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Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1-3, Hungary
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Harmonising Tort Law in the European Union: Advantages and Difficulties

I Necessity of Harmonising European Tort Law?

The call to harmonise private law and thus, among other areas, also of tort law, can often be heard and several groups of scholars have already been designing future tort law, whether as part of a whole code¹ or as a separate draft². However, it can be questioned whether harmonisation is really a necessity or, at least, brings advantages. Doubts in this respect seem reasonable when looking at the USA: While it is a sovereign state and not only a more or less loose community of national states as is the EU, 50 different legal systems nevertheless exist within the USA. However, one has to take into regard that the legal systems of the EU Member States vary a great deal more than the legal systems of the states in the USA. Not only is there a fundamental difference between common law in England and Ireland and Continental civil law but there are also divergences between the civil law systems. The Member States have been independent countries for centuries and, therefore, their legal cultures – originally partly based on Roman law³ – pursue different paths. This is obvious, of course, with regard to the ‘legal families’, for example, the Germanic and the Romance families. However, there are decisive differences even between the legal systems of the German speaking countries.

Bearing this in mind, the rationale for harmonisation is that the differences between the legal systems hinder commercial cross-border transactions in Europe:⁴ Entrepreneurs who offer their wares or services in other Member States are disadvantaged in comparison to competitors who are only active nationally, because while domestic providers only have to inform themselves of the legal frameworks in their own legal system, a foreign provider is forced to inform itself about a legal

* Prof. i.R. Dr. DDr. h.c. Helmut Koziol, Director of the European Centre of Tort and Insurance Law.

¹ Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (European law publishers 2009, Munich).

² European Group on Tort Law (ed), *Principles of European Tort Law. Text and Commentary* (Springer 2005, Vienna – New York).

³ Cf. Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (2nd edn Oxford University Press 1996, New York); Ibid, ‘Savignys Vermächtnis. Rechtsgeschichte, Rechtsvergleichung und die Begründung einer Europäischen Rechtswissenschaft’ [1998] *Juristische Blätter* 273-293.

⁴ Cf Christian von Bar, ‘Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuchs’ (1999) in European Parliament PE 168.511, available at <http://www.europarl.europa.eu/workingpapers/juri/pdf/103_de.pdf>.

system that diverges from its domestic law and to comply with such. This gives rise to transaction costs that may prove to be barriers to market entry, particularly for small and medium-sized enterprises. Differences in the stringency of liability rules may not only restrict market access but also have the effect of distorting the market, since the liability rules in the land of origin affect cost calculations. Areas further removed from the financial field, such as the liability of parents for their children or of those who keep animals, do not lead directly to distortion of competition but may indirectly have repercussions in the single market via the *liability insurance system*.

However, even in cases purely related to the law of damages, the differences between the legal systems play a considerable role. Let us take, as an example, a road traffic accident which occurs in close proximity to the border between Germany and Austria, in which both drivers are injured and their respective spouses killed. The law of the place of accident has to be applied⁵ and the applicable legal system decides over the content and scope of the resulting compensation claims. Thus, it may be of utmost importance whether the accident occurred in Austria or in Germany, since there are differences not only with respect to the maximum amounts of compensation possible but also with respect to what damage is recoverable. There are major differences under the national legal systems between the entitlements to compensation for pecuniary damage resulting from bodily injury or death, such as medical expenses, loss of earnings and other consequential expenses, but also to an even greater extent regarding claims for compensation for non-pecuniary harm sustained by the injured person or those bereaved.⁶ In many European countries (e.g. Austria, Belgium, France), those who have lost a close relative in a traffic accident have a separate claim to damages for pain and suffering directed at compensating the suffering occasioned by the death, which is not dependant on their own health being impaired (e.g. shock caused by news of the death). In several other EU Member States (e.g. Germany or the Netherlands), such pain and suffering on the part of relatives is not accorded compensation. This may lead to completely different sums being awarded for pain and suffering in respect of the bereaved person's own injuries but may also mean that someone is awarded compensation for the loss of his spouse that would never be awarded at home or, of course, vice versa, that someone cannot make a claim in this respect though his domestic system would have granted such as a matter of course.

Since the question of applicable law is of material importance when it comes to compensation claims involving other countries, the frequent differences of opinion over resolving the conflict of laws often hinder an amicable settlement of disputes and thus cause substantial litigation costs. A harmonisation of European liability law could thus lead to a noticeable decrease in legal disputes and hence of the consequential expenses involved in compensation cases with international aspects. Moreover, European citizens – who are encouraged to move around in the European Union – fail to understand these differences, since the result is that, in the event of an accident, they may be treated very differently depending on which legal system is applicable.

⁵ Art 3 The Hague Convention on the Law Applicable to Traffic Accidents, opened for signature 4 May 1971, 965 UNTS 416 (entered into force 3 June 1975).

⁶ See in more detail William Vaughan Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001, Vienna – New York); Bernhard A Koch, Helmut Koziol (eds), *Compensation for Personal Injury in a Comparative Perspective* (Springer 2003, Vienna – New York).

When all negative aspects associated with the existence of the many different legal systems relating to international compensation claims are taken into consideration, it seems natural to dream of a uniform law.⁷ This is certainly still a dream at present, which nonetheless does seem at least partially feasible, in particular in respect of contract law⁸ as well as the law of damages⁹ and limited to the European Union. However, a question yet to arise is whether it is a good dream or a nightmare.

