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COMPENSATION AND HUMAN RIGHTS (FROM A FRENCH PERSPECTIVE)

*Christophe Quézel-Ambrunaz**

In French law, an award of damages is a means to enforce human rights, such that the breach of such a right urges the payment of compensation. This situation is reinforced by the fact that the European Court of Human Rights alone has the means to ensure the protection of the rights guaranteed by the European Convention. Moreover, a strong debate has occurred on whether to consider the right to obtain compensation in the form of damages as a fundamental right or a human right. This phenomenon, which may be called 'fundamentalisation' (in French: 'fondamentalisation') of compensation is the primary focus of this article.

I. INTRODUCTION

Since the Age of the Enlightenment, France has been proud to promote, as widely as possible, human rights as enshrined in the *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and of the Citizen- 'DDHC'),¹ adopted in 1789. This text is still considered to be positive law, and of constitutional rank. Indeed, the Preamble of the French Constitution of the Fifth Republic mentions that the people of France proclaim their commitment to human rights as defined by the DDHC. The *Conseil constitutionnel*,² which is in charge of ensuring conformity of various statutes to the Constitution, has in 1973,³ firmly considered this text to be a part of the *bloc de constitutionnalité*, i.e. the set of rules with constitutional value. Many other texts, enforced in France, enshrine human rights, and are above the statutes such as the second generation rights in the Preamble of the Constitution of the Fourth Republic of 1946, the rights in international conventions, the Charter of Fundamental Rights of the European Union (2005) and the European Convention on Human Rights ('ECHR'). Even so, all these texts may not exactly correspond to a list

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¹ Translated as "Declaration of Human and Civic Rights" by the *Conseil constitutionnel*, though it seems obvious that, in 1789, the rights of women were not enforced; the same text is nowadays interpreted as protecting rights of women as well as rights of men.

² See generally *Conseil constitutionnel*, available at <http://www.conseil-constitutionnel.fr> (Last visited on May 12, 2011) (for useful material on French constitutional system in English).

³ Cons. Const. December 27, 1973 - Décision N° 73-51 DC.

of human or fundamental rights. In French law, we do not have any distinction between human rights and fundamental rights or liberties;⁴ similarly, we do not have a precise criterion by which to determine whether a particular right is to be considered a human right, or a fundamental right, or neither.

The payment of compensation in the form of damages has developed extensively in French law. French tort law is perhaps one of the most comprehensive systems of civil liability. The system is ruled by a general clause of responsibility and not by special torts. This means that any wrong, or ground of strict liability, should lead to compensation of any injury (provided that the injured interest was not illegal). Moreover, many other means exist to provide relief to injured or deprived persons, such as insurance, social assistance, special funds for compensation etc. The victims are increasingly aware of their rights and do not tolerate being dispossessed of wealth or health without compensation. This compensation is said to be a subjective right of the victim.⁵ Yet, the stress laid on this right may lead to a warped notion of civil liability.⁶ From a French perspective, tort law is more a means to award compensation to a victim, than a means to determine culpability of individual conducts.⁷ It may be considered to be a partial view of things.

This sensitivity, both to human rights and the payment of damages, leads to interactions between the two concepts- in France as well as in India.⁸ Indeed, an award of damages appears to be one of the best means to enforce human rights (II), and compensation itself seems to have become, a human right (III).

⁴ See generally DURGA DAS BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW 65 (2008).

⁵ J. CARBONNIER, DROIT CIVIL 1115 (2004).

⁶ PH. BRUN, RESPONSABILITÉ CIVILE EXTRA CONTRACTUELLE, LITEC 11 (2009).

⁷ See about English law : T. Honore, *The Morality of Tort Law – Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, (D. G. Owen ed.) 73, 75: “The tort system is one means by which the State, on behalf of the community, seeks to reduce conduct that it sees as undesirable. Others include criminal law, education and administrative means such as licensing and inspection, differential taxes, and many more”.

⁸ See J. de Salve de Bruneton, *Les Principes Constitutionnels et la Responsabilité Civile*, in MÉLANGES JACQUES BORÉ, LA CRÉATION DU DROIT JURISPRUDENTIEL 407 (2007). RAMASWAMY IYER, THE LAW OF TORTS 1.13 (A. Lakshminath & M. Sridhar eds., 2007) “The law of torts protects fundamental human interests, which may be defined as the kinds of claims, want or desires that the people seek to satisfy in life, which a civil society ought to recognise. The interests which law of torts protects certainly include human rights”. Though these authors stress that in India, some fundamental interests are first protected by tort law, and then considered as human rights, it’s possible to consider that in French law, the recognition of the fundamental rights has, in many cases, preceded the fact that they were grounds for compensation. The human rights are said to be natural law; in this approach, they are an illustration of the sentence of Paulus (Digest 50.17.1) *libro 16 ad Plautium: Non ex regula ius sumatur, sed ex iure quod est regula fiat* (law doesn’t come from the rules, but the rules come from the law). One shall find that this logic is not far from the idea of the sources of *dharma*.

