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Principles of European Tort Law: Basis of Liability and Defences. A critical view "from outside"

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My first words should be to thank the members of the European Group on Tort Law[*] , who have made it possible for me to be here today. I have been entrusted with offering a critical view "from outside" on the Principles regarding fault-based liability and strict liability as well as contributory conduct. For obvious reasons of time, I will merely explain those issues that I find most controversial.

1. In my opinion, it has been inappropriate to include in paragraph (2) of Article 1:101, the *"Basic Norm"*, the cause (c), regarding *"liability for auxiliaries"*, as a differentiated basis of the legal attribution of damage.

The reason for this statement is definitely not that I would have considered it preferable to use a phrase with a more general meaning, so as to include also liability for minors or mentally disabled persons. To the contrary, in my opinion, one of the defects of the Principles is that two provisions with very different rationale have been included in a single Chapter, specifically, Chapter 6. While Article 6:102 establishes a rule of strict liability, Article 6:101 contemplates liability based on fault of the person in charge, on breach of the duty of care in supervision, with a simple reversal of the burden of proving fault which, in my opinion, should have been contemplated as a specific Article or paragraph of Chapter 4, Section 2.

The reason for my criticism of paragraph (2)(c) of Article 1:101, which implies also a general criticism to Article 6:102, is as follows. Once the Group has decided, correctly in my view, that the Principles should include a provision on *"Enterprise Liability",* I consider it erroneous to govern liability for auxiliaries separately and using a different rationale. It is, of course, reasonable to question whether Enterprise Liability should be regulated as strict liability (as proposed at the beginning of the '60s of the past century by P. Trimarchi in Italy and G. Calabresi in the United States) or whether, to the contrary, it should be regulated as liability based on fault in the organization of the enterprise –"organization" to be construed in its widest sense, including duties of supervision and control of auxiliaries–, according to the model established in Article 49a of the Swiss draft, which has been followed, in my opinion appropriately, in Article 4:202 of the Principles. What I think cannot be reasonably doubted is that there is no good reason for the entrepreneur to be liable for damages caused by its auxiliaries in a different and stricter manner than it is liable for the damages caused by its machinery or other technical equipment.

I say "there is no good reason", unless it is intended to find the rationale of vicarious liability in making the employer the legal guarantor or insurer of the liability of its employees. It is however apparently clear that this is not the logic of Article 6:102 of the Principles, since it does not establish as a requirement for its application that the auxiliary or auxiliaries should be actually liable, but only that they should have *"violated the required standard of conduct"*. Even this requirement is more than doubtful, as shown by the case in which a person uses a minor or a mentally disabled person as its auxiliary. It is highly significant that, in section 17 of his

[*] This is the text of my address at the «Conference for the Presentation of the *Principles of European Tort Law*», which was held in Vienna on May 19th and 20th, 2005.

Comments on Article 1:101 Professor Koziol writes that only *"some form of misbehaviour on the part of the auxiliary"* is required.

However, it is not possible to share the view, expressed in the same place, that this impedes liability for auxiliaries contemplated in the Principles from being classified as strict liability. It is in fact strict liability, since no fault is required from the person to whom Article 6:102 attributes liability. A different matter, as I mentioned earlier, is whether this decision is correct in the light of the rule contained in the same Principles on Enterprise Liability. In any case, I think that paragraph (2) of Article 1:101 would have been improved had it not included its subparagraph (c).

2. A possible alternative would have been to replace the current wording of said subparagraph (c) by another containing what is in fact a third category or *tertium genus,* together with liability based on fault and strict liability. I refer, naturally, to what German jurists call *"Aufopferungshaftung"*, *"responsabilità per atto lecito"* in the words of Italian jurists. It is difficult to understand the reason why the Principles do not contain any Article or paragraph relating to what could well have been named *"liability based on* [*benefit from*] *sacrifice of the interest of another".* This is even harder to understand, where paragraph (1)(b) of Article 7:101 expressly contemplates, as one of the defences based on justifications, that the actor acted legitimately "*under necessity*". This is one of those cases where, under European laws in general, damage should be indemnified by the actor or, preferably, by the third party who was in the situation of necessity, or by both of them jointly and severally.

