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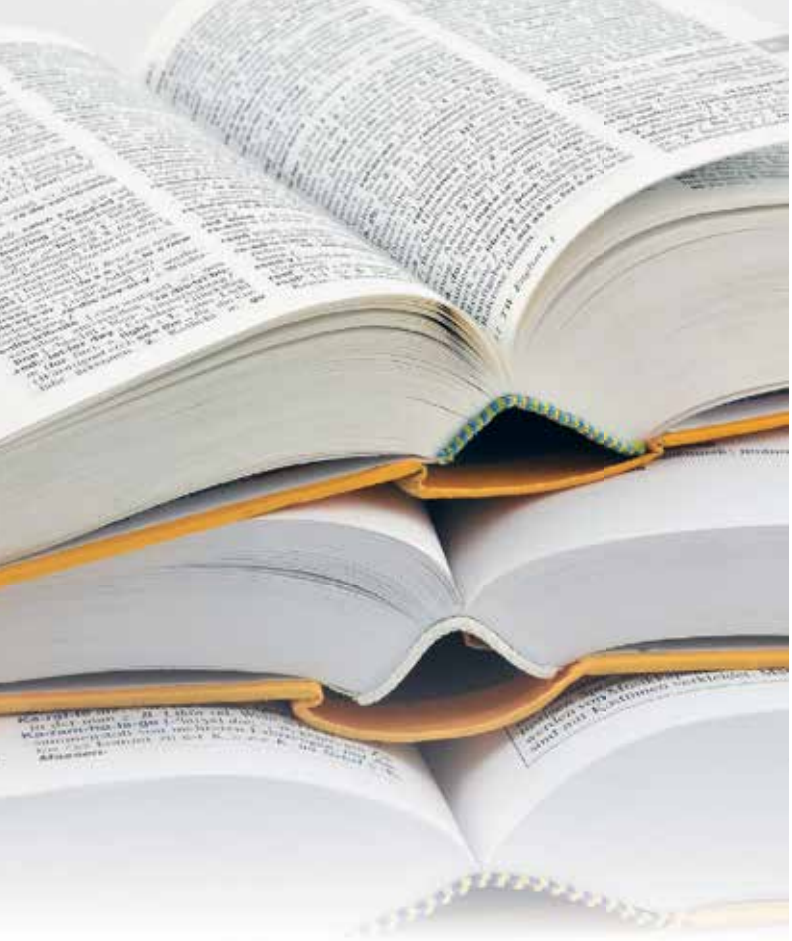

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London, March 2017
Cover photo : Paris, November 2015

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RULES

Éditorial


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President's Editorial

Laurence BORY

Dear Colleagues,

As UIA President, I have a unique opportunity to meet with people all over the world. It is a special privilege and I try to make the most of it. Such was the case, for example, during the American Bar Association Congress in August, in New York and at the Lawasia Congress in September, in Tokyo.

All these meetings have allowed me to observe that in the complex and troubled world in which we live, lawyers share the same vision of life and of what their mission should be: defending and promoting the rule of law whenever it is at risk, for the greater good, so as to ensure peace in the world.

To this unity of thought, it is necessary to add the unity of action, for greater effectiveness and a better outcome.

In fact, it is essential that lawyers and their bar associations speak with one voice, in particular, to remind those who govern them that their primary mission must be to ensure peace and well-being of all their fellow citizens irrespective of gender, race, religion or nationality.

I would like to convey UIA's unstinting support and gratitude to all lawyers – UIA members as well as non-members – who work tirelessly for this purpose, often at the risk of their life or integrity, and ensure them that UIA will always stand beside them.

Such was the case recently in Poland, for example, where the Parliament passed various laws, making judges and lawyers dependent on the executive. Another example was in the Maldives, where 56 lawyers were suspended indefinitely for obstructing justice a few hours after filing a petition with the Attorney General alleging violations of the rule of law by several courts in cases concerning political opposition leaders!

To support bar associations, fellow lawyers and magistrates, UIA is in contact not only with its members but also with other international or regional lawyers' organisations, in order to act in concert whenever necessary.

Furthermore, in the field of continuing education, the seminars and training courses organised by UIA with the support of its collective members and its Commissions and Working Groups make it possible for everyone to acquire knowledge, which has become absolutely indispensable in the context of globalisation, transnational and international law.

These high-quality training courses provide concrete answers to problems encountered by lawyers in their day-to-day practice. They also provide a very useful networking opportunity because they enable them to develop personal contacts with colleagues active in the same field of activity. I would like to encourage you to participate in such courses in large numbers.

As you read this, we will be gathered together in Toronto for our 61st Congress. The main themes (problems related to the exploitation of nature resources, transitional justice, compensation for victims of terrorism) are very topical and several Commissions and Working Groups will discuss specific issues related to one or the other of these themes in their field of activity at the same time.

Welcome to Toronto where I look forward to seeing you and I am also thinking of all those who, for one reason or another, cannot be among us for this beautiful congress.

Laurence BORY
President of the UIA
president@uianet.org

Éditorial du Président

Laurence BORY

Chers Confrères, chères Consœurs,

Présider l'UIA offre une opportunité exceptionnelle de rencontres dans le monde entier. C'est un grand privilège dont je profite pleinement. Tel fut, par exemple, le cas en août dernier à New York, lors du congrès de l'American Bar Association, et en septembre à Tokyo, au cours du congrès de Lawasia.

Toutes ces rencontres m'ont permis de constater que dans le monde complexe et troublé dans lequel nous vivons, les avocats partagent une même vision de la vie et de ce qu'est leur mission : défendre et promouvoir l'État de droit chaque fois qu'il est en danger, dans l'intérêt de tous, afin de garantir la paix dans le monde.

A cette unité de pensée, il convient d'ajouter l'unité d'action, pour plus d'efficacité et un meilleur résultat.

Il est en effet indispensable que les avocats et leurs barreaux parlent d'une même voix, notamment pour rappeler à ceux qui les gouvernent que leur mission première doit être d'assurer la paix ainsi que le bien-être de tous leurs concitoyens, sans distinctions de genre, de race, de religion ou de nationalité.

Je voudrais témoigner ici à tous les avocats, membres et non membres de l'UIA, qui œuvrent inlassablement dans ce but, souvent au péril de leur vie ou de leur intégrité, la reconnaissance et le soutien sans faille de l'UIA qui se tient à leur côté.

Tel fut, par exemple, le cas dernièrement en Pologne où le Parlement a voté diverses lois ayant pour effet de rendre juges et avocats dépendant du pouvoir exécutif. Autre exemple aux Iles Maldives, où 56 avocats ont été suspendus pour une durée indéterminée pour entrave à la justice quelques heures après avoir déposé une pétition auprès du Procureur général faisant état de violations de l'État de droit par plusieurs tribunaux dans des affaires concernant des personnalités politiques de l'opposition !

Pour soutenir barreaux, confrères et magistrats, l'UIA est en contact, non seulement avec ses membres, mais aussi avec les autres organisations internationales ou régionales d'avocats et de magistrats, afin d'agir de concert chaque fois que cela s'avère nécessaire.

D'autre part, en matière de formation continue, les séminaires et formations organisés par l'UIA avec le soutien de ses membres collectifs et de ses commissions et groupes de travail permettent à chacun d'acquérir des connaissances, devenues absolument indispensables compte tenu de la mondialisation, en droit transnational ou international.

Ces formations de grande qualité, apportant des réponses concrètes aux problèmes rencontrés par les avocats dans leur pratique quotidienne, sont également une occasion très utile de réseautage car elles permettent de développer des contacts personnels avec des confrères actifs dans le même domaine d'activité. Je vous encourage à y participer nombreux.

Lorsque vous lirez ces lignes, nous serons réunis à Toronto pour notre 61e congrès. Les thèmes principaux (problèmes liés à l'exploitation des réserves naturelles, justice transitionnelle, réparation des dommages dérivant du terrorisme) traités sont d'une grande actualité et plusieurs commissions et groupes de travail examinerons, en parallèle, des problèmes spécifiques relatifs à l'un ou l'autre de ces thèmes dans leur domaine d'activité.

Bienvenue à Toronto où je me réjouis de vous retrouver et une pensée à tous ceux qui, pour une raison ou une autre, ne peuvent être parmi nous pour ce beau congrès.

Laurence BORY
Présidente de l'UIA
president@uianet.org

Editorial del Presidente

Laurence BORY

Estimados compañeros, estimadas compañeras:

Presidir la UIA brinda extraordinarias oportunidades de encuentros en todo el mundo. Es un gran privilegio del que disfruto plenamente. Así fue, por ejemplo, en Nueva York en agosto pasado, durante el congreso de la American Bar Association, y en septiembre en Tokio, con el congreso de Lawasia.

Todos estos encuentros me han permitido constatar que en el mundo complejo y alterado en que vivimos, los abogados comparten una misma visión de la vida y de su misión: defender y promover el Estado de derecho siempre que se encuentre en peligro, por el interés de todos, con el fin de garantizar la paz en el mundo.

A esta unidad de pensamiento conviene sumarle la unidad de acción, para una mayor eficacia y un resultado mejor.

Es imprescindible que los abogados y sus colegios de abogados tengan una misma voz, para recordar a quienes les gobiernan que su misión primera es garantizar la paz y el bienestar de todos sus conciudadanos, sin distinción de sexo, raza, religión o nacionalidad.

Desde aquí me gustaría expresar a todos los abogados – miembros y no miembros de la UIA – que trabajan incansablemente con este fin, a menudo poniendo en peligro su vida o su integridad, el reconocimiento y el apoyo incondicional de la UIA que permanece a su lado.

Así fue, por ejemplo, recientemente en Polonia, donde el parlamento votó varias leyes que, como resultado, sitúan a los jueces y abogados en una situación de dependencia del poder ejecutivo. Otro ejemplo es el de las islas Maldivas, donde se suspendió a 56 abogados por un periodo de tiempo indeterminado por obstrucción a la justicia pocas horas después de haber presentado una petición al Fiscal General que dejaba constancia de violaciones del Estado de derecho por varios tribunales en asuntos que implicaban a personalidades políticas de la oposición.

Para apoyar a los colegios de abogados, compañeros y magistrados, la UIA está en contacto, no solo con sus miembros, sino también con las demás organizaciones internacionales o regionales de abogados y magistrados, para actuar de común acuerdo cada vez que sea necesario.

Por otra parte, en materia de formación continua, los seminarios y las formaciones organizados por la UIA con el apoyo de sus miembros colectivos y de sus comisiones y grupos de trabajo nos permiten a todos adquirir unos conocimientos que la mundialización ha hecho ya absolutamente indispensables en derecho transnacional o internacional.

Estas formaciones de gran calidad, que aportan respuestas concretas a los problemas con los que se encuentran los abogados en su ejercicio diario, son también una ocasión muy útil para trabajar en red, ya que permiten desarrollar contactos personales con compañeros activos en el mismo ámbito de actividad. Les animo a participar en ellas.

Cuando lean estas líneas, estaremos reunidos en Toronto para nuestro 61° congreso. Los temas principales tratados (problemas relacionados con la explotación de las reservas naturales, justicia transicional, reparación de daños derivados del terrorismo) son de gran actualidad y varias comisiones y grupos de trabajo examinaremos, paralelamente, problemas específicos relacionados con uno u otro de estos temas en su ámbito de actividad.

Les doy la bienvenida a Toronto, donde me alegro de reunirme con ustedes, y un recuerdo para todos aquellos que, por uno u otro motivo, no pueden estar con nosotros en este magnífico congreso.

Laurence BORY
Presidenta de la UIA
president@uianet.org

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

In defence of endangered lawyers

In support of the abolition of death penalty

In support of imprisoned defenders

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The UIA serving the Rule of Law

The UIA Institute for the Rule of Law (UIA-IROL) aims to bring together and coordinate actions taken by the UIA in order to:

- promote the Rule of Law
- ensure respect for human rights and the right of defence
- defend the legal profession and its fundamental principles.

Through the UIA-IROL, the UIA continues its commitment to protect lawyers by taking action to support lawyers who are prosecuted or intimidated in the practice of their profession.

The UIA-IROL supports the profession – its principles and its representative organizations – anywhere that it is threatened.

UIA-IROL is also driving long-term campaigns to promote and reinforce the Rule of Law, support the independence of the judiciary and advocate the abolition of the death penalty. All our actions are funded by contributions and personal donations.

Are you interested in our actions? Are you willing to support our projects?

Contact the UIA by email uiacentre@uianet.org, by phone +33 1 44 88 55 66 or visit our website www.uianet.org > Section "The Actions"

Message from the Chief Editor

Nicole VAN CROMBRUGGHE

Here we are on the eve of the Toronto Congress, which promises to be exciting, particularly given the three main themes selected this year: "Natural Resource Exploitation: Business and Human Rights", "Legal Remedies for Victims of Terrorism", "Transitional Justice: Issues and Approaches".

The *Juriste International* decided to incorporate one of these themes in the issue you have in your hands.

We chose the theme devoted to the consequences of the phenomenon that has been affecting all areas of the world regularly in recent years: terrorism.

Terrorist acts spare no region of the world and (too often) make it to the headlines of our newspapers. Every time we see heartbreaking images before our eyes, tearing at our heartstrings. But the nature of news is such that one new event succeeds another and such tragedies are successively displayed in our newspapers and on our screens. What happens to the victims of these acts once the flood of media coverage stops? What is the response to such terrorist acts, beyond what is prompted by immediate reactions that can verge on excess? What should be done with terrorists is another subject that raises questions. Should they be included among the victims, which would necessarily affect their punishment? There are some who do not hesitate to adopt this attitude and consider that terrorists themselves are victims – victims of a system. Hence, for example a French psychoanalyst, Jean-Claude Liaudet, believes that in Europe, the cause behind the radicalization of an entire generation – which he calls "historical", a generation of precariousness – is liberalism: "The old mole of liberalism did its work of undermining the system. It flattened out the values and laws that enabled a child to become human" (*in "Connexions", 2017-1, no. 107*). In short, this is a burning issue, which raises a number of often polemic questions. The special feature that the *Juriste International* has allocated to this topic will give you an initial overview of these questions, which we hope will give you the desire to learn more about the issue and participate in the work that will be devoted to the theme in Toronto.

After the congress, we hope to be able to publish another special feature, this time dedicated to the theme of transitional justice, also following the dramatic situations for which the highly normative framework offered by the traditional justice system did not necessarily provide the appropriate answers. The future will let us know whether we will be able to bring this project to fruition.

For the time being, in addition to the special feature dedicated to terrorism in this issue, the *Juriste* offers you exceptionally interesting contributions in each of its component sections.

The "Legal Profession" section focuses on the fundamental principles governing our profession, whether with regard to legal professional privilege, confidentiality or our independence. For example, Jean-Pierre Buyle's article on the measures envisaged by the European Commission following the so-called "Panama Papers" case, or the one by Mario Napoli devoted to the involvement of non-lawyer investors in our law firms, portraying the risks facing our profession, already perturbed by the changes forced on it by its necessary entry into the digital world, cannot leave any lawyer indifferent.

The "UIA News" section will, as usual, echo the events that have marked the life of your favourite Association over the last few months. It will give you the first coverage of the Centre's move to its new premises. A detailed photo report will be included in the next issue.

Finally, the "Legal Practice" section contains several articles on various subjects, ranging from contract law reforms (Marie-Christine Cimadevilla) to an overview of recent decisions taken by British courts on agency contracts (Stephen Sidkin), the transfer of non-performing loans under Spanish law (Francisco Gamboa) and a comparison of divorce in England and Wales one the one hand, and France on the other (Anna Shadbourne and Floriane Laruelle).

Before I wish you an excellent congress, I'd like to take advantage of this editorial to once again invite our Spanish-speaking colleagues to send us articles. UIA's multiculturalism and multilingualism are what distinguish it from other associations and constitute its value and charm. And we need each of you for that.

Nicole VAN CROMBRUGGHE
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Erratum

Contrary to what was stated in our edition of the *Juriste International* 2017-1, the article published on page 16 was written by Alberto MORIZIO, Studio Legale Morizio, Turin, Italy, and not by Flora HARRAGIN. *Juriste international* apologizes to Alberto MORIZIO.

