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The harmonisation of private law in Europe and children's tort liability: A case of fundamental and children's rights mainstreaming

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Abstract: The debate around private law harmonisation in the EU has gradually moved from a narrow scope of market-related issues to the creation of a European civil code. The relationship between this process and children's rights is, however, rarely acknowledged. The political, social and legal legitimacy of these harmonisation efforts have come under strict scrutiny, but hardly ever from the point of view of children. This article explores the impact of the process of legal harmonisation on children's rights, and uses the issue of children's tort liability as a case-study. The legal solutions in this field are analysed and compared, and the academic proposals for harmonisation are assessed. This choice of subject and approach allows us to assess the advisability of further harmonisation, illustrate the importance of socio-economic factors in this process, and highlight the relevance of children's rights and fundamental rights to this debate.

Keywords: harmonisation, private law, European Union, children's torts, fundamental rights, mainstreaming.

1. Introduction

The process of harmonising the legal systems of the European Union (EU) member states, broadly understood as including any measure falling between spontaneous convergence and full unification, has been on the list of EU priorities for many years. This can be seen from various Treaties' provisions, regulatory initiatives, and policies, both in regard to civil and criminal matters. Within the scope of this process one can include a variety of measures, binding and non-binding, leading, to a greater or lesser extent, to the approximation of the (statutory and case) law of the EU member states, thus including, but not being limited to, the traditional notions of maximum, minimum and partial harmonisation. Although children have never been the main actors of this process, they have been nonetheless inevitably affected, even if apparently only indirectly. The relationship between the harmonisation process and children's rights has, unjustifiably, rarely been acknowledged or properly analysed in academic debate or policy-making agendas. Furthermore, how that process of harmonisation has affected, and should affect, the private legal realm has been an object of great contention among legal scholarship. This debate, however, usually remains at an abstract, general level, without drawing the relevant implications for particular legal fields or groups of individuals, such as children.

The aim of this article is to assess the implications of the European process of private law harmonisation for the rights of children. The focus is on those children's rights of fundamental character, since the obligation to respect these rights in particular imposes absolute limits on the alternatives available to the policy-makers in the harmonisation process. To illustrate the discussion, the case-study of children's torts will be used. The article is thus structured as follows. In sections 2 and 3, the

process of European legal harmonisation, in particular in the field of private law, is discussed and assessed, as to contextualise the later sections of the article. We are then in a position to concentrate on the implications of this process for the particular case of children. As the case-study adopted refers to children's torts, section 4 discusses how the process of legal harmonisation has affected tort law, in general, and section 5 compares the law on children's tort liability in a selection of EU member states' jurisdictions. After analysing, in section 6, how both fundamental rights and children's rights should be borne in mind in all EU actions, the possibility and advisability of harmonising children's tort liability solutions throughout Europe is explored in section 7.

2. The process of European legal harmonisation

Initially, the process of European legal harmonisation was mostly concerned with issues of predominantly procedural, technical or formal nature. Harmonisation of substantive, value-charged legal issues has, nevertheless, also taken place with time. EU directives and regulations have been of crucial importance in bringing the different legal solutions in existence in its member states closer together, not only as a result of the notion of direct effect and of transposition measures, but also because of the interpretation that European and national courts and lawyers make of such legislative measures. Still, although the idea of harmonising legal solutions through the judiciary may seem attractive to some, the approval of legal provisions to the same end seems to be indisputably the most effective way of actually securing similar solutions for similar problems in all EU member states.

The process of legal harmonisation in the EU has so far affected mostly, in one way or the other, aspects of the functioning of the labour (for example, health and safety) and commercial fields (for example, competition and trade-marks), and non-exclusively national aspects of other economic areas. The EU's scope of action has been crucially restricted by its limited law-making competences, historically and generally circumscribed to matters which concern or have strong implications for the internal market. Moreover, the principle of subsidiarity, requiring EU institutions to only act in fields of shared competence when they are in a better position to achieve certain aims than member states, imposes general limitations on the actions of the EU institutions (Article 5(3) Treaty on European Union (TEU), Article 263 Treaty on the Functioning of the European Union (TFEU), and Protocol No. 2 to the Consolidated Versions of the TEU and the TFEU). Despite this principle and the lack of an EU specific competence to legislate on children-related matters, EU legislative action in its field of explicit competence possesses a strong effect on children, as legislating, for example, in the field of labour law, inevitably affects those children in the labour market.

Also, one may resort to the 'effet utile' argument in order to expand the aims and powers of the EU, whereby the necessary effectiveness of legal provisions may require the attribution of powers and competences not initially foreseen. Based on this argument, the possibility of legal harmonisation in the EU widens considerably, despite still having to be framed within the context of the case law of the Court of Justice of the European Union (CJEU) on Articles 114 and 115 TFEU (ex- Articles 95 and 94 TEC respectively), as in *Tobacco Advertising I* (C-376/98, *Federal Republic of Germany* v. *European Parliament and Council of the European Union*, decision of 5 October 2000), *BAT* (C-491/01, *The Queen* v. *Secretary of State for Health, ex parte:*

British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, decision of 10 December 2002), *Alliance for Natural Health* (Joined Cases C-154/04 and C-155/04, *The Queen, Alliance for Natural Health and Others* v. *Secretary of State for Health, and The Queen, National Association of Health Stores and Others* v. *Secretary of State for Health, National Assembly for Wales*, decision of 12 July 2005), and *Tobacco Advertising II* (C-380/03, *Federal Republic of Germany* v. *European Parliament and Council of the European Union*, decision of 12 December 2006). Bearing this in mind, and considering the lack of express EU competence in the field of children's rights, any EU action to harmonise rules pertaining to or affecting children is, apparently, strictly limited to those norms that possess cross-national implications and create distortions in the internal market. Still, the scope of the notions of 'distortion in the internal market' and 'necessary measures' to prevent such distortions has varied depending on the moment and context, thus leaving this issue unsettled.

