

# Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction

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*This article examines the question whether civil claimants could be legally entitled to receive apologies from the perspective of a civil law jurisdiction, taking the Netherlands as an example.*

## I INTRODUCTION

In several countries, court-ordered apologies are available as a civil legal remedy, albeit not a common one. In Japan, where apologies play an important role in the resolution of conflicts, courts can order written, public apologies in cases of defamation.<sup>1</sup> The General Principles of the Civil Law of the People's Republic of China (China's Civil Code) provides that in China, one of the main methods of bearing civil liability is the extension of apology.<sup>2</sup> Under Australian anti-discrimination legislation, the apology order is available as a remedy for discrimination and other unlawful conduct.<sup>3</sup> In her article 'Apologies as a legal remedy',<sup>4</sup> Robyn Carroll demonstrates that apologies have an established remedial role in several areas of Australian law. She sums up a diversity of circumstances in

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- 1 Max Bolstad, Learning from Japan: The Case for Increased Use of Apology in Mediation, (2000) 48 *Cleveland State Law Review*, 545, 558.
- 2 General Principles of the Civil Law of the People's Republic of China, Article 134, available at <http://www.lawinfochina.com/Display.aspx?LookType=3&Lib=law&Cgid=2780&Id=1165&SearchKeyword=&SearchCKeyword=&paycode=>. See also Nicola Brutti, 'Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology', (2013) 24 *European Business Law Review*, 127, 132, n 36.
- 3 Robyn Carroll, 'The Ordered 'Apology' as a Remedy Under Anti-Discrimination Legislation in Australia: an Exercise in Futility?', in *Recognition and Enforcement of Judgements*, (Presses Universitaires D'Aix-Marseille 2010) 362. Other countries in which court-ordered apologies are a civil legal remedy are, for example, Indonesia, Ukraine, Korea (see Brent T White, Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy, (2006) 91 *Cornell Law Review*, 1261, n 2), Vietnam (see Brutti, above n 2, 133), Slovakia, Russia, Turkey and Poland (see below Section III(B)). White notes that information on other countries is not really available. Brutti (Brutti, above n 2, 131-2) mentions that the main usage of legal apologies is represented by far eastern countries and that court-ordered apologies are less common as a civil legal remedy in western legal systems such as the United States, the United Kingdom and other European countries.
- 4 Robyn Carroll, 'Apologies as a Legal Remedy', (2013) 35 *Sydney Law Review*, 317.

which apologies are available as a civil legal remedy in Australian law. Apology orders are, in the first place, available as a remedy where power to make such an order is conferred by statute. Furthermore, a court exercising equitable jurisdiction has the power to order an apology as a form of specific relief.<sup>5</sup>

Although court-ordered apologies have a long history in the Netherlands and in other civil law jurisdictions, apologies are no longer explicitly included as a remedy in the current Dutch Civil Code. Yet there is increasing awareness that apologies can be very important to people who suffered a wrong. As elsewhere, multiple legal and practical objections surround compelling wrongdoers to make apologies. This article examines the question whether claimants could be legally entitled to receive apologies from the perspective of a civil law jurisdiction, taking the Dutch system as an example. Occasionally there will be referred to the Australian system to compare with in order to clarify the situation in civil law jurisdictions. Section II provides a short overview of the history and disappearance of apologies as a civil legal remedy in the Netherlands and Continental Europe. It will be argued that, although apologies are no longer explicitly included as a remedy in the current Dutch Civil Code, there seem to be no fundamental legal barriers for a claimant requesting an apology. Several possible legal grounds for a duty to offer apologies can be identified in Dutch law. In section III it will be explained that the enforcement of the obligation to offer apologies is the most problematic. An often-made objection against compelled apologies is that they constitute an infringement of the right to freedom of expression, but it will be submitted that this fundamental right in some specific situations may yield to the rights of plaintiffs. Finally, section IV examines the objection that compelled apologies are insincere and therefore of no or limited value.

## II COMPELLED APOLOGIES IN CIVIL LAW JURISDICTIONS: PAST AND PRESENT

### (a) *From Amende Honorable to Rectification*

Until 1992, apologies were available as a remedy in the Dutch Civil Code. In the case of defamation or derision, the claimant could request the court to declare that the defendant had acted in a defamatory or derisive manner.<sup>6</sup> To prevent the judgment being publicly posted, the defendant could choose to make a public statement in court instead. With this public statement, the defendant was required to openly exhibit remorse.<sup>7</sup> This law originated from the *ius commune* era – roughly the period from the reception of Roman Law until the codifications of the 19th century – which formed the basis of a common system of legal thought in Continental Europe. The so-called *amende honorable* – as contrasted to the *amende profitable*, making amends by way of damages – was one of the

5 Ibid 347-8.

6 *Burgerlijk Wetboek 1838* (The Netherlands) [Civil Code 1838], Article 1409.

7 *Burgerlijk Wetboek 1838* (The Netherlands) [Civil Code 1838], Article 1410.

remedies available to the victim of insult.<sup>8</sup> The *amende honorable* combined three originally separated elements. Firstly, with the *declaration honoris* the defendant formally declared that they had made the insult in anger and without the intention to assault the victim. Secondly, there was the *palinodia*, the dominant element of the three. In order to repair the victim's honour, the defendant was obliged to retract his defamatory words, by stating those as being untrue. The third element of the *amende honorable* was an acknowledgement by the defender that they had acted wrong, combined with a prayer, asking for forgiveness. This *deprecatio Christiana* originated in the teachings of the Christian Church.<sup>9</sup>

In 1838, the first Dutch Civil Code entered into force.<sup>10</sup> By that time, the *amende honorable* had fallen into disuse. Courts particularly resented enforcing the *amende honorable* through imprisonment, being the only way in which it could be enforced. The Dutch legislator thus searched for an alternative. At that time, it was considered more important to obtain satisfaction for outraged honour than to award claimants an amount in compensation for non-pecuniary damage. Hence, publicly posting, at the defendant's expense, of a judgment declaring that the defendant had acted in a defamatory manner seemed to be a suitable remedy.<sup>11</sup> Later this remedy fell into disuse as well. From the 1960s onward, courts started ordering publication of rectifications, for example in newspapers, in defamation cases. This change is probably linked with the rise of the mass media. As defamation typically occurred through the media, a rectification published in the same media became the obvious remedy. As a consequence, publicly posting a judgment declaring that a defendant had acted in defamatory manner and, with that, court-ordered apologies, faded out of practice.<sup>12</sup> Thirty years later, in 1992, the Dutch Civil Code changed significantly and one of those changes was the removal of the provision on apologies.

### (b) *Current Situation*

In civil law systems, the dominant line of legal reasoning is from substantive law to possible remedies. It could be argued that this is not really different in common law systems, according to the maxim 'for every right, there is a remedy'. Yet the second part of that maxim 'where there is no remedy, there is no right' does not fit very well into civil law thinking, which easily allows for certain rights or entitlements not to have remedies.<sup>13</sup>

8 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford University Press 1996) 1072.

9 Ibid.

10 Before 1838 the French Code Napoleon had been in force in the Netherlands from 1811.

11 C J J C van Nispen, *Het Rechterlijk Verbod en Bevel* [Judicial Prohibition and Order] (PhD Theses, University of Leiden, 1978) 93-4.

12 Marjolijn Bulk, *Rectificatie en Uitingsvrijheid: een Onderzoek naar de Civielrechtelijke Aansprakelijkheid voor Onrechtmatige Uitingen* [Rectification and Freedom of Speech: a Study Concerned with Civil Liability for Tortious Speech] (PhD Theses, University of Amsterdam, 1998) 121.

