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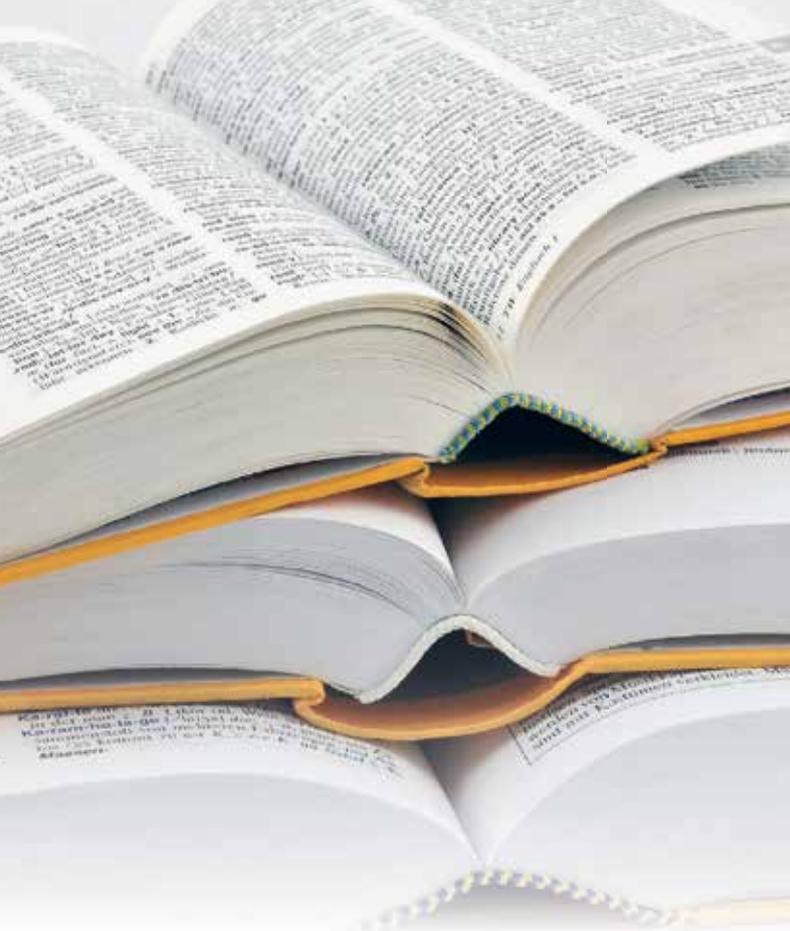


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Editorial





President's Editorial

Can't spell truth without Ruth!

I Pedro PAIS DE ALMEIDA

I have always trusted that adversity and persistence make us stronger. Accordingly, I am very happy that UIA has chosen Justice Ruth Bader Ginsburg for the attribution of the 3rd UIA/LexisNexis Rule of Law Award.

Justice Ginsburg is a firm believer that men and women are persons of equal dignity and should be equally treated before the law. When she entered Harvard Law School she was one among nine women in a class of 500 men. Back then, the Dean of Harvard Law often asked the female law students: "How do you justify taking a spot from a qualified man?". She then transferred to Columbia Law School. She was the first woman to be on two major law reviews: the *Harvard Law Review* and *Columbia Law Review*. In 1959, she earned her juris doctor at Columbia and tied for first in her class. In 1960, she was rejected for a clerkship position due to her gender.

But she persisted.

In the same year Justice Ginsberg became a clerk for Judge Palmieri of the U.S. District Court for the Southern District of New York, where she served for two years.

Thank goodness she persisted, as people around her started to realize that she could achieve great things.

In the proceeding years, Justice Ginsburg was a research associate and then an associate director of the Columbia Law School Project on International Procedure. During that time, she co-authored a book with Anders Bruzelius on civil procedure in Sweden and conducted extensive research for her book at Lund University in Sweden. Her time there also influenced her thinking on gender equality. She was inspired when she observed the changes in Sweden, where women made up 20 to 25 percent of all law students. When she entered academia as a professor at Rutgers School of Law, she became one of fewer than 20 female law professors in the United States. Despite this achievement, her first

appointment had a bitter taste as she was informed that she would be paid less than her male colleagues because she had a husband with a well-paid job.

But she persisted.

A few years later, she co-founded the Women's Rights Project at the American Civil Liberties Union (ACLU) and became the ACLU's general counsel. As the director of the ACLU's Women's Rights Project, she, in her own words, felt as "a kinder garden teacher of judges", or, according to other opinions, "was netting a sweater on gender base discrimination" or "creating a legal landscape". The Women's Rights Project and related ACLU projects participated in over 300 gender discrimination cases.

In the seventies, Justice Ginsburg argued six gender discrimination cases before the U.S. Supreme Court, winning five of them. Her strategy was to pick men and women plaintiffs to attack specific discriminatory statutes that would affect both men and women instead of asking the U.S. Supreme Court to end all gender discrimination at once. All these cases have significant relevance in the U.S. legal landscape, but I cannot resist sharing one with you. The case is *Weinberger v. Wiesenfeld* (1975). Mr. Wiesenfeld, a father of one child, was denied survivor benefits under Social Security benefits for caring for his minor children. The U.S. Supreme Court decided unanimously in favor of Mr. Stephen Wiesenfeld and found that the statute discriminated against male survivors of workers by denying them the same protection as their female counterparts.

Justice Ginsburg, thank you for persistence.

President Bill Clinton nominated Ruth Bader Ginsburg as Associate Justice of the Supreme Court on June 14, 1993. She was confirmed by the U.S. Senate by a 96 to 3 vote on August 3, 1993. On the first case on women rights, *United*

States v. Virginia (1996), Justice Ginsburg was the author of the court's decision that considered that the Virginia Military Institute's (VMI) male-only admission policy violated the Equal Protection Clause of the Fourteenth Amendment and that VMI could not use gender to deny women the opportunity to attend VMI which offered unique educational methods.

It seems like she would not stop persisting.

As a dissenting voice, Justice Ginsburg also played a very important role. In *Ledbetter v. Goodyear* (2007), a case where plaintiff Lilly Ledbetter filed a lawsuit against her employer claiming pay discrimination based on her gender in violation of Title VII of the Civil Rights Act of 1964. In a 5 to 4 decision, the majority interpreted the statute of limitations as starting to run at the time of every pay period, even if a woman did not know she was being paid less than her male colleagues until later. Justice Ginsburg found the result absurd and called on Congress to amend Title VII in order to overcome the court's decision by adopting new legislation.

In 2008, following the election of President Barack Obama, the Lilly Ledbetter Fair Pay Act was approved, making it easier for employees to win pay discrimination claims. Justice Ginsburg was credited for inspiring that law.

The protection of the Rule of Law is not an easy task. It is long, and arduous. And to fight the battles that need to be fought in defence of the Rule of Law, one needs an essential quality: **Persistence**.

Justice Ginsburg, or shall I say, the Notorious R.B.G.? I am overwhelmed by your personality and by your cause as a defender and protector of the Rule of Law and gender equality over the course of your life.

Pedro PAIS DE ALMEIDA
President of UIA

Editorial du Président

Ruth : l'autre nom de la vérité !

I Pedro PAIS DE ALMEIDA

J'ai toujours cru que l'adversité et la persévérance nous rendaient plus forts. Par conséquent, je suis très heureux que l'UIA ait choisi la juge Ruth Bader Ginsburg pour l'attribution du 3^e Prix État de droit UIA / LexisNexis.

La juge Ginsburg est fermement convaincue que les hommes et les femmes sont des personnes à dignité égale et devraient être traités sur un pied d'égalité devant la loi. Quand elle s'est inscrite à la *Harvard Law School*, elle était l'une de seules femmes (la classe n'en comptait que neuf) de sa classe, parmi 500 hommes. À l'époque, le doyen de *Harvard Law* demandait souvent aux étudiantes en droit : « Comment justifiez-vous voler une place à un homme qualifié ? ». Elle a ensuite été transférée à la *Columbia Law School* et est devenue la première femme à participer à deux revues juridiques majeures : la *Harvard Law Review* et la *Columbia Law Review*. En 1959, elle a obtenu son doctorat en droit à Columbia et a terminé première *ex aequo* de sa promotion. En 1960, elle s'est vu refusé un poste de greffier en raison de son sexe.

Mais elle a persévéré.

La même année, la juge Ginsburg a été nommée greffière du juge Palmieri au tribunal américain du district sud de New York, où elle a exercé ses fonctions pendant deux ans.

Et heureusement qu'elle a persévéré, car les gens qui l'entouraient ont commencé à se rendre compte qu'elle pouvait apporter des contributions importantes. Au cours des deux années suivantes, la juge Ginsburg a été chercheuse associée, puis directrice adjointe du Projet sur les procédures internationales de la *Columbia Law School*. Au cours de cette période, elle a co-écrit, avec Anders Bruzelius, un livre sur la procédure civile en Suède et a mené des recherches approfondies pour son livre à l'Université de Lund en Suède. Son séjour en Suède a également influencé ses points de vue sur l'égalité des sexes. Elle a été inspirée par les changements survenus en Suède, où les femmes représentaient 20 à 25 % des étudiants en droit. Lorsqu'elle est entrée à l'université en tant que professeur à la *Rutgers School of Law*, elle est devenue l'une des 20 professeures de droit aux États-Unis. Malgré cet exploit, cette première

nomination lui a laissé un arrière-goût amer car elle a appris qu'elle serait moins bien payée que ses collègues masculins puisqu'elle avait un mari qui avait un emploi bien rémunéré.

Mais elle a persévéré.

Quelques années plus tard, elle a cofondé le Projet sur les droits des femmes de l'Union américaine des libertés civiles (ACLU) et est devenue l'avocate générale de l'ACLU. En tant que directrice du Projet sur les droits des femmes de l'ACLU, elle se sentait, selon ses propres mots, comme « une institutrice de maternelle », ou, selon d'autres opinions, elle « tricotait un pull sur la discrimination fondée sur le sexe » ou « créait un paysage juridique ». Ce Projet sur les droits des femmes et les projets connexes de l'ACLU ont participé à plus de 300 affaires de discrimination fondée sur le genre.

Dans les années 70, la juge Ginsburg a plaidé six affaires de discrimination fondée sur le genre devant la Cour suprême, en gagnant cinq. Sa stratégie consistait à choisir des plaignants hommes et femmes pour attaquer des lois discriminatoires spécifiques qui toucheraient tant les hommes que les femmes au lieu de demander à la Cour suprême des États-Unis de mettre fin à toute discrimination fondée sur le sexe, d'un coup. Toutes ces affaires sont d'une pertinence significative dans le paysage juridique américain, mais je ne peux pas m'empêcher d'en partager une avec vous. L'affaire *Weinberger c. Wiesenfeld* (1975). M. Wiesenfeld, père d'un enfant, s'est vu refuser des prestations de survivant au titre des allocations de sécurité sociale pour s'occuper de ses enfants mineurs. La Cour suprême des États-Unis a statué à l'unanimité en faveur de M. Stephen Wiesenfeld et a conclu que la loi discriminait contre les survivants masculins des travailleurs en leur refusant la même protection que leurs homologues féminins.

Madame la juge Ginsburg, merci de votre persévérance.

Le 14 juin 1993, le Président Bill Clinton l'a nommée juge associée de la Cour suprême. Elle a été confirmée par le Sénat américain par un vote de 96 voix contre 3, le 3 août

1993. Dans le cadre de la première affaire relative aux droits des femmes, *États-Unis c. Virginia* (1996), la juge Ginsburg était l'auteur de l'opinion de la cour selon laquelle le *Virginia Military Institute* (VMI), une institution ayant une politique d'admission réservée uniquement aux hommes, violait la clause de l'égalité de protection du quatorzième amendement et que le VMI ne pouvait se servir du genre pour refuser aux femmes la possibilité d'assister au VMI avec ses méthodes pédagogiques uniques.

Il semble qu'elle ne cessera jamais de persévérer.

En tant que voix dissidente aussi, la juge Ginsburg a joué un rôle très important. Dans l'affaire *Ledbetter c. Goodyear* (2007), la plaignante, Lilly Ledbetter, a engagé une action en justice contre son employeur, alléguant une discrimination salariale fondée sur le sexe en vertu du Titre VII de la *Civil Rights Act* de 1964. Dans une décision de 5 contre 4, les juges ont interprété à la majorité le délai de prescription comme commençant à partir de chaque période de paie, même si une femme ne savait pas qu'elle était payée moins que son collègue masculin avant. La juge Ginsburg a trouvé le jugement absurde et a appelé le Congrès à modifier le Titre VII afin d'annuler la décision de la cour en adoptant une nouvelle législation. En 2008, à la suite de l'élection du Président Barack Obama, la loi Lilly Ledbetter sur l'équité salariale (*Lilly Ledbetter Fair Pay Act*) a été approuvée, permettant aux salariés de faire facilement valoir leurs droits en matière de discrimination salariale. La juge Ginsburg a été reconnue pour avoir inspiré cette loi.

La protection de l'État de droit n'est pas une tâche facile. C'est un chemin long et pénible. Et pour mener les combats qui doivent être menés pour la défense de l'État de droit, il faut une qualité fondamentale : **la persévérance**.

Justice Ginsburg, ou devrais-je dire, la célèbre R.B.G. ? Je suis bouleversé par votre personnalité et par votre cause en tant que défenseur et protecteur de l'État de droit et de l'égalité des sexes tout au cours de votre vie.

Pedro PAIS DE ALMEIDA
Président de l'UIA

Editorial del Presidente

Ruth: ¡el otro nombre de la verdad!

I Pedro PAIS DE ALMEIDA

Siempre he pensado que la adversidad y la persistencia nos hacen más fuertes. Estoy encantado de que la UIA haya elegido a la Jueza Ruth Bader Ginsburg para otorgarle el 3.º Premio Estado de derecho UIA/LexisNexis.

La Jueza Ginsburg está firmemente convencida que los hombres y las mujeres son personas que tienen la misma dignidad y deben ser tratadas de forma igualitaria ante la ley. Cuando entró en la Harvard Law School era una de las nueve mujeres que había en una clase de unos 500 hombres. Ya entonces, el decano de derecho de Harvard preguntaba a menudo a las estudiantes mujeres: «¿Cómo justificáis ocupar el lugar de un hombre cualificado?». Después se trasladó a la Columbia Law School y se convirtió en la primera mujer que apareció en dos importantes revistas de derecho: la *Harvard Law Review* y la *Columbia Law Review*. En 1959, obtuvo su doctorado en derecho en Columbia y empató como primera de su clase. En 1960 fue rechazada para un puesto de asistente por ser mujer.

Pero persistió.

Ese mismo año, la Jueza Ginsburg se convirtió en asistente del Juez Palmieri del Tribunal del Distrito Sur de Nueva York de EE.UU., donde trabajó durante dos años.

Y menos mal que persistió, ya que quienes la rodeaban se dieron cuenta de que podía conseguir grandes logros. Los dos años siguientes, la Jueza Ginsburg fue investigadora asociada y después directora asociada del Proyecto sobre Procedimiento Internacional de la Facultad de Derecho de Columbia. Mientras tanto, escribió un libro junto con Anders Bruzelius sobre el procedimiento civil en Suecia y llevó a cabo una profunda investigación para su libro en la Universidad de Lund, en Suecia. El tiempo que pasó en Suecia influyó en sus ideas sobre la igualdad de género. Los cambios que observó en Suecia, donde las mujeres formaban el 20 a 25% de todos los estudiantes de derecho, le inspiraron. Cuando entró en la academia como profesora en la Rutgers School of Law fue

una de las menos de 20 mujeres profesoras de derecho de Estados Unidos. A pesar de este logro, el primer puesto le dejó un regusto amargo, ya que le dijeron que le pagarían menos que a sus compañeros hombres porque tenía un marido con un trabajo bien pagado.

Pero persistió.

Unos años después, cofundó el proyecto Women's Rights Project en la American Civil Liberties Union (ACLU) y se convirtió en consejera general de la ACLU. Como directora del Women's Rights Project de la ACLU, en sus propias palabras, se sintió como «una maestra de guardería de jueces» o, según otras opiniones, «estaba tejiendo un jersey sobre la discriminación de género» o «creando un panorama jurídico». El Women's Rights Project y los proyectos relacionados de la ACLU participaron en más de 300 casos de discriminación por género.

En los años setenta, la Jueza Ginsburg defendió seis casos de discriminación de género ante el Tribunal Supremo y ganó cinco de ellos. Su estrategia consistía en seleccionar demandantes hombres y mujeres para atacar leyes discriminatorias específicas que pudieran afectar tanto a hombres como a mujeres en lugar de pedir al Tribunal Supremo de EE.UU. que terminara con la discriminación de género de una vez. Todos estos casos tienen una relevancia significativa en el panorama jurídico de EE.UU., pero no puedo por menos que compartir con ustedes uno de ellos: el caso *Weinberger vs. Wiesenfeld* (1975). Al Sr. Wiesenfeld, padre de un niño, se le negó la prestación de superávit de la Seguridad Social para cuidar de sus hijos menores. El Tribunal Supremo de EE.UU. falló unánimemente a favor de Stephen Wiesenfeld y descubrió que la ley discriminaba a los supervivientes varones de trabajadoras al denegarles la misma protección que a sus homólogas mujeres.

Jueza Ginsburg, gracias por persistir.

El presidente Bill Clinton la nombró Jueza Asociada del Tribunal Supremo el 14 de junio de 1993. Su nombramiento fue confirmado por el Senado de Estados Unidos con 96

votos a favor y 3 en contra el 3 de agosto de 1993. En el primer caso de derechos de la mujer, *United States vs. Virginia* (1996), la Jueza Ginsburg fue la autora de la opinión del tribunal que consideró que el Instituto Militar de Virginia (VMI), una institución política de solo admitía hombres, violaba la cláusula de protección de la igualdad de la Decimocuarta Enmienda y el VMI no podía aducir motivos de género para denegar a las mujeres la oportunidad de asistir al VMI con sus métodos educativos únicos.

Y parece que no dejará de persistir.

Como voz disidente, la Jueza Ginsburg también desempeñó un papel muy importante. Fue en *Ledbetter vs. Goodyear* (2007), un caso en el que la demandante Lilly Ledbetter presentó una demanda contra su empleador aduciendo una discriminación en su salario por motivos de género en virtud del Título VII de la Ley de Derechos Civiles de 1964. En una sentencia de 5 a 4, la mayoría interpretó que la prescripción empezaba con cada periodo de remuneración, aunque una mujer no supiera que se le estaba pagando menos que a un compañero varón hasta más tarde. A la Jueza Ginsburg el fallo le pareció absurdo y reclamó al Congreso que modificara el Título VII para revocar la sentencia del tribunal adoptando una nueva legislación. En 2008, tras la elección del Presidente Barack Obama, se aprobó la Ley Lilly Ledbetter de igualdad salarial, que daba una mayor facilidad a los empleados para ganar las demandas por discriminación. La Jueza Ginsburg recibió un reconocimiento por haber inspirado aquella ley.

La protección del Estado de derecho no es fácil. Es una tarea larga y ardua. Y para lidiar las batallas que presenta la defensa del Estado de derecho, hace falta una cualidad esencial: **La persistencia.**

Jueza Ginsburg, ¿o debería decir Notorious R.B.G.? Me siento abrumado por su personalidad y por su causa como defensora y protectora del Estado de derecho y la igualdad de género a lo largo de su vida.

Pedro PAIS DE ALMEIDA
Presidente de la UIA



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Message from the Editor-in-Chief

I Nicole VAN CROMBRUGGHE

It is with pleasure that we bring you the third edition of the *Juriste* which, as you will see, covers extremely diverse issues. Reading about them will, we hope, give you both joy and food for thought.

Societal evolution makes each and every one of us face new challenges, both ethically, morally, legally and professionally.

What are commonly referred to as artificial intelligence and the digital world raise many of the questions we have to face as human beings and as legal professionals.

This has already been reflected in our columns, which continue to welcome articles addressing these new challenges and the many questions that this paradigm shift raises in every respect.

The issue you have in your hands once again focuses on some aspects of the turmoil caused by the technological developments at work in our societies.

Thus, for example, Nathalie Pierce focusses on the consequences of automation in the work place and the communication policy that companies need to put in place, according to her, if they wish to defuse negative reactions, or even panic among the staff, faced with the advent of the “cobots”. Steve Sidkin, meanwhile, defends the innocuousness of technological transformation with regard to the “rule of law” and argues that it would be incomprehensible today to exclude software from the notion of “merchandise” in the context of Directive 86/653/EC relating to commercial agency contracts. The article by Sun Qigui and Wang Chen deals with issues raised by gene-editing.

The recent interview given by a well-known French journalist, Marc-Olivier Fogiel, during the talk show, “On n’est pas couché”, which received wide media coverage, reminded us again of the scientific advances that are pushing the limits of the possible, especially in terms of procreation, inducing

a profound change in the mind-set and a shift in what we considered “the” norm just a little time ago. Based on the concept of parentage, the journalist posted that, in his opinion, in the context of surrogacy – in this case for a couple of men – neither the oocyte donor nor the woman who received and carried the embryo resulting from the fertilization of the oocyte in question could claim to be the “mother” of the child, who therefore would have two fathers but no mother. Without wishing to express any opinion on the merits of his argument, it is certain that it raises fundamental questions about the notion of “family”.

On a totally different note, we are also particularly happy and proud to present an interview with representatives of two of our new collective members: Mr. Coco Kayudi Misamu, President of the Kinshasa Bar Association (DRC) on the one hand and Mr. Yutaro Kikuchi, President of the Japan Federation of Bar Associations, on the other. We thank them for enabling us to gain a better understanding of the entities they head as Presidents. We also thank Patricia Lopez-Aufranc for producing these contributions as well as those presented in the first two issues of 2018.

Today, we are just a few days away from the 62nd Congress of our Association to be held in a magical location – Porto. In addition to the social program that offers many opportunities to strengthen our friendship, in addition to the opportunity to create new ones, the scientific program promises exciting discussions, whether relating to the main themes or the work of the commissions.

We will, of course, bring it all to you in our forthcoming issues.

On the eve of this Congress, I would like to once again emphasize our concern to ensure that the *Juriste* covers not just the issues likely to interest the majority of you, as best possible, but also all the geographical regions you represent.

But we need you to be able to do so – your suggestions concerning the topics you would like to see addressed, your proposals for articles but also your active contribution to the Editorial Board. We would be happy to include representatives from the Asian and African continents in particular in our team, who could help us identify potential subjects and contributors in their region. If that is something that may interest you, please do inform Marie-Pierre Richard at the following address: mprichard@uiagnet.org. We hope you will respond positively to this invitation.

We look forward to meeting or seeing you again in Porto.

Nicole VAN CROMBRUGGHE
Chief Editor – *Juriste International*
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Message du rédacteur en chef

I Nicole VAN CROMBRUGGHE

C'est avec plaisir que nous vous présentons cette troisième édition du Juriste qui, vous le verrez, couvre des problématiques extrêmement diverses dont la lecture, nous l'espérons, vous apportera plaisir et réflexion.

L'évolution de la société oblige tout un chacun à faire face à de nouveaux défis, tant sur le plan éthique, moral, juridique que professionnel.

Ce qu'on appelle communément l'intelligence artificielle et le monde numérique soulèvent notamment nombre de questions auxquelles nous avons à faire face en tant qu'êtres humains comme en tant que professionnels du droit.

Nos colonnes s'en sont déjà fait l'écho et continuent à accueillir des articles consacrés à ces nouveaux défis et aux nombreuses interrogations que ce changement de paradigme suscite à tous points de vue.

Le numéro que vous avez entre les mains aborde à nouveau certains aspects des rebus générés par l'évolution technologique à l'œuvre dans nos sociétés.

C'est ainsi, par exemple, que Nathalie Pierce s'attache aux conséquences de la robotisation en matière d'emploi et à la politique de communication que l'entreprise lui paraît devoir mettre en place si elle souhaite désamorcer les réactions négatives, voire de panique, de son personnel devant l'entrée en scène des « *cobots* ». Steve Sidkin, quant à lui, défend l'innocuité de l'évolution technologique pour la « *rule of law* » et soutient qu'il serait incompréhensible aujourd'hui d'exclure les logiciels de la notion de « *marchandise* » dans le cadre de la directive 86/653/CE en matière de contrat d'agence commerciale. L'article de Sun Qigui et Wang Chen s'attache lui aux questions soulevées par les manipulations génétiques (« *gene-editing* »).

Le récent interview accordé par un journaliste français bien connu, Marc-Olivier Fogiel, lors de la très médiatique

émission « *On n'est pas couché* » nous rappelait encore combien les avancées scientifiques qui repoussent toujours plus loin les limites du possible, notamment en matière de procréation, induisent un profond changement des mentalités et un inflexionnement de ce que, il y a peu, nous considérions comme « *la* » norme. Invoquant la notion de filiation, ce journaliste posait, en effet, que selon lui, dans le cadre d'une gestation pour autrui, en l'espèce en faveur d'un couple d'hommes, ni la donneuse d'ovocyte ni la femme qui a accueilli et porté l'embryon résultant de la fécondation de l'ovocyte en question ne peuvent revendiquer être la « *mère* » de l'enfant, lequel a donc deux pères mais pas de mère. Sans vouloir me prononcer sur le bien-fondé de son argumentation, il est certain qu'il y a là une remise en question fondamentale de la notion de « *famille* ».

Dans un tout autre registre, nous sommes par ailleurs particulièrement heureux et fiers de pouvoir vous présenter une interview des représentants de deux de nos nouveaux membres collectifs : d'une part, celui de M^e Coco Kayudi Misamu, Bâtonnier de Kinshasa (RDC) et, d'autre part, celui de M^e Yutaro Kikuchi, Président de la Japan Federation of Bar Associations. Nous les remercions d'avoir accepté de nous permettre de mieux connaître les entités qu'ils président. Nous remercions également M^e Patricia López-Aufranc d'avoir généré ces contributions ainsi que celles présentées dans les deux premiers numéros de l'exercice 2018.

