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National Report FRANCE

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Among the different developments of environmental law in France, I chose to focus on two major events. They offer the opportunity to discuss the current evolutions of environmental law in our member states.

The first event is the judgment of the Court of Cassation of 22 September 2012 concerning the case of the Erika shipwreck and the judicial recognition of pure ecological damage.

The second is the general meeting ("Etats généraux") on the modernization of environmental law. The process was launched in May 2013 by the Ministry of Ecology and invites all the stakeholders to participate (in the light of the legal experience of member States or foreign States).

Other important issues are also on the French agenda, as the problematic of ecological compensation (see, in particular the recent publication of the expert report on compensatory measures for the airport project "*Notre Dame des Landes*" between Nantes and Rennes in Brittany), the national debate on energy transition (ongoing), the reform of ecological tax system (ongoing), the project of framework law on biodiversity and ecosystem service (due in september 2013), the project of law relating to the establishment of a scientific expertise Authority (include scientific warning) in the fields of health and environmental issues (decembre 2012).

## I- The judgement of the Court of Cassation on the Erika shipwreck (22 september 2012).

The story of the Erika shipwreck is well-known. The oil spill off the coasts of Brittany (more 10 000 tonnes of heavy fuel oil) had disastrous ecological and socio-economic impacts (400 kilometers coastline were affected). The judgment of the Court of Cassation of 25 September 2012 was eagerly awaited since the launch of judicial proceeding (for 11 years - Tribunal de Grande Instance Paris, judicial Court of first instance, January 16, 2008, Paris Court of Appeal, March 30, 2010). Contrary to the opinion of the Advocate General, the Cassation Court condemns the Total company to 375,000 euros and 200 million euros in damages to be paid to the State, territorial communities and approuved associations of protection environment. The Court clarifies the interpretation of the French rules of criminal and civil liability in light of the international law of the sea and explicitly recognizes the repair of pure ecological harm. Called a "great day for Environmental Law" by the Minister of Ecology, the judgment of the Cassation Court brings a number of legal clarifications while in the same time leaving several incertainties in relation to the notion and the implementation of pure ecological damage.

Among the questions brought before the Cassation Court, was the question of the jurisdiction of the French criminal courts, in the light of Marpol Convention, jurisdiction contested in particular by the convicted parties (As a reminder, the Erika shipwreck took place in the exclusive economic zone with obvious consequences in territorial seas and coastal areas).

The Court rejected the argument of incompetence of French criminal court and specifies who may be criminally responsible under French law. It considers that the Marpol Convention does not clearly designate the persons criminally liable. In addition, based on the Montego Bay Convention, the Cassation Court considers that the agreement does not require the legislator to respect a restrictive list of the categories of persons criminally responsible ... "*When proceedings were initiated by the coastal State to suppress an offense with applicable laws and regulations or international rules and standards to prevent, reduce and control pollution from ships, committed beyond its territorial sea of a foreign ship*", the Cassation Court deduces that the "*national competence of this State is acquired when it concerns a case of serious damage*". "The Cassation Court concludes that the national legislation could be stricter in order to contribute to the implementation of supranational norms.

The Cassation Court applies the French law which includes different person responsible (the ship's captain, the ship owner, company director or every person who have a control or management control on the ship) : four defendant are considered as criminal responsible : shipowner, ship management company, ship's charterer, the certification company.

Concerning the civil liability, four defendant also are concerned : the shipowner, ship management company, ship's charterer (Total company), the certification company. The Cassation court recognizes their civil fault and invalidates the interpretation of the appeal Court of Paris who exempted Total from civil damages. At the difference of the Court of Appeal of Paris, The Cassation court recognizes that Total group made a "temerity" fault (the Cassation Court considers that Total did not respect its vetting rules). The Cassation court quashes (on this point) the judgment of the appeal Court of Paris which did not recognize a temerity fault allowing the Total company to be not convicted under the civil liability.

Finally, the Supreme Court explicitly recognizes the pure ecological damage which is defined as "direct or indirect damage inflicted on the environment and resulting from the infringement", but the Cassation Court does not define with more precisions the pure ecological damage (the Court of Appeal of Paris March 30, 2010 had described this damage as "*damage objective, independent*", "*any significant damage to the natural environment, namely, in particular, air, atmosphere, water, soil, land, landscape, natural sites, biological diversity and the interaction between these elements, which is without impact on a particular human interest but affects a legitimate public interest* "

Parallel to this judicial marathon of Erika case, reflections and doctrinal proposals have proliferated (See the book Nomenclature des préjudices environnementaux GJ Martin L. Neyret 2012, rapport Mieux réparaer le dommage environnemental, Club des juristes 2012, Mission C. Lepage 2008 ). This dynamic has inspired the law proposal of senator Retailleau No. 546/2012 on the inclusion of the concept of pure ecological damage ("prejudice écologique") in the Civil Code and the establishment by the government of a working group on the same topic in October 2012.

