

Thoughts on harmonisation of tort law in the European Union

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At present unfortunately, the European Union is marked by a return of nationalism and the Member States' pursuance of their own, separate economic and political interests. The feeling of solidarity and the great concept of peaceful interaction to the benefit of all are being pushed into the background. This is why at the moment there is unfortunately no longer the momentum to create a uniform code on European private law.

Nonetheless, the EU is continuing a harmonisation of private law here and there by means of **Directives and Regulations** related to narrowly defined areas. The most important example in tort law is the Product Liability Directive, introducing a strict liability for some entrepreneurs; such liability was previously unknown to European legal systems and hardly fitting in. The basic ideas behind such liability are still unknown, thus also the reasonable borderlines of such liability.

Additionally, the **European Court of Justice** contributes towards unification. Sometimes it creates completely new rules. An impressive example is offered by the recognition of the *liability of Member States* when EU law is violated. The European Court of Justice introduced thus a liability of states also for legislative acts of parliament, which is independent of any misconduct on the part of the state. This is a form of liability unknown previously to most Member States. Furthermore, the Court developed very particular views in relation to causation, which cannot be reconciled with most national legal systems.

Such scattered harmonisation of law leads to double fragmentation. Not only are the very different national legal systems interspersed with rules often alien to them, but additionally the Directives and Regulations of the EU are not based on a consistent overall concept either, so that they come into conflict with each other. Disregarding the principle of equal treatment contradicts the fundamental idea of fairness and leads to legal **disorder** instead of legal order. *P. Widmer* already pointed this out forcefully years ago. Thus, an **overall concept** from the European Union, as a basis for the individual rules, would be urgently necessary in order to avoid a further decline of legal culture in the EU.

Drafting an overall concept is a difficult task as there are several obstacles in the way as the national legal systems are part of the traditional cultures and determine the social life of the country. Consider for example the French law, providing for generous claims, and the reserve in other legal systems; further the extension of contractual liability in Germany and the limiting tendencies in other countries. An overall European codification, but also any unification or harmonisation of sub-areas, can lead to serious deviation from traditions. This is true even though some parts of the European legal systems, in particular the law of obligations, are influenced by the Roman law and so there is some correspondence. Nevertheless, the national legal systems have developed independently of each other for centuries so that by now very different cultures and thinking patterns have to be brought into harmony. The road to a **consistent overall concept** for a European private law is therefore without doubt time-intensive, strenuous and difficult. Nonetheless, this concept is urgently necessary if a legal system fair, convincing and thus acceptable to all Member States is to be attained.

Happily, some preliminary work has already been done in the field of tort law by **academics**. Two working groups have submitted proposals: thanks to Jaap Spier's farsightedness the European Group on Tort Law was founded in 1993 and presented the Principles of European Tort Law to the public in 2005; the Study Group on a European Civil Code and the Acquis Group jointly published the Draft Common Frame of Reference three years later. Legal science should certainly continue to work eagerly on making the necessary concepts available, in order to give the EU the necessary basis for a consistent harmonisation and smooth the way for the individual, national legal systems to converge towards an overall European concept and thus helps future unification. In my opinion, such gradual reconciliation coming from within and not from above will in the next future be the more promising way to harmonisation in the EU.

In the context of these works, an even stronger focus should be placed on the aspect that in order to protect legal interests and goods not only the law of torts itself is important but also its position in the **overall legal system**. Therefore, the interplay with preventive and reparative injunctions for example as well as unjust enrichment and surrender of profit claims must be kept in sight. Moreover, it is also necessary to coordinate with contract law, criminal law and public law. Such a comprehensive, overall concept does not even exist in all

national legal systems thus far. We should first close the gap for the individual legal systems before tackling the problem at European level.

Furthermore, it must not be forgotten that the manner of how the rules are set is of importance for the harmonisation of the national legal systems. On the one hand, the tendency towards simplifying, mono-causal reasoning, promoting one-sided, rigid and thus often inappropriate rules is noticeable. On the other hand, there is an increasing tendency towards ever more difficult, detailed rules taking account of a multitude of fact constellations and decision-making criteria. This is intended to serve fairness in the individual cases by avoiding different facts being treated as the same. This desire for completeness is – as experience shows – nonetheless in vain. Furthermore, even in legal systems recognised as having highly developed legal cultures, academics and even more so judges in the burdensome hectic of everyday work are no longer in a position to implement all the fine differentiations provided. We should not refuse to realize that even the members of the highest courts in Europe are increasingly unable to apply private law and in particular tort law rules in a consistent, reasonable way. Tort law rules are often too many and, moreover, they often prescribe consideration of circumstances it is barely possible to prove, while additionally the theoretical criteria for assessment and determination of the legal consequences often come close to the limits of transparency. When rules that should facilitate harmonisation are involved, then the different standards and legal cultures in the individual Member States are added to this mix, which does not make a uniform implementation in all legal systems any easier.

