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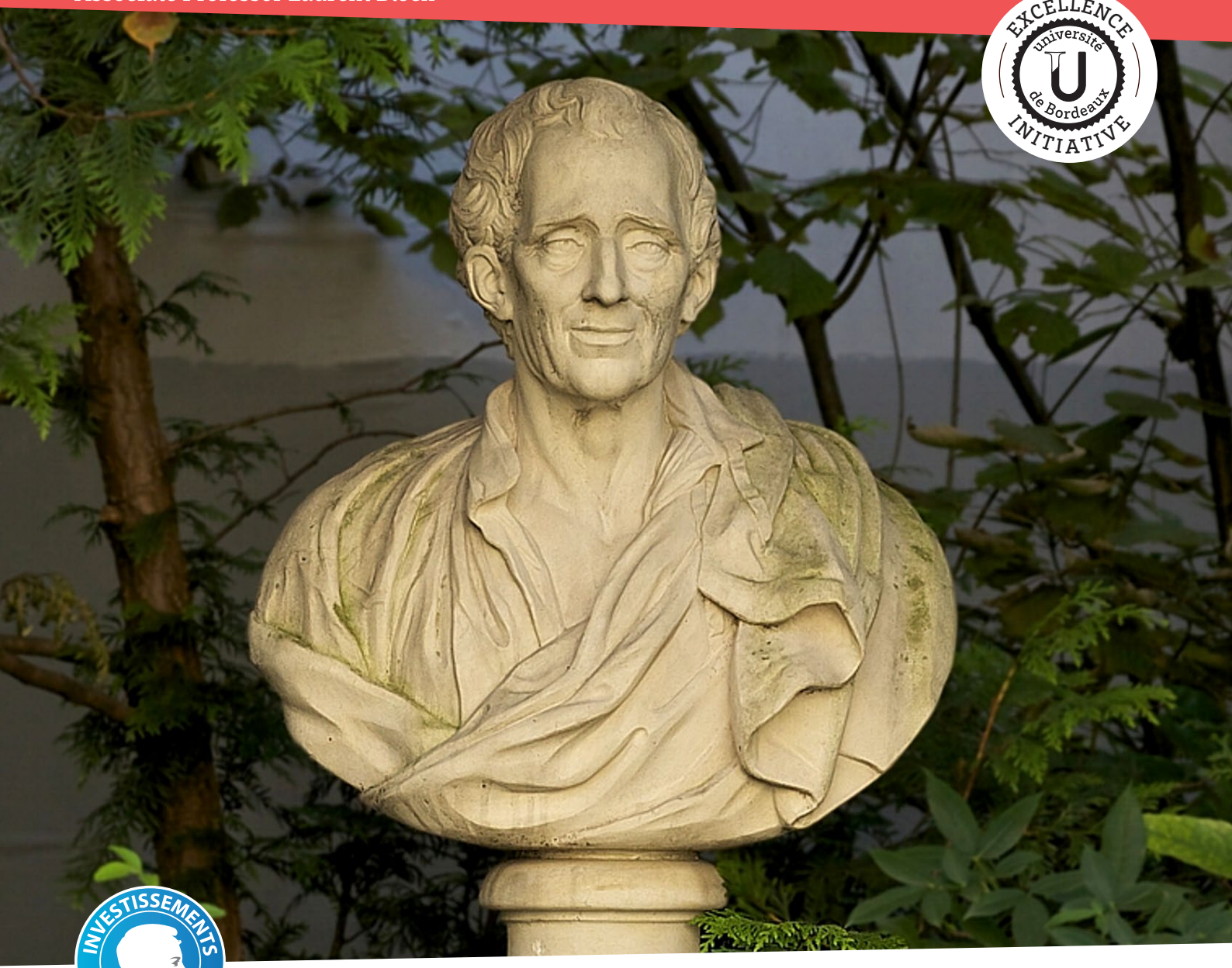

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Civil law:

Compensation for environmental damage under French law: past, present… but what future?

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Issues relating to the environment are often front and centre in the media or in politics, but rarely occupy the legal stage. It is true that, behind all the statements of principle and electoral mantras, it is very difficult to construct civil liability for environmental damage. The latter is nonetheless necessary, particularly in light of an exhausted ordinary law, even if the Court of Cassation has shown its ability to breathe new life into it with the *Erika* case.