II Today's State of Affairs

The European Union is already advancing the unification, or at least harmonisation, of the private law of the Member States, namely by way of directives and regulations; these are mainly in the area of contract law¹⁰ but also to some extent of tort law, the most important example under tort law being in the area of product liability.¹¹

Furthermore, the decisions of the European Court of Justice contribute to harmonisation and sometimes create totally new rules. The most sensational example is the development of state liability: Consumers, for example, have a claim against the state if it does not correctly implement EU directives which have a protective purpose in respect of consumers and a consumer consequently suffers a loss. As a result, the state is liable even for the legislative acts of its Parliament – a liability which was previously almost unknown to Member States.¹²

⁷ See on this topic – partly in English, partly in German – Michael G Faure, Helmut Koziol, Sonja Puntscher-Riekmann, *Vereintes Europa – Vereinheitlichtes Recht. Die Rechtsvereinheitlichung aus politikwissenschaftlicher, rechtsökonomischer und privatrechtlicher Sicht* (Verlag der Österreichischen Akademie der Wissenschaften 2008, Vienna); further Michael G Faure, 'How Law and Economics may Contribute to the Harmonisation of Tort Law in Europe' in Reinhard Zimmermann (ed), *Grundstrukturen des Europäischen Deliktsrechts* (Nomos 2003, Baden-Baden, 31-82); Thomas Kadner Graziano, 'Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen?' (2005) 13 *Zeitschrift für Europäisches Privatrecht* 523-540; Fernando Gomez, Juan Jose Ganuza, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (2011) 7 *European Review of Contract Law* 275-294; Stefan Grundmann, 'The Future of Contract Law' (2011) 7 *European Review of Contract Law* 490-527; Ulrich Magnus, 'Harmonization and Unification of Law by the Means of General Principles' in Morten Fogt (ed), *Unification and Harmonization of International Commercial Law* (Wolters Kluwer Law & Business 2012, Alphen aan den Rijn, 161-174).

⁸ See in particular the Communication from the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 final, Official Journal C 255 of 13 September 2001, 1-44.

⁹ There are already two proposals for the future drafting of a European law of damages, one from the European Group on Tort Law, which collaborates with the Research Institute for European Tort Law of the Austrian Academy of Sciences, and one from the Study Group on a European Civil Code.

¹⁰ See recently Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final; furthermore, for example Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.

¹¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210, 07/08/1985.

¹² See on this topic with further details Luboš Tichý (ed), *Odpovědnost státu za legislativní újmu. Staatshaftung für legislatives Unrecht* (Univerzita Karlova 2012, Prague).

As realists we therefore, have to accept that the question is no longer whether we want harmonisation or the unification of the laws in the EU: they are already facts which cannot be denied and we must come to terms with that development. Thus, what is on the agenda is not whether there should be a harmonisation or unification of the law, but rather how and how far harmonisation and unification should take place.¹³

As to the quality of harmonisation, it must be said that, in seeking to strike a balance, the European Union's attempts to harmonise private law have unfortunately produced a very negative result: The respective directives or regulations of the EU cover narrowly defined areas.¹⁴ Such *selective harmonisation* runs counter to this aim, to a *double fragmentation of the law*.¹⁵ First, the national legal systems become infiltrated by foreign provisions; second, the EU's directives and regulations are not based on a consistent concept and therefore very often are not in accordance with one another. Every directive of the European Union is a compromise and the outcome depends on national interests as well as the nationality and personality of the members of the Commission and, within this context, which legal system gets the upper hand over the other legal systems.

This view can easily be illustrated in an objective manner by the directive on product liability, the most important example of harmonisation in the area of tort law. This directive provides for very strict liability on the part of entrepreneurs for damage caused by defective products. However, it is open to debate whether this provision fits into any overall plan which takes regard of the whole area of liability of entrepreneurs. For example, why is liability for services not included, why not for immovables, e.g. bridges, and what about the relationship with other sorts of strict liability? Further: Is it really reasonable that strict liability is applicable for the carpenter if a set of steps breaks down, as the ladder he made is a moveable, but another entrepreneur is not strictly liable if the bridge he designed breaks down, as the bridge is not a moveable?

Besides the area of directives and regulations, the lack of a basic concept can also be ascertained in the case law of the European Court of Justice. An impressive example in tort law is the jurisprudence on Member States' liability for violations of EU Law.¹⁶ In this respect the European Court has established a liability which looks like a form of result-oriented liability which is independent of any misbehaviour by the state. Such liability contrasts with the legal systems of nearly all the Member States. Further, the Court has very strange opinions with regard to causation, which do not fit with the approaches of most of the national legal systems in respect of this issue.

¹³ On this and the following with further details Helmut Koziol, 'Comparative Law – A Must in the European Union: Demonstrated by Tort Law as an Example' (2007) 1 *Journal of Tort Law* 1-18, 4ff.

¹⁴ Sometimes because of the limited competence of the European Union.

¹⁵ See, e.g. Reinhard Zimmermann, *Die Europäisierung des Privatrechts und die Rechtsvergleichung* (De Gruyter 2006, Berlin) 13; Peter Hommelhoff, 'Zivilrecht unter dem Einfluss europäischer Rechtsangleichung' (1992) 192 *Archiv für die zivilistische Praxis* 71-107, 102; Ivo E Schwartz, 'Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft' (1994) 2 *Zeitschrift für Europäisches Privatrecht* 559-584, 570; Helmut Koziol, 'Ein europäisches Schadenersatzrecht – Wirklichkeit und Traum' [2001] *Juristische Blätter* 29-38.

¹⁶ In more detail Helmut Koziol, 'Staatshaftung für die Nichtbeachtung von EU-Recht. Some critical points' in Tichý (n 13) 145-156, 150 ff; Birgit Schoisswohl, *Staatshaftung wegen Gemeinschaftsrechtsverletzung* (Springer 2002, Vienna-New York) 273ff.

