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Let's Think Twice before We Revise! 'Égalité' as the Foundation of Liability for Lawful Public Sector Acts

Esther Engelhard
Berthy van den Broek
Ferry de Jong
Anne Keirse
Evelien de Kezel*

1. Introduction

A (still to be published) study currently conducted by researchers of the *European Group on Tort Law* seems to reveal, inter alia, that Dutch law has become one of the frontrunners in Europe as regards the shaping of general regulations for the non-contractual liability of the State, local authorities or other public authorities (henceforth: public authorities).¹ This special position is owed to the fact that in several domains of Dutch law national legislation (including two legislative initiatives that will be discussed below) and case law contain and specify distinct grounds to validate claims for damage caused by acts or omissions in 'the *lawful* exercise of their public law task or authority' (henceforth: lawful public sector acts).

The liability of public authorities for their lawful public sector acts is, however, one of the most intricate domains of Dutch law. Firstly, because of its 'patchwork' character: administrative law, private law and criminal (procedural) law each have their own, separate rules for liability in this respect. Another reason for the complexity of imposing liability for acts that were lawful at the time is, of course, that this calls for a special justification. Why should public authorities be held to pay compensation to individuals if they have done nothing wrong (they have not exceeded or abused the powers given to them or the like)? The most common justification (hereafter: ground) for these liability rules in the various fields of law comes from the public law principle of '*égalité devant les charges publiques*' (an equal apportionment of the public burdens, hereafter: the *égalité* principle). This principle entails that damage caused by the

* Dr. E.F.D. (Esther) Engelhard (e.engelhard@uu.nl) is Associate Professor of Private Law, affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL), Utrecht University and honorary judge at the Court of Appeal in 's-Hertogenbosch and at the District Court Midden-Nederland. Dr. G.M. (Berthy) van den Broek (G.M.vandenBroek@uu.nl) is Assistant Professor of Administrative Law, Utrecht University and affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL) and the Utrecht Centre for Water, Oceans and Sustainability Law (UCWOSL). Prof. Dr. F. (Ferry) de Jong (f.dejong1@uu.nl) is Professor of Criminal Law and Criminal Procedure, Utrecht University and affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL). Prof. Dr. A.L.M. (Anne) Keirse (a.l.m.keirse@uu.nl) is Professor of Private Law, Utrecht University, affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL), the Utrecht Centre for Shared Regulation and Enforcement in Europe (RENFORCE) and judge at the Court of Appeal in Amsterdam. Dr. E. (Evelien) de Kezel (E.N.F.M.deKezel@uu.nl) is Assistant Professor of Private Law and affiliated with the Utrecht Centre for Accountability and Liability Law (UCALL), Utrecht University. The authors would like to express their thanks to Ellen Gijsselaar and the anonymous reviewers for their useful comments on an earlier draft of this contribution.

1 One of the authors, i.e. A.L.M. Keirse, is a member of the European Group on Tort Law. The European Group on Tort Law has embarked on a comparative study of public authority liability. The Group aims to publish this study within a year. It gives an overview of the law of public authority liability as it currently stands in various European legal systems, but also addresses the possibility for harmonization in this area. This publication will be referred to as: K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective*, Cambridge, Intersentia, 2014, still to be published. See further K. Oliphant, 'Formulating Common Principles of Public Authority Liability Law', in P. Mankowski & W. Wurmnest (eds.), *Festschrift für Ulrich Magnus zum 70. Geburtstag*, 2014, pp. 93-104.

lawful exercise of a public task or authority must be compensated if it 'exceeds the normal social risk and affects the individual unequally harshly compared to others'.² If public authorities compensate such disproportionate burdens, then this means that these burdens will no longer be borne by the individual himself but by the public at large.³ In other words, the *égalité* principle itself brings about that public authorities are held to compensate disproportionate losses. It can thus be seen as a separate, substantive ground for liability in public law.⁴ Private law functions as a safety net here, to enable victims to obtain compensation if administrative law offers no means for redress: it is longstanding case law that if public authorities violate their public law obligation to offer compensation to individuals who are affected unequally harshly by the lawful exercise of their tasks, this omission (to offer compensation) may be qualified as an *unlawful act*. The unlawfulness is then based on a *violation* of the *égalité* principle,⁵ which means that this principle can be seen as an *indirect* ground for liability in private law (tort law). In both administrative law and private law the right to monetary compensation based, either directly or indirectly, on the *égalité* principle is limited: only disproportionate losses are recoverable.

Although administrative law and criminal law are rather separate fields of Dutch law, the *égalité* principle is currently also being used by civil law courts to establish the liability of the State for certain claimants that suffer damage as a result of lawful criminal procedural acts. Individuals who suffer damage as a result of lawful criminal procedural acts must resort to submitting a fault-based liability claim to the civil court, which then uses the *égalité* principle in certain cases, similar to what was just seen, to construe an unlawful act. Alternatively, former suspects can, if certain conditions of admissibility are met, submit a compensation claim to the criminal law court for damage resulting from custody and other forms of pre-trial detention on the basis of Articles 89 et seq. of the Code of Criminal Procedure (*Wetboek van Strafvordering*, Sv).

Yet over the last ten years the legislator has proposed to review this entire system. For the former two fields of law – administrative law and private law – new legislation has already come into force in 2013, which, inter alia, provides a clearer division of jurisdiction for claims based on the lawful or unlawful behaviour of public authorities, but which also includes a separate section on compensation which has not yet entered into force. This separate section introduces a general compensation rule that transforms the *égalité* principle into a general ground for the liability of public authorities for a lawfully caused loss. The idea is to incorporate this into the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb).⁶ Acts of formal legislation and criminal procedural acts are excluded.⁷ It currently remains uncertain when this separate section on *égalité* compensation, that is part of the new legislation, will come into force.⁸ In the field of criminal law another proposal, currently still a draft bill that has not yet been submitted to Parliament, contains provisions that seem to be quite similar. It aims to introduce an entirely new liability rule for damage caused by the lawful and unlawful acts of the State in the context of criminal proceedings. It has to be noted, however, that the Government does not afford the proposal much priority; the draft bill appears to have been shelved for already quite some time.⁹

This contribution aims to explore the *égalité* principle as a justification for and the foundation of liability for lawful public sector acts, both in current law and in the aforementioned legislative initiatives,

2 Our translation, EE/Gvdb/FdJ/AK/EdK; see Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, ABR) 18 February 1997, AB 1997/143, note PvB (*Beurskens*) and Dutch Supreme Court (*Hoge Raad der Nederlanden*, HR) 30 March 2001, NJ 2003/615, AB 2001/412 (*the State v. Lavrijsen*).

3 M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel*, dissertation Leiden University, 2010, p. 2.

4 Next to a great number of ad hoc arrangements for the compensation of financial losses due to (an) adjustment(s) in urban planning, so-called *planschade*.

5 HR 30 March 2001, NJ 2003/615, AB 2001/412 (*the State v. Lavrijsen*). See E.F.D. Engelhard & G.E. van Maanen, *Aansprakelijkheid voor schade: contractueel en buitencontractueel*, 2008, pp. 84 et seq.

6 Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 13. See for an early commentary (a.o.): G.M. van den Broek, 'Eén uniforme nadeelcompensatieregeling in de Awb?', in A.A.J. de Gier et al. (eds.), *Goed verdedigbaar. Vernieuwing van bestuursrecht en omgevingsrecht*, 2011, pp. 37-48.

7 Claims for damages caused by formal legislation can be brought before a civil court and are based on tort provisions, mostly Article 6:162 of the Civil Code (*Burgerlijk Wetboek*, BW), which requires wrongful (unlawful) behaviour.

8 The reasons for this are said to be rather practical: (inter alia) to enable local authorities to adjust their local regulations or decrees to the newly proposed compensation scheme and the formal legislator to remodel specific acts and legislation, *Staatsblad (Stb.)* 2013, 162.

9 As said, as yet it has not even been submitted to Parliament. See on this proposal N.J.M. Kwakman, 'Overheidsaansprakelijkheid in verband met overheidsoptreden in het verkeersrecht', 2011 *Verkeersrecht*, no. 7/8, pp. 221-231, who makes an integral comparison of the draft bill and the Awb proposal (with a publication of the draft bill in the appendix, pp. 228 et seq.).

and to analyze how the relevant fields of law (administrative law, private law and criminal law) interrelate in this respect. Our focus will be on (initially) lawful acts; unlawful actions will only be referred to when relevant. We will also take note of the impact of European Union (hereafter: EU) law in this respect, small as it may be. The influence of decisions of the European Court of Justice on national systems, on the one hand, and the influence of (the developments within) national systems on EU law, on the other, should not be overlooked. Notably the European Court of Justice has rejected the liability of EU institutions for lawful acts but it is not inconceivable that this may change if and when more countries are to follow the Dutch example. After all, the European public authority liability regime, introduced by the European Court of Justice, is explicitly based upon the general principles common to the laws of the Member States. For that reason we will also briefly touch upon the regulation of liability for lawful public sector acts in several national European law systems.

One caveat must be borne in mind here, namely that aspects related to the competence of the court will not be raised or treated integrally in our study. This is important since, admittedly, the law as it stands as well as the aforementioned legislative initiatives also raise questions in that respect. These are, however, so complex and various that including them would call for a separate study. Therefore our analysis will merely focus on the substantive legal foundations of liability for lawful acts in the respective fields of the law.

The format of this contribution will be as follows. In the following sections we will critically discuss various rules for (mostly) *égalité* liability concerning lawful public sector acts in administrative law (Section 2), private law (Section 3) and criminal (procedural) law (Section 4). In Section 5 we will complete our analysis with a brief excursion into other law systems amongst which is the EU, followed by a comparison of the grounds found in the aforementioned domains of the law and our conclusions in Section 6.

2. Liability for lawful public sector acts in administrative law

2.1. Specific legislation; the 'reasonableness formula'

In the context of administrative law, there are a variety of rules in Dutch legislation and case law that impose liability on public authorities (including the State) for their lawful public sector acts. Perhaps the most well-known example of this is the obligation to pay full compensation in cases of lawful expropriation and/or limitations of the use of private property for the sake of public works stipulated in legislation, such as the Expropriation Act (*Onteiningswet*) and the Public Works (Removal of Impediments in Private Law) Act (*Belemmeringenwet Privaatrecht*).