Message du rédacteur en chef

Nicole VAN CROMBRUGGHE

Nous voici à la veille du congrès de Toronto qui s'annonce passionnant, notamment au vu des trois thèmes principaux retenus cette année : «Exploitation des ressources naturelles, entreprises et droits de l'homme », « Victimes du terrorisme ; quelles réparations ? », « Justice transitionnelle : quels résultats ? ».

Parmi ces thèmes, le *Juriste International* a décidé d'en épingler un dans le numéro que vous avez entre les mains.

Notre choix s'est porté sur le thème consacré aux conséquences de ce phénomène qui affecte régulièrement toutes les régions du monde ces dernières années : le terrorisme.

Les actes terroristes n'épargnent aucune région du monde et font (trop) souvent la une de nos journaux. Nous avons à chaque fois sous les yeux des images déchirantes et notre émotion est sans bornes. Mais l'actualité est ainsi faite qu'une nouvelle chasse l'autre et que les drames se succèdent dans nos journaux et sur nos écrans. Que deviennent les victimes de ces actes une fois le flux médiatique retombé ? Quelle réponse apporter à ces actes terroristes, au-delà de ce qu'inspire la réaction immédiate qui peut incliner à l'excès? Le sort à réserver aux terroristes pose également question. Faut-il les comprendre parmi les victimes, ce qui impacterait nécessairement la sanction ? Certains n'hésitent pas à aller dans ce sens et considèrent que les terroristes eux-mêmes sont des victimes, celles d'un système. C'est ainsi que, par exemple, un psychanalyste français, Jean-Claude Liaudet, voit dans le libéralisme la cause de la radicalisation, en Europe, d'une génération qu'il qualifie d'« historique », celle de la précarité: *« La vieille taupe libérale a réalisé son travail de sape. Elle a raboté les valeurs et les lois qui permettaient à un enfant de devenir humain.* » (in Connexions, 2017-1, n° 107). Bref, nous sommes là devant un sujet brûlant, ouvrant sur de nombreuses questions, souvent polémiques. Le cahier spécial que le *Juriste International* consacre à ce thème vous donnera un premier aperçu de ces problématiques qui, nous l'espérons, vous donnera l'envie d'en savoir plus et de participer nombreux aux travaux qui y seront consacrés à Toronto.

Après le congrès, nous espérons pouvoir préparer un cahier spécial dédié au thème de la justice transitionnelle, elle aussi issue de circonstances dramatiques auxquelles le cadre hautement normatif de la justice traditionnelle n'apportait pas nécessairement les réponses adéquates. L'avenir nous dira si nous serons en mesure de concrétiser ce projet.

Pour l'heure, outre le cahier spécial consacré au terrorisme, le Juriste vous apporte des contributions particulièrement intéressantes dans chacune des rubriques qui le composent.

La section « La profession d'avocat » s'attache à des principes fondamentaux régissant notre profession, qu'il s'agisse du secret professionnel, de la confidentialité ou encore de notre indépendance. Ainsi l'article consacré par Jean-Pierre Buyle aux mesures envisagées par la Commission européenne à la suite de l'affaire dite des *Panama Papers*, ou encore celui consacré par Mario Napoli, à la participation d'investisseurs non-avocats dans nos cabinets dépeignant les risques auxquels se voit confrontée notre profession, déjà bien secouée par la transformation que lui impose sa nécessaire entrée dans le monde numérique, qui ne peuvent laisser aucun avocat indifférent.

La rubrique « Vie de l'UIA » vous apportera, comme à l'accoutumée, l'écho des événements qui ont émaillé la vie de votre Association préférée tout au long des derniers mois. Une première information vous y est apportée quant au déménagement du Centre vers ses nouveaux locaux. Un reportage photo détaillé sera inclus dans le prochain numéro.

Enfin la section « Pratique du droit » comporte plusieurs articles sur des sujets divers, allant de la réforme du droit des obligations (Marie-Christine Cimadevilla) à un survol de récentes décisions prises par les juridictions anglaises en matière de contrat d'agence (Stephen Sidkin) ou encore à la cession de *non-performing loans* en droit espagnol (Francisco Gamboa) en passant par une comparaison du divorce en Angleterre et au Pays de Galles d'une part et en France, d'autre part (Anna Shadbourne et Floriane Laruelle).

Avant de vous souhaiter une bonne lecture et un excellent congrès, je profite de cet édito pour inviter une fois de plus nos confrères espagnols à nous envoyer des articles. Le multiculturalisme de l'UIA et son multilinguisme la distinguent d'autres associations et en font sa valeur et son charme. Pour cela, nous avons besoin de chacun de vous.

Nicole VAN CROMBRUGGHE
Rédacteur en chef – Juriste International
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Erratum

Contrairement à ce qui était indiqué dans le numéro 2017-1 du *Juriste International*, l'article publié en page 16, a été rédigé par Alberto MORIZIO, Studio Legale Morizio, Turin, Italie, et non pas par Flora HARRAGIN. Le Juriste International présente ses excuses à Alberto MORIZIO.

Mensaje del Redactor Jefe

Nicole VAN CROMBRUGGHE

El congreso de Toronto está a la vuelta de la esquina. Promete ser un congreso apasionante, sobre todo por los tres temas principales elegidos este año. "Explotación de los recursos naturales: empresas y derechos humanos", "Reparación de daños para las víctimas del terrorismo", "Justicia transicional: estudio de resultados".

El *Juriste International* ha querido marcar uno de estos temas en el número que nos ocupa.

Hemos elegido el tema dedicado a las consecuencias de un fenómeno que azota regularmente a todas las regiones del mundo en los últimos años: el terrorismo.

No hay región del mundo que se salve de los actos terroristas que – con demasiada frecuencia – son noticia. Nos enfrentamos una y otra vez a imágenes desgarradoras que nos conmueven hasta límites insospechados. Pero la actualidad es así: a una noticia le sigue otra y los dramas se van sucediendo en los periódicos y en las pantallas. ¿Qué ocurre con las víctimas de estos actos una vez disipado el fervor mediático? ¿Qué respuestas podemos dar a estos actos terroristas, al margen de la reacción natural inmediata que nos llevaría a caer en excesos? También cabe preguntarse lo que se debería hacer con los terroristas. ¿Hay que incluirlos entre las víctimas, lo cual influiría necesariamente en la sanción? Algunos lo creen firmemente y consideran que los propios terroristas son víctimas: víctimas de un sistema. Así pues, por ejemplo, un psicoanalista francés, Jean-Claude Liaudet, ve en el liberalismo la causa de la radicalización, en Europa, de una generación a la califica de «histórica»: la de la precariedad. Tal como afirma en Connexions, 2017-1, n° 107, "*el viejo topo liberal ha hecho su trabajo de socavar el suelo. Ha barrido los valores y las leyes que permitían a un niño convertirse en humano.*" Estamos ante un tema candente, que abre muchos interrogantes, a menudo polémicos. El dosier especial que ha dedicado el *Juriste International* a este tema le dará una primera visión de estas problemáticas que – esperamos – le anime a profundizar más y participar en los trabajos que tendrán lugar al respecto en Toronto.

Tras el congreso, esperamos poder preparar un dosier especial dedicado al tema de la justicia transicional, que es también fruto de las circunstancias dramáticas a las que, desde el contexto tan normativo de la justicia tradicional, no se aportaban necesariamente las respuestas adecuadas. El futuro dirá si podremos materializar este proyecto.

De momento, además del dosier especial dedicado esta vez al terrorismo, el Juriste aporta contribuciones especialmente interesantes en cada una de las secciones que lo componen.

La sección "La abogacía" está dedicada a los principios fundamentales que rigen nuestra profesión, tanto si se trata del secreto profesional, como de la confidencialidad e incluso de nuestra independencia. Es el caso del artículo dedicado por Jean-Pierre Buyle a las medidas previstas por la Comisión Europea como consecuencia del asunto de los papeles de Panamá, o incluso el que dedica Mario Napoli a la participación de inversores no abogados en nuestros despachos, que ilustran los riesgos a los que se enfrenta nuestra profesión, sacudida ya por la transformación que le impone su entrada necesaria en el mundo digital, y que no pueden dejar indiferente a ningún abogado.

La sección "Novedades de la UIA" presenta, como de costumbre, los eventos que han dado vida a nuestra Asociación preferida durante los últimos meses. Una primera noticia habla sobre el traslado del Centro a sus nuevos locales. En el próximo número se presentará un reportaje gráfico.

Por último, la sección "Ejercicio de la Abogacía" incluye varios artículos sobre diversos temas, que van desde la reforma del derecho de las obligaciones (Marie-Christine Cimadevilla) a un breve repaso de las últimas decisiones tomadas por las jurisdicciones inglesas en materia de contratos de agencia (Stephen Sidkin) o incluso la cesión de *non-performing loans* en el derecho español (Francisco Gamboa) pasando por una comparación del divorcio en Inglaterra y Gales por una parte y en Francia por otra (Anna Shadbourne y Floriane Laruelle).

Antes de desearles una buena lectura y un excelente congreso, aprovecho esta editorial para invitar una vez más a nuestros compañeros españoles a enviarnos artículos. La multiculturalidad de la UIA y su plurilingüismo la distinguen de otras asociaciones, y la hacen valiosa y atractiva. Por eso, les necesitamos a todos.

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Erratum

Contrariamente a lo que se indicaba en el número 2017-1 del *Juriste International*, el artículo publicado en la página 16, fue escrito por Alberto MORIZIO, Studio Legale Morizio, Turín, Italia y no por Flora HARRAGIN. El *Juriste International* presenta sus excusas a Alberto MORIZIO.

Food Law Training Course, Paris

UIA News
Actualités de l'UIA
Novedades de la UIA

Business Law Seminar in Latin America, San Jose de Costa Rica

Doing Business in Latin America Critical Aspects of the FDI in the Region

Hernán ANDRADA

When my dear friend Eduardo Lorenzetti proposed that I be the rapporteur at the seminar held in San Jose de Costa Rica last April 20 and 21, I did not know that, on reminiscing about those days, I would be smiling from such happy memories as I set out to write as I am doing now.

We had such wonderful days in San Jose and I am glad, satisfied and enthusiastic about the great group that we have become. We were about 60 participants, mostly from Latin American countries with some exceptions such as the UIA President-elect, Pedro Pais de Almeida, who not only honored us with his presence and gave the opening words at the seminar but was also an active participant, as usual.

The seminar organizers are worthy of mention: Eduardo Lorenzetti (president of the Latin American Lawyers Forum and of UIA's Foreign Investment Commission), Gabriel Lizama Oliger (who made a great team with his colleague Melissa Ramírez Zamora) and, as usual, Colette Surin. They all managed not only to gather a very interesting number of participants, but they were also behind every detail in the pursuit of excellence.

During the welcome cocktail, we met all those friends we had not seen for some time and got to know new colleagues who, by the end of the two days, became friends as well.

Seminar speakers were highly professional, and showed a thorough preparation of their presentations, which aroused the permanent interest of all participants.

We have learnt from participating businessmen, lawyers and representatives of government entities that the beautiful Costa Rica has a highly developed Free Trade Zone that was created as one of the remedies to a national crisis that had caused a high unemployment level. In addition to other factors, the emergence of the Free Trade Zone helped convert a country which only exported four basic products (bananas, coffee, sugar and cattle) into a country with industries in diverse scientific fields, such as the manufacturing of state-of-the art medical devices, technology and highly professional quality services, always with great added value.

We have enjoyed the presentations of Erika Gómez Soto, Randall Vargas, Professor Lorna Medina, Monserrat Alfaro and other "Tica" personalities, who didactically provided us with loads of information about their attractive country. For instance, Carlos Alier, a banker specialising in M&A, gave us an outlook on this subject in the region in general and in Costa Rica in particular. I also want to refer to Gabriel Lizama Oliger who not only made an interesting presentation but also acted as panel moderator together with his team and other prestigious colleagues.

We were given detailed information on the prevailing situation in the other Central American countries and in close regions in terms of direct foreign investments as regards tax benefits, anti-trust laws, involved risks, human resources, intellectual property and even investment strategies by the always nice Guatemaltecan Marcos Palma, Pablo Cobar and Edson López and the charming Terencio García representing Nicaragua. Our Salvadorean colleagues Rommell Sandoval and Eduardo Barrientos also made excellent presentations.

Other countries were also present with their highly professional speakers such as Mexico, represented by Fernando Hernández Gómez and Dominican Republic, represented by Sigmund Freund who certainly tempted all of us present with the attractive investment conditions in his country, especially in terms of tourism.

Looking South, Martha Bonnet described the situation in the Republic of Colombia, whose overwhelming progress throughout this century had us in awe. Likewise, Jorge Inchausti gave us an update on the current scenario in Bolivia which, in certain aspects, shares government style trends with other countries in the region.

Antonio Berkemeyer always impresses on referring to his country of origin, Paraguay, a country with a very young population and an aggressive system to attract direct foreign investments, which allowed it to record an upward curve practically in all of its policies, even managing to remain unaffected by crisis in neighboring countries.

Eduardo Lorenzetti, together with his partner Alfredo Capra, an Argentine and Brazilian lawyer who has lived and developed his professional activity in Brazil for the past ten years, told us about the giant in the region, Brazil, whose huge economy drags and impacts on the other regions' economies such as that of my country, Argentina. I had the honor to make a presentation about the different investment strategies, based on my own experience as an Argentine citizen.

All presentations were of the highest quality, we had the chance to talk with friends in a relaxed environment without many formalities but always maintaining a professional essence. We enjoyed a wonderful dinner which was featured by that spirit of fellowship we noticed from the very first day and which kept getting better as the hours went by.

We said goodbye with a certain nostalgic mood, hugging and promising to see each other soon but with the satisfaction of a task well done and proud for belonging to this group of Latin American lawyers which, despite having been recently created, has consolidated strongly and which, paraphrasing President-Elect Pedro Pais de Almeida, represents a very significant group for UIA, whose increase in the number of members will always be welcome and encouraged.

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Leadership, Management and Marketing of a Law Firm

Pippa BLAKEMORE

What a wonderful workshop we had in Lisbon on June 1-2, 2017! It was productive, solution-focussed, creative and enjoyable. From all over the world, 17 outstanding lawyers and those who advise lawyers, were warmly welcome by delightfully hospitable colleagues from law firms in Portugal. We were admirably hosted in the superbly comfortable offices of Vieira de Almeida & Associados.

I co-presented the workshop with Tiago Marreiros Moreira, of Vieira de Almeida & Associados, President of the UIA Management of Law Firms Commission.

Tiago and I aim to help law firms to achieve their vision, goals and objectives through inspired leadership, effective management and results-driven marketing. Our theme was how to win, keep and grow contacts and clients cost-effectively. We really concentrated on providing practical, relevant and immediately applicable solutions to the challenges raised by participants over the two days. Day 1 focussed on Leadership and Management and day 2 concentrated on Marketing and Business Development.

We recognised that most lawyers, particularly those that attended the workshop, know what they should be doing. The challenge is actually doing it! We aimed to provide solutions to problem of remembering everything that should be done and then putting these good ideas into practice, with limited time and resources, particularly in smaller firms. Our objective was to help everybody work together, sharing experience, to develop skills and also give some time-saving and energy-saving tips and techniques.

Our principles applied to all size law firms in all jurisdictions. We adjusted the application of the principles according to requirements of different continents, countries, sectors, industries and individuals. We emphasised the need to research, know and understand the unique characteristics of each, in order to meet their unique expectations. The wonderful variety of the participants in Lisbon generated a multiplicity of ideas, anecdotes and stories which all illuminated and generated an understanding of the differences. These discussions will enable each person in future to work more proficiently with their counterparts or clients in other jurisdictions.

We had many experienced and senior lawyers among us, which meant that we had lively debates and discussions, in pairs and small groups, changing places and groups frequently, to ensure that each person gained different perspectives in all discussions. You can't teach advanced driving skills unless you practice in a car. We had role plays and practical exercises, and we discovered that we had some great actors amongst us, who gave skilled demonstrations of how to deal with difficult clients.

On day 1, we worked with everybody to clarify the vision and mission of their firm and why it was important. If you don't know where you are going, you cannot know if you have reached your destination. Everybody was then able to prioritise their activities according to whether they would help to achieve their goals.