It is obvious that the State or, in general, the Public Administrations are those that more frequently incur such third category of liabilities, since they have a general power to sacrifice private interests. The silence of the Principles on the matter of State liability apparently shows the intention of the Group to leave such liability to national law. This is explained by Professor Moréteau in section 22 of his Comments to Article 6:102. I do not find such abstention at all easy to understand. In my opinion, it would have been desirable for the Principles to have contained a rule in the sense that the liability of the State and, in general, of the Public Administrations should be governed by the same principles as the liability of private legal entities: neither more remnants of the old *"the king can do no wrong"*, nor the even more mistaken notion that public legal entities should bear stricter liability than private ones.

3. Article 4:101, under the heading *"Fault"*, is worded:

> *"A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct".*

The wording of this provision is very difficult to understand. In my opinion, the correct distinction does not lie between intentional or negligent *"violation of the standard of conduct"*, but between intentional or negligent "harm", something radically different.

"Negligent harm" exists where damage is attributable to negligence. Negligence exists where there is a violation of the required standard of conduct or, in other words, a breach of a duty of care; and not only where that violation or breach is non-intentional or unconscious, but also where it is intentional or conscious.

Surprisingly, the *"intentional harm"* contemplated, for example, in paragraph (5) of Article 2:102 of the Principles has disappeared in the wording of Article 4:101. The only manner in which the contrary position may be upheld would be by stating that the violated standard of conduct consists of the absolute duty not to cause harm to another. However, I consider it simply obvious that there is no absolute duty of *"alterum non laedere".*

4. Said error in Article 4:101 means that the systematic structure of Chapter 4 is also, in my opinion, incorrect.

It should have commenced with a Section entitled *"Intentional harm".* Such Section could perfectly have included Article 7:101, on "*Defences based on justifications*" (regarding which Article, by the way, I would like to know whether or not the omission of any mention to "unavoidable mistake" is due to a conscious decision of the Group to consider it always irrelevant). As all of you are aware, it has never been considered necessary in respect of negligence to give a specific treatment of "justifications", since this is generally contained in the balance of interests that characterizes the definition of the standard of care. A Section on *"Intentional harm"* would have also been a natural place to include a rule contemplating damage caused by abusive or faithless exercise of a right or privilege "to cause damage" (unfair competition, abuse of legal process, etc.).

Section 2 could have been entitled *"Negligence"* and have contained the rules in Articles 4:102, 4:201, 4:202 and 6:101 of the Principles. Article 4:103 would, in my opinion, fit more appropriately in Chapter 3, since it lays down those cases where omissions are equivalent to actions in terms of causation; and I have already stated my opinion that Article 6:102 should have been merged into Article 4:202, on Enterprise Liability.

It merely remains to be mentioned that Article 7:102 could have been included in Chapter 5, on Strict Liability, current Chapter 6 and Chapter 7 disappearing, unless Chapter 6 were used to rule what I have referred earlier to as *"liability based on sacrifice of the interest of another".*

5. On the other hand, I would not like to end my comment on Article 4:101 without expressing my opinion that the error in the wording of that Article is related to the use made by the Principles of the very German concept of *"wrongfulness"*. As proof of this, it will suffice to read said Article as follows: "A person is liable for intentional or negligent wrongfulness".

Professor Koziol may remember that years ago, when discussions commenced to draw up the Principles, I wrote him a letter letting him know my opinion that not only did the theoretical construction of tort law have no need for the notion of wrongfulness (as is demonstrated, for

example, by common law and French law countries and as has been upheld by a large number of Italian and Spanish jurists), but its use was furthermore clearly counterproductive. In fact:

> (i) Where it is intended to find wrongfulness in the unwanted result *("Erfolgsunrechtlehre")*, it is either necessary to uphold the existence of an absurd absolute duty not to cause harm to another, or the tendency is otherwise to state, erroneously in my opinion, that one of the conditions of liability is harm to an absolute right or interest protected *erga omnes* by a legal rule (a so called "primary norm") different from the tort law rules (which would be "secondary norms").
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> (ii) But where it is intended to find wrongfulness in the unwanted conduct *("Verhaltensunrechtlehre"),* this requirement is totally foreign to strict liability and, in the field of liability based on fault, it adds nothing to the intention to harm or to the breach of a duty of care, and it leads one to consider erroneously that the essential function of tort law is to penalize unlawful conduct so as to prevent or deter it.

