Court-Ordered Apologies under the Law of Torts? Non-Monetary Relief for Emotional Harm – A Comparative Outlook from a Western European Perspective

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Chapter 7
Court-Ordered Apologies under the Law of Torts? Non-Monetary Relief for Emotional Harm – A Comparative Outlook from a Western European Perspective

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1. Introduction

In inter-state or diplomatic relations, public apologies are often offered or requested by government officials or public authorities.[2] Apologies made by former colonial powers to their former colonies, often because of a bloody and inhuman regime, provide a striking example. Apologies are also frequently offered or requested in social relations between private individuals.

Unlike in everyday life, the patrimonial orientation of Western European tort law leaves little scope for apologies within the legal arena.[3] Indeed, nearly every Western European legal system[4] is unfamiliar with court-ordered apologies by way of legal remedy. However, in some other jurisdictions, apologies are conceived as a general or specific remedy available to

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2 For example, see J Lind, *Sorry States. Apologies in International Politics* (Cornell University Press 2008) 256 p; M Nobles, *The Politics of Official Apologies* (CUP 2008) 200 p; CW Blatz, K Schumann and M Ross, 'Government Apologies for Historical Injustices' (2009) 30 Political Psychology 219ff; M Gibney and E Roxstrom, 'The Status of State Apologies' (2001) 23 Human Rights Quarterly 911ff.

3 In this chapter, the notion of 'law of torts' also covers the notion of 'extra-contractual liability' in (continental) civil law systems. The same is true for 'tort' and 'delict'.

4 Although the term 'Western Europe' is commonly used, there is no consensus on which legal systems comprise it. The selection of legal systems used here is based on the alphabetical list of subregions in the United Nations geoscheme for Europe, created by the UN Statistics Division, according to which Western Europe includes Austria, Belgium, France, Germany, Liechtenstein, Luxembourg, Monaco, The Netherlands and Switzerland (https://unstats.un.org/unsd/methodology/m49). However, city-states and microstates are not included in this chapter.

the courts. Also in academic literature, the introduction of such a remedy has recently been suggested in several legal systems, since it may serve purposes and have effects which cannot be attained by monetary damages.[5] This is particularly true for emotional harm, since this type of harm does not (directly) affect the aggrieved party's property, however, by means of payment of damages, it is expressed in monetary terms. Indeed, monetary damages for emotional harm provide the victim only with a sum of money, if he or she desires, to be spent on other activities or goods providing him or her with pleasure or joy. Empirical studies reveal that victims suffering emotional harm caused by a civil wrong, may have indeed a need for money.[6] Nevertheless, in addition to their need for monetary compensation, these victims may have a need for acknowledgement of victimhood and the harmful consequences suffered because of the civil wrong. Compassion and apologies expressed by the wrongdoer may meet this need. However, empirical studies disclose an 'apology mismatch' in this regard: apparently, victims mainly want to receive an apology after intentional wrongs, whereas most wrongdoers want to offer an apology particularly after unintentional wrongs.[7] From the victim's perspective, the availability of court-ordered apologies may therefore provide a solution. However, at first sight, this remedy is not part of the legal arena in Western Europe. Indeed, none of the Western European legal systems provide for apologies as a statutory remedy.

In spite of such statutory provisions, this chapter investigates whether court-ordered apologies could be available as a legal remedy under the general provisions of the law of torts in Western European legal systems. Therefore, it first explores the *importance* of apologies and identifies where victims may have a need for it (see no 2). After presenting a *threefold typology* of legal systems providing for court-ordered apologies (see no 3), the *introduction of this remedy* is examined for civil law jurisdictions through a

5 For references, see no 2 'Importance of Apologies'.

6 See, for example, CP Reinders Folmer, PTM Desmet and WH van Boom, 'Beyond compensation? Examining the role of apologies in the restoration of victims' needs in simulated tort cases' (2019) 43 *L and Human Behavior* 329; RME Huver, KAPC van Wees, AJ Akkermans and NA Elbers, *Slachtoffers en aansprakelijkheid: een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht, Deel 1* (WODC 2007) 81.

7 See JM Leunissen, D De Cremer, CP Reinders Folmer and M van Dijke, 'The apology mismatch: Asymmetries between victim's need for apologies and perpetrator's willingnes to apologize' (2013) 49(3) J of Experimental Social Psychology 315ff.

case study of the Belgian legal order (see no 4). If this remedy is available under the law of torts, this chapter subsequently provides a *legal framework* for this remedy and explains how courts should take into account, before making an order for apologies, an additional assessment not directly provided under the law of torts (see nos 5-6). Finally, potential *types* of court-ordered apologies (see no 7) and their *forms of enforcement* (see no 8) are explored.

2. Importance of Apologies

Since the 21st century, the role and importance of apologies within the legal arena have increasingly been subject to scientific research. For instance, recent legal and/or empirical research has analysed the effects of apologies on the psychological well-being of victims,[8] on the willingness of wrongdoers to apologise,[9] on how wrongdoers estimate the effects of apologising[10] and how they are perceived after apologising,[11] on the role

8 For example, see H Strang and LW Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) 15 Utah L Rev 15; A Allan, 'Apology in Civil Law: A Psycho-Legal Perspective' (2007) Psychiatry, Psychology and L 5; Huver, van Wees, Akkermans and Elbers (n 6) 81-82; A Allan, 'Functional Apologies in Law' (2008) Psychiatry, Psychology and L 369; P Desmet, *In Money we Trust? Trust Repair and the Psychology of Financial Compensations* (ERIM, 2011) 96-97; MK Dhami, 'Offer and Acceptance of Apology in Victim–Offender Mediation' (2012) 20 Critical Criminology 45; N Smith, *Justice through Apologies* (CUP 2014) 253-258; AJ Akkermans, L Hulst, L Claassen, A ten Boom, NA Elbers, KAPC van Wees and DJ Bruinvels, *Slachtoffers en aansprakelijkheid: een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht, Deel 2* (Lemma 2015) 27 and 97-98; Reinders Folmer, Desmet and van Boom (n 6); CP Reinders Folmer, P Mascini and JM Leunissen, 'Rethinking Apology in Tort Litigation Deficiencies in Comprehensiveness Undermine Remedial Effectiveness' (2019) 15 Rev L Econ [20180042]. For a critical note, see V Geeraets and W Veraart, 'Over Verplichte Excuses en Spreekrecht: Wat Is er Mis met Empirisch-Juridisch Onderzoek naar Slachtoffers' (2017) 46 Neth J Legal Phil 137.

9 For example, see JM Leunissen, D De Cremer and CP Reinders Folmer, 'An instrumental perspective on apologizing in bargaining: The importance of forgiveness to apologize' (2012) 33(1) J of Economical Psychology 215ff.

10 For example, see JM Leunissen, D De Cremer, M van Dijke and CP Reinders Folmer, 'Forecasting Errors in the Averseness of Apologizing' (2014) 27 Soc Just Res 322ff.

11 For example, see JK Robbennolt, 'Apologies and Legal Settlement: An Empirical Examination' (2003) 102 Michigan L Rev 460; A Allen, D McKillop and R Carroll, 'Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) Psychiatry, Psychology and L 538; A Allan and R Carroll, 'Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event' (2017) 24 Psychiatry, Psychology and L 10.

of apologies in negotiation,[12] mediation,[13] settlements,[14] out-of-court dispute resolution,[15] court[16] and jury decisions,[17] and the number of claims brought before the courts.[18] In response to the need of victims seeking an apology, apologies have also been addressed as a *private law remedy* for civil wrongs.[19] The pattern that emerges from these studies is that apologies

12 For example, see Leunissen, De Cremer and Reinders Folmer (n 9).

13 For example, see DL Levi, 'The Role of Apology in Mediation' (1997) 72 NYUL Rev 1165; M Bolstad, 'Learning form Japan: The Case for Increased Use of Apology in Mediation' (2000) Cleveland State L Rev 545; DL Pavlick, 'Apology and Mediation: The Horse and Carriage of the Twenty-First Century' (2003) Ohio St J Disp Resol 18; MK Dhami, 'Offer and Acceptance of Apology in Victim-Offender Mediation' (2012) Critical Criminology 45; R Carroll, A Allan and M Halsmith, 'Apologies, Mediation and the Law: Resolution of Civil Disputes' (2017) 7 Oñati Socio-Legal Series 569.

14 For example, see JK Robbennolt, 'Apologies and Settlement Levers' (2006) 3 J of Empirical LS 333; Reinders Folmer, Desmet and van Boom (n 5).

15 For example, see W Vandenbussche, 'Introducing Apology Legislation in Civil Law Systems: A New Way to Encourage Out-of-Court Dispute Resolution' in L Cadiet, B Hess and M Requejo Isidro (eds), *Privatizing Dispute Resolution. Trends and Limits* (Nomos 2019) 433ff.

16 For example, see JJ Rachlinski, C Guthrie and AJ Wistrich, 'Contrition in the Courtroom: Do Apologies Affect Adjudication?' (2013) 98 Cornell L Rev 1189.

17 For example, see BH Bornstein, LM Rung and MK Miller, 'The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case' (2002) 20 Behavioral Sciences & L 393.

18 For example, see R Boothman, AC Blackwell, DA Jr Campbell, E Comminskey and S Anderson, 'A Better Approach to Medical Malpractice Claims? The University of Michigan Experience' (2009) 2 J of Health & Life Sciences L 125.

19 For example, see BT White, 'Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy' (2006) 91 Cornell L Rev 1261; P Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) UNSWLRS 30; R Carroll, 'Beyond Compensation: Apology as a Private Law Remedy' in J Berryman and R Bigwood (eds), *The Law of Remedies. New directions in the common law* (Irwin Law Inc 2010) 323ff; R Carroll, 'You can't order sorriness, so is there any value in an ordered apology? An analysis of ordered apologies in anti-discrimination cases' (2010) 33 UNSWLJ 360ff; R Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia: an Exercise in Futility?' in R Weaver and F Lichere (eds), *Recognition and enforcement of judgements* (Presses Universitaires Aix-Marseille 2010) 362ff; R Carroll and N Witzleb, 'It's Not Just about the Money – Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37 Monash University L Rev 216; D Milo, 'It's Hard for Me to Say I'm Sorry: Apology as a Remedy in the South African Law of Defamation' (2012) 4(1) J of Media L 11ff; R Carroll, 'Apologies as a Legal Remedy' (2013) Syd L Rev 317; N Brutti, 'Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology' (2013) 24 Eur Business L Rev 127; A Zwart-Hink, A Akkermans and K van Wees, 'Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction' (2014) 38 UWAL Rev 100; Z Awaiz-Bilal,

by way of legal remedy may serve a threefold purpose: (1) *compensation* for emotional harm, (2) *acknowledgement* of victimhood and suffering and (3) *signalization* of unacceptable conduct and shared values. This threefold purpose can be explained as follows.

According to their *first* purpose, apologies may contribute, in addition to monetary damages, to the psychological well-being of the victim, and therefore provide *compensation for emotional harm*. Indeed, it is said that apologies may mitigate stress, restore victims' social reputation, standing and provide restoration of esteem, feelings, dignity and self-respect.[20] The healing effect of apologies has been confirmed by empirical studies[21] and is sometimes explicitly revealed by case law. For instance, according to the Constitutional Court of South Africa, 'the importance of apology in securing redress and in salving feelings cannot be underestimated'.[22] Also the Hong Kong Court of Final Appeal points out that 'the making of an apology will usually redress, at least to some extent, the loss or damage, particularly injury to feelings, suffered by the plaintiff as a result of the defendant's unlawful conduct … An apology, even at this late stage after a finding of liability, could have the effect of redressing at least to some extent the plaintiff's loss and damage'.[23] In a decision of the Federal Magistrates Court of Australia, it has been noted that 'an apology is frequently worth more to an applicant than money … a written apology would go a long way to compensating the applicant for the distress and loss of confidence that she suffered'.[24] In addition, Canadian case law confirms that an apology by way of legal remedy may 'more appropriately satisfy the complainants than any monetary award'.[25]

'The Duty of Candour and Apologies as a Legal Remedy' (2015) J of Personal Injury L 12; G van Dijck, 'The Ordered Apology' (2017) 37 OJLS 562; P Vines, 'Apologies as Corrective Justice in Tort Law: Reparation and Compensation as (Partial) Redemption in a Tort System' (2018) UNSWLRS 79.

20 See, for example, van Dijck (n 19) 573-574 (with ref).

21 See ref in n 8.

22 *The Citizen 1978 (Pty) Ltd and Others v McBride* (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (8 April 2011) [134] (Cameron J).

23 *Ma Bik Yung v Ko Chuen* [2001] HKCFA 56; [2002] 2 HKLRD 1; (2006) 9 HKCFAR 888; [2001] 4 HKC 119; FACV 25/2000 (5 October 2001) [34-35].

24 *Cooke v Plauen Holdings* [2001] FMCA 91 (14 November 2001) [43].

25 *Naqvi v Canada* (Employment and Immigration Commission) 1993 CanLII 2154 (CHRT).

According to their *second* purpose, apologies may provide *acknowledgement of victimhood and harmful consequences*. Indeed, through apologies, the wrongdoer acknowledges the injured party as a victim of his actions. Research reveals that the injured party may have a need or desire for such an acknowledgement where his identity, social standing or personal integrity has been affected, within society, a community or particular group, for example as a result of discrimination, infringement of personality rights or unlawful dismissal.[26] However, from the wrongdoer's perspective, it is sometimes not self-evident to make apologies.[27] When forced to do so by the court, it is said that making or publishing apologies (for example, online, in a newspaper or magazine) may cause a sense of shame and public humiliation and therefore pillory the wrongdoer.[28] It is indeed likely that making involuntary apologies can be psychologically aggravating, but under certain circumstances, this burden could be reasonable in relation to the emotional harm caused.[29]

According to their *third* purpose, court-ordered apologies may have re-educational and socio-adaptive effects. Indeed, by making public apologies, the defendant seems to commit himself not to repeat this behaviour in the future.[30] The enforcement of such apologies provides a *sign to the general public* of unacceptable conduct and shared values.[31] Under certain circumstances, this message becomes even more powerful when the wrongdoer himself gives this sign, even though not on a voluntary basis. Indeed, in some Asian cultures, such as Japanese culture, the instant offer of monetary damages after a civil wrong is evaluated negatively and interpreted as

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26 See, for example, Allen, McKillop and Carroll (n 11) 538; Carroll, 'Beyond Compensation' (n 19) 358; JE Hulst, KAPC van Wees, EM Uijttenbroeck and AJ Akkermans, 'Excuses in het privaatrecht' (2008) 6772 WPNR 778, 779.

