct legal domains to find some common ground between those fields of law. Doing so would of course seriously benefit the possibilities of enforcing state liability in those cases where that would be warranted and justified on whatever moral ground. As to the victims of crimes, dealt with by both *Kool* and by *Hebly et al.*, the law can help them to accept the wrong that was inflicted upon them and to pick up their lives if there is a recognition of their status as a victim and that the consequences of the crime are removed or mitigated. To that end redress is needed, either through criminal proceedings, via an ensuing civil case, or by any other means. It requires not only the enforcement of the liability rules and the courts’ decisions to actually effectuate the redress, but also an improvement to practical issues like treatment as a victim, information supply, communication by governmental institutions like the public prosecutor’s office, and paid legal assistance. In other words, the Government has to step in. *Meyer et al.* crossed the borders of domestic criminal law in order to address the problem of establishing the criminal liability of corporations and the role of the due diligence defence to prevent corruption, which is a duty imposed by legal instruments of European and public international law and of relevance in transnational cases of bribery. Their solution, derived from the UK legal system, implies more guidance from the Government.

To be sure, this heightened attention for enforcement as a function of liability rules is as such not all that surprising; it fits in well with what has been at the forefront in many legal debates lately. At least since Van Boom's inaugural address in 2006,²¹ a strand in legal writing has emerged on, or related to, this theme. Van Boom describes three major flaws of systems of (in his case) private law. First, private law systems and the rules designed for those systems mainly look backwards, not forwards, supplying possible solutions, that is, remedies, when something has gone wrong, for example when a duty was breached. Second, when reacting to such a wrong these systems mainly try to restore the former situation by way of reparation, compensation or restoration in kind for the harm done, and nothing more. Thirdly, private law rules typically react to a specific situation, problem or dispute without taking the broader picture into account. These three 'flaws' lead to, for instance, problems as regards compliance with, and possibilities of, the enforcement of private law rules. Following Van Boom, one could state that our private law systems are not sufficiently adapted to actually enforce, in a just and effective manner, the rights and obligations they have designed. It is precisely that enforcement issue (in search of redress) that has been tackled in several ways (crossing legal borders if need be) and through several distinct means (a central role for the Government) in this special issue.

To conclude: this special issue shows some – albeit a rather small part – of the wide variety of research themes that can be grouped together under the banners of liability, responsibility and accountability, if those concepts are dealt with from the perspectives of private law, criminal law, administrative law and public international law. If such a way of trying to grasp those concepts is then combined with the multidimensional methodology we envisage, the research terrain that can be covered stretches even wider, and also reaches deeper, touching on the functions attached to distinct parts of the law. This makes the UCALL research task for the forthcoming years a formidable one, but it provides us, the researchers, also with a truly challenging endeavour. We are given the opportunity to carry out research that is academically at the forefront, that deals with topics that are pivotal in society, and we should search for the borders as regards the state of the art and the state of knowledge in our domains. And then we may also cross those borders... ¶

21 See W.H. van Boom, *Efficacious Enforcement in Contract and Tort*, 2006, who also mentions earlier literature. For the subsequent debate, see e.g. Engelhard et al. (eds.), *Handhaving van en door het privaatrecht*, 2009.