Everybody brainstormed the challenges of leading a law firm. Then we worked together to find solutions by identifying the leadership skills required to inspire, motive and move the firm forward in its chosen direction. This included how to manage change with the minimal disruption; growing the firm; effective decision-making, all supported by effective communication. I have developed "PASHMINA" which is a structured approach to be used for all communication – from the strategic to one-to-one meetings.

As well as being a leader, a senior lawyer has to be a manager. He or she not only has to formulate the strategy but be responsible for its implementation – every aspect of it. This requires a solution-focussed outlook, which needs to be encouraged and nurtured throughout the firm. One of the most difficult roles for a lawyer is delegating. There is always the feeling when under pressure that he/she could do it better themselves more quickly. We looked at how to delegate quickly and effectively, getting the job done but at the same time developing staff and freeing up leadership and management time.

Efficient systems, fair processes and streamlined procedures are essential for a successful law firm. There is now severe competition from those providers and clients who feel that legal services can be purchased "off the shelf" like a "Supermarket". This combined with the rapid advances of Artificial Intelligence means that law firms have great opportunities for cost-saving systems and procedures, if they view these developments as opportunities not threats.

Day 2 provided solutions to the challenges of Marketing and Communications. However excellent is a law firm, if you do not have clients, you cannot exist.

We discussed the challenges of marketing, particularly for small firms, and of making the time when everybody is busy providing the legal service. We looked at what to focus on in order to achieve the most productive outcomes. We gave tips on how to overcome the challenges of turning contacts into clients and looked at how to make it as easy and effective as possible. We considered the skills of building business relationships and how to ask for the work, with enthusiasm not desperation.

Tips on branding were well received and we concluded by constructing a marketing plan and the way forward in implementing it. The final activity of the day was everybody choosing a "Buddy". This meant that everybody had somebody they could

call and discuss how to overcome the challenges of implementing our two days discussion.

It was a brilliant two days. Every member of the group fully participated with enthusiasm. The humour, creativity, flexibility and the respect for each other's view were palpable. Even before we left Lisbon, some of the participants were paving the way for business referrals and working together.

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1 Pippa Blakemore has been advising lawyers and law firms all over the world on how to win, keep and grow clients for more than 30 years. She has written: *"Law Firm Pitches & Tenders: Presenting to Win"* published by Worldwide Legal Research" (http://www.legal-monitor.com/pitches-and-tenders) and *"Networking for Lawyers: a pocket guide to building business relationships"* (available from www.pep-partnership.co.uk). She can be contacted on pippa.blakemore@pep-partnership.co.uk.

UIA will run more courses of this kind in 2018. Please check the calendar on www.uianet.org or on page 61 of this issue of *Juriste* for additional information.

La UIA en la Oficina de las Naciones Unidas en Ginebra

Romina BOSSA ABIVEN

Con motivo de su 90° aniversario, la UIA reunió a sus miembros el 2 de junio de 2017 en el marco excepcional de la Oficina de las Naciones Unidas de Ginebra (Suiza), para debatir con altas personalidades de la organización onusiana y representantes de la sociedad civil sobre dos temas que movilizan actualmente a la comunidad internacional y que, desde hace mucho tiempo, preocupan a la asociación:

- El Estado de derecho, ¿una necesidad para el mantenimiento de la paz?
- La responsabilidad de los abogados y colegios de abogados en relación con los refugiados

este cuadro, algunos principios elementales que parecían hasta ahora seguros y sólidos, especialmente con respecto a la protección de los refugiados, vuelven a ser objeto de objeciones y debate.

François Longchamp, Presidente del Consejo de Estado y del Cantón de Ginebra, alertó de los intentos, aun fugaces, de debilitamiento de estos principios, que podrían hacer tambalear los cimientos sobre los que se asientan las democracias. En este sentido, los abogados y colegios de abogados tienen una responsabilidad política, profesional y moral de defender el Estado de derecho.

Se invitó a los abogados presentes a interesarse por la situación de las personas internamente desplazadas y de los menores no acompañados […].

La Cumbre de Presidentes de Colegios de Abogados de la UIA es un evento que convoca regularmente a los miembros de la asociación y da lugar a invitaciones a la acción dirigidas a las asociaciones profesionales y a los abogados. Este año, se les llamó a que se implicasen en la defensa y la promoción del Estado de derecho porque, tal como lo recordó en su discurso de apertura Michael Møller, Director General de la Oficina de las Naciones Unidas en Ginebra: *«sin Estado de derecho no podemos tener paz, desarrollo ni derechos humanos. Con él, tenemos un marco duradero y sostenible para afrontar los retos mundiales de hoy y de mañana, que no saben de fronteras[1]»*.

A través de las diferentes intervenciones que se siguieron durante la jornada, la Cumbre fue una ocasión para recordar que el Estado de derecho, cuya definición fuera adoptada por la UIA según la formulación propuesta por el antiguo Secretario General de la ONU Kofi Annan en 2004[2], debe hacer frente hoy a múltiples y diversas amenazas. Por su lado, el multilateralismo es hoy en día cuestionado y cada vez más países se aíslan y repliegan sobre ellos mismos. En

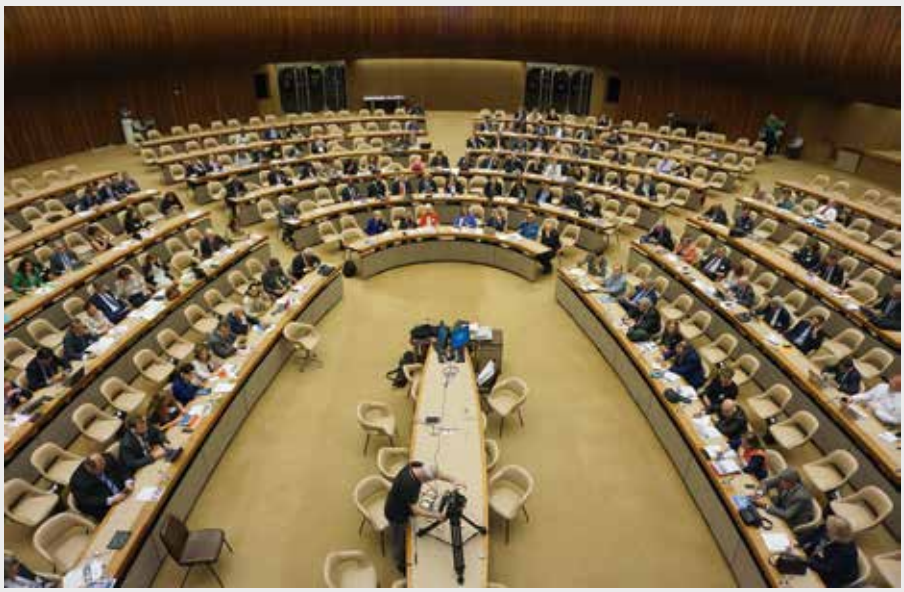
Esto va en la línea de los Principios Básicos sobre el Estatuto de los Refugiados que presentó y aprobó la UIA en octubre pasado en Budapest (Hungría). Estos principios tienen como fin sensibilizar a los abogados y colegios de abogados sobre sus responsabilidades y sobre el papel fundamental que les corresponde en la defensa y la protección de los refugiados, solicitantes de asilo y migrantes.

Este papel crucial de la profesión fue subrayado también por Volker Türk, Alto Comisionado Auxiliar para la Protección del ACNUR, ya sea mediante su contribución a una justicia fuerte e independiente, capaz de instar a los Estados al respecto de sus obligaciones y de asegurarse de que la interpretación de la ley cumpla los principios de derecho internacional; o mediante la promoción de la ratificación de los instrumentos internacionales para la protección de los refugiados y apátridas. Se invitó a los abogados a ser activos, innovadores y a presentar propuestas, tanto sobre la legislación como sobre la construcción de instituciones jurídicas y judiciales capaces de responder a las necesidades de los más vulnerables.

Peggy Hicks, representante del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, recordó una vez más que la historia de las migraciones no se limita a la de los refugiados. Incluye también a quienes se ven obligados a desplazarse por motivos de pobreza extrema, falta de acceso a un empleo digno, educación o atención médica, etc. Independientemente de las razones que empujan a la gente a desplazarse, según el derecho internacional de los derechos humanos, cada persona debe beneficiarse de todos sus derechos, sin discriminación. «Construir sistemas y sociedades que respeten los derechos de los migrantes no sólo es lo justo y lo inteligente, sino que además es una obligación jurídica», declaró.

En opinión de Yves Daccord, Director General del Comité Internacional de la Cruz Roja, la crisis migratoria actual suele clasificar a los migrantes como víctimas (desde lo humanitario) o como riesgos (desde la seguridad), cuando en realidad son seres humanos que tienen necesidades y toman decisiones estratégicas. Existiría además una tendencia a contener este problema fuera de las fronteras, construyendo muros, aun cuando parece necesario dirigir esfuerzos hacia la resolución de las dificultades que los llevan a emigrar. Asimismo, se invitó a los abogados presentes a interesarse por la situación de las personas internamente desplazadas y de los menores no acompañados, quienes se encuentran en una situación particularmente riesgosa.

Jacqui Hunt, de *Equality Now*, destacó que la discriminación contra las mujeres, un grupo especialmente vulnerable en contextos migratorios, tiene consecuencias considerables



especialmente cuando se trata de transmisión de la nacionalidad ya que no se limita solamente a la esfera familiar sino que también constituye una importante causa de apatridia.

Por último, según Andrea Chmieliński Bigazzi, del Siracusa International Institute, para ser abogado en el contexto internacional del Estado de derecho, hace falta pasión, conocimientos, creatividad y ser un poco soñador.

En la Cumbre se presentaron también distintos proyectos aportados por abogados o asociaciones profesionales de abogados. Así, el proyecto *European Lawyers in Lesvos* (ELIL), cuyo objetivo es apoyar a los abogados griegos que ofrecen asistencia jurídica gratuita a los solicitantes de protección internacional, fue detallado por Philip Worthington, su responsable. Amanda Rawls, de ABA-ROLI, citó algunos proyectos orientados a facilitar el acceso a la justicia, devolver la confianza en las instituciones del Estado y empoderar a los individuos y las comunidades para definir sus prioridades y defender sus derechos, en los que las mujeres tienen un papel especial.

Como organización internacional que reúne a abogados, la UIA ha trabajado durante sus 90 años de existencia por el establecimiento de un orden jurídico internacional basado en el principio de justicia entre nacionales, por el derecho y por la paz.

Con fuerza y energía renovadas tras esta Cumbre, la asociación seguirá brindando su apoyo a las acciones cuyo objetivo sea la defensa del Estado de Derecho y el respeto de los derechos de todas las personas, incluidos los refugiados, solicitantes de asilo, desplazados forzados y migrantes e invita a los Presidentes de Colegios de Abogados y a sus abogados a que hagan lo mismo.

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Michael Møller, Director-General of the United Nations Office at Geneva and Laurence Bory, President of the UIA.

1 Traducción libre de su intervención.

2 Informe del Secretario General al Consejo de Seguridad sobre el estado de derecho y la justicia de transición en las sociedades que sufren o han sufrido conflictos, 23 de agosto de 2004, S/2004/616, párr. 6, p. 4.

Cross-Border Mergers & Acquisitions

Carl-Olof BOUVENG

On June 8-9, the UIA held a seminar on cross-border mergers and acquisitions (M&A) together with the International Section of the New York State Bar Association.

The backdrop of the seminar was an M&A-market that continues to be active and has been so for many years. Over the years there have been less active periods but overall it is a vibrant market. The development of the M&A practice is also such that what has previously been common practice in due diligence, warranty protection, etc., may not be so any longer. We can also expect major developments going forward such as the use of artificial intelligence in due diligence.

At the seminar, different panels covered all stages of an M&A-transaction from the initial discussion about letter of intents and non-disclosure agreements, continuing with due diligence, structuring of the transactions from a tax perspective, negotiations of transactional documents, and disputes in court or arbitration.

On the first panel of the seminar the panelists shared their experiences of key points in negotiation of non-disclosure agreements and letters of intent. Soon also international audience got involved in the discussion which made it a great experience also for the panelists. It became apparent that there were legal particularities in many jurisdictions that require consideration already at an early stage of an M&A transaction and that the home-grown template for NDAs and LOIs is usually not the right choice for a foreign jurisdiction. The discussion became also more detailed when the group went over local rules on certain clauses in non-disclosure agreements, such as contractual penalties or the far reaching Brazilian competition rules to name just a few.

The second panel of the day covered current trends in due diligence. Although the topic was not one that usually generates exaggerated enthusiasm, the speakers did manage to spark considerable interest in the audience by presenting a very lively and informative discussion. The panelists touched on such diverse topics as new French rules on sellers' liability, culture specificities in China and possible use of artificial intelligence in document analysis. It seems that although due diligence has gone a long way since the time when endless hours where spent preparing lengthy descriptive reports, lawyers need not worry just yet about becoming obsolete and being replaced by computers. Cultural, legal and transactional diversity ensures that it is in the clients' best interest to have experienced professionals keeping a close lookout for them.

Thereafter there was a panel discussing the structuring of a transaction. The approach was to use a case study consisting of an acquisition of stock or assets of a US target corporation or a limited liability company (LLC) (an inbound acquisition from a US perspective) by a French/Spanish/Swiss acquirer, respectively. The panel noted that the more common US structure was plain stock or LLC membership purchase in which the US target retains its assets and liabilities, which are typically subject to negotiated seller representations and indemnities. They noted that there were advantages and disadvantages of that structure vs. an acquisition of assets, and that investors in the foreign jurisdictions might prefer one over the other, based on practices and legal issues in those jurisdictions. There was a discussion of the tax issues from the perspectives of each of the four jurisdictions. Finally, the panel discussed the current and future tax law changes driven by the OECD BEPS project, including loosening the PE (permanent establishment) tax nexus threshold, the digital economy, Country by Country (CbC) Reporting, and the controversy in the EU regarding tax rulings.

In the following discussion about the drafting and negotiations of the agreements, transactional documents, the legal and cultural background to the different styles of drafting was discussed, as well as the need for tailoring the contractual documentation not only to the specifics of the transaction but also to the legal environment, traditions and cultures. It became clear that there are good reasons for agreements in common law jurisdictions to be longer than in civil law jurisdictions where there are other statutory rules and principles of interpretation which to a larger extent allows taking into account other factors and circumstances than the wording as such. Turning to other aspects such as the purchase price mechanism many common features were identified when it came to use of "earn-outs" to bridge valuation gaps and the increased use of M&A insurance, but also differences in the use of locked box calculations of price which are very common in Europe but much less popular in the US.

A subsequent panel covered representations and warranties insurance, or M&A-insurance as it is also known. While M&A-insurance is not a new phenomenon, it has not until relatively recently become commonplace. For example in the Nordics, which is one of the regions where M&A-insurance is used most frequently, a clear majority of PE-backed transactions are insured, and about half of all mid-sized and large transactions. The panel discussed many of the intricacies of using insurance – from why it should be used to price and process. It's clear from the discussion that M&A-insurance is here to stay, and that we can expect prices to continue to drop. The price-drop, coupled with a streamlining of the insurance process will likely lead to M&A-insurance being available for smaller transactions than today.

The final panel turned to arbitration. It started off with noting that a general advantage of using arbitration to resolve cross-border M&A disputes includes the enforceability under the so-called New York convention. The special form of dispute resolution for post-closing adjustments

was explained to raise questions about whether these are expert determinations or agreements to arbitrate, and the importance to state whether the dispute resolution for post-closing adjustments is meant to be an expert determination or an agreement to arbitrate. Also in this panel the differences in interpretations of contracts under common law and civil law jurisdictions was noted, and in particular the focus on the intent of parties and good faith in civil law, while in common law jurisdictions the focus is on the clear terms of the contract. Non-compete agreements is another area where the choice of law is important because a broadly worded non-compete that may work in for example Europe is likely to be unenforceable under US state law.

Upon conclusion of the seminar, we all felt we had gained further knowledge from both the panelists and the audience to be applied on upcoming transactions.

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Arbitraje Internacional Perspectivas Actuales

Urquiola DE PALACIO DEL VALLE DE LERSUNDI y José PAJARES ECHEVERRIA

Tras diversas vicisitudes centradas en la rapidez con que se tuvo que organizar el 22-23 junio de 2017 el Seminario: "Arbitraje Internacional, Perspectivas Actuales" y su coincidencia con la celebración de las sesiones del Club Español del Arbitraje, nos pusimos a trabajar intensamente en su desarrollo junto con el Ilustre Colegio de Abogados del Señoría de Vizcaya y la Corte Civil y Mercantil de Arbitraje de Madrid (CIMA).