Nous voici aujourd'hui à quelques jours du 62^e Congrès de notre Association qui se tiendra dans un lieu magique : Porto. Outre le programme social qui nous offre de multiples occasions de renforcer nos liens amicaux et l'opportunité d'en créer de nouveaux, le programme scientifique promet des échanges passionnants, qu'il s'agisse des thèmes principaux ou des travaux des commissions.

Nous nous en ferons bien sûr l'écho.

A la veille de ce Congrès, je voudrais encore souligner notre souci de voir le Juriste couvrir au mieux non seulement les problématiques susceptibles d'intéresser le plus grand nombre d'entre vous mais aussi l'ensemble des zones géographiques que vous représentez.

Pour cela, nous avons besoin de vous : de vos suggestions quant aux sujets que vous voudriez voir abordés, de vos propositions d'articles mais aussi de votre contribution active au sein du comité de rédaction. Nous serions heureux d'intégrer à notre équipe des représentants des continents asiatique et africain en particulier qui nous aideraient à identifier sujets et contributeurs potentiels dans leur région. Si cela vous tente, nous vous proposons d'en informer Marie-Pierre Richard à l'adresse suivante : mprichard@uianet.org. Nous espérons que vous répondrez présents à cette invitation.

Au plaisir de vous voir ou vous revoir à Porto.

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Mensaje del Redactor Jefe

I Nicole VAN CROMBRUGGHE

Es un placer presentar esta tercera edición del Juriste que, como verán, cubre muy diversas problemáticas cuya lectura esperamos les agrade y haga reflexionar. La evolución de la sociedad nos obliga a todos a enfrentarnos a nuevos retos, tanto en el plano ético, moral y jurídico como profesional.

Lo que se ha dado en llamar la inteligencia artificial y el mundo digital plantean muchas preguntas a las que debemos enfrentarnos como seres humanos y como profesionales del derecho.

Nuestras columnas ya se han hecho eco de ello y siguen presentando artículos dedicados a los nuevos retos y a los numerosos interrogantes que suscita este cambio de paradigma desde todos los puntos de vista.

El número que tiene en sus manos aborda de nuevo determinados aspectos del revuelo que genera la evolución tecnológica que se está produciendo en nuestras sociedades.

Así por ejemplo, Nathalie Pierce trata las consecuencias de la robotización en materia de empleo y la política de comunicación que cree que debe implantar la empresa si desea apaciguar las reacciones negativas – e incluso de pánico – de su personal ante la llegada de los « cobots ». Steve Sidkin, por su parte, defiende la inocuidad de la evolución tecnológica para la «rule of law» y mantiene que hoy en día sería incomprensible excluir los programas informáticos de la noción de «mercancía» con arreglo a la directiva 86/653/CE en materia de contrato de agencia comercial. El artículo de Sun Qigui y Wang Chen está dedicado a las cuestiones que plantea la manipulación genética (« *gene-editing* »).

La entrevista concedida recientemente por un periodista francés conocido, Marc-Olivier Fogiel, durante el mediático programa de televisión francés « *On n'est pas couché* », nos recordaba hasta qué punto los avances científicos que superan cada vez más los

límites de lo posible – concretamente en materia de procreación – inducen un profundo cambio de mentalidades y una inflexión en lo que hasta hace poco considerábamos « la » norma. Aduciendo la noción de filiación, este periodista planteaba que, en su opinión, en el caso de una gestación subrogada, concretamente a favor de una pareja de hombres, ni la donante de ovocito ni la mujer que ha recibido y gestado el embrión resultante de la fecundación del ovocito en cuestión pueden reivindicar la maternidad del niño, quien en ese caso tiene dos padres y ninguna madre. Sin querer pronunciarme sobre la legitimidad de su argumentación, está claro que hay un cuestionamiento fundamental de la noción de « familia ».

En otro orden de cosas, nos complace y enorgullece enormemente poder presentar una entrevista de los representantes de dos de nuestros nuevos miembros colectivos: por una parte, la de don Coco Kayudi Misamu, Decano de Kinshasa (RDC) y, por otra, la de don Yutaro Kikuchi, Presidente de la Japan Federation of Bar Associations. Les damos las gracias por haber accedido a darnos a conocer mejor las entidades que presiden. Asimismo, damos las gracias a Patricia López-Aufranc por haber generado estas contribuciones así como las que se presentaron en los dos primeros números del ejercicio 2018.

Ya falta muy poco para el 62.º Congreso de nuestra Asociación, que se celebrará en un lugar mágico: Oporto. Además del programa social que nos ofrece muchísimas ocasiones de reforzar nuestras amistades y de entablar otras nuevas, el programa científico promete ofrecer unos debates apasionantes, tanto en los temas principales como en los trabajos de las comisiones.

Por supuesto, nos haremos eco de ellos.

En vísperas de este Congreso, querría recordar una vez más nuestra inquietud por que el Juriste no cubra solo las problemáticas que pueden interesar a la

mayoría de ustedes, sino también a todas las zonas geográficas que representan.

Para eso les necesitamos a ustedes: necesitamos sus sugerencias de temas que querrían que se abordaran, sus propuestas de artículos, pero también su contribución activa en el comité de redacción. Estaríamos encantados de integrar en nuestro equipo a representantes de los continentes asiático y africano en particular que nos ayudasen a identificar temas y posibles contribuyentes de su región. Si la idea les seduce, les invitamos a comunicárselo a Marie-Pierre Richard a la siguiente dirección : mprichard@uianet.org. Esperamos que respondan positivamente a esta invitación.

Hasta pronto en Oporto.

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Seminar in Poznan – June 2018

UIA News
Actualités de l'UIA
Novedades de la UIA



Séminaire à Beyrouth – juin 2018



L'UIA à Beyrouth

Les tribunaux internationaux et la sauvegarde des droits de l'homme

I Elisabeth ZAKHARIA SIOUFI

C'est à Beyrouth, au Liban, que la commission des droits de l'homme de l'UIA a tenu, les 11 et 12 mai 2018, à la Maison de l'Avocat, son séminaire annuel, avec pour thème principal « L'efficacité du rôle des tribunaux internationaux dans la sauvegarde des droits de l'homme – Réalités et perspectives ».

Ce séminaire, organisé en partenariat avec l'Ordre des avocats de Beyrouth, l'Ambassade de France au Liban, la Banque du Liban, Friedrich Ebert Stiftung, Sader Group et *L'Orient-Le Jour* qui en a assuré la couverture médiatique, visait, comme le souligna au début du séminaire M^e Elisabeth Zakharia Sioufi, Présidente de la commission des droits de l'homme de l'UIA, à examiner et évaluer l'impact de la jurisprudence des tribunaux internationaux dont le mandat premier ne réside pas dans la protection des droits de l'homme sur le développement et le respect de ces droits, mais aussi l'influence réciproque entre ces juridictions et celles spécialisées dans la protection des droits et libertés fondamentales, à travers l'analyse de leurs jurisprudences en la matière.

Durant la séance d'ouverture, le Bâtonnier de Beyrouth, M^e André Chidiac, prononça l'allocution de bienvenue et la parole fut donnée à l'Ambassadeur de France, M. Bruno Foucher, qui avait, la veille, convié tous les participants à une réception à la Résidence des Pins, demeure des Ambassadeurs de France à Beyrouth, à M^e Antoine Akl, Président d'honneur de l'UIA représentant le Président Pedro Pais de Almeida, à M. Achim Vogt, représentant régional de Friedrich Ebert Stiftung, sponsor principal du séminaire et à M^e Joe Karam, Président du comité national libanais.

Présidée par M^e Ibrahim Najjar, Professeur Émérite à la faculté de droit de l'université Saint-Joseph de Beyrouth (USJ) et ancien Ministre de la justice, la première séance cibra la Cour internationale de justice et sa contribution à la reconnaissance et au développement du droit international des

droits de l'homme ainsi que du rôle qu'elle pourrait avoir à cet effet au regard de la spécificité de son mandat.

M. Eric David, chercheur au Centre de droit international de l'université Libre de Bruxelles, estima que cette Cour n'avait toujours pas une attitude de défense systématique des droits de l'homme.

M^e Lara Karam Boustany, du Barreau de Beyrouth et professeur à la faculté de droit de l'USJ, rappela que cette Cour n'était pas – ou très rarement – présentée comme une juridiction de protection des droits de l'homme et qu'elle ne se distinguait pas dans la promotion de ces droits.

Deux sessions, modérées l'une par l'ancien Bâtonnier de Beyrouth, M^e Raymond Chédid, et l'autre par M^e Elisabeth Zakharia Sioufi, furent consacrées aux juridictions pénales internationales.

M. Sètondji Roland Adjovi, professeur assistant à l'université d'Arcadia (États-Unis), traita de la faille de la liberté provisoire devant le TPIR et analysa les conditions imposées pour bénéficier de cette liberté qui doit être justifiée par des circonstances exceptionnelles, faute de quoi la détention est fondée par défaut.

M^e François Roux, ancien Chef du Bureau de la Défense du Tribunal spécial pour le Liban, estima que l'action des tribunaux pénaux internationaux en faveur des droits de l'homme restait insuffisante et que si ces droits étaient, par nature, un droit des victimes, c'est dans la défense des accusés qu'ils trouvaient leur application la plus forte.

M^{me} Kristina Carey, Chef de la section des victimes de ce Tribunal parla des droits des victimes et des mécanismes assurant leur protection.

L'évolution de l'approche des instances d'arbitrage transnational concernant les droits de l'homme fut examinée lors de

la session modérée par M. Jad Maalouf, Président de la Première Chambre au Tribunal de première instance du Mont Liban pour les affaires civiles, commerciales et d'arbitrage.

Me Nathalie Najjar, Chargée de cours à la faculté de droit de l'USJ et à l'Université Paris II, et Présidente de la Commission d'arbitrage CCI-Liban analysa le cas du Centre International de règlement des différends relatifs aux investissements (CIRDI), et Me Ghaleb Mahmassani, ancien membre de la Cour d'arbitrage de la CCI, le rôle de l'arbitrage international dans le contrôle de la responsabilité des entreprises en matière de protection des droits de l'homme.

Le second jour, une session, modérée par M^e Carlos Fatas Mosquera, Vice-Président de la commission des droits de l'homme de l'UIA, traita de l'impact réciproque des jurisprudences de la Cour de justice de l'Union européenne (CJUE) et de la Cour européenne des droits de l'homme (CEDH).

M. Pascal Dourneau-Josette, Chef de division à la CEDH et professeur associé à l'université de Strasbourg, a notamment retracé l'évolution historique de la jurisprudence de ces deux juridictions, « longtemps caractérisée par une certaine façon de se tenir mutuellement à distance », et parlé du nouveau principe dit de la protection équivalente des droits fondamentaux ou encore « Présomption d'équivalence » et de ses conséquences sur la protection des droits de l'homme. Il a estimé que l'avenir des relations entre les deux Cours semble aujourd'hui plus apaisé et que « les impacts réciproques de leurs jurisprudences sont donc une réalité à la fois positive et... pleine d'avenir ».

Face à cette diversité des mécanismes judiciaires internationaux, se posait la question de savoir s'il était possible, mais aussi souhaitable d'harmoniser les jurisprudences afin d'assurer une protection plus efficace des droits de l'homme.

C'est à cette question que la dernière session de travail, modérée par M^e Alia Berti-Zein, ancienne membre du Conseil de l'Ordre des avocats de Beyrouth, entendait répondre.

M^e Nidal Jurdi, avocat au Barreau de Tripoli (Liban) et professeur à l'université Mc Gill (Canada), parla de ce qui pouvait lier les juridictions internationales au respect des droits de l'homme et de la possibilité de la violation par les juridictions pénales internationales de ces droits, et examina les moyens de renforcer le système de leur protection.

M. Adjovi estima que l'harmonisation de la jurisprudence n'était pas une nécessité absolue car la variété de la jurisprudence offre plus de choix à la victime mais qu'elle était importante en ce qui concerne les juridictions pénales internationales, puisqu'elles ne dépendent pas d'un État, et qu'il est impossible de recourir dans ce cas aux mécanismes de protection internationaux des droits de l'homme.

Des échanges avec les participants ont suivi chaque session et permis d'approfondir des données spécifiques menant ainsi à cerner davantage et à travers des points de vue différents les multiples aspects des sujets abordés.

M^e Elisabeth Zakharia Sioufi présenta les conclusions et recommandations et souligna l'importance du rôle de l'avocat dans la sauvegarde des droits de l'homme : un rôle qui exige de suivre de près l'évolution de la jurisprudence de ces instances internationales et d'en analyser la portée, ce qui constitue l'objectif principal des séminaires annuels de la commission des droits de l'homme.

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Legal English for Lawyers: A Participant's Perspective

I Edit FEST BAKONYI

In January and June 2018, the UIA organized two trainings in Paris for lawyers to learn more about legal English.

The subjects of the trainings were the following:

Part 1: Legal English for Lawyers – Initiation: Meet with Clients & Counsel, from January 29-30: 13 hours.

Part 2: Legal English for Lawyers – Advanced: Draft & Negotiate with Clients & Counsel, from June 18-19: 13 hours.

The vast majority of the participating colleagues were native French speakers, and although I am a Hungarian attorney-at-law, and I speak very fluent French and mid-level English, I was initially thinking that it would be an excellent opportunity to use my French and learn more English, more specifically legal English. In the end, though, my expectations were exceeded, and I was able to participate in a very useful and absolutely practical training.

There were attorneys who only participated in the second training, but they had no problem joining the course, because even though the second part was the logical continuation of the first in the training sequence. This was not a disadvantage for those who missed the first since the modules were related in subject matter (lawyers communicating in English for professional reasons) but addressed different skills. The first training was more listening, reading and vocabulary building, while the second training emphasized speaking and writing.

Our instructor was Stephanie Cooper-Slockyj, who is an attorney-at-law from California and teaches legal English to law students at the University of Paris II – Assas and other legal professionals, and also a legal translator.

What I particularly appreciated was that we were taught by a fellow attorney with a great deal of experience, who is also

experienced in teaching. Our teacher was an endlessly active, upbeat colleague with a good sense of humor. The tasks and exercises were made easier by her natural enthusiasm and explanations.

Both sessions consisted of about 15 participants, which is an ideal number for a practical training. As getting to know your colleagues, and actively participating in role plays, negotiations and simulation is very effective.

Both sessions contained numerous colleagues from Africa, who added an international touch with their wit and good energy.

During the courses we worked with material carefully compiled by Stephanie, including:

- Reference materials: legal vocabulary; useful verbs for the legal profession; general legal English; contract vocabulary; suggested negotiation language.
- Class materials & exercises: authoring legal texts by selecting between multiple possible synonyms; analyzing texts; understanding contracts; syntax and grammar exercises.

The January training was held at the UIA headquarters in Paris which is a very nice location. Lunch was served at a lovely little restaurant nearby. This initial training was introductory: we described our own practices and law firms in English, we compared general and legal English terms, we interpreted the essence of the differences. On the basis of texts and sound recordings, as well as law-related Netflix offerings, we discussed what we had learned together.

During the training, attorney participants were invited to interpret a letter written to a contractual partner of a client, analyze the type of wording and professional style, and then simulate an attorney-client discussion in a small group. We also took the time to advise an "imaginary" client and to offer legal explanations, and also interpret typical attorney sample letters together.



This first part fundamentally focused on learning and using English legal terms both orally and in writing, which helped a lot during the second training in June.

The June training was held in a nice downtown hotel with a sophisticated lunch at the same location. This training was deeper and more complex. The topic, entitled “identify and avoid false friends, obtain reliable information on contracts drafted in English”, was a nice surprise for all of us, as it is frequent that a very similar sounding term is deceptive and misleading in an official document or contract. Clearing this up was indeed a substantial step forward.

One of our tasks was determining the importance of different negotiating skills. It was interesting to see what skills different colleagues considered the most essential: such as observation, approaching with empathy, choosing the right words, repeating the negotiating partner’s words back, and researching the counterpart’s cultural background.

My personal favorites in terms of exercises were the elaborate 4-person role plays split into teams of two: we were split into Partners A and B. One of our tasks with one of my attorney colleagues was to represent the side of the owner in relation to the lease of real property. My partner and I prepared

our strategy together before meeting for a negotiation with the B team, representing a potential lessee, and our objective was to find an agreement on contract terms. Reaching a compromise was not so simple at times, as even within our own small groups, distinct skills were required to reach a shared position, being attorneys from different countries and cultures – not to mention different continents!

In another one of our oral exercises, the emphasis was on attorney-clients meeting together and how the attorney can intelligently and clearly explain an official or legal document for the client in a not-so-official style, accessible to non-lawyers.

I very much enjoyed how the attorneys from different countries approached and constructed the process, the logic of such business negotiations, the considerations of the deal, the subtle but firm assertion of interests. Although the two-day trainings provided us with a lot of information and useful new knowledge, this really energized the participants, thanks to the carefully-compiled training materials, Stephanie’s very original and fresh American-French dynamism and humor, and great organization by UIA.

Looking at the two trainings as a whole, it can be said that a four-day course of nicely concentrated legal English very much improves one’s oral comprehension skills,

rapid reaction time, and self-expression skills. With the use of the materials received, there were opportunities to continue to practice at home. In my opinion the fact that the training was interactive, active and dialogue-driven, based on many workshop exercises, significantly contributed to overcoming any language inhibitions one may have had, and to making legal communication in English much smoother.

As a way of saying goodbye at the end of the second training, Stephanie gave the group useful tips regarding learning legal English at home. Many of us agreed that with a private teacher, using the material received here, we would continue to improve, not only through “self-study” but also through watching law-related TV shows and using various Internet resources for listening comprehension and vocabulary building.

Many thanks to Stephanie for the excellent and numerous experiences, and thanks to the UIA for their efficient, careful organization, as well as their great choice of instructor.

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L'UIA à Douala

Étude d'un cas pratique selon le Règlement d'arbitrage de la CCI

I Laurence KIFFER



Du 21 au 23 novembre 2018, la Commission arbitrage internationale de l'UIA organisera à Douala, au Cameroun, conjointement avec la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale (CCI) et avec le soutien de l'Ordre des Avocats au Barreau du Cameroun et du Centre d'arbitrage du GICAM, une formation à l'arbitrage.

Cette formation s'inscrit dans le prolongement des formations organisées respectivement à Dakar en 2015 et à Abidjan en 2016. Elle est née du constat fait lors d'un séminaire à Saly (Sénégal) en 2014 qu'il n'y avait pas assez d'avocats en Afrique formés à l'arbitrage alors que l'arbitrage est le mode de résolution des litiges habituel en matière internationale.

Reproduire les pratiques judiciaires dans le cadre d'une procédure arbitrale est contreproductif. La procédure arbitrale internationale se distingue d'une procédure judiciaire notamment par un mode d'administration de la preuve qui opère un syncrétisme entre la procédure de *common law* et la procédure civile. Une méconnaissance du mécanisme et de ce qu'il implique peut-être source de difficulté.

Par le biais d'une formation très pratique, vous appréhendez une simulation de procédure d'arbitrage qui vous permettra mieux comprendre ce mode de résolution des litiges.

Le Centre d'Arbitrage du GICAM (CAG) accueillera la formation. Le GICAM est le Groupement Inter-Patronal du Cameroun, organisation représentative du secteur privé. Il s'est doté en 1998 d'un centre d'arbitrage doté d'un règlement d'arbitrage susceptible de résoudre les litiges d'affaires, de préserver et développer des relations harmonieuses entre partenaires. Depuis 2012, plus d'une cinquantaine d'affaires ont été traités par le centre d'arbitrage du GICAM.

Compte tenu de la réforme récente de l'arbitrage OHADA et du fait que le Bâtonnier du Cameroun, Jackson Ngnie

Kamga, a pris la présidence de la conférence des Barreaux de l'espace OHADA, il est apparu opportun que le séminaire débute sur les spécificités de l'arbitrage OHADA avec une présentation de la réforme de l'Acte uniforme avant d'envisager les avantages et les inconvénients d'un siège de l'arbitrage dans la zone OHADA.

On rappellera que l'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA) crée un espace communautaire regroupant actuellement dix-sept pays (Benin, Burkina Faso, Cameroun, Centrafrique, Côte d'Ivoire, Congo, Comores, Gabon, Guinée, Guinée-Bissau, Guinée-Equatoriale, Mali, Niger, République Démocratique du Congo, Sénégal, Tchad et Togo). L'acte uniforme sur l'arbitrage constitue une loi d'arbitrage applicable à l'ensemble des pays membres de l'OHADA.

Le choix du siège de l'arbitrage emporte des conséquences juridiques liées au juge d'appui compétent et aux voies de recours applicables à la sentence arbitrale.

La suite du programme de formation se déroulera sur la base de l'examen d'un cas pratique examiné sous l'angle du règlement d'arbitrage de la CCI. On rappellera que le fait que la CCI ait son siège social à Paris, n'est pas antinomique avec le choix d'un siège de l'arbitrage ailleurs qu'à Paris et notamment dans l'espace OHADA.

Cette formation constitue une opportunité pour se familiariser à la pratique de l'arbitrage international et appréhender la matière tant au stade de la rédaction de la clause d'arbitrage que de la mise en œuvre de celle-ci lors de la procédure d'arbitrage. Les participants seront eux-mêmes les acteurs de cette formation pour laquelle un cas pratique leur sera soumis et leur permettra d'analyser chaque étape d'une procédure d'arbitrage se déroulant sous l'égide du règlement d'arbitrage de la CCI.

Au cours des trois jours de formation, chaque étape de la procédure d'arbitrage

sera examinée, de la rédaction de la demande d'arbitrage au prononcé de la sentence arbitrale et à l'exécution de cette sentence après la procédure arbitrale. Chaque session permettra aux participants de travailler en ateliers puis d'échanger dans le cadre de sessions plénières interactives. Les ateliers et les sessions plénières seront animés par d'éminents spécialistes de l'arbitrage international qui seront en mesure de partager leur expérience.

Ce programme promet d'être riche d'échanges et instructif, inscrivez-vous ! Attention le nombre de participants est limité à 60 afin de permettre le travail en ateliers.

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Formation : étude d'un cas pratique selon le Règlement d'arbitrage de la CCI

Du mercredi 21 au vendredi 23 novembre 2018



 #UIAArbitration

DOUALA – CAMEROUN

Formation organisée conjointement par l'UIA – Union Internationale des Avocats et la Cour Internationale d'Arbitrage de la CCI, avec le soutien de l'Ordre des Avocats au Barreau du Cameroun et du Centre d'Arbitrage du GICAM (CAG)

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The UIA in Tokyo

Welcome to UIA's Seminar in Tokyo, Asia's Economic and Business Centre

**I Yoshihisa HAYAKAWA
& Motoyasu HIROSE**



By virtue of the great success of UIA's consecutively expanding events in Japan since 2014, accelerated, above all, by the participation in UIA of the leading bar associations of Japan, namely the Japan Federation of Bar Associations and the Tokyo Bar Association, UIA has undoubtedly attained incredibly significant recognition and visibility in the legal society of Japan as well as other Asian jurisdictions. Driven by these favourable trends, it is our honour that UIA will again organize a one-day seminar of greater size jointly with the Tokyo Bar Association, coupled with a number of convivial social events. Here, UIA's foreign investment commission, to which both of the authors belong, will lead the whole program of this seminar.

Well predictably, the investors in developed jurisdictions have been all the more eagerly advancing into the emerging markets because they are prone to generate expanding demands of the growing population, where they would ironically risk encountering more or less unexpected pitfalls totally inconceivable in developed markets. In a nutshell, the investors must be knowledgeable about the malfunction of the "rule of law" as well as the effective strategy to tackle these difficulties. To illustrate, how should they deal with their damming exposure to bribery risks, frequent and arbitrary amendment of regulations unilaterally in favour of local parties and, in the event of disputes, unreasonably delayed and discriminative judicial proceedings, with a view to pursuing safe, legitimate and remunerative business in a manner accountable to their stakeholders?

UIA speakers as well as members of the Tokyo Bar regularly assisting clients in foreign investment will gather and make presentations on the topic of "Doing Business in and with the Emerging Markets" with particular focus on how to hedge the various risks in Asia and other regions from the standpoint of both *investors* and *investees*, which would better shed light on the problematics affecting the business

activities in the midst of high barriers in the emerging jurisdictions. This approach might be somewhat unique in that the majority of other seminars on similar topics would rather place emphasis on the "fascinating" aspects of investment destinations by, say, bringing on local tourist attractions. By contrast, we will take a totally opposite approach.

Japanese speakers may wish to talk about the rough going of Japanese corporations, being their clients, in the course of their struggle against the inconsistent administrative formalities and the attempted extortion of bribes from foreign officials in the emerging market in Asia, whilst other speakers from the emerging markets would be expected to further close up vivid local circumstances as well as possible ways to tactically mitigate the risks involving such Japanese investors. The exchange of views from both sides, as the practicing lawyers catching up with the ongoing issues on a real time basis, would certainly be a fruitful discussion which would be unavailable in law classrooms.

This seminar will also include interactive Q&A sessions where participants will be able to ask the experienced speakers for their views on specific queries you may have about their insights made available through the struggles in the rough-and-tumble of foreign investment in the emerging market. Hosted by the Tokyo Bar Association, many Japanese lawyers who are not UIA members would also attend and provide their views from different angles and then be attracted to the friendly atmosphere of UIA's activities.

As was the case with UIA's former Tokyo seminars, this seminar will be followed by a reception at a traditional buffet party within a few minutes' walk of the venue, where UIA participants will be able to exchange and become more familiar with Japanese lawyers, and more broadly, Japanese culture in casual settings.

Compared to the former ones, this Tokyo seminar will have remarkable plenitude of

social events. It starts with the gala dinner, before the seminar, at a traditional Japanese restaurant surrounded by a beautiful garden, which has been highly appreciated by the past participants. On Saturday, following the seminar, we will organize a one-day excursion to beautiful places in the western suburb of Tokyo, namely, Kamakura, famous for Japanese traditional culture and history. Luckily enough, this excursion will hopefully fall on the midst of cherry blossoms.

