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Should Wrongfulness be Required or is Fault Enough? Arts 1:101, 4:101ff PETL

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Abstract: When drafting the Principles of European Tort Law (PETL), the members of the European Group on Tort Law decided to omit wrongfulness as a specific requirement for civil liability, considering it as a concept underlying the notions of interference with legally protected interests and the standard of conduct. This paper tends to demonstrate that this terminological and conceptual choice is still valid eighteen years after the publication of the PETL. On the basis of two case studies examined under German and French law, it is suggested that national traditions are too disparate to adopt a common understanding of what wrongfulness exactly means to a tort lawyer in Europe. The irreconcilability of the different interpretations becomes particularly apparent in mixed tort law systems, such as Japan or Belgium, where the French and the German approach struggle to coexist.

I Introduction

Few tort law concepts are as difficult to grasp as wrongfulness. The reason is that the legal term wrongfulness (*Rechtswidrigkeit, illicéité*) triggers very different reactions among European tort lawyers.[1] For some, it is considered as a fundamental prerequisite of liability, which is appreciated case by case according to specific rules laid out by courts or legislature. For others, it is a general idea of civil liability based on fault (or even strict liability) rather than a specific requirement to be examined in every single tort law case. When reading legal literature on the topic, the concept

1 See *H Koziol*, Title II. General Conditions of Liability, in: European Group on Tort Law (ed), Principles of European Tort Law. Text and Commentary (2005) 24 ('Unfortunately, there is no uniformity in the use of the expression.') See also *D Howarth*, The General Conditions of Unlawfulness, in: AS Hartkamp/MW Hessellink/EH Hondius/CE du Perron (eds), Towards a European Civil Code (4th edn 2011) 845, 874ff.

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of wrongfulness is constantly shifting from a purely theoretical dimension to a set of highly practical solutions.

In light of Bénédict Winiger's academic work, it is probably safe to say that addressing the role of wrongfulness in tort law is not the easiest task. What can possibly be said on an issue which has been in the spotlight of his research on tort law for such a long time and inspired him to write four monographs?[2] If it were not for the enthusiasm of this conference's organisers, I would probably have declined the proposal which sounded like a 'kamikaze mission'. However, it is also a highly interesting challenge to shed new light on the choices made by the drafters of the PETL on the basis of a legal survey of eight different jurisdictions in Europe.[3] Eighteen years after the publication of PETL,[4] it is legitimate to ask whether the approach of leaving the concept of wrongfulness out of the suggested tort law system is still relevant.

The PETL do not refer explicitly to the concept of wrongfulness. To describe the scope of civil liability, the basic norm in art 1:101 uses the terms of 'fault', 'abnormally dangerous activity' and damage caused by an 'auxiliary ... within the scope of his functions'. As to the concept of fault, defined in art 4:101, it refers to an intentional or negligent violation of the required standard of conduct, as determined in art 4:103. As to the defences based on justifications, such as self-defence, necessity or the claimant's consent, which are in some jurisdictions addressed under the label 'wrongfulness', they are defined later in the text, in art 7:101ff.

Is this approach of civil liability, primarily based on the concept of fault rather than fault *and* wrongfulness, consistent, or should wrongfulness be required as a separate requirement? Let me say right off that I find the terminological and conceptual choices made by the PETL drafters convincing. When browsing through different national tort law systems, wrongfulness appears as a deeply controversial concept in a great number of jurisdictions. Almost two decades after the publication of the PETL, it still seems impossible to elaborate a common ground, able to recon-

2 *B Winiger*, La responsabilité aquilienne romaine: Damnum Iniuria Datum (1997); *id*, La responsabilité aquilienne en droit commun: Damnum Culpa Datum (2002); *id*, La responsabilité aquilienne au 19ème siècle: Damnum iniuria et culpa datum (2009); *id*, L'illicéité en droit civil suisse (2021); *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018). See also *B Winiger*, Das andauernde Flüstern des Aquilius. Verhaltens- und Erfolgsunrecht im schweizerischen Obligationenrecht (2013) 35 Zeitschrift für Neuere Rechtsgeschichte 12; *id*, Der lange Schweif des Kometen: Ulpians Widerrechtlichkeit und das moderne Recht, in: B Verschraegen (ed), Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht, vol 2 (2011) 1; *B Winiger*/*P Wessner*, La faute et les intérêts protégés. Synthèse des travaux, in: GRERCA (ed), Le droit français de la responsabilité civile confronté aux projets européens d'harmonisation (2012) 771.

3 *H Koziol* (ed), Unification of Tort Law: Wrongfulness (1998).

4 *European Group on Tort Law* (ed), Principles of European Tort Law. Text and Commentary (2005).

cile the differences and nuances that can be observed throughout Europe. What is more, using wrongfulness as a distinct prerequisite for civil liability is not necessary to consider policy choices, which may be addressed in legal terms other than under the label of wrongfulness.

To demonstrate the advantage of a general liability clause based on fault, this paper presents two case studies and their legal assessment under French and German law, which are diametrically opposed when it comes to the concept of wrongfulness, before confronting the solutions to the PETL. I will then briefly present the state of discussion in two mixed tort law systems, influenced by both the French and German legal systems, and finish with some conclusive remarks.