Justo es reconocer que el empeño era sencillo pues a esos magníficos *Partners* y la incorporación de la Comisión de Arbitraje de la UIA se unía la increíble ciudad de Bilbao que en el mes de junio es más acogedora si cabe y la disposición por parte de Urquiola de Palacio de un magnífico almuerzo el día de conclusión del Seminario en su casa familiar de Marquina.

Y también conviene dejar dicho que el motivo del Seminario también era fácil, nada menos que un Seminario de Arbitraje Internacional en España, donde es patente el interés y también el deseo de poder ser un referente para el arbitraje internacional en español – lengua en la que se administran no pocos arbitrajes, muy a menudo por desgracia en sedes foráneas – y específicamente -por qué no- sede de referencia para el Arbitraje en Derecho Marítimo a lo que Bilbao se brinda como candidata.

Seguramente por ello el nivel de los ponentes fue soberbio y la asistencia grande, habiendo conseguido con ello transmitir a todos ellos la importante labor internacional que desarrolla la UIA, a la que nos consta varios han presentado su adhesión y otros lo irán haciendo en el inmediato futuro. Valga indicar que estuvieron presentes cuatro Presidentes de Honor de la UIA y su actual Vicepresidente.

El contenido del seminario fue certeramente desarrollado desde un punto de vista muy práctico pues se enfocó en las perspectivas actuales del Arbitraje Internacional, introduciéndose por Don Juan Antonio Cremades que impartió una nueva versión erudita del origen del arbitraje en España remontándose a la ley del encaje y concluyendo que el arbitraje es un espacio de libertad.

Tras la presentación se comenzó el Seminario con una mesa que trató del Arbitraje Marítimo dejando patente que la Corte más actual de este tipo de arbitrajes está situada en Singapur, siendo frecuentes los arbitrajes en Londres y Nueva York y, y que en España parece haber apatía (se señala que la Ley de Navegación Marítima necesitó 10 años de estudio) para atraerlos cuando por idioma y costes, sobre todo cuando son muchos los planteados por castellano hablantes, podrían ser muy competitivos. Parece pues interesante que se considere la posibilidad de crear una corte de arbitraje internacional de derecho marítimo en España.

La siguiente mesa se desarrolló sobre las medidas cautelares y el árbitro de emergencia, centrándose el debate en esta última figura propiciando consejos prácticos para su solicitud, para la ejecución de las medidas que acuerde y sobre todo para

saber en qué países el árbitro de emergencia no puede adoptar medidas cautelares sin intervención judicial.

Celebrado el almuerzo en el Ilustre colegio de Abogados del Señorío de Vizcaya en sus magníficas y bellas instalaciones, se continuó con el reconocimiento y ejecución de laudos extranjeros, significándose de entrada la importancia de conocer los países que han de intervenir en el arbitraje para mejor elegir la sede del mismo y poder obtener ese reconocimiento y ejecución.

Mayor debate e interés pero muy vinculado a lo anterior generó la siguiente mesa sobre el reconocimiento y ejecución de laudos arbitrales anulados y en concreto si pueden ejecutarse habiéndose anulado en origen.

Concluido el trabajo marchamos a disfrutar de una exposición sobre la memoria recobrada en el edificio IBERDROLA y una magnífica cena, como no podía ser menos en un paraíso de la gastronomía, en la Bilbaína.

En la mañana del sábado todavía se celebraron tres mesas de trabajo más, además de cerrar con una presentación de conclusiones y la ceremonia de clausura.

La primera de las mesas del sábado se dedicó al arbitraje de inversión. Ante la amplitud del tema, tuvimos tres visiones muy interesantes desde tres continentes, refiriéndose los ponentes a cuestiones concretas como la Cláusula de Nación Más Favorecida, o las dificultades para la designación de los árbitros en al sistema OHADA.

La segunda mesa se centró en analizar las ventajas y desventajas del sistema de Corte Permanente como alternativa al Arbitraje de Inversión. Es un tema de amplia actualidad tras la inclusión de un sistema de aquél tipo en el Acuerdo Económico y Comercial Global firmado entre Unión Europea y Canadá (CETA, en sus siglas en inglés) y ante la pretensión de extender ese sistema a otros ámbitos hoy sometidos a Arbitraje de Inversión.

La última mesa se dedicó a las posibles consecuencias del *Brexit* sobre el panorama del arbitraje en la Unión Europea. Reino Unido ha sido paladín del arbitraje en Europa y, dentro de esta, sede de referencia. Se reflexionó sobre el impacto de la salida de Reino Unido de la Unión Europea en el panorama del arbitraje; siendo que una parte importante de los arbitrajes regionales se someten a Cortes Británicas, así como sobre los arbitrajes internacionales puros, en los que se habló de la tradición de Reino Unido en este terreno – ajena a su pertenencia a la Unión Europea – , e incluso del posible peso de la tradición colonial para ganar la preponderancia que tienen hoy sus Cortes.

Todas las mesas fueron muy interesantes y dieron lugar al establecimiento de debate y a la formulación de preguntas por parte del público.

El Seminario resultó enriquecedor pero, como se planteó incluso durante la ceremonia de clausura, insuficiente por lo que es probable que tengamos que continuarlo durante el próximo año 2018, por lo que animamos a todos los que no hayan podido asistir en esta

Ocasión a que lo hagan el próximo año porque tanto la materia, como los ponentes e intervinientes, pero sobre todo el marco del Ilustre Colegio de Abogados del Señorío de Vizcaya y la ciudad de Bilbao y sus generosos vecinos, lo justifican con creces.

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Pre-Mediation and Mediation Advocacy: Skills and Strategies for Mediation

Verena MOLL

After a very successful workshop in Mediation Advocacy in Paris in 2016, the UIA together with the UIA German national committee had the pleasure to organize on June 29-30, 2017 in Hamburg a new event with Prof. Nadja Alexander. This outstanding trainer from Australia is *inter alia* the Academic Director of the Singapore International Dispute Resolution Academy (SIDRA), visiting Professor of Law at Singapore Management University and Conflict Management Adviser to the World Bank Group.

The two days workshop was exclusively dedicated to the role of professional advisers (also referred to as mediation advocates) in the pre-mediation and mediation process. The participants, all lawyers, came from Germany, France, Belgium, Italy, the Netherlands and Iraq. Some of the participants were qualified mediators, others not necessarily specialized in mediation but familiar with ADR, in particular with arbitration.

Internationally, lawyers are increasingly required to inform their clients of the appropriateness of alternative dispute resolution (ADR). Thus the knowledge of the suitability of mediation is of major importance. This poses new challenges in terms of defining the new role and skills of lawyers as mediation advisers.

On day 1, the group worked on the following topics:

1. Process choices and the different approaches to resolve conflicts (court adjudications, private judging, arbitration, case appraisal, neutral evaluation, dispute management assessing, conciliation, mediation, negotiation, hybrids). The participants shared their experience from their daily practice, the expectations and mentalities of their clients and brainstormed about the different possibilities of conflict resolution.

2. The Mediation Meta-Model, developed by Prof. Alexander, where six contemporary practice models are represented: expert advisory mediation, settlement mediation, integrative mediation, wise counsel mediation, diagnostic mediation and transformative mediation. The Mediation Meta-Model is based on two dimensions: On the interaction dimension (i.e. parties conduct in mediation), on the one hand, and the intervention dimension of the mediator, on the other hand.

The participants were required to identify the model used in various examples given by Prof. Alexander or to suggest an appropriate model on given facts. Very interesting and interactive discussions came up due to personal perceptions of the participants, inter alia because of different cultural and legal backgrounds and professional experience.

3. The role of professional advisers in pre-mediation that requires certain skills such as the ability to draft mediation clauses and apply mediation law, the desire and flexibility to initiate contact with the other parties, their representatives and with mediation institutions, the identification, negotiation and choice of mediation processes (cf. Meta-Model) and of the mediator, the negotiation and drafting of the mediation agreement (dealing with rights and obligation of the mediator, the parties, the lawyers, confidentially rules etc.), the preparation of the mediation memo and other documentation required by the designated mediator and finally the preparation of the client. The participants had the opportunity to translate directly this know-how into action with a case study and use their creativity, own experience and the tools at hand.

After a very intense, inspiring and joyful working day, the group visited the beautiful terrace of the famous concert hall *Elbphilharmonie* followed by a cocktail reception and an informal dinner.

Day 2 was mostly dedicated to the adviser's roles in mediation and the corresponding skills necessary for mediation advisers during and after the mediation.

According to their level of involvement in the mediation process and the parties' expectations, professional advisers may adopt one or more of the following five different roles: *absent adviser* (ensuring that the client can effectively and efficiently participate in the mediation process, but absent during the mediation sessions; most suitable where parties have the capacity and willingness to participate actively in the process); *adviser observer* (similar to the absent advisers, but professional advisers present in mediation sessions, observing and offering legal and other professional advice as needed, suitable for more complex mediations with sophisticated clients who have the capacity to negotiate themselves); *expert contributor* (same tasks as adviser observers, but they participate directly in the process by sharing their professional opinion with the mediator, the other party and its adviser, but refrain from actually negotiating on behalf of their client; suitable in the presence of complex legal or technical issues with clients who have the capacity to negotiate themselves); *supportive professional participant* (same tasks as expert contributors, but instead of being limited to sharing professional opinions, they work collaboratively with their client as a team. This works out best when both advisers and clients are well-prepared and work efficiently together and share similar view on desired outcomes) and *spokesperson* (here professional advisers speak on behalf of their client throughout the mediation; should be reserved for mediations where clients do not have the capacity to participate actively – psychological disorder, power imbalances etc.).

A mediation session role play involving the mediator, parties and their counsels completed this working day.

Every participant attending the 2 days training course program received the *SIDRA Certificate for Mediation Advocacy* and

eligible candidates may apply for Mediator Advocacy Certification of the International Mediation Institute (IMI).

In conclusion, it was a wonderful, productive and solution focused workshop with an excellent trainer and the participants were very happy about meeting and sharing their experiences. Special thanks to Mario Krogmann, President of the UIA German national committee, and his team of the law firm Blaum Dettmers Rabstein who warmly welcomed the participants and the trainer and hosted the workshop in their offices with an exceptional view of the Hamburg Harbour. Special thanks also to the law firm Ahlers & Vogel for offering the wonderful cocktail reception in their offices.

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UIA: New Direction for an Exciting Future

UIA Strategic Planning Working Group

Some readers will be aware that the UIA has been undertaking a strategic planning exercise for the last nine months with the objective of enabling the UIA to develop and prosper in the years ahead. The exercise has required the Executive Committee with the assistance of the Governing Board to analyse where the UIA is at the present time and where it needs to be by the end of 2020. This has involved a wide-ranging review of UIA including identifying key strengths, weaknesses, opportunities, and threats.

In undertaking this exercise, the Executive Committee and Governing Board have been assisted by both a Strategic Planning Working Group (SDWG) (chaired by President-Elect Pedro Pais de Almeida and having as its other members Issouf Baadhio, Jerry Roth, Sebaastian Molenaar, Stephen Sidkin, Marie-Pierre Richard and consultant Bob Empson); and also the UIA HQ team.

The strategy 2017 – 2020 has seven themes:

1. Focused global development: this prioritises regions and countries so that UIA's limited resources can be better targeted and co-ordinated to maximise outcomes.

2. Retain and grow membership: the aim is to not only grow individual and collective memberships but also launch a new category for "groups" (eg firms).

3. Revitalise UIA brand: a detailed brand and communications strategy will be developed during 2017; but immediate initiatives are already being taken to present and promote the UIA as a global and multi-cultural organisation.

4. Generate sustainable income: our income will be grown not only through membership growth and enhancing the value to members but also by taking a more commercial approach to sponsorship and improving efficiency and making some economies.

5. UIA-IROL impact: it is recognised that UIA-IROL needs to build on its initial foundations with a strategy for its future development.

6. Streamline and strengthen governance: an audit of our governance and feedback from Executive Committee identified opportunities improve and modernise UIA's governance. Actions are already being taken.

7. Upgrade resources/capacity: UIA needs its HQ to have the resources and management capacity to implement the strategy, this will include reviewing what information and communications technology will be needed in the future to make UIA more efficient and effective.

In addition, work is continuing with refining the **mission and objects** of UIA. The intention is to present these for approval in Toronto.

In Geneva in June the strategy was endorsed by the Executive Committee and approved by the Governing Board. A detailed implementation plan for 2017 has been produced; this is being overseen by a Strategy Implementation Group (comprising members of the SDWG with the addition of Maria Cronin and Patricia López-Aufranc) reporting through the Bureau to Executive Committee.

It is invariably the case that the implementation of a plan is harder than the actual preparation of the plan itself. The UIA's strategic plan is no different. This is where your support and involvement will be important.

In addition to other communications about the strategy, further information will be provided at the meetings in Tallinn in September and at Congress in Toronto in October. Your support going forwards will be most welcome as we all look to ensure the successful development of the UIA for the future.

UIA Strategic Planning Working Group

L'UIA à Singapour

24e Forum des Centres de Médiations

Fabienne van der VLEUGEL

Tous les neuf mois depuis 2001, le Forum mondial des centres de médiation de l'Union International des Avocats (Forum UIA) réunit, non seulement les représentants des centres de médiation commerciale les plus réputés au monde, les avocats, les médiateurs expérimentés et reconnus en médiation commerciale internationale ainsi que ceux qui souhaitent actualiser et parfaire leur pratique, mais aussi les chefs d'entreprises intéressés par la mise en œuvre de ce mode alternatif de résolution de conflit, les professeurs d'université et écoles, les étudiants, et toute personne intéressée par le développement de la médiation commerciale internationale.

Le Forum UIA est ancré dans le monde de la pratique, connu et reconnu pour offrir un espace sérieux, professionnel et convivial invitant aux débats et à la discussion franche et pratique pour échanger de façon constructive et réelle sur les développements des modes alternatifs de résolution des conflits (ADR) et les bonnes pratiques en médiation.

Chaque Forum UIA est organisé autour de thèmes divers et variés, toujours d'actualité, qui sont développés de façon pragmatique lors de sessions de travail bien encadrées par des exposés qui se veulent concrets et qui aboutissent toujours à des échanges interactifs permettant d'améliorer et d'enrichir sa pratique de la médiation.

Le Forum UIA est structuré de telle façon qu'il permet chaque fois de combiner sérieux, convivialité, dynamisme, perfectionnement professionnel, apprentissage d'une culture différente et développement concret et réel de réseaux. Les experts de haut niveau aiment partager leurs expériences avec les jeunes experts qui, eux, par leur audace et interrogations, enrichissent le débat et le colorent.

Chaque Forum UIA est une expérience unique, et tous les participants vous le confirmeront.

Cette année, du 12 au 14 octobre 2017, c'est à Singapour que le prochain Forum UIA sera organisé, avec le soutien officiel des quatre centres de médiation : SIDRA (*Singapore International Dispute Resolution Acadamy*), SIMC (*Singapore International Mediation Centre), SIMI (Singapore International Mediation Institute*) et SMC (*Singapore Mediation Centre*).

Le programme scientifique et les modalités d'inscription sont disponibles sur le site internet de l'UIA (http://www.uianet.org/fr/evenement/type-46995/24e-forum-mondial-des-centres-de-médiation).

Le Forum UIA de Singapour permettra aux participants, dans un premier temps, d'en apprendre plus sur le mode concret de fonctionnement des centres de médiation de Singapour qui seront explicités par les représentants officiels des quatre centres de médiation précités (1re session).

