EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2014) 22 ERPL 6

The *European review of Private Law* is published six times per year.
Subscription prices for 2015 [Volume 23, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 754/USD 1004/GBP 553
Online subscription prices: EUR 697/USD 930/GBP 512

This journal is also available online at www.kluwerlawonline.com.
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The *European Review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*
Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

European Review of Private Law 6-2014 [879–900] © Kluwer Law International BV. Printed in Great Britain.

Cross-Fertilization between Swiss and Turkish Tort Laws

CHRISTOPH MÜLLER & OLIVIER RISKE*

Abstract: This article analyses how the Swiss 'Draft Project on the Revision and Unification of Civil Liability' (Widmer/Wessner Project) has influenced the new Turkish tort law of 2012. This influence is all the more noteworthy as the Swiss legislator decided in 2009 not to pursue the Widmer/Wessner Project. This paper focuses on the following three instances: (i) the vicarious liability for organizational defects in enterprises [Art. 66 of the Turkish Code of Obligations (TCO)], (ii) the extension of the personal scope of application of the liability for constructions (Art. 69 TCO), and (iii) the general clause of strict liability for abnormally dangerous activities (Art. 71 TCO). By adopting these innovative solutions, which are still being debated among Swiss scholars, the Turkish legal system has overtaken the Swiss model, at least to the extent of these new implementations. In a not so distant future, it might thus very well be that Turkish tort law will have some influence on the Swiss tort law system instead of the opposite.

Resumé: Le présent article examine comment l'avant-projet suisse d'une loi fédérale «Révision et unification du droit de la responsabilité civile» (projet Widmer/Wessner) a influencé le nouveau droit turc de la responsabilité civile de 2012. Cette influence est d'autant plus surprenante que le législateur suisse a décidé en 2009 de ne pas donner suite au projet Widmer/Wessner. La présente contribution se concentre sur les trois exemples suivants: (i) la responsabilité pour le défaut d'organisation dans les entreprises [art. 66 du Code des obligations turc (TCO)]; (ii) l'extension du champ d'application personnelle de la responsabilité du propriétaire d'ouvrage (art. 69 TCO) et (iii) la clause générale de responsabilité objective pour des activités particulièrement dangereuses (art. 71 TCO). En adoptant ces trois solutions innovantes qui sont toujours débattues dans la doctrine suisse, le système juridique turc a dépassé le modèle suisse, en tout cas en ce qui concerne ces trois nouveautés. Dans un avenir plus ou moins proche, il se pourrait donc très bien que le droit turc de la responsabilité civile influence à son tour le droit suisse.

Zusammenfassung: Dieser Beitrag untersucht wie der Schweizer Vorentwurf eines Bundesgesetzes zur 'Revision und Vereinheitlichung des Haftpflichtrechts' (Widmer/Wessner Vorentwurf) das neue türkische Haftpflichtrecht von 2012 beeinflusst hat. Dieser Einfluss ist umso bemerkenswerter, als dass der Schweizer Gesetzgeber im Jahre 2009 entschieden hat, den Widmer/Wessner Vorentwurf nicht weiterzuverfolgen. Dieser Artikel beschränkt sich auf folgende drei Beispiele: (i) die

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Haftung für Organisationsmängel in Unternehmen [Art. 66 des türkischen Obligationenrechts (TCO)]; (ii) die Erweiterung des persönlichen Anwendungsbereichs der Werkeigentümerhaftung (Art. 69 TCO) und (iii) die Generalklausel für die Gefährdungshaftung für besonders gefährliche Tätigkeiten (Art. 71 TCO). Mit der Einführung dieser drei fortschrittlichen Lösungen, welche in der Schweizer Lehre nach wie vor zur Debatte stehen, hat das türkische Rechtssystem das schweizerische Modell überholt, jedenfalls was diese drei Neuerungen betrifft. Dies könnte in nicht so ferner Zukunft dazu führen, dass das türkische Haftpflichtrecht seinerseits das Schweizer Recht beeinflussen wird.

1. Introduction

The new Turkish Code of Obligations (TCO) was enacted by the Grand National Assembly on 11 January 2011 and took effect on 1 July 2012. While there are few profound changes regarding contract law, tort law has undergone some important modifications. In its efforts to reform tort law, the Turkish legislator drew inspiration from developments in the Swiss tort law system.

After a brief reminder of the Swiss origins of Turkish private law, this paper will focus on some of the main novelties of the new Turkish tort law, namely, the new vicarious liability for organizational defects in enterprises, the extension of the personal scope of application of the liability for constructions, and the new general clause of strict liability for abnormally dangerous activities.

2. Swiss Origins

The Swiss Civil Code (SCC)[1] has won admiration abroad due to its intrinsic merits. Almost every legislator in countries where private law is codified has learnt something from the SCC, which has either been used in drafting a new civil code – as in Italy and Greece – or in reforming existing laws. However, there has been only one instance of total reception of the SCC and that is in the Republic of Turkey.[2]

After *Mustafa Kemal Atatürk* (1881–1938)[3] created the Republic of Turkey in 1922/1923,[4] the SCC was brought into force almost word for word as the new Turkish Civil Code of 1926.[5] As far as Book 5 of the SCC is concerned, i.e., the

1 Code civil suisse du 10 décembre 1907 (RS 210), available on the Internet at http://www.admin.ch/opc/fr/classified-compilation/19070042/index.html (29 Jan. 2014).

2 K. Zweigert & H. Kötz, *An Introduction to Comparative Private Law* (3rd edn, Oxford/New York: Oxford University Press, 1998), p. 178.

3 *Gazi Mustafa Kemal Pascha* was later granted by decree the additional name of '*Atatürk*' ('father of Turks').

4 M. Aslan, 'Rückfahrkarte, Das schweizerische Zivilgesetzbuch in der Türkei', *Rechtsgeschichte* 2005, pp. 33at 33.

5 Zweigert & Kötz, *Comparative Private Law*, p. 178.

Swiss Code of Obligations (SCO),[6] the Republic of Turkey adopted only the first 551 Articles. The Turkish legislator preferred to codify the entire field of commercial institutions in another important code: the Turkish Commercial Code.[7]

This instance of reception is especially interesting because the context in which it took place is such a remarkable one. In order to effect a radical modernization of Turkish society, the legislator, at a stroke of a pen, abolished the Islamic legal practices that had been in force for centuries[8] and that had barely been affected by the legislative reforms of the last Sultans of the Ottoman Empire. The Republic of Turkey introduced a code modelled to fit the needs of an entirely different society with respect to its social, religious, and economic structures. In no other instance may one get such an in-depth insight into how the reception of a foreign code of law effected a mutual interaction between the interpretation of that foreign text and the actual traditions and usages of the country that adopted it, gradually developing a new law of an independent nature.[9] The transformation of the Turkish legal system and social order, which began in 1926 and was qualified in 1938 by *Georges Sauser-Hall* as being the most radical and brutal in history,[10] seems nevertheless to be on track for success.[11] The adventure of the SCC, including the SCO, is surely one of the most fascinating in the history of legal transplantations.[12]

The reasons why Turkey adopted the SCC in 1926 are manifold.[13] The SCC was the newest,[14] most complete, and most popular of the civil codes.[15]

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6 Loi fédérale complétant le Code civil suisse (Livre cinquième: Droit des obligations) du 30 mars 1911 (RS 220), available on the Internet at http://www.admin.ch/opc/fr/classified-compilation/19110009/index.html (20 Jun. 2014).