II. COMPENSATION FOR HUMAN RIGHTS VIOLATIONS

The payment of damages for violations of human rights is seldom enshrined in texts on human rights, except for some breaches, such as unlawful detention.⁹ Some of them may, however, mention the exigency of an “effective remedy”.¹⁰ Violation of human rights may lead to different consequences, depending on whether compensation is claimed before the national jurisdictions or before the European Court of Human Rights (‘ECtHR’). Before the national jurisdictions, a claim for damages on account of a violation of human rights is incidental to the enforcement of human rights (A). On the other hand, it seems to have become the foremost means to enforce human rights before the ECtHR, though Art. 41 of the ECHR provides that satisfaction is subsidiary (B).¹¹

A. NATIONAL JURISDICTIONS

Proclaiming human rights is of no use if they are not enforced. Indian law uses writs to secure human rights, as well as other means. The Supreme Court of India is an active enforcer and guardian of fundamental rights. Nothing very similar to writs exists in French law, though some mechanisms may appear similar.¹² The *Conseil constitutionnel* either totally or partially strikes down statutes which are not in conformity with the Constitution, or to text of similar value. This censure may occur before the promulgation of the law, on the request of the President of the Republic, the Prime Minister, or the President of the National Assembly or of the Senate or of sixty deputies or sixty senators. Since March 1, 2010, according to a constitutional ruling of July 23, 2008, any person who is involved in legal proceedings before a court may argue that a statutory provision infringes her rights and freedoms as guaranteed by the Constitution. This mechanism is called *Question Prioritaire de Constitutionnalité*, or priority preliminary ruling on the issue of constitutionality. Yet an ordinary judge (i.e. any judge except the *Conseil constitutionnel*) is not entitled to discard a statute because of non-conformity to the constitution.

⁹ International Covenant on Civil and Political Rights, Art. 9.

¹⁰ Universal Declaration of Human Rights, Art. 8: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”; see also International Covenant on Civil and Political Rights, Art. 2.

¹¹ ECHR, Art. 41: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

¹² See e.g., *ex multis* Art. L. 521-2 of the *Code de Justice Administrative* states that the administrative judge, in case of an urgent situation, may order any measure necessary to protect the fundamental liberty, which a public person or a private person in charge of a public utility has seriously and manifestly violated.

An ordinary judge may avoid any statute which is contrary to any international agreement, e.g. the ECHR.

All these means to protect human rights and fundamental liberties are powerful against violations caused by statutes, but are of no use when an administration (or the State) or a citizen are involved as violators.¹³ In the case of breaches committed by the State (1) or by citizens (2), an award of damages appears to be the best means to enforce human rights.

1. Breaches committed by the State

French Law offers several ways to enforce human rights,¹⁴ including the resistance to oppression, protected by Art. 2 of the DDHC. Nevertheless, compensation should be granted in cases of violation by the State. One should note a French specificity— the tribunals are split into two orders: administrative and judicial. It is a consequence of the idea of the separation of powers (judiciary shall not control the administration, i.e. the executive power). Normally, relationships between citizens and the State are ruled by the tribunals of the administrative order, although judicial tribunals have a kind of monopoly on the protection of individual liberties, including cases of violations by the administration.¹⁵

Before the administrative tribunals, the State may be sentenced to compensate the injury caused by the violation of its positive obligations.¹⁶ As an example, the *Conseil d'Etat* has ruled that the State was liable for the death of workmen exposed to asbestos, because the State was guilty of laxity in the prevention of risks.¹⁷ Moreover, the State is, ever since a ruling in 2007, compelled to compensate for damage caused by the enactment of a statute which is contrary to international covenants ratified by France.¹⁸ Breach of rights guaranteed under the ECHR is also a ground for compensation; relying on Art. 6 of the ECHR and the right to a trial within reasonable time, the *Conseil d'Etat* has ruled that the breach of this right may allow the citizens to claim compensation for damage done.¹⁹

¹³ For some criticisms, Y. POIRMEUR, *LE CONSEIL CONSTITUTIONNEL PROTÈGE-T-IL VÉRITABLEMENT LES DROITS DE L'HOMME?* in *LA LÉGITIMITÉ DE LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL* 293 (G. Drago, B. François & N. Molfessis eds., 1996).

¹⁴ H. OBERDORFF, *DROITS DE L'HOMME ET LIBERTÉS FONDAMENTALES* N° 137 (2010); X. DUPRE DE BOULOIS, *DROITS ET LIBERTÉS FONDAMENTAUX* 221 (2010).

¹⁵ There are still some exceptions, such as the treatment of mental persons, the problems cast by information technologies on liberties, the breaches done by prison administration etc... *Cf.* H. OBERDORFF, *supra* note 14, 160.

¹⁶ X. DUPRE DE BOULOIS, *supra* note 14, 183-184. One should not consider this liability as vicarious liability, but as a failure of the State's duties, H. DIPLA, *LA RESPONSABILITÉ DE L'ÉTAT POUR VIOLATION DES DROITS DE L'HOMME— PROBLÈMES D'IMPUTATION* (1994).