Most importantly, the wording of Article 352 TFEU (ex-Article 308 TEC) introduced by the Treaty of Lisbon (which was signed in 2007 and entered into force in 2009), despite still requiring unanimous voting in the Council, does no longer limit the scope of this norm to actions necessary to attain the common market. Indeed, this provision now allows the EU institutions to take any action necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties. Considering that Article 3 TEU establishes the protection of the rights of the child as one of the aims of the EU, the doors are open to a much broader scope of action in the field of child policy at the EU level than until now.

Supported by (and occasionally despite of) these lines of argumentation and case law, institutions and individuals have slowly but laboriously worked throughout

time to harmonise European *private* law. It is therefore pertinent to assess how children's rights are also affected by harmonisation in this legal realm.

3. The harmonisation of European private law

Legal scholarship recurrently mentions the idea of a past European *ius commune*, based mainly on Roman law and in existence from the XII until the XVIII century. Whether such *ius commune* ever existed or not is not entirely agreed (Wijffels, 2000: 112; Collins, 2008: 149 ff). Either way, two centuries later, many efforts are being put together to revive an old, or create a new, European *ius commune*. The amount of research that has already been carried out on this idea is extensive and offers much food for thought. Indeed, the world of academic publications and projects on the feasibility of the harmonisation process of European private law is thriving and pertains to virtually all relevant fields, from contract to tort, from property to family law, none leaving children truly immune.

The path towards harmonisation is, however, full of difficulties and faces endless intricate problems. Issues of opportunity, necessity, reasonableness, legitimacy, means and aims, are bound to arise, and these spring up in relation to any legal matter, including children's rights, as it will be seen below. The institutional competence for, and political and constitutional legitimacy of, this process is recurrently questioned as well (Joerges, 2002; Rodotà, 2006; Weatherill, 2010). Political support across all (or at least most) EU member states would also be essential to pursue harmonisation. Some EU member states would arguably be very

reluctant to give up their cherished and long treasured civil codes, and are not at all enthusiastic about the idea of private law harmonisation.

Last, but not least, one has to deal with the issues of the practical feasibility and desirability of such harmonisation process. On the one hand, authors such as Legrand have considered that there is not, and there will be no, convergence between civil and common law systems, thus making any idea of harmonisation rudimentary, misleading and not feasible (Legrand, 1996). Yet, this thought is not shared by many other authors, who believe that legal cultures in general, and common law and civil law in particular, are not so contrasting at all, since they have open and dynamic identities, are both orientated by pragmatic ideas of justice, and are in fact converging in terms of terminology, legal practice, legal education, ideas and concepts (van Hoecke, 2000: 5 ff; Schäffer and Bankowski, 2000; van Dam, 2006: 119-122). On the other hand, other authors have invoked the added value of diversity and legal pluralism guaranteed by EU national jurisdictions (Harlow, 2002; Sefton-Green, 2006). There is the fear that a process of harmonisation of private law would waste this 'living laboratory of experimentation with best practice and of mutual learning' (Gerstenberg, 2004: 786). The level of (negative) impact of harmonisation on diversity and legal pluralism is dependant on the exact type of harmonisation measure in question (maximum, minimum, full, partial, etc). At any rate, and in relation to children, such arguments mean that having 27 different legal frameworks regulating a range of aspects of children's lives may be an extremely valuable arsenal of inspiration and best practices for lawyers, policy-makers and activists alike. Such legal diversity could also prove more adequate to regulate conveniently the different contexts and experiences of children across Europe, which still differ significantly (UNICEF, 2007; European Commission, 2009).

Crucially, it has also been appropriately argued that private law norms are not morally or economically neutral, on the contrary: since the XIX century, private law norms in most European national jurisdictions have embraced a contractual freedom, private autonomy and *laissez faire* logic, indicating a clear choice for a capitalist society. Simultaneously, several national constitutions have given the highest legal rank to the values of solidarity and substantial equality. As Comandè points out, in a time of reduction of the role of the state, liberalisation and market solutions for social issues, the regulation of European private law, namely of contract and tort law, is a fundamental tool in societal multi-level governance (Comandé, 2004: 22). Collins reinforces this idea by asserting that '[i]n modern societies, private law – principally the laws of property, civil wrongs and contracts governing relations between citizens – helps to channel [social] relationships, to stabilise expectations and sometimes to correct disappointments and betrayals.' (Collins, 2008: 2) Children are no exception to this. The position of children before the law is deeply affected by those rules commonly classified as belonging to the private legal realm, and these translate particular understandings and judgments of the role children should play in society. It is nowadays consensual that perceptions of the autonomy, value, capacity, development and freedom of children, as well as the consideration they should be accorded, change throughout time and place (Ariès, 1962; deMause, 1976; Shahar, 1990; Jenks, 1996). This process is inevitably accompanied by changes to the private legal norms that apply to children.

Private legal norms therefore reflect policy issues that entail notions of fairness, (social) justice, autonomy, reasonability, market and solidarity, whose exact content and implications have to be explicated and debated, rather than assumed (van Dam, 2006: 137; Maduro, 2006; Nogler, 2008). Any attempt to harmonise European private

law has to take this into consideration and not try to cloak this under the clothes of mere technical/technocratic exercises (SGSJEPL, 2004; Kenny, 2006). Illustrations of the ideological and value-charged nature of private legal norms can also be easily found in relation to children: although norms on contractual duties of, and ownership by, children constitute private legal norms and are commonly perceived as unproblematic and neutral provisions, they in fact reflect deeply entrenched societal and moral notions of what children should be responsible for, the obligations and power of adults over children, and the relationship between children and families. By ignoring the social values and ideological framework behind private legal norms such as these, the true nature of private law is being camouflaged in the process of European legal harmonisation, and the temporal and spatial relative character of the notion of childhood is being ignored or, even worse, denied. By contributing to this trend, the EU institutions and academics alike risk dehumanising law, by eliminating moral perceptions (Gerstenberg, 2004: 782), and imposing a neo-liberal agenda (Hesselink, 2004: 687; Kenny, 2006: 804).