7 H. Burcuoğlu, 'Aperçu général sur le nouveau Code Turc des Obligations', *RDS/ZSR (Revue de droit suisse/Zeitschrift für Schweizerisches Recht)* 2013, pp. 223at 223.

8 Zweigert & Kötz, *Comparative Private Law*, p. 178; N.J. Singer, 'The Reception of the Swiss Civil Code in Modern Turkey', in: P. Tercier *et al.* (eds), *Festschrift Peter Gauch zum 65. Gerburtstag, Gauchs Welt: Recht, Vertragsrecht und Baurecht* (Zurich/Basel/Geneva: Schulthess, 2004), p. 263 at 264.

9 Zweigert & Kötz, *Comparative Private Law*, p. 178.

10 G. Sauser-Hall, 'La réception des droits européens en Turquie', in: *Recueil de travaux publié par la Faculté de droit de l'Université de Genève* (Geneva: A. Kundig, 1938), pp. 325at 345.

11 Y.M. Atamer, 'Rezeption und Weiterentwicklung des schweizerischen Zivilgesetzbuches in der Türkei', *RabelZ (Rabels Zeitschrift für ausländisches und internationales Privatrecht)* 2008, p. 723 at 753; also H.N. Kubali, 'Modernization and Secularization as Determining Factors in Reception in Turkey', *ISSB (International Social Science Bulletin)* 1957, p. 65 at 69.

12 Atamer, *RabelZ* 2008, p. 753.

13 A. Oguz, 'The Role of Comparative Law in the Development of Turkish Civil Law', *Pace Int'l L. Rev. (Pace International Law Review)* 2005, pp. 373 at 381.

14 The French *Code Civil* was considered as being already too old and the German BGB was deemed not to be fit for reception because of its complexity [H. Bandak, *Die Rezeption des schweizerischen Zivilgesetzbuches in der Türkei* (Bielefeld: Gieseking, 2008), p. 80; A.B. Schwarz,

Compared to the German '*Bürgerliches Gesetzbuch*' (BGB), its language was understandable, the legislative technique employed was easy for laypeople to grasp,[16] and it contained (including the SCO) only two thirds of the number of Articles.[17] The Turkish Minister of Justice and many other Turkish lawyers at that time had studied in the French part of Switzerland and consequently were well versed in Swiss law.[18] Moreover, the SCC had the advantage of having an official French version that facilitated its reception, since many Turkish lawyers already mastered French legal terminology due to the previous reception of French Acts in the mid-19th century.[19] Finally, Switzerland, with its German, French, and Italian population, is a culturally diversified country like the Republic of Turkey. If Swiss law had the required flexibility to satisfy such diversity, it would undoubtedly be suitable for application in a country with a 90% homogenous population such as the Republic of Turkey.[20]

The reception of the SCC by the Republic of Turkey amounted to a significant domestic political success for the Republic. The Turkish State was able to break away definitively from the legal order in place at that time, which had been bound to Islam for a thousand years. Moreover, as regards foreign affairs, the Republic of Turkey succeeded in proving that the State and the civil society of the new Republic lived up to the standards of contemporary civilization.[21]

Twenty-five years after the coming into force of the Turkish Civil Code (1951), problems in its application prompted the acting Minister of Justice to constitute a commission whose mandate was to prepare a revision of the Code. In 1971, a reform project was finally published. However, the 1971 project and a subsequent project of 1984 were never enacted.[22] In 1994 again, a commission of scholars, judges, representatives of professional associations, non-governmental

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Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung (Zurich: Schulthess, 1950), p. 48; SINGER, in: *FS Gauch*, pp. 266–267; ATAMER, *RabelZ* 2008, pp. 731–732]. The Italian *Codice Civile* was deemed to be too Catholic for an Islamic country such as the Republic of Turkey [E. PRITSCH, 'Das Schweizerische Zivilgesetzbuch in der Türkei: Seine Rezeption und die Frage seiner Bewährung', *ZVglRWiss (Zeitschrift für Vergleichende Rechtswissenschaft)* 1957, p. 123at 145; BANDAK, *Rezeption*, p. 80].

15 According to the official explanation of the Minister of Justice *Bozkurt*. For a reproduction in the original Turkish language and its translation into German, see BANDAK, *Rezeption*, p. 75.

16 E. BÜYÜKSAGIS, *Le nouveau droit turc des obligations, Perspective comparative avec les droits suisse et européen* (Basel: Helbing Lichtenhahn, 2014), N 14; SINGER, in: *FS Gauch*, p. 267; PRITSCH, *ZVglRWiss* 1957, p. 145.

17 ATAMER, *RabelZ* 2008, p. 732; BANDAK, *Rezeption*, p. 80.

18 PRITSCH, *ZVglRWiss* 1957, p. 144; SINGER, in: *FS Gauch*, p. 267; BANDAK, *Rezeption*, p. 79.

19 SAUSER-HALL, in: *Recueil de travaux*, p. 346; SINGER, in: *FS Gauch*, p. 267; ATAMER, *RabelZ* 2008, p. 731.

20 Minister of Justice *Bozkurt* in BANDAK, *Rezeption*, p. 76.

21 BANDAK, *Rezeption*, p. 82.

22 See ATAMER, *RabelZ* 2008, pp. 738–747.

organizations, and different Ministries was convened. It was mandated to reform the Civil Code and bring it up to date. The commission oriented itself, in part, on the projects of 1971 and 1984, but developments in Switzerland in particular, and – to the extent it was deemed necessary – in Germany, France, and Italy, were also taken into account.[23] The final draft project of the commission was published in 1999 and accepted by the Parliament on 22 November 2001. The new Turkish Civil Code (TCC) entered into force on 1 January 2002.[24]

In 1998, a commission was convened in order to revise the law of obligations, as part of the endeavour to modernize private law in Turkey. A first draft was published in 2005 and a revised draft followed in 2008. The final version of the TCO was adopted by the Parliament on 11 January 2011. The new Turkish Commercial Code, which had been in preparation for over ten years, followed two days later. Both Codes entered into force on 1 July 2012. The number of Articles in the TCO increased from 544 to 649. Changes were made in over 200 Articles.[25] The most important modifications concern tort law,[26] general business terms,[27] sales law, landlord-tenant law, personal securities,[28] and assignment of debt and assumption of contract.[29]

The fact that Turkish Court decisions sometimes distanced themselves from the text of the Code in order to find solutions that were in line with the social and economic realities is one of the major reasons why the Turkish legislator endeavoured to implement a new Code. The reforms became necessary in order to fill the gap between practice and the old Turkish Code of Obligations (aTCO).[30] Another important reason for adopting a new Code was the legislator's continued desire for Europeanization and modernization of its legal system.[31]

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23 Atamer, *RabelZ* 2008, p. 749.