Further, there are specific enactments that give the right to limited compensation for certain specific limitations on the usability of private property. The 'classic' type of case concerns entrepreneurs who seek compensation from their local community for the damage caused by a reconstruction of a road or by the enactment of a zoning plan. The right to receive compensation on this basis can be found in specific enactments, such as Articles 15.20 and 15.21 of the Environmental Management Act (*Wet milieubeheer*) and Articles 6.1 et seq. of the Spatial Planning Act (*Wet ruimtelijke ordening*), as well as in administrative regulations that were designed for particular projects, such as the *Regeling nadeelcompensatie Betuweroute*, the *Regeling nadeelcompensatie Verkeer en Waterstaat* and the like.¹⁰ These provisions all recognize the right to compensation in situations where a particular administrative decision or other act of a public authority causes damage that 'reasonably should not be borne by the individual who suffered the damage' (the so-called 'reasonableness formula'). In most provisions, the causes of damage giving rise to compensation are accurately determined in an exhaustive list.

In the past, there has been debate on the interpretation of the reasonableness formula and the exact grounds or justifications underlying this formula.¹¹ However, much of the relevance of these discussions was lost as the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak*

¹⁰ Some of these specific compensation rules also include extraprocedural conditions.

¹¹ G.M. van den Broek, *Planschadevergoeding. Het recht op schadevergoeding bij wijziging van het planologische regime*, dissertation Utrecht University, 2002, Chapter 5 and Tjepkema 2010, supra note 3, pp. 83 et seq.

van de Raad van State, ABRS) explicitly recognized the *égalité* principle in the *Van Vlodrop* case in 1997 to be a direct source of liability in certain cases.¹² The ABRS derived from the more general equality principle (*gelijkheidsbeginsel*) 'the rule that disproportionate (*onevenredige*) – that is: falling outside the normal social risk or the normal business risk and burdening a limited group of citizens or organizations – consequences of either an act or a decision of the Government must not be borne by this limited group, but rather equally by society as a whole'.¹³ Since then, the aforementioned *égalité* principle has developed into the main ground for no-fault State liability.¹⁴

2.2. Liability based on the *égalité* principle (in administrative case law)

As said, the ABRS recognizes a right to compensation in cases of lawfully caused damage that 'reasonably should not be borne by the individual who suffered the damage'. This is usually interpreted as 'disproportionate damage, exceeding the normal social risk, as referred to in the *égalité* principle'.¹⁵ In many administrative case law decisions following the aforementioned *Van Vlodrop* case, the ABRS has confirmed that the *égalité* principle is an independent, unwritten principle of law, requiring public authorities to compensate lawfully caused loss.¹⁶

2.3. Conditions for *égalité* liability in administrative case law

The *égalité* principle may entail that public authorities are liable for damage despite having acted lawfully in the general interest. Classic examples are major infrastructure projects, such as the construction of railways, highways and airports. Society generally benefits from these lawful activities although a small group of individuals living near these infrastructures suffer from excessive noise pollution. The same is true for other lawful decisions, for example concerning spatial planning or water management. On the one hand, citizens benefit from them while, on the other hand, it is – at least to some extent – inherent in living in society that citizens are negatively affected by these lawful decisions furthering the general interest.

The ABRS has formulated, in its reference to the *égalité* principle, the following conditions for administrative liability in this respect: '[a]n administrative authority must compensate *disproportionate* (*onevenredige*) damage which exceeds the normal social risk and which befalls a certain limited group of citizens and/or organizations, if this damage is caused by serving the public interest'.¹⁷ Examples in administrative case law that are considered to be 'normal' social developments (*normale maatschappelijke ontwikkelingen*) are 'infill developments' (building on vacant and underutilized land in city centres or urban areas), simple infrastructural developments, the establishment of nurseries or schools in residential areas and road works. Damage caused by such developments does *not* exceed the normal social risk, unless special circumstances result in disproportionately extensive damage.¹⁸

2.4. Legislative proposal: Article 4:126 Awb

The administrative case law in which liability for damage has been recognized based on the unwritten *égalité* principle is so diverse and there are so many separate rules and regulations in this field of law that, according to the legislator, there is a need for a codification and revision of this regime. In 2013 the Act concerning damage compensation and compensation for unlawful administrative decisions (*Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten*) came into force. As mentioned in our introduction, however, this Act includes one particular section that has been approved by Parliament

12 ABRS 6 May 1997, AB 1997/229 (*Van Vlodrop*).

13 ABRS 6 May 1997, AB 1997/229 (*Van Vlodrop*) (our translation, EE/GvdB/FdJ/AK/EdK).

14 Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 12. Cf. Tjepkema 2010, *supra* note 3, pp. 121 et seq. and 123.

15 Our translation, EE/GvdB/FdJ/AK/EdK; see G.M. van den Broek, 'Het voorontwerp voor een algemene nadeelcompensatieregeling in de Awb', 2007 *Overheid en Aansprakelijkheid* 73, pp. 119-128.

16 See for instance ABRS 8 November 2006, JB 2007/8; ABRS 16 November 2011, AB 2012/43.

17 ABRS 6 May 1997, AB 1997/229 (*Van Vlodrop*) (our translation, EE/GvdB/FdJ/AK/EdK).

18 For an overview of the case law, see G.M. van den Broek, 'De toekomst van nadeelcompensatie in het omgevingsrecht. Ruime reikwijdte van de regeling – beperkte toekenning van schadevergoeding!', 2012 *Tijdschrift voor omgevingsrecht*, no. 4, pp. 95-107 and B.P.M. van Ravels, 'Hoe groot is het normale maatschappelijke risico?', *Nederlands Tijdschrift voor Bestuursrecht* 2014/2.

but that has *not* yet come into force and that contains a liability rule based on the *égalité* principle for the Awb (Article 4:126 Awb).¹⁹ The legislator recognizes that activities lawfully undertaken by a public authority in the general interest may impose ‘an abnormal and special burden’ on a particular person (or group of persons), who should then receive compensation for their disproportionate damage. In order to provide more uniformity, this proposed ruling has been given a broad scope as it covers any act that is ‘in the lawful exercise of a public law task or competence’. It applies to damage caused by administrative decisions (*besluiten*) and to factual acts of public authorities (with the exception of criminal procedural acts and acts to create formal legislation, which are excluded). According to the legislator it also applies to damage caused by (the adoption of) policy rules (*beleidsregels*) or general rules of law (*algemeen verbindende voorschriften*).

This part of the new legislation, that is not yet in force, even provides for an administrative petition procedure. According to Article 4:126 Awb the individual who suffers disproportionate damage is entitled to submit an application to the public authority which has caused the damage. If an application is submitted, the public authority is required to review the application and to issue an administrative decision concerning compensation. This administrative decision is subject to judicial review: if the public authority refuses to pay damages or if the amount of compensation offered is considered to be too low, the individual may appeal to a district court.²⁰

Article 4:126 Awb mentions the following conditions to establish liability. Firstly, the damage must have been caused in the lawful exercise of a public law competence or task (*bevoegdheid of taak*). This is what then makes the damage a ‘public burden’. Secondly, there must be both ‘abnormal’ and ‘special’ burdens for the claimant.²¹ ‘Abnormal’ means that the damage must exceed the normal social risk or the normal business risk in order to be recoverable. ‘Special’ burdens means that the burdens affect a limited group of citizens or organizations (to which the claimant belongs) more severely than others (the reference group). Of course there will be no liability if the disproportionate burdens were particularly aimed at, as is the case in our progressive tax system.²²

The requirements laid down for this liability are, to summarize, that the damage has a disproportionate impact on a particular person or circle of persons and that this was a consequence of risks going beyond the limits of the normal risks in the sector concerned (‘abnormal risks’). The public authority has the power to make policy rules for the interpretation of this double standard for disproportionate burdens. In its current case law, the ABRS also provides that public authorities have discretion to determine the normal social risk.²³

There are, however, also a few exemption or limitation clauses. In Section 2 Article 4:126 Awb determines that a request for compensation can be rejected if – and insofar – the claimant can be said to have accepted the possibility that the damage would occur (for example, because s/he invested in the scheme, even when s/he could have foreseen that the public authority would take measures that would not be in his/her favour); if and insofar the claimant has failed to mitigate the damage by taking reasonable measures to prevent the damage from occurring or to limit the damage; if and insofar the damage has resulted from a circumstance for which the claimant can be held accountable by law; and if and insofar the claimant can safely receive compensation by other means (i.e. reimbursement based on a specific regulation or expropriation or the like). If one or more of these criteria can successfully be relied upon by the public authority, then that will have the effect that either no compensation will be awarded or it will be a lesser amount than requested.

19 Act of 31 January 2013, *Staatsblad (Stb.)* 2013, 50. With regard to harm caused by an *unlawful* decision by a public authority, this new legislation seeks to provide a clearer division of jurisdiction between the administrative and civil courts and to enable claimants to bring claims for compensation under € 25,000 either before the administrative law court or the private law court.

20 See Van den Broek 2011, *supra* note 6, p. 39.

21 Our translation, EE/GvdB/FdJ/AK/EdK; Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 13.

22 *Ibid.*

23 ABRS 5 December 2012, *AB* 2013/221 (*Wouwe Tol*) (note Tjepkema).

2.5. Our main critique regarding Article 4:126 Awb

Many comments can be made with regard to Article 4:126 Awb, and have already been made,²⁴ especially from a legal-technical point of view (e.g. should either Article 4:126 Awb itself or the explanatory memorandum not contain a certain clause on causality or a reference to the provision in private law, Article 6:98 Dutch Civil Code (*Burgerlijk Wetboek*, BW))? But here we will concentrate on the *égalité* principle and the role that it has been given as a ground or justification for liability in this respect.

Let us then start by saying that the legislator (claims to have)²⁵ confined itself to codifying (and providing a further regulation of) the *égalité* principle 'because in practice this is the most important ground for liability for lawful acts, which also has taken shape in case law'.²⁶ Although some authors have pointed at other legal principles that could serve as possible grounds for liability, the legislator feels that these are not yet sufficiently developed to codify them. Also it is expected that the *égalité* principle will cover most liability claims for lawful acts of public authorities.²⁷ It is therefore not surprising that the legislator follows a conservative approach in terms of codification rather than establishing an entirely new regime of liability for lawful acts on grounds other than the *égalité* principle.