27 For example, see Allan, 'Apology in Civil Law' (n 8) 6.

28 See, for example, E Descheemaeker, 'Old and New Learning in the Law of *Amende Honorable*' (2015) 132 SAfrican LJ 909ff; Geeraets and Veraart (n 8).

29 White (n 18) 1296-1297. Avoiding a humiliating dimension by making an order for apologies is (also) a matter of assessing the proportionality of court-ordered apologies (see below no 6).

30 See Allan, 'Apology in Civil Law' (n 8) 6-7; Carroll, 'Beyond Compensation' (n 19) 365-366; Hulst, van Wees, Uijttenbroeck and Akkermans (n 26) 781.

31 See, for example, Carroll, 'Beyond Compensation' (n 19) 350; Vines, 'The Power of Apology' (n 19) 1-2; White (n 19) 1278-1279.

a sign of lack of regret and compassion.[32] This cultural approach suggests that money cannot make up for everything and is aimed at restoring the relationship between the parties. Apologies, indeed, 'will hopefully put an end to that adversarial relationship and enable the parties to relate to one another more positively in the future'.[33] That is why court-ordered apologies sometimes are addressed in the ever-increasing trend towards restorative and/or corrective justice.[34]

3. Availability of Court-Ordered Apologies: a Comparative Typology

Depending on the legal system, the availability of apologies as a legal remedy can be categorised into a threefold typology. In a first type of legal systems, *statutory provisions* provide explicitly for court-ordered apologies, either as a general or a specific remedy (see no 3.1). In a second type of jurisdictions, statutory provisions do not provide for court-ordered apologies, however, the availability is confirmed by the *courts* (see no 3.2). In a third type of legal systems, court-ordered apologies are neither prescribed by statutory provisions nor accepted by the courts, but increasing legal interest in favour of the availability of court-ordered apologies can be identified within *legal scholarship* (see no 3.3).

3.1. First Type of Legal Systems: Prescribed by Statutory Provisions

In some legal systems, court-ordered apologies have been codified in general statutory provisions as an *ordinary remedy*. For instance, under Chi-

32 H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 L & Society Rev 461, 472. See also X Guan, HS Park and HE Lee, 'Cross-Cultural Differences in Apology' (2009) International J of Intercultural Relations 32-45.

33 *Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (No 2)* [2007] NSWADTAP 33 (6 July 2007) [9].

34 For example, see Vines 'Apologies as Corrective Justice' (n 19); D Bolivar, I Aertsen and I Vanfraechem, 'The Ritual of Apology and Restorative Jusice: Exploring the Victim's Perspective' in D Cuypers, D Janssen, J Haers and B. Segaert (eds), *Public Apology Between Ritual and Regret* (Rodopi, 2013) 123ff; H Strang and LW Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) Utah L Rev 15; M Swart, 'Sorry Seems to be the Hardest Word: Apology as a form of Symbolic Reparation' (2008) SAfrican J Human Rights 50, 53. In South Africa frequently referred to by the courts, comp *Dikoko v Mokhatla* (CCT62/05) [2006] ZACC 10, 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) (3 August 2006) [68-69 and 114]; *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) (8 March 2011) [197 and 201]; *The Citizen v McBride* (n 21) [134] ('apology is an important aspect of restorative justice').

nese law, court-ordered apologies are statutory embodied as a legal remedy. Indeed, on 28 May 2020, the People's Republic of China promulgated its first-ever Civil Code, into force since 1 January 2021.[35] Considered as a strategic step towards a 'socialist Rule of Law',[36] the enactment of this Civil Code is intended to codify existing law by way of rationalization of sources on the one hand, and to reform Chinese civil law on the other hand, in order to provide an answer to the actual needs of contemporary Chinese society.[37] According to Article 179 of this Civil Code, 'making an apology' is one of the available remedies for civil liability. Codified in Book 1 'General Provisions' of the Civil Code, Article 179 – providing an enumeration of eleven types of civil law remedies – is considered as a crucial norm with a broad scope of application,[38] including for example civil liability caused by breach of contract and tort. For the infringement of personality rights in particular, the victim's right to an apology is explicitly confirmed in Articles 995 and 1000 of the Civil Code.[39]

The availability of apologies as a legal remedy under Chinese law is, however, not introduced by this Civil Code. Indeed, Article 179 of the Chinese Civil Code is almost an exact copy of Article 134 of the General Principles of the Civil Law of het People's Republic of China of 1986, as replaced by the General Provisions of Civil Law of 2017 (GPCL).[40]

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35 On this codification process, see, for example, Liming Wang, 'The Modernization of Chinese Civil Law over Four Decades' (2019) 14 Frontiers L China 39.

36 See Zhu Wang, *On the Constitutionality of Compliling a Civil Code of China* (Springer 2020) 340 p.

37 Jiayou Shi, 'La rédaction du Code civil chinois: entre la compilation et l'innovation' (2019) Rev Int Dr Comp 945.

38 See Yuanshi Bu, *Chinese Civil Code – The General Part* (Hart 2019) 201ff.

39 See Chinese Civil Code, Art 995: 'Where the personality rights are infringed upon, a victim has the right to request the actor to assume civil liability in accordance with this Code and other laws. The provisions on the statutes of limitation shall not apply to any request of a victim for cessation of infringement, removal of obstacles, elimination of danger, elimination of adverse effects, rehabilitation of reputation, or extending a formal apology.'; and Art 1000: 'An actor that assumes civil liabilities of elimination of adverse effects, rehabilitation of reputation, and extending a formal apology, among others, for infringing upon the personality rights shall assume liabilities equivalent to the specific manner of the acts and the scope of influence. Where an actor refuses to assume the civil liability prescribed in the preceding paragraph, the people's court may adopt such methods as issuing an announcement or announcing an effective judgment document in such media as newspapers, periodicals, and the Internet for enforcement, at the expense of the actor.' (translation).

40 General Provisions of the Civil Law of the People's Republic of China (15 March 2017)

Accordingly, apologies were also available under these two former instruments as a remedy for civil liability. Albeit elementary on various subjects of civil law, the GPCL did not provide a comprehensive regime on civil liability. Rather, the GPCL spelled out certain fundamental concepts and principles, and therefore laid down the conceptual and doctrinal foundation upon which further civil legislation, including the law of torts, could be built. Hence, before the entry into force of the Civil Code, the Chinese Tort Liability Law of 2009[41] was the most comprehensive and specific statute in this regard. According to Article 15 of this specific statute, the methods of bearing tort liabilities included '1. cessation of infringement; 2. removal of obstruction; 3. elimination of danger; 4. return of property; 5. restoration to the original status; 6. compensation for losses; 7. apology; and 8. elimination of consequences and restoration of reputation'.

In China's culture, an apology restores the victim's ego and his image in society, which matters more than anything else.[42] As a legal remedy, an apology is thus deemed at providing psychological comfort to the victim. In China's judicial practice, making an apology is therefore mainly used in cases involving infringement of personality rights.[43] Indeed, according to the Supreme People's Court in *Chao Meng v Huainan Post Office*, the remedy of a formal apology is not available when the plaintiff cannot prove that the defendant's negligence or intent caused any harm to his personality.[44] If an apology order is made, a wrongdoer usually needs to make the apology personally. Firstly, it is said that he needs to acknowledge that his act is unlawful and has caused damage or harm to the victim. Secondly, he needs to indicate to the victim that he will be responsible for all damage caused by his act and needs to express his sorry for causing any trouble. Lastly, the wrongdoer needs to promise that he will restrain his behaviour so that such act will not happen again in the future. The apology can be made publicly or in private, orally or in writing. For example, a public apology may be

(GPCL), see Article 179.

41 Tort Law of the People's Republic of China (26 December 2009).

42 DK Srivastava and Gu Minkang, *Tort Law in China* (Sweet & Maxwell 2013) para 2.063. See also Mo Zhang, 'Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon' (2011) Richmond J of Global Law & Business 415, 470.

43 Yuanshi Bu (n 38) 207 para 27; Lei Chen, 'Debating Personality Rights Protection in China: A Comparative Outlook' (2018) Eur Rev Private L 31.

44 See Xiang Li and Jigang Jin, *Concise Chinese Tort Laws* (Springer 2014) 253. See also Yuanshi Bu (n 38) 207 para 27.

published in an agreed upon or comparable newspaper, or by posting it in a designated area.[45] The court is to make the decision on the specific manner of making the apology.[46]

In other legal systems, court-ordered apologies are not prescribed as a general remedy, but rather are expressly provided for as a remedy for *specific liability cases only*. An illustration can be found in equal opportunity and anti-discrimination legislation of several jurisdictions. For instance, the South-African Act No 4 of 2000 on the Promotion of Equality and Prevention of Unfair Discrimination provides that, if unfair discrimination, hate speech or harassment has taken place, the court may make an appropriate order, including 'an unconditional apology' (Art 21(2) j).[47] Similar statutory provisions are available within several Australian States.[48] For example, according to the Anti-Discrimination Act 1977 No 48 of New South Wales, if the tribunal finds the complaint substantiated in whole or in part, it may order the defendant 'to publish an apology… and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both)' (Section 108(2) (d). The Australian State of Queensland's Anti-Discrimination Act 1991 No 85 is worded in similar terms: if the tribunal decides that the defendant contravened the Act, the tribunal may require the defendant 'to make a private apology or retraction' and/or 'public apology or retraction by publishing the apology or retraction in the way, and in the form, stated in the order' (Section 209(1) (d-e).

Case law provides several examples of the application of this legislation. For instance, in *Burns v Radio 2UE Sydney Pty Ltd & Orse (No 2),* the New South Wales Administrative Decisions Tribunal required two radio presenters, who made discriminatory comments about homosexuals during

45 Mo Zhang (n 42) 470.

46 See Yuanshi Bu, *Chinese Civil Law* (Beck/Hart 2013) 135 para 56; Xiang Li and Jigang Jin (n 44) 127 and 155; Ye Lin, 'The tort system in China' (1989) 52 L and Contemporary Problems 143, 152. See also M Blumer, 'Tort Liability for Infringements on the Right of Reputation under Chinese Law – A Review of Selected Court Cases' (2016) Fajus Research Paper Series on Chinese and East Asian Law 10 no 1.

47 See J Neethling, 'Amende Honorable (Terugtrekking en Apologie) as Remedie by Laster – Resente Ontwikkeling in die Regspraak' (2009) 42 De Jure 286.

48 For an overview, see for example *Wotton v State of Queensland (No 5)* [2016] FCA 1457 (5 December 2016) [1550ff] (with comparative arguments). See also Carroll, 'Beyond Compensation' (n 19) 323-385; Carroll, 'Apologies as a Legal Remedy' (n 19); Carroll and Witzleb (n 19) 216ff; Vines, 'The Power of Apology' (n 19).

the radio show, to broadcast their apologies at fixed times in specific terms, while the radio station had to publish apologies in different newspapers.[49] In *Burns v McKee*, a man engaged in unlawful vilification on the ground of homosexuality by publishing material on a website, and was therefore required to post a precise apology, attributed to him, on the website and every website controlled by him, such apology to remain on the website for the life of the website or at least six months whichever is the lesser.[50] In yet another case, the owners of a residential park who had denied to a man with a physical disability the access to the swimming pool, were required, on the grounds of indirect discrimination, to apologise to the man in a letter addressed to the members of the residential park.[51]

3.2. Second Type of Legal Systems: Accepted by the Courts in spite of Statutory Provision

In a second type of legal systems, it has been accepted that, despite the lack of explicit legal provisions, the courts may make, under circumstances, an order for apologies. That is the case, for instance, in Canada,[52] Japan,[53] Poland,[54] Ukraine,[55] South Korea[56] and South Africa.[57] Swiss law

49 [2005] NSWADT 24 (16 February 2005).

50 [2017] NSWCATAD 66 (6 March 2017).

51 *Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (EOD)* [2007] NSWADTAP 19 (16 April 2007).

52 For example, see *Grover v National Research Council Canada*, 1992 CanLII 629 (CHRT); *Naqvi v Canada* (n 24); *Rodovanovic v VIA Rail Canada Inc*, 1994 CanLII 521 (CHRT); *Brown v Canada* (Department of National Revenue), 1993 CanLII 683 (CHRT); *Uzoaba v Canada* (Correctional Service), 1994 CanLII 1636 (CHRT).

53 Wagatsuma and Rosett (n 32) 479; Bolstad (13) 558

54 On the basis of Art 24 of the Polish Civil Code, see the decisions that led to *Kubaszewski v Poland* App no 571/04 (ECtHR, 2 February 2010), para 15; *Gąsior v Poland* App no 34472/07 (ECtHR, 21 February 2012), para 15; *Smolorz v Poland* App no 17446/07 (ECtHR, 16 October 2012), para 12; *Błaja News Sp Z OO v Poland* App no 59545/10 (ECtHR, 26 November 2013), para 9; *Kania and Kittel v Poland* App no 35105/04 (ECtHR, 21 June 2011), para 9; *Kurski v Poland* App no 26115/10 (ECtHR, 5 July 2016), paras 11-12; *Zybertowicz v Poland (no 2)* App no 65937/11 (ECtHR, 17 January 2017).

55 See the decision that led to *Myrskyy v Ukraine* App no 7877/03 (ECtHR, 20 May 2010), para 19.

56 D-K Choi, 'Freedom of conscience and the court-ordered apology for defamatory remarks' (2000) Cardozo J Int'l & Comp 205.