This proposal of law, debated in the Senate on May 16, is clearly in line with the logic of adaptation of the regime of civil liability to obtain appropriate reparation for ecological damage. It is not only to deduce the legal consequences of the judgment of the Court of Cassation or to translate the doctrinal proposals. This proposal of the law also aims to draw the consequences of the limited and inadequate nature of the law on environmental

liability adopted in 2008 to implement the Directive 2004/35/UE (limited scope, lack of a responsibility regime in favor of a administrative police focused on the prefect).

The proposal is clearly in accordance with the Environmental Constitutional Charter which recognizes the right of everyone to live in a balanced environment which shows due respect for health (art. 1). According to the Charter, "every person has the duty to take part in the preservation and improvement of the environment" (Article 2) and that "everyone shall be required in the conditions provided for by law to contribute to the making good of any damage he or she may have caused to the environment. " In 2011, the Constitutional Council concluded that the first two articles of the Charter implies a "duty of care in respect of environmental damage that may result from its activity" and concluded that "it is permissible for the legislature to define the conditions under which an action may be brought on the basis of the infringement of this obligation. "

The proposal of law aims to introduce into the Civil Code as a new "responsibility for environmental damage " (articles 1386.19 and 1386.20)

- "Art. 1386.19, Any person who causes through his fault environmental damage is required to repair it.

"Art. 1386.20. - The repair of environmental damage occurs primarily in kind. "

The proposal of law was amended after the report of Senator Anziani (april 2013, n°519/2013) and the committee debates

- The change of the word “prejudice” to the word “atteintes” (damage)
- A regime of liability without fault = "any person who causes environmental damage is required to repair it."
- Priority to repair in kind is confirmed but it is added that a financial compensation could be possible (paid to the Government or to a environmental organization designed by the Government) "When the kind of damage repair is not possible, repair may result in a financial compensation paid to the State or to an agency designated by the government for the protection of environment within the conditions laid down by decree in Council of State"

Proposition de loi Sénat 16 mai 3013 deposée à l’Assemblée nationale

Introduction d’un titre IV ter “De la responsabilité du fait des atteintes à l’environnement” Livre III du Code civil

« *Art. 1386-19.* – Toute personne qui cause un dommage à l’environnement est tenue de le réparer.

« *Art. 1386-20.* – La réparation du dommage à l’environnement s’effectue prioritairement en nature.

« Lorsque la réparation en nature du dommage n’est pas possible, la réparation se traduit par une compensation financière versée à l’État ou à un organisme désigné par lui et affectée, dans les conditions prévues par un décret en Conseil d’État, à la protection de l’environnement.

« *Art. 1386-21.* – Les dépenses exposées pour prévenir la réalisation imminente d’un dommage, en éviter l’aggravation ou en réduire les conséquences peuvent donner lieu au versement de dommages et intérêts, dès lors qu’elles ont été utilement engagées. »

This proposal of law is only a first step in the process of adapting the civil liability system faced to the particularities and complexities of environmental damage. Several issues remain to be addressed, such as the definition and criteria of a environmental damage, the question of the environmental damage evaluation, the problematic of the interest of the parties to act before the judge (in parallel, proposal of law from the government on consumer protection and the introduction of a procedure for class action, may 2013) and the articulation

between the implementation of the law on environmental liability and the environmental civil liability that is building.

## II- The general meeting on the modernization of the environmental law - "Les états généraux de la modernisation du droit de l'environnement"

In September 2012, the French government organized an environmental conference for the ecologic transition in line with the logic of the Grenelle Environmental Roundtable established in 2008. In his inaugural speech, the President of French republic declared that France must become "the nation of environmental excellence" under the aegis of the green economy. This environmental annual conference identified five major topics coordinated in five round table:

- Round table 1 : Préparing the energy transition.

A public debate is now ongoing (reduction of greenhouse gas emissions, renewable energies, energy efficiency (energy building renovation…)…). A proposal of programming law on energy is expected in 2013.