24 M. Inceoğlu & Y.M. Atamer, 'Das neue türkische Obligationenrecht vom 11. Januar 2011 – ein Überblick zu den wichtigsten Änderungen', *ZBJV (Zeitschrift des Bernischen Juristensvereins)* 2013, p. 67 at 67.

25 Inceoğlu & Atamer, *ZBJV* 2013, p. 68.

26 See Büyüksagis, *Le nouveau droit turc des obligations*, NN 137-210; Inceoğlu & Atamer, *ZBJV* 2013, pp. 73–74.

27 See C.A. Schwimann, *The Turkish Code of Obligations: The Civil Law Reform in Turkey Continues: On Jul. 1, 2012 a New Obligations' Law Entered into Force*, pp. 4–5, available on the Internet at http://www.spechtboehm.com/wp-content/uploads/2012/11/SpechtBoehm-The-Turkish-Code-of-Obligations.pdf (20 Jun. 2014); Inceoğlu & Atamer, *ZBJV* 2013, pp. 71–72.

28 Schwimann, *The Turkish Code*, pp. 2–8; Inceoğlu & Atamer, *ZBJV* 2013, p. 76.

29 See H.M. Develioğlu, 'Les règles du nouveau code des obligations turc concernant "les changements des parties au contrat"', *RSJ/SJZ (Revue Suisse de Jurisprudence/Schweizerische Juristen-Zeitung)* 2013, p. 565; Schwimann, *The Turkish Code*, pp. 6–8.

30 Büyüksagis, *Le nouveau droit turc des obligations*, N 23.

31 Büyüksagis, 'The New Turkish Tort Law', *JETL (Journal of European Tort Law)* 2012, p. 44 at 48.

3. New Turkish Tort Law

3.1. Introduction

While there are few fundamental changes regarding contract law, tort law has undergone important modifications.[32] Notwithstanding these changes, the TCO does not embody a fundamental reform. Nothing has changed with respect to the underlying values.[33] Just like the TCC continued to follow its Swiss counterpart,[34] the TCO stayed true to the systematics and structure of the aTCO. The reforms that did occur were influenced by changes made in the meantime to the SCO, some provisions of the abandoned Swiss 'Draft Project on the Revision and Unification of Civil Liability' (Widmer/Wessner Project),[35] and Turkish Supreme Court decisions.[36]

The Turkish legislator was influenced by developments in the Swiss tort law system, and although it did not seek to unify the regimes of contractual and extra-contractual liability,[37] it drew important inspiration from the Widmer/Wessner Project.[38]

The seeds of the Widmer/Wessner Project were sown by the so-called '*Manifesto of Neuchâtel*' of 1967,[39] in which academics of the '*Société suisse des juristes*' appealed to the Federal Council and Parliament to unify Swiss tort law. Indeed, the latter had become scattered in an ever-growing number of Acts, in particular in the field of strict liability.[40] However, one had to wait until 1986 and the environmental disaster of *Schweizerhalle*[41] to find strong parliamentary support for a reform project regarding tort law. The incident of *Schweizerhalle* served as a reminder to the political world that the *Manifesto of Neuchâtel* had been accepted in principle by the Government twenty years earlier. As a result of

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32 Büyüksagis, *JETL* 2012, p. 45.

33 Inceoğlu & Atamer, *ZBJV* 2013, p. 68.

34 Atamer, *RabelZ* 2008, p. 752.

35 The Draft Project is available on the Internet at http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/haftpflicht/vn-ve-f.pdf (20 Jun. 2014).

36 Inceoğlu & Atamer, *ZBJV* 2013, p. 68.

37 Before being finally rejected, the unification of the regimes of contractual and extra-contractual liability had been extensively discussed in the Widmer/Wessner Project [P. Widmer & P. Wessner, *Révision et Unification du droit de la responsabilité civile – Rapport explicatif*, pp. 23–24, available on the Internet at https://www.bj.admin.ch//content/dam/data/wirtschaft/gesetzgebung/haftpflicht/vn-ber-f.pdf (20 Jun. 2014)].

38 Büyüksagis, *JETL* 2012, pp. 45–46.

39 Widmer & Wessner, *Rapport explicatif*, p. 8.

40 See Widmer & Wessner, *Rapport explicatif*, p. 4.

41 On 1 Nov. 1986, six months after the nuclear meltdown in Chernobyl, the water used for extinguishing a fire in a storage facility for agrochemicals owned by Sandoz SA polluted the river Rhine over a distance of hundreds of kilometers. Although Sandoz SA satisfied all claims for damages, the disaster definitively raised public awareness regarding liability issues (see Widmer & Wessner, *Rapport explicatif*, pp. 15–16).

intense political pressure, the Federal Department of Justice and Police decided, in 1988, to establish a Study Committee for the wholesale reform of Swiss tort law. In 1992, Professors *Pierre Widmer* and *Pierre Wessner*, members of the Study Committee, were entrusted with the drafting of a reform project on the general part of tort law. The draft and its explanatory report were handed in by the experts in 1999. After launching a consultation in 2000, the Federal Council decided not to integrate the reform project into the legislative program of 2003–2007.[42] In 2009, the Federal Council finally decided to drop the Widmer/Wessner Project altogether due to a lack of consensus on most of the reform proposals formulated therein.[43]

Considering that the Widmer/Wessner Project was abandoned by Switzerland, the question arises as to why the Republic of Turkey would nevertheless be guided by a seemingly outdated Swiss draft project rather than relatively recent reforms such as those implemented in Germany (2002) or the Netherlands (1992).[44] This choice is only partially explained by the Republic of Turkey's historical attachment to Swiss law. Indeed, the explanation resides also in the belief that the provisions in the Widmer/Wessner Project set out practical solutions to many current and complex issues.[45]

Undeservedly swept aside by the Swiss political world, the Widmer/Wessner Project has received positive feedback from both Swiss and European lawyers and has been praised on several occasions for its innovative character.[46] Not only has it influenced some provisions on tort law in the TCO[47] but also the Principles of European Tort Law (PETL)[48] developed by the European Group on Tort Law,[49] a group to which one of the 'fathers' of the

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42 See the factsheet of the Federal Department of Justice and Police, available on the Internet at http://www.ejpd.admin.ch/content/ejpd/fr/home/themen/wirtschaft/ref_gesetzgebung/ref_abgeschlossene_projekte/ref_haftplicht.html (20 Jun. 2014).