¹⁷ CE. Ass. March 3, 2004, Rec. 126.

¹⁸ CE. Ass. February 8, 2007, Gardedieu, 279522.

¹⁹ CE. Ass. June 28, 2002, 239575.

Some human rights are also enforced by ordinary statutes. As an example, the right of property is protected by the DDHC,²⁰ as well as the ECHR.²¹ Nevertheless, the French Civil Code, regarded as an ordinary statute, also enforced the protection of property in Art. 545: “No one may be compelled to yield his ownership, unless for public purposes and for a fair and previous indemnity”.²² The *Court de cassation* has ruled²³ that public works in one’s property, before the compulsory purchase proceeding was completed, was constitutive of a *voie de fait* (trespass to land), so it was not necessary to prove that harm was suffered to obtain compensation. As a rule, compensation is given in these cases not by the ‘administrative’ judge, but by the ‘judicial’ judge.²⁴

The efficiency of compensation for the violation of human rights by the State can be analysed from two different points of view. For the victim, obtaining an amount of money, even a large one, cannot be expected to be an adequate compensation for the huge pain that may cause breaches of fundamental liberties. Nevertheless, something may be better than nothing. For the State, the economic analysis of law furnishes an ambiguous answer²⁵ that the State will be incentivised to prevent the violation of human rights only if the cost of compensation for any violation is higher than the cost of prevention of such violations. As an example, we can assume that if jails are crowded, it amounts to an infringement of the human dignity. Here, the State will deal with this situation only if the total amount of damages is higher than the cost of new jails. If not, it is more efficient for the State to pay compensation. By this approach, the higher the damages are, the better the enforcement of human rights is. This approach, however, leaves aside one consideration; it is politically indecent for a State to be found liable for violation of human rights. Thus, the ruling itself, without regard to the amount of damages, may help in the enforcement of human rights.

2. Breaches committed by Citizens

Violation of another’s human right is undoubtedly a civil wrong, if not a criminal offence and as such, is a ground for compensation. French

²⁰ Art. 17: “Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.” (translation by the *Conseil constitutionnel*).

²¹ Protocol I, Art. 1: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

²² Translation by G. ROUHETTE, available at www.legifrance.gouv.fr (Last visited on July 7, 2011).

²³ Cass. Civ. 3, September 9, 2009, Bull. III, 185.

²⁴ J.-M. BON *et al.*, *DRIT ADMINISTRATIF DES BIENS* 64 (2008).

²⁵ S.K. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 128 (2007) *Cf.* R. A. POSNER, *WEALTH MAXIMIZATION AND TORT LAW: A PHILOSOPHICAL INQUIRY*, IN *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, (D. G. OWEN ed.), 99. *Cf.* also about the emergent paradigm of the trade-related, market Friendly Rights, P. BAXI, *THE FUTURE OF HUMAN RIGHTS* 132 (2002).

tort law apparently does not apply a hierarchy among the protected rights; full compensation of any legal injury is the rule and the defences are the same whichever interest is violated.²⁶ Nevertheless, it is important to stress that the character of human rights attached to the violated interest leads the judges to modify their approach towards proof of damage.

Art. 9 of the French Civil Code provides that “Every individual has the right to respect for his private life”. Without prejudice to compensation for injury suffered, a court may prescribe any measure, such as sequestration, seizure etc. appropriate to the prevention or cessation of invasion of personal privacy; in case of an emergency, those measures may be provided for by an interim order”.²⁷ According to the *Cour de cassation*, mere proof of violation of privacy entitles the victim to obtain compensation.²⁸ This solution, now firmly established, contradicts the basic requirements of an action for civil liability—the plaintiff must prove fault or other basis for liability, the damage caused and the causation. According to this ruling, the proof of the fault alone is sufficient; damage and causation are presumed because of the nature of the right infringed. This rule has been applied in a symptomatic case: a landlord signs a lease contract of a flat; few days after, and before the renter enters in the flat, he visits the flat and notices somebody else in it. The Appeal Court said that as the flat was empty at this time, there was no prejudice. This ruling has been broken down by the *Cour de cassation*:²⁹ since violation of privacy had been established, there was necessarily damage requiring compensation.

Similarly, respect for the human body, as constitutive of human dignity, is a principle of constitutional and supra-constitutional rank,³⁰ and is therefore considered a human right. According to the *Conseil constitutionnel*,³¹ human dignity is enshrined in the Preamble of the Fourth Republic, 1946.³² In some respects, the ECHR, when prohibiting inhuman or degrading treatments, also protects human dignity. The transposition of this right in the French Civil Code lies in Art. 16: “Legislation ensures the primacy of the person, prohibits any infringement of the latter’s dignity and safeguards the respect for the human being from the outset of life”; 16(1): “Everyone has the right to respect for

²⁶ See THE PRINCIPLES OF EUROPEAN TORT LAW (European Group on Tort Law, 2005) or the DRAFT COMMON FRAME OF REFERENCE (E. von Bar, E. Clive, H. Schulte-Nolke eds., 2009).