Alternatively, you could also enjoy a day trip to and explore other touristic destinations, traditional culture, history and abundant nature of Japan (i.e. Kyoto, Mt. Fuji, Hakone or Nikko, etc.) in addition to Tokyo because domestic travel to any of these places is quite easy thanks to the well-organized and convenient public transport system.

We look forward to welcoming you next year in Japan.

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Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados



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Bizkaiko Abokatuen
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Abogacía de Bizkaia, con el patrocinio del Corte Civil y Mercantil de Arbitraje (CIMA)*

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Human Mobility and Modern Slavery

I Louise ARBOUR

This keynote statement was presented on the occasion of the UIA Bar Leaders' Briefing celebrated at the United Nations Headquarters in New York City on June 28, 2018.

Mr. Pedro Pais de Almeida,
H.E. Ambassador Francisco Duarte Lopes,
Ladies and Gentlemen,
Dear Friends,

It is a pleasure to join all of you here today at this international event on modern day slavery. I think it is particularly fitting that this takes place under the auspices of the Union Internationale des Avocats as the legal profession has much to contribute to the understanding of all forms of exploitation, and the tools to push back on abuses of all sorts.

I'm sure that your deliberations today will expose the scope and complexity of what is currently understood as modern-day slavery. My remarks will focus on aspects of this scourge that have been highlighted through the ongoing process by which UN Member States are about to adopt a Global Compact for Safe, Orderly and Regular Migration. I will therefore address in particular the issues related to human mobility and the vulnerabilities to exploitation and abuses that come from displacement.

[Global estimates suggest that some 40 million people were victims of modern slavery in 2016, of these, over 60% of them were in forced labour. Almost a quarter of victims of forced labour are exploited outside their country of residence.]

While we often say – accurately – that the majority of migrants move and settle in a safe and orderly fashion; and while far from all slaves are migrants; neither reality should obscure the fact that the act of migration – particularly irregular, sometimes called illegal migration – increases the vulnerability of those who, to varying degrees, lose the

protection of their state of nationality and become more exposed to predations such as exploitation, human trafficking and abuse. This is particularly so for migrant women, and for children on the move.

In other words, while the two phenomena – human mobility and modern slavery – are distinct and need to be tackled separately, equally the link between the two should be recognized, and greater efforts made to break it.

Recent events have provided ample evidence of what happens when large-scale migration takes place without effective mechanisms to manage it. In addition to the unconscionable loss of lives, shocking images revealed a flourishing slave trade of migrants in Libya.

Exploitation, in the large informal economies of the West and elsewhere, must also be documented, exposed, confronted and eradicated.

However, we must also be equally alert to forms of slavery that exist in the corners of our everyday lives, far from situations of conflict or state collapse. Exploitation, in the large informal economies of the West and elsewhere, must also be documented, exposed, confronted and eradicated.

And one way to do so is to address the shortcomings in the governance of migration that permit modern slavery to survive and even grow. Improved migration governance and better protection of migrants will go a long way in reducing recourse to forced labour.

That is, in part, what the Global Compact for Safe, Orderly and Regular Migration, presently under negotiation at the United Nations, will seek to achieve.

This Compact will be the first intergovernmental agreement covering all dimensions of international migration. The

Compact will not be a formal treaty. Nor will it place any legally binding obligations on states.

Instead, it is a unique opportunity to enhance international cooperation, in order to harvest the many positive dividends of human mobility while addressing the challenges associated with migration in today's world. Moving from chaotic, disorderly and dangerous migration patterns to safe and orderly ones will enhance the contribution of migrants to their host communities and to the sustainable development of their countries of origin.

The decision that led UN member states to embark on this two-year effort towards the adoption of this Global Compact did not happen out of the blue. After years of

approaching migration as an issue related solely to national sovereignty, governments recognized in 2016 – a time of record high numbers of people displaced worldwide, often in large, chaotic flows – that better global cooperation on migration was urgently needed.

Human mobility is an expanding global reality. There are today an estimated 258 million international migrants, or some 3.4% of the world's population, up from 2.7% in 2000.

This figure – both in real terms and as a percentage – is growing but remains modest. The history of migration is rooted in the history of humanity and clearly suggests that while there will always be people on the move, given the choice, most of our fellow citizens prefer their homelands to the unknown.

Despite overwhelming evidence of migration's positive impacts, it is often

– indeed, increasingly so – perceived in negative terms: as being larger than it really is, out of control, representing a failure of state control or a challenge to authority.

Migration is often a source of division within and between states and societies. The upshot is an environment in which measured discourse on this issue can be difficult to maintain and in which sympathy for migrants is in short supply. This is undoubtedly part of a context in which migrants are vulnerable to abuse and exploitation.

When avenues for regular and safe migration are inadequate or closed altogether, aspiring migrants inevitably fall back on irregular and dangerous migration routes, often with the help of smugglers. These migrants risk discrimination, exclusion, exploitation and abuse at all stages of the migration process. They face barriers to access fundamental services, and are unable or unwilling to seek protection from the state out of fear of exposure to law enforcement authorities due to their migratory status.

Migrant workers, even those who have travelled through regular channels, are also vulnerable – often simply because they don't speak the language of their host country or understand the systems into which they arrive – and face challenges of social integration. They disproportionately work in sub-standard conditions and face prejudice and exclusion.

Particularly in low-wage sectors such as domestic work, agriculture and construction, migrant workers are exposed to weak labour protection, inadequate monitoring and lack of effective remedy. There is, almost everywhere, a clear need for more cohesion between immigration and labour laws.

Women, who constitute some 48% of international migrants, make up the majority of domestic and care workers and are at particular risk of intersecting discrimination. Their vulnerabilities to forced labour exploitation are often linked to precarious recruitment processes, which feature charging excessive fees and holding back of passports, aggravated by the absence of adapted protection mechanisms, often set in a climate of social and cultural isolation.

Inadequate systems for the recruitment and placement of migrant workers create space

for the growth in unregulated intermediaries, some of whom are in turn responsible for severe abuse of migrants, charging exorbitant recruitment fees, knowingly making false promises about salaries or working conditions and misrepresenting the nature of the job itself. At the outset of the migration process there is a clear need to reform and regulate recruitment and contracting systems.

Restrictive visa regimes for migrant workers also create increased vulnerability. Many migrant workers find themselves employed in substandard working conditions, being paid at wage levels well below national standards and sometimes kept under these conditions due to their immigration status, which may make it difficult if not impossible to change employers either because of restrictive visa regimes, and/or debt bondage.

Most cases of forced labour and slavery are found in the informal economy. When migrants are not legally permitted to work, they are pushed to seek employment in the informal sector.

There is, almost everywhere, a clear need for more cohesion between immigration and labour laws.

The size of the informal economy varies greatly from country to country but it exists virtually everywhere. Gathering real political will to curtail black labour markets may be difficult to generate. Yet there are definite costs to retaining it: for governments in not knowing who is entering, staying and working in the country; for the labour market by creating two tiers of workers and therefore putting downward pressure on wages and working conditions; and obviously for migrants, who are at far greater risk of exploitation and abuse.

Clearly, measures sanctioning private sector employers and recruiters who seek to circumvent the rules and exploit migrant workers, particularly irregular migrant workers, should be better enforced. Where these measures don't exist, they should be drawn up as a matter of priority.

Equally important is securing the support of the general public. The more people

are made aware of the invisible workforce behind the products or services generated by the informal economy, and of its hidden costs, the more they can help confront this scourge. The growing public awareness of the evil of modern labour exploitation and slavery in many countries is a credit to the power of civil society to mobilise and become effective agents of change.

Like migration, modern slavery is a complex, global and multi-dimensional phenomenon. Both cannot be resolved by national governments working in isolation. They both require an integrated, coordinated strategy based on bilateral, regional and international cooperation. Cooperation between all stakeholders, including civil society, private sector, employers' and workers' organizations, will need to be strengthened to reach a successful outcome, both in migration governance and in combatting modern slavery. Successful cooperation has the potential to have a meaningful impact on the lives of millions of people.

The Global Compact for Safe, Orderly and Regular Migration should be the launch pad

of a new era of increased state cooperation in the better management of human mobility. In doing so, I am persuaded that it will make an important contribution to the reduction, if not the elimination, of modern forms of slavery, another sad manifestation of man's inhumanity to man.

On this somber note, I wish you a successful meeting and look forward to hearing about the outcome of your discussions today.

*Louise ARBOUR
Special Representative of the Secretary-
General for International Migration
United Nations
New York, NY, United States*

A Primer for Dignity Rights



■ Erin DALY & James R. MAY

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”

Universal Declaration of Human Rights, 1948, Preamble

“The defense of the human person and respect for his dignity are the supreme purpose of the society and the State.”

Constitution of Peru 1993, Title I, Chapter I, Article I

“To preserve human dignity and to respect free development of the personality is the core value of the constitutional structure of free democracy.”

Constitutional Court of Taiwan, J.Y. Interpretation No. 603 (2005.9.28)

Introduction

Human dignity refers to the inherent humanness of each member of the human family. It recognizes and reflects the equal worth of each person and attaches to each person equally, regardless of gender, race, social or political status, talents, merit, or any other differentiator. It is not an attribute or an interest to be protected or advanced, like liberty or equality or a house or free speech, but exists anywhere there is a person, or perhaps two, whether or not it is named or recognized in law. It is what makes us all human, and what confirms the equal worth of human beings.

In the last 100 years, dignity has been increasingly recognized as a legal right. While human dignity rarely appeared in constitutions in the early 20th century, it burst on the legal stage in response to the atrocities of World War II, first in the Charter of the United Nations, and then in the Universal Declaration of Human Rights (UDHR). There, it would take root and flourish throughout the globe and give rise

adding a reference to human dignity. And it is through its incorporation into national constitutional texts and judicial interpretations and applications of those texts that the right to dignity is coming to life. Courts around the world have found that it is a *legal right* that can be and often is asserted against the state or others and vindicated in an extraordinarily wide range of factual settings and legal contexts.

In the last few decades, dignity rights have been invoked, interpreted, and applied by courts around the world in thousands of cases in a very wide variety of factual settings.

and meaning to the modern human rights movement. The UDHR opens with the recognition that “the inherent dignity ... of all members of the human family is the foundation of freedom, justice and peace in the world...” Indeed, its first article provides that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Thus, the UDHR places dignity as the principal source of human rights throughout the world.

In the 70 years since the adoption of the UDHR, dignity rights have been recognized in the constitutions of more than 150 of the world’s constitutions from all regions of the world: Asia, Africa, the Middle East, Europe, Latin America and North America, and the Pacific. Today, few constitutions are adopted or meaningfully amended without

Moreover, promoting human dignity often serves as the very basis for national existence, as is expressed in the Constitution of Peru, which states, “The defense of the human person and respect for his/her dignity are the supreme purpose of the society and the State,” the Constitution of India, where one of its fundamental aims is to assure “the dignity of the individual,” and the more recently reformed constitution of Tunisia, where it is an element of the republic’s motto as well as an enforceable right. Dignity rights are also reflected in subnational constitutions, including the American state of Montana.

The constitutions of many nations assert that dignity is a stand-alone substantive right. For example, the German Basic Law of 1949 provides that, “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Such

constitutional 'inviolability' of human dignity is increasingly common, for instance, in the constitutions of Honduras and elsewhere. The power of this substantive right to dignity lies in its enforceability in courts, as discussed below.

Constitutions protect human dignity in a variety of other ways as well. They reinforce or animate other rights. The 1948 Constitution of Italy states, "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions." The 2011 Constitution of Morocco states, "No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] degrading treatments or infringements of human dignity." Constitutions also sometimes recognize the dignity of certain vulnerable segments of the population, including women, children, the elderly, and prisoners. Often, dignity animates several aspects of a single constitution, as in South Africa, Kenya, Colombia, and elsewhere where it is a value as well as a right.

In the last few decades, dignity rights have been invoked, interpreted, and applied by courts around the world in thousands of cases in a very wide variety of factual settings. Notable examples include: Colombia, where dignity is a measure of the state's obligation to provide health care; South Africa, where the civic dignity of prisoners has protected their right to vote; Germany, where the level of pension benefits must allow a person to live in dignity; Nigeria and Ireland, where the right to live with dignity includes the right to a clean and stable environment; Pakistan, where the concept of dignity includes climate and water justice; India, dignity guarantees the right to travel; in Israel, it is a "mother right" whose "daughters" include the right of family unity as well as the right of prisoners to be treated humanely, and many other rights. For decades, in the United States, the concept of dignity has protected prisoners from cruel and unusual punishment and more recently it also guarantees the right to marry a person of one's choosing, regardless of gender.

This growing global body of jurisprudence highlights the importance of certain specific rights, like the right to health or the right

to vote, by linking them to human dignity. But the cases often do more: the link to human dignity indicates not only that the protection and the exercise of these rights are important, but that they are essential to the unfolding or fulfillment of the human personality. The cases are thus telling us something about what it means to be human and, moreover, about what governments are bound to do to respect each person's ability to develop his or her personality.

Defining Dignity Rights

More and more, litigants are arguing their cases from the standpoint of dignity instead of or in addition to asserting other rights, and courts are responding in surprising ways. The dignity cases are unique in constitutional law for several reasons:

1. Dignity is becoming a universally recognized constitutional value, transcending geographic, cultural, and political boundaries.
2. Dignity is relevant to a wider variety of factual settings than any other constitutional right, transcending civil and political rights, as well as the socio-economic and cultural rights of individuals and collectives.
3. Jurists are increasingly embracing the opportunity to give meaning to dignity, even in cases where it is not necessary for the resolution of the case; that is, they are *choosing* to discuss what human dignity means in their particular constitutional culture.

4. Although it is often allied with equality, it is more substantive. Dignity entails equality because the dignity of every member of the human family exists in all of us in equal measure; it is the thing by reference to which we are all equal. As a practical matter, the principle of equal dignity prohibits discrimination because no one's dignity is worth more than any other's, and it prohibits objectification because no one can use another as a means to their own ends. By insisting that every person has worth, dignity goes further than the principle of equality and prohibits certain state actions even if they are undertaken on a nondiscriminatory basis.

5. Dignity protects more than liberty, in the sense of autonomy or freedom. Dignity demands more than our right to be left alone. It also demands that the state treat every person with equal concern and respect, which may include positive obligations such as the provision of free education, housing or health care, food security, and access to adequate water.

While there is not a standard legal definition of dignity that the courts invoke, some patterns are discernible and there are important areas of overlapping consensus. The Constitutional Court of Colombia has identified three clear and differentiated lines contained in the term "human dignity" that provide a useful taxonomy: (i) human dignity understood as autonomy or as the possibility of designing a life plan ... (living as one



wishes); (ii) human dignity understood as certain material conditions (living well); and (iii) human dignity understood as intangible goods, i.e. physical and moral integrity (living without humiliation). The first protects individual choice, the second promotes socio-economic and cultural rights that facilitate social inclusion, and the third protects the individual even in situations of dependence and custody where autonomy and agency are otherwise limited. To this list, we would add the civic dignity that describes the right of people to engage in political activity.

Living as One Wishes

As the United States Supreme Court has shifted its privacy jurisprudence towards a more textually grounded concept of liberty, it has relied on an understanding of human dignity that is consistent with the visions of dignity we see in other courts. A plurality in *Planned Parenthood v Casey* said that the right to choose to terminate a pregnancy was a choice “central to personal dignity and autonomy” and constitutionally protected because “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” In *Obergefell v Hodges*, the Court said that the liberties protected under the due process clauses “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs” and therefore include the choice to marry a person of the same gender.

In recent years, the Taiwan Constitutional Court has followed suit with a series of cases about family, privacy, and children. In 2017, Taiwan became the first Asian nation to constitutionally recognize same sex marriage by saying, “The freedom to marry protected by the Constitution includes the freedom to decide ‘whether to marry’ and ‘whom to marry.’ Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity, and therefore is a fundamental right to be protected by the Constitution.” Courts in Pakistan and Bangladesh have also recognized a third gender. Dignity cases about gender and sexual identity are also

becoming more common in Europe, Africa, North America, and Latin America.

These cases also derive from the Kantian principle that dignity forbids making an individual an object of another’s will. Most notably, the German Constitutional Court has absorbed this anti-objectification principle as a general background fact by saying, “the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state.” Thus, in one particularly famous case, the Court invalidated a Security law that would have permitted the government to shoot down a passenger plane if it knew that the plane would be used in a terrorist attack on the ground because to do so would be to use the passengers as the

struggle to live in conditions of dignity and to maintain their dignity throughout life. This aspect of dignity had its first textual manifestation in the Weimar Constitution of 1919, which established that “The organization of economic life must conform to the principles of justice to the end that all may be guaranteed a decent standard of living.” The term *Menschenwürdigen* is often translated to mean “dignity”. Many more modern constitutions protect this aspect of dignity, including the 2014 Constitution of Egypt, which states, “The state guarantees citizens the right to decent, safe and healthy housing, in a way that preserves human dignity and achieves social justice.” Where the constitutions are not so explicit, many courts have nonetheless developed a jurisprudence of the social welfare of human dignity.

Increasingly, courts are recognizing that living with dignity means living in a clean environment with a stable climate.

means for the state’s ends, no matter how laudable. When the courts of Latin America speak against *cosificar*—literally, “to make into a thing”—they, too, are protecting against objectification. In Colombia, the Constitutional Court held that in cases of rape, “the woman’s dignity is subjugated by the force necessary to convert her into an object of he who exercises power over her. Similarly, her dignity as a human being is denied when the legislator imposes on the woman, likewise against her will, the obligation to serve as an instrument effectively to procreate by penalizing abortion without any exception In these cases, [to prohibit abortion] would be to objectify the woman as only a womb, separated from her consciousness.” The Malaysian High Court, too, has found that “Rape is an experience which shakes the foundations of the lives of the victims. The offence of rape must be dealt with as the gravest crime against the human dignity.” These strains of dignity law should protect against modern forms of slavery including the trafficking of women and children and forced and child marriages.

Living Well, or La Vida Digna

Although each newborn baby may have an equal share of human dignity, many people

The Supreme Court of Israel has observed that “Human dignity is violated if a person wishes to maintain his life as a human being within the society to which he belongs, but finds that his means are poor and his strength is too weak to do so.” The Indian Supreme Court, too, has repeatedly insisted that the right to life includes the right to live with human dignity and “all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

Similarly, the Peruvian Constitutional Tribunal has recognized that the unjustified denial of social security benefits, including pensions, “indubitably deprives a person of his right to the minimum necessities of life for his subsistence, impeding his satisfaction of basic necessities, which is a direct threat to his dignity.”

Increasingly, courts are recognizing that living with dignity means living in a clean environment with a stable climate. In one case from Nigeria, the Court held that gas flaring violated the petitioners’ constitutional “right to respect for their lives and dignity of their persons and to

enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.” Ireland’s High Court has recently recognized that “A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights.”

Living without Humiliation

Claims of direct state violation of human dignity are most common where the claimant is within state custody or otherwise dependent on the state and not fully autonomous. The Constitution of the Maldives recognizes this, regardless of the reason for the dependence, by saying, “Everyone deprived of liberty through arrest or detention as provided by law, pursuant to an order of the court, or being held in State care for social reasons, shall be treated with humanity and with respect for the inherent dignity of the human person.”

The very first case of the South Africa Constitutional Court invalidated the death penalty precisely because the state’s taking of a life deprived the person of his or her dignity, just as it diminished the dignity of all members of the society in whose name the killing was done. In Peru, which has explicitly adopted the Kantian principle against objectification, the Constitutional Tribunal said in one case about the equality rights of prisoners that the principle of the dignity of the person, “in its negative version, insists that human beings may not be treated like things or instruments (but rather as subjects of rights and obligations)... since each person, including criminals, should be considered as an end in and of himself.” The Slovenian Constitutional Court has found that the constitutional guarantee of personal dignity “guarantees to every individual that in proceedings in which decisions are made concerning his or her rights, obligations, or legal interests, he or she is treated as a person and not as an object.”

Some of the cases concerning treatment of detainees focus on the physical conditions of detention and the minimum core of comfort that is necessary to ensure that individuals live in dignity. It has been held that prisoners must be able to eat at a table rather than on the ground, that they are entitled to a

certain amount of space, and that prisoners must be allowed reading materials. The right against self-incrimination has been held to preserve human dignity. The Supreme Court of Hong Kong put it this way: “The privilege protects ... ‘the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth.’”

In Germany, the Constitutional Court has twice held that a sentence of life imprisonment with no possibility of release (parole or pardon) implicates not only the right to liberty, but the right to dignity as well. The court explained in a 2005 case that “It would be incompatible with human dignity if the convicted person, regardless of the development of his or her personality, had to abandon all hope of ever regaining liberty.” In an earlier case from the 1970s, the court explained, “This is founded on the conception of man as a spiritual - moral being that has the potential to determine himself in freedom and develop from within.”

Civic Dignity

Courts are also affirming that human dignity entails classic civil and political rights with what the South African Court has called “civic dignity.” In a case granting the rights of prisoners to vote, that Court said, “The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.” In a case about the recognition of political associations, the Argentine Constitutional Court tied the personal to the political in these terms: “The constitutional protection of the right to dignity gives legitimacy to this persecuted group. The protection of [the value of] human dignity implies that the law recognizes ... an ambit of Liberty that is intimate and unfranchisable, that can lead to personal realization (self-fulfillment), such as is required in a healthy society. The protection of this ambit of privacy... turns out to be ... a basis of the essential difference between a state of rights and authoritarian forms of government... [T]he way in which this freedom of association is enshrined in national legislation and ... applied in practice by the authorities, is one of the safest indicators of the institutional health of democracy.”



Conclusion

Dignity rights, it appears, are no more amorphous or subject to interpretive personal whim than any other constitutional provision. There are situations to which it applies and situations to which it does not. Both evolving constitutions and cases demonstrate that the right to dignity is important and impactful. In the aggregate, dignity rights cases show convincingly that constitutional law is, at its core, about the protection of the dignity of the human being who is its subject. Indeed, the judicial invocation of the concept of human dignity is often strategic. Courts could ignore this concept and rely on other constitutional provisions, but they are choosing to invoke human dignity to say something about deeper constitutional values and about the evolving nature of society. They are using the right to dignity to describe what human beings are entitled to just by virtue of being human.

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Observación de los procesos de paz y de justicia en Colombia

I Dr. Gustavo SALAS R. Ph. D.

Del 1.º al 8 de septiembre 2018, 19 abogados internacionales y expertos en derechos humanos viajaron a Colombia para participar en la VI Caravana Internacional de Juristas en Colombia por la quinta vez consecutiva.

La UIA, representada por Gustavo Salas Rodríguez, Director adjunto de derechos humanos y defensa de la defensa del UIA-IROL, fue parte de la delegación.

Ante los constantes ataques en contra de abogados y defensores de derechos humanos en Colombia es que se crea, desde el Reino Unido, este esfuerzo que agrupa asociaciones y abogados con el propósito de visibilizar ante la comunidad internacional esta problemática, así como la de los procesos de transición derivados de los Acuerdos de Paz (de La Habana) suscritos con las FARC (Fuerzas Armadas Revolucionarias de Colombia).

Antecedentes de los Acuerdos de Paz

Luego de décadas (5) de guerra de guerrillas, el gobierno colombiano de Álvaro Uribe logra acorralar a las FARC – incluso hubo un *casus belli* derivado de un bombardeo en contra de las FARC en territorio ecuatoriano, que terminó en la arena diplomática.

El gobierno de Luis Manuel Santos (sucesor de Uribe) logra sentar a las FARC en la mesa de negociaciones y es en La Habana en el año dos mil doce donde alcanzan los Acuerdos de Paz.

Estos tienen varios puntos, de entre los que se destacan los siguientes:

1. Un modelo de justicia transicional en el que se privilegia la verdad y la prontitud, a las penas carcelarias: Jurisdicción Especial para la Paz.
2. Un programa de sustitución de cultivos ilícitos (coca, amapola y marihuana) a través de programas productivos del gobierno.

3. Un programa de restitución de tierras (aproximadamente tres millones de hectáreas) a los desplazados por la guerrilla.

4. Garantías de No Repetición.

Santos alcanza el Premio Nobel de la Paz y las FARC se desmilitarizan – se transforman en las Fuerzas Alternativas Revolucionarias de Colombia, un partido político que alcanzó diez curules en las pasadas votaciones.

A la salida de las FARC crece otra guerrilla: el ELN (Ejército de Liberación Nacional) quien toma los territorios controlados por aquellas.

A esta guerrilla le hace frente otra más: el EPL (Ejército Popular de Liberación).

Se verifican nuevas elecciones y gana un candidato afín al modelo de Estado neoliberal: Iván Duque que, al decir de la actual ministra de Justicia: “viene con mano dura y con la intención de que no haya un muerto más”; sin embargo, y pese a que en promedio hay un hacinamiento del 54% en las cárceles colombianas (aunque hay algunas que llegan al 400% según el Equipo Jurídico Pueblos de Bucaramanga) el nuevo presidente anunció volver a criminalizar el consumo mínimo de narcóticos así como a los cocaleros.

¿Qué observó la Caravana?

LA VI CARAVANA INTERNACIONAL DE JURISTAS, integrada en esta ocasión por diecinueve abogados de: España, Holanda, Italia, México (delegado de la UIA-IROL) Reino Unido y Suiza, tuvo ocasión de reunirse en Colombia con actores del conflicto: abogados y defensores de derechos humanos, víctimas, organizaciones campesinas, universidades, autoridades colombianas y organizaciones no gubernamentales.

La Plaza Bolívar, en Bogotá, nos recibió con una especie de “tarea universitaria” en la que se hacía una representación con

máscaras hechas con bolsas de estraza, en la que se realizaba una ejecución. En un cartel se leía:

**“¡Nos están matando!
No más defensores de derechos humanos asesinados.”**



Al ir conociendo opiniones y testimonios de diversos sectores, se encontró que los Acuerdos de Paz no se están implementando y que la violencia ha crecido de manera alarmante.