13 On (perceived) differences between common law and civil law systems, see K Zweigert

Apology orders are available as a remedy for civil wrongdoing in Australia. The power to order an apology could, for example, be conferred by statute upon a court, and apology orders may also be available as an equitable remedy.<sup>14</sup> A concept like “the law of remedies” is not self-evident for a lawyer in a civil law jurisdiction. Although the removal of apologies as a remedy from the Dutch Civil Code could certainly support the argument that such remedy is no longer available, this conclusion is by no means unavoidable. Several possible legal grounds, which will be examined in the third part of this section, can still be identified for a duty to offer apologies.

## 1 *Sufficient Interest*

In Australia, a plaintiff who initiates legal proceedings is required to have “standing” to make a claim. The plaintiff must have “real interest” in the matter concerned.<sup>15</sup> It is conceivable that a court order to apologise will be refused because the plaintiff has no standing. Furthermore, a court exercising equitable jurisdiction has, among other things, discretion to deny a judicial order on the ground that the relief would be futile. An order could be futile ‘when it is unable to protect the rights of the plaintiff’.<sup>16</sup> This might be the case when an injunction could no longer protect the subject matter of the claim. An order might also be unable to protect the rights of the plaintiff when the defendant is unable or unwilling to comply with the relief applied for, or when it is not possible to effectively enforce the defendant’s compliance with the order.<sup>17</sup> Hence, not only a lack of standing, but also the concept of futility might stand in the way: Carroll and Witzleb mention that some Australian courts ‘have taken the view that an apology that the defendant does not offer voluntarily will be insincere, meaningless and therefore futile’.<sup>18</sup>

In Dutch law, a general requirement for any claim to be asserted at law is that one should have “sufficient interest”. This requirement might – to some extent – be compared to the concept of “standing”. The requirement of “sufficient interest”, can be found in Article 3:303 of the Dutch Civil Code and, is considered to be self-evident. One should not be allowed to bother ones fellow citizen, let alone the

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and H Kötz, *An Introduction to Comparative Law* (Tony Weir trans Clarendon Press 3<sup>rd</sup> ed, 1998).

14 Carroll, Apologies as a Legal Remedy, above n 4, 321.

15 Christine M Forster and Vedna Jivan, Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience, (2008) 3 *Asian Journal of Comparative Law*, 1, 10.

16 Normann Witzleb, ‘Equity Does Not Act in Vain’: An Analysis of Futility Arguments in Claims for Injunctions’, (2010) 32 *Sydney Law Review*, 503, 505.

17 Carroll, Apologies as a Legal Remedy, above n 4, 321.

18 Robyn Carroll and Norman Witzleb, ‘It’s Not Just about the Money’- Enhancing the Vindictory Effect of Private Law Remedies’, (2011) 37 *Monash University Law Review*, 216, 232. Carroll and Witzleb refer to *Evans v National Crime Authority* [2003] FMCA 375, [115]; *Jones v Toben* (2002) 71 ALD 629, [106], citing Hely ‘s decision in *Jones v Scully* (2002) 120 FCR 243, [245].

courts, with legal contentions of any kind if the interest at stake is not serious. Yet, as even the smallest pecuniary interest is considered to be sufficient, fulfilment of the requirement of “sufficient interest” is very seldom questioned. However, in 1998, when the Dutch Supreme Court gave judgment in the *Jeffrey* case<sup>19</sup>, a discussion about the fulfilment of this requirement erupted among lawyers and academics.

The tragic death of a three-year-old boy called Jeffrey gave rise to this judgement. After swim therapy at an university hospital, Jeffrey’s mother and the swimming therapist both lost sight of the child. They found him some time later, lying unconscious in the swimming pool. Jeffrey passed away twelve days later. Jeffrey’s parents claimed the swimming therapist was responsible for their son’s death. They blamed her for not searching the swimming pool thoroughly the moment she had found out that Jeffrey was not in the shower, where he was supposed to be. Furthermore they blamed both the therapist and the hospital for not blocking the access to the swimming pool and for not lowering the water level after the therapy. The hospital did not acknowledge responsibility. In the following civil proceedings, Jeffrey’s parents asked the court for a declaratory judgment that the hospital was liable for what had happened. At the stage the case reached the Supreme Court, no damages were at stake. The few compensable heads of damage Dutch liability law allows for in these circumstances, were either already compensated by the parent’s first party insurance, or considered insufficiently substantiated and therefore stricken out in the previous instances. The parents argued that to them a ruling of the court confirming the liability (in the form of a declaratory judgment) of the hospital was a prerequisite to come to terms with Jeffrey’s death.<sup>20</sup>

The Supreme Court declined the parent’s request for a declaratory judgment, ruling that their interest at stake was purely emotional and did not fulfil the requirement of “sufficient interest”.<sup>21</sup> The case was received very badly. It led to a heated debate about what interests could and should be within the ambit of the law. Scholarly opinion generally rejected the Supreme Court’s position.<sup>22</sup> Nonetheless, as the Supreme Court has never had the opportunity to reconsider its position, the issue has remained controversial until the present day.

19 Dutch Supreme Court, 9 October 1998, *NJ* 1998, 853.

20 Ibid.

21 Ibid.

22 See, eg, E G van Maanen, ‘Een arrest dat shockeert: HR 9 oktober 1998’ [A Shocking Judgment: Dutch Supreme Court 9 October 1998], *Nederlands Tijdschrift voor Burgerlijk Recht* 1999/2, 47; C C van Dam, ‘Emotioneel belang en affectieschade’ [Emotional Interest and Damages for the Non-Pecuniary Loss of Relatives], *Verkeersrecht Artikelen* 2000, 73; L F Wiggers-Rust, ‘Jaarvergadering Vereniging voor Burgerlijk Recht 1999: Gaat het in het Burgerlijk Recht alleen om geld?’ [Annual Meeting Netherlands Association of Civil Law 1999: Is It Just about Money in Civil Law?], *Nederlands Tijdschrift voor Burgerlijk Recht* 2000/4, 150. *Contra* B W M Nieskens-Isphording, ‘Het vermogensrecht, de Hoge Raad en de emoties van Van Maanen’ [Property Law, the Dutch Supreme Court and Van Maanen’s emotions], *Nederlands Tijdschrift voor Burgerlijk Recht* 1999/5.

One could argue that, given the *Jeffrey* case, asking a court order to offer an apology could, under Dutch law, be considered to serve a purely emotional interest, and could therefore fail to fulfil the requirement of “sufficient interest”. It should be noted however, that the facts on which the *Jeffrey* case was decided were very peculiar indeed. There is really no reason why a plaintiff requesting an order to offer apologies would frame this claim *exclusively* as a request for a declaratory judgment. It could even be argued that the *Jeffrey* case resulted from professional negligence on the part of the plaintiffs’ lawyer. A properly substantiated claim for damages for the smallest amount of financial loss, or for rectification as mentioned in the Civil Code, would suffice to constitute “sufficient interest”. It seems very hard to image a case where the facts would not allow such additional claim to be put forward.<sup>23</sup> As fundamental as the *Jeffrey* case might seem from the point of view of principle, its practical consequences are probably very small or even non-existent.