- Round table 2 : Recovering Biodiversity

A proposal of framework law is under preparation. Actions program relating to the French strategy for protected areas and priority actions concerning the implementation of ecological continuities (under the Law Grenelle 2010). French's commitment to participate to the intergovernmental science policy platform on biodiversity and ecosystem service. French initiative for the conservation and the management of Biodiversity in overseas territories. A proposal of law relating to housing, urban planning and towns is under preparation. A new action plan for organic agriculture is under preparation (State and regions). Assessment of the action plan Ecophyto 2018 on pesticides use.

- Round table 3 : Preventing Health and environmental risks emerging.

Health and environmental risks emerging (endocrine disruptors, nanomaterials, electromagnetic fields, unregulated pollutants in water, and special cocktails and effects of very low doses) and air pollution (fine particules, necessity to be in compliance with the EU Directive and EU case law). Assessment of rhe second National Health and Environment Plan (NESP 2) which cames to an end in 2013).

- Round table 4 : Financing the ecological transition and environmental tax system

A working group has been created by the government to present reform proposal

- Round table 5 : Improving environmental governance

Improving the structuring of environmental dialogue with stakeholders at national and local levels, the involvement of expert organizations and the participation of all citizens in public decisions and the development of corporate societal responsability.

At this conference for ecological transition, the government has planned to organize in spring 2013 a general meeting of the modernization of environmental law. A public consultation process is underway since late April. A questionnaire on environmental law (20 questions) is available to stakeholders (including research organisms through the ministry for research and education) and the answers are to be submitted on the website

of the Ministry of Ecology before 9 June. Based on the questionnaire and the responses, the Ministery of Ecology has planned meetings with stakeholders, in particular with researchers environmental law through their respective research organisation and the French society for environmental law.

The “Etats généraux” for the modernization of environmental law aim to obtain a "*demanding environmental norm, better conceived and more readable*" to ensure “*the efficient and effective protection of people, health and the environment while facilitating ... the realization of projects of economic and social interest*”. The Ministry of Ecology wants that the Etats généraux become a vast field of diagnosis and innovative improvements relating to environmental law (design and implementation of the legal norm, choice of principles, procedures, instruments, normative control and sanction, actors and governance).

To understand the spirit of these Etats généraux, it is important to emphasize that those questioning about the modernization of environmental law is part of a more general discussion on the modernization of public action. The report on the modernization of public policy published in December 2012 and the report on the fight against inflation normative presented to Prime minister in March 2013 (report Boulard and Lambert) is particularly instructive on the ambiguity that can cover the expression of modernization (versus simplification, deregulation). This general debate on the modernization of public policy fit in a dynamic driven by the European Union.

The analysis of the questionnaire necessary needs to adopt a posture of caution and awareness about the risks of drift of the modernization process in relation to the objectives necessary for intelligibility, clarity, efficiency and effectiveness of the environmental law. The modernization of environmental law can not be reduced to a process of simplification, streamlining the benefit of an irrational deregulation based on a caricature of the environmental law. A careful reading of the recent report of the mission to fight against the normative inflation (A. Lambert and JC. Boulard) invites precisely to ensure that the process of modernization of environmental law does not turn into a process of regression of the environmental legal protection in favor of economic considerations at the antipodes of sustainable development. The semantic content and the proposals of this report Boulard and Lambert reflect the potential and pitfalls of the modernization process of public policy in the filed of environmental protection.

- example of the interpretation facilitator norm proposed by Lambert and Boulard in their report: since the publication of the report in March 2013, the Prime Minister has adopted an instruction to the prefects, heads of central administration and directors of national public institutions (3 April 2013): "exception to norms relating to safety, asked the administrative authorities to which this instruction to ensure that, when they are applying a legal norm, by providing an enabling interpretation taking into account the circumstances of time, place, means and interest in the project. "

- Some extracts from the report Lambert/Boulard mars 2013 (in French)

*« Les règles interprétés trop rigoureusement permettent souvent sous couvert de la protection environnementale d’une espèce, de protéger une espèce qui ne l’est pas : les riverains hostiles au projet d’aménagement, à l’inverse à partir d’une appréciation facilitatrice, des mesures raisonnables de compensation peuvent sauver le projet »*

*« Affirmer le rôle du préfet de département dans l’exercice de l’interprétation des normes – neutraliser un foyer d’interprétation rigide des normes en transférant la compétence d’interprétation des dreal vers les Directions Départementales du Territoire – Les DREAL gouvernent. Halluciant. Où sont passés les Préfets de la Région »*