There are concerns that the wide scope of Article 4:126 Awb might open the floodgates for compensation claims.²⁸ We expect, however, that the wide scope of this regulation will *not* in itself lead to an increasing governmental liability for lawfully caused losses. Although we do admit that Article 4:126 Awb will open the gates to administrative litigation, this does not mean that in the future more damages will be awarded. Recent case law of the ABRS has shown a rather stringent application of the criterion of 'normal social risk', resulting in a rejection of claims. This is confirmed by the ABRS in its case law concerning Article 6.2 of the Spatial Planning Act.²⁹ In 2008 'the normal social risk' was codified in Article 6.2, resulting in a less generous award of damages than before. The legislator explicitly codified 'the normal social risk' in the Spatial Planning Act to make clear that damage caused by decisions listed in Article 6.1(2) Spatial Planning Act will not be fully compensated.³⁰ Under the former regime of Article 49 Spatial Planning Act the criterion of a normal social risk was not applied to damage caused by zoning plans, and full compensation of damages was awarded to the owner of the property, unless the cause of the damage was foreseeable at the time the contract was concluded.³¹

Rather than fearing a flood of liability, our concerns *are* that the recognition of the *égalité* principle in Article 4:126 Awb as the main legal basis for the no-fault liability of public authorities will not create the certainty and uniformity to which the legislator aspires. As explained in Subsection 2.4, the *égalité* principle consists of the elements 'abnormal risks' and 'special burdens'. Both elements are bound to create uncertainties. As for the first element, we would like to point to the fact that the concept of 'risk' is in itself unclear. The idea of risk is bound up with the aspiration to control the future. If courts develop liability law to further the public policy of compensating atypical risks, they cannot escape the need to address what 'risks' and, more particularly, 'normal' and 'abnormal' risks are. As French case law has pointed out,³² a point of weakness of the *égalité* principle is the vagueness of the concept of 'abnormal burden'. The same can be said in respect of the second element, of 'special burdens'. The latter makes it necessary to compare the burden of the injured party to the burden of others (the reference group), but

24 See, among many, Van den Broek 2011, supra note 6; Tjepkema 2010, supra note 3, Chapter 13; M.W. Scheltema, 'Het wetsvoorstel schadevergoeding bij rechtmatige overheidsdaad (nadeelcompensatie)', 2011 *Verkeersrecht*, no. 7/8, pp. 200-205; B.J. van Ettekoven, 'Nieuw overheidsaansprakelijkheidsrecht', 2011 *Verkeersrecht*, no. 7/8, pp. 208-212; B.J. van Ettekoven et al., 'Overheidsaansprakelijkheid anno 2013: de stand van de rechtsontwikkeling', 2013 *Overheid en Aansprakelijkheid*, pp. 49-100 (at pp. 50-52).

25 See below, Section 3.

26 Our translation, EE/GvdB/FdJ/AK/EdK; Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 13. See B.J. Schueler, 'Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht', in *Schadevergoeding bij rechtmatige overheidsdaad*, VAR-reeks no. 128, 2002.

27 Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 14.

28 See Tjepkema 2010, supra, note 3, pp. 266-269 and pp. 901-902; Van den Broek 2011, supra note 6, p. 37 and J. Spier et al., *Verbindenissen uit de Wet en Schadevergoeding*, 2012, no. 185 (Keirse).

29 ABRS 29 February 2012, AB 2013/78; ABRS 5 September 2012, AB 2013/79.

30 Parliamentary Reports of the Second Chamber of Parliament (*Kamerstukken II*) 2002-03, 28916, no. 3 (Explanatory Memorandum), pp. 62-63.

31 Van den Broek 2002, supra note 11, Chapters 5 and 6.

32 CE 30 July 2003, *Rec.* 2003, 368, *Assoc. pour le développement de l'aquaculture en région Centre*; CE 22 October 2010, *RFDA* 2011, 141, *Bleitrach*, concl. Roger-Lacan; CE 23 September 2011, *RFDA* 2012, p. 46, *Mme S.*, concl. C. Roger-Lacan.

in the given circumstances it will not always be clear with whom exactly one should compare the injured party.

This is not to say that the *égalité* principle cannot or should not serve as a ground for compensation for damage caused by lawful public sector acts. On the contrary, we would think that it has already done that for a long period of time in a great variety of cases concerning liability for lawful acts and that, in doing so, it has (probably) sufficiently proven its usefulness.³³ Our point is that instead of launching this as *the* central ground for compensation and leaving its interpretation entirely to case law and the particular public authorities in question, it would be welcome if more guidance and clarity would be provided as to the exact meaning and interpretation of these concepts. The Minister of Security and Justice promised in Parliament to establish a guidance document with regard to the assessment of applications submitted on the basis of Article 4:126 Awb.³⁴ Such a guidance document was considered to be necessary in order to increase legal certainty and to further the predictability of the outcome of the assessment of applications. The Minister explained that this guidance document might serve as a source of inspiration for competent authorities in determining policy with regard to Article 4:126 Awb. In spite of the call in the Dutch literature for the various actors (the legislator, public authorities and the judiciary) to develop guidelines or standards fulfilling the concept of 'normal social risk', the guidance document has not yet been published.³⁵ In our opinion, this may be seen as an indication of the complexity of the issue.

2.6. Some points to consider regarding the scope of Article 4:126 Awb

Furthermore, it might save the effort and costs of litigation if the legislator would reconsider and would perhaps *not* include liability for certain acts and omissions of public authorities that, because of their nature, have been the topic of debate. Generally three categories of acts and omissions by public authorities can be distinguished that currently seem to fall within the ambit of Article 4:126 Awb, but that have raised questions amongst scholars as to the consequences that this might have.

Firstly, since preparatory acts and decision-making procedures qualify as a 'lawful exercise of a public law task or competence' there are some concerns that under Article 4:126 Awb strategic policy documents, draft decisions or other preparatory documents published for the purpose of preparation procedures might also lead to (extra)liability. Current regulations concerning compensation for damage that is lawfully caused often exclude damage caused by strategic plans or policy rules. On the other hand, Article 7.14 of the Dutch Water Act (*Waterwet*) – a quite recent administrative regulation concerning compensation of damages – also appears to have such a wide scope, yet there are no signs of an increasing governmental liability in the field of water management.

Secondly, Groothuijse has concluded that losses caused by the obligation to tolerate a certain situation or specific activities (*gedoogplicht*) should be eligible for full compensation. Losses caused by the obligation to tolerate a certain situation or specific activities should not be covered by the *égalité* principle (which only allows compensation for disproportionate damages).³⁶ For instance, Article 5.23 Water Act requires holders of titles to real estate to tolerate maintenance and repairs to water management structures where these activities are carried out by or under the supervision of a water authority. Furthermore, Article 5.24 Water Act requires holders of titles to land to tolerate the construction or modification of a water management structure and related activities when the interests of those holders of titles to land do not require expropriation. Obviously, these activities may cause damage to the property or at least may result in a devaluation of the land. The liability rule of the Water Act, Article 7.14, is based on the *égalité*

33 Cf. E.L. de Jongh, *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief*, dissertation Radboud University Nijmegen, 2012, who goes as far, however, as to conclude that *all* forms of compensation for lawful public sector acts must be based on the *égalité* principle (or on notions of *égalité*).

34 Parliamentary reports of the First Chamber of Parliament (*Handelingen I*) 29 January 2013, 32621, no. 15-6, pp. 53-54.

35 B.J. van Ettekovén, *Wat is normaal? Van planschade naar nadeelcompensatie*, inaugural lecture University of Amsterdam, 2010; W. Dijkshoorn, 'Over de problemen die 'in ieder geval' en 'twee procent' in artikel 6.2 Wro met zich brengen en hoe de problemen kunnen worden opgelost', *Gst.* 2011/93; B.J. van Ettekovén, 'Meer rechtseenheid in het nadeelcompensatierecht?', in T. Barkhuysen et al., *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, 2012, pp. 329-358; B.P.M. van Ravels, "'Harde en snelle' regels bij de afbakening van het normale maatschappelijke risico?", in T. Barkhuysen et al., *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, 2012, pp. 359-380; F. Limpens-Cuijpers & A. Sniijders, 'Normaliseren zonder normen? Het normale maatschappelijke risico in het planschaderecht', *Gst.* 2013/26.

36 F.A.G. Groothuijse, *Water weren*, dissertation Utrecht University, 2009.

principle and therefore full compensation is not guaranteed by the legislator. Groothuijse has pointed out that the criterion of the normal social risk should not be applied to these kinds of damages.

Thirdly, hazardous activities deserve our attention here. Some authors point at French law in this respect, which recognizes two principles governing no-fault State liability: the *égalité* principle and the risk principle, whereas Dutch law mainly recognizes the *égalité* principle.³⁷ The French *Conseil d'Etat* has developed a special compensation regime, based on the risk principle, for hazardous activities. Following this differentiation in French law, Tjepkema presents a convincing alternative draft for the regulation of liability for damage lawfully caused. The *égalité* principle should only cover damage inflicted by a conscious choice for a certain measure, inevitably leading to the specific damage.³⁸ In cases where the *égalité* principle does not apply, a regulation for special cases should be included in Articles 4:126 et seq. Awb. Such a clause for special cases would allow administrative courts to dispense justice in exceptional cases of hardship, while the conditions of an abnormal and special burden do not apply.³⁹ Tjepkema mentions hazardous governmental activities as an example of such special cases.⁴⁰ Similarly one of us has argued earlier that it would be welcome to distinguish these separate grounds for liability (the *égalité* principle and the risk principle), captured in distinct liability rules, in the field of private law.⁴¹

2.7. Back to current law: liability grounds in other fields of the law

With the ruling of Article 4:126 Awb the legislator seeks to promote uniformity, not only as far as administrative law cases are concerned but also as far as public sector acts may lead to liability claims in other fields of the law. Individuals or organizations that currently have no alternatives to claim compensation in administrative law may, in the existing legislation, claim compensation on the basis of the general tort liability rules in private law, as will be mentioned below, or on the basis of Articles 89 et seq. Sv (the latter if the case concerns damage caused to former suspects as a result of criminal procedural acts). Both of these alternative compensation mechanisms will partly be revised, once the aforementioned legislative initiatives will actually gain legal force.

In the following section we will first explore the grounds for compensation if cases are dealt with by means of tort law (including cases that involve damage caused by criminal procedural acts). We will also look at the private law implications of Article 4:126 Awb as regards the justification of liability. Then, in Section 4, claims for compensation based on Articles 89 et seq. Sv will be dealt with as well as the draft bill that proposes to revise the rules on compensation for criminal procedural acts (which was briefly mentioned in our introduction).

3. Liability for lawful public sector acts in private law

3.1. The semi-open system of obligations

Individuals or organizations who have no (or: no more) judicial remedies in administrative law and/or who suffer damage caused by *other* public sector acts than administrative acts/decisions (e.g. criminal procedural acts) may find grounds for reimbursement in private law. However, as the law now stands, there is only limited room for liability for lawful acts or omissions in private law, due to its so-called 'semi-open' system of obligations: for non-contractual obligations to arise, these must either be explicitly mentioned in written law or *be derived from* written law by analogy (Article 6:1 BW). Given this system as well as the fact that private law does not contain a general ground for liability for lawful acts, let alone a general ground for no-fault liability in public office (public authorities are held liable under the same

37 Engelhard & Van Maanen 2008, supra note 5, pp. 84 et seq. and pp. 89-90. See also Tjepkema 2010, supra note 3, pp. 148 et seq. and pp. 177 et seq.