Nevertheless, many other authors have declared legal harmonisation a necessary and positive step in the process towards achieving an internal market, diminishing the costs of legal diversity, and building a more united Europe. Let us also not forget that the aims of the EU now include the construction of a socially and economically fairer society, with express reference to children since the Treaty of Lisbon came into force in 2009 (Articles 2 and 3 TEU and 174 TFEU). A socially and economically fair society fundamentally and ultimately depends on the rules set by private law (Collins, 2008). Moreover, as Joerges puts it, ‘modern private law is intensively interwoven with regulations intended to control economic power and pursue social state policy objectives, and is involved in shaping such policy’ (Joerges, 2002: 4). It follows that

to achieve economic and social justice in relation to children, those private legal norms affecting them also need to be harmonised, or at least duly considered, by the EU institutions.

It can thus be argued that those living in the EU, including children, can only be accorded the same (fundamental) rights and duties if they are subjected to the same private law rules. Particularly in relation to the case-study explored below, children can only be offered the same (high) level of protection when they are liable for their conduct, namely in tort, the same way in all of the member states of the EU. From this perspective, children's tort liability possesses a sufficiently significant cross-national element and distortive effect in the internal market, or at least a sufficiently strong link to the aims of the EU, to activate EU's competence. Any other solution, no matter how politically or historically defensible, may distort and, inevitably, prevent real EU citizenship and real equality between all those living in the EU from taking shape. It is therefore arguably legitimate for EU institutions to take action in the European process of private law harmonisation whenever they deem it necessary, in the terms of and according to Articles 114, 115 and 352 TFEU (ex- Articles 95, 94 and 308 TEC respectively).

If this process should entail the drafting and enactment of a civil code as well, is yet another hurdle in this debate. According to some, this would be necessary to provide a coherent structure, fulfil the aim of market governance, play a symbolic function, adopt modern values of unity and progress, enhance social solidarity and community-building among European peoples, realise a European social model, and provide democratic legitimacy to the harmonisation process (Gerstenberg, 2004: 786; Collins, 2008). To this effect, since 1989 EU institutions have taken several initiatives towards greater harmonisation, namely by calling for legal studies and draft codes that

would contribute to a 'European Code of Private Law' or a 'Common Frame of Reference'. Although having asserted that it has no intention to propose a European Civil Code, the Commission financed the preparation and publication of the Draft Common Frame of Reference (DCFR), a six-volume work organised by the Study Group on a European Civil Code and the Acquis Group proposing the precise wording of the core components of a possible, future European Civil Code (SGECC / Acquis Group, 2009). As is illustrated in the case-study below, this kind of work, behind an apparently technical and apolitical exercise, makes crucial policy choices with profound effects on children's rights and various life realms.

This succession of events, and their political and legal impact and adequateness (or lack thereof), have been much discussed and called into question elsewhere, so it is unnecessary to repeat this (van Hoecke, 2000; Hesselink, 2006: 290 ff; Kenny, 2006). The DCFR and its preparatory work, in particular, have also been the target of very incisive criticism and academic opposition, albeit not always entirely justified (Legrand, 2006; Eidenmüller et al., 2008; Micklitz and Cafaggi, 2010). What remains very likely is that works such as the DCFR will produce spill-over effects across legal fields not initially included, thus increasing the impact of any harmonisation efforts on children's lives. Indeed, some legal areas relating to personality rights, family law, and succession law had until recently, with the exception of the academic work developed by the Common Core / Trento Project and the Commission on European Family Law, been rather ignored in terms of EU regulatory concerns. Recent events, however, indicate that these areas will no longer be immune to the private law endeavours of the EU, even if for now mostly in relation to norms of conflict (Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and

authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final, 14 October 2009); and Council's Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, 12 July 2010; previous signs of the beginning of this trend could be seen in Regulation (EC) No. 1347/2000 of 29 May 2000, and Council Regulation (EC) No. 2201/2003 of 27 November 2003, both concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility). By dealing with matters such as parentage, guardianship, alimony and inheritance (even if very often from a predominantly procedural or conflict of laws perspective), such academic and legislative incursions have an incremental and undeniable impact on the *substantive* legal protection of children, thus blurring any apparent distinction between procedural and substantive legal harmonisation.

4. The case of tort law

Whether private law in Europe should converge and whether it is converging are both notions that have to be tested in specific areas, since a general debate and discussion of arguments will not suffice. Indeed, the idea of European private law 'only appears to be a generic term, for areas which will develop distinctly and very much according to their own agenda.' (Wijffels, 2000: 116) Only such an area-to-area analysis, which takes into account the specificities of each legal field and social reality, will allow us to assess thoroughly the possibility and advisability of proceeding with the harmonisation of the different legal solutions existent across EU member states in

particular areas affecting children. This article will do so in relation to torts committed by children. After analysing the harmonisation process in the field of tort law, in general, and children's torts, in particular, some conclusions will be drawn regarding the feasibility and adequacy of harmonising the different legal solutions in this area across EU member states' jurisdictions.

A body of European tort law can presently be clearly identified, a body constituted by EU legislation and case law, European Convention on Human Rights case law, national tort laws, and, although less evidently, by international law and an active production of comparative law studies in the field of tort law carried out by academics, judges and other practitioners. As a consequence, there is now a 'multilayered international order', where the case law, legislation and comparative legal studies produced by the Council of Europe, EU, national institutions, and individuals, are all strongly interconnected and mutually influence each other (Zweigert and Kötz, 1997: 15 ff; van Dam, 2006: 5). As Brüggemeier puts it, the law of torts is gradually becoming transnational (even more than European, one could add), since its evolution is multi-layered: it includes elements of communitarisation, but also of internationalisation, (projected) codification, and academic discussion. In addition, national private legal systems open up vertically, as their case law, doctrine and legislation inter-plays with EU legislation and national constitutions, and horizontally, as a comparative legal approach is increasingly promoting the inter-play between different national private legal systems (Brüggemeier, 2004: 32-36). To the extent that, even if not explicitly, many elements of this body of law concern children, either as tortfeasors or tort victims, this is also a European or transnational *child* tort law.