El reclamo generalizado es que cada cuatro días muere un líder campesino o de organizaciones defensoras de derechos humanos – incluyendo al medio ambiente sustentable. Casos que quedan impunes y, como mucho, con líneas de investigación a autores materiales pero no a los intelectuales, subraya un abogado de la Corporación Colectiva de Abogados José Alvear Restrepo, hoy magistrado electoral de Colombia.

“No hay gobernabilidad en varios territorios”, – afirma Luis Alberto Rojas de la Mesa de Desplazados del Norte de Santander, Sector Víctimas de Marcha Patriótica.

“Yo sé que me van a matar” ; dijo Orgel Pérez, líder de ASCAMCAT (Asociación Campesina del Catatumbo) quien llevaba 52 días sin poder ver a sus hijos pues había sido

desplazado a causa de un nuevo atentado en su contra. A su hermano lo habían matado meses atrás – jamás le llegaron las medidas de protección autorizadas por la Unidad Nacional de Protección (UNP) consistentes, estas, en un chaleco anti-balas, un celular (refiere que en el campo no hay señal) y un botón de pánico.



“Ya me asesinaron a dos hermanos, a mi tío, a sobrinos, seis familiares... yo he sufrido ya 4 atentados y sé que me van a matar pero se trata de la defensa de la vida de la comunidad y del territorio”, – nos dijo.

Las amenazas, hostigamiento, judicialización y muerte han sido recibidas básicamente por la mayoría de defensores y abogados defensores de derechos humanos. El acceso a la Corporación Colectivo de Abogados José Alvear Restrepo (CCAJAR) en Bogotá es mediante doble puerta blindada que solo permite abrir una a la vez.

Los abogados del Equipo Jurídico Pueblos en Bucaramanga traen asignado un vehículo y un chofer “para su protección” – aun así, a uno de ellos ya le mataron al hermano.



La abogada directora de la Corporación Colectivo de Abogados Luis Carlos Pérez (CCALCP) en Cúcuta, Norte de Santander, trae un escolta armado y una camioneta blindada proporcionada por la UNP. Ya violentaron su casa partiéndole la puerta de acceso en dos: solo encontró movida su computadora; no faltaba nada.

La Unidad Nacional de Protección (UNP) es un órgano dependiente del Ministerio del Interior y, entre otras funciones, se encarga de asignar medidas de protección a líderes y a defensores de derechos humanos. “Actualmente está desfinanciada. No hay dinero para acabar el año.” Comentó la señora ministra de Justicia del actual gobierno.

Meyli Gómez es una lideresa transgénero de un colectivo LGBTTT en el Catatumbo, Norte de Santander: Red Derechos Humanos Marcha Patriótica. Por su grado de riesgo trae dos escoltas y un vehículo blindado. Su trabajo se halla en comunidades de difícil acceso. La UNP solo tiene convenio con una gasolinera en Cúcuta, por lo que no hay manera de recargar combustible de regreso del Catatumbo. Recientemente Meyli está siendo investigada por uso indebido de las medidas de protección: argumentan que ir al Catatumbo pone en riesgo a sus escoltas...

El Tarra, Norte de Santander, es un poblado rodeado por las guerrillas: Ejército de Liberación Nacional (ELN) y el Ejército Popular de Liberación (EPL) y dominado por el narcotráfico y los paramilitares.

En la región del Catatumbo señalan la existencia de aproximadamente 13 mil efectivos del ejército dispuestos en cuatro bases militares. Hay 22 refugios humanitarios. El pueblo cuenta con una numerosa fuerza policíaca, narra Holmer Pérez (también líder del ASCAMCAT). Para entrar a El Tarra normalmente hay que pasar un filtro policíaco en el que revisan exhaustivamente vehículo y tripulantes.

Para que las guerrillas no se acerquen entre sí, tomaron la increíble decisión de sembrar minas antipersonal que han cobrado ya nueve amputados, campesinos ahora temerosos de salir a trabajar su amada tierra, y la vida de un niño de diez años. La deshumanización de la guerra y de la violencia...

Estas violaciones graves a derechos humanos implican prácticas sociales genocidas, al decir del director del Equipo Jurídico Pueblos, de Bucaramanga.

Existe una oficina de la OEA en Bogotá encargada de la desactivación de estas minas antipersonal.

En estas circunstancias, el treinta y uno de julio pasado, hubo una masacre en El Tarra. Un comando entró al pueblo, abrió fuego y dio cuenta de nueve vidas. “La base militar está a quince minutos y jamás llegó el ejército”, – refiere Holmer.

Hasta el momento no se sabe nada, ni quién fue, ni por qué; el ELN se deslindó de la masacre. Ha sido el único.



Principalmente desde la época del conflicto (con las FARC) ha habido y hay procesos criminales por desapariciones forzadas en los que se hacía pasar a un campesino pobre, a un drogadicto o a un indigente, por guerrilleros de las FARC que eran presentados por el ejército como “muertos en combate”.

Estos casos se conocen como: “Falsos Positivos”.



Un joven de extracción humilde fue blanco de una “reclutadora” – como se les conoce – quien con la promesa de darle trabajo

le convenció de viajar a un determinado lugar. Allí les tomó el ejército, les vistió con uniformes de las FARC y les hizo caminar por una veredita. Entonces los cocieron a tiros militares que los estaban esperando para emboscarlos. “Presentaron a mi hijo como un combatiente de las FARC muerto en combate, cuando había estado tres meses hospitalizado por una apendicitis que se complicó en peritonitis y apenas acababa de empezar a salir de nuevo a buscar trabajo, tenía veintidós años”, – dijo la señora Alia Aranda Ruiz, madre de este falso-positivo víctima del ejército y los paramilitares: Ricardo Rueda Aranda.



“No quiero que mi caso se vaya a la JEP”. “La JEP es impunidad”, – dijo con los ojos vidriosos por el llanto retenido la señora Alia.

La JEP, la Jurisdicción Especial para la Paz, el modelo de justicia transicional adoptado en los Acuerdos de Paz de La Habana.

Esta justicia restaurativa consiste en renunciar a penas privativas de libertad severas a cambio de la verdad (*la verdad os hará libres*) llegar a los máximos responsables y un procedimiento rápido.

“Se privilegia la verdad puesto que para los supervivientes de las víctimas es más reparador saber dónde quedaron los cuerpos y cuáles fueron las razones y los responsables, que una larga pero improbable pena de prisión”, – señala el titular de la Representación Territorial de la Secretaría Ejecutiva en Norte de Santander de la JEP.

Los procesos ordinarios en Colombia son demasiado largos; los procesos civiles, por ejemplo, tienen una duración promedio de quince años.

Cuando el caso se ubica en la hipótesis de procedencia para la JEP se envía a la Sala de

Definición de Situaciones Jurídicas la que calificará el caso en un período de hasta tres años (prorrogables por tres años más).

Al enviarse el caso a la JEP se suspenden las medidas cautelares que se hubiesen dictado (como prisión preventiva).

La JEP solamente tiene tribunales en Bogotá, lo que dificulta el traslado de las víctimas de comunidades remotas a las audiencias, en un país en el que, cabe mencionar, la red de carreteras es deficiente y los traslados terrestres complicados desde tales zonas apartadas.

Si el militar o el guerrillero cuentan la verdad, entonces las penas van de entre cinco a ocho años de prisión. Si mienten, la pena puede ser de hasta veinte años de prisión – en cualquier caso, ante la posibilidad de enfrentar a la justicia ordinaria con una pena de más de cincuenta años, en la JEP aun siendo culpables esta sería de veinte.

“La JEP solo debe aplicarse a casos verificados dentro del conflicto, pero no a casos de graves violaciones a derechos humanos que no se dieron en el mismo; el problema es que todo lo quieren mandar a ese procedimiento.” Señala Julia Figueroa del Corporativo Colectivo de Abogados Luis Carlos Pérez (CCALCP) – también amenazada.

En Colombia existen fiscalías especializadas en derechos humanos y derecho internacional humanitario. Han funcionado razonablemente bien – según varios defensores; sin embargo, al decir de funcionarios de alto nivel en Bucaramanga,

hay intenciones del fiscal general (quien había sido anteriormente civilista y abogado de multinacionales) de desaparecer estas unidades altamente especializadas y mandar los casos de violaciones a derechos humanos a las fiscalías comunes.

Se teme que las investigaciones de estos casos de violaciones graves a derechos humanos se empantanen, como ocurre en general con la falta de investigación por parte del Estado.

Hay un sin número de casos sin resolver. Acusan violaciones sexuales sistemáticas por parte de miembros del ejército a jovencitas de pueblos aislados: se tuvo conocimiento de un caso en el que pese a imputación directa al militar violador, la denuncia jamás fue levantada: todas las autoridades a las que la madre de la adolescente víctima acudió rechazaron iniciar investigación alguna. La “justificación” que escucha de otras víctimas es que “a todas les va a tocar”; “suerte que no fue la guerrilla, porque esa no nada más viola, se las llevan y no se les vuelve a ver jamás.” – relata esta víctima “A. H.” de Ocaña, Norte de Santander.

“N. J.”, una defensora medioambientalista del municipio El Carmen, Santander, recibe amenazas y pronto recibe la visita de su sicario: a su casa se presentó su ex-pareja quien le dijo que “de ese día no podía pasar”. Forcejearon, la azotó contra la pared provocándole una contusión, la violó y luego le puso un cuchillo en la garganta para reiterarle que “de ese día no podía pasar”. Ella le pidió agua, como su última voluntad. Su ex-pareja consintió y ella aprovechó para escapar. En la oscuridad





de la noche rodó, desnuda, ladera abajo. Las piedras cortaron su piel y llenaron de contusiones su violentado cuerpo. Como pudo llegó arrastrándose a casa de sus padres para luego huir lo antes posible. Pese a la imputación directa de su agresor y los indicios de quienes ordenaron su ejecución, la investigación no se mueve.

Mientras tenían como preso político al padre de Alida Teresa Arzuaga Villa, de Zapatoca, Santander (otro falso – positivo) le comunicaron en la prisión que ya estaban dado cuenta de su niña de 9 años; mientras le decían esto, su madre, la señora Shirley, la buscaba frenéticamente por todo el pueblo. A la mañana siguiente la encontraron en una zanja con signos de tortura, violación múltiple (se hallaron diferentes tipos de semen) y muerte por asfixia mecánica: se señala que fue a manos del ejército y paramilitares. Cuatro días antes habían retirado a la familia las medidas de protección de la UNP.



Según la directora de la URT, Unidad de Restitución de Tierras, se llevan tramitadas más del 75 % de las solicitudes correspondientes a los más de tres millones de hectáreas de terrenos de los que el conflicto con la guerrilla de las FARC provocó desplazamientos.

De acuerdo con el colectivo Humanidad Vigente, de Bogotá, de los tres millones de hectáreas de tierras despojadas solo se han devuelto trescientos mil hectáreas (i. e., 10 %).

El nuevo gobierno (de Iván Duque) pretende volver a la criminalización del consumo mínimo o personal de narcóticos – lo que criminaliza, a la vez, la enfermedad de la adicción. De la misma manera presiona a los coccaleros que cumplan con su compromiso, según los Acuerdos de Paz, de que sustituyan sus cultivos ilícitos.

“Amenazan con perseguir criminalmente a todos aquellos que continúen sembrando coca; muchos coccaleros están dispuestos a la sustitución de cultivos, pero el gobierno no ha cumplido con instaurar ni un solo proyecto productivo según lo pactado. “¿De qué vamos a vivir? Si en el Catatumbo no hay acceso a los poblados, son todas veredas, no se han construido carreteras como se prometió. ¿Qué sembramos? ¿Bananas? ¿Quién nos las compra? ¿Cómo las sacamos



y comercializamos? Además ¿usted cree que nos van a dejar que dejemos de sembrar?” El gobierno amenaza también con retomar las fumigaciones con glifosato (luego de que se realizaran fumigaciones aéreas por 40 años) a pesar de que estas se prohíben en los Acuerdos de Paz. Son 123 mil familias coccaleras las que se verían afectadas directamente con estas fumigaciones. El glifosato es como el agente naranja que rociaban en Vietnam y que deja toda la tierra estéril”, – dijo Junior Maldonado de Juventud Rebelde integrante del Frente Fronterizo por la Paz, parte de Marcha Patriótica, quien fue secuestrado a pesar de contar con medidas de la Unidad Nacional de Protección.

“Solo hubo un proyecto productivo piloto para poder ir a la sustitución de cultivos y fue un fracaso, el plan piloto Caño – Indio.” “Se están favoreciendo monocultivos, principalmente de palma de aceite: esto genera desiertos verdes”. Señaló Elizabeth Pavón, presidente de la ASCAMCAT.

“Se está acabando con la identidad del campesino para volverlo un trabajador rural, que termina ganado un salario mínimo, sin considerar que el campesino es parte del ecosistema”, – señala al respecto el abogado defensor de derechos humanos (también amenazado y con medidas de protección) Rommel Durán del Equipo Jurídico Pueblos.



Y no solo es el conflicto y las soluciones que se intentan dar al conflicto, como los monocultivos, sino que otro terrible elemento que erosiona no solo a la tierra, sino al tejido social, es la minería de carbón a cielo abierto.

“El Cesar (departamento al noreste de Colombia) es rico en agua, madera, petróleo, hay tres tipos de carbón, oro, esmeraldas y uranio 235 (del que se usa para hacer bombas nucleares).”

“Ya una ciénaga está muerta: ya no se puede pescar. Ya hay gente que se empieza a enfermar por el polvillo del carbón, que también esteriliza la tierra. Los mineros están todos muriéndose. Jovencitos ya todos con los pulmones echados a perder. Mucha enfermedad. Las empresas no responden ni mucho menos reparan los daños. Por el contrario, las empresas tienen sus propias tiendas y ponen cantinas con prostitutas y entonces los trabajadores se dejan medio salario allí mismo.”

“70 % del Cesar, que es uno de los territorios más saqueados, tiene peticiones de concesión minera. Las transnacionales son casi de todas partes.”

“El que habla contra una minera: se muere.”
“La gente debe saber que ese carbón que va al mundo está manchado de sangre”, – dijo un vocero del Movimiento de Trabajadores Campesinos y Comunidades del Cesar (MTCC) cuyo nombre pidió permaneciera en anonimato debido a las amenazas de muerte en su contra (y que aparece de espaldas).

Toda manifestación pública en contra de mineras o transnacionales, oposición a mega – proyectos o incluso por reclamar violaciones a derechos humanos es sofocada violentamente por las fuerzas públicas. Acusan de la Fundación Miriam Castellón, de Cúcuta, Norte de Santander. “Los defensores de derechos humanos son vistos como enemigos para el gobierno.” “Utilizan balas de goma modificadas para producir daño.” Estos mismos sometimientos por la fuerza de marchas o manifestaciones sociales se relatan por el Equipo Jurídico Pueblos.

A la resistencia a proyectos transnacionales y al conflicto de las mineras se suma el señalamiento de empresas embotelladoras

(como Coca Cola) que obtienen concesiones sobre acuíferos que provoca dejar sin agua a comunidades enteras – en pro de tener botellas de agua que no sabemos de dónde vienen ni el costo social que conllevan.

“Hay empresas que utilizan paramilitares para golpear el movimiento sindical”, – apunta Rommel Durán.

Según Juan Carlos Quintero, miembro del comité operativo de la coordinación social política Marcha Patriótica Norte de Santander: 39 palmicultores, nacionales y extranjeros, han sido condenados por subsidio a grupos paramilitares.

“Los paramilitares no existen”, – asevera la ministra de Justicia del actual gobierno de Iván Duque y aporta un ingrediente adicional a esta plétora de detonantes:

“Las víctimas han sido sobrevictimizadas porque para los abogados se ha vuelto un negocio demandar al Estado. Allí está de ejemplo el caso de la Finca Las Pavas en el Cesar, en donde no eran víctimas sino que se trató de un falso desplazamiento.”

“Los abogados no han sido conscientes de su rol y responsabilidad; solo buscan dinero y no contribuir con la sociedad. Hay verdaderos carteles de abogados vinculados con la corrupción: ellos aconsejan cómo.”
“Uno no necesita estar colegiado para ser ético.”

“Malas universidades llenan la judicatura, es urgente subir los niveles en las universidades y endurecer el registro de escuelas de Derecho e incluso dar incentivos para que abogados sean jueces.”

Como se puede apreciar, el conflicto es grave. Los agentes beneficiarios están bien identificados: las guerrillas, los paramilitares (ahora conocidos como *grupos delincuenciales*) el narcotráfico nacional e internacional, el negocio de compra de armamento, los concesionarios de recursos hídricos, la agroindustria y la minería.

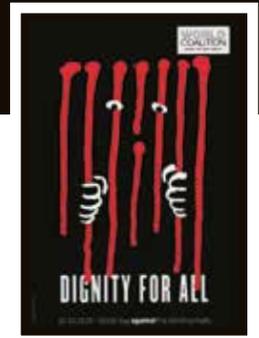
Las víctimas son siempre las mismas: el medio ambiente, las comunidades agrícolas, campesinas, indígenas y afroamericanas que se ven desplazadas de sus tierras o forzadas a los cultivos ilícitos y, desde luego, los defensores y abogados defensores



de derechos humanos que, en Colombia, están siendo sistemáticamente silenciados (en varios casos, para siempre) ante un gobierno reticente en encontrar otras soluciones (la actual promesa de mano dura no abona a la mitigación del conflicto) la falta de avance en los casos de ataques contra defensores de derechos humanos (hasta 8 años en indagación) la falta de investigación a los autores materiales y la resistencia a llegar a los principales responsables (que en casos supone políticos importantes, militares de los más altos rangos o poderosos industriales) son solo algunos de los múltiples derivadas de estos precarios procesos de paz.

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Dignity For All



On 10 October 2018 the World Coalition Against the Death Penalty and abolitionists all over the world celebrated the 16th World Day Against the Death Penalty. This year, the World Day will focus on the living conditions of those sentenced to death.

The World Coalition is addressing the issue because it is aware that regardless of the prospect of execution, the imprisonment of those sentenced to death in itself inflicts considerable physical and psychological suffering, which can in some cases amount to torture. Striving for the complete abolition of the death penalty also means we cannot ignore the daily treatment that prisoners sentenced to death endure and their anguish as they face execution.

Since the 1980s, there has been a global trend towards the abolition of the death penalty, a trend which continues to this day.

According to *Amnesty International*, 16 countries had abolished the death penalty in law for all crimes in 1977. Today, two-thirds of all countries (142) are now abolitionist in law or in practice.

However, according to Amnesty International's 2017 annual report, at least 21,919 people were known to be under a sentence of death worldwide at the end of 2017. *The Cornell Center on the Death Penalty Worldwide* estimates the number of people sentenced to death around the world to be slightly less than 40 000.

Although people on death row are entitled to the same basic rights and treatment conditions as other categories of prisoners, as set out in **the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela rules)**, many testimonies document the inhumane living conditions that people sentenced to death endure.

In addition, people on death row have very little contact with their family and lawyers, as access to death row is often very limited. Therefore, the conditions of detention affect not only the person sentenced to death but also their families and their relatives.

The death penalty in numbers ¹

107

**countries have abolished the death penalty
for all crimes**

7

**countries have abolished the death
penalty for ordinary crimes**

28

countries are abolitionist in practice

56

countries are retentionist

23

countries carried out executions in 2017

In 2017,

**the top five executioners were China, Iran,
Saudi Arabia, Iraq and Pakistan.**

1. Amnesty International, « *Death Sentences and Executions in 2017* » (ACT 50/7055/2018), April 2018.

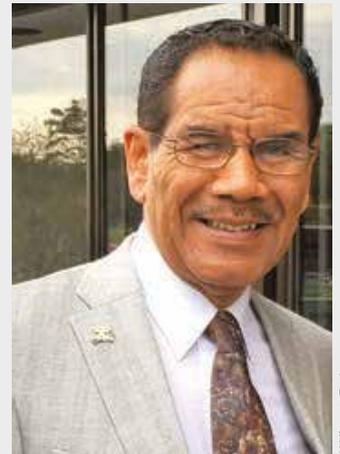
UNITED STATES

State of Louisiana

Wilbert, sentenced to death in 1961 and released in 2005

Although conditions of detention for people sentenced to death vary from one country to another, they always affect not only the person sentenced to death, but also their families, relatives, lawyers, and others.

“ I spent more than a decade on Louisiana’s Death Row. It was a cruel and brutal place. You live, day to day, week to week, month to month, with no kind words, no friendship, no love, no caring, no tenderness - nothing but the weight of society’s wrath directed at you, demanding your death. In my 6’ x 8’ cell, there was room to pace four steps in one direction and four steps back, like the zoo animals, back and forth, day after day. We lived with vermin in our cells – roaches, mostly – and used the bare hanging bulb that lighted our cage to inspect our food trays for hair and insect parts. The temperatures on Death Row (where the windows are sealed shut) had often exceeded 100 degrees Fahrenheit (37.8 degrees Celsius). The inmates would lie on the concrete floor in the nude trying to stay cool. One court ordered the prison to provide air conditioning to lower the temperature to 80 °F (26.7 °C). This decision got reversed by a higher court, which saw nothing inhumane in making the men on Death Row suffer to the point of heat exhaustion.



Wilbert Rideau

Source: **Wilbert Rideau**, former death row prisoner, whose death sentence was commuted to a long-term prison sentence, which he purged. He became an author and award-winning journalist while he was in prison. Testimony collected by Sant’Egidio.



“Our Ugly World”

Drawing by **Arthur Angel**, who was sentenced to death and spent 16 years in the prison of Enugu Prison in Nigeria. He was released in 2000 after all charges against him were dropped.



Minutes Before Six

Death row cell, Polunsky prison in Texas.

The impact of the conditions of detention as seen



Amnesty International

Sakae Menda, an innocent man who was on death row in Japan for 34 years.



DR

"I Spent 34 Years on Japan's Death Row". D. MacNeil

JAPAN

Sakae spent 34 years on death row in Japan

“ The prisoners adhere to a rigid schedule, beginning at 7am and ending at 9pm. They have 3 daily meals and evening cell inspections. They are not allowed to communicate with fellow prisoners, nor are they allowed to move about their cell as they are required to remain seated. They are given thirty minutes of exercise, such as skipping rope or running in place, several times a week. No exercise is allowed inside the cell. They are permitted to bathe twice a week (increased to three times during the summer months), for 15 minutes. They are subjected to round-the-clock monitoring by a camera on the ceiling of each cell, intended to prevent attempts at suicide, self-injury or escape. According to a letter smuggled out by one prisoner, the cells were frigid in the winter and suffocating hot in the summer, and meal time consisted of eating smelly rice next to the toilet. During the day, they could not lie down nor lean against the wall. At night, they must sleep under a bright light. One prisoner reported that they would sometimes receive chobatsu (punishment), where in one case a prisoner spent 2 months with his hands cuffed and had to eat like an animal. Prison visits are limited to a bare minimum.”

Japan is one of only two industrialized countries (the USA is the other) that retains the death penalty and carries out executions. Japan's use of the death penalty is veiled in secrecy, with prisoners informed of their fate just moments before their execution and relatives told only after the fact. Among those executed have been prisoners experiencing serious psycho-social disabilities.

Sources : "A Secret Theatre : Inside Japan's Capital Punishment System", C. Lane. "I spent 34 years on Japan's Death Row", D. MacNeil. "Hanging by a thread. Mental health and the death penalty in Japan", Amnesty international.

through the eyes of those who are subjected to them

MOROCCO

Maya*, wife of a man sentenced to death

“*My husband suffers from several diseases. When I see him, I see a living dead. He was sentenced to death twelve years ago, and for twelve years I too have endured his ordeal. I suffer the gaze of society. He is an outcast so I became an outcast. Often I tell myself that they do not even need to execute him, the hell of incarceration is going to kill him. Seeing how they are treated, I tell myself they do not even need to execute them. As soon as the phone rings, I always imagine that I will be told “Come get your husband's body ...”*

* Her name was changed. Source: “*Journey to the Living's Cemetery, Fact-finding Mission on Death Row in Morocco*”, OMDH, ECPM.

DRC

Olivier, lawyer of a person sentenced to death

“*The Uvira District Prison was built in 1948 to house 150 prisoners. Today there are 828, including 11 sentenced to death. My client lives in Cell #2, in which 143 other prisoners pile up in a room of 7 by 6 meters. They sleep six per mattress. Others lie on the ground or spend the night on canvas bags tied to the beds with ropes. For food, once a day my client receives a small slice of corn served with a small portion of beans doused with a 70 g box of tomato sauce, half full. Today, his body is skinny. For medical care, only two nurses report to the health facility next to the prison. And if he is sick, he has to buy his own medicine. But with what money?”*

Source: testimony collected by Pax Christi-Uvira, DRC.

BELARUS

Tamara, mother of Pavel, executed in 2014

“*When I came to visit my son, he was bent over to the floor as a convoy of 10 people led him along. When I saw the number of guards they had deployed to bring him to me, I couldn't help myself and asked ironically whether they needed to call for more guards. Then he confessed me that, inside, he was frequently subjected to verbal taunts and psychological pressure from prison staff.”*



HRC VIASNA

Death row cell in pretrial detention centre N°1 in Minsk, 2006.

The daughter of **Henadz**, sentenced to death in 2014

“*Since the death sentence entered into effect - it's been three months now - we do not receive any letter from him. So, I am in a permanent state of uncertainty about his state, wondering whether he's still alive. Because from what I know, officials never communicate the date of the execution, they don't allow relatives to know if a convict has been shot or not. And when it's over, corpses are not returned to families, nor personal belongings.”*

Source : “*Death Penalty in Belarus. Murder on (Un)lawful Grounds*”, FIDH and VIASNA.