38 Tjepkema 2010, supra, note 3, pp. 200 et seq.

39 Ibid., pp. 966-970.

40 Ibid., Para. 13.6.

41 Together with G.E. van Maanen, see Engelhard & Van Maanen 2008, supra note 5, pp. 90 et seq.

fault and strict liability rules as private individuals or organizations are),⁴² liability claims against them must formally be couched in the form of an unlawful act.⁴³

Three categories of cases can be distinguished in which the Dutch Supreme Court in its current case law allows the construction of an unlawful act despite the fact that the damage was caused by an *ab initio* lawful act.⁴⁴ We will briefly discuss each of these three categories of cases in the following subsections. The first two categories of cases will both be dealt with in Subsection 3.2 as these involve the *égalité* principle. The last category of cases will be discussed in Subsection 3.3 as this involves liability on an entirely different ground than the *égalité* principle.

3.2. *Égalité in the strait-jacket of an unlawful act: two categories of cases*

In the first two categories of cases the Dutch Supreme Court allows fault-based liability for *ab initio* lawful acts that later appear to be unlawful on the basis of a violation of the *égalité* principle. In the Supreme Court's approach the *égalité* principle serves as an *indirect* ground for compensation: the fact that 'disproportionate' damage exceeding the 'normal social risk' has not been compensated may qualify as an unlawful act for which the public authority can be held liable on the basis of the general fault liability rule, Article 6:162 BW.⁴⁵

The first of these two categories of cases concerns 'classic' *égalité* cases, in which regulations or other legislative acts by public authorities clearly have disproportionate effects for certain individuals or organizations compared to others. The main example is a case in which the State lawfully called off a prohibition on using swill (offal) which affected some pig farmers (to whom the claimant also belonged) much more severely than other pig farmers because the former group had fully equipped their farms for the use of swill (whereas the latter group had not done so). The Dutch Supreme Court decided that the risk of this sudden drastic prohibition, although lawful (legitimate, for the sake of public health), could not be qualified as a 'normal business risk'. It was unlawful towards the group of farmers that suffered disproportionate losses as a result of the prohibition to call it off without taking care of their economic interests, for example by offering financial compensation.⁴⁶

The – by nature very different – second type of cases has been identified and referred to (by one of us) as cases concerning 'collateral damage'.⁴⁷ These cases concern 'innocent' third parties that suffer damage as a result of a lawful criminal procedural act, for example particular means of coercion used in the course of a police investigation, such as wiretaps, directed against the suspect in a crime. In *the State v. Lavrijsen* the claimant (Lavrijsen) suffered damage as a result of a house search without being the suspect and despite the fact that she herself had nothing at all to do with the suspicion that was entirely raised against the actual suspect in that case. She claimed that the house search must be regarded as unlawful as a result of not having been offered any compensation for her losses. The Dutch Supreme Court allowed the claim and ruled that:

[o]ne of the appearances of the principle of equality is the rule that disproportionate burdens – meaning burdens that cannot be considered to be normal social risks or normal business risks and that affect a limited group of citizens or institutions – that result from acts or decisions of a public authority (*overheid*), must not be borne by that limited group of citizens or institutions but must equally be spread over the community. This rule entails that causing such disproportionate losses as a result of an (in itself) lawful act of a public authority must be qualified as unlawful against the deprived individual or institution.⁴⁸

42 Cf. E. Bauw, *Onrechtmatige daad: aansprakelijkheid voor zaken*, 2008, no. 9.

43 It has been claimed that the Dutch Supreme Court is not transparent in its reasons for restricting the liability of public authorities in a certain way. For references, see Barkhuysen, Den Ouden & Tjepkema in their introduction to Barkhuysen et al. 2012, *supra* note 35, pp. xiii-xxxiii (at p. xv).

44 This distinction is made by Engelhard & Van Maanen 2008, *supra* note 5, pp. 80-81.

45 Our translation, EE/GvdB/FdJ/AK/EdK; see Engelhard & Van Maanen 2008, *supra* note 5, pp. 81 et seq.; HR 18 January 1991, NJ 1992/638, AB 1991/241 (*Leffers v. the State*); HR 30 March 2001, NJ 2003/615, AB 2001/412 (*the State v. Lavrijsen*); HR 20 June 2003, AB 2004/84.

46 HR 18 January 1991, NJ 1992/638, AB 1991/241 (*Leffers v. the State*).

47 Engelhard & Van Maanen 2008, *supra* note 5, p. 81.

48 Our translation, EE/GvdB/FdJ/AK/EdK; HR 30 March 2001, NJ 2003/615, AB 2001/412 (*the State v. Lavrijsen*).

In other words: it is unlawful if public authorities' acts or decisions cause disproportionate damage (in the sense that the damage cannot be considered to be a 'normal social risk' or a 'normal business risk' and only affects a limited group of individuals) and if they do not offer a fair amount of compensation for such damage.

3.3. Cases of – with hindsight – unlawful criminal investigation

The third category of cases concerns (former) suspects whose own house has been searched or who have been taken into preventive custody or the like, but who then later turn out to have been innocent all along. If they were suspected of a crime their damage must be compensated, provided that they can prove their innocence.

The civil court functions as a 'safety net' for these former suspects, but interestingly the *égalité* principle is *not* used to establish liability. Another technique of legal reasoning is employed compared to the former two categories of cases (Subsection 3.2). According to the Dutch Supreme Court it is unlawful to damage someone else's goods, but if this is the result of the fact that s/he is the suspect in a crime and the police have powers to investigate this, then *prima facie* there is a legal justification for causing this harm. If, however, later – on the basis of the accompanying case file (and/or the criminal procedure investigation) and, if possible, the verdict of the criminal court (or the legal decision to drop court proceedings because of the claimant's innocence) – it becomes clear that the suspect was *innocent* (and/or when the criminal law court expressly rules that the proven facts do not qualify as a criminal act), then that particular legal justification ground lapses. The police and/or judicial actions are then, with hindsight, to be regarded as unlawful against the former suspect (the innocent individual).⁴⁹ The reasoning that the initial justification ground has – in retrospect – disappeared makes the acts of the public authority with hindsight unlawful.⁵⁰

This so-called 'manifest innocence' condition is applicable in cases where claimants were regarded as a suspect at the time of the damage-incurring act. It even applies in cases where claimants were, at that time, not yet a suspect, but where their behaviour has given rise to the use of a criminal law methods of coercion against someone else (which caused damage to the claimant). In other words, third parties who suffer damage caused by the use of a criminal law method of coercion cannot claim damages simply on the basis of the *égalité* principle if they themselves were responsible for the fact that this method had to be used.⁵¹

3.4. Brief discussion

As appears from the approach followed in the three categories of cases sketched above, the civil court assesses claims for compensation on the basis of the standard tort criteria incorporated in the general fault liability rule, Article 6:162 BW. But the *grounds* on which the civil court bases its decision to oblige or not to oblige the State to compensate damage incurred by criminal law acts differ radically depending on the quality of the claimant: in the first two categories of cases the civil court assesses the claims on the basis of the *égalité* principle. The damage suffered will have to be compensated *insofar* as it is considered to be disproportionate.⁵² Similar to what was seen above in respect of administrative law, it is currently not at all clear who can be regarded as being part of a 'more severely' affected class of individuals. Especially the first category of (private law) cases, as mentioned, would benefit from general guidelines that provide more clarity on how to assess the circumstances of the specific case as well as on what is considered to be a 'normal social risk' that any citizen (such as someone owning a business) has to bear.⁵³

49 HR 26 January 1990, NJ 1990/794 (*Van der Valk*); HR 23 November 1990, NJ 1991/92 (*Joemman I*); HR 13 October 2006, NJ 2007/432 (*Begaclaim*); Court of Appeal (*Gerechtshof*) The Hague 31 January 2008, BC3339, see Engelhard & Van Maanen 2008, *supra* note 5, pp. 85 et seq. (with further references) and, more recently, e.g. Court of Appeal Amsterdam 31 July 2012, BX3781 (*Clickfonds*).

50 Kwakman 2011, *supra* note 9.

51 See HR 12 July 2013, BZ7397 (*Cannabis*).

52 HR 30 March 2001, NJ 2003/615, AB 2001/412 (*the State v. Lavrijsen*). If the exercise of criminal law measures would be (*ex tunc*) at variance with public law norms and thus be unlawful, then the State would in principle have to compensate for the damage that integrally resulted from the wrongful conduct. Cf. Section 3.3, *supra*.

53 See also the contribution of A.L.M. Keirse in Oliphant (ed.) 2014, *supra* note 1 (to be published).

Former suspects who turn to the civil court with a claim against the State based on Article 6:162 BW are, however, confronted with an entirely different adjudicative regime. The *égalité* principle plays no role in the assessment of these compensation claims. Compensation for damage incurred by an (*ab initio*) lawful criminal law act by public authorities is awarded only if it is established with hindsight that the former suspect was *innocent* of the criminal offence that (s)he had been charged with and that the suspicion that gave rise to the damage-incurring acts of criminal law officials was unfounded.⁵⁴

This legal reasoning in the third category of cases, concerning claims by former suspects, is highly criticized in the literature. It confronts former suspects with an often infeasible burden of proof: the mere fact that the criminal proceedings against them have resulted in an acquittal, does not in itself suffice to establish the State's liability. What is more, the court can take into consideration the former suspect's attitude during the criminal proceedings as a reason to withhold the awarding of compensation, either fully or partly. The makeshift construction has, furthermore, repeatedly evoked the critical question as to whether or not the application of 'manifest innocence' as a ground for compensation is at variance with the meaning attached to the presumption of innocence as formulated in Article 6(2) of the European Convention on Human Rights (ECHR).⁵⁵ We will come back to these points of criticism in Section 4.

3.5. Legislative change; more than a codification...

If the legislative initiatives that we discussed earlier will be successful, then the law will have to change drastically in respect of the three categories of cases that were discussed above. The legislator proposes Article 4:126 Awb in order to create more uniformity; it applies to *any* lawful act of a public authority in the lawful exercise of its public task or competence (with the exception of criminal law cases and acts of formal legislation), also if such acts give rise to claims for liability in private law and/or before a civil law court. Let us start by saying that this part of the proposal, which boils down to the introduction of the *égalité* principle as a fairly general ground for the liability of public authorities in private law (and administrative law, as aforementioned), seems to fit well with the development during these last few decades, signalled by some⁵⁶ as moving somewhat away from a fault-based liability and onto the idea of bearing the risks collectively. However, some critical notes must also be made.