43 Communication of the Federal Department of Justice and Police dated 21 Jan. 2009, available on the Internet at http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2009/2009-01-21.html (20 Jun. 2014).

44 See H. Koziol, 'Revision und Vereinheitlichung des Haftpflichtrechts – Sicht aus dem Ausland', in: S. Weber & S. Fuhrer (eds), *Retouchen oder Reformen? Die hängigen Gesetzesrevisionen im Bereich Haftung und Versicherung auf dem Prüfstand* (Zurich/Basel/Geneva: Schulthess, 2004), p. 23 at 23; Inceoğlu & Atamer, *ZBJV* 2013, pp. 68–69.

45 Büyüksagis, *JETL* 2012, p. 46.

46 See Koziol, in: *Retouchen oder Reformen?*, p. 24; G. Brüggemeier, *Modernizing Civil Liability Law in Europe, China, Brazil and Russia: Texts and Commentaries* (Cambridge/New York: Cambridge University Press, 2011), p. 25.

47 Büyüksagis, *JETL* 2012, p. 46.

48 See EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law, Text and Commentary* (Vienna/Wien/New York: Springer 2005); also the text of the PETL, available on the Internet at http://civil.udg.edu/php//index.php?id=129&idioma=EN (20 Jun. 2014).

49 See the website http://www.egtl.org/ (20 Jun. 2014).

Widmer/Wessner Project, Professor *Pierre Widmer*, belongs. Some French authors have also suggested that the Widmer/Wessner Project should serve as a basis for the reform endeavours of French tort law.[50] Last but not least, it also influenced some provisions of the recent academic 'Project for a New General Part of the Swiss Code of Obligations' (OR/CO 2020).[51] Published in 2013, the goal of OR/CO 2020 is for the general part of the SCO to regain the coherence and clarity that has gradually been lost over the past hundred years of evolution in the legal institutions. During a time span of five years, 23 academics from all Swiss law faculties were confronted with the underlying question of whether Articles 1 to 183 SCO could still be characterized as being 'state of the art'. OR/CO 2020 is the result of an in-depth and systematic confrontation with Swiss case law and comparative legal research. While proven institutions of the SCO were kept, innovative solutions – including some already formulated in the Widmer/Wessner Project – found their way into OR/CO 2020.[52]

Even if some criticism was voiced against the draft version of the TCO, which was based in part on the Widmer/Wessner Project, two reasons may explain why the abandonment of the Widmer/Wessner Project in Switzerland has not had much impact on the legislative process in the Republic of Turkey.[53] First, the time span between the abandonment of the Widmer/Wessner Project in 2009 and the adoption of the TCO in 2012 was probably too short to take into account the criticism voiced in Switzerland.[54] Second, even if the formulations of some of the new provisions are based on those found in the Widmer/Wessner Project, most of the new tort provisions of the TCO are based on standards already

50 See E. Matringe, *La réforme de la responsabilité civile en droit suisse: Modèle pour la France?*, Doctoral Thesis (Strasbourg, 2010), available on the Internet at http://scd-theses.u-strasbg.fr/1860/01/MATRINGE_Eve_2010.pdf (20 Jun. 2014).

51 C. Huguenin & R. Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil/Code des obligations suisse 2020: Projet relatif à une nouvelle partie générale* (Zurich/Basel/Geneva: Schulthess, 2013); the text of OR/CO 2020 is available on the Internet at http://or2020.ch/ (20 Jun. 2014); see also E. Hondius, 'Towards a New Swiss Law of Obligations', *ERPL (European Review of Private Law)* 2014, p. 1.

52 C. Huguenin & R. Hilty, 'Einleitung vor Art. 1 ff.', in: C. Huguenin & R. Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil/Code des obligations suisse 2020: Projet relatif à une nouvelle partie générale* (Zurich/Basel/Geneva: Schulthess, 2013), NN 1-89; Hondius, *ERPL* 2014, p. 8.

53 Büyüksagis, *JETL* 2012, pp. 46–47.

54 See, e.g., I. Schwenzer, 'Der Schweizerische Entwurf zur Reform des Haftpflichtrechts, Eine Kritische Stellungnahme', in: B. Winiger (ed.), *La responsabilité civile européenne de demain: projets de révision nationaux et principes européens/Europäisches Haftungsrecht morgen: nationale Revisionsentwürfe und europäische Haftungsprinzipien* (Geneva: Schulthess, 2008), p. 77.

established by Turkish Courts, which implies that the new provisions benefitted also from an internal source of inspiration.[55]

Although the TCO did introduce original solutions, namely, with respect to the limitation of the judge's discretion in the assessment of damages (Art. 55 TCO) and the widening of the circle of persons entitled to damages for pain and suffering in cases of death and bodily injury (Art. 56(2) TCO), other new tort law provisions are influenced by the Widmer/Wessner Project.[56] Such is the case, for instance, of the reorganization of solidarity between multiple tortfeasors (Art. 62(1) TCO),[57] the statute of limitations concerning recourse claims in joint liability cases (Art. 73(1) TCO),[58] and the awarding of advance payments to an injured party (Art. 76 TCO).[59]

The Widmer/Wessner Project also permeates in various degrees the three following topics that this paper chooses to focus on: the vicarious liability for organizational defects in enterprises (Art. 66 TCO), the personal scope of application of the liability for constructions (Art. 69 TCO), and the general clause of strict liability for abnormally dangerous activities (Art. 71 TCO).

3.2. Vicarious Liability for Organizational Defects in Enterprises

Article 66 TCO regulates the vicarious liability of an employer for damage caused to another due either to misconduct of an employee or an organizational defect in the enterprise.

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55 Büyüksagis, *JETL* 2012, p. 47.

56 Büyüksagis, *Le nouveau droit turc des obligations*, N 137.

57 Article 62(1) TCO: '*Dans la répartition de la réparation entre personnes coresponsables du même dommage, toutes les circonstances, notamment la gravité de la faute et l'intensité du risque caractérisé qui sont imputables à chacune d'elles, sont prises en considération*'; Article 53c(1) Widmer/Wessner Project: '*[1]Entre personnes coresponsables, la réparation sera répartie en fonction de toutes les circonstances, notamment de la gravité de la faute et de l'intensité du risque caractérisé qui sont imputables à chacune d'elles*'.

58 Article 73(1) TCO: '*L'action récursoire se prescrit par deux ans à compter de la date où la réparation a été complètement exécutée et où la personne coresponsable est connue, et, dans tous les cas, par dix ans à compter de la date où la réparation a été complètement exécutée*'; Article 55c Widmer/Wessner Project: '*[1]L'action en réparation du dommage se prescrit par trois ans à compter du jour où la personne lésée a eu connaissance du dommage ainsi que de la personne qui en assume la responsabilité ou la couverture. [2]Dans tous les cas, cette action se prescrit par 20 ans à compter du jour où le fait dommageable s'est produit ou a cessé de se produire*'.