International Standards for Prison Conditions

Although Article 6 of the **International Covenant on Civil and Political Rights** allows the use of the death penalty, the actual practice of the capital punishment is not left to the unfettered discretion of the State².

Indeed, States must comply with various safeguards such as the prohibition against torture and cruel and inhuman or degrading treatment, set out in Article 7 of the **International Covenant on Civil and Political Rights** (“**ICCPR**”): *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

Death row phenomenon as a breach of Article 7 of the ICCPR Covenant

Life on death row can lead to severe mental trauma and physical deterioration of people sentenced to death. The “**death row phenomenon**” is internationally recognized. It generally combines 3 factors: the harsh conditions of detention, the excessive length of incarceration and the anguish of living under a death sentence. This “**death row phenomenon**” amounts to a violation of the prohibition against cruel, inhuman or degrading treatment. Thus, at a domestic level, several courts have recognized that conditions on death row constitute a possible breach of article 7 of the ICCPR.

2. United Nations General Assembly, International Covenant on Civil and Political Rights, Res. 2200A (XXI), Art.6 (Mar. 23, 1976).

3. The Nelson Mandela Rules are available here: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

The Nelson Mandela Rules

The **Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)** are, to date, the most robust set of standards in the area of prison conditions.

Adopted by the UN General Assembly in resolution 70/175 on 17 December 2015, they provide model international human rights standards regarding the basic rights of prisoners. Their stated goal is to *“set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management”*.

Some of the “Basic Rights” of Prisoners Under International Law

1. **Freedom from torture** or other cruel, inhuman or degrading treatment;
2. **Respect for prisoners’ dignity** and value as human beings;
3. **Necessary medical care**, including treatment for mental health issues;
4. **Food of proper nutritional value** and drinking water;
5. **Clean and adequate living conditions**, including sleeping and bathroom accommodations;
6. **Access to open air** and physical exercise;
7. **Adequate personal space**;
8. **Access to educational** and vocational activities;
9. **Regular contact with friends and family**;
10. **Access to legal counsel**.

10 reasons to end the use of the death penalty

1

No state should have the power to take a person's life.

2

It is irrevocable.

No justice system is safe from judicial error and innocent people are likely to be sentenced to death.

3

It is inefficient and does not keep society safe.

It has never been conclusively shown that the death penalty deters crime effectively than other punishments.

4

It is unfair.

The death penalty is discriminatory and is often used disproportionately against people who are poor, people with intellectual or psychosocial disabilities, and members of racial and ethnic minority groups. In some places, the imposition of the death penalty is used to target particular groups based on sexual orientation, gender identity, political opinion, or religion.

5

Not all murder victims' families want the death penalty.

A large and growing number of victims' families worldwide reject the death penalty and are speaking out against it, saying it does not bring back or honor their murdered family member, does not heal the pain of the murder, and violates their ethical and religious beliefs.

6

It creates more pain.

Particularly for the relatives of the person sentenced to death who will be subjected to the violence of forced mourning.

7

It is inhuman, cruel, and degrading.

Conditions on death row and the anguish of facing execution inflict extreme psychological suffering, and execution is a physical and mental assault.

8

It is applied overwhelmingly in violation of international standards.

It breaches the principles of the 1948 Universal Declaration of Human Rights, which states that everyone has the right to life and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. On five occasions, the United Nations General Assembly has called for the establishment of a moratorium on the use of the death penalty.

(Résolutions 62/149 in 2007, 63/168 in 2008, 65/206 in 2010, 67/176 in 2015, 69/186 in 2014 and 71/187 in 2016).

9

It is counterproductive.

By establishing the killing of a human being as a legal solution, the death penalty promotes the idea of murder more than it fights against it.

10

It denies any possibility of rehabilitation for the criminal.



www.worldcoalition.org



World Coalition Against the Death Penalty

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The Legal Profession
La profession d'avocat
La Abogacía



La voix des barreaux

Barreau de Kinshasa-Matete

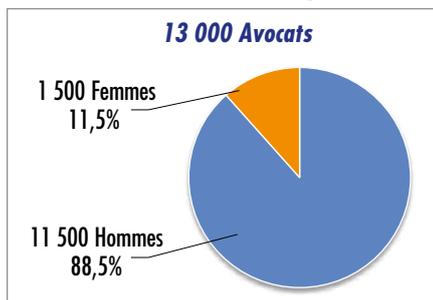
Nouveau membre 2018



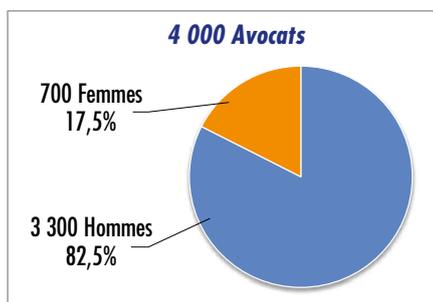
Patricia López Aufranc¹ s'entretient avec des Bâtonniers et des Présidents des membres collectifs de notre organisation pour connaître leurs préoccupations et apprendre comment l'UIA peut les aider, particulièrement en ce qui concerne le respect des principes fondamentaux de notre profession.

M^e Coco Kayudi Misamu, Bâtonnier de Kinshasa-Matete, République Démocratique du Congo, répond à ses questions.

Avocats en RD-Congo



Barreau de Kinshasa-Matete



Pour exercer la profession

- Admission à un barreau
- Examen

Patricia López Aufranc (PLA) : Racontez-nous brièvement votre histoire

Coco Kayudi Misamu (CKM) : Je suis né à Kenge en R.D. Congo, marié et père de 4 enfants. Après mes études secondaires au Petit Séminaire de Saint Charles Lwanga/Katende à Kenge, j'ai poursuivi mes études universitaires en droit économique et social, orientation droit des affaires et investissement à l'Université de Kinshasa où ai fini avec mention distinction en 1999-2000.

J'ai entamé une carrière académique et, à ce jour, je suis Chef de Travaux et Doctorant. Sur le plan professionnel, j'ai été collaborateur de l'actuel Bâtonnier National Tharcisse Matadiwamba Kamba Mutu qui m'a formé, avant de créer mon propre cabinet d'avocats en 2006-2007.

Après mon élection comme Membre du Conseil de l'ordre au Barreau de Kinshasa/Matete en 2010, j'ai sollicité le suffrage des confrères qui m'ont élu Bâtonnier de l'ordre du Barreau de Kinshasa/Matete en 2013.

Aux termes de ce premier mandat, sollicité en 2013, les confrères m'ont renouvelé leur confiance en me réalisant en octobre 2016 pour un second mandat.

J'ai dirigé les commissions de formation professionnelle, de discipline, de recherches, publications et informations du Barreau de Kinshasa/Matete.

PLA : Quelles ont été les motivations de votre campagne pour devenir Bâtonnier ? Quelles ont été les raisons de votre succès ?

CKM : L'idée est de faire du Barreau de Kinshasa/Matete un Barreau émergent et l'un des plus grands d'Afrique.

PLA : Les femmes sont-elles présentes au Conseil de l'Ordre ?

CKM : Il y a deux femmes parmi les quinze membres du Conseil de l'Ordre.

PLA : Comment est organisée la profession dans votre pays ?

CKM : En général, il n'y a que des petits cabinets personnels ou qui rassemblent deux ou trois avocats. Il n'y a pas de grands ou de moyens cabinets. Cela est dû probablement aux difficultés économiques du pays. Néanmoins, il serait intéressant de montrer aux avocats locaux les avantages de se regrouper en équipes pluridisciplinaires pour mieux servir les clients dans les affaires complexes. C'est pour cela que nous avons beaucoup d'intérêt en matière de formation sur le management des cabinets.

PLA : Quel est le principal problème auquel vous faites face en tant que Bâtonnier ?

CKM : Le principal problème est comment encadrer les jeunes avocats ; comment leur assurer la formation.

PLA : Depuis quand êtes-vous membre de l'UIA ?

CKM : A titre personnel, je suis membre de l'UIA depuis 2008. Mon barreau est membre depuis 2016. Notre demande d'adhésion date de 2014.

PLA : Comment l'UIA pourrait-elle vous aider dans votre fonction de Bâtonnier ?

Tel que je l'ai évoqué, l'un de nos principaux soucis est la formation. Je crois que l'UIA pourrait beaucoup nous aider avec des formations et des séminaires. Nous comprenons qu'il est difficile et coûteux d'organiser souvent des séminaires sur place. Même la formation en ligne ou à travers des vidéos nous serait très utile. Surtout pour les jeunes !

PLA : Quels sont les sujets qui vous intéressent les plus concernant la formation ?

CKM : Actuellement nous devrions nous concentrer dans des aspects pratiques de la profession : le management des cabinets, sans oublier la déontologie.

The Voice of Bar Associations



Japan Federation of Bar Associations

New member 2018

PLA : *Que pourrait faire l'UIA pour augmenter le nombre de membres dans votre pays ?*

CKM : Le Comité de Direction, réuni à New York le 29 juin 2018, a entériné ma nomination comme représentant national de l'UIA en R.D. Congo. Je vais travailler activement à cet objectif primordial sous mon mandat.

PLA: Voudriez-vous nous faire d'autres commentaires ?

Bien que notre barreau ne soit pas riche, nous serions en mesure de faire face à un certain nombre de frais pour assurer la formation avec des formateurs étrangers, tel que les frais de déplacement et d'hébergement, ou le coût des matériaux tels que les vidéos.

Coco KAYUDI MISAMU
Bâtonnier de Kinshasa

République Démocratique du Congo
barreaukinshasamatete@yahoo.fr



I. Entretien réalisé par Patricia LÓPEZ AUFRANC, Directrice Adjointe – État de Droit – UIA-IROL, Marval, O'Farrell & Mairal, Capital Federal, Buenos Aires, Argentina, pla@marval.com

Patricia López Aufranc interviews leaders of Bar Associations and other collective members of our organization to learn about their concerns and how the UIA may be of help to them, particularly, regarding the fundamental principles of our profession.

Mr Yutaro Kikuchi, President of the Japan Federation of Bar Associations (JFBA), answers her questions.

Patricia Lopez Aufranc (PLA) : *Approximately how many lawyers are there in Japan, and what is the percentage of women lawyers?*

Yutaro Kikuchi (YK): As of July, 2018, we have 40,000 individual members. Approximately 19% of the members are female (7,474).

PLA: *Approximately how many bar associations are there in Japan?*

There are 52 local bar associations that are members of the JFBA.

YK: The JFBA possesses a unique autonomy, free from the supervision of state institutions, and is the sole and supreme organization intended to manage matters relating to the guidance, liaison, and supervision of all attorneys, legal professional corporations, registered foreign lawyers, registered foreign lawyer corporations, and the 52 local bar associations, in order to maintain the dignity of and to improve and advance the work of its members.

PLA: *Are any of the bar associations in Japan led by women lawyers?*

YK: As of 2018, 5 local bar associations are led by female presidents (Akita, Aomori, Kanagawa, Nara, and Oita).

PLA: *How is the JFBA organized and how is governance structured?*

YK: The legislative bodies consist of the General Meeting, the House of Delegates,

the Board of Executive Governors, and the Board of Governors. The legislative body in charge of deciding a given matter depends on the importance of that matter. As for the executives, we have one President (2-year term), 15 Vice Presidents (1-year term), 71 Governors (including Executive Governors, 1-year term) and Auditors (1-year term). We have more than 80 Committees to manage the activities of the JFBA, including human rights protection. We also have a Secretariat that takes care of the day to day management and operation of the JFBA.

PLA: *What is the percentage of women's participation in the governance of the JFBA?*

YK: At the JFBA, we have 3 female vice presidents out of 15 (20%). Amongst the 39 executive governors, 5 are women (12.8%). Six of the 32 non-executive governors are female (18.8%), and one of the 5 auditors is a woman (20%). The JFBA requires that of the 15 vice presidents at least 2 of which must be female.

PLA: *Is association to a bar association mandatory?*

YK: Yes. All attorneys, legal professional corporations, registered foreign lawyers, registered foreign lawyer corporations, and the 52 local bar associations in Japan must be registered with and be members of the JFBA.

PLA: *What are the requirements to be admitted to such bar association, if affiliation is mandatory?*

YK: In order to qualify as an attorney and be admitted to a bar association, one must complete a law school curriculum, pass the bar examination, and complete an apprenticeship at the Legal Training and Research Institute of the Supreme Court. It takes three years in general, or two years for those with basic knowledge of legal studies, to finish law school. Those who cannot go to law school due to financial difficulties or other reasons

may sit for the bar examination by passing a preliminary test which anyone can take. Anyone who passes the bar examination can be admitted to the legal profession after completing a one-year apprenticeship, in which they need to pass the final examination at the Legal Training and Research Institute.

PLA: Does the JFBA have minimum continuous training requirements for lawyers as a condition to remain in the Bar? Do bar associations provide training to lawyers?

YK: All attorneys are required to participate in ethics training courses in their first year after registration, and regularly thereafter. Further, to enhance training programs, the JFBA creates and provides materials to be used at the ethics training courses held at local bar associations. Local bar associations also have their own training programs for newly registered members as well as for other members, and some of the programs are mandatory.

Also, we have various training programs including more than 350 e-learning programs in order for lawyers to improve their skills, some of which are specifically targeted at newly registered lawyers.

PLA: What subjects interest the Bar Associations most, in connection with lawyers' training?

YK: The JFBA and local bar associations offer a large number of training programs for attorneys on various subjects in order to maintain and strengthen public confidence in attorneys and to support attorneys in developing sufficiently their capability to adequately respond to the public's legal needs. Training programs related to divorce matters and traffic accident cases have been consistently popular, presumably as many Japanese attorneys occasionally engage in those types of cases. Also, attorneys appear to be interested in programs related to amendments of major laws and regulations, such as the corporate code, civil code, and code of criminal procedure.

PLA: Does each bar association in Japan have a code of ethics or are there rules at a national level?

YK: We have a code of ethics called "Basic Rules on the Duties of Practicing Attorneys"

applicable to all attorneys. In addition, since April 1998, the JFBA has made it compulsory for all of its members to participate in ethics training courses, and all attorneys are now required to periodically receive training on attorneys' ethics.

PLA: Are there rules prohibiting lawyers to let other professionals join the same firm as partners? For example, engineers to deal with patent or environmental issues.

YK: Yes, there are. It is prohibited by law for lawyers to let other professionals join the same firm as partners.

PLA: Is professional secret at risk in Japan? Where does the attack come from?

YK: Although attorneys in Japan do have the right to refuse to testify about confidential information, both in civil and criminal procedures, confidentiality is still at risk because the confidentiality of communications between attorneys and clients is not guaranteed by law. In an attempt to comply with the recommendation from Financial Action Task Force on Money Laundering ("FATF"), the government tried to impose the obligation to report to authorities when an attorney notices a suspicious transaction by its client. We found that it could result in a breach of confidentiality and also that it could be a menace to the independence of lawyers. So the JFBA opposed such obligation and instead, in 2007, enacted a regulation imposing on its members the obligation to confirm the identity of their clients by checking the ID documents and also to keep documents on cases for a certain period of time. From time to time, the JFBA may update the rule in accordance with the requirements set by the legislation on anti-money laundering.

PLA: Is the JFBA analyzing the impact that Artificial Intelligence may have in the practice of law? Can you share any ideas?

YK: I am quite sure that AI, robots, and other innovations in technology will have a great impact on our practice of law. We are gathering information and analyzing how it may influence our practice and ethics,

aiming at coming up with a strategy to deal with such innovations. I believe there are two aspects on how AI affects the legal world. One is the need to develop a legal system to accommodate the increasing use of AI, such as legal regulation on high-frequency trading of shares under securities related laws and regulations on self-driving vehicles. The other aspect is the use of AI as tools of legal services which can be further categorized into two groups: (i) the use by the general public other than attorneys, where unauthorized provision of legal service should be discussed as a primary issue; and (ii) the use by attorneys, which triggers various issues on the ethics of attorneys. We are currently gathering information through discussions with legal tech companies and others and are also discussing a possible launch of a specialized section within the JFBA that would deal with AI and other technical innovations. I hope that we can learn from the expertise and experiences of other bars around the world.

PLA: What are the main issues that the bar associations in Japan face?

YK: In Japan, we are experiencing significant changes in the legal system, including massive changes in the Civil Code and family laws, the Code of Criminal Procedure, the Corporate Act, labor laws, consumer protection laws, and so on. Moreover, a drastic review of the system to nurture the legal profession including the law school system is expected. Under such a legal environment, we are facing various challenges, but I would like to mention four topics in particular.

First, a civil judicial reform is necessary. A long-held tradition in Japan is that only a small number of civil court cases in proportion to its population are heard and that the government budget for the judiciary is very limited. In order for civil procedures to be more accessible and understandable, we believe that a civil justice reform is necessary. We need to enhance legal aid, we need to improve the function and facilities of court branches, and we need to review evidence collection rules and compensation law. Also, we have to ensure the confidentiality of communications between attorneys and clients. Lowering the handling fee of court for litigation is

critical to facilitate access to justice. Judicial reforms including these issues will be a key for justice for citizens.

Second, human rights protection is always at the top of our agenda. This year in particular, we are working hard on the abolition of the death penalty and hope to have it abolished by 2020, when Japan will host the 14th United Nations Congress on Crime Prevention and Criminal Justice in Kyoto. We will also tackle such issues as establishing a national human rights institution and individual complaints mechanism in order to attain international human rights standards. As Japan is prone to natural disasters such as earthquakes and heavy rain, we worry for the rights of the victims of such disasters, and each time a big disaster hits the country, we set up a headquarters.

Third, the JFBA is committed to push the boundaries of our profession. As the number of attorneys has doubled in the past 10 years, we are working with national and local governments, as well as business enterprises, to find internal posts for attorneys. Also, we believe more lawyers should work as legal guardians. Under Japan's Civil Code, legal guardians are persons who are appointed by the court and have authority to manage and control property and legal acts of an adult ward (i.e., a person who constantly lacks the capacity to discern right and wrong due to mental disability). We are also keen on promoting insurance for legal expenses. As such, we should go beyond traditional areas of practice so that attorneys can play an active part in society.

Last, but not least, we expect that this year will be the year of progress in our international activities. Japan's first international arbitration center, the Japan International Dispute Resolution Center (Osaka), debuted in Osaka last May, to which the JFBA is providing continuous support. We are attending many international conferences and making preparations for the 14th UN Congress, which will take place in Kyoto in 2020. With the UIA, we hope that we will have a fruitful relationship by getting to know each other more.

PLA: Is the JFBA aware of the work of the UIA as regards "defense of the defense"

(i.e., to ensure the free exercise of the profession and that no one be deprived of the right to legal assistance)?

YK: Yes, we are aware of the work of the UIA in that respect, which we highly appreciate. The JFBA has always supported the independence of lawyers, and we are actively committed to human rights protection both inside and outside of Japan, with special regard to the independence of lawyers. The JFBA has issued statements on the situation in Rwanda, Libya, and China, for example, because there was a threat to the profession in these countries.

Japan will host the 14th UN Congress in Kyoto in 2020. The JFBA is involved in the preparation of the event, as we believe that the defense of our profession is one of the key issues that should be discussed on the occasion, which will mark the 30th year since the Basic Principles on the Role of Lawyers was adopted by the 8th Congress in 1990.

PLA: Do you have suggestions or comments on what the UIA could do to attract more Japanese bar associations?

YK: We heard that the UIA is strong and active not only in business law but also in human rights protection. We are looking forward to working together in that field, as the JFBA has its own history and experiences as an advocate and defender of human rights. However, we do not have much information and knowledge on the UIA's activities, so we would like to learn more about it. For example, we would be very eager to know what exactly the UIA does with respect to the abolition of the death penalty.

Also, in order to make its presence felt and attract more individuals to the UIA, it would be very helpful to hold events in Japan.

PLA: How can the UIA help Japanese bar associations?

YK: The 14th UN Congress in 2020 will be a good occasion where the JFBA and the UIA can work together closely.

Otherwise, it is important that the Japanese bar associations and their individual lawyers learn more about the UIA and its activities. It would be useful to hold seminars in Japan

regularly. For example, if the UIA has a seminar or workshop on basic skills like drafting contracts in English, and allows non-UIA members to attend, then it would be a great opportunity for local young lawyers to take a glance at what the UIA is like.

Also, if the UIA sheds a light on the activities of the JFBA or its members, by featuring them in the UIA's publication or website, then it would help us let the world know what is going on in Japan and help us collaborate with our fellow bar associations and lawyers around the globe.

PLA: Would you like to add anything else?

YK: It is a great honor for the JFBA to join the UIA, and we appreciate that a JFBA member was appointed as a counselor to the President of the UIA. One of our vice presidents will attend the Congress in Porto this autumn on behalf of the JFBA, which will be the first appearance for the JFBA's executive members at a UIA event after joining the UIA. We are looking forward to this opportunity to become acquainted with other UIA members.

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Réforme de la justice, avocats & procureurs : aux armes inégales

I Henri CARPENTIER

Un vent de réforme souffle sur la Justice. Elle en a besoin pour s'adapter aux défis de notre temps. Mais le vent qui souffle et qui veut renforcer encore le procureur pour le rapprocher du juge est un vent ancien, qui ne peut qu'accroître le sentiment de défiance des citoyens à l'encontre du système judiciaire.

Devant un tribunal, en matière pénale, le principe est apparemment simple : l'avocat défend une personne qui est poursuivie par le procureur de la République. Après les avoir entendus, le juge rend justice en faisant application de la loi.

Pour que son jugement soit parfaitement éclairé, le peuple français, par la voix de son Parlement, a choisi de faire respecter un juste équilibre: « *La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties. Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement.* » (Article Préliminaire du Code de procédure pénale).

Il s'agit de préserver l'indépendance de celui qui juge, en le plaçant à égale distance de l'avocat et du procureur.

Or, l'application de ce texte est d'une parfaite hypocrisie. Aujourd'hui, dans les tribunaux de France, la balance de la justice est déséquilibrée entre l'accusation et la défense. Car, au quotidien, la séparation entre les autorités chargées de l'action publique et celles chargées de rendre la justice est une fiction vécue par les justiciables.

Les hommes et femmes qui composent ce corps de la magistrature aux deux visages sont issus de la même école. Ils alternent au cours de leur carrière l'une ou l'autre des fonctions, entre siège et parquet. Que ce soit au pôle financier de Paris, ou dans la plus humble des juridictions, leurs bureaux sont au même endroit. Et bien souvent, ils arrivent ensemble à l'audience. Ils ne sont pas Janus aux deux visages opposés, mais Picasso aux deux visages qui se côtoient.

Cette prétendue séparation entre la fonction de justice et la fonction de poursuite est un marché de dupes. Quand il requiert une peine dans la salle du tribunal, le procureur est à côté du juge, à sa hauteur. L'avocat, lui, doit plaider à la barre. Simple « *auxiliaire de justice* », il doit lever le regard pour être entendu.

Entre siège et parquet, cela va au-delà de la proximité. Il s'agit d'une consanguinité. Le Conseil supérieur de la magistrature (CSM) est présidé par le premier président de la Cour de cassation. Mais il est aussi présidé par le parquet, en la personne du Procureur général. Jugement et accusation réunis au sein d'un même corps.

Cette consanguinité déséquilibre le cours de la justice.

A ce titre, le projet de réforme porté par Bernard Louvel, Président du Conseil supérieur de la magistrature, est particulièrement inquiétant : « *réaliser l'unité effective du corps des magistrats en les soumettant tous au même statut garanti par un Conseil supérieur de la magistrature lui-même unique. Les cours et tribunaux seraient ainsi composés d'une seule catégorie statutaire de magistrats aux fonctions différenciées.* » Et lorsque ce projet de réforme s'accompagne, au civil, d'un filtre supplémentaire pour l'accès à la Cour de cassation, comme le revendique encore Bernard Louvel, l'inquiétude est grande.

Ce règne de l'entre-soi est dangereux. Elle rapproche encore ceux que la loi devrait maintenir à distance. Et les éloigne toujours davantage du justiciable.

Bien entendu, lorsqu'ils rendent la justice, les juges savent résister au Ministère Public et faire preuve d'indépendance intellectuelle. Mais cette indépendance doit être renforcée et lavée de tout soupçon : « *Justice must not only be done : it must also be seen to be done.* » (CEDH, 17 janv. 1970, Delcourt c/ Belgique). Il n'y a pas d'impartialité, sans apparence d'impartialité.

Aujourd'hui, en France, la justice doit se débarrasser de ce double visage de Picasso, de la trouble proximité : il faut séparer définitivement celui qui juge de celui qui poursuit. Et mettre ce dernier à égalité avec celui qui défend. Car la charge de défendre un homme n'a pas moins de valeur que de défendre la société.

La réforme qui doit être menée doit être celle d'un parquet indépendant, en droit et en fait, tant à l'égard de l'exécutif qu'à l'égard des juges. Et au même niveau que la défense.

Car, moi, avocat, dans le combat judiciaire du XXI^e siècle, je veux l'égalité des armes.

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Belgique : le Barreau se remet en question

I Jean-Pierre BUYLE

In 2017, the Minister of Justice commissioned two independent personalities to draft a report on the future of the profession of legal attorney (avocat, advocaat) with a view to preparing a plan for its modernisation.

This task was entrusted to two independent experts: Mr Patrick Henry, former chairman of the Bar Association of Liège and former president of AVOCATS.BE, and Mr Patrick Hofströssler, lawyer and former administrator of the Flemish Bar Association.

They met with a variety of stakeholders, attorney representatives and other professions (magistrates, bailiffs, company lawyers, notaries, companies, etc.) and submitted their report in early 2018.

This report consists of 654 pages and 38 recommendations. It has been submitted to the bar associations. It has been examined, analysed and discussed in numerous circles. A real democratic debate took place throughout the country.

At the beginning of summer, my Dutch-speaking counterpart and I met with the Minister of Justice to present him the position of Belgian attorneys and to advise him of several counter-proposals.