## 2 *Awareness of the Importance of Non-Pecuniary Interests*

Carroll notes that, although apologies are unsuitable as a legal remedy ‘in the eyes of many’, there has been growing attention paid in Australian law to the importance of apologies.<sup>24</sup> In the Netherlands, the *Jeffrey* case can illustrate the strong focus of present day civil law on interests with a tangible pecuniary dimension, such as the right to claim damages, the right to performance and the regulation of property. This is despite the fact that the Netherlands, as well as other civil law jurisdictions, embraces the principle of *restitutio ad integrum*: restoration to the original position.<sup>25</sup> In tort cases this means to return the injured party as near as possible to the situation that would have existed had no harm been inflicted. Hence recovery takes precedence over monetary compensation. Yet as in many other countries, there is an increasing awareness in the Netherlands that non-pecuniary interests, such as emotional recovery, the confirmation of responsibility and all kinds of other forms of “acknowledgment”, preventing the same thing from happening to others, and, indeed, apologies, can be of great or even overriding importance to plaintiffs, for instance to victims of personal injury. Being confined to the sphere of morality for what in hindsight might appear to have been a relatively short period of time, apologies seem also to be gradually entering again into the sphere of the law. Perhaps the most obvious example of this can be found in the field of adverse medical events. As in many other countries, efforts have been made in recent years to encourage health care professionals to make disclosure and offer apologies in an appropriate way following an adverse

23 A J Akkermans et al, ‘Excuses in het Privaatrecht’ [Apologies in Civil Law], *WPNR* 2008/6772, 778, 779.

24 Carroll, Apologies as a Legal Remedy, above n 4, 317.

25 A S Hartkamp and C H Sieburgh, *Mr. C. Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen Overeenkomstenrecht* [Mr. C. Asser’s Handbook to the Practise of Dutch Civil Law. 6. The Law of Obligations. Part III. General Contract Law] (Kluwer, 2012), [31].

medical event.<sup>26</sup> This has reached the stage at which failing to do so is clearly contrary to the applicable professional standard. Health care professionals who fail to be open and apologise to patients will be disciplined for misconduct by disciplinary tribunals.<sup>27</sup>

In the Netherlands, the “professional standard” of physicians and other health care professionals is laid down in various guidelines and codes of conduct. The professional organization of physicians in the Netherlands, the Royal Dutch Medical Association (“Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst”, KNMG), seeks to maintain the quality of professional practice and public health. In 2007, the KNMG developed a guideline: ‘*Dealing with incidents, mistakes and complaints: what can be expected of doctors?*’ (‘*Omgaan met incidenten, fouten en klachten: wat mag van artsen worden verwacht?*’). This guideline emphasizes the importance and necessity for physicians to communicate openly with patients concerning medical negligence. In this guideline, it is stipulated that mistakes should be admitted and apologies should be offered. Furthermore, in 2010, the Personal Injury Council (“de Letselschade Raad”) introduced the ‘*Code of conduct on open communication after medical incidents and better resolution of medical malpractice claims*’, (‘*Gedragscode Openheid medische incidenten; betere afwikkeling Medische Aansprakelijkheid, GOMA*’). The GOMA provides a number of guidelines to improve communication and the resolution of medical malpractice claims. The GOMA encourages physicians to communicate openly about their mistakes and to offer their apologies. One of the GOMA recommendations explicitly states that when proper care was not provided, physicians should make apologies. In addition, it is emphasized that making an apology does *not* imply recognition of civil liability, as the latter is not a decision for the physician to make.

A growing awareness that non-pecuniary interests can be of great importance to plaintiffs can also be noticed in the public sector, both in Australia and in the Netherlands. According to Carroll, a growing interest can be discerned in apologies as a form of redress in complaints against governmental institutions in Australia. Apologies are, for example, encouraged and recommended by way of resolving complaints made to ombudsman offices.<sup>28</sup>

In 2009, The National Ombudsman of the Netherlands stressed that financial compensation alone is generally not enough: honest explanations and apologies are no less important than pecuniary compensation.<sup>29</sup> The National Ombudsman

26 Carroll, Apologies as a Legal Remedy, above n 4, 319.

27 Disciplinary tribunals can impose a number of disciplinary measures: a warning, reprimand, fine or temporary or permanent suspension from practice. See the website of the Dutch medical disciplinary tribunals (only in Dutch), <http://www.tuchtcollege-gezondheidszorg.nl/>.

28 Carroll, Apologies as a Legal Remedy, above n 4, 332.

29 A F M Brenninkmeijer, *Apologies in Public Administration* (2010) [http://www.nationaleombudsman.nl/sites/default/files/jv\\_2009\\_apologies\\_in\\_public\\_](http://www.nationaleombudsman.nl/sites/default/files/jv_2009_apologies_in_public_)

guidelines on proper conduct determine that appropriate government action is:

- A. Open and clear
- B. Respectful
- C. Caring and solution focused
- D. Fair and reliable<sup>30</sup>

One of the guidelines specifically prescribes that, when mistakes have been made, public authorities should show leniency and flexibility. As a note is added that ‘authorities should be prepared to admit their mistakes and to offer appropriate apologies’.<sup>31</sup>

Dutch health care professionals and public authorities who fail to admit their mistakes, communicate openly and apologise, act contrary to their professional guidelines and/or codes of conduct. The question remains as to whether they could actually be *obliged* to act in accordance with these guidelines and codes of conduct, hence, if they could possibly be obliged to offer apologies. In 2001, the Dutch Supreme Court gave judgment in the *Thrombosis* case.<sup>32</sup> In this case, the Supreme Court explicitly held that, as part of his contractual rights towards his physician, a patient could claim his physician to act in accordance with his professional standard. Hence, when some protocol, professional guideline or code of conduct compels health care professionals to apologise, they might be considered to be obliged to do so as a matter of performance of their legal contract with their patients. The same probably applies to public authorities. Failing to offer apologies for a wrongful act might be a breach of the principle of sound administration.<sup>33</sup>

### 3 *General Legal Grounds*

As mentioned, since 1992 apologies are no longer explicitly included as a remedy in the current Dutch Civil Code. However, it does not follow from this that such remedy is no longer available. As indicated above, Dutch health care professionals and public authorities could possibly be legally obliged to offer apologies. Also several possible *general* legal grounds can be identified for a possible duty to offer apologies.

#### (i) *Specific Performance*

Typical for a civil law system is that specific performance is conceived as a primary remedy, and that there are no special requirements for injunctive relief.

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 30 [http://www.nationaleombudsman.nl/sites/default/files/guidelines\\_on\\_proper\\_conduct\\_october\\_2012\\_2.pdf](http://www.nationaleombudsman.nl/sites/default/files/guidelines_on_proper_conduct_october_2012_2.pdf).  
 31 Ibid.  
 32 HR 2 March 2001, *NJ* 2001, 649, note *F C B van Wijmen* and *J B M Vranken*.  
 33 Brenninkmeijer, above n 29, 11.



The Dutch Civil Code's provision on injunction reads:

‘Unless it follows otherwise from the law, the nature of the obligation or a juridical act, the person obliged to give, to do or not to do something in regard to another, may be ordered to do so by the court upon the demand of the person to whom the obligation is owned.’<sup>34</sup>

It is perfectly conceivable that a claim to receive an apology (‘to do something’) could be awarded by the court on the basis of this provision.<sup>35</sup> As we have seen, public authorities and physicians can be obliged by applicable standards of conduct to offer apologies. Under certain circumstances, the same obligation might be construed for private parties.<sup>36</sup> The only possible obstacle for injunctive relief in such cases seems to be that an order to offer apologies could be considered to be irreconcilable with ‘the nature of the obligation’. Apologies could be characterized as exclusively personal and enforcement thereof could be considered an undue interference with the personal freedom, especially the freedom of expression, of the defendant. Enforcement could also be considered to impair the value of the apology. One could reason that compelled apologies are, unlike voluntary apologies, insincere, and therefore without value. Such reasoning could perhaps be compared to the above-mentioned ‘futility’ argument of some Australian courts. Furthermore, it could be considered practically difficult or even impossible to force someone to apologise. These and other practical and legal obstacles will be examined in the next section.

