INTEGRATING SOCIAL AND ENVIRONMENTAL RESPONSIBILITY INTO LEGAL CONCEPTS: THE LESSONS OF THE 2017 FRENCH LAW "ON THE DUTY OF VIGILANCE"

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In unison with other countries, France is experiencing recurrent debates on the value of developing Social and Environmental Responsibility(SER), a concept that comes from the world of business and the academic disciplines that take it as its object. These discussions are a symptom of an awareness among economic actors and public decision-makers of the urgent need to involve companies more in the framing of economic practices. Indeed, the globalization of trade limits the effectiveness of traditional legal arrangements : corporate groups manage to shift their responsibilities to third parties that are, in fact, under their control. This is particularly important when looking at the development of global supply chains.

The concepts of French civil liability law do not make it possible to attribute to the parent company of a group the compensation of serious damage to persons occurring in the global supply chains. As in many legal systems, the principle of the autonomy of the legal personality of subsidiaries "screens" the responsibility of the parent company.[1]

The judge did not follow the authors ' proposals for strict liability of the parent company for the wrongful conduct of its subsidiary. Nor has the case law recognized the right of victims of the acts of a subcontractor to turn against the payer. However, it is well known that the subsidiaries or principals who are the direct cause of the damage are often insolvent. Although a very large majority of the literature has advocated greater accountability of parent companies, the March 2017 civil liability reform project does not provide a satisfactory response to this.[2]

Only a law of 27 March 2017[3] was finally adopted, charging certain companies headed by groups of a certain size with a "duty of vigilance", which is translated into the obligation to put in place a prevention plan against serious violations of "human rights and fundamental freedoms"[4]. It is an interesting attempt to integrate the concept of social and environmental responsibility into legal concepts.

However, if this law can help to take account of the interests of workers outside the European Union, many obstacles to the effective implementation of its provisions will have to be removed (1). It is therefore impossible to avoid thinking about promoting social and environmental responsibility (2).

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1 Cf S. Laval 2017, qui examine les diverses techniques adoptées aux Etats-Unis, en Angleterre et en France pour contourner l'écran de la personnalité morale.

2 G. Viney 2016.

3 Un événement tragique (l'effondrement d'une usine textile située au Bangladesh avait provoqué la mort de plus de 1000 travailleurs employés par le sous-traitant de nombreuses multinationales) est à l'origine de l'adoption de la loi.

4 C. Hannoun 2017 ; A-D. Fâtome et G. Viney 2017 ; M. A-. Moreau 2017

1. Potential and limitations of the duty of vigilance act

In companies exceeding a workforce threshold of 5,000 employees, possibly taking into account the workforce of their subsidiaries whose head office is located on French territory, the law (Art. L. 225-102-4 of the Commercial code) requires the adoption of a plan providing for " reasonable vigilance measures to identify risks and prevent serious infringements of human rights and fundamental freedoms, the health and safety of persons and the environment, resulting from the activities of the company and those of the companies it controls within the meaning of Article L. 233-16 II, directly or indirectly, as well as from the activities of subcontractors or suppliers with whom an established commercial relationship is maintained (...) ". The same provisions also apply to companies exceeding a workforce threshold of 10,000 employees, both within and in their direct or indirect subsidiaries whose head office is established in French territory or abroad. The duty of vigilance could thus apply to companies whether they are located in the national territory or abroad.

One author[5] has, however, identified a first difficulty in determining the law applicable to the parent company, which is usually referred to as the lex societatis.

In fact, the French law on the duty of vigilance presupposes that the parent company is actually subject to French law and is therefore established on French territory. But it is precisely this criterion that could favour fraud : in order to escape the application of the French law on the duty of vigilance, it would be sufficient for a parent company to establish its Registered office outside the French national territory. It could then establish a simple branch or subsidiary on French territory if it wishes to develop its activities there without being subject to French law. Such an organization is not a priori illegal but it risks promoting forum shopping practices and the fraudulent neutralization of French law.

The usual corrective mechanisms of private international law show their limitations here. On the one hand, international public order is very restrictive.[6] It is unlikely that provisions that merely establish an obligation of vigilance could fall within the scope of international public policy.

