COMPLIANCE, THE NEW LEGAL WAY FOR HUMAN VALUES: TOWARDS AN *EX ANTE* RESPONSIBILITY

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What is the time in which Responsibility is anchored? The question is so classic that all of the responses to it seem to have been written: while we can more easily be responsible with respect to the past because we can more easily make a link between the situation understood, because it is more detectable, as it is easier to state the consequences to be drawn from this about a person, this does not however exclude articulating responsibility with the future: conceiving of *Ex Ante* Responsibility.

This is possible if we disarticulate the construction of this responsibility with a past event or situation. *The Imperative of Responsibility* of Jonas or the Ethics of Responsibility also let Responsibility travel through time, by a relay between Law and Ethics, which only looks towards the future so that it will still exist. As a principle. But this outlook becomes more difficult to support if we remain solely in the legal order.

We could however support that the Law could make an effort, even affirm that this is not difficult for it because the Law does what it wants. It could thus impute a responsibility to anyone for the time that it would establish, for example designating someone as a bearer of a responsibility, i.e., a bearer of a burden, the person that it would want, if necessary a future person for a future event. The "responsible person" would then be the holder of a sort of "pure weight", who would take it on because the Law wanted it for the time that it desired, for example a duty

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[2] This article is based on a digital working document, with hypertext links, footnotes which themselves contain additional developments and technical references. It is available at the following address: https://mafr.fr/en/article/la-responsabilite-ex-ante/

to act so that the future takes shape as the Law wanted it, although the Responsible Party did not do anything wrong in the past.

But the Law is not arbitrary, it is indeed designed so that the arbitrary does not hold sway. The vocabulary is changing and it is now a "duty of vigilance" that the French Law of March 23, 2017 brought to bear on companies and not an obligation, as the Law is ill at ease with the idea of obliging without causality. This is more generally why Constitutional Courts and Supreme Courts defend a minimal relationship between Responsibility and the burden that it puts on an individual or a legal entity, particularly between the burden that it endures and what it did, thus keeping the consubstantial link between Law and Morality, as the legal technique of Responsibility could not be equivalent to that of a mandatory levy.

The idea of an *Ex Ante* Responsibility is thus circumscribed in its principle. It is that of a burden legally applied to an entity either by itself (commitment), or by the Law or a Judge over an entity ordering it to do something to prevent the occurrence of something that would happen if it did nothing, or so that something happens that would not happen if it remained inactive.

This latter conception, which justifies *Ex Ante* Responsibility, takes its place in the rationale of Compliance Law, a branch of Ex Ante Law which prevents harmful behaviors (which corresponds to the "negative Monumental Goals") and engenders the positively required behaviors, producing appropriate behaviors to lead to the desired future.

But the legal conditions to admit such a burden, even though the link with a past situation would be broken, are more difficult to conceive of in the mechanisms of *Ex Post* Responsibility. To admit this, we can first continue to see in the future the projection of the past, a "virtuality" technique which allowed for the control of concentrations, which is resolved by conditionalities and commitments proposed by companies to obtain the authorization.

But the climate issue implies another rationale: that of commitments imposed without compensation. We thus find the core of Regulation and Compliance Law, which is then used to compel on the general basis of Responsibility those who had promised to do something. This leads to a relationship not just between the past and the future, because we become responsible if we do not do what was said, but there is also a link between the present and the future, because we are condemned to do immediately not just what we said, but also what science

suggests doing so that the result is effectively reached in the future. A "program" is then set according to a "trajectory" so that this actually happens.

This use of Responsibility Law places a new burden not just on companies but also on States. This constraint stemming from *Ex Ante* Responsibility is then in the hands of the Judge, whose function itself becomes an *Ex Ante* function. The powers obliged Ex Ante by such a responsibility used by the Judge are the powers which were previously held solely by the future, i.e. the Legislator and the people, who handled the future alone or through a contract; they are now subject to Responsibility Law which is not only used by the Judge, but which does this with an *Ex Ante* outlook, which produces towards them obligations to do, in a new breakdown of powers with respect to time.