57 See, for example, *Mountain Oaks Winery (Pty) Ltd and Another v Smith and Another*

provides another example. Indeed, according to Article 49, para 2 of the Swiss Code of Obligations, the court may order that the compensation due for infringement of personality rights is awarded 'in another manner instead of or in addition to monetary compensation'. The Federal Supreme Court of Switzerland (*Bundesgericht/Tribunal fédéral/Tribunale federale*) accepted that this may include an order for apologies.[58] The case concerned a complaint for assault against a well-known playboy millionaire, which attracted a lot of media attention. The playboy millionaire denied the facts on various websites and wrongfully referred to the complainer as a liar. The Federal Supreme Court accepted that for these facts, an order could include the publication of a rectification and apologies on the same websites. In another case, the District Court of Zürich stated in more general terms that especially for the infringement of personality rights by the press, other forms of compensation than monetary damages, such as apologies, are often more appropriate.[59]

Also in common law jurisdictions, the courts accepted in some particular cases, despite the lack of an explicit statutory provision, that court-ordered apologies are available as a legal remedy. Two distinct sources of power to make such an order can be identified. *A first source* can be found in legislation which does not explicitly provide for an apology order but has statutory provisions that courts have interpreted as conferring that power. The equal opportunity and anti-discrimination legislation of Australian States provide an example.[60] Indeed, the availability of court-ordered apologies is not laid down in statutory provisions in each individual Australian State. For instance, the Equal Opportunity Act 1984 No 83 of Western Australia does not provide for court-ordered apologies. However, according to Section 127(b)(iii), the Tribunal is allowed to order the defendant

(20117/2017) [2018] ZAWCHC 69 (11 June 2018) [62].

58 BerG 4 November 2013, 5A_309/2013, Medialex 2014, 41, ann RE Aebi-Müller, ZBJV 150/2014, 369, ann RE Aebi-Müller, AJP 2014, 718, RSJ 110/2014, 490. See R Brehm on Art 49 in *Berner Kommentar. Schweizerisches Zivilgesetzbuch. Das Obligationenrecht* (Stämpfli Verlag 2013) para 113; W Fischer on Art 49 in *OR Kommentar Schweizerisches Obligationenrecht* (Orell Füssli Verlag 2009) para 2; S Wérly, 'Le tort moral en cas d'atteinte à la personnalité par la voie des médias' in C Chappuis and B Winiger (eds), *Le tort moral en question en question. Journée de la responsabilité civile 2012* (Schulthess 2013) 79, 99; F Werro, *La responsabilité civile* (Stämpfli Verlag 2011) para 1386.

59 Bezirksgericht Zürich 9 October 1992, ZR 94/1995, 74.

60 For an overview, see Carroll, 'You can't order sorriness' (n 19) 360ff; Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 362ff.

'to perform any reasonable act or course of conduct to redress any loss or damages suffered by the complainant'. By now, it is generally accepted that 'any reasonable act or course' may also include court-ordered apologies.[61] The same reasoning can be found in a case before the Hong Kong Court of Final Appeal. According to Section 72(4)(b) of CAP 487 Disability Discrimination Ordinance, the court may 'order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant'. In *Ma Bik Yung v Ko Chuen*, the Court stated that 'this loss or damage will in many cases include injury to feelings. … The making of an apology will usually redress, at least to some extent, the loss or damage, particularly injury to feelings, suffered by the plaintiff as a result of the defendant's unlawful conduct … An apology, even at this late stage after a finding of liability, could have the effect of redressing at least to some extent the plaintiff's loss and damage. So long as the making of the apology is a reasonable act for the defendant to perform, the court may order an apology. Such an order would be within the court's power under this provision.'[62] *A second source* of power to make an order for apologies in common law jurisdictions when an explicit statutory provision is lacking, is the general jurisdiction of a court invested with equitable jurisdiction to make coercive orders. This power of a general nature has application to common law actions in tort and breach of contract but does not apply to civil actions and remedies created by legislation, such as anti-discrimination legislation. For instance, as far as tort claims are concerned, it has been suggested in the Canadian case *Moore v Canadian Newspapers Co Ltd*,[63] although the order was not made, that it is within the power of a court exercising equitable jurisdiction to order specific relief in the form of an apology for common law wrongs.[64]

It follows from this second type of legal systems that both in common law and civil law legal systems, courts are prepared to make an order for apologies based on general provisions and/or principles requiring the re-

61 For example, see Carroll, 'You can't order sorriness' (n 19) 367-368; Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 368; van Dijck (n 19) 563.

62 See (n 23) [34-35]. See for apologies ordered in a defamation case, for example, *Shiu Hon Po v Tam Siu Ping* [2013] HKCU 1079.

63 *Moore v Canadian Newspapers Co* (Ont Div Ct) 1989 CanLII 4144 (ON SC).

64 For an analysis, see Carroll, 'Beyond Compensation' (n 19) 342ff; Carroll, 'Apologies as a Legal Remedy' (n 19) 324ff. See also White (n 19) 1301ff.

spondent to compensate for the loss, even if these provisions do not explicitly provide for court-ordered apologies.

3.3. Third Type of Legal Systems: Advocated by Legal Doctrine

In a third type of legal systems, court-ordered apologies are not an explicit remedy in statutory provisions, nor have they been accepted in case law on other grounds. This is essentially the case, for example, in Western European legal systems, such as Germany, France, Belgium and the Netherlands.

However, in recent years, increasing legal interest in favour of the availability of court-ordered apologies can be identified within these legal systems. While French and German legal doctrine is virtually non-existent on this point,[65] the availability of court-ordered apologies has recently been argued under Dutch law on the basis of several provisions or general principles, such as the duty to mitigate damages and the principles of reasonableness and fairness.[66] However, this point of view is not (yet) followed by Dutch case law. Indeed, in the absence of a clear statutory provision or other legal grounds, a claim for court-ordered apologies is usually declined by Dutch courts.[67] That said, there is also Dutch case law, albeit a significant minority, which has made an order for apologies, however, not as a stand-alone remedy. Indeed, when the defendant is liable because of an incorrect or, by its incompleteness, misleading publication of information of

65 See, however, C Schubert, *Die Wiedergutmachung immaterieller Schäden im Privatrecht* (Mohr Siebeck 2013) 251-252.

66 See AFM Brenninkmeijer, N van der Bijl and YM van der Vlugt, 'Schadevergoeding en excuses vanuit het perspectief van de behoorlijkheid. Een schadeclaim als motie van wantrouwen' in *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek* (Kluwer 2012) 97; Hulst, van Wees, Uijttenbroeck and Akkermans (n 26) 778; WH van Boom, 'Iets over handhaving in het privaatrecht' (2008) WPNR 765, 767; G van Dijck 'Hebben afgedwongen excuses zin?' (2017) NTBR 42; OMBJ Volgenant, 'Excuses en spijtbetuigingen' in *Groene serie Onrechtmatige daad* (Deventer 2019) para VII.9.5.2. However, in most Western European legal systems, the duty to mitigate damages is not considered as an obligation, but rather as an *Obliegenheit* (or *incombance*), which cannot be enforced in the same way as an obligation.

67 For example, see Trib Amsterdam 30 June 2010, NFJ 2010/455 para 4.20. See also Court of Amsterdam 23 May 1996, Mediaforum 1996/B99; Court Amsterdam 19 June 2008, JAR 2008/238 para 4.6; Court of Amsterdam 7 August 2008, para 4.3, ECLI:NL:RBAMS:2008:BD9783; Trib Utrecht (pres.) 14 June 1994, KG 1994/262 para 4.8; Trib Zutphen 5 September 2007, NJF 2007/503, Mediaforum 2007/310; Trib Rotterdam 21 November 2012, JOR 2013/69, JONDR 2013/313 para 5.42; Trib Oost-Brabant 11 July 2013, GJ 2013/135 para 4.22.

factual nature, he may be required to publish a rectification in a way to be set by court (see Art 6:167 of the Dutch Civil Code). On several occasions, Dutch tribunals have accepted that this may include an order for apologies.[68] For instance, after infringement of a trade name, a Dutch tribunal required the respondent to publish on his Facebook page, LinkedIn account and his website following notice: 'We have previously reported here that [X] was a continuation of [Y] as well as that [Y] would offer products in an unauthorized manner. This is incorrect. We … apologize'.[69] In another case, an employer who had wrongfully reprimanded an employee and had communicated this internally to all employees by e-mail, was required to send a new message to be approved by the employee, explaining that the reprimand was incorrect and stating that he apologised to the employee.[70]

4. Introducing Court-Ordered Apologies in Civil Law Jurisdictions: the Belgian Case

The question whether court-ordered apologies, despite the absence of statutory provisions, are available as a legal remedy under the law of torts within a Western European legal system, is addressed by a case study of the Belgian legal system. Under Belgian tort law, the enforcement of apologies by way of legal remedy sounds somewhat exotic. Founded on the Code Napoleon of 1804 and remaining virtually unchanged over the last two centuries, the provisions on tortious liability under the Belgian Civil Code do not provide for court-ordered apologies. Also within more recent, specific enactments, such as anti-discrimination legislation, court-ordered apologies are not included as a legal remedy.

4.1. In Search of a Legal Ground: a Matter of Non-Monetary Relief for Emotional Harm

According to the key provision on tortious liability under the Belgian Civil Code, 'any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to make reparation for it' (Art 1382). The legislator does not provide in what form this 'reparation' shall

68 See Trib 's-Gravenhage 22 August 2007, ECLI:NL:RBSGR:2007:BB2188; Trib 's-Gravenhage 17 October 2007, ECLI:NL:RBSGR:2007:BB5893.

69 Trib Midden-Nederland 18 June 2014, para 7.4, ECLI:NL:RBMNE:2014:2472 (free translation)

70 Trib Haarlem 1 November 2006, JAR 2006/273, RAR 2007/22, JIN 2006/474.

be made. Some authors have argued that this term refers to monetary damages only.[71] As a result, the remedies for tortious liability would be limited to the payment of a sum of money.

However, by now it is clear that the injured party does not necessarily have to be satisfied with monetary damages. Indeed, on the basis of the French version of Article 1382 of Napoleon's Civil Code of 1804, which is worded somewhat more broadly than its Dutch translation in the Belgian Civil Code, the French Court of Cassation accepted already in 1869 that 'albeit the most ordinary way of making reparation is to pay a sum of money by way of monetary damages, the terms of Article 1382 of the Code Napoleon does not exclude any other form of reparation'.[72] Influenced by this French case law, also under Belgian law, it has been accepted that reparation can be made not only by paying monetary damages, but also in a *form other than the payment of a sum of money*. This alternative form of compensation is termed 'non-monetary relief', sometimes referred to as 'reparation in kind',[73] which is more in line with French (*réparation en nature*),[74] Dutch (*herstel in natura*)[75] and German (*Naturalherstellung*)[76] terminology. Non-monetary relief is not to be confused with 'injunctions' or 'specific performance'. Whereas the latter are mainly aimed at providing discontinuation of the violation of a right to the extent that this violation is ongoing (eg elimination for the future of an actual and present interference with the claimant's right by an order to do something or to refrain from doing something), non-monetary relief, by contrast, is considered as a form of compensation for loss – ie a form of alternative redress in lieu of monetary damages.

Unlike other Western European jurisdictions providing for non-monetary relief as an ordinary remedy for civil liability in statutory provisions

71 For example, see F Laurent, *Principes de droit civil*, X (Bruylant 1887) para 522; L Ripert, *La réparation du préjudice dans la responsabilité délictuelle* (Dalloz 1933) 13-15.

72 Cass 6 December 1869, S 1870, 104 (free translation of '*si le plus ordinairement la réparation du dommage est évaluée en argent, les termes de l'art. 1382 Code Napoléon n'excluent pas cependant d'une manière absolue tout autre mode de réparation*').

73 H Unberath, 'Reparation in kind' in J Basedow, KJ Hopt, R Zimmermann and A Stier (eds), *Max Planck Encyclopedia of European Private Law* (OUP 2012) 1453

74 F Terré, Ph Simler, Y Lequette and F Chénedé, *Les obligations* (Dalloz 2018) para 861.

75 S De Rey, *Herstel in natura,* in *Recht & Onderneming,* no 51 (die Keure 2019) paras 21-22.

76 H Lange and G Schiemann, *Schadensersatz* (Mohr Siebeck 2003) 216-217.

(for example, see Article 6:103 of the Dutch Civil Code[77] and § 249, para 1 of the German Civil Code[78]), the availability of non-monetary relief under Belgian law is based on case law. The first confirmation by the Belgian Supreme Court (*Hof van Cassatie/Cour de cassation*) is a decision of 30 January 1965,[79] but a decision of 5 May 2011 provides a more striking example.[80] In this case, the city of Namur ordered a sculpture to be placed in front of the casino. More than 30 years later, due to renovations, the sculpture was taken away by the city and never returned. A few years later, the artist found his sculpture in the garden of the father of the contractor who carried out the renovations at the time. However, the sculpture was badly damaged. Although the city was held liable for disregarding the moral rights of the artist the artist was not seeking monetary damages. Instead, he obtained by way of symbolic damages the payment of 1 euro, and by way of non-monetary relief the (re)production of a new, equivalent sculpture based on the initial sculpture, intended for the same or a different, equivalent public place.

Under Belgian law, non-monetary relief is not only *available for pecuniary loss, but also for non-pecuniary loss*, including emotional harm.[81] For instance, by way of non-monetary relief for emotional harm, Belgian courts have required the defendant to publish the court's decision,[82] a right of

77 According to this provision, 'loss is compensated in money. The court may, nevertheless, grant another kind of compensation than a sum of money if the injured party has requested so (…)' (free translation).

78 According to this provision, 'a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred'. To the extent that this is not possible or is not sufficient to compensate for the loss, 'the person liable in damages must compensate the obligee in money' (see § 251, para 1) (free translation).

79 Cass 30 January 1965, Pas 1965, 538, RW 1964-65, 1554, JT 1965, 32, RCJB 1966, 77, ann J Dabin. Confirmed by Cass 27 April 2006, C.04.0591.N, Arr Cass 2006, 993, Pas 2006, 976, RW 2009-10, 236, TBBR/RGDC 2008, 507, ann J Dewez.

80 Cass 5 May 2011, C.10.496.F, Arr Cass 2011, 1157, Pas 2011, 1272, A&M 2012, 437, ICIP 2011, 50, RCJB 2012, 363, ann L Van Bunnen, RGAR 2012, no 14.846, ann E Estienne, TBBR/RGDC 2012, 247, ann P Wéry.