II Two case studies

When you confront tort lawyers from Germany with the concept of *Rechtswidrigkeit*, it is likely that they will mention some emblematic examples to demonstrate the value of wrongfulness as a separate prerequisite of civil liability, such as the infringement of personality rights, tort law-relevant defences (for example, self-defence or consent) or the case of liability based on an omission or inaction.[5] During a guest lecture in Berlin, I came across another example, which is maybe even more interesting: the case of personal injury caused in a sports context. Using the examples of privacy litigation and sports accidents, this chapter is intended to underline the distance lying between the German and the French vision of fault and wrongfulness as well as the intermediate approach taken by the PETL drafters.

A German vs French approach

Before getting into the details, it is helpful to recall the basic elements of fault-based liability under German law according to sec 823(1) of the Civil Code.[6] For an action to be based on this provision, the claimant must satisfy the following requirements:

5 For an overall presentation of the concept of 'Rechtswidrigkeit' in the English language, see *BS Markesinis*/*J Bell*/*A Janssen*, Markesinis's German Law of Torts (5th edn 2019) 49ff; *G Spindler*/*O Rieckers*, Tort Law in Germany (3rd edn 2019) 45ff.

6 *Markesinis*/*Bell*/*Janssen* (fn 5) 29. For a more detailed presentation, see for example *H Kötz*/*G Wagner*, Deliktsrecht (14th edn 2021) 41ff; *G Wagner* in: FJ Säcker/R Rixecker/H Oetker/B Limperg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol 7 (8th edn 2020) § 823.

first, there must be a breach of one of the enumerated rights or interests, that is life, body, health, freedom, property, or 'another right' recognised by the courts; secondly, this interference must be wrongful (*rechtswidrig*); thirdly, there must be fault (*Verschulden*), that is conduct which is either intentional or negligent; finally, there must be a causal link between the defendant's conduct and the claimant's harm as well as between this harm and a reparable loss.

This shows that, unlike in France, tort law in Germany keeps the element of fault separate from that of wrongfulness.[7] Whereas *Verschulden* is understood as intentional or negligent conduct, *Rechtswidrigkeit* indicates the violation of a legal norm and the absence of a legally recognised excuse.[8] The matter is much more complicated when it comes to the exact object of wrongfulness. Traditionally, one considers that the element of wrongfulness is automatically satisfied whenever one of the enumerated rights or interests has been violated; in other words, wrongfulness depends on, and arises from, the harmful result (*Erfolgsunrechtslehre*) and is neutralised only in cases in which the defendant can establish a legally relevant excuse (*Rechtfertigungsgrund*), such as self-defence, necessity or consent.[9]

However, in the 1950s and 1960s, influential scholars such as Nipperdey[10] or von Caemmerer[11] developed another way of understanding wrongfulness. According to these authors, *Rechtswidrigkeit* should be determined by looking not at the result of the conduct, but at the conduct itself; that is why this doctrine is called *Handlungsunrechtslehre*. The practical impact of this theoretical debate (*Meinungsstreit*) is almost none,[12] as the courts do not adopt a single approach and adjust their reasoning to specific tort law constellations. However, for our topic, it is important to recog-

7 The historical background of this position is set out in *Winiger*, La responsabilité aquilienne au 19ème siècle (fn 2) 321ff. Among German legal scholars of the 19th century, *R von Jhering* has played a leading role: Das Schuldmoment im römischen Privatrecht (1867).

8 *Markesinis/Bell/Janssen* (fn 5) 49. See also *Wagner* (fn 6) § 823 no 4ff (with further refs).

9 *H Kötz/G Wagner*, Deliktsrecht (13th edn 2017) 50 ('für die Praxis übrigens durchaus nebensächlich'; strangely enough, this remark disappeared in the 14th edition 2021). See also *Markesinis/Bell/Janssen* (fn 5) 51 ('in practical terms, however, these two theories will, in the vast majority of cases, produce the same result, for it makes little *practical* difference if one's liability under § 823 I BGB is excluded for lack of fault or unlawfulness'; emphasis in the original).

10 See, in particular, *HC Nipperdey*, Rechtswidrigkeit, Sozialadäquanz, Fahrlässigkeit, Schuld im Zivilrecht (1957) Neue Juristische Wochenschrift (NJW) 1777; *id*, Rechtswidrigkeit und Schuld im Zivilrecht (1959) Karlsruher Forum 3ff.

11 *E von Caemmerer*, Wandlungen des Deliktsrechts, in: Hundert Jahre deutsches Rechtsleben. Festschrift zum hundertjährigen Bestehen des Deutschen Juristentags, vol 2 (1960) 49, 131f; *id*, Die absoluten Rechte in § 823 Abs 1 BGB (1961) Karlsruher Forum 19. For a contemporary contribution to this debate, see *N Jansen*, Das Problem der Rechtswidrigkeit bei § 823 Abs. 1 BGB (2002) 202 Archiv für die civilistische Praxis 517.