*Annexe « Histoire édifiante du scarabée pique-prune, de l’hélianthème faux alyson et de l’escargot de Quimper*

*« De puissants défenseurs de normes sont prêts à dénoncer tout assouplissement comme un signe de laxisme ou de recul – nous avons rencontré un intégrisme normatif dans le domaine de l'environnement qui n'est pas le fait de l'écologie politique mais celui d'associations environnementalistes relayées par les DREAL qui mettent au service de l'interprétation rigoriste des normes la bureaucratie »*
*« Fouilles : l'abus du devoir de mémoire archéologique peut parfois obérer le devoir d'avenir – ne plus déléguer les décisions aux fouilles préventives aux conservateurs régionaux de l'archéologie mais exiger qu'elles soient signés par les préfets eux mêmes et garantir que sera pris en considération l'intérêt général qui ne se résume pas aux intérêts archéologiques »*
*« ZNIEFF= données produites sans débat, sans concertation, sans enquête publique, peuvent impacter gravement une opération : face au risque d'usage abusif des ZNIEFF par des interprètes intégristes il est utile de rappeler qu'une znieff est dépourvue de portée juridique »*

## QUESTIONNAIRE SUR LA MODERNISATION DU DROIT DE L ENVIRONNEMENT

1- Le droit de l'environnement est-il suffisamment efficace pour protéger l'environnement, la santé publique et la qualité de vie ?

2- Le droit de l'environnement a t-il des conséquences positives ou négatives pour le développement économique et social ? Lesquelles

3- Quels devraient être les axes prioritaires de modernisation du droit de l'environnement ?

4- Quel mode d'action doit être selon vous privilégié (réglementation, incitation financière ou fiscale, contractualisation, engagements volontaires, régulation…). Faut-il différencier le type d'instrument selon les domaines ?

5- Faut-il favoriser l'expérimentation de règles ou procédures ? Dans quel domaine ?

6- Est-il préférable que les règles soient uniformes sur le territoire ou faut-il permettre des différenciations locales ? Dans quel domaine ?

7- Le droit de l'environnement met-il en œuvre de façon satisfaisante les principes de règles de niveau supérieur (Charte de l'environnement, textes européens et internationaux, notamment la convention d'Aarhus)

8- Faut-il créer de nouveaux principes ? modifier ceux qui existent ?

9- La transposition en droit national des règles élaborées par les institutions de l'UE (directives…) est-elle réalisée de façon satisfaisante ? sinon, que faudrait-il modifier ?

10- Faut-il modifier les conditions d'articulation du droit de l'environnement avec les autres législations (urbanisme, agriculture, santé…) ? comment (fusionner les documents de planification d'urbanisme et d'environnement, structurer autrement les différents codes) ?

11- Est-il possible et souhaitable de créer une procédure et une décision uniques pour un projet alors qu'il relève de plusieurs législations (urbanisme, agriculture, installations classées pour la protection de l'environnement…), ? Comment ?

12- Les modalités actuelles de mise en œuvre du principe de participation à l'élaboration des décisions en matière d'environnement (débats publics, concertations, consultations, enquêtes publiques) sont-elles satisfaisantes ? En quoi devraient-elles être modifiées ?

13- Les procédures d'instruction (études d'impact, composition des dossiers, délais..) des projets ayant une incidence sur l'environnement (aménagement, infrastructures, ICPE…) sont-elles satisfaisantes ? en quoi devraient-elles modifiées ?

14- Faut-il changer d'autorité décisionnaire (Etat, collectivité locale, organe collégiale, autorité administrative indépendante ; niveau départemental, régional ou national) ? si oui dans quels domaines ?

15- Faut-il modifier l'organisation des administrations chargées de l'application du droit de l'environnement (instruction, évaluation, décision, contrôle) ? En quoi ?

16- Quels sont les moyens les plus appropriés pour améliorer le respect du droit de l'environnement (information, expertise, contrôles, répression, contentieux) ?

17- Faut-il créer de nouvelles sanctions pénales ou administratives ? Modifier leurs modalités de mise en œuvre ?

18- La réparation des dommages à l'environnement est-elle satisfaisante ? Comment l'améliorer ?

19- Faut-il modifier les conditions d'exercice des recours en justice ou certaines règles de procédure contentieuse ? Lesquelles, de quelle manière ?

20- Faut-il développer des procédures de médiation ou de transaction environnementale ?

21- Autres points relatifs à la modernisation de l'environnement