Ross W. Stoddard III (Tx-USA) animera ensuite avec ses collègues médiateurs d'Australie (Emma-May Litchfield et Danielle Hutchinson) et de Singapour (Dorcas Quek), une session nous éclairant sur la « *pound conference* 2016-2017 » (2e session). Joe Behan (Irlande, et Vice-Président du Forum UIA) développera avec Alan Limbury (Australie), Fleur Kingham (Australie) et Lawrence Tan (Singapour) le thème de la médiation et des grands projets environnementaux et de construction (3e session). Ce sujet rencontre toujours un intérêt incontestable tant il est vrai que la médiation constitue, pour ces dossiers, une solution pragmatique de gestion des différends. La 4e session sera synonyme de choc de culture entre Abu Dhabi (Mazen Tajeddine), Singapour (Prof. Nadja Alexander), France (Catherine Leclercq), Grèce (Zoe Giannopoulou) et Royaume-Uni (Rahim Shamji), via le prisme du système « RRR » (*Regulatory Robusteness Rating*) qu'on appréhendera mieux, guidés par les conférenciers.

Et ceci n'est qu'un aperçu de la 1re journée qui prendra fin avec une soirée réservant plusieurs surprises.

Dès le lendemain, Kimberly Schreiber (TN, États-Unis) organisera en 5e session un « *gameshow* » hors du commun avec David Adams (TN, USA) et Cezary Rogula (Pologne) pour, ensuite, laisser la place à Aneesha Bhunjun (Royaume-Uni) nous guider avec Aloysius Goh (Singapour) et Jeffry Abrams (TX, États-Unis), qui a participé à quasi tous les Forum UIA, vers le thème « *ADR Tourism* ». En 6e session, les représentants de Modron (Nathan Polito et Richelle Nicols) nous introduiront leur technologie ODR. Nous terminerons avec l'incontournable F. Peter Phillips (NJ, États-Unis) qui interviewera le Prof. Tye Beng Lee, pour nous sensibiliser et nous éclairer, d'une façon certainement unique, à l'importance de la compréhension de la culture de nos voisins du monde.

Le 24e Forum UIA à Singapour d'octobre 2017 promet d'être à nouveau riche en apprentissage.

L'organisation du Forum UIA à Singapour est parfaitement d'actualité et s'intègre dans une dynamique de développement de la médiation fort enrichissante. Les sessions de travail qui y seront organisées, et les échanges qui en ressortiront, permettront sans nul doute au praticien de peaufiner sa façon de gérer une médiation à caractère international. La présence, en introduction du Forum UIA, du Prof. Yihan Goh (*Singapore Management University*), concrétise ce lien intergénérationnel que ce Forum entend aussi créer et favoriser : sensibiliser les étudiants, futurs décideurs, futurs chefs d'entreprise et futurs praticiens aux avantages découlant de l'utilisation de la médiation.

Nous nous réjouissons de vous voir nombreux du 12 au 14 octobre 2017 à Singapour.

Ne manquez pas non plus, d'ores et déjà, de bloquer vos agendas pour participer au 25e Forum UIA qui sera organisé en Europe du 22 au 25 juin 2018.

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90 ans et un nouveau siège !

Car les dates anniversaires sont souvent synonymes de changements et de bonnes résolutions, l'UIA a décidé de faire ses cartons et de déménager son siège administratif dans de nouveaux locaux.

Depuis la mi-juin de cette année, le Centre UIA se trouve désormais au 20 rue Drouot dans le 9e arrondissement de Paris.

Un peu d'histoire

Au début du XXe siècle, ce quartier attirait de grands industriels et des hommes d'affaires. Les banques françaises renommées, les compagnies ferroviaires et les grands magasins ont rapidement établi leurs sièges sociaux dans l'arrondissement.

L'Hôtel des Ventes de Drouot, inauguré en 1852, attirait aussi les antiquaires et les marchands d'art, indiquant que le quartier était aussi tourné vers le monde des arts et lettres. En 1862, Charles Garnier y construisit l'Opéra et Haussmann en aménagea les abords.

Et aujourd'hui ?

Autour de la rue Drouot, se trouvent désormais de nombreux antiquaires, numismates et philatélistes. C'est un quartier d'affaires qui attire en soirée les Parisiens pour ses nombreux théâtres qui animent l'arrondissement. Les touristes flânent, quant à eux, autour des grands magasins.

Accessibilité

Situés au cœur de cette ambiance d'affaires et de loisirs, les nouveaux locaux restent très centraux et accessibles par tous les moyens de transport parisien (3 lignes de métro, RER A et E) et très proches de trois grandes gares (Saint Lazare, Gare du Nord, Gare de l'Est).

Les nouveaux locaux

D'une surface d'environ 200 m^2, les nouveaux locaux sont clairs, agréables et fonctionnels. Une accueillante salle de réunion recevra bientôt les formations parisiennes de l'UIA : anglais juridique pour les avocats (fin janvier 2018), marketing et communication pour les cabinets d'avocats (mai 2018), entre autres.

Les horaires d'ouverture

Le Centre UIA accueille les visiteurs les lundis et mardis de 9h00 à 18h00, les mercredis et jeudis de 9h00 à 17h30 et le vendredi de 9h00 à 13h00. Toute l'équipe attend avec impatience de vous faire découvrir sa nouvelle installation.

À très bientôt !

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Derechos Humanos y de la Defensa

Professional Women: Understanding the Gender Gap

Patricia LÓPEZ AUFRANC

While women graduate from Law Schools and other professional schools and take entry-level positions in equal numbers with men, at least in most Western countries, top leadership positions in the corporate world remain a male bastion. Law firms are not an exception.

In the '90s, women took huge leaps forward in the workplace, but the situation appears to have plateaued. Even worse, in some cases, it seems to be receding!

The ability to retain women talent has not yet been sufficiently mastered. For many years, the "glass ceiling" described the main obstacle to women´s advancement. These days, organizations are concerned with the "leaking pipeline" long before women reach top management positions or partnership candidacy, since women seem to be stepping down at all levels of their careers. This is worrying, since attracting, developing, and promoting the best talent is essential to keep an organization's competitive edge, even without considering the loss entailed in training a workforce only to see it leave a few years down the road.

Understanding the reasons behind the current gender gap at the top is crucial to devise effective gender diversity policies. Unless we address the root causes, women in leadership positions will remain scarce. This is not just a fairness concern, it is an economic development issue and a bottom line issue, since talent is scarce and evidence shows that diverse organizations make better decisions, are more innovative, and are generally more profitable.

With the increase in highly qualified professional women entering the workforce and blatant sexist discrimination having been significantly reduced in the corporate world, why is it still, in 2017, more difficult for women to make it to the top?

Multiple barriers that can be classified as external or internal have been identified. External barriers are societal or organizational. Internal barriers are certain traits, generally attributed to women.

Culture, whether societal or organizational, is at the heart of external and internal barriers. The combination of these barriers results in an uneven playing field for women in their way to leadership positions.

Stereotypes and biases are partially blamed for many of the hurdles raised to the advancement of women and for the imperfect functioning of meritocracy.

Stereotypes and biases are deeply ingrained in our society and condition both men's and women's behavior. Since stereotypes and biases are subtler than blatant discrimination, they are more difficult to identify and eradicate.

Because external and internal barriers to a large extent result from stereotypes and biases, I will discuss these first.

Stereotypes and Biases

Stereotypes, in this context, are oversimplified, fairly fixed ideas, which a group of people has about another group. Since they are not updated frequently and do not account for individual differences, they tend to be inaccurate. They can be based on an array of circumstances such as race, religion, gender, or sexual orientation. Obviously people should be judged on the basis of their own individual characteristics, not pigeon-holed into groups on the basis of generalizations.

Traditionally, leadership is associated with masculinity, and traits such as decisiveness, assertiveness, independence, and ambition are considered definitional. Stereotypical women are expected to be warm, gentle, nurturing, and friendly; all these are personality traits that are rarely associated with leadership.

Individuals who do not behave stereotypically face potential backlashes, since people tend to react negatively when faced with individuals who do not fit in the stereotype. Further, when people encounter evidence inconsistent with their beliefs, they tend to ignore it, leaving the stereotype undamaged in their mind.

Culture, upbringing, and the media perpetuate stereotypes. It is unlikely that our conceptions about gender roles will change radically in the near future. Rather they solidify the biases held by both men and women.

Unconscious or implicit biases are mental shortcuts that happen automatically and allow our brain to process information at a speed that would be otherwise impossible and make judgments about people and situations, influenced by our background, cultural environment, and experience. While very helpful in everyday life to deal with dangers and ever-changing circumstances, when biases are based on social norms and stereotypes, they can lead to make decisions in favor or against a given group, without objective grounds.

Bias at work can appear almost anywhere, but they are most relevant in recruiting, screening, performance reviews and feedback, coaching, mentoring, sponsoring, and promotions. Numerous biases have been identified that operate in the workplace. Some of those most relevant to the workplace are described below.

> When we persist in the traditional upbringing of children, and are exposed to this bombardment in the media, it is not surprising that stereotypes and biases continue to be pervasive in the collective unconscious.

Affinity bias shows an inclination to warm up with people like us. For example, the indication that a given individual "fits in the culture" should be a warning regarding the operation of affinity bias, since it hints that a person is accepted for resembling the incumbents.

Confirmation bias operates when one looks for or interprets information and behavior in a manner that confirms what the person already believes and conforms to the stereotype (i.e. our beliefs and assumptions) disregarding other aspects.

Conformity bias is the tendency not to voice one's own opinions when the majority of the group leans in another direction.

Correlation bias leads, for example, to success and likeability being positively correlated for men and negatively correlated for women.

Groupthink bias is the tendency to mimic a group, adopting the prevailing group's traits and minimizing individuality as a way of fitting in such group. Pictures of company boards where a few women sit, help to illustrate this. These women tend to dress in a manner undistinguishable with men (e.g., dark suits, white shirts; black dresses).

Perception bias makes it difficult to make objective decisions, once a stereotyped idea about members of a group is deeply ingrained (e.g., women are bad at math).

Our biases affect our perception (i.e., how we see people, how we see reality), our attitude (i.e., how we behave vis-à-vis certain people), our attention (i.e., what aspects we focus on) and as a consequence, our decision making process.

Since meeting the expectations associated with the stereotype frequently results in better assessments about the person in question, or at least, reduces the risk of backlashes, many women end up conforming to the stereotype to some extent, thereby falling in the so called "**stereotype risk**".

One may be surprised of the extent to which stereotypes and biases persist in the 21st Century. However, a visit to a toy store gives a first clue. Sections for girls' toys tend to be pervasively pink and full of toys that encourage fantasy (e.g. princesses´ attire), housework, beauty, or reflect support roles (e.g. nurses´ attire and equipment as opposed to doctor's) while toys for boys encourage action. Upbringing contributes to the problem. Generally, girls are taught to be nice to others, behave, and be good students; boys, meanwhile, are raised to compete.

Women's image depicted in the media also contributes to reinforce these stereotypes. Shockingly sexist advertisements can be seen everywhere on TV, billboards, magazines, and social media, letting alone the abundance of ads where women happily carry out household tasks or are depicted as frivolous or unintelligent. Men, however, are much more likely to be seen in the workplace on TV and elsewhere than women.

When we persist in the traditional upbringing of children, and are exposed to this bombardment in the media, it is not surprising that stereotypes and biases continue to be pervasive in the collective unconscious. They are so common and deeply ingrained that it takes training to identify them, let alone eradicate them.

External and Internal Barriers to Equal Opportunities

Stereotypes and unconscious biases are responsible for many of the barriers to the advancement of women.

External Barriers

Women displaying traditional women's characteristics are viewed as warm but not competent. Those who deviate from traditional femininity are seen as competent but not warm. Deeply ingrained beliefs and traditions both at the society and the organizational level are somehow to blame.

Research points out to the partial failure of meritocracy in the workplace also due to stereotypes and unconscious biases. This is the only plausible explanation why, irrespective of the composition of the selection panel, when musicians audition behind a screen, 25% more women get chosen, or why a CEO is more harshly assessed when given a woman's name as opposed to a man's name, all other facts being equal, by students analyzing a business school case (HBS´s case known as "Harold and Heidi").

Working culture that requires **24/7 availability** definitely disfavors women. The **"any time, anywhere" culture will be difficult to maintain for women, as they have more than a fair share of the nurturing role.** Availability 24/7, 365 days a year is often required for many leadership positions and is often an insurmountable barrier for women. So is the idea of a linear career. Step careers may be a solution to help women´s climb to the top.

Favoring **"face time in the office",** as opposed to performance, somehow sounds anachronistic. This work model was developed in and for the industrial era. In the knowledge era, with ubiquitous technology, alternative and more flexible work arrangements, such as flexible hours, remote working, shared positions, and maternity/paternity leave should become the norm whenever possible.

A deeply **disproportionate caring duty within the family and housework burden**, even for women working full time, prevails in most countries. Men who take responsibility for household and caring duty give invaluable support.

Women who defy stereotypes commonly face social resistance and social identity conflict within themselves. Even today, society tends to be surprised at successful professional women who are good wives and mothers. There seems to be an engrained belief that "good professional/working women" and "good mother" are somehow incompatible roles. Frequently non-working mothers are inclined to make working mothers feel "guilty" for not being always present. Cultural stereotypes are so strong that they often lead professional women to question themselves on whether they are doing the right thing, irrespective of the fact that there are no studies proving that children of non-working mothers are happier or develop better than children of working mothers. On the contrary, some studies claim that having a mother as role model is stimulating for girls and boys and fosters their independence. Whether someone fulfills a role as a parent is highly dependent

on the individual and other circumstances, such as the support from the other parent.

Also, becoming a mother faces a woman with the risk of being judged as "being less good for the job", while parenthood makes men seem more competent and committed.

Most professional women who have somehow defied the stereotype will also admit having been characterized as "**difficult", "bossy", "pushy",** even **"bitchy",** at some stage in their career for having asked for a raise, a company car, or any of the perks associated with a position. A similar attitude in a man is most often appreciated, if not encouraged, as showing ambition.

Women often must outperform their male counterparts to obtain equal status and equal career rewards. Research shows that men tend to be promoted on the basis of potential, while **women are commonly judged based on past achievements**. This often results in unfair performance evaluations. Women are more often than men expected to continuously prove that they deserve the position they hold.

The fact that there are fewer women in leadership positions often excludes women from informal networks and communication channels. **The "boy's club" still operates** in most working environments, and belonging is most helpful in the way to the top.

The **shortage of role models, mentors, and sponsors** also is adverse. The importance of role models cannot be sufficiently underscored to encourage younger generations to aim at the top, as a possible and worth-the-effort goal.

Less women leaders implies **less role models for women**, since men tend to mentor men more often and more eagerly than mentoring women, particularly, since a large part of the mentoring may be informal. The lack of role models and lack of mentors is lethal to career advancement. The life stories of women who have overcome barriers are always inspiring. Sharing the life stories of successful women is important to help overcome prejudices and self-imposed limitations.

When women at the top are scarce, they tend to be considered exceptional, and few dare to follow their steps. This **"tokenism",** the fact that some women have made it, **leads many to believe that there are equal opportunities, while in most cases this is not the case**. It is true that the percentage of women who made it to the top who are "exceptional" seems higher than in the case of men, thereby indicating that it is more difficult for an "average" woman to reach a leadership position than it is for a man.

Organizations should **make sure the women are put in the game**: that they get the good assignments, are considered for promotions, and are valued for their contribution, since people who are in leadership positions who are still mostly men, are inclined often to look for future leaders who resemble them.

Limited workplace flexibility, lack of sufficient sponsorship, and unconscious biases are deeply intertwined, making them difficult to eliminate.

Gender diversity is far from being at the top of the list of priorities of most organizations. Continuing efforts towards creating corporate cultures more welcoming to women at the top is crucial. Establishing targets and holding top management accountable may prove most useful to achieve measurable progress.

Notwithstanding, establishing the proper quality level of one's work and the right level of commitment is always a challenge.

Internal Barriers

On the other side, literature has singled out certain common feminine traits, which also result from culture, upbringing, and social and working habits, that make it more difficult for women to navigate the system.

It has been maintained that highlighting the things that women could do better tends to put the burden on women, further increasing the pressure on them. However, until the systems adapt and the prevailing culture is more gender balanced, changing some of these behaviors will make it easier to navigate the system, improve women´s chances of success, or, at least, make their lives easier. Likewise, developing men's awareness of these differences may lead to changes in behavior and better outcomes, and so would increasing an organization´s awareness of the hurdles.

Women, who in general have been **raised to love and be loved**, to please and nurture, often face the "being liked or respected" dilemma, as they climb the ladder, since, as mentioned earlier, likeability and respectability seem to not be as directly correlated in women as in men.