12 *Kötz/Wagner* (fn 6) 85ff.

nise that the second theory tends to bring fault and wrongfulness together, as the lack of reasonable care is seen as a part of the concept of wrongfulness, decreasing the importance of fault.[13]

Under current German case law, both ideas have their legitimate place. The courts still admit that the element of wrongfulness is automatically satisfied whenever one of the enumerated rights or interests has been violated directly. However, in the case of an indirect infringement or a violation by inaction or when a 'new interest', brought under the term 'other rights', is concerned, the judge will have to carefully balance the conflicting interests.[14]

The presentation of fault-based liability under French law, according to arts 1240–1241 Code Civil, is much shorter. In France, all law students in their second-year tort law course learn that the basic requirements are the existence of a fault, a loss and causation between both, presented as 'the famous trilogy' of fault-based liability. It is commonplace to emphasise the 'broad approach' of the French understanding of fault.[15] Since 1804, generations of civil lawyers have tried to elaborate viable definitions of the concept of fault, without any notable success. While there is agreement on the idea that *faute* reflects the breach of a duty of conduct, there is still much opacity as to its exact outlines. Moreover, it is not unusual for French courts to deduce the existence of fault from the mere proof of harm or vice-versa, blurring boundaries between the requirements of liability.[16]

As Bénédict Winiger explains in his monography on wrongfulness under the 'common law' (or *ius commune*), the drafters of the French Civil Code and the legal scholars back in the 15th and 16th centuries progressively departed from the doctrine of wrongfulness and fault, considered as two distinct requirements, to a unitary approach where wrongfulness is enshrined or even implied in the concept of

13 See eg *A Teichmann* in: Jauernig. Bürgerliches Gesetzbuch: Kommentar (18th edn 2021) § 823 no 50: 'Mit dieser zu weitgehenden Aussage hebt diese Auffassung jedoch die Trennung zwischen Rechtswidrigkeit und Verschulden auf und wird dem Zweck dieser Trennung nicht gerecht.' Translation: 'With this overly broad statement, however, this view abolishes the separation between unlawfulness and fault and does not meet the purpose of this distinction'.

14 *Kötz*/*Wagner* (fn 6) 56f, 85ff. See also in the English language *Markesinis*/*Bell*/*Janssen* (fn 5) 52ff.

15 See eg *E Steiner*, French Law: A Comparative Approach (2nd edn 2018) 250.

16 *J Knetsch*, Tort Law in France (2017) no 69. For a critical assessment of the concept of *faute*, considered as 'an increasingly abstract and disembodied idea', see *JS Borghetti*, The Definition of *la faute* in the *Avant-projet de réforme*, in: J Cartwright/S Vogenauer/S Whittaker (eds), Reforming the French Law of Obligations (2009) 271, 284ff. See also *L Gratton*, Le dommage déduit de la faute (2013) Revue trimestrielle de droit civil 275.

fault.[17] This position is still valid today in French law, as the wrongful or unlawful character of the defendant's conduct is not a distinct prerequisite.[18]

However, it would be wrong to say that *illicéité* is completely absent from the French law of torts. In scholarship, there have been some attempts to restore the distinct meaning of this concept, with little success so far.[19] There is one field of tort law where *illicéité* seems to have a life of its own, detached from the overshadowing idea of fault: that is, injunctive reliefs. The French Code of Civil Procedure allows claimants to request injunctions when confronted with the 'risk of imminent harm' or exposed to 'wrongful nuisance' (*trouble illicite*).[20] It is not clear whether the legal term *illicite* is only used as a synonym for fault in this context or if there are cases in which a nuisance arising from another person can be *illicite* without qualifying as fault.[21]

B Case 1: Sports accidents

After this introduction to the current state of French and German tort law, I will come now to the case of sports accidents. In every jurisdiction, such cases challenge tort law rules as the standard of civil liability needs to be adjusted.[22] It would not

17 *Winiger*, La responsabilité aquilienne en droit commun (fn 2) 123ff. See also *B Auzary-Schmaltz*, Liability in Tort in France before the Code Civil: The Origins of Art. 1382ff. Code Civil, in: EJH Schrage (ed), Negligence. The Comparative Legal History of the Law of Torts (2001) 309. The reference work in the French language is *O Descamps*, Les origines de la responsabilité pour faute personnelle dans le Code civil de 1804 (2005).

18 *Knetsch* (fn 16) no 70. See also *G Viney*, Le 'Wrongfulness' en droit français, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 57; *M Dugué*, The Definition of Civil Fault, in: JS Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019) 79.

19 See, in particular, *M Puech*, L'illicéité dans la responsabilité civile extra-contractuelle (1973). For an overview of the doctrinal debate, see *G Viney*/*P Jourdain*/*S Carval*, Conditions de la responsabilité (4th edn 2013) no 443 (with further refs).

20 *Knetsch* (fn 16) nos 48, 197, 274. See also *P Giliker*, Injunctions Requiring the Cessation of Unlawful Action, in: JS Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019) 377ff. See also *WH van Boom*, Comparative Notes on Injunction and Wrongful Risk-Taking (2010) 17 Maastricht Journal of European and Comparative Law 10, 18ff.

21 For a more detailed assessment of this issue, see the reference work *C Bloch*, La cessation de l'illicite. Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle (2010).

22 See, in particular, *T Kadner Graziano*, Comparative Tort Law. Cases, Materials, and Exercises (2018) 158ff (with a focus on ski accidents); *C von Bar*, The Common European Law of Torts, vol 2 (2000) no 253ff. From a comparative standpoint, see also *H Fleischer*, Reichweite und Grenzen der Risikoübernahme im in- und ausländischen Sporthaftungsrecht (1999) Zeitschrift für Versicherungsrecht (VersR) 785.

make sense to apply the same rules to a personal injury occurring in a sporting context, for example a ruptured cruciate ligament after a tackle during a soccer game, as for an injury caused under ordinary circumstances. But how can this adjustment of the standard of conduct be translated in legal terms?