81 For example, see C Cauffman and B Weyts, 'Privaatrecht en rechtshandhaving' in Preadviezen 2009 voor de Vereniging vande Vergelijkende Studie van het Recht van België en Nederland (BJU 2009) 303, 336; D de Callataÿ and N Estienne, *La responsabilité civile. Chronique de jurisprudence 1996-2007, II* (Larcier 2009) 481; E de Kezel, 'Juridische bescherming van niet-vermogensrechtelijke belangen' (2003) TPR 501, 542; E Dirix, *Het begrip schade* (Maklu 1984) para 90; J Viaene, *Schade aan de mens III* (Kluwer 1976) 524-525.

82 For example, see Court of Brussels (1st ch) 14 September 1999, A&M 2000, 92; Court of

reply[83] or a rectification.[84] Unlike under English law, which in any event has clear reservations against non-monetary remedies,[85] under Belgian tort law, non-monetary relief is a primary remedy of a general nature. Indeed, according to the case law of the Belgian Court of Cassation non-monetary relief takes precedence over other remedies, such as monetary damages.[86] This would be more in line with the ultimate purpose of the law of torts, which aims to place the victim, who has suffered the consequences of the tortious act, in as good a position as if the civil wrong never had occurred.[87]

To make up emotional harm under Belgian law, basically all measures, goods and services likely to improve the victim's physical, mental, social and environmental condition are available.[88] Previous empirical research reveals that court-ordered apologies may increase victims' emotional well-being (see above no 2). Therefore, *court-ordered apologies*, as a measure to improve the victim's physical, mental, social and environmental condition, may be considered *as a form of non-monetary relief* for emotional harm under Belgian law. This is far from generally accepted and sometimes is explicitly refuted by legal scholars.[89] However, in recent years, multiple authors have been arguing the availability of court-ordered apologies as a legal remedy for emotional harm under Belgian law.[90] Within other West-

Antwerp 25 September 2005, TBBR/RGDC 2001, 618; Court of Antwerp 26 March 2007, NjW 2007, 801; Trib Ghent 19 November 2003, A&M 2004, 384; Trib Brussels (14th ch) 2 December 2003, A&M 2004, 372.

83 For example, see Court of Brussels (2nd ch) 3 April 2003, RGAR 2004, no 13.909, A&M 2003, 303.

84 For example, see Court of Brussels 29 October 2002, RW 2004-05, 1467; Court of Antwerp 25 September 2005, TBBR/RGDC 2001, 618; Trib Brussels 12 March 1996, A&M 1996, 449, ann F Ringelheim.

85 Unberath (n 73) 1454.

86 Cass 3 April 2017, S.16.0039.N, JTT 2017, 293, RW 2017-18, 1414, ann P Dion and Y Stevens, JLMB 2018, 1892, ann P Wéry.

87 In legal doctrine, however, the hierarchical priority of non-monetary relief is not always well received, see De Rey (n 75) paras 279ff.

88 Viaene (n 81) 527.

89 For example, see P Wéry, *Droit des obligations,* vol 1 (Larcier 2011) para 596.

90 See S De Rey, 'Excuseer?! Afgedwongen excuses in het aansprakelijkheidsrecht' (2017) TPR 1153, 1176 para 17. Confirmed by: P Colson, 'Réparation en nature et préjudice corporel: faux ennemis ?' in B Dubuisson (ed), *Le dommage corporel et sa réparation* (Anthemis 2019) 85ff ; F Swennen, *Het personen- en familierecht* (6th edn, Intersentia 2019) 71 fn 171; J Van de Voorde, 'L'excuse contrainte par justice (l'amende honorable) en droit de la responsabilité

ern European legal systems as well, although not (yet) (generally) accepted, court-ordered apologies have sometimes been suggested, at least considered, as a form of non-monetary relief for emotional harm.[91] Also within non-European legal systems, including Australia,[92] Canada,[93] Hong Kong[94] and South Africa,[95] court-ordered apologies are usually referred to as a form of compensation in 'a non-pecuniary way', or in more general terms, as 'non-physical damages'[96] or compensation 'on a mental level'.[97]

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belge – Recherches sur la réparation ou la satisfaction du dommage moral' (2019) RGAR no 15.545.

91 For instance, according to Article 6:103 of the Dutch Civil Code, 'loss is compensated in money. The court may, nevertheless, grant another kind of compensation than a sum of money if the injured party has requested so …' (free translation). On the basis of this provision, forming part of the general regime of obligations and therefore also applicable to emotional harm, scholars have argued that this non-monetary form of compensation could include court-ordered apologies (see Hulst, van Wees, Uijttenbroeck and Akkermans (n 26) 780 and 784 (invoking other grounds as well, including the duty to mitigate damages, Article 3:296 of the Dutch Civil Code and principles of reasonableness and fairness under Article 6:2(2) of the Dutch Civil Code); AFM Brenninkmeijer, 'Excuses in het openbaar bestuur' (2010) NTB 3; Zwart-Hink, Akkermans and van Wees (n 19) 109). Indeed, according to the Supreme Court of the Netherlands (*Hoge Raad*), 'other forms of compensation and acknowledgement of pain and suffering than an order for monetary damages, are conceivable' (see HR 22 February 2002, NJ 2002/240 para 4.1, free tanslation). Court-ordered apologies have also been suggested, at least considered, as a form of non-monetary relief for emotional harm under § 249, para 1 of the German Civil Code, see, for example: U Wolter, *Das Prinzip der Naturalrestitution in § 249 BGB. Herkunft, historische Entwicklung und Bedeutung* (Duncker & Humblot 1985) 72. The qualification has also been accepted by the Federal Supreme Court of Switzerland with regard to compensation for infringement of personality rights, see BerG 4 november 2013 (n 58).

92 For example, see *De Simone, Giuseppe & De Simone Consulting Group P/L v Bevacqua, Jenny* [1994] VicSC 545 (15 September 1994); *Forbes v Commonwealth of Australia* [2003] FMCA 140 (26 June 2003) [34]; *Cooke v Plauen Holdings* (n 23) [43]; *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (7 April 2004) [17]; *Fischer v Byrnes* [2006] QADT 33 (8 August 2006) [22]; *Ellis v Solutions Matchmaking Pty Ltd & Anor* [2019] FCCA 1454 (30 May 2019) [45]. See also Vines 'Apologies as Corrective Justice' (n 19).

93 For example, see *Grover v National Research Council Canada* (n 52); *Naqvi v Canada* (n 25); *Rodovanovic v VIA Rail Canada Inc* (n 52); *Brown v Canada* (n 52); *Uzoaba v Canada* (n 52).

94 See *Ma Bik Yung v Ko Chuen* (n 23) [34-35].

95 The Constitutional Court of South-Africa confirms that 'the importance of apology in securing redress and in salving feelings cannot be underestimated', see *The Citizen 1978 v McBride* (n 22) [134].

96 Ye Lin, 'The tort system in China' (1989) 52 L and Contemporary Problems 143, 152 and 159.

97 Xiang Li and Jigang Jin (n 44) 127 and 155. See also Brutti (n 19) 140ff; Vines 'Apologies as

Court-ordered apologies as a form of non-monetary relief for emotional harm are, of course, only available when all other requirements for compensation are met. In more general terms, it follows that, in the end, the availability of court-ordered apologies under the general provisions of tortious liability within Western European legal systems, basically is compensation for emotional harm. In other words, court-ordered apologies as a legal remedy may fit into a legal system if within this legal system (1) *compensation for emotional harm* is available and (2) this compensation *may take a non-monetary form*. Unlike other Western European legal systems, such as the Netherlands and Germany which are somewhat reluctant to allow compensation for non-pecuniary loss, the French and Belgian legal systems are particularly *generous* in terms of *compensation for emotional harm*. For instance, according to Belgian tort law, where there is proof that the civil wrong caused the loss incurred by the victim, the latter has a claim for compensation not only for his or her pecuniary loss, but also for 'the pain, suffering or any other moral distress suffered as a result of the wrong'.[98] The French and Belgian legal orders are also highly *open to non-monetary remedies*.[99] Therefore, these legal orders should not pass over or ignore the opportunity to make up emotional harm caused by a civil wrong by making an order for apologies. Indeed, emotional harm does not, in principle, affect the aggrieved party's property, but is, however, by means of monetary damages, expressed in financial terms. This explains why monetary damages are not always the answer to the aggrieved party's complaint.[100] Other forms of compensation, such as court-ordered apologies, may provide an appropriate alternative. As far as Belgian law is concerned, an affirmative but very specific example is provided already by the Special Arbitration Procedure regarding statute-barred criminal offences of sexual abuse within church. Indeed, in order to settle the civil consequences of this offence,

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Corrective Justice' (n 19).

98 Free translation of, for example, Cass 10 October 1972, Arr Cass 1973, 146, Pas 1973, 147, RW 1972-73, 718, RGAR 1973, no 9001, JT 1973, 163; Cass 3 February 1987, Arr Cass 1986-87, 724; Cass 13 October 1999, Arr Cass 1999, 528, Pas 1999, 528; Cass 20 February 2006, C.04.0366.N, Arr Cass 2006, 414, NjW 2006, 798, ann I Boone, Pas 2006, 413, RW 2008-09, 1143.

99 For a historical evolution, see J Oosterhuijs, *Specific Performance in German, French and Dutch Law in the Nineteenth Century* (Martins Nijhoff 2011) 635 p.

100 See also L Hulst and AJ Akkermans, 'Can Money Symbolize Acknowledgment? How Victims' relatives Perceive Monetary Awards for Their Emotional Harm' (2011) 4 Psychological Injury and L 245.

this procedure provides that the victim, in addition to monetary damages, may ask for recognition of the emotional harm caused by the offences, for example by an acknowledgement of the facts, a conversation or a letter of regret, or even an apology expressed by the ecclesiastical authorities.[101]

4.2. Revival of a Legal Historical Concept?

From a Western European perspective, the enforcement of apologies is not necessarily to be considered a novelty in the legal tradition. Indeed, for the jurisdictions of the Western European continent, it has been suggested that this remedy has (some of) its roots in medieval canon law and local customary law.[102] Back then, insults and reputational injuries could not only give rise to an *actio iniuriarum aestimatoria* (ie a monetary assessment of the injury, reason why sometimes referred to as *amende profitable*), but also to an *amende honorable*. Essentially, the latter constituted an amalgam of three originally distinct institutions. First of all, it included a formal declaration, on the part of the offender, that he had made his allegation in heat and without any intention to defame the other (*declaratio honoris*). Secondly, it involved a retraction of the defamatory words as being incorrect and untrue (*recantatio, revocatio* or *palinodia*). Thirdly, it included an acknowledgement by the offender that he had done wrong, combined with a prayer that he may be forgiven (*deprecatio)*.[103] Initially the *amende honorable* was (sometimes) conceived as (part of) a punishment, (occasionally) characterized by a certain degree of self-humiliation in public.[104] During the process of reception, however, it was shaped by moral-theological concepts and meant

101 See Art 5.1 of the Arbitration Regulation ('*De aanvrager bepaalt in zijn aanvraag het voorwerp van zijn of haar vordering. Deze kan bestaan in een vraag tot erkenning van het aangedane leed van het slachtoffer van een seksueel misdrijf en tot herstel in zijn waardigheid, en/of in tot toekenning van een financiële compensatie*'), for which the Explanatory Notes provide: '*Verschillende vormen van erkenning zijn mogelijk: het slachtoffer kan vragen om een gesprek met de kerkelijke overheid, om een brief met spijtbetuiging of excuses, om een erkenning van de feiten…*' (see www.centrum-arbitrage-misbruik.be). See also Parl St Kamer 2012-13, no 53-0520/008, 6-7. See for an emperical study on this type of cases: G van Dijck, 'Victim Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases' (2018) 15 J of Empirical LS 126.

102 See J Hallebeek and A Zwart-Hink, 'Claiming Apologies: a revival of *amende honorable?*' (2017) 5 Comp L Hist 1-49; Zwart-Hink, Akkermans and van Wees (n 19) 101–102; Descheemaeker (n 28) 909.

103 See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990) 1072.

104 See Descheemaeker (n 28) 909.

to undo injury, rather than punishing the wrongdoer.[105] For example, until the early 1990s, the Dutch Civil Code codified only a reminiscence of the *amende honorable* in provisions on defamation (see eg Arts 1408 and 1410 of the Dutch Civil Code of 1838), but during the 20th century, it was soon to disappear from legal practice.[106]

However, at present, the importance of the *amende honorable* is not purely legal-historical. Indeed, albeit court-ordered apologies cannot be considered as a legal transplant of the *amende honorable,* a 'revival' of (some aspects of) this concept has been identified within some legal systems. In South Africa for instance,[107] Willis J considers that the *amende honorable* 'was not abrogated by disuse. Rather, it was forgotten: a little treasure lost in a nook of our legal attic. I accordingly come to the conclusion that the remedy of the *amende honorable* remains part of our law' and, 'even if the *amende honorable* had never existed, the imperatives of our times would have required its invention…'.[108] The Constitutional Court of South-Africa, in the judgement of Mokgoro J, confirms that, in case of defamation, 'whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of (…) emphasising restorative rather than retributive justice… It is an area where courts should be pro-active encouraging apology and mutual understanding wherever possible'.[109] It follows that according to South African case law, at least to some extent,

105 On this evolution, see JR Farr, 'Honor, law and sovereignty: The meaning of the *amende honorable* in early modern France' (2000) Acta Histriae 129, 131; Zimmermann (n 103) 1072-1073.

