Creating Clarity, and Insecurity

Preparation of a Reform of Civil Liability in France

By Christelle Coslin

French civil law has undergone significant changes during the last years. After the reform in 2008 of the statutes of limitations and the suggested reform of contract law in May 2011, the third chapter of this modernization process tackles civil liability. This proposal is based on the endeavors of a working group led by Professor Terré, under the aegis of the French Academy of Moral and Political Sciences. Legal authors and practitioners wrote a draft text. The Ministry of Justice organized a public comment period on this draft, which ended on January 16, 2012, and we do not know the results yet.

This suggested reform aims to improve the clarity and efficiency of civil liability. To achieve this, the working group has suggested substantially amending the French Civil Code and gathering all relevant rules in one single source by carrying out a double codification covering (1) case law developments, and (2) the various texts having established special liability regimes, for instance, the specific traffic accident compensation regime.

The suggested reform would newly define civil torts. Firstly, it would create a general definition of a civil fault in which illicitness would become the central point. Indeed, a civil fault would now correspond to an "illicit fact," meaning a breach of "a rule of conduct imposed by the law or by the general duty to be cautious and diligent." Adopting previous case law solutions, the suggested reform also specifies the conditions to hold legal entities liable from a civil standpoint when a company body, its organization, or its functioning has engaged in a civil fault.

Secondly, respecting the notion of damage, defined as "any established harm to a personal interest that is recognized and protected by the law," the main innovation would introduce a new head of loss: the harm to a collective interest, which particularly aims to compensate environmental losses. However, the suggested reform only creates this concept and refers to the law for more details on the conditions governing compensation of this type of loss.

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Thirdly, the suggested reform also affects causation principles. On the one hand, the suggested reform defines a cause as "any fact that may… produce [the damage] in the ordinary course of things and without which it would not have occurred," and a limit is defined in the chain of causes: "only the immediate and direct consequences of the damage can be compensated pursuant to this text."

On the other hand, the law includes and clarifies the principle of joint and several liability: the law would hold each party involved liable for the entire damage toward the victim, and the victim subsequently could file an action against the co-tortfeasors in proportion to the seriousness of their respective fault. Moreover, the suggested reform would establish equal contribution in the event of collective liability without any fault, a noticeable novelty under French law.

The suggested reform also innovates the scope and reason of civil liability, particularly exemption from liability. In several instances a harmful event would not give rise to liability, more specifically when the behavior in question "resulted from legal and regulatory provisions, was imposed by the legitimate authority or required for purposes of self-defense or to protect a higher interest[,]" or when the victim agreed to the breach of a right insofar as the right was available. A victim's fault could only partially exonerate a tortfeasor, unless the fault meets all the conditions of a force majeure event.

Moreover, the public policy nature of tort liability resulting from a fault would arise from the law as the suggested reform explicitly would prohibit contractual clauses limiting liability except in cases that do not require a fault to create liability, unless a victim sustained a personal injury.

Furthermore, while retaining the principle of full compensation and specifying its scope, the reform would create a new large-scale exception due to an intentional lucrative fault. In such a case, the reform would authorize a court to set the amount of damages according to the profit generated from the fault and not from the loss sustained. Such decisions bring to mind punitive damages even though the reform would limit the amount of

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damages to the profit generated. Another concept taken from Anglo-Saxon common law that the reform would also introduce is mitigation, as the text enables a court to reduce the amount of damages if a victim does not take "the safe and reasonable measures to limit the loss."

The text also suggests departing from the traditional distinction between tort liability and contractual liability by specifying that "damage to the physical and psychological integrity of the person are compensated [according to the tort regime] even though they would be caused in the scope of the performance of a contract." However, this distinction would be maintained in a case of a contractual breach because contract nonperformance could only give rise to compensation under the rules relating to the implementation of contractual liability.

To conclude, this suggested reform would make changes that may greatly modify French law on certain points. While more clarity generally could result from adopting the reform, modifying concepts such as fault or introducing new heads of loss or new rules to compensate losses could create legal insecurity. So it will be interesting to examine the results of the public comments organized by the Ministry of Justice and to follow the transformation of the current propositions into a bill. FD