Under French law, there is no specific legal concept that is used to explain the modification of the way fault is assessed in this context. Courts take into account the risk of being physically injured, inherent to most sports, following, therefore, a more liberal approach to fault-based liability. Indeed, a claimant has to establish a 'deliberate failure to comply with sports rules' in order to be awarded compensation under tort law rules.[23] Usually, this is presented as a 'correction', a sort of 'fine tuning' of the assessment of fault. The French concept of *faute* may thus appear to foreign tort lawyers like an 'umbrella concept' which encompasses many different arguments leading to liability (or to an exemption of liability). Indeed, the doctrine of *acceptation des risques* ('acceptance of risk'), as well as the defence of consent, are used to raise the threshold of fault in those cases, without a need for any further conceptual framework.[24]

The situation under German law is surprisingly ambiguous, as there is a gap between the assessment in legal scholarship and case law.[25] While everyone agrees on the need to adjust liability rules in a sporting context, there is no agreement on what exactly has to be adjusted in the field of civil liability. Whereas legal scholarship tends to see in the concept of wrongfulness (*Rechtswidrigkeit*) the relevant adjusting tool,[26] the Federal Court of Justice and trial courts adopt a more complex approach.[27] The courts tend to distinguish between a subjective and an objective dimension of the standard of care (*äußere und innere Sorgfalt*), which tends to bring together the yet distinct requirements of fault and wrongfulness.[28] However, in the context of sports

23 See Court of Cassation (2nd Civil Chamber), 20 November 2003, no 02-13.653; 20 November 2014, no 13-23759. For a presentation in the English language, see also the brief exposé given by *JM Marmayou*, Sports Law in France (2nd edn 2019) no 151ff.

24 *Knetsch* (fn 16) no 214; *P Brun*, Responsabilité civile extracontractuelle (6th edn 2023) no 331 (with further refs).

25 On this issue, see, in particular, *E Deutsch*, Die Mitspielerverletzung im Sport (1974) VersR 1045; *Fleischer* (1999) VersR 788ff; *B Pfister/J Fritzweiler/T Summerer/J Alvermann*, Praxishandbuch Sportrecht (4th edn 2020) 543ff; *P Kreutz*, Grundzüge des deliktischen Sporthaftungsrechts – Haftungsbegrenzung durch Rechtswidrigkeits- und Verschuldenserfordernis – Die Verkehrskreishaftung (2011) Juristische Arbeitsblätter 337, 339ff.

26 *Fritzweiler/Pfister/Summerer* (fn 25) 544f; *F Fechner/J Arnhold/M Brodführer*, Sportrecht (2020) 79f.

27 See, in particular, Federal Court of Justice, 16 September 1975, ref VI ZR 156/74; 12 June 1990, ref VI ZR 297/89; 31 May 1994, ref VI ZR 233/93.

28 *Wagner* (fn 6) § 823 no 29ff.

accidents, as some scholars point out, it seems almost impossible to implement this distinction, as irregular conduct of a soccer player will often be contrary to both the subjective and objective dimension of the standard of care.[29]

Under the PETL, there is no doubt that the conceptual distinction between fault and wrongfulness is not relevant, which eliminates a source of legal complexity. Article 4:102 lists the elements which allow an adjustment of the 'required standard of care', a legal tool that the PETL drafters have encapsulated in the concept of fault.[30] In the particular context of sports, several criteria may be used to adjust the threshold of liability: the 'dangerousness of the activity', the 'foreseeability of the damage' and possibly even the 'relationship of proximity or special reliance between those involved'; as for the idea of consent, it is expressed in art 7:101 as a 'defence based on justification'.[31] All in all, the PETL follow a simpler approach than German law, while offering a more complete set of rules than under French law, by laying out the different variables for the adjustment of the standard of civil liability.

C Case 2: Infringement of personality rights

The second case study examines the way to assess, in terms of fault and wrongfulness, the infringement of personality rights. Over the last decades, privacy litigation has raised interest among comparative tort law scholars, not only due to its practical importance, but also because of its theoretical aspects.[32]

As in many other jurisdictions, the legal protection of personality rights evolved quite spectacularly under French law over the course of the twentieth century. Based on the constitutional and international dimension of individual fundamental rights

29 *Kreutz* (2011) Juristische Blätter (JBl) 337, 341: 'Zumeist werden im Bereich der Verkehrspflichtenhaftung Rechtswidrigkeit und Schuld jedoch parallel laufen, was eine scharfe Abgrenzung zwischen beiden nicht zwingend erforderlich macht.' Translation: 'For the most part, however, unlawfulness and culpability will run parallel in the area of liability for breach of duties towards the public ('Verkehrspflichtenhaftung'), which does not make a sharp distinction between the two absolutely necessary.'

30 For a commentary of this provision, see *P Widmer*, Title III. Bases of Liability, in: European Group on Tort Law (ed), Principles of European Tort Law. Text and Commentary (2005) 64, 75ff.