²⁷ Translated by G. ROUHETTE, available at www.legifrance.gouv.fr (Last visited on July 7, 2011).

²⁸ Cass. Civ. 1, November 5, 1996, Bull. I, 378.

²⁹ Cass. Civ. 3, February, 25 2004, Bull. III, 41.

³⁰ A. LEGOUX, *Gazette du Palais*, June 17, 2010, 168, 9.

³¹ Cons. Const Janvier 19, 1995, Loi relative à la diversité de l’habitat, 94-359 DC ; Cons. Const. Août 5, 2010, 2010-612 DC.

³² §1: “In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.” (translated by the Conseil constitutionnel).

his body. The human body is inviolable; 16(3): “There may be no invasion of the integrity of the human body except in case of medical necessity for the person or exceptionally in the therapeutic interest of others. The consent of the person concerned must be obtained previously except when his state necessitates a therapeutic intervention to which he is not able to assent”.³³ From these texts, and from the general clause of civil liability, the *Cour de cassation* deduces that a surgery made on a patient who was not fully informed of all the possible unwanted effects of this surgery, causes a prejudice, which must be compensated. To understand why the judges did not ask for proof of the harm, it is necessary to infer that infringement of the human body is considered a breach of human rights, which must be compensated without the proof of damage. The Indian law is in line with this statement: “In India, the individual patient’s right to self-determination will flow from the fundamental right enshrined in Art. 21 of the Constitution of India”.³⁴ Many similar statements could be made about the enforcement of the presumption of innocence by Art. 9(1) of the French Civil Code etc.³⁵

Contrary to many other legal systems, in French tort law, nothing similar to exemplary or punitive damages may be awarded to a victim when his basic fundamental rights are flouted. The rule of full compensation— nothing more, nothing less than the damage— shall not be derogated. It appears that before national judges there are a few particularities when such interests are infringed, which are mainly proof facilities.

B. THE EUROPEAN COURT OF HUMAN RIGHTS

Granting compensation in case of violation of human rights is the aim of the ECtHR, which has no power to directly modify the settlement of an internal dispute, or the law in a State.³⁶ As mentioned in Art. 34 of the ECHR, “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right”; and in Art. 41, “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and

³³ Translated by G. ROUHETTE, available at www.legifrance.gouv.fr (Last visited on July 7, 2011).

³⁴ R.K. BAG, LAW OF MEDICAL NEGLIGENCE AND COMPENSATION 92 (2001).

³⁵ For further reading, X. DUPRE DE BOULOIS, *supra* note 14, 283.

³⁶ Nevertheless, effectiveness of European rulings is assured... Though the ECtHR is unable to directly obligate the State to adopt a specific comportment, yet it shows the State the way quite often – including an amendment to the statutes. As an example, after the ruling ECHR February 1, 2000, N° 34406/97, Mazurek, France adopted a statute, thereby removing from the Civil Code all the provisions discriminatory against the children born from adultery. Moreover, nowadays, a special recourse is offered to citizens sentenced to jail after a trial found in violation of Art. 6 ECHR (Art. 626-1 Code de Procédure Pénale). On this topic: X. DUPRE BOULOIS, *supra* note 14, 289.

if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party³⁷. By the doctrine of positive obligations, roughly all the fields of law are irrigated by the ECHR.³⁷

The satisfaction that justice has been done sometimes lies in the finding of violation in itself. As an example, in the case *Christine Goodwin v. United Kingdom*,³⁸ July 11, 2002, the ECtHR awarded €39,000 to the plaintiff, in respect of costs and expenses only, the non-pecuniary damage being compensated by the finding of violation. The plaintiff was transsexual, and had sustained a gender re-assignment treatment, but could not obtain full legal recognition of her gender, which is, according to ECHR, a violation of Art. 8 (right to respect for private and family life) and of Art. 12 (right to marry) of the ECHR. This kind of ruling has no major financial impact on the State but nevertheless, the symbolic nature of the sentence often leads the member-State, if not all the other member-states, to modify its law to comply with the requirements of the ECHR. The change in the civil status register to accommodate trans-sexualism was effected in the decision against France by the ECtHR on March 25, 1992,³⁹ and the *Cour de cassation* modified the law by two decisions on December 11, 1992.⁴⁰

III. COMPENSATION AS A HUMAN RIGHT

One may understand that the infringement of a human right warrants the payment of compensation, and that this compensation borrows the character of fundamentality from the right violated. Another question is to determine if compensation, as a consequence of an ordinary violation (i.e. a non-fundamental right), is by itself a human right. It could be a kind of “fundamentalisation” of the right to obtain compensation.⁴¹ This question may seem quite strange; though Indian authors agree that a right is a human right if it appears to be a natural one,⁴² and it is said by the French doctrine that civil liability comes from natural law.⁴³ The issue is to know if the law-giver may reduce or take away the compensation. In French law as well as in Indian law,⁴⁴

³⁷ See e.g., G. ROYER, *LA CONVENTION EDH ET LE DROIT DES SOCIÉTÉS - ÉLÉMENTS POUR UNE LECTURE HUMANISTE DU DROIT ECONOMIQUE* 1, 185 (2008).