In addition, it must be pointed out that those who design the EU's directives and regulations but also the European Court have a deplorable lack of knowledge of the fundamental functions, prerequisites, aims and legal consequences of the individual legal instruments and also of their interplay. In this connection, it appears that the awareness of the necessity for specific requirements to be appropriately linked to specific legal consequences is diminishing. For example, according to Directive 2007/64/EC on payment services,¹⁷ in case of non-performance of a transfer order, the payer's payment service provider has to refund to the payer the amount of the non-executed payment transaction if there is liability (Art 75). Although the wording gives the impression that liability under the law of damages is at stake, it is astonishing to see that fault is not required. Ultimately this may be justified because, in substance, the provider's obligation derives from the law of unjust enrichment. However, if one accepts this, it seems quite unreasonable that art. 78 rules that no liability at all exists in the case of abnormal and unforeseeable circumstances beyond the provider's control. Such grounds for exemptions are acceptable if compensation for imputable damage is at stake but not under the law of unjust enrichment: irrespective of the reasons for non-execution, there is no justification at all for granting the provider the amount he should have transferred.

Another example is set by the European Court: according to the recent judgment in the cases of *Gebr. Weber GmbH* and *Putz*, the non-fault based guarantee claims of a consumer when there is a delivery of faulty goods also include the costs of dismantling the non-conforming good and installing the replacement; however, other damage sustained by the acquirer as a consequence of the non-conformity is still not covered in the eyes of the CJEU either. As the costs for the removal of the non-conforming good or installation of the replacement are no longer part of the performance within the equivalence ratio, it already runs contrary to the fundamental principles that these costs be deemed covered by the guarantee rights, since these rights are aimed at creating the balance intended by the parties between performance and counter-performance.¹⁸ This is not about delivering the promised performance itself but about bearing the consequential damage that was triggered by the inadequate performance; thus, there is no sufficient grounds to impose liability for the damage upon the trader without considering any grounds for imputation at all. It must be stressed that granting a non-fault based claim for compensation for the expenses of installation and removal, i.e. of damage consequential to the defect, massively departs from a basic tenet of legal systems, namely that legal consequences must be balanced against the elements of the offence they derive from: This is the only way to achieve an overall system that is consistent and complies with the principle of equal treatment and hence the fundamental concept of justice.¹⁹ Moreover, the CJEU case law leads to a barely resolvable conflict of values, insofar as it only foresees non-fault based liability for the installation and

¹⁷ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC OJ L319/1.

¹⁸ Franz Bydlinski, *System und Prinzipien des Privatrechts* (Springer 1996, Vienna-New York) 181f; Michael Hassemer, *Heteronomie und Relativität in Schuldverhältnissen* (Mohr Siebeck 2007, Tübingen) 271ff.

¹⁹ See Helmut Koziol, *Grundfragen des Schadenersatzrechts* (Jan Sramek Verlag 2010, Vienna) no 2/90.

removal expenses, but not for all other damage consequential to the defect, for example, the disadvantages that arise until the defect is remedied due to the uselessness of the goods delivered or the things in which the defective goods were installed. To say the least, no convincing arguments are discernible in favour of a distinction – producing serious consequences – between different types of damage consequential to defects.

In addition to all these deficiencies, one has to stress that quite often the quality of the respective directives or regulations and also the judgments²⁰ is deplorable, as some of the single provisions are not based on a convincing idea and the concepts they are based upon are not understandable. This can again be shown by the directive on product liability. The reasons given for this directive point out that entrepreneurs' liability encompasses only defective goods which have been produced industrially. The idea behind this was that industrial mass production causes a special danger, namely the unavoidable risk of delivering defective products; the problem of the so-called 'Ausreisser' or 'runaways.' Even with all possible care, it is not possible to produce only flawless goods, or at least to withdraw all defective products from circulation. However, this idea would not justify establishing liability for defects caused by product design. What is even worse, the final version of the directive does not take any account of the above reason for strict liability and also includes defective products made by craftsmen, innkeepers, farmers and artists. It seems highly problematic that a great part of the directive's provisions are in clear contrast to the only valid reason for it which was explicitly stated at the beginning of the drafting process. Moreover, the lawmaker has never even attempted to justify the extended application of strict liability and it seems difficult to find any convincing arguments in favour of such broad and very strict liability – at least nobody has been able to come up with any.

All these shortcomings mean that the European legal systems are drifting away from a well thought-out, consistent system which follows the idea of equal treatment. *Pierre Widmer*²¹ therefore rightly diagnosed that, in the area of tort law, the EU provisions are even more inconsistent than the national provisions and that there is no recognisable overall concept. As a result, Community tort law is merely a torso and so the legal systems correspond less and less with the fundamental idea of justice.

III How to Proceed?

Of course, a significant number of the deficiencies could be avoided by taking more time and more care in designing directives, regulations and judgments. Nonetheless, there can be no doubt that unification and harmonisation are awkward processes which run into fundamental

²⁰ Stefan Lorenz, 'Ein- und Ausbaupflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung' [2011] *Neue Juristische Wochenschrift* 2041-2044, 2242, this referred to the standard of the decision in the CJEU on 16 June 2011, C-65/09 *Gebr. Weber GmbH v Jürgen Wittmer* and C-87/09 *Ingrid Putz v Medianess Electronics GmbH* ECR I-05257 as shocking.