31 See *BA Koch*, Title IV. Defences, in: European Group on Tort Law (ed), Principles of European Tort Law. Text and Commentary (2005) 120, 126.

32 See eg *J Krzeminska-Vamvaka*/*P O'Callaghan*, Mapping out a Right to Privacy in Tort Law, in: G Brüggemeier/A Colombi Ciacchi/G Comandé (eds), Fundamental Rights and Private Law in the European Union (2010) 111.

and on art 9 Civil Code,[33] French courts have recognised numerous facets of personality interests which are protected by tort law against infringement by others.

Despite the doctrinal interest in this litigation, the appreciation of fault has not fundamentally altered in the context of privacy litigation.[34] Most authors consider that the assessment of fault does not differ from that observed in other cases, even though the case law does not refer consistently to the 'reasonable person' test. Whether there has been misconduct or not appears more like a matter of balancing (*mise en balance*) conflicting rights. An infringement of the right to privacy often comes into conflict with the principle of freedom of the media to inform society of matters of public interest, or with consent.[35] When taking a closer look at the case law, it appears that the method used by courts to determine whether or not a fault was committed by the defendant is very similar to that adopted for the purposes of constitutionality review (*contrôle de constitutionnalité*): it is primarily a question of estimating the respective weight of two competing principles and determining the proportionality of the defendant's infringement.[36]

Once again, there is no specific legal concept used to adjust the application of fault-based civil liability. Instead of refining the theoretical framework underlying the concept of *faute*, legal scholarship focuses on a much more practical issue, which is the scope of arts 1240–1241 Civil Code in the field of privacy litigation. Indeed, in a 2000 landmark case, the Court of Cassation held that the general clause of liability for fault should not apply to cases which fall under the definition of two criminal offences laid out in the Freedom of the Press Act of 23 July 1881.[37] According to this

33 According to this provision, inserted by an act of 17 July 1970, 'everyone has the right to respect for his private life' so that 'without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order'.

34 For a general overview of the rules governing civil liability in this context, see *Knetsch* (fn 16) no 118ff.

35 See eg in the context of the right of image, *E Logeais/JB Schroeder*, The French Right of Image: an Ambiguous Concept Protecting the Human Persona (1998) 18 Loyola of Los Angeles Entertainment Law Journal 511, 528–532. For a detailed overview in French, see *Viney/Jourdain/Carval* (fn 19) no 256ff; *P le Tourneau* (ed), Droit de la responsabilité et des contrats (12th edn 2020) no 2125.200ff.

36 In 2013, the First Civil Chamber of the Court of Cassation introduced an explicit (and exclusive) reference to art 10 ECHR in its case law on civil liability arising from an 'abusive exercise of the freedom of expression'. See Civ 1, 10 April 2013, no 12–10177. On the (potentially far-reaching) consequences of this decision, see eg *G Viney*, La sanction des abus de la liberté d'expression (2017) Recueil Dalloz 787.

37 On this specific feature, see the reference work of *J Traullé*, L'éviction de l'article 1382 du Code civil en matière extracontractuelle (2007) nos 106–119; *G Viney*, Introduction à la responsabilité (4th edn 2013) nos 208–222.

decision, the claimant has to establish the existence of one of those two offences, which requires the demonstration of malice and the compliance with a set of procedural rules designed to protect editors and media directors.[38] Yet, this distinctive feature of privacy litigation is not based on a specific concept used to raise the liability threshold. It is generally seen as a mere variation of the wide notion of *faute*.

The situation under German law is different. In 1954, the Federal Court of Justice recognised a 'general right to one's personality' (*allgemeines Persönlichkeitsrecht*) as one of the 'other rights' referred to in § 823(1) BGB.[39] By doing so, the court inverted the decision of the drafters of the BGB to exclude non-material rights from the scope of extra-contractual liability, as it was then seen as unacceptable for the 'better circles of society' to place non-material interests on the same level as property interests.[40] Since 1954, the trial courts as well as the Federal Court of Justice have established comprehensive case law on the legal protection of the various aspects of personality (image, name, honour, etc).

For the purposes of wrongfulness, the 'general right to one's personality' is seen as a *Rahmenrecht*, that is, an interest which is not protected in an absolute manner, but only by taking into consideration the context of the infringement.[41] This means that wrongfulness does not arise automatically from the infringement of a personality right, but has to be established separately by balancing the different interests, as under French law. However, this approach becomes problematic in the (rather frequent) cases of intentional violation of personality rights. Indeed, some tort law scholars tend to deduce wrongfulness from the mere intentional character of the infringement of the claimant's right, without balancing the conflicting interests or delineating the scope of protection of tort law.[42] This anomaly has led several authors to criticise the German approach of wrongfulness as inconsistent and improperly implemented in the case law under sec 823(1) BGB.[43]

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38 According to art 34(1) of the 1881 Freedom of the Press Act, criminal sanctions of *diffamation* and *injure* are subject to the proof of the willingness to harm another person's honour or reputation.

39 Federal Court of Justice, 25 May 1954, ref I ZR 211/53. For an English translation of this landmark case, see *Markesinis/Bell/Janssen* (fn 5) 284ff.

40 Protokolle der Kommission für die Zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs, vol I (1897) 622f. On this aspect, see also in the English language, *Markesinis/Bell/Janssen* (fn 5) 43.