³⁸ *Christine Goodwin v. United Kingdom*, Application No. 28957/95: 2002 ECHR 583.

³⁹ *B. v. France*, Application No. 13343/87: 16 Eur HR Rep 1 (1992).

⁴⁰ Bull. A.P. N° 13.

⁴¹ Cf. the learned study of P. DEUMIER & O. GOUT, *LA CONSTITUTIONNALISATION DE LA RESPONSABILITÉ CIVILE, LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL* N° 31, 21 (2011).

⁴² BASU, *supra* note 4.

⁴³ PH. REMY, *CRITIQUES DU SYSTÈME FRANÇAIS DE RESPONSABILITÉ, DROITS ET CULTURES* 1, 34 (1996). The ground for this idea is to be read in S. PUFENDORF, *LE DROIT DE LA NATURE ET DES GENS*, translated from Latin by J. Barbeyrac, E. & J. R. Thourneisen, 1732, 293.

⁴⁴ U. Ramanathan, *Statute Law, Injury and Compensation*, 47 J.I.L.I. 158, 177 (2005); K. KANNAN, *ACCIDENTS & COMPENSATION LAWS* (2005) citing the Motor Vehicles Act, 1988; the Railways

several statutes tend to have this effect. Sometimes, they tend to make the claim of the victim easier, and in turn limit the extent of the liability. It is a fact that different jurisdictions, on the ground of equality (A), or liberty (B), or on the ground of property (C), consider that compensation in the form of damages to be a human right.

A. COMPENSATION AND EQUALITY

In 1982 a statute was adopted giving a new defence to employees, union or employee representatives, because of the damages caused by a strike or other labour conflict. In this case, they should incur no civil liability, except for wrongs constituting criminal offences, or obviously if there is no relation with the right to strike or the right of the trade union. This statute was referred to the *Conseil constitutionnel*, which ruled that it was not in conformity with the Constitution.⁴⁵ Indeed, the *Conseil* underlined that, as a principle, “any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. Moreover, there is no special regime in French law depriving any person of compensation for injuries which were the consequence of a wrong, with no regard to the seriousness of such a wrong. The *Conseil* decided that this statute, by depriving one kind of victims to the right to claim compensation, was contrary to the principle of equality, which has constitutional value.⁴⁶ This decision was the first landmark one in a long and hesitant process to the “Constitutionalisation” of the liability for fault.⁴⁷

Obviously, the law-maker cannot not give immunity to some persons, or about some kind of harms, without infringing the fundamental right to equality. Nevertheless, this does not mean that no amendment to tort law is possible. The *Conseil* declared a law reducing the fault liability of creditors lending money to enterprises as in conformity with the Constitution because it was limited, and in public interest.⁴⁸

Act, 1989; the Carriage by Air Act 1972; the Merchant Shipping Act, 1958 and the Workmen's Compensation Act, 1923.

⁴⁵ Cons. Const., October 22, 1982, Loi relative au développement des institutions représentatives du personnel, 82-144 DC.

⁴⁶ Equality is mentioned in the Art. 1 of the Constitution: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law...”; in the maxim of the Republic, Art. 2 of the Constitution: “Liberty, equality, fraternity” (three words in the preamble of the Constitution of India); and in Art. 1, DDHC: “Men are born and remain free and equal in rights”. All translations by the *Conseil constitutionnel*.

⁴⁷ On this process, *c.f.* the learned study of PH. BRUN, LA CONSTITUTIONNALISATION DE LA RESPONSABILITÉ POUR FAUTE, 37,15, (2003). An author speaks of the making of a constitutional law of civil liability, N. MOLFESSIS, LE CONSEIL CONSTITUTIONNEL ET LE DROIT PRIVÉ, LGDJ, 370, (1997).

⁴⁸ Cons. Const. July 25, 2005, Loi de sauvegarde des entreprises, 2005-522 DC.

B. COMPENSATION AND LIBERTY

In 1999, an Act was created called the “*pacte civil de solidarité*”, “civil covenant of solidarity”, defined by Art. 515(1) of the French Civil Code as a “contract concluded by two persons, of different sexes or of a same sex, to organise their life in common”. According to Art. 515(7) of the French Civil Code, any of the partners could put off the covenant, only by notifying to the other, his or her decision. As the break-up is free, liability shall occur if the circumstances of this break-up point towards guilt. The statute, before promulgation, was referred to the *Conseil constitutionnel*, which ruled that it was constitutional.⁴⁹ On the precise point of the break-up, the *Conseil* said that the possibility to claim compensation of the consequences of a fault in the circumstances of the break-up was in conformity with the principle: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it” deduced from Art. 4 of the DDHC. The principle involved is exactly the text of Art. 1382 of the French Civil Code, which is the main norm governing fault liability and Art. 4 is “Liberty consists in being able to do anything that does not harm others.”⁵⁰ In this ruling, the statute was found to be in conformity to the Constitution; though, the principle was discovered: the fault liability is a consequence of the liberty, as enshrined in the DDHC, and understood by the *Conseil constitutionnel*.