As women, we often suffer from the "Confidence Gap", which on the one side makes us believe that chances to get to the top are scarce and therefore not necessarily worth the effort, and on the other side, leads us to undervalue our strengths and underestimate our own abilities. It grounds a certain reluctance to self-promote, claim our achievements, ask for promotions, and negotiate for ourselves. This attitude of even highly competent women may be rooted in the education imparted to girls, who are generally taught to be nice, rather than to be competitive. To self-assess one's achievements objectively and periodically and learning to feel comfortable "owning one's story" is advisable to overcome this feeling.

We tend to down play our ideas and often advance our ideas in the form of questions, starting phrases with qualifiers, let alone asking to be excused for advancing them, such as "I think that", "I am not sure but", "I am sorry to disagree" or finishing sentences with a question mark, thereby sounding less assertive or confident. As part of their mentoring, women should be advised not to frame their statements as questions regularly.

We even **sometimes fall into the "impostor syndrome".** Women who have ventured far from stereotyped roles often feel that they "don't belong", "should not be occupying the position", and worse

of all even fear to be "unmasked as a fake"! It is not unusual to hear a woman justify a career opportunity, saying: "I was in the right place, at the right time, and with the right credentials", rather than, "I have been preparing my whole professional life for this opportunity". In the same vein, women often use the word "lucky" when referring to themselves, without realizing that by doing that, they are diminishing their own accomplishments. This feeling has been reported to be decreasing in Generation X and millennial women, as compared with baby boomers. It remains to be seen whether they can maintain such self-assurance as they climb up the ladder and face new hurdles.

A reduced or even suppressed sense of personal entitlement raises barriers to women asking for what they want, whether salary raises, perks or opportunities. Women feel more comfortable working hard in view of being recognized and rewarded by a third party who thereby confirms entitlement. This is an issue when faced with male colleagues for whom "asking" is the way to go about. Women more often complain to colleagues and third parties about what they don't get at work than make specific requests about what they want. However, unless one clearly states what one wants, one cannot claim to be discriminated! **Speak up** and contribute in meetings, share ideas with peers and people in higher positions, identify areas where your reputation is not what you would want it to be and work on it. All this will help you build a reputation towards "smashing the glass". Visibility both within the organization and outside is most crucial to succeed.

That being said, whether consciously or unconsciously, women have learned to be overly cautious in avoiding the risk of backlash that boosting our qualities often brings. This is one of the reasons why it is so difficult for women to toot their own horn. When one understands that moving towards the radar zone may be counter stereotypical and therefore result in backlashes, it is not that surprising. Since women are good at negotiating or advocating for others, an effective way around this potential obstacle is to develop alliances and toot each other's horn!

We tend to be **perfectionist**s, without noticing that perfectionism often inhibits action. We want to be perfect at work, as partners, as mothers, and in everything we do. Meticulosity acts as an action inhibitor and generally deprives experience or slows responses. Pointless perfection should be discouraged in favor of timely action. Nothing builds confidence like taking action, especially when action involves risk and failure. Risk keeps you growing, improving, and gaining confidence. Failure is an opportunity to learn and grow. Notwithstanding, establishing the proper quality level of one's work and the right level of commitment is always a challenge.

Women are **more reluctant to move out of their comfort zone**. We will be well advised to overcome this tendency, continuously seek for challenging, high-profile projects that will give us visibility. Often we should be prepared to work more than our colleagues to get noticed. If we leave our comfort zone, the worse that can happen is that we fail. Staying there is stagnating. Women should learn to make decisions big and small in a timely manner. Research reports that women will accept a challenge if they feel they exceed 85% of the competencies required, while, in general, men will accept it if they feel they meet 50 to 60%. Often, what is most important is not the competency but the disposition to learn quickly and commit the effort!

Women tend to be less competitive than men. As mentioned above, this is generally rooted in education. Women should be encouraged to compete even if they lose. A piece of advice that I have learned to cherish is the importance of failure. Fail fast, fail often, fail deep. How do you overcome failure and the lessons you learn is what is important. Failure is an opportunity for growth and to develop resilience. Unless one risks some degree of failure, living a life in one´s comfort zone, is far from a recipe for success.

Women are **great to assume responsibility for things gone wrong and attribute success to luck or third parties**.

Women should learn to better take feedback and act upon it. Feedback may be hard to hear, but when given by those we respect, it reveals weaknesses and helps us to understand where one needs to grow. Even when it comes from someone you don't particularly respect, there is always some truth to it. Our difficulty probably arises from the fact that girls are scolded much less often than boys, because we behave better as children, and therefore received much less criticism than our male counterparts growing up and, thus, tend to be less resilient. This sometimes leads to women getting less negative feedback than men, from superiors who prefer to avoid unpleasant reactions, thereby depriving women from opportunities to improve. Asking for continuous feedback, once goals have been set, helps to monitor the growth of one's skills and areas that must be developed and must be sought as a helpful tool.

We tend to believe that adverse circumstances are personal. "They don't like me" is a statement that I have often heard from female colleagues. I have never heard a similar statement from a man. More often than not, it is not personal. Other people are not thinking about you all the time. This may respond to our need to love and be loved, which does not necessarily happen in a working environment.

We are **inclined to ruminate our failures and errors endlessly**, torturing ourselves for having committed them. Ruminating drains confidence. Learning from mistakes, turning the page and moving on is the attitude that takes you forward. However, women's mistakes seem to be remembered longer and brought up more frequently than in the case of men.

Women should learn to say "no". We tend to feel that any limit we raise would indicate lack of commitment. This sometimes leads us to be overwhelmed and entails the risk of not delivering at the level of our potential. But next to the "no" there should be a "yes".

We also tend to be **less inclined to engage in networking,** which is crucial to develop the connections that are sources of information and opportunities in the professional arena. Anyone aiming at the top should regularly reach out to new people, become involved in multidisciplinary teams and expand her network inside and outside the organization where she works. Women should be encouraged to participate both in organization sponsored events and industry

events, among others. While women networking events may be a source of peer support, information, and connections, women should also attend larger networking events, which bring a larger network, more enhanced visibility, and a greater access to potential opportunities. Networking should be considered an important part of work.

We are **bad at understanding, coping with, and navigating organizational politics,** and often unconsciously expect that the organization adapt to us. Understanding the power matrix is crucial in the way to the top, to find the right mentors and sponsors and develop alliances. What competencies are valued within the organization? Which are the values and behaviors that the organization rewards? What does it take to be promoted? What sets the organization and it leaders apart? Unless women learn to decode and navigate an organization's politics, they will have to invest a much larger effort to achieve their goals.

While women are hard workers, generally, they should **focus more on understanding the business and developing strategic and financial acumen** to redirect and focus their efforts to achieve their goals. Being responsible for the bottom line leads to the top quicker and more easily than when one excels in support or staff roles.

When I look backwards to a successful career as an international corporate lawyer, I have to admit to having made many of these mistakes at different stages of my career and at several degrees. Irrespective of my increased awareness, I continue to make some, so deeply ingrained some traits are.

Women's Excel in Soft Skills

However, not everything is to the disadvantage of professional women. Other traits traditionally associated with women such as empathy, communication skills, multitasking, teamwork and team building, participative decision-making, motivation, and generally, people skills, have been identified as key to success in the 21st Century. Most management books consider that soft skills or people skills are as important as technical competence and key to success and are trying to teach men to exercise them more often. Leaders will be well advised to value these traits in professional women looking forward, instead of expecting that women behave more like men.

Final Remarks

Clearly, workforce diversity is essential to the long-term success of every business, and the gender gap is costing the economy fortunes. Accordingly, the gender gap should be acknowledged and its bridging should be a goal. To achieve this goal, the tone from the top is crucial. Establishing targets at each organization's level may prove useful; accountability is essential to achieve results.

Gender barriers resulting from stereotypes and biases should be highlighted to develop awareness in view of combatting them through training and good practices. Organizations' prevailing practices regarding recruiting, meritocracy, development, promotion, and compensation of the workforce should be periodically reviewed to identify potential weaknesses and flaws.

It is very difficult, if not impossible for anyone, individually, to change the culture of the organization where one works, let alone the societal culture. This is why, I underscore the importance of developing awareness on women's internal barriers as described above, in the meantime. Removing internal barriers to career development, or at least minimizing their impact, is within every woman's reach.

Professional women should train themselves to identify and overcome internal barriers to enhance their chances to achieve leadership positions and climb the ladder more easily.

Unless the business community wholeheartedly embraces the challenge, the situation will remain unchanged for many years.

At the organizational level, leadership engagement is crucial to bridge the gaps. Set targets, have action plans, establish a communication strategy, ensure that there is alignment at all levels of the organization, make people accountable, monitor results.

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Free Mohammed al-Roken!

The UIA is launching an international campaign calling for the release of the Emirati lawyer, Mohammed al-Roken, who was the recipient of the 2017 Ludovic Trarieux International Human Rights Prize.

Mohammed al-Roken is a lawyer who is deeply committed to the cause of human rights and the rule of law in the United Arab Emirates. He was a prominent member of the UIA, where, as Vice President of the UAE National Committee, he drew attention to the obstacles facing the rule of law and the difficulties encountered by his fellow lawyers in the UAE. He also held positions at Amnesty International for more than twenty years.

Mohammed al-Roken was arrested on July 17, 2012 during a series of mass arrests of human rights activists, judges, intellectuals and student community leaders. These arrests followed a petition that called for reforms to bring greater democratisation to the UAE.

On July 2, 2013, he was sentenced to 10 years in prison, including a 3-year probation period because he created an organisation allegedly designed to overthrow the government. He also is prohibited from practising law.

Mohammed al-Roken was tortured and deprived of the right to an effective defence. Independent observers were not able to be present at his hearings. He has always denied the charges made against him.

No human rights advocate should be detained or imprisoned due to the peaceful exercise of his or her rights to freedom of expression and freedom of association.

The detention of Mohammed al-Roken is incompatible with the United Arab Emirates' responsibilities and commitments as a member of the United Nations Human Rights Council.
Mohammed al-Roken should not spend another day in prison!

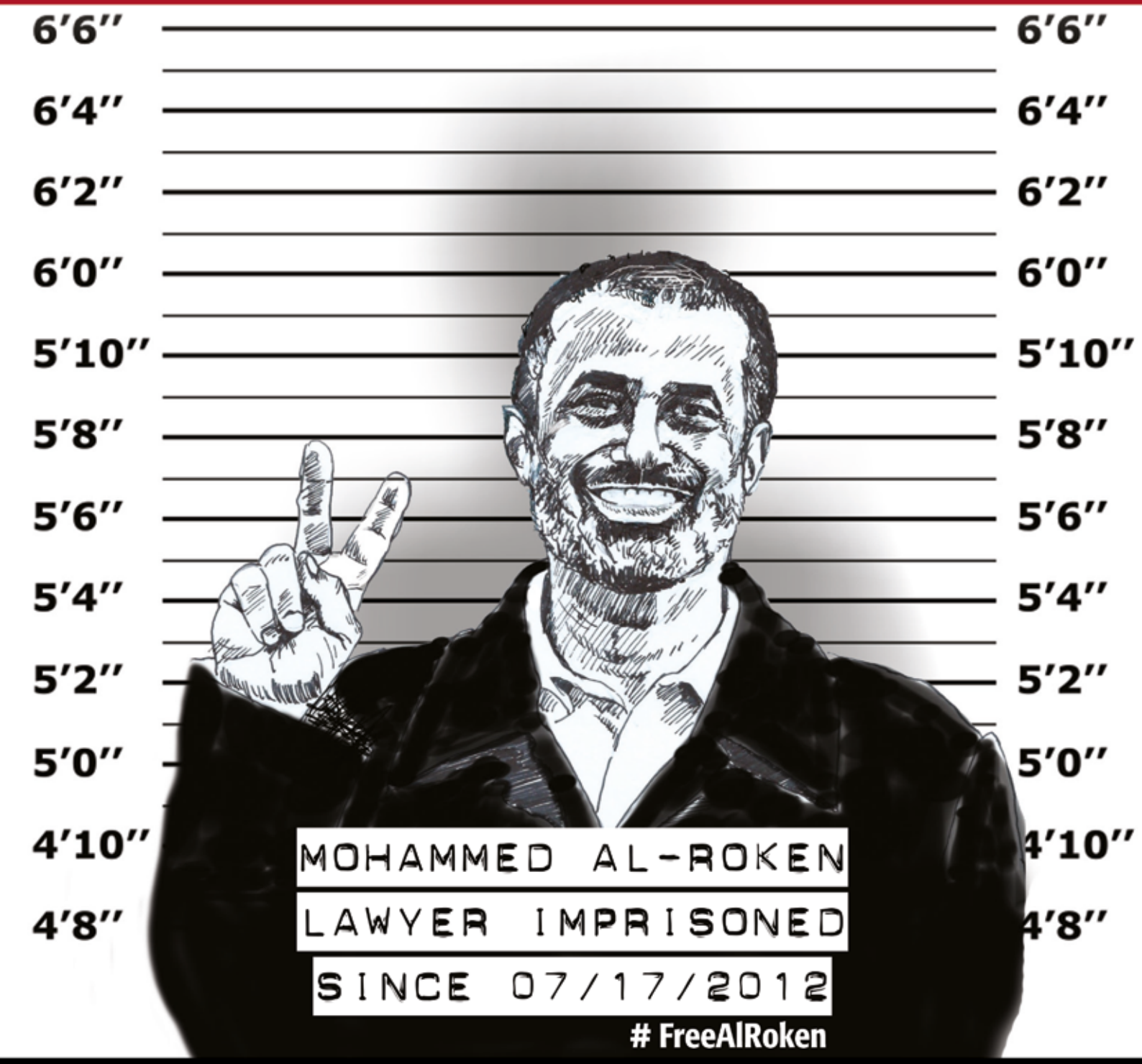
The UIA calls on the international legal community to condemn the injustice of Mohammed al-Roken's incarceration.

Join the UIA in this action, express your solidarity with our colleague and demand his release by personalising and signing the letter that is available on the UIA website and by publicising this campaign.

Follow the campaign on Facebook, LinkedIn and Twitter: #FreeAlRoken.

Join the campaign to obtain the immediate and unconditional release of the Emirati lawyer Mohammed al-Roken

IN THE EMIRATES, HUMAN RIGHTS DEFENDERS ARE ARRESTED AND TORTURED



THE UIA DEMANDS HIS RELEASE

For 90 years, the UIA has actively supported lawyers, judges and defenders across the globe who are persecuted, threatened, imprisoned or tortured for exercising their profession.

Write to the Emirati authorities. Download a model letter at:
www.uianet.org

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

Poverty & Justice: a Deadly Mix

October 10, 2017 - 15th World Day against the Death Penalty

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 (141) are now abolitionist in law or in practice.

However, an ongoing feature on the application of the death penalty is that it is inextricably linked to poverty. Social and economic inequalities affect access to justice for those who are sentenced to death for several reasons: defendants may lack resources (social and economic, but also political power) to defend themselves and will in some cases be discriminated against because of their social status.

THE DEATH PENALTY IN PRACTICE[1]

- **104 countries** have abolished the death penalty for all crimes
- **7 countries** have abolished the death penalty for ordinary crimes
- **30 countries** are abolitionist in practice
- **57 countries** are retentionist
- **23 countries** carried out **executions** in 2016
- In 2016, the top five executioners were **China**, **Iran**, **Iraq**, **Pakistan**, and **Saudi Arabia**.

1 Source :Amnesty International

[10 reasons why the death penalty is used discriminatorily, and often against the poor

1. Unequal access to education and information

All over the world, justice systems are very complex and people facing the death penalty need expertise to assist in their defense. People living in poverty often lack access to education and are often deprived of necessary and elementary social and financial support and legal knowledge to understand and participate fully in legal proceedings initiated against them in death penalty cases. They are less likely to assert rights and benefits provided by the law, and they may not know how to get support.
In **India**, **20% of people on death row never went to school** and the majority have a low level of education. (*The Death Penalty in India Report*, New Delhi University).

2. Bail and pretrial release

A person from a disadvantaged socio-economic background will be less likely to afford bail and obtain release before trial. The defendant will therefore be less able to assist in preparing a defense.