41 On this concept, see eg *S Lorenz*, Grundwissen – Zivilrecht: Deliktsrecht – Haftung aus § 823 I BGB (2019) Juristische Schulung 852, 854.

42 See eg *von Caemmerer*, Wandlungen des Deliktsrechts (fn 11) 77. According to this author: '[es ist] überall offensichtlich, daß vorsätzliche Verletzungen eines Menschen oder fremder Sachen rechtswidrig sind'. Translation: 'It is obvious everywhere that intentional injury to a human being or to another's property is wrongful'. See also among contemporary scholars, *G Brüggemeier*, Haftungsrecht: Struktur, Prinzipien, Schutzbereich (2006) 37ff.

43 *Wagner* (fn 6) § 823 no 23f (with further refs).

When it comes to the PETL, there is interestingly no explicit mention of personality rights, neither in the Principles themselves,[44] nor in their Commentary.[45] Unlike the provisions in Book VI of the Draft Common Frame of Reference,[46] the list of protected interests laid out in art 2:102 PETL only refers to 'human dignity and liberty', but not explicitly to the various personality rights that are nowadays recognised in all national tort systems. The silence of the PETL drafters implies that the appreciation of fault follows the general rule of art 4:102, which leaves some room for the balancing of interests, as 'the required standard of conduct ... depends, in particular, on the nature and value of the protected interest involved'. As for the idea of consent, it is expressed in art 7:101 as a 'defence based on justification'.[47] Given the great practical importance of personality rights litigation, providing more visibility to personality rights in a future version of the PETL should be considered. However, the approach midway between the poorly conceptualised French tort law and German tort law, which some might regard as 'over-dogmatic', is probably the only way to find a common ground to the issue of wrongfulness in continental Europe and should be maintained.

In this chapter, the assessment of both case studies was limited to the PETL as well as to tort law in France and Germany. These jurisdictions present a contrasting picture, which is, however, not representative enough of the diversity of tort law systems that opt for a less radical approach. A brief glimpse at tort law systems influenced by both jurisdictions will give some further insight.

III The curious case of wrongfulness in mixed tort law systems

As has been seen, the approaches of French and German law to wrongfulness seem widely incompatible, as the French concept of *faute* is so broad that it embraces all the various considerations that a German lawyer would intuitively put into differ-

44 Except the brief reference in art 10:301, according to which, 'the violation of an interest may justify compensation of non-pecuniary damage ... in particular where the victim has suffered personal injury; or injury to human dignity, liberty, or other personality rights'.

45 See *G Brüggemeier*, Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms, in: G Brüggemeier/A Colombi Ciacchi/P O'Callaghan (eds), Personality Rights in European Tort Law (2010) 5, 30 f.

46 According to art 2:203(1), 'loss caused to a natural person as a result of infringement of his or her rights to respect for his or her *personal dignity, such as the rights to liberty and privacy*, and the injury as such are legally relevant damage' (emphasis added).

47 For a commentary, see *Koch* (fn 31) 126.

ent conceptual categories. Despite all ambiguities regarding the distinction between *Verschulden* and *Rechtswidrigkeit*, the opposition of both legal concepts is so deeply entrenched in the German tort law culture that it is highly unlikely that, in the near future, alternative approaches to fault-based liability will become reality.

In jurisdictions where the law of obligations was influenced by both the French and the Germanic legal traditions, this contrast is a serious problem, as it requires the lawmakers or the courts to choose one approach over another or to try reconciling both approaches despite their apparent contradiction. Tort law in Japan and in Belgium are good illustrations of both solutions.[48]

It is well documented that the current Japanese Civil Code is the result of the work of a French legal scholar, *Gustave Boissonade*, and the influence of the German Civil Code. It is definitely not the intention of this paper to trace, once more, the turbulent history of the origins of the Japanese Civil Code.[49] It suffices to say that, during the drafting of the chapter on the law of civil liability, a compromise had to be reached between the general approach of the French law and the more restrictive approach of the German Civil Code.[50] In line with the French Civil Code, art 709 of the Japanese Civil Code does not contain the legal term 'wrongfulness' and qualifies as a general clause for civil liability. However, the drafters insisted on the 'intentional and negligent violation of another's right', a formula-

48 The tort law of Switzerland could also have been mentioned in this context, as the reform of the law of obligations (better known as 'OR 2020' or 'CO 2020') was accompanied by an intense debate on the role of wrongfulness. See, in particular, *C Chappuis*, La distinction entre l'illicéité et la faute: n'est-il pas temps de renoncer? in: S Fuhrer/C Chappuis (eds), Haftpflicht- und Versicherungsrecht, Droit de la responsabilité civile et des assurances, Liber amicorum Roland Brehm (2012) 83; *C Chappuis*, Une nouvelle clause générale de responsabilité pour faute (2013) Haftung und Versicherung / Responsabilité et Assurances (HAVE/REAS) 360; *C Müller*/*O Riske*, Commentaire critique de l'article 46 OR/CO 2020 – plaidoyer en faveur de l'illicéité (2014) HAVE/REAS 119. On a similar debate in Croatia, see *M Baretić*, Protupravnost kao pretpostavka odštetnopravne odgovornosti u hrvatskom pravu [Unlawfulness as a condition for tort liability in Croatian law] (2020) 70 Zbornik Pravnog fakulteta u Zagrebu 595 (with a summary in English).