The Principles only evade both bad alternatives in appearance. I find Articles 2:101 and 2:102 clearly unnecessary. It will suffice to read together the latter article and paragraph (1) of Article 4:102 to see that they are practically the same and could well have been identical. I am certain that a common law judge or, for example, a French or Spanish judge would find it extremely difficult to understand where the purpose of Articles 2:101 and 2:102 is different from that of Article 4:102(1) together with Article 3:201, on *"Scope of liability"*. We have two specific tools for the function of marking the outer perimeter of liability for negligence: "duty of care" and "scope of duty". We do not need another one called "protected interests": this is a clearly otiose "fifth wheel on the wagon". The "three stages approach" mentioned by Professor Koziol in section 4 of his Introduction to Chapter 2 is somewhat mystifying, because it is obvious that the first stage cannot be passed before the second and that the two should instead be gone through together. "Protected interests" does not label a general condition of liability, but the result or effect of the whole law of torts of a certain country in a concrete historical period. Finally, if wrongfulness in the field of strict liability is intended to permit the exclusion from it of the compensation of pure economic losses (or even of damages to property insured by the owner), this should be expressly provided for in Article 5:101 and not left to the judges who may or not deduce such exclusions from a rule such as Article 2:102 of the Principles.

6. In my opinion, Article 4:201 of the Principles is also misconceived. The reversal of the burden of proving fault in general need not to depend on the gravity of the danger presented by the activity, and should rather depend on the degree of control or of easier access that the defendant has the means to prove or clarify what actually occurred. Articles 4:202 and 6:101 contain specific applications of that idea, as do most European Civil Codes´ provisions on liability of the owner of a ruined building.

I am aware –since this is well explained by Professor Widmer in his Comments– that Article 4:201 is a product of the notion that the difference between liability based on fault and strict liability is

one not of essence but of degree, that we are before a continuum rather than two different categories. I dare not argue that this is the case in the court practice of certain European countries; however, in my opinion, the Principles should not convey the message that such trend should continue. No theoretical support should be provided to the wrong court practice of stealthily doing away with fault for reasons of mere subjective equity.

7. I will now deal with the rules of strict liability.

In my opinion, both paragraph (2)(b) of Article 1:101 and Article 5:101 of the Principles are excellent. Excellent, above all, because they clearly convey the fundamental idea, which I share, that the law of torts or the law of civil liability is a basic tool of Private Law having the modest purpose of making corrective justice ("corrective" in the same sense as that in which Professor Hart speaks of "justice in compensation" as opposed to "justice in distribution") between concrete plaintiffs and concrete defendants. The fundamental idea that European Tort Law, unlike the American law of torts (up to now), is not and does not wish to become a powerful instrument of Social Engineering, for redistribution and/or market deterrence purposes.

I only regret, in this respect, that the members of the Group have let themselves be seduced by the temptation of *"être a la page"*, adding at the end of Article 10:101 the sentence *"Damages also serve the aim of preventing harm"*, despite the fact that the Principles evidently exclude not only punitive damages (as properly mentioned by Professor Koziol in section 2 of his Comments to Article 1:101), but also all manner of "deterrent damages" for cases where conducts much deserving to be deterred due to their obviously unjustified damaging potential, have by chance not caused any damage. Prevention is not an aim of the law of torts, but a factual and occasional by-product of compensation.

8. However, in my opinion, it would have been most appropriate for Article 5:101 to have been the sole rule on strict liability contained in the Principles; although they could simultaneously recognize the possibility that the national laws may establish (not additional strict liabilities but instead) social security or social insurance systems to cover situations of necessity (as opposed to provide full compensation of damages) caused by activities that, while they are not "abnormally dangerous" pursuant to section (2) of Article 5:101, entail a very high risk of causing harm.

Road and airplane traffic provide two excellent examples of that. When carefully considered, most special laws on road accidents of the States of continental Europe are, in fact, social insurance systems, where "strict liability" has no purpose other than to determine the specific private insurance company, with which the owner of the motor vehicle has arranged the compulsory insurance, that has to pay the victim the legally scheduled amount. If you would be so kind as to imagine for an instant that all motor vehicle owners have to arrange their compulsory liability insurance with one and the same Public Office, you would be much better able to see what I mean.