3. Unequal access to justice

No justice system is completely free of charge. The expenses related to access to justice are a major obstacle for people living in poverty, as they simply can't cover the costs. These obstacles are amplified in capital cases, where each stage of the legal process involves an additional cost, such as hiring a lawyer competent to handle legal and evidentiary matters specific to capital proceedings. These accumulated expenses are one of the main reasons people living in poverty have trouble making use of the remedies available to them in the criminal justice system.

In **India**, the law provides for the right to legal counsel before the first magistrate hearing. Despite this provision, **89%** of prisoners sentenced to death affirmed that they **never had legal representation before their first hearing**. Only **1.6% had access to legal counsel** (*The Death Penalty in India Report*, National Law University)

4. The importance of the effectiveness of the legal assistance

The legal representation for defendants from vulnerable backgrounds is often of lesser efficacy; appointed attorneys are often underpaid, lack adequate means to lead their own investigations, and lack the trial experience required for death penalty cases. The inferior quality of legal representation places defendants living in poverty at a serious disadvantage, thereby increasing their likelihood of being sentenced to death.

"The death penalty is not for the worst criminal, it's for the person with the worst lawyer."
Clive Stafford Smith, founder of the NGO Reprieve.

5. Building a strong defense

Building a strong defense in a capital case can require a lot of financial resources. People

from a disadvantaged economic background do not have the means to pay experts or to obtain a more in-depth investigation of facts and evidence. Such defendants may also not have the resources to effectively assess whether they are receiving adequate representation.

"We have a serious issue in the U.S. Our criminal justice system is very sensitive to wealth. Our system treats you better if you are rich and guilty, than if you are poor and innocent." *Bryan Stevenson, Equal Justice Initiative.*

6. The specific case of foreign nationals

Some countries host foreign nationals to perform underpaid or menial work, such as housekeeping or hard physical labor. Those migrant workers often take such jobs because they come from disadvantaged socio-economic backgrounds in their home countries. If these people interact with the criminal justice system, they may face additional discrimination because of their status as foreign nationals, because they don't speak the language and don't have the network of people and social influences to support their cases, in addition to the barriers they face as persons living in poverty.

In Saudi Arabia, according to Shari'a law, the murder victim's family may choose to pardon the murderer in exchange for Diyat, or "blood money," but migrant workers often don't have these funds. As a result, they may be executed simply because they don't have enough financial, social, or political power.
("Killing in the name of justice," The Death Penalty in Saudi Arabia, Amnesty International)

7. Biases and discrimination against people living in poverty

In many criminal justice systems, the judge and/or jury may have explicit or implicit biases against people from disadvantaged socio-economic backgrounds, making those defendants more likely to face a guilty verdict and to be sentenced to death.

8. Corruption

Corruption is endemic in many countries, including in the police force, the judicial system, and even judges themselves. Those who have financial means or who have a strong social network may be able to access much more efficient justice and even ensure a favorable trial outcome.[2] Those who don't have the financial means to pay for these justice-sector services – which are supposed to be free of charge – see their petitions and requests delayed, rejected, or dropped. Corruption is often coupled with dreadful prison conditions. Bribery may be the only way for prisoners to survive. Corruption may also permeate the system of pardons and commutations.

In **Nigeria**, bribery is common throughout the criminal justice process, from police interrogations through imprisonment. At the time of the arrest, police often demand payment in exchange for release. "I was arrested for an offence I never committed. I was at the police station to visit a friend who was in police custody. I was saying my friend should not be arrested and I was arrested as well. Then the police asked my family to pay an amount they could not pay. I was charged to court, there was nobody, no complainant to say I robbed him so I was given a murder case. All my complainants were police. At the end of the day I was given six days of trial, on the seventh day I was sentenced to death[…]" Arthur Judah Angel, former death row prisoner in Nigeria (Waiting for the Hangman, *Amnesty International and LEDAP*)

9. Death row living conditions

The conditions of detention may largely depend on the financial resources of the convicted person. For example, people from poor socio-economic backgrounds will have more difficulty accessing certain prison services such as medical care or food, and will not be able to receive financial assistance from family members to remedy the situation. Poverty can also limit the opportunities a death row prisoner has to stay in contact with family members and friends.

2 Report of the Special Rapporteur on Extreme Poverty, 2012; A/67/278

10. Impact on relatives

The economic and social consequences of a death sentence can be dramatic for people living in poverty. Deprived of liberty, they are also deprived of income, employment, and social benefits. The family is also directly affected, especially if the convicted person was the family's main breadwinner. The financial burdens on family members throughout the legal proceedings can also lead to poverty.

Recommendation for governments to abolish the death penalty and address root causes of crime

The death penalty is a discriminatory practice, often used against the poor and should be abolished

We call upon the governments of countries that still apply the death penalty to:
- abolish this unfair practice
- ensure full respect for the right to a fair trial and the right to effective counsel
- work to reduce poverty and inequality in their respective countries

"Poverty is an urgent human rights concern in itself. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. Not only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality."
Office of the High Commissioner of Human Rights of the United Nations, "The Guiding Principles on extreme poverty and human rights," 2012.

Further information about the 15th World Day against the Death Penalty available on the link below
http://www.worldcoalition.org/worldday.html

WORLD COALITION
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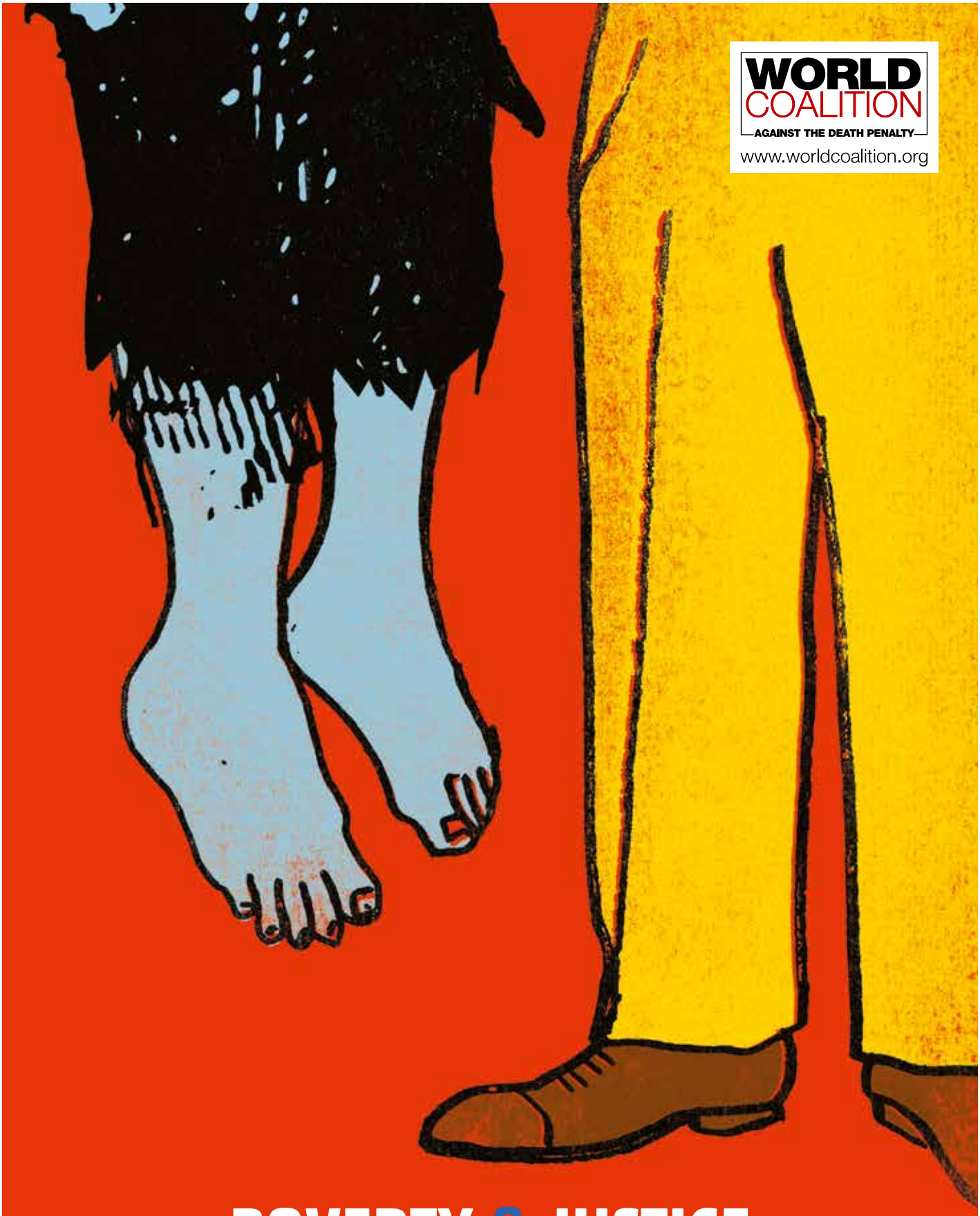

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POVERTY & JUSTICE
A DEADLY MIX

October 10th 2017 – World day **against** the death penalty

Le statut de la femme comme un pilier indispensable de l'État de droit

« Le Savoir est Lumière », *Khadija Al-Salami*

Alain GROSJEAN

Si le statut de la femme a considérablement évolué en ce début du XXIe siècle. Il n'en demeure pas moins que des discriminations subsistent. Parfois moins perceptibles mais tout autant stigmatisants, des stéréotypes, des préjugés, des traditions, des croyances continuent de dicter la position et le rôle de la femme dans nos sociétés.

Le 8 juin dernier s'est tenu au Cercle Cité de la Ville de Luxembourg, un colloque de l'Union Internationale des Avocats (UIA) sur le statut de la femme et l'État de droit. Il réunissait un panel de femmes d'exception et a connu un vif succès avec plus de 300 participants.

Comme l'a rappelé la Présidente de l'UIA, Laurence Bory, défendre les droits des femmes, c'est forcément défendre l'être humain, le droit de chaque être humain de s'autodéterminer, de choisir sa vie en toute liberté et de pouvoir s'épanouir sans subir de contraintes sociales illégitimes.

Si dans les textes, les discriminations basées sur le sexe ont progressivement disparu en Europe. Elles subsistent dans les faits, et plus particulièrement en matière d'indépendance économique – recouvrant les inégalités en matière de salaires, de pensions et d'accès aux postes d'encadrement – et de violence.

Il est, dès lors, primordial de faire évoluer les mentalités par des actions citoyennes. Il faut agir sur tous les fronts au niveau mondial, européen, national, ainsi qu'au sein du système éducatif, des cercles familiaux et d'amis.

La lutte contre toute discrimination nécessite en effet un soutien gouvernemental actif mais également une mobilisation de la société civile à travers de multiples initiatives.

La Constitution luxembourgeoise en son article 11, alinéa 2, affirme que « les femmes et les hommes sont égaux en droits et en devoirs ». Il ajoute que : *« l'État veille à promouvoir activement l'élimination des entraves pouvant exister en matière d'égalité femmes et hommes ».*

A ce titre, des campagnes de sensibilisation initiées par le ministère de l'Égalité des Chances et la Ville de Luxembourg incitent à une meilleure égalité entre les femmes et les hommes notamment dans la représentation des femmes dans des postes décisionnels et veillent au rééquilibre salarial ou encore l'établissement d'un plan d'action communal pour l'égalité entre femmes et hommes à l'échelle de la ville de Luxembourg. Monsieur Ralph Kass du ministère de l'Égalité des Chances est notamment revenu lors de la conférence sur les initiatives menées par le ministère.

L'égalité de traitement entre les hommes et les femmes est un principe fondamental, également consacré à l'article 23 de la Charte des droits fondamentaux de l'Union européenne.

> L'égalité de traitement entre les hommes et les femmes est un principe fondamental […].

Très présent dans le traité de Lisbonne, ce principe fondamental se traduit par le combat contre la discrimination fondée sur le sexe (Art. 19 Traité du fonctionnement de l'Union européenne (TFUE)), en particulier dans le domaine du travail (Art. 153 TFUE), tant en termes d'accès au marché de l'emploi qu'en termes d'égalité salariale (article 157 TFUE).

Le droit dérivé de l'Union européenne consacre également la lutte contre ces formes de discrimination, notamment à travers la directive 2006/54/CE du 5 juillet 2006 relative à la mise en œuvre du principe de l'égalité des chances et de l'égalité de traitement entre hommes et femmes en matière d'emploi et de travail.

La Cour de justice de l'Union européenne (CJUE), à travers sa jurisprudence, est un élément moteur de l'intégration européenne, d'autant plus qu'il s'agit d'interpréter les droits fondamentaux. À la fin des années 70, la CJUE s'était déjà prononcée sur l'égalité hommes/femmes en reconnaissant l'effet direct du principe d'égalité des rémunérations entre hommes et femmes dans son arrêt *Defrenne II*, du 8 avril 1976. Cette haute juridiction a éliminé progressivement les discriminations fondées sur le sexe.

La première oratrice de ce colloque, Madame Juliane Kokott, avocat général à la CJUE, a retracé la jurisprudence de la Cour dans le temps et a apporté un éclairage sur les inégalités et les discriminations subies par les femmes dans de nombreux domaines.

Madame Kokott a rappelé que les premières décisions ont été prises à une époque où la CJUE n'était constituée que de juges hommes. C'est certainement de nos jours à eux de prendre l'initiative, comme ce fut le cas lors de la campagne du ruban blanc menée par des hommes à travers le monde, et relayée sur le portail de l'égalité entre femmes et hommes du gouvernement luxembourgeois, afin de mettre fin aux violences perpétrées par des hommes à l'égard des femmes.

La transposition et l'application du droit de l'Union européenne à l'échelle nationale pour rendre l'égalité de traitement entre les hommes et les femmes effective doivent mobiliser de nombreux acteurs à la fois européens et nationaux.

C'est dans ce contexte que Madame Isabelle Riassetto, professeur agrégé de droit de l'université du Luxembourg, est revenue sur l'évolution de la protection du statut de la femme à travers le temps.

Elle a axé ses développements sur l'épineux et récurrent problème des violences à l'égard des femmes, expression de ce que l'inégalité a de plus inacceptable. En effet, une femme sur trois en Europe subira durant sa vie un acte de violence physique ou sexuelle et 5 % ont été victimes de viol. Après avoir rappelé ce que recouvre concrètement la violence à l'égard des femmes, et notamment la violence domestique, et mis en évidence les justifications tirées de la culture, la coutume, la religion, et l'honneur de la famille derrière lesquelles s'abritent trop souvent certains auteurs, Madame Isabelle Riassetto a présenté les outils de prévention et de lutte contre ces violences, en mettant l'accent sur la Convention d'Istanbul et, au Luxembourg, sur la loi modifiée du 8 septembre 2003 sur la violence domestique. Dans l'attente de la ratification de la convention précitée par le Luxembourg, elle a rappelé que l'éradication de la violence, vrai défi sociétal du XXIe siècle, passe par la prévention et la déconstruction des stéréotypes de genre, à travers l'information et la formation dans tous les domaines d'activité.

L'Union européenne vient de réitèrer son engagement à lutter contre la violence à l'égard des femmes sur son territoire et dans le monde, et entend renforcer le cadre juridique existant ainsi que sa capacité d'action en signant le 13 juin 2017 la Convention d'Istanbul au Palais de l'Europe à Strasbourg.

Le Conseil de l'Europe rappelle qu'*"il incombe à l'État, sous peine d'être en faute, de lutter efficacement contre cette violence sous toutes ses formes en prenant des mesures pour la prévenir, en protégeant les victimes et en poursuivant les auteurs. Dans la mesure où les femmes et les filles ne sont pas les seules victimes de la violence domestique, les parties à la convention sont encouragées à en étendre le cadre protecteur aux hommes et aux garçons exposés à la violence dans le cercle familial ou au sein du foyer"*. Ainsi la demarche du Conseil de l'Europe vise à promouvoir une politique qui se met au service des deux genres.

Le témoignage de la réalisatrice yéménite Khadija Al-Salami a ému toute l'assemblée. Son dernier film *« Moi Nojoom, 10 ans, divorcée »* avait été projeté la veille à la cinémathèque de la Ville de Luxembourg à guichet fermé. Mariée elle-même de force à l'âge de onze ans, elle lutte contre le mariage précoce et favorise l'accès à l'éducation des petites filles yéménites à travers sa fondation.