### ***(ii) The Obligation to Mitigate Damage***

Formal apologies to citizens by public administrators could be a condition for reconciliation or may restore damaged relations.<sup>37</sup> Also, victims of medical malpractice often experience a strong need to know more about what happened and what went wrong, and to receive apologies for any mistakes made. A physician who fails to be open about a medical incident and fails to offer an apology, ignores important non-pecuniary needs of his patient. It is imaginable that this patient's recovery will be hampered or even that the physical and psychological consequences of the incident may worsen. This phenomenon is known as secondary victimization.<sup>38</sup> It is therefore perfectly arguable that physicians and public authorities who fail to communicate openly and apologise, can be considered to be acting in breach of their obligation to mitigate damage.<sup>39</sup>

34 *Burgerlijk Wetboek* (The Netherlands) [Civil Code], Article 3:296.

35 Akkermans et al, above n 23, 780.

36 E.g. where private parties have some kind of public responsibility.

37 Brenninkmeijer, above n 29, 2.

38 A J Akkermans and K A P C van Wees, ‘Het letselschadeproces in therapeutisch perspectief’ [Personal Injury Claim Settlement – from a Therapeutic Point of View], *Tijdschrift voor Vergoeding Personenschade* 2007/4, 106.

39 J L Smeehuijzen, ‘Schadevergoeding wegens onzorgvuldige afwikkeling van letselschadevorderingen’ [Compensation for Negligent Resolution of Personal Injury

### *(iii) Compensation in kind*

It is also quite conceivable that a court would order someone to offer apologies as a form of non-pecuniary compensation for breach of an obligation. Dutch law provides that the loss that has to be compensated in case of liability consists of both pecuniary losses and ‘other detriments’.<sup>40</sup> Damages for pain and suffering can be awarded for instance if a person sustained personal injury or if his honour or reputation is injured.<sup>41</sup> If so requested by the claimant, the court may also order compensation in kind instead of a pecuniary award.<sup>42</sup> It is very well imaginable that the court would order someone to offer apologies as a form of non-pecuniary compensation for non-pecuniary harm on this basis.<sup>43</sup> Of course, this option is only open when all other requirements for compensation are met. This entails certain limitations, e.g. when a medical mistake is made but it remains unclear whether damage has arisen, there is a wrong committed but no obligation to compensate exists. In that situation, a request to order an apology as a form of compensation in kind can of course not be granted.

### *(iv) Reasonableness and Fairness*

Article 6:2 (1) of the Dutch Civil Code stipulates that parties to an obligation must behave towards each other in accordance to the requirements of reasonableness and fairness.<sup>44</sup> The principles of reasonableness and fairness form another possible legal ground for a request for apologies. Under the proper circumstances, one could argue that these principles compel a party to offer apologies to the other party.<sup>45</sup> This, however, does require that a pre-existing legal obligation of some sort between the parties is established, e.g. the obligation to pay damages, as doctrine deems obligations arising from the principles of reasonableness and fairness to be complementary only. These principles can’t call additional obligations into being where none exist already.

## **III COMPELLED APOLOGIES AND FREEDOM OF EXPRESSION**

As we have seen above, several possible grounds can still be identified in Dutch law for a legal duty to offer apologies. Awareness is increasing that non-pecuniary interests can be of great importance to claimants. It seems to be much more the enforcement of the obligation to apologise, than the acceptance of this obligation as such that remains problematic – at least that is how it looks from the perspective

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Claims], *NTBR* 2009/44, 328.

40 *Burgerlijk Wetboek* (The Netherlands) [Civil Code], Article 6:95.

41 *Burgerlijk Wetboek* (The Netherlands) [Civil Code], Article 6:106(1).

42 *Burgerlijk Wetboek* (The Netherlands) [Civil Code], Article 6:103.

43 Akkermans et al, above n 23, 780.

44 ‘Creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.’ *Burgerlijk Wetboek* (The Netherlands) [Civil Code], Article 6:2(1).

45 Akkermans et al, above n 23, 780.

of a civil law system.

A first and often-made objection against compelled apologies is that they would constitute an undue infringement of the right to freedom of expression. For example, in the Australian case *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd*, Young J decided not to make an apology order, referring to the right to freedom of expression as enshrined in Article 19 of the *International Covenant on Civil and Political Rights*<sup>46, 47</sup>.

The right to freedom of expression is also a fundamental right recognized in the European Convention on Human Rights<sup>48</sup> (hereafter called the Convention). Article 1 of the Convention determines that all contracting states are obliged to directly secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. The supervision thereof rests primarily with the national authorities, in particular the national courts. Individuals, groups of individuals and nongovernmental organizations claiming to be the victim of a violation of the rights set forth in the Convention by one of the contracting states, enjoy a right of action to assert these rights.<sup>49</sup> When all efforts to resolve the dispute have been undertaken within the national legal order, the European Court of Human Rights (ECHR) has a role as secondary to the institutions of national legal systems in the adjudication of claims that there has been a violation of the Convention rights.<sup>50</sup>

The right to freedom of expression is articulated in Article 10 (1) of the Convention. Everyone is free to hold opinions and to receive and impart information and ideas. At first sight, an obligation to offer apologies to someone seems hard to reconcile with this fundamental right. It can be argued that apologies represent an opinion or an emotion, which nobody may be forced to express. However, under certain circumstances, Article 10 of the Convention permits restrictions on the right to freedom of expression. In several contracting states, infringements of this right in the form of apology orders have been made, usually in defamation proceedings, to protect the privacy or the reputation of the claimant.<sup>51</sup> Plaintiffs are ordered to publish a rectification or retraction of untrue statements, containing apologies. In the next section, a number of Dutch and European cases concerning the connection between the right to freedom of expression and apologies will be discussed.

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46 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976).

47 (1998) 45 NSWLR 291 (*Summertime Holdings*). See also Carroll, Apologies as a Legal Remedy, above n 4, 326.

48 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

49 Article 34 of the *European Convention on Human Rights*.

50 Robin C A White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, (Oxford University Press, 2010), 84.

51 For example Slovakia, Russia, Turkey, Ukraine and Poland. Below n 59.

**(a) *Compelled Apologies, Freedom of Expression and Dutch Courts***

In cases of defamation, Dutch courts can order to publish a rectification on the basis of Article 6:167 of the Dutch Civil Code:

‘Where (...) a person is liable towards another person on account of an incorrect or, by its incompleteness, misleading publication of information of a factual nature, the court may, upon the demand of such other person, order him to publish a correction in such manner as it determines.’

As this provision illustrates, a rectification is considered a correction of incorrect, incomplete or misleading factual information. It is not about changing an opinion or emotion. In order to infringe the freedom of expression as little as possible, courts generally try to formulate an ordered rectification in such way, that a clear-cut retraction of the defendant’s opinion is avoided. The text will read as factual as possible (‘the court has determined that so-and-so was incorrect’), the subjective position of the defendant preferably not explicitly addressed. In this particular light, it will come to no surprise that the prevailing view in the literature on rectification is that apologies cannot be ordered under Article 6:167.<sup>52</sup> Nevertheless, claimants sometimes seek rectifications that do contain apologies, and in a few of these cases the court actually awarded that request. The cases to be discussed next will illustrate that Dutch case law differs on the issue whether apologies can be awarded.

In 1996, the Amsterdam Court of Appeal gave judgment in a case between labour unions and employers’ organizations. The lower court had ordered rectification of an article in which the labour unions had exaggerated certain differences of opinions about the new collective labour agreement. The ordered text of this rectification did not contain apologies, but it *did* contain an opinion. The labour unions were, among other things, ordered to publicly change their opinion about the statement that employers are planning to fire occupationally disabled employees. The Court of Appeal upheld the lower court’s decision: according to the Court, a rectification order was a suitable remedy to prevent damage. However, it also took the view that the ordered text of the rectification, especially the part where the labour unions were ordered to express an opinion, was contrary to the right to freedom of expression. According to the Court of Appeal, an order to express an opinion amounts to the infringement of a further-reaching fundamental right, namely the *negative* right to freedom of expression. The Court determined that nobody may under any circumstances ever be forced by a judge to orally or in writing express an opinion that is not its own.<sup>53</sup>

In 2008, The Amsterdam Court of Appeal confirmed this earlier decision. The Court refused a request for publication of a rectification containing apologies

<sup>52</sup> Akkermans et al, above n 23, 782.