59 Article 76 TCO: '*Lorsque la personne lésée rend vraisemblable le bien-fondé de sa prétention et que sa situation économique l'exige, le tribunal peut condamner la partie recherchée à lui verser des paiements anticipés. Les paiements provisoires sont déduits de l'indemnisation accordée; si l'indemnisation n'a pas été accordée, le juge ordonne que le demandeur les rende avec l'intérêt légal*'; Article 56h Widmer/Wessner Project: '*Lorsque la personne lésée rend vraisemblable le bien-fondé de sa prétention et que sa situation économique l'exige, le tribunal peut condamner la partie recherchée à lui verser des paiements anticipés qui ne préjugent en rien de la décision finale*'.

As far as misconduct of an employee is concerned, Article 66(1) and (2) TCO[60] is based on the principles set forth in Article 55 SCO: the person making use of auxiliary personnel is liable for the misconduct of such persons in the exercise of their functions.[61] For the employer to be held liable, it is necessary and sufficient that the latter failed to exercise due care as regards the choice, instruction, and supervision of the employee. As is the case under Swiss law,[62] but not under French law,[63] the question of whether the auxiliary was at fault has no impact on the employer's liability.[64]

Before the TCO entered into force, the Turkish Courts, like the Swiss Courts,[65] imposed stringent requirements of proof upon employers who sought to establish that they took all reasonable steps that, from an objective perspective and with the highest degree of probability, were necessary to avoid damage.[66] However, Turkish case law evolved as the following example illustrates:[67] During her stay at a hotel, a tourist guide was sexually assaulted by a member of the security staff and sought damages from the hotel owner/manager for pain and suffering. Basing its decision on the failure by the employer to detect its employee's propensity to commit such acts, the Supreme Court condemned the employer for pain and suffering and so extended the scope of liability to wilful misconduct of employees.[68] The Supreme Court established an adequate causal link between the auxiliary person's act and the inherent risks of the business activities of the employer.[69]

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60 Article 66(1) and (2) TCO: '*La personne qui recourt à un auxiliaire est tenue de réparer le dommage causé à autrui par ce dernier dans l'accomplissement de son travail. s'il prouve qu'il a pris, dans le choix, dans l'instruction et dans la surveillance de son auxiliaire tous les soins commandés par les circonstances pour éviter la survenance du dommage, l'employeur n'est pas responsable*'.

61 BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 140.

62 Fault of the auxiliary or the employer is not a prerequisite of the employer's liability [see C. MÜLLER, *La responsabilité civile extracontractuelle* (Basel: Helbing Lichtenhahn, 2013), N 284].

63 See Cass. Civ. 2e, 8 Apr. 2004, 03-11653, Bull. 2004 II no. 194 p. 164 = RTD civ. 2004, p. 517, note P. JOURDAIN.

64 BÜYÜKSAGIS, *JETL* 2012, pp. 64-65; BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 140 and the cited reference to Turkish Supreme Court decision YİBGK T. 27 Mar. 1957, E. 1957/1, K. 1957/3.

65 See DFT 110 II 456 c. 2; MÜLLER, *La responsabilité civile*, NN 288–296.

66 BÜYÜKSAGIS, *JETL* 2012, p. 65; BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 141.

67 Y4.HD, 04 May 2000, E.2000/2062, K.2000/4389 cited in BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, fn 315.

68 BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 141.

69 BÜYÜKSAGIS, *JETL* 2012, p. 65.

As regards organizational defects of enterprises, Article 66(3) TCO[70] codifies to some extent this case law by partially adopting the wording of Article 49a Widmer/Wessner Project[71] that also influenced Article 59 OR/CO 2020:[72] a person who resorts to engaging employees in its enterprise is liable for damage caused by the enterprise's activities. Thus, for Article 66(3) TCO to apply, it is necessary and sufficient that the damage is linked to the enterprise's activity.[73]

However, the new Turkish provision neither requires, like Article 49a Widmer/Wessner Project,[74] that the enterprise in question must be economic or professional in nature, nor, like Article 59 OR/CO 2020,[75] that it has to be a commercial enterprise. In order to fall within the ambit of Article 66(3) TCO, the person relying on one or more auxiliaries in order to run an enterprise only needs to be a physical person or a legal entity. It does not matter whether he or it seeks to make a profit or not.[76]

Although the enterprise liability of Article 66 TCO is found under the section 'liability without fault' of the TCO, the provision is placed under the heading 'diligence liability'. This raises the question of the nature of the enterprise liability. Is it a liability without fault, or is it a fault-based liability with a reversal of the burden of proving fault? While the answer to that question surpasses the scope of the present paper, the fact remains that Article 66(3) TCO does impose upon the employer a duty of care that goes beyond the requirement to take reasonable care. This liability is based on the argument that the circumstances causing damage could have been prevented if the employer had had sufficient control over his enterprise.[77] The employer may only rebut the presumption of liability if he establishes that his enterprise is free from any organizational defect. In order to do so, he has to prove that he respected the relevant authorization and administrative requirements, that the enterprise had an internal system of information, that a high level of safety in the provision of

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70 Article 66(3) TCO: '*La personne qui recourt à un auxiliaire dans le cadre d'une entreprise est tenue de réparer le dommage découlant des activités de cette entreprise, à moins de prouver que l'organisation de l'entreprise était apte à éviter la survenance du dommage*'.

71 Article 49a Widmer/Wessner Project: '*La personne qui, pour exploiter une entreprise comportant des activités de nature économique ou professionnelle, recourt à un ou plusieurs auxiliaires, est tenue de réparer le dommage causé dans le cadre de ces activités, à moins de prouver que l'organisation de l'entreprise était apte à éviter la survenance du dommage*'.

72 See W. Fellmann, C. Müller & F. Werro, 'Art. 46-63', in: C. Huguenin & R. Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil/Code des obligations suisse 2020: Projet relatif à une nouvelle partie générale* (Zurich/Basel/Geneva: Schulthess, 2013), Art. 59 OR/CO 2020 NN 1-6.