There is, however, no lack of law. Thus Article 1 of France's *Charte de l'environnement* (Charter for the Environment) proclaims "[…] *the right to live in a balanced environment which shows due respect for health*". The Charter has constitutional value, as it was made part of French constitutional law in 2005. Equally, the right to a safe environment has been enshrined in the *Code de l'environnement* (Environmental Code) as a stand-alone right. Furthermore, Directive n°2004/35/EC, adopted on 21st April 2004, also considered environmental liability.

Despite wishing to be at the forefront of the struggle in environmental matters, France was condemned by the ECJ for the late transposition of the above Directive, as it took Law n°2008-757 of 1st August 2008, on environmental liability, various provisions bringing French law into line with European Community law in the environmental sphere (known as the *loi LRE* or LRE Law), and Decree n° 2008-468 of 23rd April 2009 on the prevention of and compensation for particular kinds of environmental damage. This new mechanism, which institutes a new form of *police administrative* (administrative police), imposes a duty on professionals to take the necessary steps to prevent environmental damage. This is a very different approach to that which had dominated previously.

Indeed, the true difficulty in France's classic rules relating to civil liability is that these did not recognise environmental damage *per se*, but rather addressed the issue as part of the broader question of damage to property, a consequence of environment damage. This was the case for the operating losses suffered by a beachfront hotel where the beach was devastated by an oil slick. French case law thus resorted to the theory of *trouble anormal de voisinage* (1) or abnormal neighbourhood disturbance or nuisance; fault-based liability for negligence as provided under Articles 1382 and 1383 of the Civil Code; the notion of *responsabilité du fait des choses* (liability for damage or injury caused by things in one's care), as provided under Article 1384 paragraph 1; or even the principle of *responsabilité du fait des produits défectueux* (liability for damage or injury caused by defective products) established in 1998 under Articles 1386-1 to 1386-18 of the Civil Code. Furthermore, such an analysis matches that of the European Court of Human Rights, which does not directly take environmental damage into account but instead compensates the victims of an unhealthy environment by applying the concept of infringements of the right to life (2).

As such, the damage suffered by the environment itself appeared to be out of range since it was viewed only in terms of its repercussions on persons and their property. So the decision that was handed down by the Court of Cassation on 25 September 2012 in the *Erika* case – taken from the name of the petrol tanker that sank off the coast of Brittany – was a real turning point, in that it clearly enshrined the concept of "pure" ecological damage (see part I below). This warning shot – the prelude to probable legislative enshrinement – may yet nevertheless prove to be in vain if the attacks on the precautionary principle bear fruit. Indeed, it would appear that the precautionary principle has been under threat for some months (see part II).

I. The *Erika* decision – a turning point

Despite a proliferation of legislation, environmental damage struggled to emerge prior to the *Erika* decision (see section A). Following the decision, its recognition is no longer in dispute (see section B), and the statutory entrenchment of environmental liability seems possible (section C).

A. Pre-*Erika*

While the Charter for the Environment provides that "*[e]veryone has the right to live in a balanced environment*", whether a person has an actual, existing legal right to act in procedural terms is quite another matter (3). For associations or legal persons governed by public law, this is difficult to prove as they represent collective interests. However, the former are authorised under the *Code de l'environnement* while the latter benefit from a frequently broad interpretation in French case law of the right to bring an action. Nevertheless, while the procedural obstacle could thus be surmounted, the issue of pure ecological damage, i.e. damage to the environment itself, had never been tackled head-on by the courts.

We may cite a decision of the First Civil Chamber of the Court of Cassation, ordering a hunting association to pay compensation for the damage suffered by an association for the protection of birds, owing to the death of an osprey shot by hunters; or even the decision handed down by the *Tribunal de grande instance* (regional court) at Bastia on 4 July 1985, ruling in favour of the *départements* in Corsica and finding a company liable for the discharge of red mud slurry. In reality, case law made no provision for compensation for environmental damage *per se*; furthermore, the terms "damage to the environment", "ecological damage" or even "environmental damage" had long been absent from the grounds of the courts' decisions.

Admittedly, draft legislation (which has often been rejected) such as the bill to reform the law of obligations and the statute of limitations – known as the *projet Catala* (Catala Bill) – gave a glimmer of a possibility of recognition. Indeed, the latter put forward, under a new Article 1343 to the Civil Code, a very broad definition of reparable losses or damage; this would have encompassed environmental damage, as "any established damage, consisting in a wrong against a lawful, proprietary or non-proprietary, individual or collective interest, shall be reparable". The reference to collective damage is clearly intended to include environmental damage.