<sup>53</sup> Court of Appeal of Amsterdam, 23 May 1996, *Mediaforum* 1996-7/8, B99.

in a company's magazine. An employee who was wrongly accused of stealing a colleague's boots had sought vindication, as well as apologies. Since it had decided to refuse the rectification, the Court of Appeal didn't have to decide about the sought apologies. However, it explicitly added that it wouldn't have ordered the company to publish apologies in any case, since compelled apologies would be an infringement of the right to freedom of expression.<sup>54</sup>

In 2013, a District court had to decide about a request for the publication of a rectification of untrue statements, containing apologies. A regional radio and television station broadcasted a commentary on "Addictioncare", a corporation for care and treatment of drug addicts. Addictioncare was of the opinion that in this commentary, the radio/television station had published incorrect and misleading information about the corporation and had falsely accused it of fraud. The court determined that the radio/television station had indeed acted unlawfully against Addictioncare. Although it awarded the requested rectification, the court turned down the request for apologies, stating that people should offer apologies in the conviction they did something wrong. The court concluded there was no indication for this, and added the defendant just had to publish a rectification because the court ordered him to do so.<sup>55</sup>

However, in a few cases, District courts did order defendants to publish a rectification containing apologies. Recently, in a copyright infringement case where the plaintiff also complained about false allegations on the defendant's website, the District court ordered the defendant to publish a rectification on their Twitter-account, Facebook-page and LinkedIn-page. The publication was to read as follows: 'We were wrong. [X] does NOT offer unauthorized copies of [Y]-products. We apologize to [X].'<sup>56</sup> The court considered that the defendant's allegations were untruthful and defamatory and that an infringement of their right to freedom of expression was compatible with Article 10 of the Convention. It is remarkable that the plaintiff in this case had indeed claimed the publication of a rectification, but they had not explicitly added a request for apologies. Moreover, the court did make clear why it ordered the defendant to publish a rectification, but it did not explain why it added apologies to the cited text. Also in other defamation cases, the motives for the District court's decision to order an apology – in contrast to its decision to order a rectification – were not explicitly addressed.<sup>57</sup>

The above shows that Dutch courts have different opinions about the relation between apologies and the right to freedom of expression. Perhaps it should be noted here that civil law jurisdictions have no formal rule equivalent to the common

54 Court of Appeal of Amsterdam, 19 June 2008, ECLI:NL:GHAMS:2008:BE9682.

55 Court of Oost-Brabant, 11 July 2013, ECLI:NL:RBOBR:2013:2856.

56 Court of Midden-Nederland, 18 June 2014, ECLI:NL:RBMNE:2014:2472.

57 See, eg, Court of Haarlem, 1 November 2006, ECLI:NL:RBHAA:2006:AZ1366; Court of The Hague, 17 October 2007, ECLI:NL:RBSGR:2007:BB5893; Court of The Hague, 20 August 2007, ECLI:NL:RBSGR:2007:BB2188.

law doctrine of *stare decisis*. The consequences of this doctrinal difference are however easily overestimated. Even without *stare decisis* it is generally common wisdom not to judge contrary to higher courts decisions, as this can only lead to successful appeals. For courts in civil law jurisdictions it is no less core business to analyze other cases and follow the judgments of others, especially those of higher courts.<sup>58</sup> The art of distinguishing is very much the same. But of course it can happen that (lower) courts appear to hold different opinions, especially on issues that have not yet been fully articulated and that lack an explicit decision of the Supreme Court. In regard of the relation between compelled apologies and the right to freedom of expression, most Dutch courts seem to be of the opinion that court-ordered apologies are an undue restriction of the right to freedom of expression. Only a few courts determined differently. However, as mentioned above, Article 10 of the Convention does not guarantee a wholly unrestricted right to freedom of expression. Like most provisions of this kind, Article 10 (2) permits restrictions, as long as these restrictions are prescribed by law and ‘necessary in a democratic society’. The right to freedom of expression may for example under certain circumstances be restricted to protect the health, reputation or rights of others.

**(b) *Compelled Apologies, Freedom of Expression and the European Court of Human Rights***

In the case law of the European Court of Human Rights (ECHR), several rulings can be found that concern the relation between the right to freedom of expression and compelled apologies. Claims to receive an apology have been awarded in several contracting states, such as Slovakia, Russia, Turkey, Ukraine and Poland.<sup>59</sup> In none of the cases brought before the ECHR, the court has taken the position that the national courts’ authority to grant an order to apologise *as such* constituted a breach of the right to freedom of expression. The ECHR considered that the national court’s decision constituted an interference with the right to freedom of expression, and subsequently examined whether that interference was justified under Article 10 (2) of the Convention. The ECHR considers compelled apologies to be a restriction of the right of freedom of expression that can be permitted provided that the interference with this right is prescribed by law and ‘necessary in a democratic society’.<sup>60</sup>

<sup>58</sup> Zweigert and Kötz, above n 13, 262.

<sup>59</sup> See, eg, Slovakia: *Radio Twist AS v Slovakia* (European Court of Human Rights, Fifth Section, Application No 62202/00, 19 December 2006); Russia: *Kazakov v Russia* (European Court of Human Rights, First Section, Application No 1758/02, 18 December 2008); Turkey: *Cihan Ozturk v Turkey* (European Court of Human Rights, Second Section, Application No 17095/03, 9 June 2009); Ukraine: *Editorial Board of Pravoye Delo v Ukraine* (European Court of Human Rights, Fifth Section, Application No 33014/05, 5 May 2011); Poland: *Kania v Poland* (European Court of Human Rights, Fourth Section, Application No 35105/04, 21 June 2011).

<sup>60</sup> See, eg, *Ovchinnikov v Russia* (European Court of Human Rights, First Section, Application No 24061/04, 16 December 2010); *Kania v Poland* (European Court of Human Rights, Fourth Section, Application No 35105/04, 21 June 2011); *Blaja News v Poland* (European

An interference is ‘necessary in a democratic society’ provided that the interference corresponds to ‘a pressing social need’, that it is ‘proportionate to the legitimate aim pursued’ and that ‘the reasons given by the national authorities to justify the actual measures of “interference” they take are relevant and sufficient’.<sup>61</sup> National authorities have a certain “margin of appreciation” in assessing whether an interference is necessary, but the ECHR is authorised to give the final ruling. It is the ECHR’s task to determine whether states exercise their discretion ‘reasonably, carefully and in good faith’. To this end it considers the interference in the light of the case concerned as a whole.<sup>62</sup>

Interesting for our present inquiry is the case of *Kazakov v Russia* of 18 December 2008.<sup>63</sup> In this case, the ECHR determined that compelled apologies are ‘a doubtful form of redress’.<sup>64</sup> A commander of a military unit, who received a letter of a defamatory nature from a former military officer, lodged a defamation action claiming that the letter concerned had impaired his honour and dignity. He sought compensation for non-pecuniary damage and a written apology. Both claims were sustained by the national court. The former military officer who wrote the letter complained under Article 10 of the Convention ‘that the domestic courts had forced him to change his opinion by ordering him to make written apologies’. The ECHR set out to determine whether the interference in this case, which was ‘prescribed by law’, was also ‘necessary in a democratic society’. It concluded: ‘the Court notes that the applicant was ordered to issue an apology. In its view, to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be “necessary”’<sup>65</sup> The ECHR declared the former military officer’s complaint admissible and held that there had been a violation of Article 10 of the Convention.<sup>66</sup>

The phrasing of this conclusion seems to suggest that the ECHR is making a general statement about ordering apologies, and not a consideration in regard to this specific case. In subsequent judgments though, the ECHR seems to have abandoned this position.<sup>67</sup> The cases to be discussed next will support this observation.