Such a revolution, taking place before our eyes, is justified because we must act now so that the future is not catastrophic. Science informs us that it certainly will be if nothing is done according to a "program" of which we now know the terms and the calendar. It is thus legally required that responsible parties be designated, not because they will have done something in the past, as the *Ex Post* dimension is not the subject, but so that they do something; with *Ex Ante* Legal Responsibility being a central element of this new branch of Law: Compliance Law. It is no longer so much the commitment but rather the "position" of the entities which makes them responsible, with this responsibility being activated by the "people involved," as Compliance Law over data has demonstrated. Responsibility proceedings are thus thrown into upheaval because the judge must welcome petitions without disputes.

The Law is thus placed before a strategic choice, i.e., it must turn its attention no longer so much to the past but rather towards the future, because it is urgent, with Responsibility Law being the most appropriate mechanism for making this shift from the past towards the future (**I**). To make this shift of Responsibility to *Ex Ante* so that it can address the Future, we must find legal channels: this movement in time can continue to be anchored in the past, because of commitments, but it can also appear in the future which, because we know it, can then become present, the aptitude to be responsible being attached to the "position" of the entity: the Judge can thus act without taking the place of the other authorities, because he does not take the place of the Legislator or contractors, who remain the sole parties legitimate to address the "unknown future" (**II**). Once this displacement has been made, the fruits can be gathered, at the request of the "people involved," i.e., no longer an obligation to repair but an obligation to do, to do what was promised or what is necessary, with a path to be followed (a transition, a

trajectory), through a "program", the open question then being to know who will supervise such a path by the obligated party.

I. THE URGENCY OF PLACING RESPONSIBILITY IN *EX ANTE*

Why should we make such efforts to orient Responsibility Law towards the future, since it is naturally turned towards the past in that it compels people to "be accountable," which assumes accomplished actions, while the future would make this task impossible, a time in which these actions have not been carried out? Because of a new situation which now makes the Future the priority (**B**), a situation in light of which the traditional breakdown of time between the sources of the Law (**A**) turns out to be inadequate (**C**).

A. THE TRADITIONAL BREAKDOWN OF TIME BETWEEN THE SOURCES OF THE LAW

In the legal system, the breakdown of time is a matter of power. It was long channeled by the distinction made between the various holders of power to efficaciously pronounce the Law. The powers that express a will, powers that are legitimate to have and thus real, are thus apt to address the future to make of it what they want: these are the Legislator and the "small legislators" who are contractors. They take hold of the future because of their legitimate will to build it, which makes the Law by nature an act which "makes use" of the future through an application which is both immediate and *erga omnes,* while the contract is by nature an "act of forecasting."

The principle of "legal security," particularly in its technical substrate of "predictability," implies that other powers do not disturb what the legislators and contractors have decided on of what would be, according to their intention, the future. The principle of non-retroactivity of the new laws and the principle of survival of the old law in contractual situations express these elementary and fundamental rules, rules which maintain the powers.

It is then logical that the judge, a neutral agent of effectiveness of what the first two decided, has as his natural time the past, because he, in the traditional system, is not supposed to have an autonomous will: he takes what is already there, i.e., de facto and legal situations already constituted and the rules of law which are available to him, as reminded to us by article 12 of the Code of Civil Procedure.

The best example of this is precisely Responsibility Law, largely of Praetorian origin, including in the Roman-Germanic legal systems, which does not cause any confusion because the judge, considering only the constituted facts and acts, the operated responsibility of people, sanctioned in this regard, is thus an *Ex Post* responsibility. Christian Mouly was the first to cite the "super-retroactivity" of the case law, as it is underscored that all of the case law in terms of responsibility is articulated around the mechanisms of insurance, which are *Ex Ante*, but the breakdown of the time remained established because if the interpretation of the Law by the judge makes him master of the whole, it remains established that the future situations remained out of reach for him.