As for the qualification of police laws, the analyses are shared. It should be recalled that this mechanism makes it possible to enforce the law of the forum where the law normally applicable prevents the achievement of the purpose of the former. With this in mind, French law applies to companies which have a sufficiently close connection with French law. This would be the case for companies that carry out their real activity on French territory. However, some authors consider that this corrective technique is not necessarily operable.[7] The case law of the Court of justice of the European Union is in fact not favourable to the implementation of this mechanism. In an *Inspire Art*[8] case, the court held that a state imposing its requirements on a company located abroad on the ground that the latter carries out most of its economic activity in its own territory would disproportionately infringe Economic Freedom. The European legal order gives questionable primacy to freedom of establishment.

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5 E. Pataut 2017.

6 S. Laval 2017.

7 E. Pataut 2017.

8 CJCE, 30 sept. 2003, aff. C-167/01.

Whatever the position the Court of justice will adopt, the very existence of uncertainty as to the applicability of French law in any event reveals a deficient mechanics of the criteria for attachment. To remedy this difficulty, one author argues that it is necessary to develop a specific legal category for determining the applicable law on social and environmental responsibility.[9] In this respect, several criteria can be considered, which can revolve either around the organization of the company (real head office, presence of establishment of a certain importance) or around its activity (significant economic activity on French territory, distribution networks...).

A second question then arises : assuming that the parent company concerned is actually subject to the provisions establishing the obligation to draw up a vigilance plan, could victims located in third countries bring an action before the French court and seek compensation for the damage on the basis of French law?

The general rules of regulation no 864.2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, known as 'Rome II', should be applied. This regulation applies in situations where a conflict of laws involving non-contractual obligations relating to civil and commercial matters. The objective appears in the first recital: to promote the creation of an internal market with unified conflict rules.

The principle of designation of the applicable law is set out in article 4 of the regulation : it is in principle the law of the country where the damage occurs. Damage is defined, according to article 2, as any "infringement resulting from a harmful act" and " also applies to non-contractual obligations that may arise ". According to article 15, the law applies, in a consistent manner, not only to reparation but also, within the limits of the powers conferred on the court seised, to the measures that that court may take to ensure the prevention, cessation or reparation of the damage.

As the doctrine has pointed out, this choice for the law of damage is intended to standardize the norms of conduct in a given territory. However, it was pointed out that this choice encourages potential perpetrators to locate their activities in countries where standards of behaviour are the least restrictive.[10] In this case, French law has no special provision. Since the provisions of the regulation are mandatory, it could not do so freely in any case. It follows that companies, if they are bound by obligations under the duty of Care Act, will not necessarily be liable for damages that have occurred in the territory of third countries.

The traditional mechanisms of private international law are referred to in the regulations : international public order (article 26) and police laws (article 16). The first text states that the application of the law normally designated may be waived if such application is " manifestly incompatible with the public policy of the forum ". The doctrine agrees that the very applicability of this exception is unlikely in this case.[11] Contrary to international public order means the assumption that the application of a law whose content and application would conflict with essential values. However, the application of a law which does not penalize a failure to comply with a parent company's duty of care only reflects differences of assessment between legal systems as to the duty of

[9] E. Pataut 2017.
[10] E. Pataut 2017.
[11] S. Laval 2017.

care of the holder of power in groups of companies. Article 26 is therefore unlikely to play the role of an effective safeguard. With regard to police laws, article 16 states that " the provisions of these regulations shall not affect the application of the provisions of the law of the forum which govern the situation imperatively, irrespective of the law applicable to the non-contractual obligation ". The application of this text is, however, delicate as the classification of police provisions is uncertain. But according to other analysis,[12] the qualification of "police law" could be conceivable. Article 9 of the Rome I regulation on the law applicable to contractual obligations defines the police law as a law whose compliance is considered crucial by a legal order for the protection of its public interests, such as its political, economic or social organization, to the point of requiring its application to any situation falling within its scope. It could be argued, in the hypothesis examined here, that " compliance with the legislative policy underlying the police Act requires its mandatory application regardless of the law normally applicable.[13]

In addition to these traditional mechanisms, there are also two exceptions. On the one hand, where the victim and the defendant in the action have their habitual residence in the same country at the time of the occurrence of the damage, the law of that country applies. On the other hand, article 4 (3) states that if it is apparent from all the circumstances that the harmful event is manifestly more closely connected with a country other than that referred to above, the law of that country shall apply. The same paragraph 3 adds that a manifestly closer relationship with another country could be based, inter alia, on a pre-existing relationship between the parties, such as a contract, which is more closely related to the harmful event in question. The reference to the contract here has nothing exclusive. It could, perhaps, be sufficient to recover the situation of a relationship between the parent company and the direct perpetrators of damages. In other words, the judge might consider that French law logically applies, even where the damage has occurred abroad, since the damage is the result of a link between that direct perpetrator and that French parent company. It may, however, be asked whether this connection does not imply that a causal link is first characterized between the breach of the duty of vigilance, on the one hand, and the production of the damage, on the other. If the causal link is too loose, it is not excluded that the judge denies the existence of clearly closer links with France. In any event, it is unlikely that the Court of justice will give an overly abstract view of these obviously close links : the clause is intended to act as an exception, not as a general correction of the connecting criterion.