Autorégulation et irréductibilité

Dans notre réponse au ministre de la justice, nous avons rappelé que l'autorégulation des Ordres est essentielle. C'est à eux qu'il appartient le soin de décider de la manière dont les avocats envisagent leur avenir. Nous sommes libres de nous organiser et de nous associer comme nous l'entendons. Il en va d'autant plus ainsi que les Ordres ne sont aucunement financés par de l'argent public.

Nous faisons aussi le pari que la profession n'est pas réductible aux notions d'entreprise

et de marché. Le marché c'est bien, les droits de l'homme et de la défense, c'est mieux.

La profession d'avocat se trouve dans son identité et non dans l'adoption de modes de fonctionnement. L'avocat survivra en se distinguant des autres professionnels et non en se diluant. L'avocat reste avant tout un contre-pouvoir, maillon indispensable de la démocratie dans tout État de droit.

La production des services des avocats n'est pas qu'une production égoïste. Elle contribue à fournir une réponse dont la collectivité dans son ensemble peut bénéficier. La production de services de justice a parfois de bonnes raisons de s'affranchir des lois de l'offre et de la demande. Il faut accepter ce qu'on ne peut pas changer.

À l'heure actuelle, nous ne sommes pas favorables à la grande profession du droit qui permettrait de cumuler sur la même tête les professions de notaires, d'huissiers, de juristes d'entreprises et d'avocats. Il n'est pas exclu de penser que ce rapprochement puisse intervenir dans les années 20.

Nous sommes opposés à la suppression de l'incompatibilité avec la fonction d'agent d'État (ou plutôt de fonctionnaire). Nous plaçons, par contre, pour l'introduction de règles strictes de conflits d'intérêts lors de l'exercice de fonctions ou de mandats politiques.

Nous sommes favorables à de nouvelles activités, telles qu'avocats détachés en entreprises ou avocats liquidateurs de dommages.

L'indépendance est une exigence fondamentale du bon exercice de la profession.

Une formation initiale et un accès à la profession réformée

Nous sommes favorables à une réforme de la formation initiale. Nous prônons une formation professionnelle de quatre mois entre l'obtention du diplôme en droit et la prestation de serment. Cette formation doit être assurée par des avocats rigoureusement choisis, et sanctionnée par un examen sérieux. Cela devrait permettre aux candidats avocats de trouver un stage plus aisément.

Cette réforme implique de doter l'élève avocat d'un statut social non pénalisant. Notre objectif est de rendre cette réforme effective dès la rentrée judiciaire de septembre 2019.

Périmètre de la profession

AVOCATS.BE n'est pas au bout de sa réflexion sur le périmètre de la profession. Le cœur de notre métier reste la représentation en justice, l'évaluation juridique et le conseil.

Nouveaux services

De manière prioritaire, nous souhaitons donner force exécutoire aux actes d'avocats. Cela vise, par exemple, le cas de la transaction intervenue sous seing privé entre les parties, à l'intermédiaire de l'avocat et qui serait homologuée par le juge.

Ces actes font partie du *core business* de l'avocat. L'homologation judiciaire s'inscrit dans une logique cohérente de l'homologation des autres modes alternatifs de règlements de conflits.

D'autres actes pourraient aussi être formalisés de cette manière : certains actes de société, ou en matière successorale, l'introduction du divorce extra-judiciaire, etc. C'est l'intérêt des justiciables.

Nous sommes aussi favorables à donner aux avocats une place centrale dans le cadre

des actions en réparation collective de droit commun. Nous serions d'ailleurs partisans de supprimer l'interdiction du pacte de *quota litis* pour ce type de contentieux uniquement.

Il s'agit d'une question d'accès à la justice.

Création d'un juge du secret

Actuellement, le bâtonnier est présent aux côtés du juge d'instruction lors des perquisitions au cabinet de l'avocat. Lorsqu'il y a divergence de vues sur le caractère secret ou non d'une pièce, le juge instructeur a le dernier mot, même si cela se fait sous le contrôle, *a posteriori*, du tribunal de fond.

Nous souhaitons la création d'une juridiction indépendante du secret professionnel de l'avocat, en appel de la décision du juge d'instruction.

Confier à un juge indépendant le soin de décider, préalablement aux débats sur le fond, de la recevabilité d'une pièce soumise au secret, permet d'éviter que le magistrat instructeur puisse se laisser influencer par le contenu de cette pièce qui s'avèrerait par la suite secrète.

L'indépendance

L'indépendance est une exigence fondamentale du bon exercice de la profession. Elle est tout à l'avantage du justiciable qui ne peut que tirer bénéfice du fait d'obtenir de son conseil un avis qui n'est pas influencé, notamment, par des considérations politiques ou financières. Nous exigeons la consécration de cette valeur essentielle de la profession dans la loi.

L'accès à la justice

L'aide juridique a fait l'objet d'une réforme importante en 2016. La rémunération des avocats a été revalorisée. La valeur du point a été portée à 75 €, majorés de 20 % pour les frais, soit 90 €. Le remboursement des frais de fonctionnement des bureaux d'aide juridique, organisés par les barreaux, a également été sensiblement augmenté.

La nomenclature des points a été revue. Des recours sont pendants devant la

Cour constitutionnelle. Dès que cette haute juridiction se sera prononcée, une première évaluation de la réforme devra être faite. Nous voulons une politique juste et équitable pour les plus démunis.

Parmi nos préoccupations, nous considérons qu'il n'est pas acceptable que les avocats ne sachent pas au préalable quand et à quelle hauteur leurs prestations seront rémunérées. Nous exigeons qu'un débat sérieux et ouvert ait lieu sur cette question. Cela implique de passer à un système de financement fondé sur des enveloppes ouvertes, et non plus fermées comme c'est le cas actuellement.

Nous réfléchissons aussi actuellement à l'opportunité ou non de créer des avocats salariés ou dédiés en aide juridique. Une étude est en cours sur ce sujet avec l'Université Libre de Bruxelles.

Nous souhaitons enfin que le système d'assurance protection juridique soit fondamentalement revu afin de permettre un meilleur accès à la justice aux classes moyennes.

L'État de droit digital

Depuis 2017, l'informatisation de la justice a été confiée aux barreaux. Nous avons initié plusieurs projets avec nos confrères néerlandophones : gestion informatisée des faillites (RegSol), création d'une plateforme commune aux Ordres francophones, germanophone et néerlandophones (DPA), carte professionnelle à puce, dépôt digitalisé des actes de procédures (e-Deposit)... D'autres projets sont en cours de production (notification électronique, médiation de dettes ...).

Nous entendons jouer un rôle essentiel afin d'alléger le coût de la justice et de renforcer la sécurité des communications entre les avocats.

Nous voulons aussi participer à la mise en œuvre de l'intelligence artificielle au service de la profession et des justiciables, en veillant, notamment, au respect des principes de probité et de neutralité dans la définition des algorithmes destinés à mettre en place des outils de justice prédictive. Maîtrisons les algorithmes avant qu'ils ne nous formatent.

Et maintenant ?

Les propositions des experts en matière de gouvernance des Ordres n'ont pas rencontré un vif succès. Se projeter dans l'avenir crée toujours des ombres. C'est le propre des prophètes et des sybilles. Mais fallait-il, dans un rapport public, aborder ce sujet si sensible qui touche aux identités et aux affaires de famille (regroupement des barreaux, redéfinition des compétences des Ordres, égalité des genres, suffrage universel...) ? Par contre, un consensus assez large s'est dessiné sur une réforme du droit disciplinaire.

La mise en œuvre des réformes de la profession sera mise en chantier dès la rentrée judiciaire 2018. C'est une opportunité pour la profession et une chance pour le justiciable. Mais quand on met de l'ordre, on ne peut pas décider à quel rythme cela se fera ou cela ne se fera pas.

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Staffing and Morale in the Age of Robotics and AI Adoption

I Nathalie PIERCE

Background

Developments in technology have increasingly affected people, businesses, and the economy. Specifically advancements in “cobots” (robot coworkers) and increased use of artificial intelligence applications will continue reinventing and redefining the workplace. With these developments, come opportunities for companies to help guide employees through inevitable changes.

The Rise of Robotics and the Advent of Artificial Intelligence: Another Industrial Revolution

The Agricultural Revolution resulted in increased labor and land productivity, catapulting population growth and decreasing the agricultural portion of the labor force. What resulted was an urban workforce, paving the way for the Industrial Revolution. Moving from hand production methods to machine tools and factories, rapid industrialization led to increases in average incomes for workers. The Industrial Revolution created the modern-day labor market model. A third revolution came about in the mid-twentieth century, coined the “Digital Revolution.” It heralded computerization and electronic technology. Today, we are experiencing the Fourth Industrial Revolution, which focuses on artificial intelligence (AI), robotics, and various combinations of technologies. This revolution is characterized by a fusion of many technologies and is evolving exponentially faster than past revolutions. While some are apprehensive about the impact the Fourth Industrial Revolution may have on businesses, jobs, and the economy, many see this revolution as an opportunity to shape our future for the better.

Big Picture: How Will Implementation of Robotics Affect the Workforce?

A lot of media attention has focused on the destruction of jobs due to automation. However, technology and automation

positively affect the workplace. While job destruction is a real effect of automation, historically, efficiency and productivity gains from automation helped create jobs and we see the same phenomenon with the Fourth Industrial Revolution.

Job Displacement, Not Job Destruction

Humans fear the unknown. However, once the unknown reveals itself, people discover what they feared was not so scary. While losing jobs to automation may appear ominous, the financial services company Accenture has proven that automation and job loss need not be synonymous.¹ Accenture automated 17,000 back office jobs, terminating no workers. After 18 months of planning and training, the company retrained staff in order to reskill and reposition their employees. While Accenture realizes that technology will always disrupt the workforce, their experience shows that if companies retrain their staff now, retention will be much higher.

Leaders must agree on timelines, employee communications, what resources will be used, and the main goals of automation.

Amazon is another company that has successfully integrated AI and robotics into the workplace. It has automated some of its warehouses with robotic arms and movable pallets, allowing its employees to engage in more mentally stimulating work. Instead of doing monotonous, heavy lifting, employees now work with computers to determine where to allocate certain products. This warehouse transition has not eliminated jobs, but rather reduced physical demands on employees and increased efficiency. Amazon jobs have more than quadrupled in the last five years.

Rather than keeping workers in the dark and making their future employment a scary “unknown,” businesses can follow

Accenture’s lead and create a transparent business model that prioritizes automation and retraining of employees where possible. The skills gap is already proving to be an issue that many companies struggle with, so businesses must manage the inevitable disruption of the Fourth Industrial Revolution through open communications and collaborations with staff. While this new revolution appears to be formidable, it realistically will only destroy demand for specific tasks, *not* the demand for work.

Managing Morale

Many companies are preparing for AI and robotics in the workplace, with many already using those technologies today. However, only a small percentage of businesses feel that their Human Resources Departments are prepared for the new way of working that AI and robotics bring. Companies agree that using robots will not replace human labor. Instead, the transition

will be much more nuanced. Businesses should not think of jobs holistically; instead, they should break down the tasks within each job. Whatever tasks *can* be automated *should* and *will* be automated.

Planning Ahead

For employers to understand what tasks should be automated, they must first look to each position and uncover work variation and realize what business process complexity are present in each task. One way of doing this is to evaluate each task as either routine or non-routine. “Routine” tasks are those with minimal deviation, which produce simple rule-based output and can be performed in isolation

without social interaction. Tasks such as scheduling calendar invites, customer support communications, and calculating numbers lend themselves to being enhanced by automation because of their routine nature. For example, AI can help free up HR representatives' time by quickly screening through thousands of resumes or streamline a doctor's tasks by scanning through many radiology images to detect illnesses more efficiently. "Non-routine" tasks are those involving significant people management and problem-solving ability, such as interacting with people, thinking over long time lines, developing strategies, and managing complicated work scenarios. These tasks are less likely to be automated.

Even though people's jobs will be changed greatly through rapid automation, it is still commonly thought of as something that will happen to other's jobs, and not their own. Between businesses not knowing how to integrate robots into the workplace and workers not thinking that their own jobs will be affected, the general population appears ill-prepared for a rapidly approaching future. Having clear leadership alignment at the top is crucial for success. Leaders must agree on timelines, employee communications, what resources will be used, and the main goals of automation.

Next, businesses should identify people at the top that will be the 'face' of the transformation. These leaders will communicate important messages to staff to be transparent about changes being implemented. A key aspect of this communication is explaining how automation will become an integral part of the corporate structure. Clarifying to staff how automation will create a better user interface for customers, while simultaneously benefitting workers and cutting bottom-line cost, will help staff become excited for this change.

Lastly, businesses must decide if there will be workforce reductions. People, unlike robots, have strong feelings. If staff numbers must be cut, or if full-time workers must have their hours reduced to part-time, employees will be concerned about the security and benefits they will lose. To reduce stress stemming from either unemployment or underemployment, companies can implement flexible

unemployment and part-time benefits. For example, companies such as REI, Costco, Starbucks, UPS, and Whole Foods provide benefits for part time workers.² REI offers a Flex Plan that allows employees working at least 20 hours a week to choose a medical plan that works best for them. Starbucks also offers a specially tailored benefits package to fit part-time employees' personal needs. Employees might also be eligible for comprehensive healthcare coverage, discounted stock purchase options, 401(k) with match, educational savings, or a time-off program. The economy is moving towards a more flexible labor force, and it is up to companies to reflect that flexibility in their benefits packages.

Communicating with Employees

It is an employer's job to effectively communicate change in the workplace to staff. As Accenture has shown, jobs will likely be altered rather than destroyed. Instead of robots taking over entire positions, they will take over repetitive tasks that employees dread doing. Businesses must communicate to employees how this transition is an opportunity for them to focus on more creative tasks they did not previously have time for before robots were introduced to the workplace.

For example, Creator, a robot-based burger restaurant in San Francisco, is paying its employees to spend five percent of their shift reading educational books of their choice.³ The company also plans to offer a book-shopping budget and free Coursera classes. Creator founder Alexandros Vardakostas said his company's robot could save a fast-food restaurant around \$90,000 a year in training, wages, and overhead costs. This savings allows for unique educational programs to prosper. Because the robot can make 130 burgers in an hour that are prepped, cooked, and assembled with no human help, it gives employees more time to spend reading books or completing online degree programs. While Vardakostas once said this robot would "completely obviate" fast-food workers, he is now effectively communicating to his staff that the robot cannot work without help from its human coworkers. Instead, working with the robot will allow staff more time to be creative and social at work. And because of the online learning

program offered by Creator, there will be more opportunities for front-of-house staff to move into higher paying positions where they perform maintenance and repairs on the robot. Creator's business model shows the potential that robots can bring to improving employees' everyday work. Employers should prioritize explaining to employees the positive implications and opportunities that having a "cobot" will provide.

Retraining and Repositioning

Today, we are living in a time of constant relearning and reskilling. Every industry will be disrupted by AI, robotics, and automation. However, some staff may feel uncomfortable with retraining. The best way to deal with this is to have strong management create an office culture that embraces change. One way to go about this is to actively support workers during the transition. Instead of rushing through hours of training in a short time period, management should be patient and creative. They must understand that the training process is an important part of humans becoming comfortable with their "cobots" and AI assistance. Preparing workers for different, non-routine jobs they will not be used to, and with new technology, will be overwhelming for some. Businesses should view this as an opportunity to build a solid foundation for staff to work with all types of rapidly innovating technology.

The Nanodegree program is just one example of how a company can implement a comprehensive retraining program.⁴ With over 10,000 users enrolling in this program, including more than 1,000 AT&T employees, both current and potential AT&T employees are learning entry-level industry-relevant software skills. Additionally, the program offers more than just helping employees do better at their job. The courses are also designed to prepare employees to enter new positions. The program is accessible online, completed in less than a year, and affordable at around \$200 a month. It is programs like this that reinforce the notion of lifelong learning in the workplace. Applications like retraining through teaching algorithms and augmented reality allow employers to customize the retraining experience to fit learners' needs.

Preparing Employees for the Introduction of Robotics

Technical training to help employees incorporate AI into their work responsibilities is also crucial. Encouraging people to hone their “human” skills such as empathy and persuasion will also help the transition into automation. Inspiring people to stay in touch with their emotions and celebrating people skills will create a strong company culture that embraces advancement in technology. People may initially be apprehensive about interaction with robots and how their job tasks will change. Having a clear training plan that explains these roles and transitions at the individual, department, and company levels, as well as the big picture, should help alleviate confusion.

Assuaging Workers’ Privacy Concerns

Workers may have concerns about their privacy in the workplace. Because robots, predictive analytics, and biometric devices, such as wearable wristbands, mobile applications for employee surveillance, and even exoskeleton suits, can collect and transmit data, privacy can be violated absent proper notice and consent.

The requirements of such notice and consent will vary by state and by country. Many jurisdictions do not allow recording communication with others without consent. If robots employee surveillance or telepresence devices are recording communication between employees, it is important that corporations work with their IT department or third-party robotics provider to ensure that the sensitive information is not being stored improperly. Despite lower expectations of privacy in the workplace than the home, getting heavily informed consent from staff is the best way to reduce liability. Employers should provide notice regarding how the technology works, how it will enhance the employee’s overall job experience, what type of information is collected, to whom it will be disclosed, how it will be safeguarded, how it will be used, and how long it will be retained. Once collected, employers and/or their agents should retain the data for the shortest possible time, on an as-needed basis, and should try to aggregate and anonymize that data in order to apply analytics and

derive conclusions, while at the same time, protecting individuals’ information.

Preparing for Change

Identify Tasks Workers Need to Perform

Strategic planning is always important to businesses, but workforce planning is just as important when implementing workplace robotics and AI applications. Understanding where the industry is going, how and why it is changing, what is causing those changes, and how those changes will affect the workforce is crucial to developing a strategic plan for robotics implementation. AI can assist with this assessment. Once a problem potentially hindering workplace efficiency and productivity is identified, using predictive analytics can help extract data from communications and apply it to work products to assess the aptitude of the workforce to work with the automation solution. Because organizations must properly comprehend its future talent requirements, this process must be made a central priority. A company cannot train staff if it does not understand its own needs or does not understand the skills staff must master.

Besides considering whether “cobots” and AI applications can help improve workplace productivity, employers should look to other possible forms of enhancing workers’ skill and abilities. For example, exoskeletons, wearable mobile machines, give workers extra limb strength. Besides reducing incidents of workplace injuries, including repetitive use injuries, this technology creates opportunities for staff with existing injuries or disabilities that could not otherwise perform certain tasks. This technology can take many forms but is generally affixed to workers’ bodies and used by the workers to supplement actions usually performed by their muscles. It can assist the forward-bent posture of the body used when lifting heavy items and also have power units that exert torque at each joint. Additionally, employers may use wearable technology as a reasonable accommodation for employees with disabilities. Exoskeleton assisted workers can today be found handling baggage at airports, building cars and skips, and in fulfillment centers.

While new possibilities still exist of an injury stemming from a sense of overconfidence from the wearing of the exoskeleton itself, training and monitoring can mitigate this

Even though the era of automation and the Fourth Industrial Revolution appears daunting, it is helpful to know that the United States has actively and successfully transitioned its workforce.

Assess Whether Workers Have Those Skills

After identifying skills workers need to succeed following automation, companies will likely find that many workers lack those requisite skills. Because not all companies’ workforces will have the skills required for new tasks, it is imperative that businesses consider hiring freelancers to assist with transition. Having a contingent workforce to fill interim positions can make the entire automation process much smoother. Instead of disrupting everyday work by recruiting for a highly skilled full-time hire for months, companies should consider other non-traditional possibilities. Even though training the workforce is a high priority, positions will inevitably be created which staff cannot fill. Hiring contingent workers can relieve some of the stress that months of recruiting can put on a company.

risk. Moreover, the possibility of injury must be weighed against the opportunity for workers to partner with human enhancement tools designed to greatly improve productivity, develop new skills capabilities, and ultimately reduce incidents of muscle and joint-related injuries.

Look for Means of Growing Future Skills Base

Though many workforces lack the requisite skills to work side-by-side with robots today, training future generations to hone these skills will benefit both businesses and society. Many countries have implemented successful training programs. For example, Germany has an apprenticeship program that prepares around half a million young people for industrial work. This program succeeds because it pairs young people directly with companies to gain real-life

skills they learn by doing. Another reason this program has had many successes is because of its social prestige. High-level management at large German corporations oftentimes did not attend a university, but instead achieved the “meister” title. Greater cultural acceptance of alternative educational paths to fill talent needs can bridge existing skills gaps.

Some companies have created technical programs to produce a pipeline of talent in the United States. For example, Bavarian Motor Works (BMW) has a program geared towards teaching the skills required to become “equipment service associates.”⁵ One BMW plant in Greenwood, South Carolina has over 2,000 robots and the company needs people with the skills to keep the robots working at full efficiency. Because of this need, BMW is expanding its program to include this location. The Scholars Program helps BMW develop and maintain a pool of talent that will succeed in the highly innovative and increasingly automated automotive industry.

Programs like these in America are rare, though. There is a social stigma surrounding “trade” type career paths. Many more young Americans are enrolling in college and formal graduate school. This increase in enrollment has not created the labor force that many companies need. Instead of having a general, theoretical background that a formal college education provides, employers are seeking people with technical skills that generally come from on-the-job learning. Because many companies have not adequately developed their own training programs, the gaps in the formal education system have been hindering young people’s career advancement. This gap will continue to widen until formal training, whether in school or on the job, bridges it.

American companies are reluctant to implement programs similar to Germany’s apprenticeship program because of the high cost of training. However, as Germany has shown, apprenticeship programs are a good investment. At the end of the second year, apprentices are doing over half of a full workload, and by the end of three years, companies have a highly-skilled worker. Private-sector spending ensures that the apprenticeship programs are in line with labor market demands, too.

However, American businesses are worried that they will train their workforce and then lose their investment when their employees leave to work for a competitor. Conversely, if an employer needs employees with different skill sets, it can generally fire the employees it has and hire new employees with the requisite skill sets. This is because the United States operates under an at-will employment regime, whereas most other countries have indefinite employment. The at-will nature of work in the U.S. disincentivizes businesses’ need to invest in retraining and reskilling workers. Other countries’ employers have an incentive to retrain and reskill workers because they can only fire employees based on good cause. However, an incentive exists for American employers to do what they do not necessarily have to do. Keeping employees around helps protect a company’s investment and can improve morale and cut down on costs generally associated with hiring and orientation, particularly where the requisite skill sets to manage use of transformative technologies remain scarce.

Recognizing and addressing skills realities would not be the first time the U.S. has dealt with its workforce needing a major skill-set overhaul. The U.S. High School Movement (1910-1940) made attending high school a norm for children. The GI Bill, passed in 1941, also enabled many war veterans to attend college for a discounted price. It helped de-stigmatize college as being only for the elite. These movements helped increase human capital, which resulted in the rise in middle class incomes over many decades. Even though the era of automation and the Fourth Industrial Revolution appears daunting, it is helpful to know that the United States has actively and successfully transitioned its workforce.

Conclusion

The advancement of technology is inevitable. Creating a plan to implement robotics in the workplace may feel futuristic to some, but in reality, it is already here. Introduction of transformative technologies in the workplace will displace, rather than destroy, jobs. Workers fear the unknown, so it is crucial that companies are transparent in communicating with employees about their plans. Businesses know there will be a lot of change, but if they communicate this change

effectively and efficiently to workers, staff morale can remain stable or even improve. It is imperative that private businesses invest in training staff and even students to ensure a qualified talent pool. The skills for working alongside robots and enhancing skills through AI are teachable, but need to be prioritized.

The best way employers can manage employee morale is by being open with their staff about why the robots are being brought in, what the robots roles are, and if there are no plans to lay off workers, explaining to staff how the new system will actually enhance their work experience. Staff will be more productive and have higher morale when they know the “cobots” they are working with will not jeopardize their jobs. Navigating the robotic revolution and its effects on the workplace will be challenging, but planning ahead and being in-tune with the needs of employees will make the inevitable transition much smoother.

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1 See Matthew Griffin, *Accenture Automates 17,000 Jobs Without Making Anyone Redundant*, FANATICAL FUTURIST (Feb. 1, 2017), <https://www.fanaticalfuturist.com/2017/02/accelture-automates-17000-jobs-without-making-anyone-redundant/>.

2 Sammi Caramela, *10 Part-Time Jobs with Benefits*, BUSINESS NEWS DAILY (May 22, 2018, 9:02 AM), <https://www.businessnewsdaily.com/5752-part-time-jobs-with-benefits.html>.

3 Business Insider, *This Robot-Powered Burger Restaurant Says it’s Paying Employees \$16 an Hour to Read Educational Books While the Bot Does the Work*, RED LION TRADER (June 22, 2018), <https://redliontrader.com/this-robot-powered-burger-restaurant-says-its-paying-employees-16-an-hour-to-read-educational-books-while-the-bot-does-the-work/>.

4 AT&T’s Nanodegree Program Provides Affordable Training for High-Demand Tech Jobs, AT&T CAREERS, <https://www.att.jobs/nanodegree-program-provides-affordable-training-tech-jobs> (last visited July 13, 2018).

5 Anna B. Mitchell, *BMW Seeks More Humans to Maintain Greer Plant’s Robots*, GREENVILLE NEWS (Feb. 5, 2018, 11:10 AM), <https://www.greenvilleonline.com/story/news/2018/01/31/bmw-doubles-down-tech-apprentice-program/1082773001/>.



The New World of Personal Jurisdiction in the United States

■ Lisa J. SAVITT

When a corporation is sued in the United States, whether a court has personal jurisdiction over a corporation is a threshold issue. This is true whether the corporation is a U.S. or a foreign corporation. It is a civil procedure subject that many overlook, but one that can have significant ramifications. If it can be proven that the court in the individual state in the United States which the lawsuit is brought has no jurisdiction over a corporate defendant, the defendant must be dismissed from litigation in that state. Recent U.S. Supreme Court cases have provided a new narrow paradigm as to the limited number of jurisdictions in which corporations can be sued.