Thus, in the traditional conception, going against this breakdown equals challenging the separation of powers: in a first direction, this would mean challenging the exclusive power of the Legislator or contractors to make use of the future as they wish, the former *erga omnes* and the latter within the scope given to their exchanges; in the reciprocal direction, this would mean claiming that the Judge could address the future, in *Ex Ante*, which would mean giving him a political power, according to the expression so often used of the "government of judges," either to say that he is favorable to it or to express his hostility and to say that it should be restored to the proper order.

In this very anchored conceptual environment, because Responsibility is in Law handled by judges, the notion of "*Ex Ante* Responsibility" could appear to be aporetic. This would be very detrimental because today the time that most requires the force of Law is the future time.

B. THE PRIORITY OF THE FUTURE

As Pierre Godé wrote in 1992 regarding Environmental Law, what we should think about is not so much "the future of the Law" but rather "the Law of the Future." 30 years later, the expression of a legal urgency to build it is general,

associated with the idea that it implies radical legal changes. *Ex Ante* Responsibility is one of them. The facts imply it. It is indeed probably the first time that it is possible that a local event that could occur could have a catastrophic effect on the whole planet.

The systemic effects have always existed, justifying *Ex Ante* systems, detection and prevention concerning structures, people and behaviors that could endanger complete systems: it is the object of Compliance Law, which constitutes a branch of *Ex Ante* Law, which extends Regulation Law, a branch of Law which is also *Ex Ante*.

The purpose of Compliance Law is to make sure that a systemically catastrophic event does not occur, either in itself, or in all of its systemic effects. This constitutes its "negative monumental goal." This systemic dimension has been amplified over the centuries, which partly explains the late appearance of this branch of the Law.

But if we use this substantial definition of it, which was initially that of Europe, particularly with regard to personal information, the mechanism of Responsibility is then required within Compliance Law, not just *Ex Post*, so that the breaches observed in the past by operators subject to obligations of compliance (which is classic) are sanctioned, but also and above all in *Ex Ante* so that the entities that can do something with regard to the Monumental Goals concerning the future at stake do so immediately, although they have not committed any breach. But it seems out of reach in that the breakdown of power between the sources of the Law opposes it. We must therefore underscore this inadequacy, in order to best remedy it.

C. THE INADEQUACY OF THE TRADTIONAL BREAKDOWN OF TIME BETWEEN THE SOURCES OF THE LAW

The Legislator and the Executive exercise influence over the future, through texts which bind those subjected to them, but the expression *erga omnes* is misleading because their will is only binding with respect to those covered by the legal system in which the legal order in question is deployed. But the systemic

stakes which must be detected and prevented in their harmful potentiality by an organization to be built as of today go beyond the geographical borders of each of the legal systems, because global stakes are involved and global Law does not exist.

The issue of "extraterritoriality," which draws so much reaction as an aggression of one government against another, nevertheless responds to the systemically global dimension of the subject, because corruption and money laundering are considered not as such but rather in that they destroy economies, then societies and lead to war; climate change being the most violent example of this systemic dimension.

To this, international public Law cannot respond by the international conventions concluded between the sovereign subjects of law that States are, insufficient to build an overall plan, in the same way that no international institution can, for the moment, comprehensively detect and prevent future global systemic crises, whether sectoral, particularly in banking, finance and energy, and still less when they are non-sectoral, i.e., digital and climatic.

We then think about turning towards the "small laws" which are the international contracts of companies, which have for them that they are not restrained by the consubstantial link that States have to a territory, or even the unilateral commitments of companies which could be sufficient to produce effects of law that are really *erga omnes*, because their issuers are themselves really "global." But what is lacking here is the normative legitimacy of the source, because while the Legislator does not grasp everyone and everything, which makes him inadequate with respect to the objet, he remains legitimate to decide politically for the future of the group, which contractors or a company cannot claim.

We must therefore turn towards the path of Responsibility. But Responsibility Law is indeed the affair of the Judge. We must therefore find legal channels to allow the Judge to place this responsibility in Ex Ante.