73 Büyüksagis, *Le nouveau droit turc des obligations*, N 142.

74 Widmer & Wessner, *Rapport explicatif*, p. 130.

75 Fellmann, Müller & Werro, Art. 59 OR/CO 2020 N 2.

76 See Büyüksagis, *Le nouveau droit turc des obligations*, N 143 and the cited Turkish case law.

77 Büyüksagis, *JETL* 2012, p. 66.

services or manufacturing and distribution of products was guaranteed, and that the defect affecting a technical installation was undetectable at the time in terms of existing scientific or technical knowledge.[78]

The Turkish solution differs from the solution implemented by the model rules of the Draft Common Frame of Reference (DCFR),[79] the latter being undoubtedly one of the most ambitious academic projects in recent years as regards harmonization of European private law. Indeed, Article VI.-3:201 DCFR ('Accountability for damage caused by employees and representatives'), under section 2 ('Accountability without intention or negligence'), provides for a strict liability of the principal regardless of any organizational defect of his enterprise or fault in the selection and supervision of the auxiliary.[80]

Article 66(3) TCO also differs from Article 4:202 PETL ('Enterprise Liability'), which is a 'liability based on fault' pursuant to Chapter 4 PETL. Whereas Article 4:202 PETL is a fault-based regime – albeit with a reversal of the burden of proving fault (Art. 4:201 PETL)[81] as regards a 'deviation from the standards that are reasonably to be expected from the enterprise or from its product or services' (Art. 4:202(2) PETL) – Article 66(3) TCO presupposes a defect from the mere fact that damage resulted from the activities of the enterprise.[82]

One may regard the regime of Article 66(3) TCO as an intermediate solution between Articles VI.-3:201 DCFR and 4:202 PETL.[83]

3.3. Personal Scope of Application of the Liability for Constructions

Article 69(1) TCO,[84] like Article 58(1) SCO, provides that the owner of a building or any other construction is liable for the damage that it causes due to its defective design or construction or due to inadequate maintenance. Compared to

78 See BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 144; similarly under Article 49a Widmer/Wessner Project, Widmer & Wessner, *Rapport explicatif*, p. 133.

79 See STUDY GROUP ON A EUROPEAN CIVIL CODE/RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP) [C. von Bar & E. Clive (eds)], *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Full Edition (Munich: Sellier, 2009); also the Outline Edition of the DCFR, available on the Internet at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (29 Apr. 2014).

80 See DCFR, Full Edition, Art. VI.-3:201 DCFR Comment A.

81 PETL-KOCH, Art. 4:202 PETL N 1; PETL-WIDMER, Art. 4:201 PETL N 6.

82 BÜYÜKSAGIS, *JETL* 2012, p. 66.

83 Of the same opinion, BÜYÜKSAGIS, *JETL* 2012, p. 66.

84 Article 69(1) TCO: '*Le propriétaire d'un bâtiment ou de tout autre ouvrage est tenu de réparer le dommage causé par leurs vices de construction ou par leurs défauts d'entretien*'.

Swiss law, Article 69(2) TCO[85] widens the personal scope of liability for damage resulting from inadequate maintenance of a building or other construction.

The difference between Turkish and Swiss laws is that the latter qualifies the 'owner' based on the criterion of formal (full-fledged) ownership.[86] Thus, a person enjoying only a limited property right such as a right of usufruct or a right of occupation is generally not held accountable for the damage caused by the building or construction.[87] Compared to the aTCO, Article 58(1) SCO, and Article 62 OR/CO 2020,[88] Article 69(2) TCO expands the personal scope of application of the liability for buildings and other constructions: a person either enjoying a right of usufruct or having been granted a right of occupation is held jointly liable with the formal owner for damage resulting from inadequate maintenance of the building or construction. For damage resulting from defective construction, however, the formal owner remains solely liable.[89]

This limitation of the personal scope of liability with respect to defective construction is coherent. Whereas persons benefitting from a right of usufruct or a right of occupation are able to assume the safety and maintenance of the building or construction, such persons cannot prevent or remedy defective construction.[90]

The extension of the personal sphere of application with respect to inadequate maintenance is not unheard of under Swiss law. According to Swiss case law, the person who is liable may, in certain exceptional circumstances, not be the formal owner of the construction.[91] Such is the case of public authorities charged with the maintenance of a construction that was put at their disposal.[92] This case law has found some scholarly support.[93] Furthermore, Article 61(2)

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85 Article 69(2) TCO: '*Ceux qui ont le droit d'usufruit ou d'habitation sont tenus, avec le propriétaire, solidairement responsable des dommages causés par le défaut d'entretien du bâtiment*'.

86 MÜLLER, *La responsabilité civile*, N 339.

87 DFT 106 II 201 c. 2b; MÜLLER, *La responsabilité civile*, N 339.

88 The solution of Article 58(1) SCO has been taken over by Article 62 OR/CO 2020 ('*Responsabilité pour les bâtiments et autres ouvrages*') in the following words: '*Le propriétaire d'un bâtiment ou tout autre ouvrage répond du dommage qui en résulte, s'il ne prouve que le dommage ne provident ni d'un vice de construction ni d'un défaut d'entretien*' (FELLMANN, MÜLLER & WERRO, Art. 62 OR/CO 2020 N 1).

89 BÜYÜKSAGIS, *JETL* 2012, p. 67; BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 149.

90 BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 150; WIDMER & WESSNER, *Rapport explicatif*, p. 296.

91 See Decision of the Swiss Federal Supreme Court 4A_244/2010 of 12 Jul. 2010, c. 1.1.

92 DFT 121 III 428 c. 2d; DFT 91 II 281 c. 4.

93 R. BREHM, *Berner Kommentar, Das Obligationenrecht, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR* (4th edn, Berne: Stämpfli, 2013), Art. 58 OR N 15. The extension of the personal scope of liability may be justifiable as regards limited property rights, because the legal position such rights confer is comparable to full-fledged ownership. However, such

Widmer/Wessner Project[94] provides that if the building or construction is not owned by the holder, the owner is jointly liable.[95] Article VI.-3:202 DCFR ('Accountability for damage caused by the unsafe state of an immovable') even goes so far as to impose strict liability on anyone who independently exercises control over an immovable for all types of dangers, including, but not limited to, dangers caused by the poor state of construction or maintenance of buildings and other man-made structures.[96] Contrary to both Article 69(2) TCO and Article 61(2) Widmer/Wessner Project, Article VI.-3:202 DCFR does not provide for joint liability. If the owner is able to prove 'that another independently exercises control' (Art. VI.-3:202(3) DCFR), liability does not attach to the owner but to the third person. For example, a person who has leased out a large complex of commercial premises is not responsible for the state of the commercial units within the complex under Article VI.-3:202 DCFR.[97]

Compared to Article 61 Widmer/Wessner Project and Article VI.-3:202 DCFR, Article 69 TCO sets out a more measured solution. Whereas the formulation of the latter draws some inspiration from the solution proposed in Article 61 Widmer/Wessner Project, Article 69(2) TCO does not however extend liability to any holder of the building or construction. Only a person endowed with a right of usufruct or a right of occupation is held jointly liable with the owner for damage resulting from inadequate maintenance of the building or construction.[98]

3.4. General Clause of Strict Liability for Abnormally Dangerous Activities

Among the key innovations of the TCO, the introduction of a general clause[99] of strict liability for abnormally dangerous activities is one of the most noteworthy instances of the Widmer/Wessner Project's influence on the legislative reform.[100]

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extension is not justified when the owner only grants a personal right, e.g., to a private tenant [H. Rey, *Ausservertragliches Haftpflichtrecht* (4th edn, Zurich/Basel/Geneva: Schulthess, 2008, N 1072); Müller, *La responsabilité civile*, N 343].