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Court of Human Rights, Fourth Section, Application No 59545/10, 26 November 2013).

61 See, eg, *Handyside v The United Kingdom*, (European Court of Human Rights, Application No 5493/72, 7 December 1973) [48]-[50].

62 See, eg, *The Sunday Times v The United Kingdom*, (European Court of Human Rights, Application No 6538/74, 26 April 1979) [59].

63 *Kazakov v Russia* (European Court of Human Rights, First Section, Application No 1758/02, 18 December 2008).

64 *Ibid* [30].

65 *Ibid* [30].

66 *Ibid* (Court’s decision).

67 See, eg, *Ovchinnikov v Russia* (European Court of Human Rights, First Section, Application No 24061/04, 16 December 2010); *Kittel v Poland* (European Court of Human Rights, Fourth Section, Application No 35105/04, 21 June 2011); *Blaja News v Poland* (European Court of Human Rights, Fourth Section, Application No 59545/10, 26 November 2013).

In the case of *Cihan Ozturk v Turkey* of 9 June 2009, the ECHR implicitly confirmed that compelled apologies can be a permitted restriction of the right to freedom of expression *and* that compelled apologies can, under certain circumstances, be more appropriate than other sanctions.<sup>68</sup> The applicant in this case, a post office manager in Beyoğlu, Istanbul, had written an article in which he criticized the former Director of the Istanbul State postal service. He criticized the former Director's 'negligence in the project to restore the Beyoğlu post office building and blamed her for the dilapidated stand and partial collapse of the building'. The article was published in the State postal service magazine. The former Director brought a civil action for compensation against the applicant and the editor-in-chief of the magazine before the Istanbul Civil Court of First Instance. This court awarded the former Director a financial compensation for non-pecuniary damage. The Court of Cassation upheld this judgment. The ECHR noted that the judgment constituted an interference with the applicant's right to freedom of expression, which was 'prescribed by law'. It needed to determine whether the interference was 'necessary in a democratic society'. The ECHR observed that defamation laws or proceedings, which in fact prevent legitimate criticism of public officials, cannot be justified. In this case, according to the ECHR, the imposed sanction was significant; it could deter others from criticizing public officials. The ECHR found that the national authorities failed to strike a fair balance between the relevant interests in this case, and concluded that there had been a violation of Article 10 of the Convention. The most interesting part of the case for our present inquiry however, is the fact that the ECHR suggested that the national courts, instead of awarding financial compensation for non-pecuniary damage, might have considered other sanctions, 'such as the issuance of an apology'.<sup>69</sup>

Furthermore, in the case of *Aleksey Ovchinnikov v Russia* of 16 December 2010, the order to publish a retraction containing an apology was found 'prescribed by law' and 'necessary in a democratic society'.<sup>70</sup> The son of two federal judges and the step grandson of the deputy head of the Ivanovo Regional Traffic Police, both twelve years of age, committed violent and sexual acts against a nine-year-old boy. Evidence was found, but because of the minor age of the offenders, the offences were not prosecutable. The media took interest in the case and multiple newspaper articles were published.<sup>71</sup> The offender's parents and step grandfather brought a civil action for defamation and disclosure of private information and sought retraction. The Sovetskiy District Court granted their requests for a retraction because the journalists who had published the articles had failed to prove the allegation that the parents and the step grandfather had interfered with the investigation, as Article 152 of the Russian Civil Code required. The newspaper and the applicant (a journalist) were ordered to publish retractions

68 *Ozturk v Turkey* (European Court of Human Rights, Second Section, Application No 17095/03, 9 June 2009).

69 *Ibid* [33].

70 *Ovchinnikov v Russia* (European Court of Human Rights, First Section, Application No 24061/04, 16 December 2010).

71 *Ibid* [6]-[12].



containing an apology to both families.<sup>72</sup> The Ivanovo Regional Court upheld both judgments. The journalist complained with the ECHR of a violation of his right to freedom of expression. He submitted:

that the order to publish a retraction containing an apology had had no basis in domestic law. He argued that only a voluntary apology might be acceptable under the Convention. It was clearly excessive to compel someone to make an apology, thereby forcing him to express an opinion that did not correspond to his personal convictions.<sup>73</sup>

Explaining the relevant domestic law, the ECHR referred to Resolution no. 3, which was adopted by the Plenary Supreme Court of the Russian Federation in 2005. This Resolution prohibited the national courts from ordering defendants to apologise, because this form of redress did not have a basis under Russian Law.<sup>74</sup> However, the ECHR recognised this to be different *before* the adoption of the Resolution. Since the national court gave judgments before 2005, the ECHR concluded that the interference in this case was indeed ‘prescribed by law’.<sup>75</sup> Moreover, it declared that the interference could be considered ‘necessary in a democratic society’ and consequently, there had been no violation of Article 10 of the Convention.<sup>76</sup>

Interesting to mention is Judge Kovler’s concurring opinion in this case. Although he finds no violation of Article 10 as well, he adds the following: ‘the Court has already found that “an apology” cannot be considered “necessary” under Article 10 (...); thus, the domestic courts overstepped to a certain extent the narrow margin of appreciation afforded to them for restrictions on debates of public interest.’<sup>77</sup> He nonetheless swayed his position to finding no violation of Article 10, ‘only’ because of the fact that Resolution no. 3 was adopted after the national court’s judgments.<sup>78</sup>

Despite the case of *Kazakov v Russia*<sup>79</sup> and the opinion of Judge Kovler in the case of *Aleksey Ovchinnikov v Russia*<sup>80</sup>, it appears that the ECHR is of the opinion that compelled apologies can, under the appropriate circumstances, be a permitted restriction of the right to freedom of expression.<sup>81</sup> The ECHR also

72 Ibid [13]-[4] [17]-[8].

73 Ibid [37].

74 Ibid [32].

75 Ibid [45].

76 Ibid [56]-[7].

77 Ibid (Concurring Opinion of Judge Kovler).

78 Ibid.

79 *Kazakov v Russia* (European Court of Human Rights, First Section, Application No 1758/02, 18 December 2008).

80 *Ovchinnikov v Russia* (European Court of Human Rights, First Section, Application No 24061/04, 16 December 2010). (Concurring Opinion of Judge Kovler).

81 See, eg, *Kania v Poland* (European Court of Human Rights, Fourth Section, Application No 35105/04, 21 June 2011); *Blaja News v Poland* (European Court of Human Rights,

seems to think that under certain circumstances, compelled apologies could even be more appropriate than other sanctions.<sup>82</sup> Hence, it can be argued that the right to freedom of expression as enshrined in Article 10 (1) of the Convention can be restricted to meet a justified desire to receive apologies in order to protect the rights of others.<sup>83</sup>

**(c) *Infringement of the Right to Freedom of Expression in Personal Injury Cases***

It should be kept in mind that the above-mentioned cases of the ECHR and of the Dutch Courts all originated in defamation proceedings. Infringements of the right to freedom of expression in the form of an order to offer apologies were accepted to protect for example the privacy or the reputation of others. The question remains as to whether the right to freedom of expression may also be restricted to accommodate the desire to receive apologies in cases of a different kind, for instance to benefit a person's emotional recovery from injury. In the Netherlands, as far as we are aware, no personal injury victim has as yet asked for an apology in court. Apologies have been claimed in a few civil cases, but as in the above-mentioned cases of the Dutch Courts, these were all defamation proceedings in which the claimant not only requested apologies, but also demanded rectification. In cases where the claimant was successful and rectification was ordered, the defendant was, generally (except for a few cases), not forced to incorporate an apology in this rectification. The court's decision not to order an apology is usually motivated in just a few general terms. The opinion of most courts seems to be that apologies cannot be compelled, are not enforceable, or that enforcing apologies would not have any added value.<sup>84</sup> In a few defamation cases, the court has explicitly stated that there is no legal ground for court-ordered apologies in Dutch law.<sup>85</sup> In other cases, as discussed above, courts have ruled that court-imposed apologies are contrary to the freedom of expression.<sup>86</sup>

Although in the Netherlands, apologies have been (as far as we are aware) only requested in defamation proceedings, it seems perfectly conceivable that an order to offer apologies will sooner or later be sought for in a personal injury case.