II. THE LEGAL CHANNELS FOR PLACING RESPONSIBILITY IN *EX ANTE*

To move responsibility in time, the Judge can base himself on commitment, which does not constitute a real movement, because a commitment is by nature a fact or an act which is in the past. Responsibility is therefore not overturned. This validates on the contrary the idea that Responsibility is rather a question of execution (**A**). The Law goes in this direction, because it does not manhandle the breakdown of the powers that were previously presented. On the other hand, the affirmation by the Judges that the knowledge of the catastrophic future is so established that the rights of the future victims become immediately present is a revolutionary conception of *Ex Ante* Responsibility (**B**). Furthermore, the idea that the burden of Responsibility for the future can be put on an entity because it is in a position to endure this load, because someone must do it and it is in a position to do it, would be a revolutionary basis (**C**).

A. THE PAST COMMITMENT, BASIS FOR TRIGGERING *EX ANTE* RESPONSIBILITY

With regard to contracts, Philippe Rémy had underscored that contractual liability is essentially distinct from tortious liability in that the former aimed to compel the person who had made the commitment to fulfill it, in principle certainly as an equivalent, but with this being sufficient to distinguish it from compensation like that triggered in the second type of liability.

More globally, this reasoning which attaches Responsibility not so much to a fault but rather to a commitment, with respect to which there is a breach if there is no execution, which allows through a declaration of responsibility by the Judge who observes in the past the existence of a commitment and concludes that the author of this commitment must respect it, has a value that goes well beyond the sphere of the contract, with the unilateral commitment now being part of substantive law.

Indeed, if we examine the *Grande Synthe* decision pronounced by the *Conseil d'État* (French Council of State) on July 1, 2021, with this decision this Judge of the excess of power cancelled an implicit refusal opposed by the regulatory power to act because it was compelled on the one hand by the European Regula-

tion of May 30, 2018 and also by article L.100-8 of the Energy Code which expressly formulated a "trajectory for the reduction of greenhouse gas emissions" with regard to the objectives pursued by the texts, i.e., the aforesaid reduction. But on the date of the decision, the absence of measures taken, i.e., the refusal implicitly formulated to take them, already made impossible the respecting of this trajectory, which had been set by the decree of April 21, 2020 for reaching the objectives set. Consequently, the implicit refusal had to be cancelled. The result, by a mirror effect for the Government, the author of the refusal, was a responsibility taking the form of an obligation to act.

This remarkable decision is not revolutionary, because if the legislative authority, in the broad sense (European sense, targeting both the parliamentary authority and the executive authority), did not commit itself, the nullity of the implicit refusal, i.e. its Ex Ante Responsibility to act because it was itself compelled to do so, would not have been made explicit by the Judge. But the Judge is only deploying a commitment that the Political Authority itself made.

The same analysis can be carried out with regard to companies, and in a still clearer way, as Responsibility Law had been expressly used by the Tribunal in the Hague in the judgment pronounced on May 26, 2021, engaging Shell's responsibility. The law suit was brought by associations against the entity RDS which the judgment described in this way: "The activities of RDS consist of holding shares of intermediary companies, fulfilling its obligations towards shareholders according to the stock market quotes in New York, London and Amsterdam, and determining the general corporate policy of the Group. The Operating Companies carry out operational activities and are responsible for the implementation of the general policy of the Shell Group determined by RDS. These Shell entities possess assets and/or infrastructures which produce and market oil, gas and other forms of energy and have licenses for the use, production or extraction of oil. The Service Companies provide the other companies of the group with assistance and services in the carrying out of their activities." Thereafter, the judgment refers to the "Shell Group."

This underscores the fact that, beyond the distinctions, the multiplicity and the diversity of the legal entities, in terms of responsibility, the branch which grasps the situations through their factuality, it is a global company which is in direct contact with a global subject: the climate.

Based in particular on the reports of the IPCC, the Tribunal of the Hague observes that the actions to which the States commit in principle through

various agreements, for example the Paris Agreement, are insufficient to protect the population of the Netherlands. In the face of a long description of the "policy intentions," the judgment describes the system specific to the Shell Group in these terms: "As the head holding company, RDS determines the general policy of the Shell Group. For example, RDS defines the guidelines for the investments aiming to support the energy transition and the commercial principles for the Shell companies. RDS reports on the consolidated performance of the Shell companies and maintains relations with the investors. In the 2019 sustainable development report of RDS, the board of directions of RDS is designated in an "organizational chart of climate change management" as "supervision of management of the risks linked to climate change." The companies of the Shell Group are responsible for the implementation and fulfillment of the general policy. In doing so, they must comply with the applicable legislation and the contractual obligations. Each Shell company takes on the operational responsibility for the implementation of "policies and strategies relating to climate change."