There are two forms of personal jurisdiction – specific and general. In a nutshell, specific jurisdiction requires some connection between the cause of action and the forum state – it is dispute specific. General jurisdiction does not require such a connection and allows a court to exercise jurisdiction over a defendant for a claim, regardless of any connection of the dispute to the forum. Up until recently, what was primarily required for general jurisdiction was a showing that a corporation had continuous and systematic contacts with a forum state.

Until 2011, there had been no U.S. Supreme Court decision on either concept for about 25 years. That June the U.S. Supreme Court issued two decisions – one on specific jurisdiction and one on general jurisdiction. While the split decision on specific jurisdiction did not bring much clarity to this concept, the unanimous decision on general jurisdiction was the start of a real game changer for corporations. Even more recently, U.S. Supreme Court decisions have further clarified general personal jurisdiction. This article discusses the new case law on general jurisdiction. The cases underscore how critically important it is for all corporations – U.S. and foreign – to always consider bringing a threshold jurisdictional challenge.

Four recent U.S. Supreme Court cases - *Goodyear Dunlop Tires Operations SA v.*

*Brown*¹ in 2011, *Daimler AG v. Bauman*² in 2014, *Bristol-Myers Squibb Co. v. Superior Court*³ and *BNSF Railway Co. v. Tyrrell*⁴ in 2017 - set very strict limits on when a court can exercise general jurisdiction over a corporation. Essentially, the standard is that general jurisdiction will be found where “the corporation is fairly regarded as **at home**.” The Supreme Court interpreted “at home” to mean where a corporation is incorporated or has its principal place of business. As Justice Ginsburg explained in *Daimler*, the inquiry is not whether the corporation’s “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” To seek otherwise – for a court to find general jurisdiction to exist over a corporation in every State in which the corporation engages in business – even if the business is substantial, continuous and systematic – the Supreme Court recognized in *Daimler* would be “unacceptably grasping.”

these decisions, and many have been successful. A number of states have statutes that require companies to register to do business in their states and appoint an agent for service of process there. Some courts, after looking at such statutes have found that corporations “consented” to general jurisdiction by registering in their states and appointing service agents in them. A few state legislatures seek to amend statutes to explicitly state that registering to do business means agreeing to general jurisdiction. This reasoning in individual states, is certainly at odds with the *Daimler* U.S. Supreme Court decision. It subverts the high Court’s stated recognition that corporations cannot be subjected to lawsuits all over the country.

The *Daimler* opinion does state that there can be “exceptional circumstances” where a corporation can be found to be “at home” in a forum other than where it has its principal place of business or its place of incorporation.

A few state legislatures seek to amend statutes to explicitly state that registering to do business means agreeing to general jurisdiction.

The *Daimler* opinion recognizes the reality that because corporations do business globally and nationally, limits need to be applied regarding the states in which a corporation may be sued. **Generally speaking, if there is no specific jurisdiction, corporations may only be subject to personal jurisdiction in the state where they have their principal place of business or in the state where they are incorporated.** Thus, every time a corporation is sued in the U.S., the corporate lawyer should contemplate a jurisdiction challenge.

Legal challenges to *Daimler* and progeny

Numerous challenges to general jurisdiction over corporations have been made since

This rare circumstance was exemplified in a case that took place during World War II where a Philippine company ceased its operations and basically the company’s President relocated to Ohio where he had an office and conducted business. In those circumstances, Ohio was found to be a “temporary” principal place of business.⁵

Practical Considerations

If a corporation is sued in a state in which there is no specific jurisdiction, and the corporation is not incorporated there and does not have its principal place of business there, the general rule of thumb is for the corporation to consider immediately move to dismiss the action for lack of personal jurisdiction. When deciding whether this is the best course of action,

lawyers for the corporation face a number of practical and strategic considerations including whether the lawsuit could still be brought in the corporation's principal place of business or place of incorporation. Another matter to consider is whether the statute of limitations, which is effectively a deadline, has passed in either of those jurisdictions. The corporation's counsel should also consider whether the forum in which the corporation has been sued is a more desirable forum than the place where there is jurisdiction. Depending upon the answers to these questions, the counsel for the corporation may choose not to contest jurisdiction. Counsel should, though, consider whether not contesting jurisdiction in a particular state could have a precedential effect.

Corporations should also be aware that plaintiffs may be allowed to conduct limited discovery on the issue of jurisdiction. In filing a motion to dismiss for lack of personal jurisdiction, it is often necessary to file an affidavit from a corporate representative confirming that the corporation's principal

place of business and place of incorporation is not in the forum state. Some defendants go further and add in some essential information about the corporation's *de minimus* contacts or lack of contacts with the state. It is questionable whether this is a wise practice, as it may cause the plaintiff to proceed with jurisdictional discovery.

Another common consideration is how the presence of co-defendants may affect the decision-making process. It might be more desirable to stay in the litigation where there are co-defendants who might not be in a forum where jurisdiction may also lie. A practical and strategic question is how likely it is that the plaintiff will file another lawsuit if dismissed from its chosen forum. It is understood that a contract between the parties which may have a choice of forum or court clause or governing law clause or a subsidiary may be sued for the actions of the parent company or vice versa.

Finally, do not lose sight that should a court have specific jurisdiction over a corporation and there is no basis to challenge specific

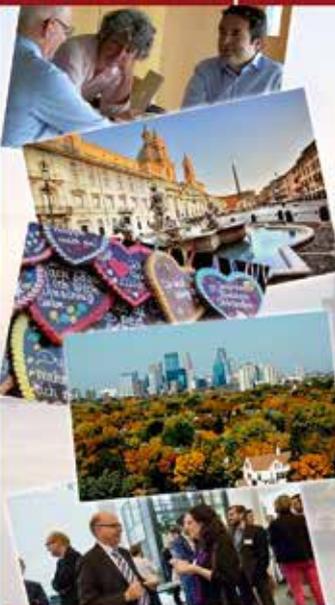
jurisdiction, there is no need to advantage in making a general jurisdiction challenge.

In summary, there are multiple factors to weigh in the analysis of whether to contest jurisdiction. The issue of whether a court has personal jurisdiction should always be considered. With the new paradigm shift on general jurisdiction, corporations need to look closely at whether to proceed with a motion to dismiss – even if the particular forum had exerted personal jurisdiction over the corporation previously. Old norms have changed now that corporations are now working in a global marketplace.

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- 1 131 S.Ct. 2846 (2011).
- 2 134 S.Ct. 746 (2014).
- 3 137 S.Ct. 1773 (2017).
- 4 134 S.Ct. at 755-756.

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Could the Way in Which you Read Matter for the Rule of Law?

I Stephen SIDKIN

In the Budapest Congress edition of *Juriste International*, the question was asked, “**Software - goods or not to be goods?**”

The article drew attention to the judgment of the High Court of Justice in England in the case of *The Software Incubator Limited v Computer Associates Limited* [2016] EWHC 1587 (QB).

The judgment was significant insofar as it established for the first time that:

1. Software should be considered ‘goods’ within the meaning of the Commercial Agents (Council Directive) Regulations 1993 (cf. the Agents Directive (86/653/EC)); and
2. The grant of a software licence represents the sale of goods for the purposes of the Regulations.

The judgment was important because the Regulations define a commercial agent by reference to an agent who is concerned with the sale of goods.

But there is a further issue which could matter for the rule of law. Read on...

Background

The Software Incubator Limited (“TSI”) had brought a claim under the Regulations against Computer Associates Limited (the UK subsidiary of NASDAQ listed CA Inc.) following the termination of its agency agreement by Computer Associates in October 2013.

Following termination, Fox Williams LLP, on behalf of TSI, issued a claim in the High Court for compensation and post-termination commission under the Regulations and for damages for failure to give proper notice of termination.

Appeal

However, in March of this year the Court of Appeal disagreed with the judgment which

had been given in favour of TSI in 2016. On an appeal brought by Computer Associates against the original judgment [2018] EWCA Civ 518, the Court of Appeal decided that software is not goods.

So why did the Court of Appeal disagree with the original judgment?

Certainly, the Court of Appeal had sympathy with the approach of the original judge. As Lady Justice Gloster (who gave the lead judgment in the Court of Appeal) remarked, at the core of the original judge’s conclusion was the view that the court should ensure that the law keeps abreast of recent developments in technology by giving an expansive interpretation of “goods” to accommodate electronically supplied software.

Lady Justice Gloster sympathised with this approach given what she perceived to be the various difficulties with maintaining the tangible/intangible distinction.

She identified four difficulties:

1. She accepted that the original judge had a point when he stated that there was no logic in making the status of software as “goods” (or not) turn on the medium by which they were delivered or installed. Whilst she noted that such a distinction had been followed and applied by both the High Court and the Court of Appeal, she had difficulty nevertheless in seeing any principled basis for such an approach. She noted that leading counsel appearing for Computer Associates had accepted that if in TSI’s case, a company or individual had asked for, or been sent, a back-up disc that carried the software in case something went wrong, in such circumstances, the software would be tangible property. The idea that this situation would fall under the Regulations, whilst if the software was downloaded from the Internet it would not, appeared illogical.
2. Lady Justice Gloster recognised that her conclusion that the definition of “goods”

does not include electronically supplied software enables the odd inference to be drawn that the legislators would have wanted to protect a commercial agent selling hard copy books on behalf of its principal to a wholesaler for onward sale to consumers, but not one selling electronic books to the same wholesaler for onward sale to the same consumers. This lays bare the arbitrariness of the tangible/intangible distinction.

3. Leading Counsel for TSI had argued that Computer Associates’ argument was undermined by the way gas and electricity are treated under the Regulations. More than 17 years ago the High Court had accepted that the supply of gas and electricity constituted the sale of goods for the purpose of the Regulations.

However, the Court of Appeal found it impossible to coherently explain why gas and electricity are any more tangible property than software.

4. The Court of Appeal noted that both New Zealand and Australia have updated their existing sale of goods legislation to take account of the increasing prevalence of intangible/digital products.

Despite these issues, Lady Justice Gloster was not persuaded that it was open to the Court of Appeal to impute what many might think was a common-sense meaning of “goods” to the legislators of the European Agents Directive and the Regulations.

It was her opinion that to do so would be contrary to precedent and the Court of Appeal could not simply ignore the “weight of judicial authority” that supports maintaining the tangible/intangible distinction.

She was therefore of the view that an approach which departed from precedent and the well understood meaning of “goods” in law “should be resisted by the judiciary”. But whilst noting that consumer legislation now addressed digital goods she did not consider that commercial parties are so in need of protection that the judiciary should

adopt a completely different approach to interpreting “goods” than that established by precedent.

In short – the Court of Appeal in its judgment recognized that the law needs changing. However, it declined to do so.

The rule of law

And so why does all this matter for the rule of law?

Because can it truly be said in the second decade of the twenty-first century that:

- if you read a hard copy book then you have read it in a different way to reading it on an electronic book reader (aka a Kindle)?
- There is a difference between purchasing a hard copy of a book as opposed to taking a licence when you download it on to a Kindle – when both exercises are ultimately to result in the payment of a royalty to the author?
- Your experience of reading will be any different?

And because for the rule of law to exist and thrive it must be respected by the people. In contrast if the people think that the law is an ass (as suggested by Charles Dickens in *Oliver Twist*), then it will fall into disrepute.

Further it is possible to point to a number of judgments given by the English courts concerning the Regulations where technological change has been recognized and accepted in applying the law.

It is to be hoped that the UK Supreme Court will now permit an appeal to be brought on behalf of TSI to try and overturn the Court of Appeal’s judgment.

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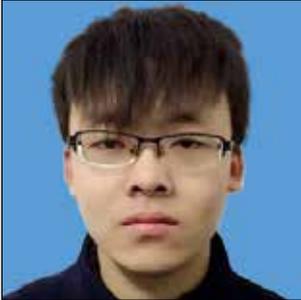
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Thinking About the Ethical Issues of Gene-Editing Technology



■ SUN Qigui & WANG Chen

Gene editing technology enables humans to use artificial biotechnology to manually edit the target genes that they seek to modify. By using gene editing technology we can implement, eliminate, join, or perform other operations on specific DNA fragments. This biological technology can directly edit the human genome and change the structure of DNA, thereby creating great value for the future of mankind.

Gene editing technology can be applied to all species. However, the technology, which reflects opportunities for positive change, has caused intense ethical controversy and three important ethical issues that must be faced. In 2014, researchers edited the genome of cynomolgus monkeys, whose genes are genetically similar to humans. These monkeys have often been used as models of human genetic diseases. It was learned through experimentation that by directly editing the germ cells of cynomolgus monkeys, its modified genes became heritable. In 2015, a Chinese research team at Sun Yat-Sen University used CRISPR/Cas9 technology to modify the genes that cause β -thalassemia in human embryos. This was the first published human attempt to edit genes in their own embryos. After research findings were published in "Protein & Cell," there was great controversy in the academic community about the ethical issues of gene editing technology. We cannot help but ask, "Could such technologies be applied to human beings?"

In recognition of the ethical problems caused by the rapid development of gene editing technology, an international summit on

human gene editing was held in Washington, D.C., in December 2015. The scholars participating in the summit discussed a series of questions on the application of gene editing technology in the framework of modern technical bioethics. The goal was to reach a basic consensus about genetic editing pertaining to "basic and preclinical research," as well as the "clinical application at the somatic cell level." At this summit, there were great divergent views on the clinical application of germ cells. Thus, the ethical debate of genetic editing technology to modify human embryonic genes persists.¹

application of gene editing technology to quantify the probability of risk.

The concept of gene editing technology used to be understood as a mechanistic theory and reductionist approach, originating from a 17th century search for the meaning of methodology. In the 21st century, with complex systems like the human body better understood, it is possible to better comprehend the situation of domino effects caused by the modification of what would otherwise be understood as an "insignificant" gene

Editing diseased genes with hereditary traits may affect the normal functioning of other genes and cause often unexpected genetic mutations and safety problems.

1. Ethical Issues in Genetic Editing

1.1 The Issues of Safety and Risks for Genetic Editing

Major breakthroughs are rare in biology and applied life sciences. Gene editing is such an advancement. Compared with ZFN and TALEN technology, the editing accuracy of the CRISPR/Cas9 continues to improve, but it lacks a 100% success rate.

The dual complexity of technological applications and the human body itself increases the probability of various types of risks. Even with sophisticated analytics, it is still difficult for scientists utilizing the

fragment. We must acknowledge that the genetic and life information obtained through animal models have limitations and may be even speculative with regard to the human body. After all, there are significant differences between primates and human beings in terms of gene types. Due to a lack of clinical experiments as evidence, there is no way to make a sufficient scientifically reliable conclusion for the time being. Little is understood about cognition in the context of the complexity of the evolution of nature and life. Moreover, in the history of biotechnology development, scientists and engineers often fail to achieve their desired goals in precise operations on the current limited scale of experimentation. It is wise to expect unexpected problems.

The team of Professor Zhang Feng from the MIT in 2015 has developed three new versions of the Cas9 enzyme that could greatly reduce the off-target effect of CRISPR. However, this still does not fully prove the absolute safety of gene editing technology in the process of practical applications. It is undeniable that there are still technical risks in the gene editing process, whereby efforts are made to repair genetically induced disease processes. Editing diseased genes with hereditary traits may affect the normal functioning of other genes and cause often unexpected genetic mutations and safety problems.

It is generally believed that some diseases could be caused by errors in individual and partial genes. If this is the cause, pathogenic genes could be knocked out and modified during the process of gene editing operations. However, on June 11, 2018, the "Nature" magazine published two articles that pointed out that stem cells resulting from the successful editing by CRISPR might be "time bombs."

More specifically, the idea was that the "genetic magic scissors" CRISPR represents caused a panic. DNA double-strand breaks caused by CRISPR gene editing might activate p53, and cause the apoptosis of human pluripotent stem cells. Apoptosis is a term widely described as a process of programmed cell death. Instead of the expected apoptosis results, the cells that were finally "screened" for survival were likely to have defects in p53 function—a feature of many malignancies. There might be a very high risk of carcinogenesis, or cancer, when these kinds of cells are transplanted into the human body. These two articles once again rang alarm bells for the safety risk of CRISPR. It reminds us that there is still a long way to go before gene editing technology is applied to the human body.² While once, the characteristics of high accuracy and speed of gene editing technology was considered to be a promising new hope for gene therapy, experimental results are causing more and more scientists to worry about the negative effects of gene editing technology.

In 2017, the research on what is called the "off-target" effect of CRISPR published in "Nature," under the heading of "Methods," caused more widespread discussion and

controversy in academia. Researchers from Columbia University and other institutions found that the common tool for gene editing, CRISPR/Cas9, caused unexpected genetic mutations while curing targeted genetic diseases in mice. It is noted that the study published on the "off-target" effect of CRISPR has been officially retracted because off-target effects have not been discovered on the genome-wide level. This does not mean that CRISPR is 100% safe.

Of course, many geneticists believe in the safety of CRISPR and continue to perform research. More research is needed to better understand the impact of using this disruptive technology on large-scale editing of the genome. Allan Bradley, Honorary Director of the UK's Wigsangg Institute, published an article in "Nature-Biotech" in 2018 pointing out that the maturity of CRISPR technology is still far away because CRISPR is not perfectly safe. While denying the great potential and prospects of gene editing technology, he advocated that we should persist in exploring and re-examining the clinical practical value of CRISPR.

of self-interests, the healthy development of genetic editing technology would be negatively impacted. It is foreseeable that gene editing technology will not only be applied to health and medicine, but to forms of commercialization. The economic interest of the market is expected to be dominated by the more affluent. This would seriously violate the basic principles of fairness and equality in human societies.

The richer could make use of their wealth and privilege to cause their descendants to have higher intelligence quotients, stronger bodies, and better looks than ordinary people, and to do so in utero. The offspring of the more affluent could seriously damage the balance of the entire human society and impact value systems. This could be reminiscent of the ancient Indian racial surname system, whereby class stratification was defined for people when born. In a relatively fair society, ordinary people could gain a higher social status and living standards through continuously learning and hard work. However, once those who are qualified to be modified by

It is difficult for the public to truly understand the future significance of genetic editing technology through ordinary science forums and the dissemination of official statements.

The scientific community and all circles of society should make a comprehensive and rigorous assessment of gene editing technology before opening "Pandora's box." We must set an early warning mechanism for the application of such technology, and reduce or even avoid devastating trauma to humans and society to the greatest extent.

1.2 The Problems of Justice and Equality in Society

Technology is playing an increasingly important role in promoting economic development. Modern societies are attentive to the development of the emerging high-grade, precision, and advanced technology. However, improper economic interest demands might lead to technological alienation. Based on different moral standards and different moral judgment, decision makers from different countries and organizations may cause escalating serious ethical conflicts. Driven by various kinds

genetic editing technology would appear in society, and they would predictably occupy more resources of society, these changes would form social stratification and class differentiation. The differentiation and stratification have characteristics of "innateness" and "sustainability." There are few ways to surpass these genetic characteristics for the ordinary. This would lead to serious social inequality and would likely cause great social contradictions and conflicts. Like social Darwinism, it would make a negative impact on the principles of justice and equality of human society, shock views about the sanctity and values of life, and cause a devastating blow to the sustainable development of human society, as well as the construction of social equality.

In addition, it is foreseeable that those who have been enhanced through genetic editing technology would make use of their innate advantages by gradually controlling the society and the public. This might

also lead to new forms of dictatorship. Without the consideration of rationality and humanization, the pursuit of demand for gene editing would bring about the distortion of fair values, which would gradually be “rationalized” and “justified” due to the conformity psychology of the masses. Mainstream social awareness and the promotion of gene enhancement, which advances gene determinism, could inevitably lead to the severe discrimination, if not elimination, of the so-called poor genes, such as obesity, myopia, and small height. All results caused by applications of gene editing, as they come into being, will bring a series of ethical and moral dilemmas.

1.3 The Issues of Genetic Diversity and Evolutionary Direction

The 2015 “International Summit on Human Gene Editing,” described above, brought forward the idea that the well-being of the human community depends on the diversity of gene sequences. This is an idea akin to that of biodiversity. We must protect species diversity for the purpose of protecting nature. This is an essential requisite to ensure the ecological stability and sustainable development of the earth. Following the same reasoning, the human gene is a “gift” from our ancestors and contains the human evolutionary experience and history. Both are fundamental characteristics of human beings and are very important and significant for humans. The abuse of gene editing technology and the absence of meaningful relevant laws and regulations are expected to lead to the reduction of human genetic diversity, thereby impacting the process of human evolution. The singularity of genes would unfortunately lead to serious consequences, including human ability to adapt to the environment. In the future, there could be a virus that is aggressive against less diverse genotypes, and humans would suffer devastating consequences.

Gene editing technology changes the form of human existence from the state of natural evolution to the state of technological transformation. This affects the position of existence and significance of human beings in nature. From the perspective of the relationship between human beings and nature, the artificial behaviors reflected in gene editing are the embodiment of the supremacy of human rationality. Far from



knowing, once technology causes mistakes in application, there may be serious and irreversible results. As Engels pointed out, when we thought that we could control the world of nature, it is inevitable that the Nature would retaliate against us as a result. The Big Nature would inevitably “transcend” the evolution of human beings in accordance with the evolutionary laws of natural development and cause the emergence of “leap-forward” evolution as the application of gene editing technology transforms human genes. The emerging “superman” and “superwoman” would inevitably lead to the crisis of the survival status of ordinary “natural people,” and the traditional sense of human beings would end. The definition of “human” would evolve. Could the artifacts produced by the panoramic change be continuously called human?

1.4 Issues about Informed Consent and Power Conflicts

We know that informed consent is a basic and fundamental principle of bioethics. The code of life ethics generally requires that the human embryos used by the gene editing should not be used for reproductive purposes and must be destroyed within 14 days. The embryonic sources must originate from legal channels and ensure the right to informed consent of the donor.

Regardless of the extent to which the modification is large or small, genetic engineering might turn human beings into a commodity. There is no way to take into

account the willingness, through informed consent, of the embryonic subject in the future. Gene editing technology could be applied for the repair of human germ cell genes, since the object of editing would include the modification of the embryo with defective genes. A human formed in the future would be dramatically impacted by decisions made by technical experts and the embryo “parent” providers.

1.5 Ethical Qualifications

Do technical experts and “parents” have sufficient moral qualifications to make decisions for the editing of future “children?” The relevant discussion is reflected in news published in “Nature” in 2016. There, it was reported that a young girl, Ruthie Weiss, carried an inborn error gene that would cause albinism and blindness. Although this was unfortunate, she revealed an optimistic attitude by facing her life and learning. The “Nature” reporter asked whether the girl’s parents would be willing to let their child have the “wrong” gene repaired before the birth of the child. Ruthie’s parents answered that they would accept the “editing” of gene without hesitation before the child was born. But, now it seems that these kinds of technical behaviors might make Ruthie lose a special life experience that should have belonged to her and might have even made her life completely different from the present. It is hard to say whether having the natural child would be good or bad. In fact, only the child would be qualified to make this decision.³

Genes seem like magical items, and they have complex connections with each other. It would not be right for all modifications and repairs to be in accord with the “willingness” of modern people. People like Ruthie in the world are not in the minority. We cannot simply and harshly think that “disabled people equals definitely unhappy.” Everyone has a different definition of happiness. There might be no “universal” value which would apply to everyone.

In addition, characteristics of the human body are not only determined by genes, some are also affected by the surrounding environment. Genes could mainly affect human characteristics such as appearance, height, and intelligence quotient. After genetic editing technology matures, it is very likely that the more affluent would want to “correct” and “improve” the genes of their offspring in order to obtain the genetic qualities of the offspring they prefer. This would not only violate the right of independent choice of future generations, but it would also cause offspring to lose the right to determine their own independent personalities. But, remember, there are differences in aesthetic standards in each society. With the change of history and societies, the aesthetic views of modern people would not necessarily be suitable for the needs of the future, thereby negatively impacting the modified individual.

The above problems lead to more questions, including: are we really qualified to make decisions for the next generation? Should we change the unique life experiences that belong to future generations in order to protect their health? Except for the specific editing and restoration of genes that cause serious diseases and death, gene editing is difficult to defend on moral grounds. Contemporary scientists may gain the right to determine human interests and wishes in the future based only on so-called precise “opinions.”

2. Countermeasures for Solving the Ethical Problems of Gene Editing

2.1 Setting up Internationally Relevant Ethical Norms, Laws and Regulations

Although gene editing technology has continued to be developed in recent years,

the technology itself still has uncertainty and potential high risks. Therefore, it is necessary to strengthen the supervision of gene editing technology. It is urgent that relevant ethical regulations about gene editing be formulated.

In terms of basic norms, some basic consensuses have been reached. We should increase our support and funding for research and development of great medical applications that reflect ethical controversies by restricting or prohibiting some research directions. For example, there should be strict prohibition of gene editing human embryos and germ cells for the purpose of reproduction. Even so, it should be supported for clinical research to prevent major hereditary diseases caused by genes. In a word, it should be supported for scientific activities in the field of biological basic research or the method of gene editing, but it must be treated with caution on the subjects of technical applications that could refer to clinical trials and reproductive purposes.

From the perspective of the rule of law, sound laws and regulations are not only necessary for the development of technology itself, but also necessary for the protection of the social masses living in the background of modern technologies. On the surface, various types of laws and regulations have produced many “rules” about the future development of gene editing technology. In essence, these laws and regulations play a protective role in preventing and controlling the occurrence of genetic discrimination and the artificial remolding of biological events. The development of gene editing technology has potential huge benefits. Effective and well-formulated mandatory laws and regulations are needed in order to prevent the destructive abuse of science and promote the healthy development of gene editing technology that enhances social stability and progress.