This horizontal and vertical multi-layered evolution has produced a 'European (child) tort law', but this does not necessarily imply unification, harmonisation, or even convergence. Though a convergent tendency, including between common and civil law jurisdictions, is apparent at some points, it is also clear that differences between the member states remain substantial, regarding the normative content, doctrinal structures, the procedure, the legal culture, and the social, economic, and political backgrounds, and this may render it particularly difficult to find 'common ground' in certain areas of tort law (van Dam, 2006: 106; Zimmermann, 2009: 494-95). A striking example thereof regards children's torts, as it will be seen below. At any rate, any process of harmonisation of tort law in Europe has to be contextualised within the process of harmonisation of private law, which in its hand must be contextualised within the process of European integration. Hence, all the legal, technical, political and economic arguments at stake and considered above apply to the harmonisation of (child) tort law as well, rendering it a highly contentious issue.

Presently, the harmonisation process of tort law in Europe can be seen at a crossroads, without knowing where to proceed: should it follow the codification path and become a part of a European civil code, or should it limit itself to the minimum required for the proper functioning of the EU internal market? The former would require a generous understanding of EU's aims and competences, while the latter would be consistent with a more stringent view on these points. A decision on the path to follow will also determine the extent to which children's rights are affected (positively or negatively, depending on the chosen substantive solutions). The reply to this dilemma will remain unsettled for the time being, as the competence issue goes on being the contentious crux of the legal harmonisation debate. Perhaps the differences across EU member states' jurisdictions are such, that instead of seeking to

harmonise, we should instead be aiming at *creating* a new tort law (Banakas, 2008: 312). One thing at least seems to be clear: similarly to what has been argued in relation to European contract law harmonisation, any type of harmonisation (or creation) of tort law should be enlightened by, and reflect, social justice considerations, as to contribute towards a European society socially and economically fairer (Wagner, 2006: 679; Banakas, 2008: 312). And that also applies to the case of children's tort liability.

5. The case of children's tort liability

It has been asserted that, due to increasing divergences in case law and statutory rules between the different legal systems in Europe, 'the area of tort liability of children is one of the least harmonised as well as intricate areas of law' (Martín-Casals, 2006: para. 3). That is certainly true if one considers the number of different legal solutions adopted in EU member states' jurisdictions. The ones analysed in this article are France, Italy, Germany, Portugal, Sweden, Finland, and England and Wales, for their representativeness of the European legal families. Even if one only considers this limited number of jurisdictions, the diversity of relevant legal norms and case law is manifest in relation to a range of different aspects, namely the legal basis for fault-based liability, the minimum legal age (if any) for tort liability, the exemption from liability of children lacking discernment, the legal basis to hold children without discernment liable, the standard of care required from children, and the admissibility of holding children liable under strict liability norms. The details and intricacies of

these differences have been discussed at length elsewhere (Ferreira, 2011), so in this context only a sketch of the main traits in this legal area will be provided.

It is possible to distinguish roughly between those jurisdictions where the law establishes a (presumed) minimum age of tort liability (Germany and Portugal), and those jurisdictions where there is no such presumption (France, Italy, Sweden, Finland, England and Wales). Still, from another perspective, one may also highlight that all jurisdictions under scrutiny, except for France, have one way or the other acknowledged that children's diminished capacities warrant a diminished degree of liability. Nevertheless, these distinctions and characteristics are far from decisive, since many other aspects may contribute to similar statutory norms being applied differently and differently worded legal provisions leading to similar outcomes. The determinant element seems to lie on judicial interpretation of the current legal provisions, general principles of law, and fundamental rights discourse.

In practice, the French legal system is the one that most easily allows a child to be held personally liable in tort, since it provides for the general strict liability of children for the damage they cause. The English and Welsh legal systems also accept children's tort liability relatively easily. The same is true in relation to the Swedish and Finnish legal systems, but *only* when there is liability insurance cover. The Italian, German and Portuguese legal systems limit children's tort liability in different ways, although simultaneously establishing parents' liability to protect the victim's interests.

In brief, most jurisdictions provide for the legal limitation of children's tort liability, mostly that of children of young age and/or who have not acted intentionally. Still, that is neither the case of the French legal system, nor of occasional judicial instances in other jurisdictions. Moreover, several other differences can be pointed out

across the jurisdictions being considered, including: the conditions under which children may be held contributorily negligent; the liability of third parties, chiefly of parents and schools, for the harmful conduct of children; and the existence of clauses of liability in equity and of mitigation or equitable reduction of compensation.

Only the consideration of all these aspects allows us to gain a thorough picture of the legal framework applicable to children's torts in the jurisdictions in question. What is important to highlight here is the degree of disparity that can be identified amongst EU member states' jurisdictions in relation to children's torts. Although legal solutions in any field are fluid and subject to improvement and external influences, the differences remain striking. Such differences are clearly also related to variations in the familial, social, economic and historical contexts of children in different EU member states. Above all, these legal frameworks are, to a greater or lesser extent, a reflection of the conceptualisation and treatment of childhood and families in the societies to which such frameworks apply (at least from the perspective of those who were in a position to influence the solutions above discussed when they were developed, and despite children and families not being homogenous categories). This case-study, therefore, strikingly illustrates the difficulties that any project aiming to harmonise private law norms, namely in less commercial or business-related areas, invariably faces. Whether a harmonisation project would be feasible in relation to children's tort liability will be considered below, in section 7. Before doing that, one must consider the role that fundamental rights and children's rights should play in such project.