94 Article 61(2) Widmer/Wessner Project: '[2] *Si l'ouvrage n'appartient pas à la personne qui le détient, la personne qui en est propriétaire répond solidairement*'.

95 Widmer & Wessner, *Rapport explicatif*, p. 297.

96 DCFR, Full Edition, Art. VI.-3:202 DCFR Comment A.

97 DCFR, Full Edition, Art. VI.-3:202 DCFR Comment C.

98 Büyüksagis, *Le nouveau droit turc des obligations*, N 151.

99 The General Provisions on Tort in the TCO include two general clauses of tort liability: one for traditional fault-based liability (Art. 49 TCO) and a new one for strict liability for abnormally dangerous activities (Art. 71 TCO).

100 See Inceoğlu & Atamer, *ZBJV* 2013, pp. 73–74.

Under previous Turkish legislation,[101] as is still the case under current Swiss law,[102] strict liability for dangerous activities was exclusively set out in specific legislative Acts. However, in the absence of a specific rule of strict liability, and contrary to the approach adopted by the Swiss Courts,[103] the Turkish Supreme Court has extended strict liability by analogy to cases in which enterprises are held to have a heightened duty to avoid harm when running dangerous commercial operations.[104] This case law has, to some extent, addressed the problem of discrimination between victims of relatively similar accidents. For damage resulting from abnormally dangerous activities such as the exploitation of railway transportation, electrical supply installations, coal gas pipelines and mines for instance, the Turkish Supreme Court has given a wide interpretation to the liability for constructions without waiting for a legislative intervention.[105]

Nevertheless, case law alone was not deemed to sufficiently satisfy the need for legal certainty.[106] In order to codify the Turkish Courts' case law, the legislator turned to Article 50 Widmer/Wessner Project.[107] Indeed, the basic idea behind the Project's proposed general clause of risk-based liability was to introduce a sufficiently flexible provision into the Code in order to help the Courts avoid unequal and, therefore, unjust treatment of situations that are comparable to those that, under current Swiss law, are regulated by specific provisions providing for strict liability. The introduction of a general clause of strict liability sought to open the way for the Courts to make reasonable analogies, in a manner similar to what they are entitled to do under the famous Article 1(2) and Article 3 SCC. A general clause of strict liability would guarantee

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101 E. BÜYÜKSAGIS, 'Die Haftung aus unerlaubter Handlung im Entwurf eines neuen türkischen Obligationenrecht', *REAS/HAVE (Responsabilité et assurance/Haftung und Versicherung)* 2006, p. 330 at 332.

102 See, e.g., Article 58 *et seq.* Federal Act on Road Traffic (LCR, RS 740.01); Article 30a *et seq.* Federal Act on Interior Navigation (LNI, RS 747.201); Article 40b *et seq.* Federal Act on Railroads (LCdF, RS 742.101); Article 3 *et seq.* Act on Civil Liability in Nuclear Matters (LRCN, RS 732.44); Article 27 *et seq.* Federal Act Relating to Electric Installations (LIE, RS 734.0).

103 '[L']*article 58* [de la Loi fédérale sur la circulation routière] *consacre la responsabilité causale du détenteur de véhicule automobile* […]. *La* [Loi fédérale sur la navigation intérieure] *ne contient aucune norme semblable. Il n'existe par ailleurs aucune coutume dégagée par la jurisprudence consacrant une responsabilité causale des conducteurs de bateaux. Il en résulte que la responsabilité de ceux-ci est fondée sur la faute au sens de l'article 41* [du Code des Obligations]' (Decision of the Geneva Court of Justice of 24 Apr. 1998, SJ 1999 I 11, p. 12).

104 See BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 158 and the cited references to Turkish case law.

105 BÜYÜKSAGIS, *JETL* 2012, p. 68 and the cited references to Turkish case law.

106 BÜYÜKSAGIS, *JETL* 2012, pp. 68–69.

107 BÜYÜKSAGIS, *Le nouveau droit turc des obligations*, N 155. Article 50(1) Widmer/Wessner Project ('*Responsabilité pour risque*') has the following wording: '*1 La personne qui exploite une activité spécifiquement dangereuse est tenue de réparer le dommage dû à la réalisation du risque caractérisé que celle-ci comporte, même s'il s'agit d'une activité tolérée par l'ordre juridique*'.

a coherent system and avoid the need for the legislator to enact specific Acts as matters arise in order to keep pace with social or technical evolutions.[108]

In line with Article 50 Widmer/Wessner Project, Article 71 TCO extends the scope of strict liability to all dangerous activities not covered by specific rules. As such, it may be seen as an expression of the principle of equity: a person who stands to profit from the running of his enterprise's 'significant risk'[109] should be obliged to compensate in the event of an accident causing damage, even if all due care expected from a specialist in such activities has been exercised.[110]

Furthermore, in Article 71(2) TCO,[111] just like in Article 50(2) Widmer/Wessner Project[112] and in Article 5:101(3) PETL,[113] the concept of dangerous activity[114] is defined by the likelihood of the danger occurring and its propensity to cause damage, two criteria whose roots can be found in the definition of 'abnormally dangerous activity' in sections 519 and 520 of the US-American Restatement (Second) of Torts.[115]

Although the Widmer/Wessner Project as a whole has been abandoned in Switzerland, the idea of a general clause of strict liability for abnormally dangerous activities has received lasting recognition among Swiss scholars.

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108 WIDMER & WESSNER, *Rapport explicatif*, p. 138.

109 Article 71(2) TCO: '*Est réputée spécifiquement dangereuse l'entreprise qui, par sa nature ou par celle des substances, instruments ou énergies utilisés, est susceptible, en dépit de toute la diligence qu'on peut exiger d'une personne spécialisée en la matière, de causer de fréquents ou de graves dommages. Une entreprise est réputée spécifiquement dangereuse notamment si, dans une* [autre] *loi, une responsabilité spéciale pour risque est prévue pour des entreprises présentant des dangers comparables*'; Article 50(2) Widmer/Wessner Project: '*[2] Est réputée spécifiquement dangereuse l'activité qui, par sa nature ou par celle des substances, instruments ou énergies utilisés, est susceptible, en dépit de toute la diligence qu'on peut exiger d'une personne spécialisée en la matière, de causer de fréquents ou de graves dommages; tel est notamment le cas lorsqu'une loi institue une responsabilité spéciale à raison d'un risque comparable*'.