French case law has proved to be more audacious and, above all, more effective than the legislature. Trial judges have, meanwhile, appeared gradually to be moving towards a separate concept of environmental damage. In a decision handed down in 2006, the Court of Appeal at Bordeaux awarded compensation to a group of associations "for the damage suffered by aquatic flora and invertebrates" when there was no damage to private property (4). This daring on the part

of trial judges had never really been enshrined by the higher courts until the celebrated decision in *Erika*.

B. Back to *Erika*

In December 1999, off the coast of Saint-Nazaire, the Maltese petrol tanker MV Erika (chartered by Total) broke up and sank, spilling its cargo of fuel oil along more than 400 km of coastline between Finistère and Charente-Maritime. The significant environmental damage triggered the mobilisation of regional bodies and the voluntary sector. What could have been yet another oil slick instead witnessed particularly innovative legal developments, thus circumventing the "flag of convenience" stratagem that protected ship charterers.

In its decision of 25 September 2012 (5) in the *Erika* case, the Court of Cassation ruled that there had been negligence on the part of Total; this in turn led the Court to find Total and its co-defendants jointly liable in civil claims. On the issue of criminal prosecutions, it was confirmed that French courts did indeed have jurisdiction.

Admittedly, the MV Erika was a foreign vessel sailing in an Exclusive Economic Zone (EEZ), but the environmental damage was suffered in territorial waters and along the French coast. While in civil matters, legislation in favour of jurisdiction for the place where the damage in question has been suffered has proliferated (Articles 4 and 7 of the "Rome II" Regulations or Article 5.3 of the "Brussels I" Regulations), the question of jurisdiction in criminal matters was much vaguer. The Court of Cassation gave an unequivocal decision on the issue, ruling that the French and not the Maltese courts had jurisdiction.

Thus Total, having a power of supervision or control in the management or operation of the vessel, could have checked the latter's suitability for transporting cargo, without being able to hide behind its sister classification society, Rina. The criminal offence of negligent pollution had thus been committed and could be imputed to Total. The guilt established by the Court of Appeal was not challenged by the decision handed down by the Court of Cassation. The order that Total pay a fine of €375,000 was therefore final.

As regards the civil claims, the Court of Appeal, applying the 1992 CLC Civil Liability Convention (CLC), overturned the decision of the court of first instance by clearing the Total Group. The oil company, deemed a charterer by the appeal judges, could therefore benefit from the immunity conferred by the CLC's special scheme, liability falling exclusively to the owner of the vessel. The Court of Appeal thus ruled that civil liability lay solely with the parties falling outside the scope of the Convention, namely the owner's agent, the ship management company and the classification society. Although the *Erika* case was admittedly disastrous for its image, the French oil company came out of it pretty well in financial terms.

Before the Court of Cassation, the argument (contained in a judgment that is over 300 pages long) centred in particular on the issue of negligence on the part of the oil company. The immunity enjoyed by the charterer falls down if the latter has been grossly negligent. While the French Court of Appeal had indeed acknowledged that Total had not respected "*the rules that the company it had itself put in place so as not to risk chartering a vessel unsuited to the transportation of dangerous pollutants*" but that the negligence had not been committed with the "*awareness that by acting in this way, damage caused by pollution would probably ensue*". The Court of Cassation

stepped into this particular breach by imputing negligence to all parties to the shipping operation – including, therefore, Total: having simply been found guilty by the trial judges, Total became guilty under criminal law *and* liable under civil law by France's highest court. The hierarchy of blame was thus re-affirmed and the separate concept of environmental damage, which had already been acknowledged by the trial judges, definitively established. Total was ultimately ordered to pay the sum of 200 million Euros in damages. Regardless of the amount, the Group, doubtless out of concern to repair its image, had already got a head start by compensating the various communities affected by the oil spill. The decision will apply above all for the future: it is intended to serve as a warning to all those who, hidden in international waters or benefitting from immunity under international agreements or conventions, thought that they could avoid liability.

A. Post *Erika*

This vitality in ordinary French law will serve to fill in the gaps left by the law emanating from the 2004 Directive. While the latter does allow environmental damage to be taken into account on a European Community level, it only covers damage sustained after 30 April 2007. Damage covered by the Directive relates only to three aspects that must have been "gravely affected". This concerns, first of all, those species and habitats protected by Directives 79/409/EEC and 92/43/EC (wild birds; wild flora and fauna); water policy under Framework Directive 2000/60/EC; and finally, contaminated soil, insofar as the contamination poses a serious risk to human health (6). Furthermore, only the damage caused or that may be caused by certain activities fall within the remit of the programme.