In these circumstances, several avenues for reflection could be exploited.

In the context of the Rome I regulation, the first approach could be to identify, on the territory of a member state, damage distinct from that which occurred in the third country. For example, French civil liability law (and probably others in Europe) distinguishes between "final" damage (damage to the body, a right or an interest) and the loss of chance to avoid that final damage. The distinction is not only conceptual in nature: it makes it possible to make good the damage when it is not certain that, without the event giving rise to civil liability (e.g. a loss of chance), the victim could have es-

[12] S. Laval 2017 ; v. aussi C. Hannoun qui paraît envisager la qualification de loi de police.

[13] S. Laval 2017.

caped the occurrence of the damage. By identifying and isolating the loss of chance damage, the right allows for reparation despite the uncertainty.

But even assuming that we manage to find such damage, distinct from that which occurred in the third country, located on French territory (but which ?), the Rome II convention makes it clear, in its introductory recitals, that the applicable law must be determined on the basis of the place where the damage occurs " independently of the country or countries where indirect consequences may occur ". Article 4 states in the same sense that the applicable law is that of the country in which the injury occurs, " regardless of the country in which the event giving rise to the injury occurs and some of the country or countries in which indirect consequences of the event arise ". By way of illustration, it should be noted that compensation for damage by ricochet (suffered by a close relative of the victim) is also provided on the basis of the law of damage. This is the solution adopted by a judgment of the Court of justice of the European Union of 10 December 2015.[14] The court notes that property and moral damage suffered in the country of residence by family members are indirect consequences of the damage suffered by the direct victim who died in another member state. It is a question, she says, of avoiding that " the damaging fact can be broken down into several parts subject to a different law according to the places where persons other than the direct victim suffer damage ". The court thus seeks to ensure a certain unified treatment of the damage and its immediate repercussions.

On the other hand, French law could apply to action by associations, located in France, which defend the interests of workers in global supply chains. Under French civil liability law, a legal person who gives himself an "altruist" mission[15] is declared admissible to take action to obtain compensation for the infringement of the collective interests he defends. It may be a trade union acting to compensate for an infringement of the collective interest of the profession (Article L. 2132-3 of the labour code). It can also be an association that defends a great cause(families, fight against discrimination, etc...). In the first instance, French case law allowed only associations authorized by law to defend a particular case to be admissible. In successive stages, which it is not useful to refer to here, the case-law has finally accepted that even without legal authorization, an association can act in the name of collective interests as long as these are part of its corporate object. An association that pursues an objective of combating violations of fundamental rights or of combating child labour would therefore be eligible to take action to redress the infringement of this collective interest resulting from the violation of the duty of vigilance act.

Unlike loss of luck or damage by ricochet, this infringement of a collective interest does not constitute an indirect consequence of the damage occurring in the territory of the third country. It is the cause of damage associated with the lack, as such, of a standard intended to defend that interest. It is a moral injury which is in principle indifferent to the actual occurrence of an individual injury suffered by the persons whose interests are protected by the associations in question. A judgment of the French court of cassation illustrates this idea of environmental damage. In this case, the judges ad-

[14] CJUE, 10 déc. 2015, aff. C-350/14, Florin Lazar : Europe 2016, comm. 82, obs. L. Idot.

[15] Selon l'expression générique de G. Viney, P. Jourdain et S. Carval, Les conditions de la responsabilité, Traité de droit civil (dir. J. Ghestin), LGDJ, 4ème édition 2013, n° 303 et s.

mit the admissibility of the action for compensation of two environmental associations solely because the infringement of the collective interest resulted from the violation of environmental regulations. The solution is all the more significant since the condemned company argued, in vain, that the contravention of the provisions at issue did not in itself constitute an infringement of the collective interests 'in the absence of any damage to the environment'. However, since this damage is entirely autonomous, it seems that it can be located on French territory even before workers are victims of damage and regardless of the place of occurrence of such damage.