110 BÜYÜKSAGIS, *JETL* 2012, p. 69.

111 *Ibid*.

112 P. WIDMER, 'Ein erster Schritt zu einem europäischen Haftpflichtrecht?', *REAS/HAVE (Responsabilité et assurance/Haftung und Versicherung)* 2005, p. 245 at 247.

113 Article 5:101(3) PETL has the following wording: 'A risk of damage may be significant having regard to the seriousness or the likelihood of the damage'. See also B.A. KOCH & H. KOZIOL, 'Generalklausel für die Gefährdungshaftung', *REAS/HAVE (Responsabilité et assurance/Haftung und Versicherung)* 2002, p. 368 at 371; for an evaluation of Article 5:101 PETL, see F. WERRO, 'Les principes de droit européen de la responsabilité civile en deux mots: contenu et critique', *REAS/HAVE (Responsabilité et assurance/Haftung und Versicherung)* 2005, p. 248 at 250.

114 The term 'activity' employed in Article 5:101 PETL stems from the terminology used in Article 50 Widmer/Wessner Project. It is not meant to limit the scope of Article 5:101 PETL to dangerous conduct. The very fact of possessing certain items is sufficient to create a risk of a danger to others no matter how much care is taken. The Swiss terminology was thought to have this meaning (PETL-KOCH, Art. 5:101 PETL N 6).

115 BÜYÜKSAGIS, *JETL* 2012, p. 69.

Indeed, Article 50 Widmer/Wessner Project has been adopted, with a slight variation in the wording, by Article 60 OR/CO 2020.[116]

4. Conclusion

The Republic of Turkey's historical attachment to Swiss law dates back to the 1926 reception of the SCC and the SCO. At that time, the SCC was found to be the newest, the most complete and most popular, and overall best suited Code among all considered European civil Codes for a reception by the young Republic of Turkey. When the time came to revise the law of obligations in order to fill the gap between practice and the aTCO, and to address the legislator's continued desire for Europeanization and modernization, the latter again drew inspiration from the developments in the Swiss tort law system.

With respect to the reform of tort law, the Turkish legislator often drew inspiration from the Widmer/Wessner Project, a reform project that has been abandoned in Switzerland. The latter permeates, in particular, the new Turkish provisions relating to the vicarious liability for organizational defects in enterprises, the personal scope of application of the liability for constructions, and the general clause of strict liability for abnormally dangerous activities.

Article 66(3) TCO on vicarious liability for organizational defects in enterprises partially adopts the wording of Article 49a Widmer/Wessner Project. However, Article 66(3) TCO has a wider scope of application since it does not require, unlike Article 49a Widmer/Wessner Project,[117] that the enterprise in question must be economic or professional in nature. In order to fall within the ambit of the Turkish provision, the person relying on one or more auxiliaries in order to run an enterprise may be a physical person or a legal entity, no matter whether he or it seeks to make a profit or not. Placed under the heading 'Liability without fault' of the TCO, Article 66(3) TCO stipulates that the employer may only rebut the presumption of liability if he establishes that his enterprise is free from any organizational defect. Similar to what was intended by Article 49a Widmer/Wessner Project, in order to do so the employer has to prove that he respected the relevant authorization and administrative requirements, that the enterprise had an internal system of information, that a high level of safety in the provision of services or manufacturing and distribution of products was guaranteed, and that the defect affecting a technical installation was undetectable at the time in terms of existing scientific or technical knowledge.

Article 69(2) TCO widens the personal scope of liability for buildings or constructions. Persons who are endowed either with a right of usufruct or a right of occupation are held jointly liable with the owner for damage resulting from the

116 Fellmann, Müller & Werro, Art. 60 OR/CO 2020 N 1.

117 Widmer & Wessner, *Rapport explicatif*, p. 130.

inadequate maintenance of the concerned building or construction. Article 69(2) TCO draws some inspiration from Article 61 Widmer/Wessner Project. However, the former provision provides for a more measured solution, since it does not follow Article 61(2) Widmer/Wessner Project that proposed to extend joint liability to any holder of the building or construction.

Article 71 TCO provides for a general clause of strict liability for abnormally dangerous activities. The latter illustrates one of the most noteworthy instances of the Widmer/Wessner Project's influence on the TCO. Indeed, Article 71 TCO, like Article 50 Widmer/Wessner Project, extends the scope of strict liability to all dangerous activities not covered by specific rules. Moreover, in Article 71(2) TCO, just like in Article 50(2) Widmer/Wessner Project, the concept of dangerous activity is defined by the likelihood of the danger occurring and its propensity to cause damage.

Although the Widmer/Wessner Project as a whole has been abandoned in Switzerland, some solutions, which are now totally or partially adopted by the TCO, also received lasting recognition in OR/CO 2020. Article 49a Widmer/Wessner Project on vicarious liability for organizational defects of commercial or professional enterprises strongly influenced Article 59 OR/CO 2020 on commercial enterprise liability. Article 50 Widmer/Wessner Project, which sets out a general liability clause for abnormally dangerous activities, has even been adopted, with a slight variation in the wording, by Article 60 OR/CO 2020.

One cannot help but notice that by adopting some of these innovative solutions, which are still being debated among Swiss scholars, the Turkish legal system has overtaken the Swiss model, at least to the extent of these new implementations.

The reason why Swiss tort law seems to be at a standstill is primarily due to the lack of a political will and leadership to undertake an in-depth reform. Since the *Manifesto of Neuchâtel* of 1967, Swiss academics have uninterruptedly pointed towards the shortcomings of the SCO. The political world, however, rarely considered the wholesale reform of tort law as being a priority. Even in times when a need for profound revision received some acknowledgement, it has never been placed on top of the political agenda for an extended period of time. One can only hope that another industrial disaster of the type of *Schweizerhalle* will not be required to draw our political leaders' attention once more to the needed overhaul of the Swiss tort law system.

In a not so distant future, it might very well be that Turkish tort law will have some influence on the Swiss tort law system instead of the opposite. A collaborative project between Swiss and Turkish academics that aims at publishing translations of leading case law of the Turkish Supreme Court is in the pipeline. Topical case law with respect to civil law and the law of obligations would first be translated into French, German, or English and then be published

on the site of the Swiss Institute of Comparative Law (ISDC).[118] In parallel, translations of the TCC and TCO would also be made available on the Internet. While such an initiative would undoubtedly be welcomed by scholars and could hardly be overlooked by the Swiss Federal Supreme Court, it might also help raise awareness within the Swiss political landscape that a profound reform of tort law is not simply a dogmatic ideal but that it answers a need to resolve concrete and complex problems.

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European Review of Private Law 6-2014 [1075–1076] © Kluwer Law International BV. Printed in Great Britain.

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REVUE EUROPÉENNE DE DROIT PRIVÉ
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Index

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