6. Mainstreaming fundamental rights and children's rights into EU policies

A particularly relevant problem with the way in which the law is applied in some of the European jurisdictions included in this analysis, is that children may be held liable for full compensation, either on grounds of fault or not, even when that might result in premature over-indebtedness or a ruinous claim. Although most jurisdictions analysed above have the legal instruments, at least theoretically, to safeguard the interests of both the child and the parents from these scenarios, only the effective judicial application of the existing legal principles and mechanisms may ensure the actual protection of children from premature (over-)indebtedness and crushing liability, which can certainly not be taken for granted. To take some real examples of children who have caused significant damage: in 2004, four Italian youths wished to miss a Greek language class and decided to cause a flood in the school's toilets, causing damage valued at around €330,000 (Monestiroli, 2004); in 2007, two German youths put stones on a rail track, which derailed a train and caused a damage valued at around €50,000 (FAZ, 2007). If the Italian and German courts, respectively, do not make use of notions (where available and legally applicable) such as 'age of discernment', reduced fault, liability of third parties for supervision of children, clauses of mitigation or equitable reduction of compensation, or bankruptcy, then the children in question may be held liable for damages of such an amount that will leave them indebted at a very young age, thus 'crushing' their potential and plans for personal, educational and professional development, in brief, 'ruining' their lives on account of acts committed whilst still children.

This possible outcome of a tort claim against a child brings us to the issue of the rights of tortfeasors, in general, and child tortfeasors, in particular. There is a

growing trend in European jurisdictions to consider life-ruining or crushing liability claims as incompatible with the principles of social justice, solidarity, good faith and abuse of right, common to most EU member states. Most important, such claims, when leaving (child) tortfeasors with extremely limited economic resources and depriving them of the possibility of carrying on their lives in a way held compatible with European societies' and legal systems' values and minimum standards, may also constitute a violation of their fundamental rights, namely the rights to human dignity, development of personality, equality, private autonomy, minimal livelihood, maximal development, and special protection of children. Last, but not least, the principles of best interests and evolving capacities of the child need to be taken into account when determining children's tort liability. All these aspects, further explored elsewhere (Ferreira, 2009; Ferreira, 2011), should enlighten legal reforms to the effect of protecting more efficiently children's fundamental rights in their private legal relations, specifically in the field of tort liability.

Any harmonising effort in relation to tort liability across the EU should thus consider ways to improve the fairness and efficiency of this legal field, taking into account the fundamental rights of children tortfeasors. This is a direct requirement of the mainstreaming of (i) fundamental rights and (ii) children's rights into EU action in any of its fields of action. Hence, these two types of mainstreaming need to be offered special attention in the present discussion, which will now be done in sequence.

The mainstreaming of fundamental rights into EU policies is an established principle of EU law. Several CJEU decisions have confirmed this throughout the years (for example, Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermitte*, 17 December 1970; and Case 5/88, *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*, 13 July 1989), and all EU

institutions and member states are bound to respect fundamental rights both when producing and applying EU law. This has been reflected in the willingness of the CJEU in resorting to fundamental rights, as well as to an increasingly stronger social rights discourse, as the ultimate check-line (Betten and Devitt, 1996; Blanpain, 1996). Further reinforcement came from the signature of the EU Charter of Fundamental Rights (CFR) in 2000, which became legally binding with the coming into force of the Treaty of Lisbon in 2009. The CFR addresses the institutions and bodies of the EU and its member states when they implement EU law (Article 51 CFR). The founding and growing of the EU Agency for Fundamental Rights has further contributed to the strengthening, and arguably mainstreaming, of the fundamental rights policy in EU law (De Schutter, 2008: 517 ff).

Mainstreaming fundamental rights into all EU policies must undoubtedly also affect the EU acts and initiatives in the process of harmonisation of European private law (Cherednychenko, 2006: 51-52; Rodotà, 2006: 115-116 and 122-123; Mak, 2007: 60; Mak, 2009). The implications of this are three-fold: any harmonising proposal (be it through hard or soft law instruments) needs to be submitted to a fundamental rights control; any such proposal needs to be informed by the CFR and EU fundamental rights and freedoms; and any outcome of the harmonisation process needs to be interpreted and applied in the light of the CFR and EU fundamental rights and freedoms. In other words, not only any harmonising proposals and outcomes have to *conform* to EU fundamental rights and freedoms, but they also have to *reflect* and be *interpreted* according to the high level of protection offered to these rights and freedoms in the EU.

Conversely, the consideration of children's rights as such (as opposed to their indirect relevance via the fundamental rights discourse) and their mainstreaming into

EU policies is considerably more recent. The CFR reflects the increasing concern of the EU institutions with the rights and protection of children. Article 24 CFR, on the rights of the child, states that '[c]hildren shall have the right to such protection and care as is necessary for their well-being. (…) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.' Other CFR provisions substantiating children's rights include Articles 14, on the right to education, and 32, on the prohibition of child labour and the protection of young people at work. Since the CFR was signed, in 2000, the EU has been active in protecting children's rights. This has included measures in the fields of, for example, asylum, health and safety, social exclusion, justice, labour, education, media, trafficking and sexual abuse, development aid and external action, and in creating indicators for the protection of children's rights. Due to the EU's limited scope of competence, much of this activity has taken place within the framework of the Open Method of Co-ordination (OMC), as in the case of child poverty and social exclusion, thus producing no binding legal effect (Stalford and Drywood, 2009: 157 ff).