It is remarkable that the term of "operational responsibility" is used to describe this *Ex Ante* organization. Furthermore, the Court adds: "RDS wrote that its CEO is ultimately responsible for the overall management of the Shell Group. The CEO is the final authority and has the ultimate responsibility for all issues of management, with the exception of those which are the ultimate responsibility of the whole board of directors of RDS or of the general meeting of shareholders of RDS. With regard to climate change, the declaration of the CDP indicates:"*The CEO is the highest person responsible for climate change. This includes the implementing of Shell's strategy, for example through the plans of Shell (...) to set short-term objectives for reducing the net carbon footprint of the energy products that it sells (...).;* The declaration of the CDP of 2019 expresses that the climate policy of which the CEO of RDS is ultimately responsible is determined by the board of directors of RDS, which has "*supervision of issues linked to the climate.*"

Then the Court analyzed the way in which the Shell Group handles climate as a risk to be evaluated and implements technologies to decrease the negative effects of the technologies currently used by the group, regretting that States do not act more concerning them and compares the declarations to the Board and to the shareholders with the existence of clauses of non-responsibility of the company because of the maintained pollution and perfectly clear public declarations regarding the massive maintaining of oil use, while we find on the site of the company declarations such as: "We have the responsibility and the commitment to respect human rights by strongly stressing the way in which we interact with communities, safety, labor laws and the conditions of the supply chain."

From all of this, the Court concluded that RDS is obliged, through the company policy of the Shell Group, to reduce the CO2 emissions from the activities of the Shell Group between now and the end of 2030 by 45% net compared with 2019. This reduction obligation concerns the entire energy portfolio of the Shell Group and the combined volume of all of the emissions. It is up to RDS to define the obligation of reduction, taking into account its current obligations and other relevant circumstances.

It is therefore on the one hand the notion of commitment and on the other hand the notion of coherency which are used, starting solely from the Civil Code of the Netherlands in its general provisions on Responsibility Law, that the judgment was pronounced. These notions of commitment and coherency, which were classically linked more to ethics than to Law, are now developing strongly in Law borne by the economy of Regulation. They are based on the idea that the person who is strong enough to commit the others in the future must be able to be compelled to be bound by his promises and his speech. This means, as Alain Supiot perfectly explained it, "taking responsibility seriously."

The Court furthermore acknowledges that this responsibility is shared between the States and the company, because the company cannot simply claim to "conform" to the regulations (which shows the opposition between "conformity" and Compliance Law, in its links with Responsibility and Ethics), no more than States can claim to not be compelled by Responsibility Law to act under the pretext that they did not cause damage.

The judges were thus able to seize the future because the company itself claimed to be sufficiently powerful to do it. Under the ordinary Law of responsibility, the judges, because the fact that they invoke, i.e., declarations made to shareholders and to public opinion and covering the modification of the systemic future by companies can thus engage the responsibility of companies, because they said it.

The open question is that of a legal authority, Legislator or Company, that has not committed itself to anything, and about which a person involved would however come to ask that it be compelled to act because of its responsibility with respect to the future.

This assumes that we already know the future.

B. KNOWLEDGE OF THE CATASTROPHIC FUTURE, BASIS FOR PLACING RESPONSIBILITY IN *EX ANTE*

In the *Vocabulaire fondamental du Droit*, in an admirable article presenting "Responsibility," Geneviève Viney underscored that what Responsibility responds to above all is "trouble." If the judge knows in advance the trouble that will occur in the future, because its detection was done by science, the subjective procedural right of asking the judge to intervene is already present.