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Fourth Section, Application No 59545/10, 26 November 2013).

82 *Ozturk v Turkey* (European Court of Human Rights, Second Section, Application No 17095/03, 9 June 2009) [33].

83 See *Ovchinnikov v Russia* (European Court of Human Rights, First Section, Application No 24061/04, 16 December 2010). See also, eg, *Kania v Poland* (European Court of Human Rights, Fourth Section, Application No 35105/04, 21 June 2011); *Blaja News v Poland* (European Court of Human Rights, Fourth Section, Application No 59545/10, 26 November 2013).

84 See, eg, District Court of Leeuwarden, 14 September 2011, ECLI:NL:RBLEE:2011:BT2357; District Court of Leeuwarden, 18 August 2010, ECLI:NL:RBLEE:2010:BN6111; District Court of Amsterdam, 7 August 2008, ECLI:NL:RBAMS:2008:BD9783.

85 See, eg, District Court of Leeuwarden, 31 August 2010, ECLI:NL:RBLEE:2010:BN6133; District Court of Amsterdam, 30 June 2010, ECLI:NL:RBAMS:2010:BO1998.

86 See, eg, Court of Appeal of Amsterdam, 19 June 2008, ECLI:NL:GHAMS:2008:BE9682; Court of Rotterdam, 21 November 2012, ECLI:NL:RBROT:2012:BY4993.

Empirical research shows that apologies are important and valuable to victims.<sup>87</sup> The victim's recovery could be hampered or the physical and psychological consequences of the incident may be exacerbated, should their non-pecuniary needs be ignored.<sup>88</sup> As recovery takes precedence over compensation, the availability of effective remedies seems essential. It might be argued that preventing or mitigating (further) damage and providing an adequate compensation, for example in the form of compelled apologies, could justify an infringement of the freedom of expression. A judgment of the Supreme Court of the Netherlands, the "*HIV case*"<sup>89</sup> might illustrate that restriction of a defendant's fundamental rights may, in certain circumstances, be justified to protect the plaintiff's rights.

In this case, the non-pecuniary needs of a rape victim were at issue. The victim demanded that her rapist would be ordered to undergo an HIV-test. Several months after the rape, the victim herself had her own blood tested for HIV and the results were negative. The victim was told to repeat the test after 6 months to rule out HIV infection. Yet, the victim claimed to be emotionally incapable of undergoing a second test. She claimed the rapist should undergo an HIV test instead. In case the test was negative, the victim was assured of not being infected with the HIV virus. The claimant based her claim on multiple legal grounds. The first two of these legal grounds were the obligation to "pay" non-pecuniary compensation and the obligation to mitigate damage. With regard to these grounds, the Supreme Court judged it was the claimant's right that the consequences of the rape should either be mitigated by the defendant, or be counterbalanced with an appropriate form of compensation. The defendant argued that a mandatory blood test would be an infringement of his fundamental right to physical integrity. Nevertheless, the Supreme Court judged that a restriction to the defendant's right to physical integrity was allowed in this specific situation. It was imperative for the victim that one of the most severe consequences of the rape – uncertainty about a possible HIV infection – would be removed. On the ground of the duty of care of tort law, the Supreme Court believed the defendant was required either to mitigate the claimant's damage, or to counterbalance the consequences of the rape with an appropriate form of compensation. This meant specifically that the defendant was obliged to end the victim's uncertainty about a possible HIV infection by undergoing a blood test and, as a consequence thereof, to tolerate the infringement of his fundamental right to physical integrity.<sup>90</sup>

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87 See, eg, R M E Huver et al, *Slachtoffers en Aansprakelijkheid. Een Onderzoek naar Behoeften, Verwachtingen en Ervaringen van Slachtoffers en hun Naasten met Betrekking tot het Civiele Aansprakelijkheidsrecht, Deel I, Terreinverkenning* [Victims and Liability. Research Aimed to Gain Insight into the Needs, Expectations, and Experiences of Victims, their Relatives, and Bereaved with Respect to Liability Law. Part I, Exploration], Den Haag: WODC 2007.

88 See above Section II(B)(3)(b).

89 Dutch Supreme Court, 18 June 1993, *RvdW* 136.

90 *Ibid.*

In cases involving, for example, medical malpractice or car accidents, apologies can meet important psychological needs of victims. Compelling a defendant to apologise entails a restriction of his right to freedom of expression. However, the *HIV* case can illustrate that restriction of a defendant's fundamental rights may, in certain circumstances, be justified to protect the victim's rights. With the *HIV* case in mind, it might be argued that preventing or mitigating (further) damage and providing an adequate compensation in the form of compelled apologies could justify an infringement of freedom of expression, as long as, of course, the interference is prescribed by law and 'necessary in a democratic society'.

#### IV ARE COMPELLED APOLOGIES INSINCERE AND THEREFORE NOT OF ANY VALUE?

A second possible objection to enforcement of an apology order is that, if one considers a particular emotion, such as regret or sorrow, to be essential to an apology, it seems rather difficult to compel someone to apologise who does not actually feel that way. Suppose individual A is a driver involved in a car accident with driver B. B is injured and holds A liable. He claims damages and apologies in court. Although the court judges A to be responsible for the cause and consequences of the car crash, A does not agree that he did something wrong and consequently refuses to apologise. In such a case one could doubt whether it is at all possible to achieve a meaningful apology. One can bring a horse to the water, but one cannot make it drink.

Carroll refers to the Hong Kong *Ma Bik Yung* case.<sup>91</sup> In this case, the Court of Final Appeal actually *did* hold that the Court had the statutory power to make an apology order, even against a defendant 'who does not feel sorry'<sup>92</sup>, but it concluded that to make such an order, the circumstances would have to be 'exceptional'.<sup>93</sup>

In regard of this second objection against ordered apologies one can distinguish two related issues: (1) the assumption that compelled apologies are, unlike voluntary apologies, insincere and (2) given that a court cannot order sincerity: the question whether insincere apologies could have any value.

As mentioned above, some Australian courts have concluded that ordering an apology that is not offered voluntarily 'will be insincere and meaningless and therefore futile'.<sup>94</sup> Although voluntary apologies are indeed more likely to be sincere than compelled apologies, it is not necessarily true that ordered apologies

91 [2002] 2 HKLRD 1 (*Ma Bik Yung v Ko Chuen*). See Carroll, Apologies as a Legal Remedy, above n 4, 328.

92 [2002] 2 HKLRD 1, 11.