The inadequacy of such a piecemeal approach soon became evident (Ruxton, 2005). In an attempt to combine these isolated efforts into a workable framework, in 2006, the Commission presented the Communication 'Towards an EU Strategy on the Rights of the Child' (COM(2006) 367 final, 4 July 2006), which highlighted, amongst other things, the need to mainstream the rights of children into all other EU policies. The EU Council subsequently approved the 'EU Guidelines on the Promotion and Protection of the Rights of the Child' (2839th Council Meeting, General Affairs and External Relations, 10 December 2007), underlining that the EU had become unreservedly committed to the relevant key international and European legal

instruments and political declarations, among which are the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Convention on Human Rights. The European Parliament also approved a decision, largely based on provisions from the CRC and the CFR, calling for the rights of children to be mainstreamed into all internal and external policies and actions of the EU, as well as for the adoption of a strategy rooted on: i) the protection against all forms of discrimination, ii) the best interests of the child as a primary consideration, iii) the rights to life and development, iv) and the right to participation ('Towards an EU strategy on the rights of the child' (2007/2093(INI)), 16 January 2008). Moreover, the Treaty of Lisbon brought with it a new version of Article 3 TEU, which establishes that the Union shall promote the protection of the rights of the child and that, in its relations with the wider world, the Union will contribute to the protection of human rights and, in particular, the rights of the child. The 2011 Commission's Communication 'An Agenda for the Rights of the Child' offered the most recent impetus to the process of ensuring EU policies respect and promote children's rights. It did so by building on the previous child-related communications, decisions and guidelines, and proposing, among other things, a more prominent consideration of children's rights in the 'fundamental rights check' of legislative proposals already carried out ('Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU agenda for the rights of the child', COM(2011) 60 final, 15 February 2011).

The CFR provisions above discussed, together with the acts of the EU institutions and the new version of Article 3 TEU, potentially guarantee that, at least in the areas of legislative and policy-making competence of the EU, children's rights,

particularly those enjoying the rank of 'fundamental', are respected and have a role in shaping the outcome of the work of the EU institutions. Furthermore, respect for the most significant international and European human rights instruments, namely those with an impact on children's rights such as the CRC and the ECHR, is guaranteed through recognition and adherence by the EU institutions to them. Finally, it is worthwhile remembering the remarkable dimension and depth of the impact that EU law has on national legal orders, including on their constitutional orders, undoubtedly (also) due to the principles of direct applicability, of direct, indirect and incidental horizontal effect, and of supremacy. This may signify that, once the EU institutions comprehensively mainstream children's rights into all their legislation and policies, national legal systems may also consequently improve the application they presently do of the child-related rights and principles contained in the CFR, ECHR, CRC and UDHR, and even those in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). We are still, however, very far from a satisfactory, systematic and universal process of mainstreaming of children's rights in the EU (Stalford and Drywood, 2009: 163 ff).

In conclusion, both through the mainstreaming of fundamental rights and the mainstreaming of children's rights, children's fundamental rights and best interests need to be given due consideration in any actions taken at EU level and affecting them. The detrimental effects of not doing so in a systematic and consistent way is patent in the most disparate areas, from free movement and family reunification (Drywood, 2007), to obesity prevention and advertising regulation (Garde, 2010). This also applies, understandably, to any measure towards harmonising private law norms amongst EU member states' jurisdictions, such as the ones pertaining to

children's torts. Consequently, any proposal to harmonise the rules presently applicable to children's torts throughout EU member states' jurisdictions needs to acknowledge that the position of child tortfeasors is surely different from that of adult tortfeasors, while simultaneously striking a balance between the fundamental rights and freedoms of tort victims and tortfeasors. Let us analyse in more detail what such rules could look like.

7. Harmonising European children's tort liability?

The level of legal disparity across the EU has not completely discouraged potential initiatives aimed at promoting increased harmonisation in the field of tort law. These initiatives, for now mostly academic and not legally binding, have adopted different methodologies, from more descriptive and empirical ones, to more normative ones, or a combination of both (Wagner, 2006: paras. 28 ff). It is worth discussing here two of these initiatives which are directly relevant to children's rights and torts.

Along the lines of some European academic projects on the development of a framework of European principles in specific legal areas, the European Group on Tort Law (EGTL) has developed the Principles of European Tort Law (PETL) (EGTL, 2005: paras. 31 ff). From the Principles drafted by this group, of direct relevance to our subject matter are Articles 4:102, 6.101 and 10.401. The general fault-based rule in Article 4:101 is to be applied in the light of an apparently objective standard of conduct (Article 4:102). Article 4.102 (2), however, considers the relevance of subjective elements, such as age, specific personal (dis)abilities, and extraordinary circumstances. In absence of a norm specific to the liability of children, it is this more

general provision that should apply. Accordingly, children would be held liable in approximately the same way as in the English and Welsh legal systems. The main strict liability provision (Article 5.101) is quite narrow, since it only refers to 'abnormally dangerous activities' that are not 'a matter of common usage', thus, in principle, excluding damage caused by children in their regular activities, even when causing damage through an animal or an object in their possession and under their control. The provisions on liability for others (Chapter 6) include both vicarious liability and liability for loss caused by persons under someone's supervision. Article 6.101, on liability for 'minors' or 'mentally disabled' persons, states that:

> '[a] person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the person in charge shows that he has conformed to the required standard of conduct in supervision.'

This norm thus establishes a presumption of fault against those in charge of children, recalling, to a certain extent, those norms existent in the Romanistic and Germanic legal families. Of utmost importance in the case of torts committed by children is Article 10.401, on reduction of damages:

> 'In an exceptional case, if in light of the financial situation of the parties full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the scope of protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular.'

Although only meant for exceptional cases (given that most fairness issues are in principle solved at previous stages of the assertion of tort liability), this norm, were it to apply to all European jurisdictions, would undoubtedly represent a far-reaching and quite significant change to the European torts scenario. Wagner, nevertheless, also points out that the use of 'may' instead of, for example, 'shall', renders liability in these circumstances excessively unforeseeable and indeterminate (Wagner, 2006: para. 43). No wonder, then, that such principle gave rise to dissenting voices within the group, and that, as Koch foresees, it 'might give rise to substantial debate' (Koch, 2007: 114). In sum, the overall picture of what is proposed by the PETL in the field of children's and parents' liability is perhaps not as favourable to victims as some would wish, but certainly achieves a very reasonable balance between the (fundamental) rights and relevant interests of all legal actors.