Moreover, the argument put forward could be supported by another provision of the regulation. Article 4, paragraph 2, states: "however, where the person whose liability is invoked and the injured person have their habitual residence in the same country at the time of the occurrence of the damage, the law of that country shall apply ". This provision would make French law applicable in the case in question (the association being located as the defendant on French soil) even though the infringement of the collective interest would not be considered to be localized on French territory.

Finally, if workers do not seem to be able to obtain compensation on the basis of French law, could at least the associations defending their interests act in their place to obtain compensation for their own moral damage resulting from the infringement of the collective interest they defend. In addition, as part of this action, article L. 225-102-5 of the Commercial code provides that the applicant can obtain the publication of the decision. If the fate of the victims could not be improved, this action would at least have the merit of ensuring a better sanction of the provisions of the law on the duty of vigilance.

Another path of reflection needs to be explored. It relates to the contractualisation of vigilance obligations.

2. Towards a contractualisation of vigilance obligations

While the concept of social and environmental responsibility is of undeniable interest, the question of its implementation in hard law remains a delicate one. The general norms of the law of civil liability — the concept of civil fault in particular — do not appear to be truly capable of giving them full effectiveness. Moreover, compensation for damage would always be faced with the same problem of conflict of laws...that is why it seems interesting to shift the problem from the contractual point of view : regulation no 593/2008 of the European Parliament and of the council on the law applicable to contractual obligations (Rome I) makes it possible to avoid the application of the law on the production of damage. Under these regulations, it is in principle the law chosen by the parties that applies (art.3). And the scope of this law of the contract includes reparation: according to article 12, the law applicable to the contract under this regulation governs "within the limits of the powers conferred upon the court seised by its procedural law, the consequences of total or partial non-performance of these obligations, including the assessment of damage, to the extent that rules of law govern it". The same provision subjects to the law of the contract "the performance of the obligations it engenders".

If, therefore, some parent companies agreed to undertake, on the basis of French obligations law, to submit to contractual obligations in environmental matters, for ex-

ample, with their subcontractors or subsidiaries, an action for performance of the contract and an action for compensation for damage resulting from the breach of the contract could be examined on the basis of the same law. It could even be argued that employees located abroad could benefit from a right of a contractual nature which is recognized to them by the parties to the act. French law recognizes the technique of stipulation for others which allows, under certain conditions, contracting parties to stipulate a right for the benefit of a third party provided that it is determined or sufficiently determinable. The qualification would allow the implementation of the reasoning proposed on the basis of the Rome II regulation.

It has become commonplace to see that this type of agreement can actually produce legal obligations, but it all depends on the goodwill of the companies concerned. In order to broaden the scope of social clauses, new, more binding techniques would therefore have to be devised. From this point of view, collective bargaining offers an interesting track.

In the French context of collective bargaining, social and environmental liability commitments are conceivable but only for the benefit of employees. It would seem that the authority given by the legislator to conclude and negotiate collective agreements concerns only the conditions of employment, vocational training and work and the social guarantees of " employees ".[16] Beyond the letter of the text, it is the whole system of collective representation that poses difficulties : trade unions and other categories of staff representatives are only meant to represent the interests of employees and possibly self-employed workers who are integrated into the working community. Employees of subsidiaries or subcontractors do not appear to be concerned ... unless they argue that the undertaking entered into with workers ' representatives is valid at least as contractual agreements under ordinary law(even if they do not have the legal value of a collective agreement).

In any event, the current social dialogue is unlikely to favour the negotiation of duties of vigilance with national workers ' representatives. It would then remain to build an ad hoc system of collective bargaining at the global level. Doctrinal proposals are regularly proposed in this regard. But for the time being, global framework agreements between large multinationals and international federations of trade unions are valid as mere private-law agreements. They are treated, like individual contracts, by the provisions of the Rome II regulation.

Beyond the technical difficulties that cannot be ignored, the legal analysis that has been carried out above clearly shows that taking into account the violation of human rights and fundamental freedoms is not inconceivable. But the evolution of the legal frameworks available, whether in domestic or international law, requires more than the ingenuity of a particular national legal order : a real political will to change the postulates underlying the current configuration of the international legal order.

[16] Articles L 2221-1 et L. 2221-2 du code du travail.

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