93 Ibid 19.

94 Carroll and Witzleb, above n 18, 232. Carroll and Witzleb refer to *Evans v National Crime Authority* [2003] FMCA 375, [115]; *Jones v Toben* (2002) 71 ALD 629, [106], citing Hely's decision in *Jones v Scully* (2002) 120 FCR 243, [245].

are never sincere. In her article on court-ordered apologies, Carroll shows this to be not so black-and-white.<sup>95</sup> She describes some grey, but plausible situations in which a victim could receive an obligatory, but, to a certain extent, still sincere apology. For example, it is conceivable that a defendant is unwilling to acknowledge a mistake, but is prepared to sincerely apologise once the court orders him to do so.<sup>96</sup>

Nevertheless, an apology that is not offered voluntarily will typically be less than sincere. However, apologies do not necessarily need to be sincere in order to be *effective*.<sup>97</sup> Empirical research suggests that compelled apologies or even insincere apologies could still be effective and valuable to claimants.<sup>98</sup> Sincerity of an apology seems most important when offered in private situations, since personal apologies are meant to re-establish a damaged relationship. By offering apologies, one secures the forgiveness of the other party. It means the acceptance of the rules of social behaviour and willingness to conform to those rules in the future.<sup>99</sup>

Mandatory offered apologies by, for instance, public authorities or health care professionals, are often a reaction to incidents that affect all of society, even when the incident itself involves only one or just a few individual victims. In those situations, apologies are usually expressed publicly instead of privately. For example, a few months after his term of prime minister of Ukraine, Viktor Yanukovich was ordered to apologise publicly to a man whom he had insulted by using an obscenity.<sup>100</sup> Acknowledgement of the violation of a social or moral contract is significant in those cases, and sincerity of the apology is of marginal importance.<sup>101</sup>

This is consistent with the situation in Australia where apology orders are available as a remedy in anti-discrimination cases.<sup>102</sup> Carroll notes that in many Australian cases the courts have not expressed any view about the value of such an apology to the claimant concerning.<sup>103</sup> She describes a distinction between

95 Robyn Carroll, 'You Can't Order Sorrow, So Is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases', (2010) 33 *University of New South Wales Law Journal*, 360, 373.

96 Ibid 372.

97 Aaron Lazare, *On Apology*, New York: Oxford University Press, 2004, 117.

98 Jane L Risen and Thomas Gilovich, 'Target and Observer Differences in the Acceptance of Questionable Apologies', (2007) 92 *Journal of Personality and Social Psychology*, 418; Mark Bennett and Christopher Dewberry, 'I've said I'm sorry, haven't I?' A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients, (1994) 13 *Current Psychology*, 10, 19.

99 Lazare, above n 97, 229-31; Michael Alberstein and Nadav Davidovich, 'Apologies in the Healthcare System: From Clinical Medicine to Public Health', (2011) 74 *Law and Contemporary Problems*, 150, 158.

100 Brutti, above n 2, 133.

101 Lazare, above n 97, 118.

102 Carroll, You Can't Order Sorrow, above n 95, 362.

103 Ibid 374-5.

personal apologies on the one hand, and apologies made for the purpose of fulfilling a legal requirement on the other.<sup>104</sup> In the *Burns v Radio 2UE Sydney Pty Ltd & Ors (No 2)* case,<sup>105</sup> ordered apologies are characterized as such a legal requirement. In this case, apologies were ordered ‘to satisfy the objectives of the legislation rather than as an apology as commonly understood.’<sup>106</sup> In such circumstances ordered apologies are clearly considered valuable regardless of the question of sincerity. Furthermore, Australian courts take into account the benefits of an apology order to the community in addition to the benefits to the claimant. Court-ordered apologies could for example have symbolic and educative value.<sup>107</sup>

Hence, compelled apologies are not necessarily insincere, and insincere apologies could still be valuable. On this account, a claimant’s demand for apologies should not be rejected on the assumption that compelled apologies are insincere and therefore not of any value. When someone seeks an ordered apology, it is obvious that he also regards an involuntary and insincere apology as having value.<sup>108</sup>

## V MODALITY OF THE JUDGMENT

As argued above, there are several possible legal grounds upon which apologies could be claimed in the Netherlands. Enforcement is problematic because of the ensuing infringement of the fundamental right to freedom of expression, but may under certain circumstances be justified in order to protect the rights of the claimant. It has also been submitted that compelled apologies can be valuable to victims, and that an ordered apology it is not necessarily insincere. Thus, in theory, it is very well conceivable that a claim to offer apologies may, under certain circumstances, be awarded.

At this point it seems to be important to realise that, as is the case in regard of the sincerity of compelled apologies, also the issue of enforcement is not necessarily a matter of black-and-white. Creativity on the side of the claimant in the formulation of his claim, as well as the discretion of the court to frame its exact ruling, allow for several ‘grey’ solutions, at least according to Dutch civil procedural law.<sup>109</sup>

To diminish the interference of the freedom of speech, a court could for example order the defendant to express apologies in words of their own choosing. Another option is the mere declaration that the defendant should apologise, without making available the usual sanction of a monetary sum to be paid upon non-performance. It is after all not the verdict that a defendant should offer an apology that constitutes an infringement of his right to freedom of speech, but being actually compelled

104 Ibid 362-3; Carroll, *The Ordered ‘Apology’ as a Remedy*, above n 3, 418.

105 [2005], NSWADT 24.

106 Carroll, *The Ordered ‘Apology’ as a Remedy*, above n 3, 418.

107 Ibid 384.

108 Carroll and Witzleb, above n 18, 233.

109 Akkermans et al, above n 23, 784.

to do so. It should be mentioned here that civil law jurisdictions generally are unfamiliar with the concept of contempt of court. It seems a reasonable assumption that many public and private institutions, but many private persons also, will be prepared to offer apologies so far refused, once a court of law has decided that they should do so, even when no coercive sanctions have been made available to the claimant. Another modality is when courts 'reward' someone who apologises. In a few Dutch civil cases, the court lowered the amount of damages because the defendant had apologised.<sup>110</sup> All these modalities can address the importance of apologies for claimants and constitute an incentive to defendants to actually make them.

## VI CONCLUSION

In both Australia and the Netherlands, there is an increasing awareness that apologies and other non-pecuniary interests can be of great importance to plaintiffs who suffered a wrong. In the Netherlands, efforts have been made in recent years to encourage health care professionals and public authorities to offer apologies in an appropriate way following mistakes. Failing to offer apologies for a wrongful decision or act by public authorities might be a breach of the principle of sound administration and health care professionals who fail to be open and apologise to patients may be disciplined for misconduct by disciplinary tribunals. Yet in contrast to Australia, there are no statutes providing for court ordered apologies. Although apologies are not explicitly included as a specific remedy in the Dutch Civil Code, it is argued in this article that there are still several possible legal grounds upon which apologies could be claimed. It is not the acceptance of the obligation to offer apologies as such that remains problematic, but much more the enforcement thereof. If a defendant is (persistently) not willing to voluntarily apologise, a court order to offer an apology seems problematic, not primarily because compelled apologies are insincere (it has been argued that also insincere apologies could still be valuable for the claimant), but because compelling a defendant to offer apologies constitutes to an infringement of his fundamental right to freedom of expression as enshrined in Article 10 (1) of the European Convention of Human Rights. The case law of the European Court of Human Rights seems to indicate that the ECHR is of the opinion that compelled apologies can be a permitted restriction of the right to freedom of expression. The ECHR even seems to think that under certain circumstances, compelled apologies could be more appropriate than other sanctions.

Given the above, it is conceivable that a claim to offer apologies may, under certain circumstances, be awarded by the Dutch courts, not only in defamation proceedings, but also in cases of a different kind, such as personal injury cases. It seems only a matter of time until some claimant will give it a try.

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110 See, eg, Court of The Hague, 12 December 2001, ECLI:NL:RBSGR:2001:AD7073; Court of Amsterdam, 20 July 2011, ECLI:NL:RBAMS:2011:BR6128.