2.2 Strengthening the Unique Function of Censorship and Supervision of Gene Editing Ethics

First of all, the supervisory body of gene editing ethics should occur at the national and international level. Countries with the ability for using gene editing technology should formulate corresponding laws

and regulations to guide the healthy development of gene editing technology. In order to ensure the authority and fairness of supervision, we strongly recommend that all countries of the world set up a neutral and credible independent organization to monitor and regulate genetic editing technologies and educate the public about the possible consequences of technological development. Plans should be devised to minimize the social impact of the negative effects that gene editing technology could bring. At the same time, the academic communities should actively cooperate to establish international legal and ethical organizations and formulate appropriate international norms and standards.

Secondly, the ethical supervisory body of gene editing technology must be organized by all relevant actors. While some scientists, including ethicists and sociologists, believe that the problems about the application of technology should be solved by scientists themselves, many believe that the public could not fully understand the true value and meaning of technology as the public is an “outsider.” It is feared that the “public” would hinder the development of technology. These views are negative, incomplete, and inadequate. While objectivity and neutrality are difficult to achieve, there could be an overlap between the ethical review of technology and the research and development institutions that constitute it. This is equivalent to a person who is both an athlete and a referee in a sports competition. The athlete might complain that the result of the referee is unfair. It would cause lack of supervision of such institutions and be difficult to monitor.

2.3 Guiding the Public to Actively Participate

The public would rarely make judgments based only on scientific information, but would instead embed their own goals and values in the consideration of the risks. It is not enough to achieve an effective dialogue with the public through only the diffusion of scientific knowledge.

It is difficult for the public to truly understand the future significance of genetic editing technology through ordinary science forums and the dissemination of



N'Djaména, place d'arbitrage ?

I Sobdibé ZOUA

Les modes alternatifs de règlement de litiges constituent sans doute un renfort crédible à l'administration de la justice étatique. Cela s'observe à travers l'engouement porté à cette justice privée, présentée comme étant plus souple, plus rapide et plus "amicale". Engouement au niveau mondial avec Paris place d'arbitrage, flambeau porté au firmament par la Cour d'arbitrage de la Chambre de commerce internationale (CCI), ou avec la London Court International Arbitration (LCIA), la commission des Nations Unies pour le droit commercial international (CNUDCI).

Engouement au niveau africain également. Continent d'avenir, l'Afrique entreprend à divers niveaux la promotion de l'arbitrage et notamment dans l'espace OHADA (Organisation pour l'Harmonisation en Afrique du Droit des affaires) qui regroupe 17 États membres au Traité de Port Louis. Des Actes Uniformes pris, régissant l'activité économique-juridico-judiciaire de l'espace, l'un a été consacré à l'arbitrage, qui "a vocation à s'appliquer à tout arbitrage lorsque le siège du Tribunal arbitral se trouve dans l'un des États parties" (cf. article I de l'AUA du 11 mars 1999 révisé en novembre 2017) et l'autre plus récent, à la médiation, constituant ensemble une valorisation des modes alternatifs de règlement des litiges.

Ainsi, la Cour commune de justice et d'arbitrage (CCJA), en plus de faire office de juge de cassation (Cour de cassation) de l'ensemble des décisions rendues par les Cours d'appel des États membres, administre les procédures d'arbitrage et de médiation, contribuant pour ainsi dire à l'ancrage de l'harmonisation du droit dans l'espace et au renforcement de l'arbitrage.

Bien entendu, dans les pays membres de l'espace, des centres d'arbitrage, de médiation et de conciliation ont été créés, certains plus anciens et plus réputés que d'autres, portés par des initiatives privées, publiques ou mixtes : GICAM au Cameroun, CAMCO au Burkina Faso, CACI en Côte d'Ivoire, plus récemment CAM-CN au Tchad.

Le Tchad, pays d'Afrique centrale, enclavé mais devenu pays producteur de pétrole, participe aujourd'hui plus qu'hier à la promotion de cette justice alternative. A ce titre, d'ailleurs, les acteurs judiciaires ont été conviés à un colloque international tenu à Yaoundé les 23 et 24 mai 2018 sur l'arbitrage CPA, l'arbitrage CRCICA, l'arbitrage et la médiation OHADA, riche d'enseignements.

L'outil le plus en vue de cette promotion de l'arbitrage au Tchad devait être le centre d'arbitrage de médiation et de conciliation de N'Djaména (CAMC-N) autorisé à fonctionner depuis 2017 mais qui n'a malheureusement connu à cette date, aucun arbitrage, aucune médiation et aucune conciliation, ce qui permet d'interroger le contexte et la justification de la mise en place d'un centre (I) dont les difficultés sur le terrain ont pratiquement endigué les espoirs. Il s'agira d'en déterminer les causes et d'appeler à la rescousse les autres Centres ou Cour à la réputation établie pour une véritable harmonisation des pratiques (II).

dire qu'un mauvais arrangement vaut mieux qu'un bon procès.

Loin de nous l'idée de réduire les modes alternatifs de règlement de litiges à une sorte d'arrangements sans lendemain et à contrecœur !

L'objectif visé par cette initiative du conseil national du patronat Tchadien (CNPT) et de quelques professionnels du droit était, entre autres, de contribuer à l'amélioration, à l'assainissement et à la sécurisation du climat des affaires au Tchad.

Il faut dire que la création du centre de formalités des entreprises (CFE) avec la mise en place de l'Agence nationale des investissements et des exportations (ANIE) forte de son guichet unique avaient déjà été perçues comme des préalables nécessaires au rehaussement et à la structuration de l'investissement privé local ou étranger.

Ces structures ont amélioré, en les rendant flexibles et moins longs, les délais de création d'entreprise au Tchad, d'obtention

L'objectif visé par cette initiative du conseil national du patronat Tchadien (CNPT) et de quelques professionnels du droit était, entre autres, de contribuer à l'amélioration, à l'assainissement et à la sécurisation du climat des affaires au Tchad.

I- Contexte et justification de la création du centre d'arbitrage, de médiation et de conciliation de N'Djaména

Dans le classement *Doing business*, le Tchad n'a jamais occupé un rang respectable tant en termes de promotion de l'investissement par des mécanismes juridiques attractifs, qu'en termes de sécurité juridique et judiciaire. L'on devrait penser que la faiblesse de la justice étatique et les barrières fiscales et autres contraintes énergétiques sont les terreaux de l'amenuisement des portées des modes alternatifs de règlements de litiges, car, ici plus qu'ailleurs, on aime à

des informations dans le fichier national des RCCM (Registre de commerce et du crédit mobilier).

A la suite de ces initiatives, le patronat Tchadien a tranché l'épineuse question posée sur sa table, il y a déjà plusieurs années – nous avons accompagné en 2012 un confrère du Barreau de Paris rencontrer le Vice-Président du Conseil national du patronat tchadien, pour échanger sur la nécessité de mettre en place une structure devant promouvoir les MARL en général et l'arbitrage en particulier – en aidant à la création d'une structure chargée de faire régler les différends commerciaux

plus rapidement, dans la transparence et la confidentialité la plus totale.

C'est donc un outil de développement par excellence que le patronat avait aidé à mettre en place, en principe capable de drainer les investissements par leur sécurisation et par le choix qu'il offre de contourner les lenteurs décriées de la justice étatique. Mais le pari était-il pour autant gagné ?

Les entraves au rayonnement du CAM-CN

Le texte organique du CAM-CN indique que le **Directeur du centre** assure la Présidence de l'**Assemblée de Direction** conduite par trois membres avec pour mission d'arrêter la politique générale du CAM-CN, d'adopter tous documents indicatifs y compris ceux relatifs à la procédure d'arbitrage, de médiation et de conciliation, d'adopter le barème des frais, d'adopter le rapport annuel du comité d'inspection des procédures, d'approuver les arbitres médiateurs, conciliateurs à inscrire sur la liste du centre, de veiller au respect des règles de bonne moralité, de gérer financièrement les organes du centre.

C'est aussi l'Assemblée de Direction qui nomme les membres du **comité d'inspection** et du **Conseil de bonne moralité**.

Si, au niveau de l'Assemblée de Direction, les missions sont précises, les tâches du comité d'inspection des procédures assurant une liaison permanente avec le Secrétariat-greffe devrait exclure toute possibilité pour les membres d'être désignés arbitres, médiateurs ou conciliateurs.

Comment concilier en effet la désignation des arbitres médiateurs et conciliateurs sur la liste du CAM-CN – qui est par ailleurs l'une des missions soustraites à l'Assemblée de Direction – et leur confirmation et nomination pour les dossiers soumis au centre avec l'indépendance et la neutralité chères à l'arbitre, au médiateur et au conciliateur ?

Être membre du comité d'inspection des procédures devrait constituer un obstacle à se faire désigner ou nommer arbitre, médiateur ou conciliateur.

Le CAM-CN institue un conseil de bonne moralité dont les membres, à l'inverse du comité d'inspection des procédures, ne peuvent être arbitres, médiateurs conciliateurs. Ce qui est gage d'indépendance. Cependant, les missions du conseil de bonne moralité sont attachées au respect d'un code de bonne moralité qui ne fait pas encore partie des documents diffusés par le centre. La mission de recueillir les plaintes et contestations relatives audit code, d'évaluer l'état général du respect des valeurs morales de l'arbitrage, de la médiation et de la conciliation en plus d'être tributaire de la divulgation dudit document, est vague et imprécise quand à apprécier l'état général des valeurs morales de l'arbitrage, de la médiation et de la conciliation.

Le mal congénital : le CAM-CN évoluait sous la coupe d'un cabinet d'ingénierie juridique.

A sa création, le CAM-CN dépendait d'un cabinet d'ingénierie juridique c'est-à-dire d'une structure dont l'activité, portée vers la défense des intérêts matériels de ses membres ainsi que des personnes susceptibles de lui faire recours, était gérée par le même Directeur du CAM-CN.

Il n'y avait pas de ressemblances dans les tâches respectives des deux entités mais elles devaient fonctionner dans un même local, sous le contrôle d'un même responsable.

Ce pouvait être source de confusion, surtout si le cabinet d'ingénierie juridique devait pourvoir le centre en arbitres ou le financer, ce qui transparissait du moins dans les intentions des promoteurs qui y trouvaient un moyen de porter financièrement le centre, en attendant que les premières affaires surviennent.

Or, les valeurs de confidentialité, d'indépendance, d'impartialités chères aux acteurs des modes alternatifs de règlement de litiges pouvaient ne pas être partagées par un cabinet chargé de pourvoir en conseils, assistance juridique et même financière.

Depuis peu, les promoteurs du centre ont compris et décidé que les deux structures cheminent distinctement, sans jamais se mêler l'une du fonctionnement de l'autre. Pourrait-ce enfin permettre au CAM-CN de connaître ses premières affaires ?

II- Un centre aux règlements d'arbitrage et de médiation modernes

Le texte organique du centre d'arbitrage, de médiation et de conciliation de N'Djamena indique bien qu'« il est organisé et fonctionne selon une particularité qui est sienne ».

Au titre du Règlement d'arbitrage du CAM-CN les fonctions du centre sont entre autres « ...d'exercer ses attributions d'administration et d'organisation des procédures d'arbitrage, de médiation et de conciliation qui lui sont soumises en application d'une convention d'arbitrage, de médiation ou de conciliation ».

Le centre ne règle pas lui-même les litiges qui lui sont soumis. Cette mission relève de la compétence des arbitres.

Egalement, les propositions conduisant à une entente émanant uniquement des médiateurs et des conciliateurs.

Un descriptif de la procédure d'arbitrage devant le centre y est exposé, de la demande d'arbitrage à la reddition de la sentence arbitrale en passant par l'ouverture de l'instance arbitrale et l'instruction de la cause.

Enfin, le Règlement précise que « pour tous les cas non visés expressément par le Règlement d'arbitrage CAM-CN, le centre et le Tribunal arbitral doivent se référer à l'Acte uniforme sur le droit de l'arbitrage ou à la volonté des parties ».

C'est ici le lieu de préciser que le CAM-CN n'a pas vocation à administrer uniquement les arbitrages OHADA, puisque les parties restent libres de choisir le lieu de l'arbitrage, la loi de procédure entre autres.

Le règlement du CAM-CN sur la médiation, sans doute pour des questions de présence n'intègre pas, à part l'affirmation des principes essentiels de la médiation, le récent Acte uniforme OHADA sur la médiation.

L'indépendance, la neutralité du médiateur, la confidentialité dans les échanges, la liberté des parties et l'efficacité de la transaction y sont affirmées, ce qui permet de retenir la possibilité que le CAM-CN administre la médiation, même sur des questions ne relevant par des Actes Uniformes OHADA.

Sur ce point c'est un règlement qui ne bouscule pas les règles de la médiation. En revanche, dans le règlement on note qu'il n'y a pas de précision sur la médiation *ad hoc* et la médiation judiciaire.

La première devant permettre aux parties de mener leur médiation en dehors de l'encadrement qu'offre le CAM-CN. La seconde résulte de la décision du juge, ou de l'arbitre lors du déroulement de l'instance arbitrale ou de la procédure judiciaire, de désigner un tiers pour la conduire.

Le règlement de médiation du CAM-CN, même s'il indique comment se déroule la médiation n'aborde pas la question de l'administration de la preuve, ni celle de la forme que devait prendre l'accord de médiation, et les possibles voies de recours.

Pour faire œuvre utile à la promotion du droit OHADA en général et de l'Acte uniforme sur

la médiation en particulier, il y a lieu de donner la possibilité à travers le règlement, aux parties de déposer l'accord de médiation au rang des minutes du notaire.

Le CAM-CN offre une réelle opportunité de règlement de litiges, à bref délai, basé essentiellement sur la volonté des parties.

Il a bientôt trois ans d'âge mais aucune expérience pratique de l'arbitrage et de la médiation en dépit de la communication qui a été faite autour de sa création et de la grande volonté de ses promoteurs d'en faire un vrai outil privé de dissémination du droit.

C'est pourquoi cet article devient un outil de sensibilisation, d'information à l'endroit des praticiens du droit en général, en particulier les spécialistes des MARL et autres investisseurs d'oser croire sur la capacité de ce jeune centre.

Et à l'endroit des centres ayant une maturité dans le traitement des arbitrages, médiation et conciliation, c'est un appel au secours car, s'il est bien vrai que la réputation d'un centre résulte de la qualité des règlements de litiges qui y sont administrés ou conduits, il n'est pas moins vrai que toutes contributions en terme de partage d'expériences devient inestimable.

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Of Ethics and Algorithms A Female Perspective

I Dace L. LUTERS-THÜMMEL

In times when politicians praise the advantages of digitalisation as the next technological breakthrough compared to the invention of the weaving loom, electric current or personal computers that will slingshot us into a new dimension and will increase economic productivity to an unknown magnitude, one is tempted to sit back and start to deliberate on what the real consequences of all this will be for us as human beings.

Having recently read books like “The Googlization of Everything (and why we should worry)” by Siva Vaidhyanathan¹, “Homo Deus. A Brief History of Tomorrow” by Yuval Noah Harari² or “Weapons of Math Destruction” by Cathy O’Neil³ – all of them worth reading – I honestly start worrying.

Some of us will only have become aware of the means of voters’ manipulation after the Facebook scandal. Some unheard Cassandras have already written about the threats to democracy by extensive Big Data analysis and targeting of certain undecided voter groups. Now, there are not only doubts whether the last U.S. elections have not been influenced, but also the BREXIT vote in the United Kingdom. Nudging of consumers by customized micro-marketing of individuals in all sorts of economic spheres have become a common practice and also belong to the “captology” strategy of platform economy companies that make profits with their advertising business models that seemingly and initially do not cost the users anything ‘but’ their personal data. Such a system is encouraging a vicious circle of getting addicted to your ‘pings’ and ‘likes’ on social media, never ending repetitions of always the same and a living in silos or you can also call it living in a box. You will never get offered a totally different product, your tastes have been analysed and now they are reloaded over and over again offering similar products you might also be interested in like other neighbours of ‘your’ box have chosen and done before.

Why that? Algorithms are analysing the status quo of a huge number of people and thereby they are predicting the future only by facts derived from the past. Be it your former reading habits or preferred clothing. Those who used to live in a poor neighbourhood earlier will never qualify for better loan conditions as they are constantly categorized by a scoring system according to their ZIP codes and former places of domicile, where is the way out there?

Job interviews are conducted by programmed bots, so that some people never get into contact with a human being, when they are sorted out right away without having even been given the chance to prove that they are different from their categorization as they do not get a second chance to see a real interviewer. People who do not

of our children into our hands or maybe looking over the shoulders of our teenage youngsters when sitting at their computer gadgets playing their computer games.

The latest culmination of all this underlying (be it unintentional or intentional) manipulative effect on our thinking and beliefs now was the reported finding that the Irish Referendum on legalization of abortion had been influenced by so-called dark-ads from abroad trying to manipulate the undecided voters by allegedly ‘objective’ information on social media platforms⁶ that in the future abortion would become legal until 6 month pregnancy (which was – pardon – rubbish). Are we still independent and self-determined thinkers or are others only lulling us with pseudo-scientific jargon that is meant to deceive us with its seemingly scientific appearance?

Are we still independent and self-determined thinkers or are others only lulling us with pseudo-scientific jargon that is meant to deceive us with its seemingly scientific appearance?

represent the average or pattern looked for are sorted out or ‘weeded out’ - as it is called - automatically. Where is there a place and chance for birds of paradise? Potential stars may be overlooked.

The crucial question is, as Cathy O’Neil puts it, are “... we as a society willing to sacrifice a bit of efficiency in the interest of fairness” (p. 95) ?⁴ “A crucial part of justice is equality.”⁵ (p. 96).

And here comes the female perspective: not only that autonomous systems are taking decisions autonomously, they mainly have been - and first of all - programmed by male programmers and male software designers educated by mainly male university professors (if at all) hanging around together with their male peer groups with all the stereotypes that we know so well when taking either the fairy-tale story books

It is high time that we - in a concerted effort - take future developments into our own hands and decide what we really want to be decided by autonomous systems and what definitively not. This is not just a matter of a just gender policy, but certainly a matter for the whole of mankind.

Meanwhile the European Commission has also taken up the discussion on ethical questions regarding the use of Artificial Intelligence. A High-Level Expert Group on Artificial Intelligence is expected to have been set up by May 2018 to support the implementation of an upcoming European initiative on artificial intelligence and to come forward by the end of 2018 with draft guidelines for the ethical development and use of artificial intelligence based on the EU’s fundamental rights.⁷ In this context it will be tasked to consider issues such as fairness, safety, transparency, the future of

work, democracy and more broadly the impact on the application of the Charter of Fundamental Rights.

The recently published “Statement on Artificial Intelligence, Robotics and ‘Autonomous’ systems”⁸ of March 9, 2018 of the “European Group on Ethics in Science and New Technologies” (that contains a first concept of the basic principles that should be observed when setting up a common, internationally recognised ethical and legal framework for the design, production, use and governance of AI, robotics and ‘autonomous’ systems) will serve as a starting point for the deliberations of the High-Level Expert Group.

In an overall description of the situation, it is stated that “without direct human intervention and control from outside, smart systems today conduct dialogues with customers in online call-centres, buy and sell stock at large quantities in milliseconds, direct cars to swerve or brake and prevent a collision, classify persons and their behaviour, or impose fines.”⁹ But despite of the positive effects of an increasing efficiency, it is also noted “that some of the most powerful among these cognitive tools are also the most opaque ... as their actions are no longer programmed by humans in a linear manner”.¹⁰ Actions of deep learning machines “are no longer intelligible, and no longer open to scrutiny by humans” whereby “biases and errors that they have been presented with in the past become engrained into the system”.¹¹

In other words: an effective control or human direction of those opaque decision-making procedures of AI and autonomous systems or a follow-up on those people who have been ‘weeded out’ by the system never occurs and this means that corrections for the sake of fairness do not occur either.

The authors of the European Group make suggestions for a set of basic principles and democratic prerequisites that are based on the fundamental values laid down in the EU Treaties and in the EU Charter of Fundamental Rights. They postulate the following principles:

1. Human Dignity: human dignity sets limits on the determination and classification of persons on the basis of algorithms. And it

implies as well that there are and should be limits to the ways in which people can be led to believe that they are dealing with human beings while in fact they are dealing with smart machines. The right to chose whether a certain task is vested to a human or the machine must be reserved.

For me this does imply that there will always have to be offered alternative routes, opt-outs and ways for circumvention of automatisms and categorisations to allow for a more colourful and diverse society that still accepts every individual in his or her uniqueness. This is technically feasible.

2. Autonomy of human beings: Autonomous systems should not impair freedom of human beings to set their own standards and norms and choose their own way of living. Autonomy means that humans should be able to choose whether they want to delegate decisions and actions to autonomous technologies.

For me this does also implicate that AI should not be able to intrude in every sphere – and in particular the private sphere – if people do not want to accept it. Often, the individual is not even aware that the counterpart is already AI or AI-driven.

3. Responsibility: those autonomous systems should serve the global social and environmental good, as determined by outcomes of deliberative democratic processes. Human freedom should not be compromised by illegitimately and surreptitiously reducing options for and knowledge of citizens. Autonomous systems should be guided by an authentic concern for research ethics and social accountability of developers.

For me this should also mean that we should not give neuronal systems that have gained their findings by mere machine-learning from facts derived from the past a chance to exclude human democratic decision-making from making the final decision, if crucial aspects of human life are concerned.

4. Justice, equity and solidarity: AI technology should contribute to global justice and equal access to the benefits and advantages of AI, robotics and autonomous systems. Discriminatory biases in data sets used to train and run AI systems should be prevented and neutralised at the earliest stage possible.

For me efficiency of distribution, better allocation of products, optimisation of logistics doubtlessly represent an improvement. However, it should have its limits at that point where - for the sake of efficiency and profit - exploitation of humans start and minimum standards of human dignity are not observed or some humans are excluded from the advantages in total. AI should still enable inclusion and in any case it should not eternalise stereotypes that we have tried so hard to get rid of in the last decades. I see – of course – the potential of robotics to make human life easier, it is there, in particular when having aging societies in the industrialised countries in mind, but we must take all members of society with us in this digitalisation process.

5. Democracy: a spirit of global cooperation and public dialogue on AI development and regulation will ensure that inclusive, informed and farsighted decisions are taken. The human right to self-determination is ensured through the means of democracy and reflected in the right to participate in decisional processes that crucially shape our future. New technologies should not jeopardise, influence or inhibit political decision-making.

For me it is high time that the democratic society gives answers and clear directions on how technical development should be channelled and in such a way that it serves humans. We should seize the momentum now before technology has reached a maturity that the factual situation has already surpassed the moment where legitimised law-making can realistically still have an impact on the (technical) future. In any case, democracy should be endowed with a right of self-defence against voter’s manipulation by bots pretending to be human beings.

6. Rule of law and accountability: The rule of law, access to justice and the right to redress and a fair trial provide the necessary framework for ensuring the observance of human rights standards. This also means that protections against risks stemming from autonomous systems that could infringe human rights, safety or privacy are needed. A clear allocation of responsibilities and efficient mechanisms of binding law are the solutions.

For me a concerted global effort will be needed. As AI is not restricted to the

EU territory, but ubiquitous, it will be of essence to co-ordinate the standard-setting with other nations who are far developed in AI research and application and to make use of multilateral agreements. I see a danger in the fact that some of the most developed AI states have no democratic political system behind and are already testing impact of AI in local communities that starts nudging citizens by total control of the public (or also private?) sphere. Believing in our democratic system we cannot afford to only be part of a rat race for the fastest AI progress and leaving humanity and humans behind.

7. Security, safety, bodily and mental integrity: autonomous systems need to be externally safe for their environment and users, must be reliable and protected against hacking and emotionally safe with respect to human-machine interaction, in particular, when persons are in a vulnerable position. Bodily and mental integrity and a safe environment require a special attention that has to be given for instance to cybersecurity, finance, infrastructure and armed conflict.

For me cybercrime poses a considerable threat to all vulnerable systems, be it hospitals, be it any sort of 'talking refrigerator' or home assistant that you have equipped your home with. A range of questions regarding liability of these Internet of Things products and services will have to be regulated accordingly. To be honest, I have not bought any of these for my household (yet, and who knows if I will do it in the future). Who wants to have a 'spy' at home?

8. Data protection and privacy: ubiquitous and massive collection of data represent a potential threat to the right to private life. AI robots and AI softbots that operate via the World Wide Web must comply with data protection regulations and not collect or spread data for whose use and dissemination no informed consent has been given. Autonomous systems must not interfere with the right to private life which comprises the right to be free from technologies that influence personal development and opinions, the right to develop relationships with other human beings and the right to be free from surveillance. Consideration should be given

to a possible new right to meaningful human contact and the right to not be profiled, measured, analysed, coached or nudged.

For me and in my view the European Union has already come quite far with the coming into force of the General Data Protection Regulation on 25 May 2018. The European Union has become a standard setter as we are exporting our data protection rules to third countries whose companies offer EU citizens their services or goods. It

do indeed very much hope that we will not let the opportunity pass by to take active steps to regulate Artificial Intelligence and the phenomena related thereto in a way that our children will still love to live and to work on this planet.

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New technologies should not jeopardise, influence or inhibit political decision-making.

certainly is a means to set a world-wide standard. In how far the provisions on the imposition of administrative fines will have a deterrent effect will show the near future. For mother companies abroad with EU daughter companies it has already become a compliance issue.

9. Sustainability: AI technology must be in line with the human responsibility to ensure the basic pre-conditions for life on our planet, continued prospering for mankind and preservation of a good environment for future generations.

For me it is crucial that profit is not the ultimate criterion that should motivate technological progress. Entrepreneurship is at the forefront of technological progress, creativity and finding new niches that might turn out to become unicorns. Ingeniousness is something that deserves our admiration, nevertheless it also means responsibility and giving something meaningful back to society. It does not stand alone as a quality as such, it should be framed by a common set of values. And it certainly is difficult enough to find a common denominator there, but the EU Charter of Fundamental Rights could be a starting-point.

This article reflects only my personal deliberations, in some parts it might be polemic, and it certainly is not written with the intention to start a debate at an academic level. But it is meant to give food for thought on how we wish that our future and that of our children should look like. I

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