Regarding, on the other hand, products liability, does anybody still have any serious doubt on the fact that products liability is not and will not become strict liability other than in the field of manufacturing defects (not for design defects, or for insufficient warnings), and on the fact that the rationale of strict liability for manufacturing defects is a logic of contractual law rather than of tort law?

Finally, I think that liability for the possession of a domestic animal (that cannot be considered an "abnormally dangerous activity", in contrast to the possession of a wild animal) should be not strict, but instead a fault-based liability with a reversal of the burden of proving fault; and in my modest opinion, French "*responsabilité du fait des choses*" deserves abrogation.

9. Quite the contrary, Article 5:101 of the Principles establishes the minimum (not the maximum) necessary strict liability, and Article 5:102 permits not only the national laws but also the national judges by analogy to establish strict liabilities for activities which are not abnormally dangerous.

This new sacrifice of the unifying function of the Principles for the benefit of national laws and judges, which I consider to be erroneous, immediately gives rise to certain difficult questions, such as the following: if the Principles, as they are currently worded, become uniform European law tomorrow,

> (i) Could a European State, on the grounds of Article 5:102, establish or maintain a legal or judicial rule of strict liability for damages caused by minors or mentally disabled persons, despite Article 6:101?
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> (ii) Or, even more important, could a European State establish a general or very wide strict Enterprise Liability? Professor Widmer has stated, in section 1 of his Comments to Article 4:202:
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>> *"Enterprise liability under these Principles is not strict liability. This seems to be the most important message* […] *particularly for the representatives of industry".*
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> May Article 5:102 of the same Principles be of use to contradict such an important statement?

10. In my opinion, it is at least necessary that these questions could be answered to the negative. It should be noted that paragraph (1) of Article 5:102 does not state that national laws can provide for further categories of strict liability for any activities that are not abnormally dangerous, but only for "*dangerous*" activities, even if the activity is not abnormally dangerous.

In my opinion, *"dangerous activities"* in paragraph (1) of Article 5:102 should be construed as activities *"that create a foreseeable and highly significant risk of damage even when all due care is exercised in its management".* As you may have observed I have just quoted subsection (2)(a) of Article 5:101. I believe the most appropriate construction of Article 5:102 would restrict its scope

of application to those activities that may not be considered "*abnormally dangerous activities*" (to which Article 5:101 would apply) for the sole reason that they are *"a matter of common usage".*

Unfortunately I am unable to find any indication in the Comments made by Professor Koch to Article 5:102 that such construction of mine is consistent with the intention of the members of the Group. The only reference I find in section 1 of his Comments is that *"a gradual expansion of the notion of strict liability may prove desirable, as long as it neither deviates from the internal standards of the respective jurisdiction itself nor from external standards (as compiled here) in a way which overturns the system as a hole"*. In my view, this reference is quite imprecise for such an essential issue.

Such imprecision is understandable. Were the proposed construction of Article 5:102 correct, a general strict "*responsabilité du fait des choses*", a general strict "*responsabilité du fait des animaux*" and a general strict products liability would have been rejected in the Principles. It is obvious that the possession of any thing or any animal and the production of any goods cannot be considered activities *"that create a foreseeable and highly significant risk of damage even when all due care is exercised in its management".*

11. As I do no want to try your patience any further, I will add only a few brief observations to Article 8:101, "*Contributory conduct or activity of the victim*":

(i) It is apparently not very consistent to have used the term *"contributory conduct"* in the heading of the Article to then use term *"contributory fault"* in its text. I prefer the latter expression although I am aware that from a technical standpoint no proper fault may exist against oneself, since it makes clear that the victim must have tortious capacity (a matter of discrepancy in European laws) and must have failed to exercise reasonable care by way of self-protection.

(ii) In the definition of *"contributory activity"* –i. e., *"any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor"*–, I find it impossible to understand the reason why the words *"or reduce"* are used. In my opinion, it would have been correct to omit them or, at the most, to have used the statement: "[…] to establish total or partial liability […]" .

(iii) To end with an applause, the decision made by the Group to consider that contributory fault of the person in charge of another who is a minor or subject to mental disability neither excludes nor reduces the damages recoverable by the latter definitely deserves one. Also to be applauded is the fact that the Group has not left to the national laws the power to establish or maintain the contrary rule. As it sensibly has not done in the vast majority of the Principles, of which Article 5:102 constitutes the most important and, in my opinion, most regrettable exception.