106 On this evolution, see Hallebeek and Zwart-Hink (n 102) 39ff.

107 The *amende honorable* is often invoked with reference to the customary concept of '*ubuntu*', a notion representing the source of African values and meaning 'I am because we are'. Expressed in legal terms, *ubuntu* seeks to convey the notion of restorative justice, and includes notions of reasonableness and equity, as well as calling for harmonious relations, prevention or healing of breakdowns in human relations, and mutual comprehension and care. For the relationship of the *amende honorable* and *ubuntu,* see ALM Keirse, '*Ubuntu.* Voor een verbintenissenrecht met ruggengraat. Over lessen van het Afrikaanse wereldbeeld en Grieks- en romeinsrechtlijke grondbeginselen voor het hedendaagse verbintenissenrecht' (2014) TPR 1055, 1066 paras 16ff; A Mukheibir, '*Ubuntu* and the *amende honorable* – a marriage between African values and medieval canon law' (2007) 28(3) Obiter 583; Neethling (n 47) 286ff; GJ van Niekerk, '*Amende honorable* and *Ubuntu:* an intersection of *ars boni et aequi* in African and Roman-Dutch jurisprudence?' (2013) Fundamina 397, 403; CJ Visser, 'The revival of the Amende Honorable as applied to defamation by the media' (2011) SAfrican LJ 327.

108 *Mineworkers Investment Company (Pty) Limited v Modibane* (2001/20548, 2001/21162) [2002] ZAGPHC 6 (18 June 2002) [23-25 and 28].

109 *Dikoko v Mokhatla* (n 34) [69].

the *amende honorable* is considered as a form of non-monetary relief for emotional harm.[110] This confirms the classification of court-ordered apologies as suggested under no 4.1 (see above).

5. Interference with the Freedom of Expression

At present, in Western European civil law jurisdictions, courts are usually reluctant to meet a request for court-ordered apologies. Indeed, if not relying on the argument that an explicit statutory provision in favour of such a request is lacking, these courts usually invoke that court-ordered apologies would lead to a violation of the right to freedom of expression.[111] More precisely, these courts rely on the 'negative' component protected under this freedom, namely the right not to be compelled to express oneself.[112] A decision of 19 July 2018 of the German Federal Court of Justice (*Bundesgerichtshof*) provides a striking example.[113] The case concerned a German television company, which published on its website the announcement of a program, including following extract: 'April 1945: A few days before the end of the war, the Allied troops advancing on the Western front open numerous labour and concentration camps – and show the world the horrifying evidence of Nazi terror. The discovery of the Polish extermination camps Majdanek and Auschwitz by Soviet soldiers had hardly caused an uproar among the Allies…' The applicant was a Polish citizen and former prisoner of the Auschwitz-Birkenau and Flossenbürg concentration camps.

110 See also *Le Roux and Others v Dey* (n 34) [195ff].

111 For the Netherlands, see for example Trib Utrecht (pres) 14 June 1994, KG 1994/262 para 4.8; Court of Amsterdam 23 May 1996, Mediaforum 1996/B99; Court of Amsterdam 19 June 2008, JAR 2008/238 para 4.6; Court of Amsterdam 7 August 2008, para 4.3, ECLI:NL:RBAMS:2008:BD9783; Trib Zutphen 5 September 2007, NJF 2007/503, Mediaforum 2007/310; Trib Leeuwarden 14 September 2011, para 7, ECLI:NL:RBLEE:2011:BT2357; Trib Rotterdam 21 November 2012, JOR 2013/69, JONDR 2013/313 para 5.42; Trib Oost-Brabant 11 July 2013, GJ 2013/135 para 4.22; Trib Midden-Nederland 19 December 2018, NJF 2019/168; Trib Oost-Brabant 16 January 2019, NJF 2019/108.

112 On this 'negative' component protected under Article 10 of the European Convention on Human Rights (ECHR), see for example *Semir Güzel v Turkey* App no 29483/09 (ECtHR,13 December 2016), para 27; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 October 2014), para 52.

113 BGH 19 July 2018, IX ZB 10/18, NJW 2018, 3254. For the German Federal Court of Justice there seems to be more scope for a statement of facts than for a value judgment, however, apologies cannot be expressed as a pure statement of fact because, to a certain extent, the formulation of apologies always involves a value judgment (see below no 7.2).

He objected to the wording 'Polish extermination camp' and argued that his personality rights, in particular his national identity and national dignity, had been infringed. The Court of Appeal of Krakow ordered the publication of an apology on the defendant's website, to include the explanation that 'an incorrect formulation distorting the history of the Polish nation' was published earlier 'alleging that the Majdanek and Auschwitz extermination camps were built and run by Poland'. However, when it came to a procedure in Germany to obtain enforcement of this foreign decision, the German Federal Court of Justice found that such an apology forced the defendant to express a value judgement and opinion rather than a statement of facts, and therefore violated the right to freedom of expression and the German *ordre public*. Moreover, the Federal Court took into account that the defendant published a rectification with apologies immediately after receiving the applicant's complaint and apologised towards the applicant personally in two separate letters. Consequently, the Federal Court of Justice ruled that the Polish order to publish an apology was not enforceable under German law.

According to case law of some non-European jurisdictions, however, including Australia,[114] Canada,[115] Hong Kong[116] and South Africa,[117] an order to apologise does not necessarily violates the right to freedom of expression. Also the European Court of Human Rights (ECtHR) accepted that an order for apologies may be reconciled with the right to freedom of expression protected under Article 10 of the European Convention on Human Rights (ECHR).[118] Indeed, claims for court-ordered apologies have been awarded in several contracting states of the ECHR, including Slovakia, Russia, Turkey, Ukraine and Poland.[119] In none of these cases brought

114 For example, see *Wotton v State of Queensland* (n 48) [1570ff].

115 Comp *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 (4 May 1989).

116 *Ma Bik Yung v Ko Chuen* (n 23) [52].

117 See Visser (n 107) 329ff.

118 For example, see *Aleksey Ovchinnikov v Russia* App no 24061/04 (ECtHR, 16 December 2010); *Kania v Poland* App no 35105/04 (ECtHR, 21 June 2011); *Błaja News v Poland* (n 54); *Zybertowicz v Poland (no 2)* (n 54).

119 For example, see for Slovakia: *Radio Twist AS v Slovakia* App no 62202/00 (ECtHR 19 December 2006); for Russia: *Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008); *Redaktsiya Gazety Zemlyaki v Russia* App no 16224/05 (ECtHR, 21 November 2017); for Turkey: *Cihan Ozturk v Turkey* App no 17095/03 (ECtHR, 9 June 2009); for Ukraine: *Editorial Board of Pravoye Delo v Ukraine* App no 33014/05 (ECtHR, 5 May 2011); and for Poland: *Kania v Poland* (n 118); *Zybertowicz v Poland (no 2)* (n 54).

before the ECtHR did the Court rule that the domestic courts' power to grant an order for apologies should be considered as such a violation of the freedom of expression. Rather, the ECtHR considered that court-ordered apologies, as an interference of the right to freedom of expression, may be justified under Article 10(2) ECHR. Indeed, according to this provision, the exercise of the right to freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. Three requirements follow from this provision, which will be explored below. Indeed, to be justified under Article 10(2) ECHR, it is required that court-ordered apologies, as an interference of the right to freedom of expression, (a) are 'prescribed by law' as a legal remedy (see no 5.1), (b) can be justified for one of the legitimate aims laid down in this provision (see no 5.2), and (c) are 'necessary in a democratic society' (see no 5.3).

5.1. Prescribed by Law

In order to meet the conditions of Article 10(2) ECHR, the ECtHR does not require court-ordered apologies to be explicitly allowed by statutory provisions.[120] Indeed, the legal ground required under Article 10(2) ECHR does not have to be formal, but may be unwritten or result from established case law. According to the ECtHR, a norm can be regarded as a 'law' within the meaning of Article 10(2) ECHR, if it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if necessary with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions. However, those consequences are not required to be foreseeable with absolute certainty.[121] When the courts can reasonably interpret that under a provision an order for apologies is available, the ECtHR is ready to accept this pro-

120 For example, see: *Kazakov v Russia* (n 119) para 24; *Aleksey Ovchinnikov v Russia* (n 118) para 45; *OOO 'Vesti' and Ukhov v Russia* App no 21724/03 (ECtHR, 30 May 2013), para 56; *Redaktsiya Gazety Zemlyaki v Russia* (n 119) para 30.

121 For example, see *RTBF v Belgium* App no 50084/06 (ECtHR, 29 March 2011), para 103.

vision as a 'law' formulated with sufficient precision within the meaning of Article 10(2) ECHR.[122]

Albeit the Belgian legislator does not provide explicitly for court-ordered apologies, it could be reasonable to include court-ordered apologies as part of the compensation basket under Article 1382 of the Belgian Civil Code (see above no 4.1). Consequently, Article 1382 of the Belgian Civil Code would provide a law formulated with sufficient precision in favour of court-ordered apologies. After all, the ECtHR has accepted already that this very same provision provides a legal ground within the meaning of Article 10(2) ECHR for other forms of non-monetary relief for emotional harm, albeit not explicitly laid down in this provision, on the condition that it concerns a *retrospective* interference of the right to freedom of expression, such as the publication of the court's decision.[123] Also court-ordered apologies are to be considered as a retrospective interference. However, for measures amounting to a *preventive* restriction of the right to freedom of expression, such as a prohibition on broadcasting, the ECtHR ruled that Article 1382 of the Belgian Civil Code cannot be regarded as a 'law' formulated with sufficient precision within the meaning of Article 10(2) ECHR.[124]

5.2. Legitimate Aim

In addition to a legal basis formulated with sufficient precision, the restriction must pursue a legitimate aim laid down in Article 10(2) ECHR. Indeed, this provision lists the legitimate aims that may justify a restriction of the right to freedom of expression. By doing so, the authors of the ECHR wanted to avoid the result that a restriction can be justified based on any objective, which would totally erode the protection of fundamental rights. The 'protection of the reputation … of others' is one of the legitimate aims

122 For example, see *OOO 'Vesti' and Ukhov v Russia* (n 120) para 56.

123 See *De Haas and Gijsels v Belgium* App no 19983/92 (ECtHR, 24 February 1997) publication of a court's judgment in the magazine committing the infringement and in six other newspapers, together with monetary damages, all ordered under Article 1382 of the Belgian Civil Code; *Leempoel v Belgium* App no 64772/01 (ECtHR, 9 November 2006) removing a magazine from the shelves as a remedial measure via Article 1382 of the Belgian Civil Code.

124 Article 1382 of the Belgian Civil Code does not provide a legal basis for a *preventive* restriction (such as a temporary broadcast prohibition), because (i) this provision is not preventive but retrospective in nature and (ii) Belgian case law does not interpret this provision unanimously on this point, but divergently, so that the legal basis is at least not sufficiently predictable, see *RTBF v Belgium* (n 121) paras 108-111.

of Article 10(2) ECHR. The ECtHR is ready to accept this legitimate aim may justify court-ordered apologies in case of defamation,[125] or even for the protection of the credibility and reputation of a newspaper.[126] The 'protection of … rights of others' is another legitimate aim under Article 10(2) ECHR. This legitimate aim is interpreted broadly and provides a justification for the enforcement of apologies in all cases other than defamation of honour and reputation. Indeed, protecting any right of a third party, this legitimate aim includes the protection of the right to compensation for loss caused by a civil wrong,[127] either in a monetary or non-monetary way, such as court-ordered apologies.[128] Thus, the obligation to compensate for the loss arising from tortious liability, which under Belgian law is codified in Article 1382 of the Civil Code, could be considered as a legitimate aim that may justify a restriction of the right to freedom of expression.[129]

5.3. Necessary in a Democratic Society

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. As set forth in Article 10 ECHR, this freedom is subject to exceptions, which must be/are 'necessary in a democratic society'. According to the ECtHR, the adjective 'necessary', within the meaning of Article 10(2) ECHR, implies the existence of a 'pressing social need'. This test requires it to determine whether the interference was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This margin of appreciation is not unlimited, but goes hand in hand with a European supervision by the ECtHR, whose task it is to

125 For example, see *Kubaszewski v Poland* (n 54) para 35; *Gąsior v Poland* (n 54) para 34; *Redaktsiya Gazety Zemlyaki v Russia* (n 119) para 33; *Zybertowicz v Poland (no 2)* (n 54) para 45. See also LG Loucaides, 'Freedom of expression and the right to reputation' in *Mélanges offerts à Silvio Marcus Helmons* (Bruylant 2003) 197ff.

126 *Kurski v Poland* (n 54) para 48.

127 For example, see B Girard, *Responsabilité civile extracontractuelle et droits fondamentaux* (LGDJ 2015) para 103.

128 Zwart-Hink, Akkermans and van Wees (n 19) 117-118.

129 See also S Somers, *Aansprakelijkheidsrecht en mensenrechten* (Intersentia 2016) paras 711-712.

give a final ruling on whether a restriction is reconcilable with the freedom of expression as protected by Article 10 ECHR.[130]

Initially, court-ordered apologies were considered by the ECtHR to be a questionable form of redress that cannot be necessary within a democratic society. For instance, in *Kazakov v Russia*,[131] the Court noted 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' in a democratic society. In later decisions, however, the ECtHR has nuanced its view. Indeed, on several occasions, the Court considered that the restriction resulting from court-ordered apologies is relatively light.[132] Later, the ECtHR went even further and paved the way for court-ordered apologies. Indeed, in several decisions, the ECtHR ruled that the domestic courts did not overstep their margin of appreciation by making an order for apologies, and that an order for apologies by way of legal remedy, under circumstances, may meet the requirements under Article 10(2) ECtHR.[133] In concrete terms this means that, in a particular case, no less far-reaching remedies with a similar effect are available for the victim, and that therefore, the enforcement of apologies can be regarded as 'necessary' within the meaning of Article 10(2) ECHR.

For instance, in *Aleksey Ovchinnikov v Russia*, a nine-year-old boy was beaten and sexually abused by his twelve-year-old roommates during a Russian summer camp. These roommates turned out to be the sons of two federal judges and the step-grandson of the head of a local police officer. Because of their young age, the perpetrators were not prosecuted. A journalist picked up the story and speculated that the parents and step-grandparent had intervened in the case to prevent the prosecution of the boys. However, the journalist could not provide any evidence for this, and the ECtHR held that the order to publish apologies with regard to both fam-

130 For example, see *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1973) paras 48-50; *Kubaszewski v Poland* (n 54) para 37; *Aleksey Ovchinnikov v Russia* (n 118) para 46.