49 See recently *C Sokolowski*, Der so genannte Kodifikationenstreit in Japan (2010). See also *TF Chen*, Transplant of civil code in Japan, Taiwan, and China – With focus of legal evolution (2011) 6 National Taiwan University Law Review 389, 392ff.

50 See eg *H Oda*, Japanese Law (3rd edn 2009) 180ff; *H Kihara*, Tort Law in Japan (2015) 31ff; *E Matsumoto*, Tort Law in Japan, in: M Bussani/AJ Sebok (eds), Comparative Tort Law (2021) 373; *N Yamada*, Le problème contemporain rencontré par le droit japonais de la responsabilité délictuelle: Quelle orientation devrait prendre notre droit? (2018) 36 Ritsumeikan Law Review 45, 48ff; *E Osaka*, Reevaluating the Role of the Tort Liability System in Japan (2009) 26 Arizona Journal of International & Comparative Law 393, 394ff.

tion which is almost a carbon copy of the formulation of § 823(1) of the German Civil Code.[51]

When discussing the role of wrongfulness with Japanese tort law scholars, I was very surprised to find out that this struggle for influence between the German and the French tradition continues to be very lively in Japanese scholarship. Depending on academic background and language skills, there are still two contrasting schools of thought when it comes to the role of wrongfulness.[52] Those with a French background do not see the need for this concept, while others with a German background tend to see in the concept of wrongfulness a fundamental idea of tort law and a distinct requirement of civil liability for fault. It is quite telling that, in 1947, when the Japanese lawmakers adopted an act on State liability, the choice was made to insert the term 'wrongfulness' in the basic norm for State liability, creating a discrepancy between the conceptual framework of civil liability and that governing State liability.[53]

The situation in Belgium bears some resemblance to that in Japan.[54] The current tort law rules are identical to those under French law, as the Napoleonic Civil Code came into force at a time when Belgium (then called the Southern Netherlands) was a part of the French Empire. Since the independence of Belgium in 1830, courts and Parliament have not always followed the same approach as France and, over the last decades, there has been a significant process of emancipation from French law. This process was in particular accelerated by the growing influence of Dutch-speaking legal academics, tending to observe the developments in the Netherlands, but also in Germany and common law jurisdictions.[55]

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51 On this aspect, see eg *T Nakahara*, Le préjudice économique pur. Rapport japonais, in: Association Henri Capitant (ed), Le préjudice: entre tradition et modernité (2015) 53, 57. For a presentation of the structure and the evolution of art 709 of the Japanese Civil Code, see, for example, *Kihara* (fn 50) 31f.

52 On the concurrence between the Tokyo Faculty of Law (close to French legal scholarship) and the Kyoto Faculty of Law (considered closer to the Germanic legal thinking), see eg *T Hayashi*, The Education of Roman Law from 1874 to 1894 in Japan. The Transition of Contemporary Model of Legal Systems in the West and the Intellectual Backgrounds of Professors in Charge of Roman Law (2022) 99 Acta Universitatis Lodziensis. Folia Iuridica 83. See also *S Ono*, Comparative Law and the Civil Code of Japan (1996) 24 Hitotsubashi Journal of Law and Politics 27.

53 *Kihara* (fn 50) 39f. For more details, see in *M Kobayakawa*, La responsabilité administrative en droit japonais, in: Études de droit japonais, vol 2 (1999) 224.

54 For a presentation of the French influence on Belgian law, see *S Bouabdallah*, La réception du modèle français en droit civil belge (2014). See also *R Piret*, Le code Napoléon en Belgique (1954) Revue internationale de droit comparé 753; *P Durand*, Le droit des obligations dans les jurisprudences française et belge (1929).

55 *D Heirbaut*, L'émancipation tardive d'un pupille de la Nation française: l'histoire du droit belge aux 19ème et 20ème siècles, in: A Wijffels (ed), Le Code civil entre *ius commune* et droit privé européen (2005) 632; *D Heirbaut*/*ME Storme*, The Belgian Legal Tradition: From a Long Quest for Legal Indepen-

Against this historical background, it is interesting to comment on the revision of the Civil Code, which the Belgian Federal government initiated in 2015.[56] Since then, several parts of the reform have been adopted by the Parliament (contracts, general rules on obligations...).[57] The working group, which was established to revise the tort law rules, presented a draft in 2019,[58] which was introduced, in a slightly amended version, in the Belgian Parliament in March 2023.[59]

When addressing civil liability for fault, the working group, composed of both French- and Dutch-speaking members, could not disregard the choice made in 1992 by the drafters of the Dutch Civil Code. Under art 6:162, fault-based liability explicitly requires a wrongful act (*een onrechtmatige daad*).[60] However, the Belgian working group decided to stick to the French approach, stating in the explanatory memorandum that 'the draft does not contain explicitly the requirement that the behaviour which caused a loss be wrongful' and that wrongfulness 'is not a distinct prerequisite and remains included in the concept of fault'.[61]

I asked one of the six members of the working group, responsible for drafting the tort law rules, if wrongfulness was an issue during the debates, especially against the background of art 6:162 of the Dutch Civil Code. He assured me that

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dence to a Longing for Dependence ? (2006) European Review of Private Law (ERPL) 645; *Bouabdallah* (fn 54) 317ff.