²¹ Pierre Widmer, 'Die Vereinheitlichung des europäischen Schadenersatzrechts aus der Sicht eines Kontinentaleuropäers' (1999) 1 *Revue Hellénique de Droit International* 87-102.

difficulties:²² The national legal systems are part of the traditional culture of the respective countries and determine the social life of that country. A general European codification, but also the unification or harmonisation of some areas, could be a far-reaching break from tradition, although – as mentioned before – parts of the European legal systems, especially the law of obligations, are formed by Roman law and thus correspond to some extent. Moreover, as the many European legal systems developed independently from one another over centuries, the largely divergent legal cultures and habitual ways of thinking have to be reconciled. It will therefore be a time-consuming, strenuous and hard (as well as, to some extent, frustrating) process to reach the urgently needed goal of a general consistent concept for the unification of European private law. Nevertheless, one should not condemn the EU as a whole or simply complain about the situation and the difficulties, but instead try to improve the EU, try to influence the harmonisation process and to do it better by overcoming the hurdles. Hence, the decisive question is how we can improve harmonisation of the legal systems of the Member States.

I am convinced that we can reach the goal of reasonable harmonisation or unification of tort law in the EU only by drawing up, as a first step, a new and consistent concept which is acceptable to all or at least to most of the Member States. I am also convinced that this aim will be attainable only by embarking on intensive comparative law work:²³ First of all, we have to know more about other legal systems to better understand each other, to explore the different legal cultures and the ways of thinking in other countries. In this way, we will recognise the common bases, receive many valuable stimulations, be inspired by alternative solutions and discover new tools for solving problems, become more open-minded to different ideas and increase our understanding of fundamental perspectives; we will learn which differences in legal culture we have to take and will know which largely divergent habitual ways of thinking have to be reconciled.

However, it must also be pointed out that the more different the foreign legal systems, the more dangerous it is to drawing inspiration from these systems. When I say ‘different’ I not only refer to the differences in parts of private law, e.g. tort law, or the whole of private law, but also to fundamental divergences in the overall legal systems,²⁴ including, for example, the social security system or criminal law, because these may be of greatest influence on tort law.

²² See on this Helmut Koziol, ‘Rechtsvereinheitlichung auf europäischer Ebene aus privatrechtlicher Sicht’ in Faure, Koziol, Puntischer-Riekman, *Vereintes Europa – Vereinheitlichtes Recht* (n 8) 50ff.

²³ See the recommendation by Basil S Markesinis, *Comparative Law in the Courtroom and Classroom* (Hart Publishing 2003, Oxford) 157 et seq. See also Basil S Markesinis and others, ‘Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)’ (2004) 52 *American Journal of Comparative Law* 133-208.

²⁴ Cf. Markesinis, *Comparative Law* (n 23) 167 et seq.

IV Different Legal Cultures²⁵

First of all, one has to consider the differences between the common law system and the Continental civil law systems: The characteristic feature of Continental legal systems is that they are based on codes, unlike the case law systems of the UK and Ireland. However, there is also quite significant divergence between the 'legal families' under civil law, e.g. the German and the French, and even members of the same legal family show fundamental differences. Let us take, for example, two German speaking countries: the Austrian and the German Code date from different times – 1811 and 1900 – and therefore the Austrian Code is a product of the 'Age of Enlightenment' whereas the German Code is strongly influenced by the theory of Pandectism, which is based on Roman law. The basic ideas behind them have a lasting influence on the respective legal systems as a whole.

There are also significant differences as regards allocating the duties between the legislator and the courts; not only between the common law countries with the dominant role of case-law designed by the courts, but also between the Continental civil law systems based on codifications. It is, for example, obvious that on the one hand the French Code civil, the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB), the Dutch Code and also the new Hungarian Code prefer flexible general principles over detailed casuistic provisions, thus entrusting the courts to apply the provisions of the law to individual cases, whereas, on the other hand, the German Bürgerliches Gesetzbuch (BGB) tends to strict and detailed rules without scope for development.

However, I do not intend to deal with these general characteristics of culture in more detail as they are well known; instead I want to introduce some differences in culture which are decisive for the design and development of tort law.

I begin my book on 'Basic Questions of Tort Law from a Germanic Perspective'²⁶ by pointing to the old Roman rule *casum sentit dominus*, expressing the idea that the person who suffers damage must, in principle, bear this damage himself. There must be particular reasons to justify allowing the victim to pass the damage on to another person. The accent is thus more on corrective justice than on distributive justice. The same is true for the United Kingdom,²⁷ among others. On the other hand, France – usually differing from the other Continental European countries – emphasises a victim-oriented approach²⁸ in tort law and thus underlines the idea of distributive justice. According to *Askeland*,²⁹ distributive justice solutions also enjoy

²⁵ To be recommended is the special issue of the Journal of European Tort Law (JETL) on Cultures of Tort Law in Europe: Ken Oliphant, 'Culture of Tort Law in Europe' (2012) 3 JETL 147-157; Jean-Sébastien Borghetti, 'The Culture of Tort Law in France' (2012) 3 JETL 158-182; Jörg Fedtke, 'The Culture of German Tort Law' (2012) 3 JETL, 183-209; Håkan Andersson, 'The Tort Law Culture(s) of Scandinavia' (2012) 3 JETL 210-229; Richard Lewis, Annette Morris, 'Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation' (2012) 3 JETL 230-264.

²⁶ Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag 2012, Vienna).

²⁷ Oliphant, (2012) JETL 156.

²⁸ Borghetti, JETL 2012, 158 f; Olivier Moreteau, 'French Report on Basic Questions' in Helmut Koziol (ed), *Basic Questions of Tort Law in a Comparative Perspective* (forthcoming).

²⁹ His paper will be published in 2014 in Koziol, *Basic Questions of Tort Law in a Comparative Perspective* (n 28). See also Andersson (n 25) (2012) JETL 216ff.

broad support in Scandinavia. It is thought fair that he who has caused damage should pay compensation.