Naturally, no relief is offered by rules that call for the consideration of “all circumstances”, “equity”, “the general understanding” and similar empty phrases, since such legislature is in no way fulfilling its leading function. The floodgates for unequal treatment would be opened. Nonetheless, it will also have to be considered how far the refinement of the law should be pushed. If it becomes scarcely possible to draw the lines between the various detailed fact constellations relevant, or prove the criteria that must be taken into account, or clearly grasp the value judgments, then the rules can no longer be reliably managed by an average judge. This makes decisions unpredictable. This kind of pushing for a desired theoretical fairness in the individual case impairs legal certainty and thus also the idea of law to a greater extent than a theoretically less perfect but more manageable rule. This aspect should not be neglected either when working towards harmonisation.

Overcoming all these challenges could be easier to quite some extent by paying attention to the ideas of *Walter Wilburg* – the European Group on Tort Law has done so to some extent. *Firstly*, he emphasises the *plurality* of the value judgments and aims that operate in the respective legal field. Larger legal fields can usually not be understood and applied on the basis of just *one* notion. Thus, the law of liability cannot be explained one-dimensionally with the fault principle or source of danger principle or with the principle of economic optimisation. *Wilburg* therefore opposes all attempts to provide monocausal explanations based on exclusive principles and he underlines the interplay of a plurality of relevant factors.

Secondly, the weight of the individual criteria, the gradations and thus their comparative character as well as their interplay must be taken into account. For example, in case of intent, the most serious type of fault, liability can be established even if adequacy is very weak.

The emphasis on plurality and respective independent weight of the principles distinguishes *Wilburg's* concept from all attempts to explain larger legal fields by *one, single* legal principle.

This idea helps further on. For example even for establishing fault, a number of criteria are relevant, not only *one* factor is decisive. In this sense, Art 4:102 of the Principles of European Tort law points out the relevant factors. These are in particular the nature and value of the protected interests involved, the dangerousness of the activity, the foreseeability of the damage, and the relationship of proximity or special reliance between those involved as well as the availability and the costs of precautionary or alternative methods.

Becoming aware of the fact that quite a number of criteria are decisive in establishing fault can be helpful in bridging serious differences between legal systems. For example, continental European legal systems broadly accept strict liability based on the dangerousness of activities or things, in particular motorcars. In contrast, English lawyers rejects it; they can hardly be convinced that a regulation on strict liability based on dangerousness is reasonable and a necessity when codifying liability law. They may be more compliant when it is made clear to them that dangerousness is one of the most important factors in establishing fault. English lawyers – maybe unconsciously – take regard of this as a matter of course. Precisely therefore, the results in establishing liability of car-drivers are nearly the same in England as in continental European

countries. Thus, it is only a small further step to accept liability based on high dangerousness openly and above-board, even if there is no misbehavior at all.

Similarly, the different ideas about the area of contractual liability and tortious liability can be bridged. The most important criteria for establishing contractual liability is the proximity between the persons involved. Naturally, proximity exists to very different degrees and, therefore, it is a matter of course that there are many gradations of the relationship between the partners of a contract and between one person and the general public. Therefore, it would not be reasonable to treat the grey zone either according to the rules of contract or of tort law, but instead the consequences also have to be graded.

By mentioning this I have brought up another characteristic of *Wilburg's* theory: not only can the *prerequisites* for liability be graduated but also the *legal consequences*. These are determined in the individual case by the comparative weight of the elements in interplay with each other. Contributory fault offers a recognised example, with apportionment of damage depending on the gravity of the fault.

I have to underline, that of course *Wilburg* accepts the requirements of legal certainty and therefore prefers as far as possible hard and fast rules. However, 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 reasonable firm rules. But even then, *Wilburg* rejects merely discretionary rules. He offers a method for drafting a code, which avoids unreasonable hard, detailed rules but also empty phrases: the legislator has to set out the *basic value judgments* and how they interplay. Secondly, the weight of the individual criteria, the gradations and thus their comparative character have to be taken into account. Consequently, judges are provided with *valuable signposts*, but have enough room to manoeuvre.

Hence, *Wilburg's* system makes it possible to have regard in an optimal manner within the harmonisation process to the different national legal cultures and the varying solutions in them and therefore to increase the acceptance for consistent uniform rules.