Firstly, as far as private law is concerned Article 4:126 Awb seems to entail more than, to put it in the words of the legislator, 'a mere codification'. It introduces a general rule for liability concerning lawful acts whereas currently there is no separate, general rule in private law for no-fault liability in public office. Moreover, Article 4:126 Awb is formulated in such a broad, general sense that it seems possible that more private law claims could be brought under this umbrella than those that were mentioned in our three categories of cases above, such as perhaps – for example – claims against supervisors. In Subsection 2.5 we claimed not to expect that the wide scope of Article 4:126 Awb will lead to an excessive increase in governmental liability in the administrative courts, but this might be different to the extent that this ruling will make it easier for individuals to apply for compensation in situations where they suffer damage caused by factual acts, policy rules or generally binding rules. Article 4:126 Awb entails a jurisdictional shift from the civil court to the administrative court. In general, administrative appeal proceedings are considered to be more accessible than civil law proceedings. In this respect Article 4:126 Awb might also lead to an increase in claims for damages in the 'normal', classic cases such as *Leffers v. the State*.

Secondly, the ruling of Article 4:126 Awb will replace the artificial construction of private law cases as far as the first category of cases is concerned that we discussed above (Subsection 3.2), viz. 'classic' *égalité* cases (such as the aforementioned case of *Leffers v. the State*). It seems fair to say, though, that to that degree the compensation rule of Article 4:126 Awb will lead to more uniformity: the current artificial reasoning in civil law jurisprudence ('not offering compensation is a violation of the *égalité* principle and therefore unlawful') will then no longer be necessary in *égalité* situations as presented by the *Leffers* case. In such cases (and more generally in cases in which lawful regulations, policy rules or

54 See HR 13 October 2006, NJ 2007/432 (*Begaclaim*), annotated by J.B.M. Vranken.

55 S.A.M. Stolwijk, *Onschuld, vrijspraak en de praesumptio innocentiae*, 2007, pp. 26-27. The ECtHR has ruled in its decision of 18 January 2011, Application no. 45482/06, *Bok v. the Netherlands* that the 'manifest innocence' condition is not in itself at variance with the presumption of innocence.

56 Barkhuysen et al. 2012, *supra* note 35, p. xv.

other generally binding rules, with the exception of formal legislation, cause damage and/or in cases that involve factual acts in the exercise of a public task) the obligation to pay compensation will, once Article 4:126 Awb enters into force, arise directly from the *égalité* principle itself. Instead of being a mere 'ground' for liability (i.e. a justification for or an explanation of liability), as is currently the case, the *égalité* principle will then (if Article 4:126 Awb will actually gain legal force) be given the status of a 'hard' rule. As a result private law and administrative law will be brought closer together.

A third point, however, that we would like to make is that – if we are right in saying that Article 4:126 Awb, once put into force, will only replace the artificial construction of private law liability in cases that are close to the *Leffers* case – it will still leave much to be desired in terms of uniformity. In other words, it must be doubted whether this new arrangement will in fact create much uniformity in the context of private law, other than the fact that it will relieve us from the artificial construction as mentioned before. The fact remains that the new Awb regime (Article 4:126 Awb) may *not* be applied to damage caused by formal legislation (the reason for this is that the formal legislator is not an administrative body in terms of Article 1:1 Awb), nor to claims for criminal procedural acts.⁵⁷ Given the semi-closed system of private law obligations that was mentioned above (see Subsection 3.1), claims for damage caused by formal legislation will therefore probably continue to be dealt with within the strait-jacket of Article 6:162 BW (unlawful acts) based on another ground than (a violation of) the *égalité* principle, or, if possible, on an ad hoc basis, for example when the formal legislator chooses to include a special provision in newly-enacted legislation that gives certain individuals and/or organizations a right to have disproportionate losses compensated. Such an ad hoc provision may be satisfactory for the claimant, but it may also be disputed by certain (groups of) claimants on the basis that it does not offer sufficient compensation, which might lead to a tort claim on the basis that there is no 'fair balance' because the formal legislation imposes an 'individual and excessive burden' on the claimant(s), as is required by Article 1 of the First Protocol of the European Convention on Human Rights (FP ECHR). This might possibly lead to the conclusion that based on Article 1 more or other rights to compensation are in place.⁵⁸ This separate regime on the basis of Article 1 FP ECHR, however, seems to differ somewhat from the new Awb regime, for a start because in private law, in order to be granted the right to compensation, it must be called upon in the context of a tort claim: the violation of Article 1 FP ECHR may qualify as an unlawful act (which will make the State liable vis-à-vis the individual who was disproportionately affected).⁵⁹ Such differences call for a special justification in cases similar to the *Leffers* case, if these involve formal legislation and are, for that mere reason, excluded from Article 4:126 Awb.

The exclusion of claims concerning *criminal procedural acts* in the Awb proposal, on the other hand, seems understandable as these claims are to be covered by a special compensation scheme, proposed in another legislative initiative. However, as was mentioned in Section 1, this latter initiative has not yet found its way to Parliament and appears to have been shelved. It will be dealt with in the following section.

4. Liability for lawful criminal procedural acts

4.1. 'Fairness' (Articles 89 et seq. of the Code of Criminal Procedure)

As was partly seen above, the law, as it stands, offers different possibilities for awarding compensation of damage caused by criminal law acts. The legal framework for this is rather obscure and involves a division of competency between the criminal court and the civil court.

Articles 89 to 93 of the Code of Criminal Procedure (*Wetboek van Strafvordering*, Sv) contain a set of provisions that make it possible to receive compensation for damage caused by certain acts performed by criminal law officials during the investigative stage of criminal proceedings.⁶⁰ The regulation's scope

57 Parliamentary reports of the Second Chamber of Parliament (*Kamerstukken II*) 2010-11, 32621, no. 3 (Explanatory Memorandum), p. 14.

58 Cf. HR 2 September 2011, *NJ* 2011/391, *AB* 2011/369 (*Pig farming*).

59 Based on his comparison and analysis of both systems Tjepkema 2010, *supra* note 3, pp. 945 et seq. points at a few differences, for example that the case law regime based on Article FP ECHR, strictly speaking, seems to permit relatively large(er) groups of individuals to claim compensation.

60 The provisions of Arts. 591-592a Sv, on the basis of which it is possible to receive compensation for legal aid and travel expenses, we will leave aside.

is limited in different respects. Conditions of applicability include, first of all, a set of requirements that individuals have to meet in order for their request for compensation to be admissible: only former suspects (or alternatively their heirs) are eligible to lodge a request for compensation with the court (a district court or an appeal court) before which the criminal case was last brought. Secondly, it is required that the criminal proceedings have resulted in an acquittal or at least that they were ended without the imposition of a criminal sanction.

What is important to note, furthermore, is that by no means all damage-incurring Government acts within the context of criminal proceedings can give rise to a request for compensation: the scope of the provisions in Articles 89-93 Sv is restricted to damage resulting from custody and pre-trial detention (including clinical observation).⁶¹ Lastly: even if all of the aforementioned prerequisites are met, the law still does not grant the requestor any *right* to be compensated for the damage that resulted from the (lawful) exercise of the relevant coercive criminal law methods. The provisions of Articles 89-93 Sv are based on a 'system of favours': it is left to the court to decide whether or not – taking into account all the circumstances of the case at hand, including the personal circumstances of the former suspect – compensation should be awarded. The law designates as the central *ground* for any compensation the rather obscure and equivocal principle of 'fairness' (*billijkheid*; Article 90 Sv). Insofar as grounds of fairness entail this, the court can award compensation for both material and emotional damage.⁶²

This brief exposition suffices to demonstrate that far from all forms of damage that may result from the (lawful) exercise of coercive criminal law powers can give rise to State liability to pay damages on the basis of Articles 89-93 Sv. As was seen in Subsection 3.3, the civil court functions as a sort of 'safety net' for those cases that are not covered by these provisions.

4.2. Possible future liability regime for damage caused by the State acting during criminal proceedings

In the scholarly literature, numerous objections have long been raised to the existing legal regime concerning Government liability for damage incurred by the (lawful) exercise of State powers in criminal proceedings.⁶³ As was seen in Subsection 3.3, the contrived makeshift construction that the civil court employs in its assessments of compensation claims lodged by former suspects – in the case of manifest innocence the damage-incurring and (*ex tunc*) lawful criminal law act is transformed (*ex post*) into an 'unlawful' act – has been highly criticized in the scholarly literature. At any rate, this ground is considered by many to be highly problematic, both because of its artificial reasoning (in itself lawful behaviour becomes unlawful) as well as the way the Supreme Court applies this case law (requiring a high burden of proof for the claimant).

Secondly, as regards the provisions of Articles 89-93 Sv, it has become the dominant view that the opportunities for receiving compensation should not be limited to damage caused by custodial measures.

All in all, it seems fair to say that the current legal regime amounts to a rather fragmented regulation, which is characterized by a certain measure of legal insecurity and legal inequality. Partly due to these objections to the current regulation, a new bill (still a draft bill at present) was already announced some considerable time ago and it aims to provide an entirely new statutory regulation of State liability for damage caused by Government acts during criminal proceedings.⁶⁴ As this draft bill will introduce some

61 Also in the event that a former suspect has been convicted of a crime with respect to which the law does not allow custodial measures, compensation can be requested for the damage that occurred as a result of the (retrospectively undeserved) time spent in custody.

62 Compensation for emotional damage is normally allotted according to a fixed-rate scheme. See G.J.M. Corstens & M.J. Borgers, *Het Nederlands strafprocesrecht*, 2011, pp. 426-427.

63 See on the different points of view N.M. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, 2009; N.J.M. Kwakman, *Schadecompensatie in het strafprocesrecht*, 2003.