131 For example, see *Kazakov v Russia* (n 119) para 30.

132 See *Kubaszewski v Poland* (n 54) 46; *Smolorz v Poland* (n 54) para 42.

133 For example, see *Aleksey Ovchinnikov v Russia* (n 118) paras 56-57, concurring op Kovler; *Kania and Kittel v Poland* (n 54) para 52; *Błaja News v Poland* (n 54); *Gąsior v Poland* (n 54) paras 45-47, diss op David Thór Björgvinsson.

ilies did not violate Article 10(2) ECHR.[134] According to this European case law, it is even possible to make an order for public apologies, even though the infringement of the victim's honour and social reputation had a purely private character. For instance, in *Gąsior v Poland*, a letter writer had informed a television station via (unpublished) letters about the tempestuous life of a politician. The television station used those letters to question the politician during a broadcast about the content of the letters. When it turned out that the letter writer could not provide elements to support the content of the letters, while the reputation of the politician was badly damaged, the letter writer was required to make public apologies. According to the ECtHR, this order did not constitute a violation of Article 10(2) ECHR.[135]

Indeed, public apologies are often aimed at 'public rehabilitation', particularly since such an order is often intended to restore a person's (social) reputation.[136] This applies in particular if the infringement, for example of a personality right, was committed in the media[137] or, by extension, was brought to the media by the wrongdoer.[138] For instance, the District Court of Zürich stated in more general terms that especially for the infringement of personality rights by the press, other forms of compensation than monetary damages, such as apologies, are often more appropriate.[139] Court-ordered apologies may therefore satisfy the need for 'a shift from an exclusive focus on the patrimonial aspect of a damaged reputation to the human aspect'.[140] In this context, the South African Constitutional Court points out that 'the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. … Courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human

134 *Aleksey Ovchinnikov v Russia* (n 118).

135 *Gąsior v Poland* (n 54) paras 45-47, diss op David Thór Björgvinsson.

136 Carroll and Witzleb (n 19) 219; Neethling (n 47) 286.

137 Xiang Li and Jigang Jin (n 44) 127; Visser (n 107) 337ff.

138 See also R Carrol, 'Apologies and Corrections as Remedies for Serious Invasions of Privacy' in JNE Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing 2018) 205ff; R Carroll and J Berryman, 'Making amends by apologising for defamatory publications: Developments in the twenty-first century' in K Barker, K Fairweather and R Grantham (eds), *Private law in the 21st century* (Hart Publishing 2017) 479ff.

139 Bezirksgericht Zürich 9 October 1992, ZR 94/1995.

140 Visser (n 107) 333.

dignity of the plaintiff, thus acknowledging … his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. … Our law in this area should be developed in the light of … emphasising restorative rather than retributive justice …'[141]

6. Proportionality under the Law of Torts: Impact of the Human Rights Test

The availability of court-ordered apologies as a legal remedy under the law of torts, however, does not mean that the victim is entitled to this remedy for any emotional harm. Indeed, since an order for apologies has repercussions on the right to freedom of expression, courts should, before making an order for apologies, take into account an additional assessment, which is not directly provided under the law of torts.[142] For instance, under the Belgian key provision on tortious liability (Art 1382 of the Civil Code, see above no 4.1), the evidence of fault, loss and causation is a necessary, but sufficient condition to be entitled to full compensation. However, when this compensation is awarded in a non-monetary way by making an order for apologies, even though the conditions of fault, loss and causation are met, the courts are required to assess whether an order for apologies by way of non-monetary relief is 'necessary' in a democratic society. Hence, the availability of court-ordered apologies by virtue of the general rules on tortious liability, in the end, boils down to a *proportionality test*.[143] In order to avoid this test being an empty shell, the court is required to give adequate reasons for its decision, making clear that it not only has weighed the right to freedom of expression against other rights laid down in Article 10(2) ECHR, but also that the restriction imposed satisfies the proportionality test laid down in that same provision.

An important question is what factors the courts can take into account in the assessment of this proportionality test. A number of points of reference have already been provided. For instance, in case law, the *gravity of the contravening conduct* (eg gross discrimination or serious infringements of personality rights[144]) turns out to be an important factor in this propor-

141 *Dikoko v Mokhatla* (n 34) [69].

142 Comp on other measures of non-monetary relief: Girard (n 127) paras 190ff; Somers (n 129) paras 711-712.

143 See also on the requirement of a proportionality test: van Dijck (n 19) 575-576.

144 Comp *Ellis v Solutions Matchmaking Pty Ltd & Anor* (n 92) [38] ('The kind of conduct which might warrant the grant of an apology might include the following: virulent abuse related

tionality test. Indeed, the more serious the unlawful conduct, the more this may justify an order for an apology.[145] Other factors are the *intent* and *impact* of the wrong (social, private or public), the *type of the wrongdoer* (public or private person, public authority), the *type of the ordered apologies* (written or oral, specified or unspecified wording, public or bilateral) and the *form of enforcement* (simple invitation by the court or with a sanction, such as additional monetary damages or penalty payment).[146] The *costs of the apology* are also a criterion. Indeed, if these are excessively high, a claim for court-ordered apologies will be considered disproportionate. For instance, in *Kurski v Poland,* a Polish politician who, during a television broadcast, unlawfully attacked a newspaper, was required by the domestic courts to apologise in that newspaper and on the television channel where he committed the infringement. However, the ECtHR considered this order to be disproportionate, since this would cost the wrongdoer approximately eighteen times an average monthly salary.[147] Also the fact that the *defendant has already apologised* to the victim, for example in a personal letter, and/or published already a rectification, can make a claim for public apologies (in specified wording) disproportionate.[148]

Where court-ordered apologies as a legal remedy can sometimes be disproportionate, in other cases, court-ordered apologies may constitute a *more appropriate remedy* compared to other remedies. For instance, according to the ECtHR, an order for apologies can sometimes provide a more appropriate remedy than monetary damages. For example, in *Cihan Öztürk v Turkey*, the manager of the Istanbul post office published an article in the

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to the discrimination alleged, systemic institutional conduct giving rise to the discrimination alleged, or physical assault')

145 For instance, for Australia, see for example *Wotton v State of Queensland* (n 48) [1577] ('that the gravity of the contravening conduct is an important factor to consider when determining whether such an order should be made in a particular case. That factor is likely to affect an assessment of both the extent to which the order will be appropriate to achieve redress and vindication in light of other remedies granted and whether the order is justified'); for Hong Kong, see *Ma Bik Yung v Ko Chuen* (n 23) [52] ('There may be rare cases where the court could be satisfied that an apology, albeit insincere, would be a reasonable act for the defendant to perform… The circumstances in these rare cases, including the degree of gravity of the defendant's unlawful conduct as well as the nature and extent of the plaintiff's loss and damage, would have to be exceptional').

146 van Dijck (n 19) 585.

147 *Kurski v Poland* (n 54) para 57.

148 Comp BGH 19 July 2018, IX ZB 10/18, NJW 2018, 3254. On this German case, see above no 5.

state postal magazine in which he criticised the former director of the post service. The Turkish domestic court awarded monetary damages in compensation for non-pecuniary loss. Bearing in mind the amount of these damages, the ECtHR observed that the remedy imposed was too significant, since this could deter others from criticising public officials and limit the free flow of information and ideas ('chilling effect'[149]). Therefore, the ECtHR considered in this case that other remedies, such as the issuance of an apology or the publication of the court's decision finding the statements to be defamatory, would have been more appropriate.[150] This European case law is not unique. Also according to non-European case law, an order for apologies may sometimes provide a more appropriate remedy than monetary damages. For example, in a case on a discriminatory refusal to issue a visa, the Canadian Human Rights Tribunal noted that 'the remedy sought by the complainants is an apology from the government and we feel that such a remedy would more appropriately satisfy the complainants than any monetary award'.[151]

Where someone is required to apologise in a *representative capacity*, such as a head of unit, administrative body, public authority or responsible director, there is some more scope for court-ordered apologies.[152] Indeed, these apologies are not a statement of personal regret, but rather a spoken act on behalf of the represented system or body, such as apologies by a hospital or a public authority for a medical or administrative fault.[153] These apologies do not express a personal opinion, but have to be considered as a statement issued in a representative capacity.[154] An apology on behalf of a public entity or by an office holder can be made by an individual who had nothing at all to do with the contravening conduct. In case law it has been observed that, under such circumstances, it is 'reasonable and appropriate to order … to apologise if that apology is characterised as a public acknowledgment of wrongdoing rather than as an actual statement of re-

149 See Rónán Ó Fataigh, 'Article 10 and the chilling effect principle' (2013) Europ HRights L Rev 304; K Lemmens, 'Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d'expression' (2005) A&M 32.

150 *Cihan Öztürk v Turkey* App no 17095/03 (ECtHR, 9 June 2009) para 33.

151 *Naqvi v Canada* (n 25).

152 Hulst, van Wees, Uijttenbroeck and Akkermans (n 26) 783.

153 van Dijck (n 19) 577.

154 Comp *Wotton v State of Queensland* (n 48) [1591].

gret'.[155] Such public apologies certainly have a role to play where a community (eg for discrimination)[156] or group (eg colleagues)[157] or consumers can identify with the victim.[158] If so, these apologies can be just as important to restore confidence or trust within public opinion, the affected community or group, in order to ensure the system (eg government entities), service (eg of a hospital or use of public transport after train delay)[159] or businesses operation.[160] In addition, such apologies may constitute a signal to the affected community or group that similar behaviour is unacceptable. From this perspective, apologies may provide an expression of a positive commitment to the future.[161]

7. Types and Forms of Court-Ordered Apologies

7.1. Starting Points in Statutory Provisions and Case Law

It is not immediately clear, if court-ordered apologies are available, how such an order and the particular apology should look. There are, however,

155 *Sunol v Collier (EOD)* [2006] NSWADTAP 51 (27 September 2006) [54].

156 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) [34].

157 For instance, after wrongful dismissal on discriminatory grounds: *Grover v National Research Council Canada* (n 52).

158 Carroll, 'Beyond Compensation' (n 19) 365-366; Carroll, 'You can't order sorriness' (n 19) 371 and 381; Desmet (n 8) 103; BT White, 'Saving Face: The Benefits of Not Saying I'm Sorry' (2009) 72 L & Contemp Problems 261, 269.

159 For example, see E Cracco, N Dirix and CP Reinders Folmer, 'The Role of Specifity and Apologies in Excuse Messages Following Train Delay' (2017) 20 J of Public Transportation 131ff.

160 White (n 19) 1265, 1281 and 1284-1285; Zwart-Hink, Akkermans and van Wees (n 19) 120. See also T Haesevoets, C Reinders Folmer, D De Cremer and A Van Hiel, 'Money isn't all that matters: The use of financial compensation and apologies to preserve relationships in the aftermath of distributive harm' (2013) 35 J of Economic Psychology 95ff; T Haesevoets, A Joosten, C Reinders Folmer, L Lerner, D De Cremer and A Van Hiel, 'The Impact of Decision Timing of the Effectiveness of Leader's Apologies to Repair Followers' Trust in the Aftermath of Leader Failure' (2016) 31 J of Business and Psychology 533ff; A Patel and L Reinsch, 'Companies Can Apologize: Corporate Apologies and Legal Liability' (2003) Business and Professional Communicaction Quarterly 9; M Racine, C Wilson and M Wynes, 'The Value of Apology: How do Corporate Apologies Moderate the Stock Market Reaction to Non-Financial Corporate Crises?' (2020) J of Business Ehtics 485ff.

161 N Smith, 'An Overview of Challenges Facing Collective Apologies' in D Cuypers, D Janssen, J Haers and B Segaert (eds), *Public Apology Between Ritual and Regret* (Brill/Rodopi 2013) 29, 36-37.

points of reference in both legislation and case law, indicating which elements may be important from a legal perspective. For instance, according to the Scottish Apology Act 2016 (asp 5), apologies include 'any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence' (Art 3). The Explanatory Notes highlight that the core element of this apology is 'an indication that the person is sorry about, or regrets, an act, omission or outcome'.[162] According to the Apology Ordinance of Hong Kong (Cap 631), an apology refers to 'an expression of the person's regret, sympathy or benevolence in connection with the matter, and includes, for example, an expression that the person is sorry about the matter. The expression may be oral, written or by conduct …' (Section 4).[163] Under the Australian Civil Liability Act (2002) of New South Wales, apologies are defined as 'an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault …' (Section 68). According to the Canadian Apology Act of British Columbia, apologies include 'an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault …' (Section 1).[164]

All the examples above, randomly selected, relate to *apology-protecting legislation*. This type of legislation encompasses a combination of statutory provisions reducing or removing the adverse consequences of apologising, mainly aimed at preventing the plaintiff from using to his advantage the fact that a defendant has expressed apologies. If it comes to *court-ordered* apologies as a legal remedy, Australian case law refers to, by way of example, 'an expression of sympathy or regret in relation to an incident directed to alleviating the injury, loss or damage to reputation or feelings, or hurt'[165], or 'a way of recognising wrongdoing (large or small, moral,

162 Explanatory Notes Apologies (Scotland) Act 2016 (asp 5) para 16.

163 See R Carroll, J Chiu and P Vines, *Apology Ordinance (CAP.631): Commentary & Annotations* (Sweet & Maxwell 2018) 175 p; P Vines and R Carroll, 'The Apology Ordinance: Bold Steps into Some Uncharted Areas of Apology Protecting Legislation' (2018) 48 HKLJ 925ff.

164 [SBC 2006] Chapter 19.

165 *Falun Dafa Association v Melbourne City Council* (n 92) [17].

personal, social, public or legal) and acknowledging hurt and grievance caused or felt in others because of that wrongdoing'[166]. According to the Hong Kong Court of Final Appeal, a court-ordered apology includes at least 'a regretful acknowledgement of a wrong done'.[167]

7.2. Essential Components

As the selection above makes clear, the definition of court-ordered apologies in legislation and case law diverge, but research reveals some essential components to be provided in this regard.[168] In general terms, three components can be identified which should include an apology: (1) *an affirmation* of facts or admission of fault, (2) *an affect* implying regret or remorse and (3) the willingness to take remedial *actions*, such as compensation.[169]

166 *Wotton v State of Queensland* (n 48) [1589].

167 *Ma Bik Yung v Ko Chuen* (n 23) [34].