The work of the Study Group on a European Civil Code (SGECC) is of a considerably different nature from that of the EGTL. As mentioned above in relation to the DCFR, the texts produced by the SGECC do not constitute mere principles or a common framework, as in fact they are apt to (eventually or possibly) becoming an enforceable legal text. The tort law articles included in the DCFR (SGECC / Acquis Group, 2009: Vol. 4) have been, arguably undeservedly, overall criticised for their conceptual lack of clarity, for opening the liability floodgates, and for allowing too much judicial discretion (Zimmermann, 2009: 496). These articles include a general fault-based liability provision (Article 1:101), followed by specific intention and negligence-based liability norms, the latter based on a standard of care statutorily imposed and on the notion of 'reasonably careful person' (Articles 3:101 and 3:102). Article 3:103 concerns specifically children, and establishes that:

> ‘[a] person under eighteen years of age is accountable for causing legally relevant damage according to VI. – 3:102 (Negligence) sub-paragraph (b) only in so far as that person does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case.’

It can, thus, *e contrario* be concluded that children will be held liable when acting intentionally, under Article 3:101, and when acting in violation of a standard of care statutorily imposed (Article 3:102 (a)). The only exception to this concerns children under the age of seven, since these would never be held liable in tort (Article 3:103 (2)). This choice of age milestones reflects the norms in place in Germany and Portugal, and can find some support on cognitive and moral development studies (Ferreira, 2008). Furthermore, Article 3:103 (3) establishes an obligation of liability in equity, in case the injured person is not compensated for the loss suffered by any other individual and liability to compensate is equitable in the light of the financial resources of both the child and the victim, as well as of all other circumstances. This obligation, however, is not complemented by a general or specific equitable damages reduction clause. The explanations attached to this provision clarify that, similarly to German, Portuguese or English and Welsh law, the standard of care imposed statutorily in relation to particular areas of life, such as road traffic, still applies to children, and that children may nevertheless be held strictly liable (SGECC / Acquis Group, 2009: 3424 and 3426).

In addition, Article 3:104 establishes that:

> ‘[p]arents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable for the causation of legally

relevant damage where that person under age caused the damage by conduct that would constitute intentional or negligent conduct if it were the conduct of an adult.'

Yet, if the parents or those in charge of supervision of the child prove that their supervision was not defective, then their liability is not asserted (Article 3:104 (3)). In sum, children could be liable on grounds of fault when their conduct falls below the normal behaviour of children of the same age, children under the age of seven would never be considered liable except in case of adult activities and strict liability, children of any age could be held liable in equity and strictly liable, and parents and those in charge of supervision of children would be presumably liable for the damage caused by children under the age of fourteen. These provisions thus remain close to the German and Portuguese relevant norms. Nonetheless, in these legal systems, the presumption of fault against parents and those in charge of supervision is valid for children of any age, not only those under the age of fourteen. Moreover, in Portuguese law, the lack of liability of children under the age of seven is merely a rebuttable presumption. The overall solution proposed by the SGECC is, thus, more detrimental to the victim and more favourable to the parents than those in Germany and Portugal. This proposal seems to try to achieve a compromise between the French general strict liability of children and parents, the German and Portuguese presumed lack of fault of children under the age of seven and presumed-fault liability of parents, and the English and Welsh and Nordic fault-based liability of parents and children.

A particularly remarkable synthesis of the different legal solutions existent in Europe has been adopted by the 1992 Burgerlijk Wetboek (Dutch Civil Code, BW). The general fault-based torts rule of the BW, Article 6:162, considers capacity of

discernment a requirement to hold an individual liable in tort. Article 6:164 BW adds that children below the age of fourteen cannot be held liable in tort for their own personal conduct. In these cases, parents are strictly liable, under two conditions: that the child's conduct was not an omission, and that it was objectively negligent, that is, the same conduct that the child adopted would be considered a tortious act if it had been that of an adult (Article 6:169 (1) BW). In case of torts committed by children between the age of fourteen and sixteen years, parents are subject to a mere presumption of fault (Article 6:169 (2) BW), and case law indicates that they can easily refute this presumption, in the light of the difficulty to control the conduct of youths of this age (Hoge Raad (Dutch Supreme Court, HR) 26 November 1948, 1949 *NJ* 149 PhANH; HR 9 December 1966, 1967 *NJ* 69 *GJS*). No matter what age the child is, parents are only liable if fault, even if objective fault of the child, is proven. Once the child is sixteen years old, no special rules apply, so parents are only liable on grounds of the general fault-based liability norm. Children can already be held liable on grounds of the general fault-based liability norm starting from the age of fourteen. Also, the equitable reduction of damages due from children is allowed according to the general rule in Article 6:109 BW. This is essential, considering that, in the light of Article 6:165 BW, individuals possessing a mental or physical handicap (including children over fourteen years of age) can be held 'statutorily' liable for the damage they cause (except for omissions).

The Dutch solution thus seems to combine smoothly strict liability of parents until a certain age and presumed fault of parents at a later age, with the lack of fault of children until a certain age and children's tortious liability according to the general fault-based liability norm at a later age. Nonetheless, there are two elements that could be added to the Dutch solution with substantial benefit to its overall fairness and

comprehensiveness: i) a clause establishing liability in equity of children of any age; and ii) a statutory obligation on parents of subscribing private liability insurance at least in relation to children under the age of fourteen, and ideally until the age of eighteen (especially considering the possible liability of children over fourteen years of age with a mental or physical handicap). The Dutch legislator seemingly considered the possibility of statutorily compulsory insurance, but chose to separate the two issues (*Parlamentaire geschiedenis boek* 6, 656), perhaps because in practice the majority of Dutch families is protected from fault-based and strict liability claims by insurance policies (van Boom, 2006: §§ 17, 28 ff). If these two elements (equitable liability and statutorily compulsory insurance) were to supplement the norms already in force in the Netherlands, then the possibility of cases of crushing liability occurring would (at least if families fulfilled their obligation) be excluded, both families' and tort victims' interests would be fully protected, and the Dutch system could perhaps even rank as a model for future, possible European harmonisation of the rules pertaining to the liability (of children and parents) for the damage caused by children.