This ruling has been interpreted as the “constitutionalisation” of fault liability. It is true that the concept of liberty and responsibility are philosophically interdependent. Besides, in the French Constitution of 1791, it is said that legislative power is not allowed to adopt statutes which infringe natural and civil rights, but liberty only to do what is not harmful to others. The law may prevent acts which affect public security or rights of other citizens. Therefore, the link between liability and liberty is evident even in early constitutional history.⁵¹

Later, the *Conseil*⁵² gave some criteria to determine whether the limit to the liability is acceptable or not, taking into consideration Art.4 of the DDHC, but also Art. 16 of the same, from which is deduced the right to efficient access to justice.⁵³ The limit should be enacted because of public interest; but it should not result in a disproportionate infringement to the rights of victims of

⁴⁹ Cons. Const., November 9, 1999, Loi relative au pacte civil de solidarité, 99-419 DC, cons.70.

⁵⁰ Translation by the *Conseil Constitutionnel*.

⁵¹ C.f. M. FRANGI, CONSTITUTION ET DROIT PRIVÉ, LES DROITS INDIVIDUELS ET LES DROITS ECONOMIQUES, ECONOMICA 237 (1992).

⁵² Cons. Const., June 11, 2010, N° 2010-2 QPC.

⁵³ DDHC, Art. 16: “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.” (Translation by the *Conseil constitutionnel*). Art. 6 of the ECHR grants the right to a fair trial, but it’s not one of the norms used by the *Conseil constitutionnel* to examine the constitutionality of statutes.

guilty wrongs, or to the right to an efficient access to justice. No limitations to liability should be accepted for victims of gross negligence. This last rule has been used by the *Conseil constitutionnel* to set some reserves of interpretation (*i.e.* the *Conseil* gives the interpretation of a statute, binding for all judges; and the statute is said conform to the Constitution only if interpreted in this way). The case was about the compensation of workmen's accidents. French law provides a lump sum from social assistance, but the victim has still the right to claim extra-compensation in case of inexcusable fault (very gross negligence) of the employer. Yet, the heads of damages are restrictively enumerated in the *Code de la sécurité sociale*, Art. L. 451-1 sqq. Some heads of damages are omitted, such as sexual prejudice, or the loss of chance. The *Conseil* has said that the list in the *Code de la sécurité sociale* cannot be seen as a restricted one, while at the same time it should not amount to a disproportionate infringement of the right of victims to obtain compensation.⁵⁴

C. COMPENSATION AND PROPERTY

The link between compensation and property is not new. For example, Art. 545 of the French Civil Code cited above supposes that the one who is deprived of his property for public interest shall be compensated beforehand. The right to property has attained the status of a human right, and there is no doubt that this compensation has the same character. Nevertheless, there is now a new understanding of this relationship between compensation and property. An award of damages appears to be a patrimonial right, which itself could be considered as an object of property.⁵⁵

The beginning of this new understanding comes from a French ruling. A young boy was born with a severe disease, because his mother contracted rubella during pregnancy. The mother did not have this information because of a false diagnosis, and therefore, didn't explore the option of terminating the pregnancy. Compensation was claimed by the parents for themselves and in the name of the child. The Court of Appeal said that the prejudice of the child was coming from rubella, and not from the fault of the doctor. The *Cour de cassation*, however, upturned this ruling, saying that the child should obtain compensation.⁵⁶ Many scholars, academics, politicians and others have argued against this ruling, taking both technical as well as ethical arguments. A statute has been adopted, on the March 4, 2002, which states in its first article (now Art. L. 114-5 of the *Code de l'action sociale et des familles*) that nobody may obtain compensation only by virtue of his birth. This statute was expressively

⁵⁴ Cons. Const. June 18, 2010, N° 2010-8 QPC. C.f. the observations of Ph. BRUN, RECUEIL DALLOZ 35 (2011). For other rulings of the Cons. Const. C.f. P. DEUMIER and O. GOUT, *supra* note 41.

⁵⁵ There are rhetorical discussions to know if the property is a right, or if a right can be a property; yet there is no point in discussing it further as it is inconsequential to our topic.

⁵⁶ Cass. AP, novembre 17 2000, Bull. N° 9.

retroactive, so enforceable to the ongoing trials. The ECtHR⁵⁷ concluded that there had been a violation of the Art. N° 1 of the Protocol N° 1 because “The law complained of therefore entailed interference with the exercise of the right to compensation which could have been asserted under the domestic law applicable until then, and consequently of the applicants’ right to peaceful enjoyment of their possessions. The Court noted that in the present case, in so far as the impugned law applied to proceedings brought before March 7, 2002 which were still pending on that date, such as those brought by the applicants, the interference amounts to a deprivation of possessions.” It held that this statute could be applied to pending proceedings; this ruling of the ECHR has been followed by the *Conseil d’État*⁵⁸ and the *Cour de cassation*.⁵⁹

The point to be stressed here is that the right to obtain compensation is considered as property. So, it is not possible to be deprived of this right, except if the interference is “provided for by law”, “in the public interest”, and is “proportionate”. We may imagine that in the French jurisdiction, the right to be compensated by an award of damages may also be considered a constitutional value by way of protection of property, as this right is protected by Art. 17 of the DDHC. This could be useful when the text reducing the liability is an international agreement, such as Varsovia or Montreal on Carriage by Air, because in such cases the conflict before the ECHR is a conflict between two norms of the same value.