64 The draft bill will result in the introduction of Arts. 593-600 Sv; see N.J.M. Kwakman, 'Het ontwerp-wetsvoorstel "Schadecompensatie strafvorderlijk overheidsoptreden"', 2008 *Strafblad* 6, no. 1, pp. 5 et seq.; C.J.M. van Dam, *Schadevergoeding voor strafvorderlijk overheidsoptreden. De strafvorderlijke en civielrechtelijke schadevergoedingsmogelijkheden voor gewezen verdachten en veroordeelden*, 2008. As was mentioned before, the Government does not seem to have made any appreciable effort to navigate the draft bill through the legislative process; the proposal has, as yet, not even been submitted to Parliament. However, the Dutch Ministry of Justice recently announced that no less than eighteen legislative proposals concerning criminal procedural law – many of which would entail considerable revisions of differing provisions in the Code of Criminal Procedure – will be disclosed in the very near future (i.e. June 2014, which is later than the date of completion of the current article). It is conceivable that among the proposed revisions will be a legislative proposal aiming to provide a new statutory regulation of State liability for damage caused by Government acts during criminal proceedings.

novel grounds and novel conditions for the awarding of compensation, we will discuss the main points of the relevant proposed provisions.

To begin with, it should be noted that the draft bill purports to create a uniform and exclusive legal arrangement covering (almost)⁶⁵ all forms of both (*ex tunc*) lawful and (*ex tunc*) unlawful damage-incurring State acts in the context of criminal proceedings. Moreover, both former suspects and third parties who suffered damage as a result of criminal law acts will be eligible to claim compensation based on the proposed regulation. As mentioned before, the regime of Article 4:126 Awb (discussed in Section 2) excludes damage resulting from criminal procedural acts.⁶⁶ As a result of the draft bill on criminal law, however, the currently still existing 'safety net' offered by the possibility to submit a compensation claim to the civil court will cease to exist and, consequently, the contrived makeshift construction that the civil court feels that it is necessary to apply with regard to former suspects will no longer be needed.

The draft bill aims to provide for an accessible petition procedure with features known from administrative law. There will be one central office where every individual who is eligible to do so can submit his compensation claim. This office will be formed by the Board of Procurators General (*College van procureurs-generaal*), which is formally at the head of the Dutch Public Prosecution Service (*Openbaar Ministerie*).⁶⁷ In the interest of legal protection, the draft bill will provide for the possibility of an appeal and even – if the compensation claim exceeds a certain threshold sum – of lodging an appeal in cassation to the Dutch Supreme Court. More important still with respect to our purposes in this contribution, however, is that the draft bill designates roughly *two different grounds* for compensation, depending on whether the damage was caused by (*ex tunc*) lawful or unlawful acts. In any case, a rather strict requirement is applicable: an immediate causal link must be established between the contested act and the damage suffered.

In the event that the petition for compensation pertains to a criminal procedural act that (judged on the basis of the circumstances at the time of its performance) contravened a norm of public law and that accordingly is held to be *unlawful*, the damage that was directly caused by the unlawful act will in principle have to be integrally compensated, unless standards of tort law indicate that the damage ought reasonably to be borne by the victim (the proposed Article 597(2) Sv). Thus, in these cases, the ground for compensation is the classical notion of 'fault'. With regard to the 'standards of tort law' that were just mentioned, we can think of the 'contributory negligence' rule of Article 6:101 BW or of another special circumstance within the meaning of Article 6:109 BW on the grounds of which the damage ought partly or fully to be borne by the claimant.⁶⁸

In the event, however, that the petition pertains to a criminal procedural act that (judged according to the circumstances at the time of its performance) was *lawful*, then any possible awarding of compensation will be grounded on a variant of the *égalité* principle that, as was seen in Section 2, is well known from administrative law. This implies that the differing grounds that figure in the current legal regime – that is: both the notoriously vague notion of 'fairness' mentioned in Article 90 Sv, and the ground of 'manifest innocence' that is employed by the civil court in relation to former suspects (see Subsection 3.3) – will disappear. The fact that the draft bill designates the *égalité* principle as the ground for compensation for damage incurred by (*ex tunc*) lawful criminal law acts implies that the directly concerned individual will be awarded compensation if it is established that s/he has been disproportionately affected by the damage-incurring criminal procedural act *and* that the damage that was suffered as a direct result of that act exceeds the 'normal social risk' (proposed Article 597(1) Sv). The State will then be liable to compensate the damage, albeit *insofar* as it is considered to be disproportionate.⁶⁹

65 Certain existing compensation regulations that are tailored to specific situations or specific types of damage will however remain in force, such as the regulation in Arts. 591-592a Sv mentioned earlier.

66 In case the draft bill will ultimately pass through the legislative process intact, no specific implications for the criminal law are therefore expected to ensue from the recently adopted compensation regulation in Article 4:126 Awb.

67 See Subsection 4.9 in the Explanatory Memorandum to the draft bill (not yet reported). The processing of the petitions will de facto be carried out by subordinate public servants at the National Office of the Public Prosecution Department (*Parket-Generaal*). Complex cases can immediately be referred to the criminal court.

68 See Subsection 4.7.2 of the Explanatory Memorandum to the draft bill (not yet reported).

69 See Subsection 4.7.1 of the Explanatory Memorandum to the draft bill (not yet reported), where references are also made to ECtHR case law regarding the First Protocol to the ECHR and to the case law of the ECJ.

But apart from these similarities, the proposed regulation does not completely coincide with the meaning that is attached to the *égalité* principle in the administrative and private law case law. Under the proposed regime, the possible disproportionality of the damage suffered is measured, not by means of a comparison of the situation of the claimant with a so-called ‘reference group’, but merely by scrutinizing his or her situation according to a set of pre-established legal criteria.⁷⁰ These criteria, however, do match the exemption clauses of Article 4:126, Section 2 Awb (that were discussed above, in Section 2). For, according to the proposed regulation (the proposed Article 597(1) sub a-d Sv), a request for compensation can be rejected if and insofar as claimants can be said to have accepted or reconciled themselves to the possibility that the damage would occur; if and insofar the claimant has failed to take reasonable precautions in order to reduce the damage or prevent the damage from occurring; if and insofar the claimant has received or can receive compensation for the damage through other routes; or if and insofar as there exist other reasons why the damage ought ‘reasonably’ to be borne partly or fully by the claimant (the so-called ‘reasonableness’ clause). These criteria can be fleshed out in specific governmental ordinances.⁷¹ We will come back to this ‘reasonableness’ clause below, in Subsection 4.3.

As was already noted: both former suspects and third parties can rely on the proposed regulation.⁷² However, in relation to the category of former suspects, an important restriction will apply (the proposed Article 594 Sv). If a former suspect requests compensation for damage that resulted from (*ex tunc*) lawful conduct, then his/her claim will not be admissible when the criminal proceedings against him/her have resulted in a conviction that has led to the imposition of a criminal sanction or in the case of a so-called ‘judicial pardon’ (Article 9a of the Dutch Criminal Code: a criminal sentence without the imposition of punishment). To this extent, the proposed regulation strongly resembles the existing regulation in Articles 89-93 Sv.

A novel feature of the proposed statutory regulation is, however, that also other different forms of compensation than monetary indemnification can be awarded; reputation damage, for example, can be restored by publishing the decision on the claimant’s petition (the proposed Article 598(5) Sv).⁷³ An important other novelty is the fact that the types of damage for which compensation can be received will no longer be limited to damage caused by custodial measures. This means that many different forms of conduct in the context of criminal proceedings will potentially be the object of compensation claims. With that it should be noted that the ambit of the proposed *égalité* regulation in the field of criminal law is very wide: it covers all acts performed by criminal law officials that take place from the earliest stages of a criminal investigation (a term defined rather broadly in Article 132a Sv) up to and including the execution of the sentence (in the event that the proceedings result in a conviction).⁷⁴

4.3. Brief discussion

Compared to the current legal regulation of State liability for damage caused by (lawful) Government conduct in the context of criminal proceedings, the proposed regulation that was discussed in the previous subsection evidently offers several important advantages. As things appear, the proposed regulation will, with the introduction of one central office, provide for an accessible legal facility, which will put an end to the current lack of legal certainty that is a consequence of the existing regulation’s strong fragmentation, both when it comes to the different ways of commencing proceedings and when it comes to the different grounds and conditions for compensation. Given that the draft bill opts for one uniform legal regulation that covers nearly all forms of damage-incurring Government conduct in the context of criminal proceedings, and that is open to both former suspects and third parties, the civil court’s function as a ‘safety net’ in these cases will become obsolete. With regard to petitions that concern (*ex tunc*) lawful criminal law acts, the draft bill introduces one single ground for compensation, as a

70 Here, the draft bill follows the proposal by the research group ‘Strafvordering 2001’; see N.J.M. Kwakman, ‘Schadevergoeding in het strafprocesrecht’, in M.S. Groenhuijsen & G. Knigge (eds.), *Afronding en verantwoording. Eindrapport onderzoeksproject Strafvordering 2001*, 2004, pp. 513-602. Cf. Dane 2009, supra note 63, pp. 478 et seq., who argues for a closer connection with the *égalité* principle as has been developed within the administrative compensation regulations. See also infra.

71 See Kwakman 2008, supra note 64.

72 Not only the victim himself but also his heirs or relatives can, albeit under certain conditions, rely on the proposed regulation.

73 It is proposed that the amount of compensation for emotional damage is to be determined by means of a fixed-rate scheme.

74 See Kwakman 2008, supra note 64.

result of which the contrived makeshift construction that is currently being used by the civil court will disappear.

Nonetheless, the draft bill also raises a number of questions. First, one might ask why the legislator has not chosen to create an even more uniform regulation: it would have been imaginable to include the different possibilities for compensation in connection with damage-incurring criminal law acts under one general compensation regime that would cover the whole of public law, for example by not excluding criminal procedural acts from the compensation regulation in the Awb. The legislator has not chosen for this option, because the Board of Procurators General and the criminal courts are assumed to be better equipped for the assessment of criminal procedural measures than are the administrative (and civil law) courts,⁷⁵ yet it can be doubted whether the latter is a fair assumption to make.