168 See likewise, the overviews provided in Carroll, 'You can't order sorriness' (n 19) 374-375; Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 390; DW Shuman, 'The role of apology in tort law' (2000) 83 Judicature Rev 180, 185; van Dijck (n 19) 565-567; Vines, 'The Power of Apology' (n 19) 5; White (n 19) 1306-1307.

169 This reference to *affirmation*, *affect* and *action* draws on the work of A Allan and D McKillop, 'The Health Implications of Apologizing after an Adverse Incident' (2010) 22 Inter J for Quality in Health Care 126 (considering a full apology as 'one that consists of an admission of responsibility for causing the harm, an expression of regret, and action to remedy the harm and to prevent future occurrences of similar incidents'); Allan, 'Apology in Civil Law' (n 8) 7-8 (*idem*); Allen, McKillop and Carroll (n 18) 538 (*idem*); Carroll, 'Apologies as a Legal Remedy' (n 19) 332-333 (considering that 'there is consensus that a 'full' apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim, and acknowledges the wrongdoer's transgression' – subsequently emphasizing the multidimensional theory of apology as developped by Allan and others); Carroll, 'Beyond Compensation' (n 19) 330 (considering for the court-ordered apology that 'essentially it will be an acknowledgement by the defendant that he has committed a wrong against the plaintiff and that the plaintiff has suffered harm as a result'); A Lazare, *On Apology* (OUP 2005) 23-24 (considering an apology as 'an acknowledgement of an offence together with an expression of remorse'); DSK Maxwell, 'The Apologies (Scotland) Act 2016: an innovative opportunity in the twenty first century or an unnecessary development?' (2016) J of Personal Injury L 79, 83-84; Shuman (n 168) 180 (referring to the expression of regret for the harmful event and acknowledgement of responsibility); D Slocum, A Allan and M Allan, 'An Emerging Theory of Apology' (2011) 63 Australian J of Psychology 83 (developping a multidimensional theory of apology, ie what constitutes an apology in a particular situation and context is highly variable – therefore recognizing that there are components of an apology); N Smith, *I was Wrong: the meanings of Apology* (CUP 2008) (providing a long list of elements making up the 'categorical' apology of which acknowledgement of fault is only one); N Tavuchis, *Mea culpa: A sociology of apology and reconciliation* (Stanford University Press 1991) 3 and 26 (considering

Indeed, the respondent may apologise even when he does not consider the facts to be wrong, but an acknowledgement or affirmation of harmful consequences as a result of his acts turns out be essential. Indeed, a request for the enforcement of apologies is rejected by case law where the evidence of the civil wrong is established, but the wrongdoer continues to deny the wrong or the harmful consequences which have arisen as a result.[170] However, the mere affirmation of a breach of moral standards is insufficient. It takes more to apologise. According to case law, apologies should also include an expression of 'regret as to any trouble, inconvenience and damage to reputation that was caused'.[171] Nevertheless, in most circumstances, the mere expression of regret is not considered as a sufficient apology.[172]

In more general terms, depending on the circumstances, most recent research suggests that court-ordered apologies should include at least three components: (1) *affirmation* of the infringement of at least a moral standard (ie not necessarily a legal rule, but may also include a socially accepted principle of behaviour to be adopted in a social context based on certain values) and the harmful effects which have arisen as a result, (2) *affect* or an expression of feelings such as regret, and (3) an offer to take *action* or remedial measures, such as compensation (in a monetary or non-monetary way).[173] Additionally, an apology could include some other components, considered less essential, such as (4) *explanation* on the facts and/or the infringement – why the behaviour was wrong, (5) a request for *forgiveness*,

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an apology as 'acknowledgement of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done'); van Dijck (n 19) 565 (considering that 'the four components – affect, affirmation, action and forbearance – capture most definitions previously used in research'); Vines 'Apologies as Corrective Justice' (n 19) 79 (considering that a 'full' apology includes 'an acknowledgement of fault along with an expression of regret'); Vines, 'The Power of Apology' (n 19) 5 (considering that 'an apology does not exist unless the person who is expressing regret is also taking responsibility for a wrong which they have committed'); White (n 19) 1307 (considering six components for a successful apology: acknowledgement of wrongdoing, acknowledgement of harm, acceptance of full responsibility, expression of remorse, promise to refrain from repeating offense, and offer for reparations).

170 See, for example *Borg v Commissioner, Department of Corrective Services & Anor* [2002] NSWADT 42 (26 March 2002) [236]; *K v S and N Company* [2006] QADT 11 (5 April 2006) [50].

171 *Falun Dafa Association v Melbourne City Council* (n 92) [43].

172 *Russell v Commissioner of Police, New South Wales Police Service & ors* [2001] NSWADT 32 (26 February 2001) [189].

173 See ref in n 169.

(6) an expression of *self-insight* and (7) a promise or *commitment* showing that the respondent wishes to avoid new similar facts or harmful consequences.[174]

In some legal systems, such as Australia,[175] the Netherlands,[176] Poland,[177] and Ukraine,[178] the courts provide in the apology order the exact wording of the apologies to be made by the respondent (apologies in *specified* wording). The three essential components – affirmation, affect and action – are then usually included in this formulation. For example, Australian officers who had arrested a man in a discriminatory way had to send a letter to the man's parents after his death in prison, in the following words: 'I am a member of the NSW Police Service who was involved in the apprehension and arrest of your son, … The Equal Opportunity Division of the Administrative Decisions Tribunal has found that the conduct of the police officers, and the language used by them, towards your son during his arrest, were in breach of the racial discrimination and the racial vilification provisions of the Anti-Discrimination Act. I wish to apologise to you for my conduct on that occasion'.[179] Other courts leave the wording of the apology to be expressed to the respondent open, sometimes to be approved by the victim.[180] Exceptionally, the respondent and the victim are required to draft a text on which both parties agree, usually in the light of mediation and restorative justice.[181]

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174 See eg Allan and McKillop (n 169) 126; Patel and Reinsch (n 160) 13. Comp the authors in n 169.

175 For example, see *Russell v Commissioner of Police* (n 172) [32]; *Falun Dafa Association v Melbourne City Council* (n 92); *Burns v McKee* (n 50); *Menzies & Ors v Owen* [2008] QADT 20 (19 September 2008).

176 For example, see Trib Midden-Nederland 18 June 2014, ECLI:NL:RBMNE:2014:2472, para 7.4

177 See the domestic decisions in *Błaja News v Poland* (n 54) para 9; *Kania and Kittel v Poland* (n 54) para 9; *Kurski v Poland* (n 54) paras 11-12.

178 See the domestic decision in *Myrskyy v Ukraine* (n 55) para 19.

179 *Russell v Commissioner of Police* (n 172) [32].

180 See van Dijck (n 19) 579. For the Netherlands, see Trib Haarlem 1 November 2006, JAR 2006/273, RAR 2007/22, JIN 2006/474 (to be approved by the victim).

181 For example, see for Australia: *Escobar v Rainbow Printing Pty Ltd* [2002] FMCA 22 (13 February 2002) [43] ('The terms of the apology can be agreed between the parties'); for Hong Kong: *Shiu Hon Po v Tam Siu Ping* [2013] HKCU 1079.

7.3. Modalities

Where the wrong took place in the press or online (eg discrimination or infringement of personality rights), it is reasonable that the respondent is required to publish his apologies at the very same *place*. Indeed, courts frequently order the publication of apologies on a website,[182] in a newspaper,[183] magazine[184] or during a radio broadcast,[185] depending on where the infringement was committed. However, an order for apologies during a broadcast on a television channel was considered disproportionate, since this would cost the wrongdoer approximately eighteen times an average monthly salary.[186] Apologies sent by letter or e-mail are much less expensive, especially when the composition of the group and the size of the group to which the apology is addressed are suitable. Under these circumstances, court-ordered apologies are probably less rapidly to be considered disproportionate. For instance, in a Dutch case, an employer who had wrongfully reprimanded an employee and had communicated this internally to all employees by e-mail, was required to send a new message to be approved by the employee, explaining that the reprimand was incorrect and stating that he had apologised to the employee.[187] In a case concerning discrimination against some residents within a residential park, an Australian Tribunal did not consider it necessary for all residents of the residential park to receive a separate letter with apologies from the managers. According to the Tribunal, the apologies should be made clearly visible to each resident, for example in a newsletter sent to the residents.[188]

The *period* during which the apologies are required to be made on a website, in a newspaper or during a broadcast on the radio is usually determined in the light of the period during which the infringements were accessible to the public. For example, a man who published discriminatory statements about homosexuals on a website from 30 December 2013 to 16

182 For example, see for Australia: *Burns v McKee* (n 50) para 66; for the Netherlands, see Trib Midden-Nederland 18 June 2014, ECLI:NL:RBMNE:2014:2472, para 7.4; for Switzerland, see BGer 4 November 2013 (n 58).

183 For example, see *Burns v McKee* (n 50).

184 *Russell v Commissioner of Police* (n 172).

185 For example, see *Burns v McKee* (n 50).

186 *Kurski v Poland* (n 54) para 57.

187 Trib Haarlem 1 November 2006, JAR 2006/273, RAR 2007/22, 2006/474.

188 *Tallong Park Association Inc v Sutherland (No 2)* (n 33) [10].

June 2014, had to apologise on the same and all other websites managed by him for six months.[189]

Instead of *public* apologies, the court may also impose *bilateral* apologies. The latter are only to be made to the victim, for example in a formal letter[190] or orally[191]. Bilateral apologies are particularly suitable where the infringement is not of a public character. For instance, case law has ordered bilateral instead of public apologies for the discriminatory and therefore unlawful arrest of a man that remained without media attention,[192] discriminatory statements by a neighbour[193] or an employer,[194] and discriminatory dismissal because of skin colour[195]. Particularly interesting is the Canadian case in which an employer unlawfully dismissed his employee for insufficient returns. The Canadian Supreme Court confirmed that the employer may be required to write a letter of recommendation to the employee, in which he explains that the dismissal was unlawful. This letter may help the employee in his search for a new job. The defence based on an infringement of the right to freedom of expression was not accepted by the Court: 'while an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute'.[196] In a similar Australian case concerning the unlawful dismissal for health reasons, the employer was required to make bilateral apologies to the employee.[197] The same solution may apply in the event of discriminatory or unlawful refusal of promotion.[198]

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189 *Burns v McKee* (n 50) [187-188].

190 For example, see for Australia: *Chew and Director General of The Department of Education and Training* [2006] WASAT 248 (14 August 2006); see for Canada: *Rodovanovic v VIA Rail Canada Inc* (n 52).

191 Xiang Li and Jigang Jin (n 44) 127.

192 *Russell v Commissioner of Police* (n 172).

193 *Campbell v Kirstenfeldt* [2008] FMCA 1356 (30 September 2008).

194 *Chew and Director General of The Department of Education and Training* [2006] WASAT 248 (14 August 2006).

195 *Uzoaba v Canada* (n 52).

196 *Slaight Communications v Davidson* (n 115).

197 *Forbes v Commonwealth of Australia* (n 92). Comp similar case: *Escobar v Rainbow Printing Pty Ltd* [2002] FMCA 22 (13 February 2002) on unlawful dismissal for gender discrimination. For similar Canadian case and order for apologies in a letter to the injured party, see *Uzoaba v Canada* (n 52) on unlawful dismissal for skin colour discrimination.

198 See for example *Grover v National Research Council Canada* (n 52).

7.4. Autonomous or Combined with Additional Remedies

Court-ordered apologies are sometimes imposed as a stand-alone remedy.[199] In such cases, the court is satisfied that these apologies provide full compensation for the emotional harm incurred by the victim. However, in most cases, the remedy of court-ordered apologies goes with additional measures, aimed at providing full compensation for emotional harm or restoring the victim's (social) reputation.[200] This often involves an order for rectification. Indeed, to justify such an order, the courts frequently refer to the restoration of public or social reputation, honour or status sought by the victim, to which court-ordered apologies can only partially remedy. For instance, there is Dutch case law requiring the respondent to publish a neutral rectification in which he states the full facts of the case, for example on a website, in a newspaper or magazine, and on top of that, to apologise in the same rectification or only bilaterally, such as in a letter to the victim.[201] Other courts do not order the rectification as an autonomous remedy, but include this rectification in the court-ordered apologies, of which the exact wording has been determined.[202]

According to the principle of full compensation, which constitutes a guiding principle within the law of torts in nearly every legal system,[203] the victim is entitled to compensation (monetary or non-monetary) for the entire loss incurred, nothing less, nor anything more. Thus, in assessing the compensation, the principle of full compensation constitutes not only a minimum, but a maximum ceiling as well. This explains why the courts cannot combine an order for apologies with an order for monetary damages if those damages compensate the same emotional harm as already compensated in a non-monetary way by the court-ordered apologies.[204] If the

199 For example, see *Falun Dafa Association v Melbourne City Council* (n 92).

200 See, for example, Carroll, 'Apologies as a Legal Remedy' (n 19) 341ff.

201 See, for example, Trib 's-Gravenhage 22 August 2007, ECLI:NL:RBSGR:2007:BB2188; Trib 's-Gravenhage 17 October 2007, ECLI:NL:RBSGR:2007:BB5893.

202 For the Netherlands, see for example Trib Haarlem 1 November 2006, JAR 2006/273, RAR 2007/22, JIN 2006/474; for Australia: *Russell v Commissioner of Police* (n 172).

203 See for example G Wagner, 'Comparative Tort Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 995ff.

204 See for Australia, for example: *Grulke v K C Canvas Pty Ltd ACN 057 228 850* [2000] FCA 1415 (29 September 2000) [4] ('having regard … that I have endeavoured to compensate for loss or damage suffered by the applicant by making a pecuniary award of damages, it is inappropriate to exercise the discretion reposed in the Court by additionally ordering the making of an apology').

court wishes to impose, in addition to court-ordered apologies, an order for monetary damages, the court should provide proper justification of which types of losses are compensated in a non-monetary way by apologies (eg reputation, reduction of self-esteem) and which types of losses are compensated in a monetary way by payment of damages (eg stress or depression feelings). In essence, the court will have to point out that, under the circumstances, court-ordered apologies do not provide full compensation and that therefore additional monetary damages are imposed. However, where monetary damages are not intended to compensate emotional harm but provide compensation for pecuniary loss instead, such as loss of profit due to an affected commercial reputation, an order for apologies and an order for monetary damages then clearly compensate a different type of loss.