These differences in tort law are less important in the area of personal injury because there they are largely levelled out by the social security systems. This seems to be true for all EU Member States, at least for the German speaking countries³⁰ as well as for the United Kingdom,³¹ France,³² Hungary³³ and the Scandinavian countries,³⁴ in contrast to the much less exhaustive American social security system. Nonetheless, while the varying cultures of compensation under tort law are to an extent adjusted by social security systems, the differences in the social security systems create astonishing differences in respect of tortfeasors' liability. The extensive compensation of victims in Scandinavia, as well as in Poland, is accomplished by overlapping tort law in the area of personal injuries to a large degree with the rules of insurance and social security schemes; however, it is most impressive that the legislator has additionally abolished the social security institutions' right of recourse.³⁵ Therefore, with regard to personal injuries, the Scandinavian and the Polish legal systems combine far-reaching compensation of the victim with the offender's far-reaching release from liability.

Providing for the victim's extensive compensation for losses caused by personal injuries via the social security systems makes the provision of comprehensive compensation under tort law less urgent. Hence, the argument that the highest-ranking protected interest deserves the most extensive protection by tort law no longer seems to apply as another legal instrument already ensures such protection. From the *victim's perspective*, protection under tort law is required in this area only as far as social security does not provide full compensation. Probably such loopholes do not usually concern the most important interests of the victim. Seen from the *compensation perspective*, we therefore come to the conclusion that the principle that 'the highest-ranking interests deserve the highest degree of protection' is no longer convincing; indeed, one can say that the opposite is true.

Looking at the – in most countries broadly accepted – preventive effect of tort law, no problem arises as long as the social security system has the right to claim recourse from the tortfeasor. From the *offender's perspective*, so to speak, there is no change if there is simply a replacement of the creditor. However, if such recourse is abolished, as under Scandinavian and Polish law, then the question arises as to whether other legal instruments – e.g. criminal law – have to be reinforced.

By means of these examples, we can learn that the interplay of tort law and social security law is of the highest importance when designing tort law provisions. This realisation may be of some influence when rating the product liability rules provided by the EU – the EU's main product in the field of tort law. As in the case of damage to property, only the consequential loss is covered

³⁰ Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (n 26) no 2/74ff.

³¹ Lewis, Morris, (2012) JETL 232ff.

³² Borghetti, (2012) JETL 164ff.

³³ Attila Menyhárd, 'Hungarian Report on Basic Questions' in Koziol, *Basic Questions of Tort Law in a Comparative Perspective* (n 28).

³⁴ Andersson (n 25) (2012) JETL 219ff.

³⁵ Andersson (n 25) (2012) JETL 220.

and only if the property has served mainly for private purposes; the field of application is above all personal injury. However, this is – as we have just learned – exactly the area where victims enjoy extensive protection by the social security system and no urgent need for their additional protection by tort law can be diagnosed. Thus, one could say that the producer's strict liability is solely an advantage for social insurers who can claim redress, but even this is not true under those legal systems which have abolished the recourse against the offender. Moreover, under these legal systems, there is no preventive effect of the product liability provisions either. Bearing all this in mind, the question as to which reasons or – in other words – which elements of liability can justify such quite strict producer's liability, gain importance and one begins to have one's doubts as to whether there was really such an urgent need to provide for such strict liability of the producers.

Quite different legal cultures in the area of tort law itself can be recognised in respect of accepting strict liability; this area is also interesting because of the interplay between tort law and the system of compulsory insurance: in the area of strict liability, European legal systems show much more diversity than in other areas of tort law.³⁶ On the one hand, the scale begins with the very far-reaching French strict liability of the holder of a thing, the *gardien*. This strict liability is not based on the special dangerousness of factories or things but is really independent of such ideas. This leads to some astonishing results: A four-year-old child was sitting in the upper floor on the windowsill drawing a picture with a pencil on a piece of paper. Unfortunately the child – in looking down – lost its balance and fell down with its pencil still in its small hands. The child was lucky as it fell on a pedestrian and not on the pavement but it hurt the pedestrian with its pencil. The French court was of the opinion that the child is the *gardien* of the pencil and therefore strictly liable for the damage caused by the pencil.

Much more convincing is the modern Hungarian general clause on 'Liability for extra-hazardous activity', pointing out that it is high dangerousness which justifies strict liability. section 6:535 reads: 'The operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it.'

Perhaps in the middle is Germany's legal system; special legislation establishes strict liability for the keepers of a variety of dangerous things. England is at the other end of the scale; the English legal system is very reluctant to recognise strict liability. The absence of any strict liability for motor vehicles is perhaps the most marked difference between English law and that of most European countries.

The majority of European legal systems have introduced rules on strict liability and it is important to note that they have coupled their liability rules with the imposition of some compulsory insurance schemes as well as compensation funds. Consequently, while dangers resulting from the object as such (for example, motor vehicles which can move at high speed and bring about substantial harm) were certainly considered by the legislators in those

³⁶ See in more detail Bernhard A Koch, Helmut Koziol, 'Comparative Conclusions' in Bernhard A Koch, Helmut Koziol (eds), *Unification of Tort Law: Strict Liability* (Kluwer Law International 2001, The Hague / London/Boston) 395ff.

jurisdictions, an overall view supports the impression that *Israel Gilead's* following statement³⁷ not only applies to Israel: 'The absolute liability attached to motor vehicles has been designed and actually functions as a tool for channelling the burden of road accidents to insurers.' Therefore, at least some notion of loss-spreading amongst those who profit from traffic seems to justify strict liability in those countries.