Second, with respect to the compensation offered for damage that is caused by lawful conduct, it is notable that the draft bill opts for a ground (the *égalité* principle) that explicitly ties in with the recently adopted compensation regulation in administrative law, but gives it a different specification. The possible disproportionality of the damage suffered will be measured by means of a set of pre-established legal criteria that are similar to the exemptions mentioned in Section 2 of Article 4:126 Awb. However, as was seen in Subsection 4.2, the draft bill for criminal procedural acts includes a blanket reasonableness clause that promises to still provide much leeway for a rather flexible, casuistic adjudication of the compensation claim. In the Explanatory Memorandum that accompanies the draft bill it is stated in this connection that the disproportionality of the damage does not, as it does in administrative law, primarily pertain to the idea that an individual or organization has been harmed or damaged in comparison with other people, but primarily pertains to the idea that the damage suffered 'is such that it is undesirable, given the interests at stake, to have the victim be the one to bear this damage.'⁷⁶ However, the fact remains that the introduction of such a blanket reasonableness clause entails a substantial risk of a proliferation of diverse, and hence unpredictable judgments, something that the draft bill has been designed to remedy. Would it not be preferable to aim for more consistency with the administrative law regime, where a blanket reasonableness clause is no longer used?⁷⁷

Another point concerns the ambit of the regulation proposed by the draft bill. As was said before, the regulation's scope is wide. Practical problems may arise in certain cases as to the retrospective determination of the exact moment when the initial stage of a criminal investigation can be said to have commenced (considering that the definition of the term criminal investigation given in Article 132a Sv is very broad and not very precise) and thus when subsequent damage-incurring Government conduct will fall under the ambit of the proposed regulation. Damage caused by purely administrative surveillance (that takes place outside of the context of a criminal investigation) falls under the scope of the compensation provisions in the Awb. The dividing line between (damage-incurring) investigative acts and the (damage-incurring) exercise of administrative surveillance measures can sometimes, however, be quite difficult to draw precisely.⁷⁸

Lastly: it is not altogether clear how the proposed regulation in the draft bill relates to the provision of Article 359a Sv. This provision regulates the ways in which the criminal court may, to the benefit of the defendant, attach certain consequences (such as a sentence reduction or an exclusion of irregularly obtained evidence) to certain unlawful acts that were performed by criminal law officials during criminal proceedings. As yet it is not altogether clear to what degree a former suspect, with respect to whom this provision has been applied in the criminal case, is able to subsequently also claim (extra) compensation on the basis of the proposed regulation in the draft bill.⁷⁹

75 See Subsection 4.1.2 of the Explanatory Memorandum (not yet reported).

76 Explanatory Memorandum to proposed Article 597 Sv (not yet reported).

77 Arguing along these lines also: Dane 2009, *supra* note 63, pp. 501 et seq.

78 This is pointed out by Kwakman 2008, *supra* note 64, who also, with regard to the draft bill, argues for a system of 'two offices', one for petitions pertaining to damage caused by unlawful criminal procedural acts, the other for petitions pertaining to damage caused by lawful criminal procedural acts. See also N.J.M. Kwakman, 'Een algemene schadevergoedingsregeling in het strafrecht. Haast geboden?', 2006 *Delikt en Delinkwent*, pp. 1127-1136. Cf. Section 4.3 in the Explanatory Memorandum (not yet reported).

79 Somewhat curiously, the Explanatory Memorandum mentions Article 359a Sv in connection with the proposed Article 597(1) sub c Sv, as an example of a ground for restricting or withholding compensation for damage resulting from *lawful* conduct in criminal proceedings (Subsection 4.7.1), but does not mention the Article in connection with the proposed provisions on the compensation for damage resulting from *unlawful* conduct in criminal proceedings (Subsection 4.7.2).

5. Observations from a comparative and European law perspective

5.1. A comparative law overview

The claim in our introduction to this paper, the Netherlands being one of the front-runners in respect of public authority liability for lawful acts, also requires a comparative law overview. As a general starting point for all law systems, there is no liability without a breach of the law. In principle this applies to public authorities to the same extent as to private individuals. However, in all law systems this principle should be put into perspective against the backdrop of State measures and actions taken in the common interest that might adversely affect individual interests. National laws on public authority liability allow individuals, albeit to varying degrees, in specific situations and in accordance with differing rules, to obtain compensation for certain kinds of damage, in the absence of unlawful action by the public authority causing the damage.⁸⁰ Some law systems, including the Polish, Portuguese and Spanish systems, provide for general statutory clauses governing public authority liability regarding both unlawful and lawful acts.⁸¹ This is more or less comparable with Article 4:126 et seq. Awb in the Netherlands, but it should be mentioned that the Dutch approach is more general. This means that the acceptance of no-fault public authority liability in these countries is not limited to cases where exceptional laws (or case law) explicitly and specifically provide for compensation.

The latter is also true for Germany and France, but in these countries the general principle of no-fault liability is not based upon legislation but upon case law. In Germany, the courts have developed a public authority liability for lawful acts based on the principle that no citizen shall be forced to sacrifice his or her own rights in the interests of the public without compensation if he or she alone is to bear that burden. As said before, French case law recognises public authority liability for lawful conduct and bases it on two separate regimes, the risk regime and the *égalité* regime. Whereas the risk regime concerns coincidental, unforeseen damage resulting from the hazardous actions of public authorities, the *égalité* regime instead sees to compensation for damage that is the deliberate and foreseeable consequence of (more or less desired) State conduct which serves the public interest.

Contrary to this approach, a general right to compensation for lawfully caused loss, whether statutory or extra-statutory, is not recognised, in any case, in countries with a common law tradition, such as England and Wales, South Africa and the United States.⁸² On the basis of administrative law compensation will be awarded in particular instances of the lawful infringement of private interests by public authorities, if and when this is specifically authorised by legislation. Austria, amongst others, demonstrates a similar view, considering State liability for matters other than unlawful acts to be primarily a legislative issue.⁸³ Also the Danish law system, to name one more, rests on the principle of no liability for lawful activities unless there is a special, statutory legal basis for liability in such cases.⁸⁴

The above comparative law overview and analysis⁸⁵ teaches us that the reasoning that one individual or a small group of persons should not have to face a disproportionate, unbalanced and unusual burden as a consequence of an activity carried out for the public good, has all over Europe, at least in individual cases such as cases of expropriation, led to the awarding of some forms of compensation, albeit that some law systems, such as the common law systems and the Scandinavian systems, are very restrictive, whilst others, the more continental traditions, are more open to incorporate liability for lawful acts in their law systems.

80 As is mentioned by the Court of First Instance in T-69/00, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies, Inc. (FIAMM Technologies)*, [2005] ECR II-5393, Paras. 157-160.

81 See the contributions by E. Baginska (Poland), M. Rangel de Mesquita (Portugal) and M. Martin-Casals & J. Ribot (Spain) in Oliphant (ed.) 2014, supra note 1 (to be published). See also Tjepkema 2010, supra note 3, pp. 779-789 and M.K.G. Tjepkema, 'Between Equity and Efficiency: the European Union's No-Fault Liability', 2013 *Review of European Administrative Law*, no. 1, p. 22.

82 See the contributions by K. Oliphant (England & Wales), J. Neethling (South Africa) and M.D. Green & J. Cardi (United States) in Oliphant (ed.) 2014, supra note 1 (to be published).

83 See the contribution by B.A. Koch in Oliphant (ed.) 2014, supra note 1 (to be published); Tjepkema 2013, supra note 81, p. 22.

84 See the contribution by V. Ulfbeck in Oliphant (ed.) 2014, supra note 1 (to be published).

85 Which also seems to match Tjepkema's overview, 2010, supra note 3, pp. 779 et seq. and his conclusions on p. 799.

5.2. The European law perspective

Not surprisingly, the problem addressed in this paper also appeared at the level of the European Union, since the Union has taken legislative actions in the common interest, which had particularly damaging effects for some categories of commercial enterprises. The second paragraph of Article 340 of the Treaty on the Functioning of the European Union (TFEU) requires the European Union to make good any damage caused by its institutions or its servants in the performance of their duties in accordance with the general principles common to the laws of the Member States. On the basis of this Article it is settled case law that there is liability for unlawful conduct, without regard to personal, subjective fault, when the rule of law infringed intends to confer rights on individuals, the breach is sufficiently serious and a direct causal link between the breach and the damage suffered is established. However, the matter whether or not European law also provides scope for State liability for lawful conduct remained unclear for quite a while. Liability in the absence of unlawfulness was in various cases requested, but for a long time was neither rejected nor explicitly acknowledged by the European courts.

Later the European Court of Justice brought the speculation to an end. In its so-called *FIAMM* ruling of 9 September 2008 the European Court of Justice explicitly and categorically rejected the existence of a liability regime under which the European Union can incur liability for conduct falling within the sphere of its legislative competence.

5.3. European case law prior to the FIAMM case

Up until the *FIAMM* case, both the Court of First Instance and the Court of Justice touched upon the liability of the European Union for lawful activities, thereby using formulations that would seem to allow for the possibility of the Union bearing such liability.⁸⁶ However, opting for a conditional approach these fragments were formulated as hypothetical sentences. In the *Biovilac* case of 1984 it was held that *if* the concept of liability without fault were to be accepted in European Union law, the principle that liability requires the existence of damage exceeding the limits of the economic risks inherent in operating in the sector concerned would have to be applied a fortiori.⁸⁷ In *Dorsch Consult* the European Court of Justice remarked that it is settled law that *if* the Union is to incur non-contractual liability as a result of a lawful or unlawful act, it is necessary in any event to prove that the alleged damage is real and that a causal link exists between that act and the alleged damage. The Court continued that, *in the event* of the principle of Union liability for a lawful act being recognised in Union law, a precondition for such liability would in any case be the existence of 'unusual' and 'special' damage. It was thus concluded that the European Union cannot incur non-contractual liability in respect of a lawful act, unless the three conditions referred to – namely the reality of the damage allegedly suffered, the causal link between this damage and the conduct of its institution, and the unusual and special nature of that damage – are all fulfilled. And so it occurred that both the Court of First Instance and the Court of Justice in individual cases tested whether the conditions for no-fault liability were met, in each case deciding in the negative and not awarding damages, but without answering the preceding question of whether this type of liability at the level of the European Union is actually accepted.

5.4. The FIAMM case and its implications

In the *Beamglow*, *FIAMM* and *Fedon* cases the Court of First Instance took a big step forward and actually phrased unconditionally a general principle of Union liability for lawful conduct.⁸⁸ This Court stated that under the second paragraph of Article 340 TFEU (previously Article 288 EC Treaty), the obligation imposed on the European Union to make good damage caused by its institutions is based on the 'general

⁸⁶ See e.g. Case 59/83, *SA Biovilac NV*, [1984] ECR 4057, Para. 28; Case 81/86, *De Boer Buizen BV*, [1987] ECR 3677, Para. 17; Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH*, [1998] ECR II-667; Case C-237/98, *Dorsch Consult Ingenieurgesellschaft mbH*, [2000] ECR I-4549; Case T-170/00, *Forde-Reederei*, [2002] ECR II-515, Para. 56; Joined Cases T-64/01 and T-65/01, *Afrikanische Frucht-Compagnie*, [2004] ECR II-521, Para. 150.

⁸⁷ Case 59/83, *SA Biovilac NV*, [1984] ECR 4057, Para. 28.