8. Enforcement

8.1. Sincerity Concern

Apart from the lack of a clear legal ground (see above no 4) or the potential interference with the right to freedom of expression (see above no 5), the concern of sincerity provides a final bottleneck to enforce apologies. Indeed, the objection that court-ordered apologies lack sincerity and are therefore not beneficial to the victim is frequently raised in case law. The conventional idea is that apologies only make sense if they are made voluntarily, because only then are they sincere. For instance, according to Hely J of the Federal Court of Australia, the idea of ordering someone to make an apology is, *prima facie,* a contradiction in terms.[205] Also under Dutch law, the courts invoke the sincerity concern as an (additional) argument to reject a claim for court-ordered apologies.[206] For example, the Tribunal of Leeuwarden observed that 'to apologize is a highly personal (moral) choice, which no one can be obliged to make. This would harm the value of apologies'.[207] According to the Tribunal of Zutphen 'court-ordered apol-

205 *Jones v Scully* [2002] FCA 1080 (2 September 2002) [245] (Hely J). Comp *Jones v Toben* (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002) [106] (Branson J); *Forest v Queensland Health* [2007] FCA 1236 (14 August 2007)[13] (Collier J).

206 For example, see Trib Rotterdam 21 November 2012, JOR 2013/69, JONDR 2013/313, para 5.42; Trib Oost-Brabant 16 January 2019, NJF 2019/108, para 4.9; Trib Gelderland 2 March 2020, ECLI:NL:RBGEL:2020:1387, para 4.23.

207 Trib Leeuwarden 14 September 2011, ECLI:NL:RBLEE:2011:BT2357, para 7 (free translation).

ogies cannot be considered as a true apology' since apologies 'derive their power in interpersonal relations precisely from spontaneous and sincere repentance for own mistakes'.[208] A study on Australian discrimination cases reveals indeed that courts rejected a request for a court-ordered apology because it would lack sincerity in 65% (*n* = 24) of the 37 cases where an apology was sought, whereas the same study reveals that the same reasoning was used under Dutch law, mainly in defamation cases, in 52% (*n* = 13) of the 25 cases where an apology was sought and where the court found the behaviour of the respondent unlawful.[209] The concern of sincerity is confirmed by other empirical studies. For instance, a study in equal opportunity cases revealed that victims generally prefer spontaneous and voluntary apologies to non-spontaneous apologies.[210] Moreover, it is said that apologies may backfire if they are not sincere.[211]

However, even though sincerity is considered as an important factor, it is not necessarily true that court-ordered apologies have no utility at all. Indeed, the fact that apologies are sought by the victim, even though the respondent is unwilling to make a voluntary apology, suggests that court-ordered apologies can be meaningful for the victim.[212] In *Ma Bik Yung v Ko Chuen,* the Hong Kong Court of Final Appeal stated that 'whether an apology made by an unwilling defendant, albeit insincere, has the effect of redressing the plaintiff's loss and damage to some extent would depend on the circumstances of each case. In some cases, it may have such an effect'.[213] This idea can also be identified within the legislation on court-ordered apologies. Indeed, under the statutory provisions according to which court-ordered apologies are available either as a general or specific remedy (see above no 3.1), an order for apologies can be made, even though the respondent did not make an offer to apologise.[214] Also from an empirical

208 Trib Zutphen 5 September 2007, NJF 2007/503, Mediaforum 2007/310, para 4.9 (free translation).

209 van Dijck (n 19) 569.

210 Allen, McKillop and Carroll (n 11) 538.

211 DP Skarlicki, R Folger and J Gee, 'When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome' (2004) 34 J of Applied Social Psychology 322. See van Dijck (n 19) 570.

212 See also Carroll, 'Beyond Compensation' (n 19) 353-354 and 355.

213 See (n 23) [51].

214 Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 398.

perspective, research reveals that involuntary apologies may serve a purpose for the victim (*compensation* purpose, see above no 2).[215] Moreover, one should be aware that the rejection of a request for an apology may have the effect of 'secondary' victimization.[216]

In addition to this, court-ordered apologies may provide a signal to public opinion or to the (social) group within which the infringement was committed that such unlawful conduct cannot be accepted (*signalling* purpose, see above no 2).[217] This purpose of court-ordered apologies can also be observed in case law. The Anti-Discrimination Tribunal of Queensland, for example, states that by way of court-ordered apologies, 'the members of the public that have been incited to hatred, serious contempt or severe ridicule should be told by the respondent that such conduct was unlawful'.[218] Public apologies can indeed be just as important to restore confidence within public opinion, for example where a community (eg for discrimination) or group (eg colleagues or consumers) can identify with the victim.[219] From the respondent's view, court-ordered apologies may then provide an *educational* function (see above no 2).

Hence, court-ordered apologies as an acknowledgement of facts, unlawful conduct and/or harmful consequences and emotional suffering, should be considered as a *fulfilment of a legal obligation*, rather than a statement of sincere feelings of regret.[220] However, the enforcement of such an

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215 See, for example, Allen, McKillop and Carroll (n 11) 544; A Jehle, MK MIller and J Maskaly, 'How Voluntariness of Apologies Affects Actual and Hypothetical Victims' Perceptions of the Offender' (2012) J of Social Psychology 727-745; JL Risen and T Gilovich, 'Target and observer differences in the acceptance of questionable apologies' (2007) 92 J of Personality and Social psychology 418; van Dijck (n 19) 570. See also van Dijck NTBR 2017/42 (n 66).

216 On the issue of secondary victimization in case of emotional harm, see, for example, Huver, van Wees, Akkermans and Elbers (n 6) 30-31. Reference has also been made to this danger in the assessment of damages, see, for example, Carroll, 'Apologies and Corrections as Remedies for Serious Invasions of Privacy' (n 138) 223.

217 See, for example, Allen, McKillop and Carroll (n 11) 548; Carroll, 'Apologies as a Legal Remedy' (n 19)343-344; Lazare (n 169) 117 and 150; Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 396; Hulst, van Wees, Uijttenbroeck and Akkermans (n 26) 781; Swart (n 34) 69; van Dijck (n 19) 570-571; White (n 19) 1296; Zwart-Hink, Akkermans and van Wees (n 19) 121.

218 *Menzies & Ors v Owen* [2008] QADT 20 (19 September 2008)[279]. Comp *Ma Bik Yung v Ko Chuen* (n 23) [38].

219 Likewise: van Dijck (n 19) 574.

220 See and comp *Burns v McKee* (n 50) [29]; *Tallong Park Association Inc v Sutherland (No 2)* (n 33) [9]. See also van Dijck (n 19) 568.

apology is not appropriate in all circumstances. Indeed, the prototype cases in which they are relevant constitute a first limitation (see above no 2). In addition, court-ordered apologies may serve little purpose because of the circumstances. For instance, case law is not willing to enforce apologies where too long a period of time has elapsed in the meantime,[221] where involuntary apologies enforced by the court would only reinforce the conflict,[222] where the evidence of the civil wrong is established, but the wrongdoer continues to deny the wrong or the harmful consequences which have arisen as a result (see above no 7.2), or where there is proof that apologies will be made in the near future.[223]

8.2. Forms of Enforcement

Opinions diverge as to the means by which the court can enforce an apology. First, case law seems reluctant to impose this legal remedy as an interim or provisional measure.[224] Where the decision is on the merits, there is case law enforcing apologies under (periodic) penalty payment[225] (*astreinte, Zwangeld* or *dwangsom*) or additional[226] or a higher amount of monetary damages.[227] Also some Dutch decisions applied this way of enforcement, albeit often in combination with an order for rectification.[228]

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221 *I v O'Rourke and Corinda State High School and Minister for Education of Queensland* [2001] QADT 2 (30 April 2001); *Creek v Cairns Post Pty Ltd* (n 156) [34] (four years).

222 *Lang v Nutt* [2004] QADT 37 (23 November 2004). See also *Brown v Economic Freedom Fighters and Others* (14686/2019) [2019] ZAGPJHC 166; [2019] 3 All SA 499 (GJ); 2019 (6) SA 23 (GJ) (6 June 2019) [45ff].

223 Carroll, 'The ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia' (n 19) 408.

224 Comp *Wotton v State of Queensland (No 6)* [2017] FCA 245 (15 March 2017)[26-27] (Mortimer J).

225 See also van Dijck (n 19) 579-580.

226 For example in South Africa, see *Mineworkers Investment Company v Modibane* (n 108) (the respondent should make public apologies or pay monetary damages).

227 For Australia, see for example *Cohen & anor v Harguos; Karelicki v Harguos (No 2)* [2006] NSWADT 275 (22 September 2006); *Burns v Sunol* [2014] NSWCATAD 61 (14 May 2014) [64]; for South Africa, see Neethling (n 47) 293. There is also Dutch case law awarding a lower amount of monetary damages for the emotional harm because the respondent has in the meantime made (voluntary) apologies, see for example Trib 's-Gravenhage 12 December 2001, ECLI:NL:RBSGR:2001:AD7073, para 3.11; Trib Amsterdam 20 July 2011, ECLI:NL:RBAMS:2011:BR6128, para 4.13.

228 See for example Trib Haarlem 1 November 2006, JAR 2006/273, RAR 2007/22, JIN

The Federal Supreme Court of Switzerland takes a more nuanced approach. Indeed, according to the Court, the respondent cannot be forced to apologise under threat of punishment. However, if he has already apologised bilaterally to the injured party (for example, in a formal letter), he can be forced to make these apologies public or to publicly apologise again.[229] The Court stated that the victim is entitled to have third parties informed of the unlawful conduct and the bilateral apology. Although this objective can be achieved through other forms of redress, such as the publication of the court's decision, a rectification or a right of reply, the Court stressed that it may be important for the injured party and the public that the respondent does so himself.[230] For the Swiss Federal Supreme Court, the involuntary nature of an apology is then precisely an additional argument in assessing the appropriate form of redress. Indeed, the enforcement of apologies may imply a compulsory exchange of power and shame between the injured party and the respondent,[231] and in more general terms, an expression of respect towards each other.[232] The exchange of humiliation on the side of the wrongdoer and power on the side of the victim to accept, reject or successfully claim an apology, has been considered as the clearest explanation of how apologies can restore dignity and self-respect, which would explain why sincerity is not the sole predictor of an effective apology.[233] This is also what the South African Constitutional Court seems to have in mind when it considers that 'because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging… his or her

2006/474; Trib Midden-Nederland 18 June 2014, ECLI:NL:RBMNE:2014:2472, para 7.4.

229 BerG 4 november 2013 (n 58).

230 *Ibid* para 6.3.3.

231 Shuman (n 168) 180; P Vines, 'Apologies and civil liability in the UK: a view from elsewhere' (2008) Edin L Rev 200, 206-207; van Dijck (n 19) 573-574; P Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 Syd L Rev 14. See also JQ Whitman, 'What is Wrong with Inlicting Shame Sanctions?' (1998) Yale LJ 1055, 1061. The *amende honorable* is also conceived in this sense, see for example van Niekerk (n 107) 405-406. For some, however, court-ordered apologies may cause a sense of shame and public humiliation and therefore pillory the offender, see Descheemaeker (n 28); Geeraets and Veraart (n 8).

232 See JQ Whitman, 'Enforcing Civility and Respect: Three Societies' (2000) Yale LJ 2000 1279, 1290-1291.

233 van Dijck (n 18) 574. See also, for example, Lazare (n 169) 52.

inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant'.[234]

9. Concluding Remarks

Emotions in themselves are a risky driving force for legal development, but that does not mean that the law should deny the importance of emotions suffered by the victim of a civil wrong. Indeed, the omnipresence of monetary damages for making up emotional harm may result in an area of tension between the injured party's emotional needs and the possibilities provided under the law of torts. Therefore, it is no coincidence that it is common law jurisdictions, which in any event have clear reservations against non-monetary remedies, where we find have broken, to a certain extent, with their mainly monetary approach of compensation for emotional harm, and are willing to accept court-ordered apologies as a legal remedy, leading the field for other legal traditions to follow.

Within Western European legal systems, albeit not (yet) (generally) accepted, legal starting points are available to embody court-ordered apologies as a legal remedy. The inclusion of such a remedy under the law of torts basically depends on two bottlenecks: (1) the availability of compensation for non-pecuniary loss, more in particular, for emotional harm, and (2) the availability of granting this compensation in a non-monetary way, more in particular, by non-monetary measures. These are general issues settled separately in each legal system in accordance with the national general rules and principles on tortious and/or civil liability.

The interference with the defendant's right to freedom of expression is often considered as another bottleneck, preventing the courts from making an order for apologies. Indeed, if not relying on the argument that an explicit statutory provision in favour of court-ordered apologies is lacking, the domestic courts of Western European legal systems usually refer to the right to freedom of expression to decline a request for court-ordered apologies. However, in line with non-European case law, the European Court of Human Rights accepted on several occasions that an order for apologies may be reconcilable with the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights. Indeed, albeit such an order amounts to an interference with the right to freedom of expression, this interference may be justified under the particular circumstances. Basically, this human rights assessment results in a

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proportionality test, which is not provided for under the general rules on tortious liability. An order for apologies therefore requires, in addition to the general conditions for tortious liability, an additional balance of interests. Thus, while court-ordered apologies within Western European legal systems could be available based on the general rules on tortious liability, this does not mean that the victim has a claim for court-ordered apologies for any emotional harm.

I am aware that, from a Western European perspective, this chapter pushes the boundaries of the legal arena. However, it is not too optimistic to give the law a role which makes way for the victim's emotional needs, beyond what current remedies for emotional harm allow, such as the publication of a court's decision, a rectification or a right of reply, and the award of monetary damages. More in particular, non-European case law reveals interesting examples where the victim's identity, social standing or personal integrity has been affected, within society, a community or particular group, for example as a result of discrimination or infringement of personality rights. Court-ordered apologies may then provide a form of non-monetary relief for emotional harm.