A further serious difference between the common law and Continental European legal systems is that common law countries, especially the USA, but also – to a lesser degree – England and Israel, think highly of punitive damages while Continental European countries reject them.³⁸ This contrast stems from a fundamentally different way of thinking and from focussing on different aims of tort law. Common law countries underline the preventive function of tort law; nevertheless, by accepting punitive damages under tort law one oversteps the borderline between private and criminal law and thus neglects criminal law's fundamental principles, namely, e.g. *nulla poena sine lege* and rules on burden of proof.

It is astonishing that Continental European lawyers seem to feel much less need for punitive damages than their colleagues in the USA and England. The reasons underlying this phenomenon may be some differences between the legal systems. It seems possible that, under US law, punishment under *criminal law* is of less importance than in Continental Europe,³⁹ this may be true to an even higher degree in the area of *administrative penalty law*. Thus, there may be a greater need for punitive damages in the USA than in Europe. But there are a number of other possible reasons, which have been elaborated elsewhere.⁴⁰

V Different Ways of Thinking

When trying to harmonise European law, one must further consider the difficulties caused by the various ways of thinking; these are very different and involve different levels in the various legal families.⁴¹ An illustrative example is the difference between the English, French and German ways of legal thinking.⁴² The difference between the English case law system and the Continental civil law system is obvious: English lawyers have to look out for similar cases; Continental lawyers start with an abstract rule provided by the code. However, there are even astonishing differences

³⁷ Israel Gilead, 'Israel in Koch', Koziol (eds), *Unification of Tort Law: Strict Liability* (n 36) no 45.

³⁸ An overall view is provided by the country reports in Helmut Koziol, Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009, Vienna – New York); Lotte Meurkens, Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012, Cambridge – Antwerp – Portland).

³⁹ Esther Sonntag, *Entwicklungstendenzen der Privatstrafe* (Berliner Wissenschafts-Verlag 2005, Berlin) 348ff.

⁴⁰ Helmut Koziol, 'Comparative Report and Conclusions' in Koziol, Wilcox (eds), *Punitive Damages* (n 38) 54ff.

⁴¹ See Filippo Ranieri, *Europäisches Obligationenrecht* (3rd edn, Springer 2009, Vienna – New York) 2f.

⁴² See Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany' (2000) 59 *Cambridge Law Journal* 294-309; Basil Markesinis, 'French System Builders and English Problem Solvers: Missed and Emerging Opportunities for Convergence of French and English Law' (2005) 40 *Texas International Law Journal* 663-690; Ronen Perry, 'Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule' (2004) 56 *Rutgers Law Review* 711-788, 719, who gives an interesting example in the area of pure economic loss.

between the legal systems on the Continent: Germans tend to adopt a very systematic way of thinking and usually try to give a convincing reason for the decision at both the legislative and the judicial stages. The French legislator and the Supreme Court almost never give sufficient reasons and therefore one never knows why a case is solved in a particular way and one never knows beforehand how the next case will be solved.

To overcome these differences, we need a consistent overall concept at European level, which can serve as a signpost for future directives by showing the European Union how directives can fit into a consistent system. Such a concept can further stimulate national legislators in respect of future development of their national legal systems and – maybe – ultimately provide a basis for a future common European tort law⁴³. Designing such a concept will be not easy, will require much time, patience and openness to ideas which we are not used to at all, a willingness to accept compromises and last but not least hard work, first of all on comparative law. If all show goodwill and cooperate in a reasonable way, we will reach the goal; maybe not an ideal concept on the first go, but the basis for further improvement.

VI Method of Designing the Draft

Different approaches may be taken in order to design such a concept and draft provisions. The European legislators have usually hitherto applied two different methods in this respect; on the one hand, firm, detailed rules, and, on the other hand, general, elastic rules which must be put into concrete terms by the courts.⁴⁴

The basic rules of tort law provide very good examples of the difference. The German Civil Code, the Bürgerliches Gesetzbuch (BGB), clearly tends towards the first-named method of firm, detailed rules: ‘Whosoever unlawfully injures, intentionally or negligently, the life, body, health, freedom, property or other right of another person, has an obligation to the other person to compensate the resulting loss.’ [section 823 (1) BGB]⁴⁵

The rules in the French Code civil and the Austrian ABGB, both of which are almost 100 years older than the BGB, on the other hand, are formulated in a more general and elastic manner: ‘Tout fait quelconque de l’homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.’ [Art 1382 Code civil] (*Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.*)⁴⁶

⁴³ As to the different means of harmonisation and unification see Jochen Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* (Mohr Siebeck 1993, Tübingen).

⁴⁴ See Helmut Koziol, ‘Begrenzte Gestaltungskraft von Kodifikationen? Am Beispiel des Schadenersatzrechts von ABGB, Code civil und BGB’ in Constanze Fischer-Czermak and others (ed), *Festschrift 200 Jahre ABGB I* (Manzsche Verlags- und Universitätsbuchhandlung 2011, Vienna) 469-493.

⁴⁵ Translation by Jörg Fedtke, Florian Wagner- von Papp, ‘Germany’ in Ken Oliphant, Barbara C Steininger (eds), *European Tort Law: Basic Texts* (Jan Sramek Verlag 2011, Vienna, 91-103) 93.

⁴⁶ Translation by Olivier Moréteau, ‘France’ in Oliphant, Steininger (eds), *Basic Texts* (n 45) 85-90, 85.

Similar is the wording of section 1295 (1) ABGB: 'Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by breach of a contractual duty or independently of any contract;' [...] ⁴⁷

The new Hungarian Code also prefers the elastic style: section 6:519, the general rule of liability, reads 'Whosoever unlawfully causes damage to another person shall be liable for such damage'.