⁸⁸ Case T-383/00, *Beamglow Ltd*, [2005] ECR II-5459, Paras. 171-174; Case T-69/00, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies, Inc. (FIAMM Technologies)*, [2005] ECR II-5393, Paras. 157-160; Case T-135/01, *Fedon v. Council*, [2005] ECR II-29, Paras. 150-153.

principles common to the laws of the Member States' and therefore does not restrict the scope of those principles solely to the scheme that governs non-contractual liability for the unlawful conduct of those institutions. After considering that national laws do compensate lawfully caused damage under certain circumstances, albeit that there is not a great deal of convergence between the various legal systems on this issue, the Court of First Instance concluded as follows:

'When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met.'⁸⁹

However, the European Court of Justice overruled this.⁹⁰ On Appeal, the Court of Justice stated that the Court of First Instance had erred in law in affirming the existence of a regime providing for non-contractual liability of the Union on account of the lawful pursuit by it of its activities falling within the legislative sphere.

'Contrary to what the Court of First Instance stated in the judgments under appeal, it cannot, first of all, be deduced from the case-law prior to those judgments that the Court of Justice has established the principle of such a regime. (...) the Court has on the contrary hitherto limited itself, as set out in settled case-law, to specifying some of the conditions under which such liability could be incurred in the event of the principle of Community liability for a lawful act being recognised in Community law.'

Continuing its line of reasoning, the Court of Justice recalled that the general principles common to the laws of the Member States, to which Article 340 TFEU refers, allowed for the finding that an unlawful act or omission gives rise to an obligation to make good the damage caused, thereby observing that such liability is particularly limited in cases where legislative activity is concerned. After all, the exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the European Union requires legislative measures to be adopted which may adversely affect individual interests. Following this, the Court pointed out that in a legislative context – characterised by the exercise of a wide discretion essential for implementing a Union policy – liability can only be found if the body concerned had manifestly and gravely disregarded the limits on the exercise of its powers. It further argued that such a convergence of the legal systems of the Member States enabling the establishment of a principle of public authority liability in the case of unlawful conduct had by contrast not been found regarding a principle of liability for the lawful conduct of public authorities, in particular not where the conduct is of a legislative nature. In so doing the European Court of Justice rejected the existence of a liability regime under which the European Union can incur liability for lawful conduct, at least where it concerns lawful activity falling within the sphere of its legislative competence:

'It must be concluded that, as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.'

It is important to note that the Court of Justice briefly considered that this finding does not, of course, exclude the voluntary granting by a body of the European Union of certain forms of compensation for harmful effects resulting from legal legislative acts to third parties. Furthermore, the Court brings to

89 Case T-69/00, *FIAMM*, [2005] ECR II-5393. The Court of First Instance nevertheless denied liability in this case, considering that the conditions governing such liability had not been fulfilled because, in the light of the normal hazards of international trade, the damage suffered by the applicants was not unusual in nature.

90 Joined cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others*, [2008] ECR I-06513.

mind that a legislative measure taken by the Union whose application leads to restrictions on the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Union. Apparently the European Court of Justice was of the opinion that arguments relating to the disproportionate impact on certain parties flowing from the exercise of legislative powers by the European Union are best suited to be addressed under the normal liability regime and the general principles of European Union law, including fundamental rights.⁹¹ Moreover, one could argue that the wording of this *FIAMM* ruling keeps the option open that liability for lawful acts outside the legislative sphere is indeed possible.⁹² It should be emphasized, however, that the span outside this sphere is limited. The introduction of a normative act compliant with the law – lawful legislative activity – cannot result in the European Union being subject to liability for damages, whereas unfounded criminal charges or properly conducted administrative activities of an armed security force do not, of course, fall under the current scope of European Union competencies. Finally, the rejection of the liability regime for lawful Union acts is prefaced by the phrasing ‘as Union law currently stands’, which might leave room for change. If and when more countries will follow the example of the Dutch approach the general principles common to the laws of the Member States may point towards the future acceptance of a Union liability regime for lawful conduct.

6. Conclusion

Acts and decisions of public authorities cause damage all the time; this does not automatically mean that individuals who are thereby affected are entitled to compensation. A *prima facie* right to compensation would, if maintainable at all, not be compatible with the basic assumption underlying liability law that, in the absence of special grounds for liability, the loss must lie where it falls.⁹³ This calls for an analysis of the meaning and application of these special grounds. In this contribution we have focused on the *égalité* principle, the leading ground for liability after lawful acts by public authorities. Two Dutch legislative initiatives were dealt with in particular, that seek to codify, improve and expand *égalité* liability in administrative law as well as private law and in criminal law respectively. We welcome both the fact that the legislator seeks to unify the law in this respect and that a ground (justification) for liability is identified and explicitly mentioned. Together, the aforementioned legislative initiatives will even make the artificial *égalité* construction used in private law cases (‘not offering compensation is a violation of the *égalité* principle and is therefore unlawful’) no longer necessary, which will make the legal reasoning and the justification of liability in those cases more transparent. However, some problems still remain as reality may be more obstinate here than theory might suggest.

Our main concern is that the recognition of the *égalité* principle as the main legal basis in cases concerning lawful acts may not create the certainty and uniformity that the legislator aspires towards. Vagueness is detrimental to the predictability of decisions. To the extent that liability law is used to further the public policy of compensating atypical risks, one cannot escape the need to address what ‘risks’ and, more particularly ‘normal’ and ‘abnormal’ risks are and to investigate whether these terms or criteria can be given enough substance and clarity to be suitable. It would be welcome if more guidance and clarity would be provided as to the exact meaning and interpretation of these concepts, although this cannot necessarily be expected solely of the legislator. Rather it is a challenge for those that actually use and apply the law, public authorities, practitioners and the judiciary, to take more initiatives to further the law in this respect (especially given the fact that until now this does not seem to have led to much clarity). On a more concrete and detailed level, however, we have identified three types of acts

91 S. Thomas, ‘Community Liability for Lawful Conduct: An Aborted Child? Some Comments on the *FIAMM* Judgment of the ECJ’ (13 November 2009). Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505295> (last visited 16 June 2014), p. 6.

92 K. Gutman, ‘The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection,’ 2011 *Common Market Law Review* 48, pp. 743-744.

93 See particularly B.P.M. van Ravels in the introduction of his chronicle ‘Schadevergoeding (w.o. onrechtmatige overheidsdaad)’, *Nederlands Tijdschrift voor Bestuursrecht* 2012/30.

and omissions by public authorities that currently seem to fall within the scope of the administrative law initiative, Article 4:126 Awb, but because of their nature, have been the topic of debate: it might save the effort and costs of litigation if the legislator would reconsider and would perhaps *not* include liability for preparatory acts and decision-making procedures, the obligation to tolerate a certain situation or specific activities (*gedoogplicht*) and hazardous activities. All these might be captured in distinct liability rules. At least the legislator might take the opportunity to in fact provide more guidance and clarity as to whether or not Article 4:126 Awb should be applied in these three instances.

A positive consequence of Article 4:126 Awb, once it will enter into force, seems to be that liability for damage caused by lawful regulations, policy rules or other generally binding rules, with the exception of formal legislation, and damage caused by factual acts in the exercise of a public task will all arise directly from the *égalité* principle itself. Ultimately this will lead to the result that private law and administrative law will be brought closer together. Further, given the fact that Article 4:126 Awb also entails a jurisdictional shift from the civil court to the administrative court and that (general) administrative appeal proceedings are considered to be more accessible than civil law proceedings, this might lead to an increase in actual claims for damages. Not only may this effect be found in the typical, ‘classic’ cases such as *Leffers v. the State*, but different, new types of cases may be developed along this route as well. After all, Article 4:126 Awb is formulated in such a broad, general sense that it even seems possible that more private law claims could be brought under this umbrella, such as perhaps – for example – claims against supervisors.

Concerning the *draft bill on criminal law* that has been proposed (though not yet submitted to Parliament), it must be noted that this draft bill bears many features that can be considered to be important improvements in relation to the current regime provided by Articles 89 et seq. Sv. Criminal (procedural) law has a separate liability regime, which at first sight sounds logical given the special interests involved. But internally the current State liability regime for lawfully incurred damage in the context of criminal proceedings is characterized by a rather strong fragmentation, both with respect to the different ways of commencing proceedings (either at the criminal court or at the civil court), and with respect to the differing grounds and conditions for compensation (fairness, manifest innocence, or the *égalité* principle). An evident advantage of the regulation proposed by the draft bill is that it purports to put an end to the said fragmentation and the ensuing lack of legal certainty by introducing a uniform statutory regulation that will cover nearly all forms of damage-incurring actions by the police or judicial authorities in the field of criminal proceedings, and by providing a relatively easily accessible petition procedure which is open to both former suspects and third parties. With regard to (*ex tunc*) lawful criminal procedural acts, the bill will introduce one central ground for compensation (a variant of the *égalité* principle), thereby, as said, making the contrived construction currently used by the civil courts obsolete. We would therefore welcome it if the Government would take the proposal from the shelf and submit it to the further legislative process.

We have however noted that it is not altogether clear why the draft bill opts for a specification of the *égalité* principle that does not fully coincide with the meaning attached to the administrative law principle. Contrary to the administrative law regime, the possible disproportionality of the damage suffered will be measured by means of a set of pre-established legal criteria, including a blanket reasonableness clause that promises to still provide much leeway for a rather flexible, casuistic adjudication of the compensation claim. A further point of uncertainty pertains to the wide scope of the proposed regulation in the draft bill on criminal law: considering that the definition of the term criminal investigation (in Article 132a Sv) is very broad and not very precise, practical problems may arise in certain cases as to the retrospective determination of the exact moment when the initial stage of a criminal investigation can be said to have commenced and thus when subsequent damage-incurring Government conduct will fall under the ambit of the proposed regulation.

All in all, we support the fact that initiatives have been taken to codify and improve the rules on liability for lawful public sector acts or omissions, but, as we hope to have made clear above, there are still serious questions that must be considered before the law can be revised. If and when these questions are answered and clarified the renewed Dutch law on liability for lawful public sector acts can set an example for other national law systems and consequently for European Union law. After all, as is shortly illustrated

above, other national law systems are also struggling to incorporate in a conceivable and coherent way some generally accepted forms of compensation for damage caused by lawful public sector acts in their law systems. Given the influence of European Union law on national law especially in the field of State liability, it does not help that the European Court of Justice is reluctant to redraw the boundaries of the European State liability regime with respect to lawful acts. The adoption of a separate and general regime, set apart from the normal State liability regime, comparable to the new Dutch approach, may therefore be recommended for other countries too. Such a broader acceptance of separate liability regimes for lawful public sector acts on the national level will lead the way for European Union law, since this is based upon the general principles common to the laws of the Member States. ¶