56 See, in particular, the 'Justice Programme' (*Plan Justice*) presented in March 2015, in which the Federal Minister of Justice Koen Geens announced 'vast reforms of civil and business law' (<https://cdn.nimbu.io/s/1jn2gqe/assets/Plan_Justice_18mars_FR.pdf>). See also *S Stijns*, Faut-il réformer le Code civil? Réponses et méthodologie pour le droit des obligations contractuelles (2016) Journal des tribunaux (JT) 305; *B Dubuisson*, Faut-il reformer le Code civil (II) ? Interrogations et propositions concernant la responsabilité extracontractuelle (2016) JT 673.

57 For an up-to-date overview of the ongoing reform process, see the website of the Federal Ministry of Justice <https://justice.belgium.be/fr/bwcc>.

58 The text and the explanatory report of the reform draft were published by the members of the reform commission. See *B Dubuisson*/*H Bocken*/*G Jocqué*/*G Schamps*/*T Vansweevelt*/*J Delvoie*/*B Zammito*, La réforme du droit de la responsabilité extracontractuelle (2019). They are also available on the website of the Federal Ministry of Justice (<https://justice.belgium.be/sites/default/files/avant-projet_de_loi_-_voorontwerp_van_wet_-_livre_boek_5.pdf>). For commentary on this text, see the contributions of various authors from Belgium to *B Dubuisson* (ed), La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé (2020).

59 This new version of the reform draft is available on the website of the Belgian Parliament <https://www.dekamer.be/flwb/pdf/55/3213/55K3213001.pdf>.

60 On this requirement, see *J Spier*, The Netherlands: Wrongfulness in the Dutch Context, in: Unification of Tort Law: Wrongfulness (1998) 87; *E van Schilfgaarde*, Negligence under the Netherlands Civil Code: an Economic Analysis (1991) 21 California Western International Law Journal 265, 273ff. In the Dutch language, see the monograph *CHM Jansen*, Onrechtmatige daad: algemene bepalingen (3rd edn 2009).

61 *Dubuisson*/*Bocken*/*Jocqué*/*Schamps*/*Vansweevelt*/*Delvoie*/*Zammito* (fn 58) 55.

there was no debate, even among the Dutch-speaking members of the group. However, he informed me, somewhat enigmatically, that it would be an error to say that 'the working group had simply abandoned wrongfulness as a distinct requirement for liability, as it comes up in many other provisions of the draft'.[62]

IV Conclusion

What lessons can we draw from the case studies and the brief presentation of the role of wrongfulness under the law of Japan and Belgium? The least one can say is that the concept of wrongfulness appears as an element of complexity and, in some cases, even a source of confusion. It is notable that, in recent years, influential tort law scholars in Germany are in favour of a simpler tort law system that is not based upon the distinction between fault (*Verschulden*) and wrongfulness (*Rechtswidrigkeit*).[63]

Of course, the purpose of this presentation was not to give a comprehensive overview of all European jurisdictions; in particular, the English standpoint on wrongfulness was not taken into consideration. Nevertheless, this brief glance at the situation in three continental European jurisdictions, which are somehow representative of the different approaches, makes me think that the stance taken by the drafters of the PETL was a good one. Wrongfulness is most probably not a concept which is suitable to create sufficient enthusiasm among European tort law scholars and practitioners: it creates great confusion amongst those who are not familiar with it and reminds others of fruitless doctrinal controversies.

Introducing wrongfulness in a codification, designed as a framework for the further development of a harmonised European tort law (whatever one may think of this objective), would probably have been counterproductive, exacerbating the differences between the national tort law systems. Yet, one has to be aware of the limits of this statement. Of course, it shall be open to tort law scholars to elaborate,

62 *B Dubuisson*, Interview with the author.

63 See, in particular, *Wagner* (fn 6) § 823 no 26f; *Kötz/Wagner* (fn 6) 132; *G Wagner*, Grundstrukturen des Europäischen Deliktsrechts, in: R Zimmermann (ed), Grundstrukturen des europäischen Deliktsrechts (2002) 189, 216f. See also *Brüggemeier* (fn 42) 42 f: 'Die Privatrechtswissenschaft in Deutschland hält auch heute noch, mehr als hundert Jahre nach der Verabschiedung des BGB, in einer erstaunlichen "Gesetzesuntertänigkeit" an der durch § 823 I BGB vermeintlich a priori vorgegebenen dreistufigen Struktur eines Delikts und an der Erfolgsunrechtslehre, in welch modifizierten Formen auch immer, fest.' (Translation: 'Even today, more than a hundred years after the adoption of the German Civil Code, private law scholars in Germany still adhere to the three-stage structure of a tort, supposedly prescribed a priori by § 823 I of the German Civil Code, and to the *Erfolgsunrechtslehre*, in whatever modified form, with astonishing "obedience to the law"').

for their respective jurisdictions, a more consistent concept of wrongfulness, with less internal contradictions and conceptual weaknesses. I am thinking in particular of the concept of wrongfulness in Switzerland, where it covers not only liability for fault but also strict liability, as Winiger depicted impressively in his last book.[64]

64 *B Winiger*, L'illicéité en droit civil suisse (fn 2) 37ff.