The precise list of protected goods in section 823 (1) BGB contains more information than is covered by the very generally worded blanket clauses in Art 1382 Code civil, section 1295 (1) ABGB and section 6:519 Hungarian Code. However, the fact that the German legislator has regulated far more details means that wrong decisions by the legislator also have a more noticeable effect due to the rigidity of the provisions, and statutory rules are also more likely to become inappropriate due to social, technical or economic changes, while the indefinite scopes of the Code civil and the ABGB allow the courts room to manoeuvre in order to keep up with progress.

Moreover, it must be noted that the German approach to formulating provisions has not led to legal certainty, one example being *pure economic loss*. Pure economic interests are not covered at all by section 823 (1) BGB. German jurists feel that this is too restrictive⁴⁸ and, therefore, have turned to section 826 BGB, the rule on liability in case of behaviour 'contra bonos mores' and have overstretched this provision. For example, intentional interference with contractual relations is always considered to be contrary to public policy and therefore, in essence contractual relations are generally protected against intentional interference. In addition, section 826 BGB requires intent, but courts and scholars take a very broadminded approach to the effect that gross negligence is equal to intent.

Moreover, Germans also pave the way for claims on compensation for pure economic loss by expanding the area of contractual liability, where pure economic loss has to be compensated. Therefore, culpa in contrahendo and positive *Forderungsverletzungen* (violation of duties of care between the parties to a contract, even if the contract is null and void) are declared to belong to the area of contractual liability, although the relevant duties are not established by agreement of the parties. German lawyers also use conjuring tricks to try to establish *Verkehrssicherungspflichten zum Schutz des Vermögens*; a construct so strange that it cannot be translated into English, but has been described by *Markesinis* as follows:

Whoever, by his activity, establishes in everyday life a source of potential danger which is likely to affect the pure economic interests of others is obliged to ensure their protection against the risks thus created by him.

Last but not least, the German lawyers accept a mysterious *Recht am Gewerbebetrieb* (right to the business establishment).

It seems that German lawyers have become accustomed to all of this because they have been indoctrinated since their legal childhood.⁴⁹ However, an outside observer gets a strong impression that, because of the strictness of the code, our German colleagues end up trying to get around

⁴⁷ Translation by Barbara C Steininger, 'Austria' in Oliphant, Steininger (eds), *Basic Texts* (n 45) 1-13, 3.

⁴⁸ Münchener Kommentar/*Wagner*, BGB V (5th edn, CH Beck 2009, München) section 823 no. 186.

⁴⁹ Helmut Koziol, 'Glanz und Elend der deutschen Dogmatik. Das deutsche Zivilrecht als Vorbild für Europa?' 212 (2012) *Archiv für die civilistische Praxis* 1-62, 60.

its provisions in a rather illicit way, by circumvention of the statutes and by the famous ‘Flucht in die Generalklauseln’ (escape into the blanket clauses) – the commentaries on the general clauses section 242 and section 826 BGB really speak volumes (in every meaning of the word). Such – broadly speaking – illegal proceedings are a habit-forming drug and have led German courts and scholars to become accustomed to ignoring fundamental value judgements and decisions of the legislator without any sense of shame. I could give quite a few examples, but I call your attention only to the bypassing of provisions regarding form and time prescription. All of this produces an astonishing result: the more generous, even untidy, Austrians respect their code to a much greater degree than the orderly Germans.

A lesson on legal policy ought to be drawn from this: If the legislator tries to restrict the courts’ room to manoeuvre to an unreasonable extent with firm, detailed rules, then it ultimately achieves the opposite effect and legal certainty results to a lesser degree than with more elastic provisions.⁵⁰

However, we must now take a glance at section 1295 ABGB and compare its solution for pure economic loss with the German version. At first sight, we see that this provision says nothing about the protection of pure economic interests. One can only infer from the wording that it seems possible to claim compensation for pure economic loss, as section 1295 rules that everyone is entitled to demand compensation from the person who did him harm by fault. Nonetheless, the decisive questions as to what extent pure economic interests enjoy protection and when causing pure economic loss violates a duty of care are not answered. The same seems to be true under the new Hungarian Code: according to section 6:520 lit d, it is decisive whether the conduct interferes ‘with legally protected interests of another person’, but it does not say how far pure economic interests are protected.

A glance at French tort law reveals how much room to manoeuvre is left by provisions like those of the ABGB on tort law: although the wording of the tort law provisions of the French Code civil is nearly the same as those of the ABGB, French tort law is not only totally different from today’s Austrian tort law, but also very different to French tort law at the beginning of the 19th century on the same legal basis as today.

Such open provisions already pose problems in a national legal system, but even more so in rules intended to unify European private law, because they will be interpreted in the individual Member States in very different ways, as the legal tradition in each country differs to quite some extent.

I feel that a middle course would be reasonable and that, therefore, the *flexible system*, designed by *Walter Wilburg*⁵¹ on a comparative basis, can give valuable support.

Wilburg makes two fundamental observations.⁵² First, he recognises the *plurality* of independent valuations and purposes inherent in large legal complexes. The law may thus *not* be understood, interpreted and applied from the perspective of a *single* guiding idea. However, this must not be allowed to lead to an equity jurisprudence of countless unpredictable ad hoc

⁵⁰ See Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991, Vienna – New York) 533f.

⁵¹ Walter Wilburg, *Die Entwicklung eines beweglichen Systems im bürgerlichen Recht* (Kienreich 1950, Graz); idem, ‘Zusammenspiel der Kräfte im Aufbau des Schuldrechts’ 163 (1964) *Archiv für die civilistische Praxis* 346-379.