The list is contained in Decree n° 2009-468 of 23 April 2009 and codified under Article R. 162-1 of the *Code de l'environnement*. Thus only professional activities are covered (para. 1). Moreover, for environmental damage that falls within the scope thereof, the administration – more specifically, the Prefect of the *département* – will be responsible for the implementation of reparations and preventative measures. The Prefect will also be the point of contact for any natural or legal persons directly affected. We can therefore understand that ordinary law, which has admittedly be at fault in ignoring environmental damage for far too long, has the merit of being much more straightforward in comparison with a framework of administrative provisions, which can seem a little dated. Admittedly, we can take comfort from the fact that the law faithfully transposing the Directive instituted a strict liability scheme found on the well-known "polluter pays" principle.

The overly inflexible "co-habitation" of two emerging laws – an ordinary law that managed to extend the concept of damage and a special law, based on EU legislation – may pose problems in future.

For the purpose of clarification, following the vote in May 2013 by the Senate on a bill relative to the insertion into the Civil Code of the duty to repair environmental damage, the Minister of Justice and *Garde des Sceaux* ("Keeper of the Seals", a title held by the Minister) set up a working party on the issue. The group, chaired by Professor Yves Jégouzo, published its findings in September 2013. The report provides for the creation of sections of legislations that would later become Articles 1386-19 to 1386-23. These provisions firstly aim to define environmental harm and create a specific reparations scheme. Environmental harm would therefore be "*abnormal damage to the elements and functioning of ecosystems, as well the collective benefits drawn from the environment by humankind*". For the purposes of effectiveness, a list will be established by decree.

The new scheme also provides for the costs incurred in preventing the imminent occurrence of environmental harm to be borne by the person liable. The courts have been given powers to prescribe "*reasonable measures suitable to prevent or halt the illegal nuisance to which the environment is exposed*". In order to overcome the usual procedural obstacles, essentially linked to the issue of the interest to act, in addition to the procedures already provided in the *Code de l'environnement*, the State, the Public Prosecutor's Office, the regional and local authorities, groups from the communities concerned by the area at risk, public institutions, foundations and voluntary organisations whose purpose is to protect nature and the environment, are all authorised to institute legal proceedings. A specific limitation period, extended to 10 years, is also provided. That period runs from the date on which the complainant had knowledge or ought to have had knowledge of the damage. Following the 2004 Directive on this point, priority is given to reparation in kind of the damage suffered. In the event of gross negligence, provision is made for a civil fine.

This draft bill is innovative in many respects and it highlights the necessary operation of a process to anticipate damage. Admittedly, yet again, positive law is not entirely ill-equipped on this point: complainants can validly claim imminent damage, which allows them to bring an action for interim relief on the basis of Article 809 of the CPC, but that remains the exception rather than the norm.

The future has appeared bleaker in recent months. There lay at the heart of environmental protection provisions the now famous precautionary principle. This keystone of the newly emerging legal edifice has been the subject of repeated attacks on the part of the French National Assembly and the Senate.

I.The precautionary principle under threat

While the precautionary principle has been readying itself finally to find the legal tools allowing it to become truly consistent, it seems to have been confined within new limits so as not to annoy manufacturers, who were formerly dubbed polluters and recently renamed as innovators. Behind all those words, there is much political and economic tension. In order to gauge the issues, it is useful to go back over the origins of the precautionary principle (section A below) the better to understand the threats that it currently faces (section B below).

A. The origins of the precautionary principle

The precautionary principle took centre stage in 1992, at the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro (also known as the Earth Summit). It posits a prudence rule by virtue of which "*the absence of absolute scientific certainty must not serve as a pretext for deferring the adoption of effective measures serving to prevent the deterioration of the environment*". The Maastricht Treaty, which was adopted in the same year, reiterated the principle. It featured at Article 130-R, which became Article 134 of the Treaty of Amsterdam then Article 191 of the Treaty on the Functioning of the European Union (TFEU). On a European level, the scope of the principle is very broad; obviously it concerns the environment but also the fields of human and plant health.

It was thereafter introduced into French national law by the 1995 Law on Environmental Protection, though more limited in scope than under European law (Article 110-1 of the *Code de l'environnement*). Then, ten years later, it was Article 5 of the Charter for the Environment, on a

constitutional level, which imposed a duty on public authorities to make decisions in light of the precautionary principle.