IV. CONCLUSION

Compensation is inextricably linked to human rights, and this link could be strengthened. On one hand, an award of damages may appear to be an opportunity for enforcement of human rights, including in horizontal relationships. On the other hand, compensation itself seems to be, at least in some cases, a fundamental right: the right to obtain compensation is part of a triptych of equality, liberty and property.

Yet, this movement towards the “fundamentalisation” of civil liability leads to the consequence that apart from maybe a few proof rules, there is no distinction between the compensation for a breach of human rights, and an award of ordinary damages. This rule is fully in line with the assessment of French law, which says that there is no hierarchy in the protection of lawful interests.

⁵⁷ ECHR, October 6, 2005, *Maurice v. France*, Application No. 11810/03; *Draon v. France*, N° 1513/03. An agreement has been entered into between the litigants, whereby the Draon family has been granted €2,131,018, and the Maurice family has been granted €2,065,000.

⁵⁸ CE February 24, 2006, N° 250704.

⁵⁹ Cass. January 24, 2006 (3 cases), Bull. N° 29.

What can we expect from the linkage of human rights and compensation? It is possible to assume that a better compensation for breach of human rights may lead to better enforcement of human rights. Moreover, conceptually, this movement is congruent with the proposal to replace or add to the western notion of human rights, based on the concept of “right”, and an alternative notion, based on the idea of “duty”.⁶⁰ One may say that civil liability arises from the unlawful infringement of a right, or from the harmful consequences of the violation of a duty: this appears to be two ways to express the same thing, though the philosophical grounds are entirely different. This alternative model may fit with one part of the French tradition of human rights: though the DDHC speaks only in terms of rights, the *Déclaration* of 1793 gives one duty, said to be the most essential, the duty to resist to oppression. In 1795 (3rd year, 5th of Fructidor, in the revolutionary calendar) a Constitution was adopted which has in preamble a declaration of Rights and Duties. Moreover, the *Charte de l'Environnement*, 2004 (Charter of Environment), which has a constitutional value, imposes some duties (Arts. 2 to 5): everybody has the duty to take part in the preservation and improvement of the environment, to prevent or mitigate consequences of harm to environment, to compensate, according to the law, the damages done to environment.⁶¹ Protection of environment is now a fundamental duty in French law, though it has been enshrined for centuries in the Indian tradition; the Supreme Court of India has referred in recent times to *dharma* and cites Manu and Kautilya⁶² in this matter.

⁶⁰ Mahendra P. Singh, *Human Rights in the Indian Tradition: An Alternative Model*, 2 NUJS L. REV. 145 (2009). See also for a critical study of human rights, G. CHAKRAVORTY SPIVAK, RIGHTING WRONGS, in WRONGING RIGHTS? PHILOSOPHICAL CHALLENGES FOR HUMAN RIGHTS 79 (A. Singh Rathore & A. Cistelecan eds., 2011); A. SHARMA, ARE HUMAN RIGHTS WESTERN? A CONTRIBUTION TO THE DIALOGUE OF CIVILISATIONS (2006). It's obvious that one may find ways to promote justice, and finally what may evolve to Human Rights, both in the Ancient Testament and in Indian Tradition, M. R. ISHAY, THE HISTORY OF HUMAN RIGHTS, FROM ANCIENT TIMES TO THE GLOBALIZATION ERA, (2004); see also P. ISHWARA BHAT, FUNDAMENTAL RIGHTS, A STUDY OF THEIR INTERRELATIONSHIP, 3.1.1, 57 (2004-edition used): “the concept that an entitlement to rights comes from proper performance of duties towards the society was the centrality of Ancient Indian jurisprudence. Subordination of Artha, and Karma to Dharma, in Shastrik writings, and the Upanishadic recognition of welfare right in the social duties of individuals emphasize the correlation between rights and duties”(quoting Mahabharata, Shanti parva, 86, 24-25).

⁶¹ This principle is enforced by the statute on environmental liability, August 1, 2008, 2008-757, transposing a European directive 2004/35/CE, April 21, 2004.

⁶² KM Chinnappa and TN Godavarman Thirumalpad v. Union of India, (2002) 10 SCC 606, “To protect and improve the environment is a constitutional mandate. It is a commitment for a country wedded to the ideas of a welfare state. The world is under an impenetrable cloud. In view of enormous challenges thrown by the industrial revolution, the legislatures throughout the world are busy in their exercise to find out means to protect the world. Every individual in the society has a duty to protect the nature. People worship the object of nature. The trees, water, land and animals had gained important position in the ancient times. As Manu VIII, page 282 says different punishments were prescribed for causing injuries to plants. Kautilya went a step further and fixed the punishment on the basis of importance of the part of the tree. (See Kautilya III, XIX, 197)”.