⁵² Franz Bydlinski, ‘A “Flexible System” Approach for Contract Law’ in Herbert Hausmaninger, Helmut Koziol, Rabello, Israel Gilead (eds), *Developments in Austrian and Israeli Law* (Springer 1999, Vienna – New York, 9-20) 10.

viewpoints that may be alternately observed or ignored in isolated decision-making processes. On the contrary: all basic guidelines inherent in a given area of the law have to be observed in the light of their specific interaction in certain types of cases, that is to say in a generalised context. *Wilburg* calls these independent fundamental values ‘elements’ or ‘forces’; one could also say ‘factors’ or ‘system-forming principles’⁵³. The plurality and autonomous weight of *Wilburg*’s principles clearly distinguish his theory from all attempts to explain and apply major areas of the law on the basis of any single fundamental idea. Such attempts always necessitate the overemphasis of some basic values and purposes by means of fictional extension and the downgrading of others, despite their autonomous effects. *Wilburg* therefore opposes all attempts to provide monocausal explanations based on exclusive principles. This view has already become widely accepted today.⁵⁴

Aside from the plurality of principles in a major area of the law, *Wilburg*’s system emphasises their *gradation*; in other words, the ‘comparative’ character of the ‘elements’. The legal consequence in a specific case results from the comparative strength of the elements in their interplay. The elements thus exhibit a clear, multifaceted structure of ‘more or less’. In the case of colliding principles, a compromise must be found by determining priorities. It is important to point out that regard must be had not only to the gradations of the relevant elements in establishing a legal consequence but also the possibility of grading the *legal consequences*.

Criticism of the flexible system is very often based on the misapprehension that the disciples of this system are aiming at rules as flexible, uncertain and hazy as possible. However, this is not true at all and therefore akin to defamation. The leading scholar of the flexible system, *Franz Bydlinski*⁵⁵, underlined quite a different basic idea:

Insofar as there are typical, clearly comprehensible facts, also as regards the consequences of a rule, the requirements of legal certainty and pragmatism, i.e. in this context predictable and simple application of law, and moreover also fairness and equality, support adherence to the system of fixed rules and prohibitions within the legislative system. Also, in cases where legal certainty is one of the particular aims of a law, there will be no (or at least very little) room for ‘flexible’ enclaves. A basically flexible law on bills of exchange, real property law, procedural or punitive law is certainly impossible.

Due to the complexity of the problems and the variety of the facts in different cases, it is by no means always possible to design firm rules in private law. But even then, *Wilburg* is not in favour of formulating sets of merely discretionary rules which can be either observed or ignored altogether in the decision-making process; at random; on the contrary. However, the flexible system offers a middle course between rules with firm and strict elements and vague general

⁵³ On the relation between *Wilburg*’s system and the ideas of the theory of principles, see Franz Bydlinski, ‘Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft’ 204 (2004) *Archiv für die civilistische Praxis* 309-395, 329ff, as well as idem, ‘Die “Elemente des beweglichen Systems”: Beschaffenheit, Verwendung und Ermittlung’ in Bernd Schilcher, Peter Koller, Bernd-Christian Funk (eds), *Regeln, Prinzipien und Elemente im System des Rechts* (Verlag Österreich 2000, Vienna, 9-29).

⁵⁴ Koziol, *Basic Questions* (n 26) no. 6/1 ff.

⁵⁵ Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (n 50) 534.

clauses: by describing the decisive factors which the judge has to take into consideration, the legislator can reach a much higher level of concretisation and considerably restrict the discretion of the judge. As such, the decision of the court becomes foreseeable and understandable on the one hand and, on the other, still allows consideration to be made to the variety of facts in different cases in a guided manner. The interplay of the different factors, which may be present in different intensities, is decisive for the legal consequence.

One concluding remark: it is manifest that the flexible system not only has special merits as regards the development of national laws but in particular in respect of the harmonisation of laws, as it provides an appropriate way to satisfy two, opposing claims to the greatest extent possible, namely by not merely setting up blanket clauses in dire need of more specification on the one hand, or rigid rules on the other that cannot do justice to the multitude of individual cases and moreover hinder all adaptation to changed circumstances.⁵⁶ By stating the material factors to be taken into account by the judge, the system accomplishes a significant degree of specification, decisively limiting the discretion of the judge and rendering the decision foreseeable but also allowing consideration of the diversity of possible facts in a controlled manner. The flexible system is moreover highly suitable for the development of rules in which the factors deemed to be material in the various legal systems may be included and which take account of the variously weighted evaluations as far as possible.⁵⁷

The European Group on Tort Law has tried to follow up this line of thought in setting signposts for judges by mentioning the relevant factors. Art 2:102 Principles of European Tort Law gives a good example; this provision reads:

Protected interests. (1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity and liberty enjoy the most extensive protection. (3) Extensive protection is granted to property rights, including those in intangible property. (4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered interest, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim. (5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases. (6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

I feel that this method could be helpful in harmonising European law.

⁵⁶ Helmut Koziol, 'Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadensersatzrecht' (1996) 4 *Zeitschrift für Europäisches Privatrecht* 587-599.

⁵⁷ Helmut Koziol, 'Rechtswidrigkeit, bewegliches System und Rechtsangleichung' [1998] *Juristische Blätter* 619-627; idem, 'Diskussionsbeitrag: Rechtsvereinheitlichung und Bewegliches System' in Schilcher, Koller, Funk (eds), *Regeln, Prinzipien und Elemente im System des Rechts* (n 53) 311ff.



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