Any common, harmonised legal solution to be adopted in the future should, in any case, avoid scenarios of 'life-ruining liability'. Inspiration for this purpose can also be drawn from the Nordic legal systems, since they offer thorough consideration for all relevant circumstances of each case, including the tortfeasor's degree of fault, the existence of liability insurance cover, and the economic conditions of both tortfeasor and tort victim. What one loses in legal certainty and dogmatic logic can be gained in substantive justice and protection of the core of all parties' fundamental rights. This is, of course, not to advocate for any transplant of the Dutch or Nordic legal solutions in this field into other legal systems, since that would require also transplanting rules on insurance, the notion of reasonableness, clauses on general

damages reduction, etc. Any harmonising effort should consider not only the legal principles and fundamental rights above mentioned, but also a range of other tools, such as equity, alternative dispute resolution and mediation, private insurance, alternative compensation schemes, and even criminal law norms, thus entailing an intense comparative, selective and creative exercise (van Dam, 2006: 135; Vespaziani, 2008: 567; van Dam, 2010: 172; Ferreira, 2011).

Despite all the merit that the work of the EGTL and the SGECC possesses, the real harmonisation of the law of torts, including children's torts, seems to be (at least in the foreseeable future) an impossible task to complete, as the critique to the 'crude uniformity thesis' makes a point in highlighting (Smits, 2004; Husa, 2005: 82). Nevertheless, academic efforts, to which the present article aims to contribute, are undoubtedly indispensable if we are ever to witness a greater degree of harmonisation amongst the different legal solutions that presently exist in Europe. The 1992 BW relevant legal provisions illustrate powerfully how new reforms are capable of departing from the traditional solutions with regard to the liability of children and parents for the acts of the former, and are capable of creating more original and balanced proposals. Bearing in mind the increasing importance of legal comparative studies in the work of national legislatures, particularly interesting solutions as the Dutch or the Nordic ones may in the future be adopted in other jurisdictions to regulate children's tortious liability in a way compatible with their (fundamental) rights. Slowly, the process of gradual harmonisation of European national legal systems may thus be achieved, but this should only take place if and when it leads to the protection of children's rights and interests, namely by preventing their life-ruining liability, fostering social justice, and improving children's socio-economic situation. To help the law change towards this direction, the EU institutions and

member states could even resort to the OMC, as children's liability, in particular cases of life-ruining liability, can lead to poverty and social exclusion and, as noted above, the OMC is particularly adequate in such fields.

8. Conclusion

The future of harmonisation of European private law seems, at least for the time being, to be better off relying on the slow building of a European legal scholarship, based, for example, on courses of European private law and on the comparative work produced by national legislatures and courts, rather than on grand European legislative projects (Smits, 2004: paras. 47 ff; Bauer and Mikulaschek, 2005: 1110-15; Wagner, 2006; Schepel, 2007). Accordingly, the harmonisation of private legal norms with an impact on children's rights and interests needs, for now, to settle for comparative child law courses, international conferences on children's rights, scholarly research on the impact of EU policy on children, and raising the awareness of national legislatures of the law applicable to children in other EU member states. Although less directly relevant to children, promoting private and autonomous rule-making, self-governance mechanisms, or simply cross-national contractual and commercial interaction between private parties, may also prove to be more effective than top-down, public approaches (Schäffer and Bankowski, 2000: 29 ff; Schiek, 2007). Even if the EU pushes forward a harmonisation agenda, it may nevertheless do so by relying mostly on 'alternative governance mechanisms' (above all the OMC), based on cooperation and mutual learning, and on 'non-statutory means of approximation of laws', such as recommendations, case law, legal training and

standard clauses (von Bar, 1998: paras. 398-409; Collins, 2008: 210 ff). Indeed, resorting to a range of means and *fora* to 'exchange best practices' and 'promote dialogue amongst stakeholders' has become increasingly popular in relation to several other policy fields in which the EU aims to obtain an increasingly influential role. The adoption of a strategy along these lines would overcome the crucial obstacle of the (disputable) legal competence and legitimacy of the EU in relation to (private) law harmonisation. Zweigert and Kötz say it clearly: 'legislation is not necessarily the ideal way to unify the law; it has costs as well as gains (…) What we need is to "Europeanize" the way lawyers think, write, and learn.' (Zweigert and Kötz, 1997: 28). In the field of children's rights, this might translate in the near future into much more work by the EU on guidelines, policy recommendations, consultation with the civil society, and promotion of academic and professional networks and exchanges, rather than more work along the lines of the DCFR and proposals for binding EU law. For this purpose, one can also rely on the activities developed by the Permanent Childhood and Adolescence Intergovernmental Group 'L'Europe de l'Enfance', the European Network of National Observatories on Childhood 'ChildONEurope', and the European Forum on the Rights of the Child.

The particular case of children's torts presents us with important challenges and requires us to consider several dimensions of the legal, social and economic system in which we operate. Arguably, fundamental rights and non-economic interests need to be awarded equal protection across the EU member states, if one is to ensure a truly integrated market and a meaningful EU citizenship. For as long as the standards of protection remain disparate, both legal and natural persons, including children, will feel constrained in their choices of movement, contracting, etc. Likewise, the (fundamental) rights of tortfeasors and victims and their (economic and non-

economic) interests can arguably only be given the same level of protection if their acts are judged the same way and involve the same consequences in every EU member state. Presently this is not the case, since persons are considered liable in tort according to different rules, depending on the law that is considered applicable. This is a powerful argument in favour of harmonising the relevant legal norms in this field. This said, one has to recognise that such harmonisation will, in any case, involve an extremely long and costly process, with strong political opposition. As Banakas pertinently asks, despite the legal culture, conceptual, technical, language and dogmatic issues being relevant, 'does anyone wish to seriously argue that such considerations should stand in the way of improving the lot of European citizens?' (Banakas, 2008: 296) The rights and interests of all those living in the EU are worth our continued efforts in this field. The case of children and their fundamental rights are strong evidence thereof.

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