It is also possible to assume that the “fundamentalisation” of the award of damages is a way offered to victims to secure their compensation, and finally their rights, including those related to liberties not yet recognised as fundamental ones. From a French perspective, it is more the right of the victim to obtain compensation than the duty of the wrongdoer to pay the damages which is protected.⁶³ It could, however, evolve in the sense that the individuals’ conduct, as well as the State’s behaviour, may be influenced by the mechanism of compensation, in order to act according to what is said to be the right way.

So is this fundamentalisation of compensation, or the development of compensation for breaches of human rights, the way forward for India, and some other countries? I prefer not to answer this question, but note that some quite agree,⁶⁴ at least for the accountability to provide basic human needs,⁶⁵ or when it is necessary to restore dignity of the victim,⁶⁶ and the Indian Supreme Court seems to be in line with this approach⁶⁷ by regularly according compensation and exemplary costs.⁶⁸ The extraordinary process of law following

⁶³ Ph. BRUN, *supra* note 48 (with some nuances); J. CARBONNIER, *supra* note 5.

⁶⁴ See IYER, *supra* note 8, 1.12.

⁶⁵ B.B. PANDE, RE-ORIENTING THE “RIGHTS” DISCOURSE TO BASIC HUMAN NEEDS, in HUMAN RIGHTS AND BASIC NEEDS, THEORY AND PRACTICE 159 (M. P. Singh, H. Goerlich & M. von Hauff eds., 2008).

⁶⁶ K.I. Vibhute, *Victims of rape and their Right to Live with Human Dignity and to be Compensated: Legislative and Juridical Responses in India*, 41 J.I.L.I. 222 (1999).

⁶⁷ See S. JAIN, PUBLIC INTEREST LITIGATION 19 (2002): “Existing remedies were simply inadequate for the suffering of disadvantaged who could not be relieved merely by the issue of prerogative writs because such suffering was result of continuous repression and denial of rights. The Supreme Court explored unconventional new remedies which could ensure distributive justice to the deprived sections of community, intended to initiate affirmative action on the part of state and its authorities. Exercising its remedial power under article 32, the Court has provided novel kind of reliefs and has created suitable remedies for violation of fundamental rights. Court has provided remedies like monetary compensation, rehabilitation, exemplary cost, etc. Monetary compensation or “pecuniary recompense” was held necessary not only in wrongful arrest or wrongful detention but also in all appropriate cases involving violation of fundamental rights”; P. ISHWARA BHAT, *supra* note 60. Recently Art. 32 has been applied to implement the rule of law notions of reparation and punishment for, and prevention of, public wrongs. With some nuances: B.P. Singh Sehgal, *Compensation to victims of state excesses - A new dimension in the field of victimology in India* in LAW AND CHANGE TOWARDS 21ST CENTURY 189 (K.L. Bhatia ed., 1995): “The interpretation of Art. 32 of the constitution as to give compensation to the victim in case of State lawlessness/highhandedness/excess has given a new dimension to jurisprudence of victimology in India. For a long time this proposition of giving compensation to the victims was never invoked by the Supreme Court. In the light of the cases discussed above, it has been found that court did not generalize the provision of granting compensation. It has granted compensation/exemplary costs only in cases of extreme necessity, where the infringement is gross and patent, incontrovertible and glaring. No general yard stick to measure such hardships has been laid down.”

⁶⁸ See V.N. SHUKLA, CONSTITUTION OF INDIA 280, 281 (M.P. Singh ed., 1998): “In the exercise of that wide power, the Court has directed the State to pay compensation and exemplary costs for the violation of fundamental rights (and the examples cited)”; “in respect of award of compensation, the Court has clarified that Article 32 is a public law remedy and the limitation of sovereign immunity in Art. 300 in respect of private law remedies, is inapplicable to it”.

the Bhopal gas leak disaster shows that compensation is the only thing to be done when the point of no return has been reached.⁶⁹ Nevertheless, it cannot be denied that the overdevelopment of tort law may in itself be a problem, and that an award of damages may be granted in many ways, and not only by the civil liability.⁷⁰ Indian law encompasses some concepts French Law ignores, although some similarities may be found, such as *parens patriae*, writs, or public interest litigations.⁷¹

⁶⁹ D.R. SAXENA, UNION CARBIDE (BHOPAL GAS DISASTER) CASE: ENFORCEMENT OF HUMAN RIGHTS THROUGH JUDICIARY in LAW AND CHANGING SOCIETY 151 (M. Saxena & H. Chandra eds., 1999).

⁷⁰ Some authors stress that because it's a fact that tort law is a transfer of the cost of damages to the public in general, there is no sense in compensating only the victims of faults. *C.f.* P.S. ATIYAH, THE DAMAGES LOTTERY (1997-edition used); P. CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW (1999).

⁷¹ JAIN & SAXENA, *supra* note 67.