It is the power of the "virtuality" to already make present what is established in the future: in the same way that the tree that will be cut into logs and sold as furniture, even if, at the time of the sale, it is still rooted in the ground. Law travels through time, not by will but by the very respect that it has for reality, by its perfect examination. It is through submission that the Judge, with respect to reality, can intervene.

This hypothesis is that which was examined by the German Constitutional Court in its ruling of April 29, 2021. It was fairly described as a "legal revolution," because the Judge had examined the conformity of the German law voted to fight against climate change with the German Constitution.

The issue was procedural, because the reproach made was the fact that the Legislator had only planned actions until 2050, leaving to the parliaments of future times the care to take the appropriate measures at that time. The petitioners maintained that if the Legislator then chose to do nothing, he would be violating the fundamental right to life of future generations. He answered them to say that this right of "future generations" could not be cited because these generations were not present, their rights were not effective and could not be cited.

The Constitutional Court affirmed that the scientific studies were so credible that while it was possible for the future Legislator to do nothing, it was already established that many people of these future generations would die. In Law, it considers that a Legislator cannot adopt a Law of which the subject is the fight against climate change of which the mechanisms implemented do not go beyond 2030, thus leaving the possibility for the party which deals with the Future in 2030 to possibly do nothing. This is incoherent and the Legislator (no more and no less than a company) does not have the authority to be incoherent.

We can assess that such a decision is not the expression of a "government of judges" but the affirmation of an obligation of coherency, with respect to what

the Legislator said, i.e. the right opposition between the Law and the Arbitrary. It is also a way of preserving the Sovereignty of the legislator: avoiding being arbitrary when dealing with the Future, i.e., linking Will and Reason.

The question that remains open is thus knowing whether the Judge can also impose an *Ex Ante* Responsibility on companies if there were no commitments, for the sole reason that there is "trouble," for the sole reason that that there is future trouble of which the occurrence is already established and that the entity should bear the burden of doing something because it is "in a position" to do it.

C. THE POSITION OF THE ENTITY, SUFFICIENT GROUNDS FOR TRIGGERING *EX ANTE* RESPONSIBILITY?

Responsibility Law has not yet crossed the Rubicon. It still draws from a commitment, seeking in its natural time which is the past, a commitment to apply a burden, even though it stretches this past towards the future.

But this crossing has already been enacted by Compliance Law, a revolutionary branch of the Law from which Responsibility Law must be considered.

When Compliance Law burdens banks with obligations of detecting and preventing money laundering or corruption behaviors, it is not because they are - even potentially - accomplices, nor because they made commitments to take part in this fight: it is because they are in a position to do so efficaciously. In the same way and in an extraordinary way, the European Central Bank stated that its foremost objective is the fight against climate change, an affirmation of which the sole grounds are the necessity of doing it. A "Monumental Goal" which is inserted by its authority and by the Financial Market Authorities for banking and financial operators not because they have a relationship with the phenomenon (because they have no energy activities - contrary to Shell or to a legislator who adopts a law in this area -) but because they are in a position to do so.

Compliance Law, a Law of the Future par excellence, designates as obliged subjects of law those who are "in a position" to act. In its decision of March 17, 2013, the *Conseil constitutionnel* (French Constitutional Council) thus distinguished the civil liability of companies with regard to the personal responsibility that the "duty of vigilance" assigns them, with the *Conseil* considering that it is a personal responsibility that the Legislator has the right to impose on them to

reach a goal of public order, i.e., the protection of the environment and human beings. And it is indeed because the responsibility takes on the appearance of a sanction, thus rediscovering its link with offenses and the past, that the *Conseil* declared contrary to the Constitution the civil fine that the "Vigilance" law had already planned.

Because we must think of *Ex Ante* Responsibility as being an integral part of Compliance Law, a branch of *Ex Ante* Law which places its normativity in its "Monumental Goals" which are the effective respect of human dignity, which is dissociable from the concern for preventing the disappearance of Humanity because of a fatal climate change, the principle of necessity and trouble should suffice to put this burden on the entities "in a position" to do something.

As the "Revolution" of the *Jand'heur ruling* was possible, why shouldn't this one be too?