Prior to that legislation, the precautionary principle had above all been a doctrinal concept. Arguing for a new ethical responsibility, some scholars suggested a radical break with classic theories, at least as regarded the risks of serious and irreversible harm (7). It would therefore be a preventive responsibility founded on the precautionary principle. Where there is doubt, there must be no delay: action must be taken as soon as the risk is apparent and even where the harm has not yet come about. This is potential harm. A person who does not act when he ought to have intervened is deemed negligent. Ultimately, we come back to negligence: negligence resulting from the failure to take the steps necessary to prevent a possible risk.

The precautionary principle is now part of the French Constitution but is only incumbent on public authorities. Its scope is for the time being relatively limited except that it will undoubtedly be behind a restoration of the preventive aspects of civil liability. In spite of it all, the principle seems to frighten a number of France's elected representatives.

B. The threats faced by the precautionary principle

Surprisingly, both Houses of the French Parliament are currently proving to be less than benevolent towards the precautionary principle. On 27 May 2014, the Senate adopted a constitutional bill (PPL n° 532) that aimed to define the scope of the precautionary principle and to amend Articles 5, 7 and 8 of the Charter for the Environment. In detailing the reasoning behind the bill, the *rapporteur* stressed that "*the assessment of the application of the new constitutional principle reveals its limits. An often excessive, even unreasonable interpretation of deviations, but also of material difficulties in its application*". He adds that "*[i]n a context of increased competition and a loss of competitiveness, the precautionary principle must not manifest itself in an standstill that would harm our economy; on the contrary, it must bring out truly dynamic activity: the precautionary principle now cannot be divorced from the innovation principle*".

The rapporteur for the bill pursues his line of argument by asserting that the precautionary principle "*may have amplified the atmosphere of suspicion towards innovation, and even towards scientific and technical progress*". He states further that "this danger is all the more worrying in that it now entails a dismissal of scientific expertise". The purpose of the bill is therefore to reassure citizens terrified by the precautionary principle by amending Article 7 of the Charter for the Environment which may consequently provide that "*public information and policy-making are based on the dissemination of research results and the use of independent, multidisciplinary scientific expertise, conducted in line with the conditions defined by law*". The Senate has not, however, sought to strip the precautionary principle of its constitutional status. The final blow may well come from the National Assembly. On 12 June 2014, a group of 121 deputies put forward a bill seeking to remove the principle from the Constitution. Deputy Eric Woerth, who proposed the bill, takes the view that the precautionary principle "*has, over time, become a principle of inaction, all too often obstructing research and risk-taking in the economy*".

The bill seeks nothing less than the repeal of Article 5 of the Charter for the Environment, the main provision containing the principle. But the proponents of the precautionary principle need not worry. It is simply a matter of stripping it of its constitutional status so that it may be reinvigorated. The reasons for the bill state that "*by stripping the precautionary principle of its*

constitutional scope, it is not a matter of bringing the principle to an end but rather giving Parliament, the nation's representatives the opportunity better to define it and thus strengthen and make it more indisputable than it currently is".

It remains to be seen whether these bills or drafts are passed into law. In any event, they reveal an attitude of defiance towards the precautionary principle. The issue of environmental liability is far from resolved. To paraphrase Robert Badinter, who said with some malice that France was not the land of human rights but the land of the declaration of human rights, let us hope that France does not become merely the land of the Charter for the Environment.

Notes:

(1) Recent applications: Versailles, 4 February 2009, n° 08/08775, – Montpellier, 15 September 2011, n° 10/04612, and Ph. Stoffel-Munck, *La théorie des troubles anormaux de voisinage à l'épreuve du principe de précaution : observations sur le cas des antennes relais*, Dalloz. 2009. 2817; J.-Ph. Feldman, *Le trouble voisinage du principe de précaution*, Dalloz 2009. 1369

(2) See, in particular, ECHR, *Öneryildiz v Turkey*, Application no. 48939/99, 18 June 2002.

(3) Article 31, CPC

(4) CA Bordeaux, n° 05-00.567.

(5) n°10-82.938

(6) Now Article L. 161-1, I of the *Code de l'environnement*

(7) For example, C. Thibierge, *Libres propos sur l'évolution du droit de la responsabilité. Vers un élargissement de la fonction de la responsabilité civile ?*, RTD civ. 1999; *Avenir de la responsabilité, responsabilité de l'avenir*, Dalloz 2004. Chron. 577