Dans son livre « *Pleure, ô Reine de Saba !* », Madame Khadija Al-Salami déclare que ce dont elle est le plus fière est d'avoir réussi à faire admettre l'idée qu'une personne peut être à la fois différente et acceptée, et son dernier film en est un beau témoignage.

A la question d'un journaliste souhaitant savoir si imposer nos valeurs occidentales à un pays comme le Yémen qui a une culture et des traditions différentes n'est pas contreproductif, Madame Khadija Al-Salami a répondu, qu'enfant, sans éducation, sans connaître les droits de l'homme ou d'autres modes de sociétés, elle savait que ce que l'on avait fait subir à sa grand-mère, à sa mère et à elle-même était injuste.

Les droits de l'homme sont universels et toute loi, toute tradition, toute croyance allant à l'encontre de ces droits doit être combattue sans relâche. Les oratrices ont rappelé à l'unisson l'importance de l'éducation à tout âge pour faire évoluer les mentalités.

Chaque fois que les droits de la femme sont attaqués, c'est l'État de droit qui est affaibli.

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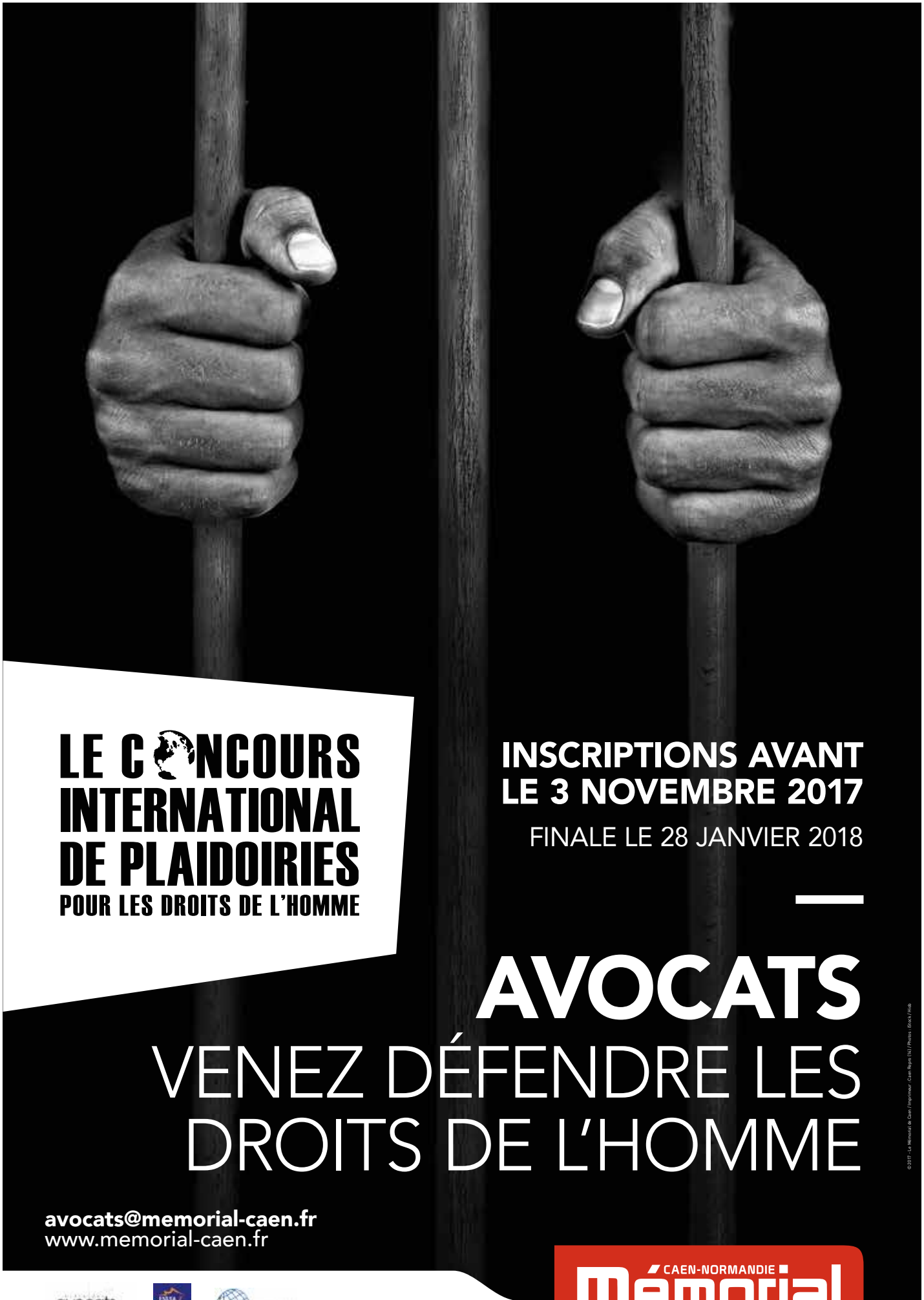
Colloque Femme et État de droit


Khadija Al-Salami



LE CONCOURS INTERNATIONAL DE PLAIDOIRIES

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The Legal Profession
La profession d'avocat
La Abogacía

The Bright Line

La ligne de démarcation nette que ne peut franchir l'avocat au risque de se faire déclarer inhabile à représenter son client

Francis GERVAIS

L'émergence des demandes de déclaration d'inhabilité des avocats

Il est difficile de confirmer précisément la date de la naissance de la profession d'avocat. Selon l'encyclopédie en ligne Wikipedia, il y aurait des traces de la présence d'avocats dans l'Antiquité, dans la Grèce antique et à Rome. En France, on reconnaît l'existence de la profession d'avocat depuis le XIII[e] siècle.[1]

Nous ne sommes pas à la recherche de l'histoire de la profession, mais depuis toujours, on reconnaît le « métier d'avocat » comme étant une « profession libérale ou artisanale » ou *« a learned profession »* selon la tradition anglo-saxonne.

L'appartenance à une profession libérale, implique entre autres que ces professions :

« Elles répondent aux besoins de la société plutôt que de viser à obtenir des gains personnels pour leurs membres. En contrepartie de l'indépendance des pouvoirs qui leur sont accordés, les membres des professions doivent appliquer des normes strictes de compétence et de responsabilité morale. [2] *»*

Une de ces règles strictes imposée à l'avocat est le devoir de ce dernier d'éviter de se retrouver en situation de conflit d'intérêts. De nouveau, sans en faire une recherche historique, mais avec un clin d'œil, je vous invite à lire « Matthieu 6 : 24 » (l'Évangile de Matthieu).

Est-ce là vraiment la source de l'obligation d'éviter les conflits d'intérêt ? J'aime mieux m'en remettre à la tradition anglo-saxonne qui se réfère à un passage de la décision concernant le procès de la Reine Caroline en 1821[3], durant lequel l'avocat Henry Brougham, qui deviendra par la suite Lord chancelier, dans sa défense de la Reine Caroline s'adressait ainsi à la Chambre des Lords :

« [Traduction] *[L]'avocat, dans l'accomplissement de son devoir, ne connaît qu'une personne au monde et cette personne est son client. Le sauver par tous les moyens, aux dépens et aux risques de tous les autres et, parmi les autres, de lui-même, est son premier et son unique devoir et il doit s'en acquitter sans se préoccuper de l'inquiétude, des tourments ou de la destruction qu'il peut causer à autrui. Il doit faire la distinction entre ses devoirs de patriote et ses devoirs d'avocat et agir sans se soucier des conséquences, jusqu'à entraîner son pays dans la confusion si malheureusement tel doit être son destin.* [4] *»*

Le corollaire de l'obligation de l'avocat d'agir sans être en conflit d'intérêts est le pouvoir inhérent d'un tribunal de déclarer l'avocat, officier de justice, inhabile à représenter son client.

À partir de la fin du siècle dernier, on a vu apparaître un nouveau phénomène, soit un accroissement du nombre de demandes pour obtenir une déclaration d'inhabilité d'un avocat. Les tribunaux ont été pris par surprise par l'arrivée de ce nouveau phénomène :

"Until very recently, applications to remove lawyers were so rare an event that, at least in this jurisdiction, few judges or lawyers seemed to be more than vaguely aware that such a remedy existed. Nor, so far as I am aware, was there any general feeling of discontent on the part of the public arising from the possibility of conflict. But there was and is a rising tide of discontent with the length, complexity and cost of proceedings. Since MacDonald Estate v. Martin, the application to disqualify has become a growth area as it began to do 20 or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation. No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation. If that becomes a regular feature of our litigation it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way." [6]

Les tribunaux nous mettaient en garde afin que ce nouveau phénomène ne devienne pas une arme pour tenter inutilement et sans raison d'obtenir la disqualification d'un confrère.

> La Cour a retenu que c'était la transmission d'informations confidentielles dans le mandat antérieur qui entraîne la disqualification de l'avocat.

Jusqu'à la fin du siècle dernier, il y avait très peu de décisions rapportées dans les annales jurisprudentielles qui traitaient de demandes de déclarer un avocat inhabile à exercer dans un dossier. Il faut se rappeler toutefois qu'à cette période, l'exercice de la profession se faisait selon un modèle restreint. La grande majorité des avocats exerçaient seuls ou dans des cabinets composés d'un nombre restreint d'avocats ou d'associés ce qui favorisait la continuité des relations entre le cabinet et ses clients.

Plusieurs phénomènes ont toutefois modifié ce *modus operandi*. La mondialisation, que ce soit des entreprises ou des cabinets, la pratique multidisciplinaire, la création de méga cabinets, tant nationaux qu'internationaux, les directives d'établissements établies par l'Union européenne et au Canada, la reconnaissance du droit fondamental de la liberté de circulation et d'établissement introduit par la Charte canadienne des droits et libertés[5] en sont des exemples.

La notion d'informations confidentielles comme élément de disqualification

La Cour suprême du Canada a établi les règles applicables lors d'une demande de déclaration d'inhabilité dans l'arrêt *Succession MacDonald c. Martin* [7].

D'entrée de jeu, la Cour suprême rappelle qu'un tribunal saisi d'une demande de déclaration d'inhabilité devra prendre en considération au moins 3 valeurs, soit :

- Au premier rang se trouve le souci de préserver les normes exigeantes de la profession d'avocat et l'intégrité du système judiciaire.
- Vient ensuite en contrepoids, le droit du justiciable de ne pas être privé sans raison valable de son droit de retenir les services de l'avocat de son choix.
- Enfin, il y a la mobilité raisonnable qu'il est souhaitable de permette au sein de la profession.

La Cour suprême rappelle qu'il n'y a pas d'interdiction pour un avocat d'accepter un mandat pour représenter une tierce personne dans un litige contre un ancien client. Toutefois, la Cour suprême ajoute que, dans le cadre du mandat antérieur, l'avocat ne doit pas avoir reçu des informations confidentielles qui pourraient lui être utiles et qui seraient au désavantage de son ancien client dans le nouveau mandat contre son ancien client. La Cour a retenu que c'était la transmission d'informations confidentielles dans le mandat antérieur qui entraîne la disqualification de l'avocat.

Toutefois, la Cour suprême a reconnu qu'elle faisait face à un dilemme, car pour rencontrer le fardeau qu'on lui imposait, l'ancien client pourrait être obligé de dévoiler des faits confidentiels qu'il aurait transmis à son avocat. Le simple fait de l'obliger à le faire irait à l'encontre même de la protection de la confidentialité des informations.

Pour éviter ce dilemme, la Cour a conclu que le fardeau imposé à l'ancien client se limite à faire la démonstration qu'il y a un lien important avec le dossier antérieur, de telle sorte que la **connexité** entre les deux mandats était suffisante pour que la Cour en infère que des renseignements confidentiels avaient été transmis. Il s'agit d'une présomption toutefois réfragable parce que l'avocat peut tenter de convaincre la Cour qu'aucun renseignement pertinent n'a été communiqué.

La Cour ajoute qu'il s'agit d'un fardeau dont l'avocat aura beaucoup de difficulté à s'acquitter parce que la cour doit être convaincue au point qu'un membre du public raisonnablement informé serait persuadé qu'aucun renseignement de nature confidentielle n'a été transmis tout en rappelant que la preuve doit être faite sans que ne soient révélés les détails de toute communication privilégiée visée.

L'avocat sera automatiquement déclaré inhabile à agir et ce, peu importe qu'il donne l'assurance ou qu'il promette de ne pas utiliser les renseignements. La Cour concluait « *que l'avocat ne peut pas compartimenter son esprit de façon à trier les renseignements appris de son client et ceux obtenus d'autres sources* »[8].

La Cour devait ensuite déterminer la position des associés de l'avocat déclaré inhabile. La Cour a conclu que dans la grande majorité des cas, il est fort à présumer que les avocats qui travaillent ensemble échangent des renseignements confidentiels. Il s'agissait d'une 2e présomption mise en place par la Cour suprême.

Cette présomption est aussi réfragable, et pour la renverser, la Cour devra être persuadée par une preuve claire et convaincante que des mesures raisonnables ont été prises pour veiller à ce que l'avocat en cause ne divulgue rien aux membres du cabinet. On réfère ainsi aux notions de « muraille de Chine » et de « cône de silence ». Toutefois, la jurisprudence reconnaît que cette preuve est difficile à faire et presqu'impossible dans des cabinets de petite taille. Le plus gros handicap demeure le moment où les mesures sont mises en place car souvent, il est trop tard lorsque les avocats réalisent qu'ils sont dans une situation possible de disqualification. Il faut des mesures concrètes qui puissent être constatées, même par des tierces personnes indépendantes et non de simples affirmations.

Le devoir de loyauté

Les enseignements de l'arrêt *MacDonald* ont fait office de loi au Canada en matière de déclaration d'inhabilité jusqu'en 2002, lorsque la Cour suprême du Canada a rendu son arrêt dans l'affaire *R. c. Neil*[9] dans lequel elle détermine que la confiance du client ne peut se limiter à la seule garantie d'absence de transmission d'informations confidentielles. La Cour a retenu un principe de portée beaucoup plus grande en décidant que le critère que doit examiner un tribunal pour déterminer l'habilité d'un avocat à continuer à exercer dans un dossier, est **le devoir de loyauté de l'avocat** envers les clients actuels (paragraphe 17) lequel devoir comprend 3 aspects (paragraphe 19) :

- le devoir d'éviter des conflits d'intérêts ;
- le devoir de dévouement à la cause de son client (qu'on appelle parfois la « représentation zélée ») ;
- un devoir de franchise envers son client.

La Cour suprême a réitéré que les principes émis dans son arrêt *MacDonald* (la transmission d'informations confidentielles) continueraient de s'appliquer à un avocat face à un **ancien client** (paragraphe 27). Toutefois, pour les **clients actuels,** le critère est celui du devoir de loyauté de l'avocat.

La Cour a imposé un standard très élevé pour les avocats, soit celui de « la ligne de démarcation nette » *(The bright line rule)* : *« 29 L'interdiction générale constitue sans contredit un inconvénient majeur pour les grandes sociétés d'avocats, et particulièrement pour les cabinets qui œuvrent à l'échelle nationale et dont les bureaux se multiplient dans les grands centres partout au Canada. En vérifiant les documents du cabinet pour déceler un conflit, on peut découvrir tardivement, dans un autre bureau, des dossiers dont l'avocat ignorait peut-être l'existence. En fait, l'avocat ou l'avocate peut fort bien ne pas connaître l'associé responsable du dossier à l'autre bout du pays. Les procédures de recherche visant à déceler les conflits sont souvent inefficaces. Néanmoins, c'est le cabinet, et pas seulement l'avocat, individuellement, qui a un devoir de fiduciaire envers ses clients, et une ligne de démarcation très nette est requise. Cette ligne de démarcation très nette est tracée par la règle générale interdisant à un avocat de représenter un client dont les intérêts sont directement opposés aux intérêts immédiats d'un autre client actuel – même si les deux mandats n'ont aucun rapport entre eux – à moins que les deux clients n'y aient consenti après avoir été pleinement informés (et de préférence après avoir obtenu des avis juridiques indépendants) et que l'avocat ou l'avocate estime raisonnablement pouvoir représenter chaque client sans nuire à l'autre (nos soulignés) ».*

La Cour a toutefois reconnu qu'il y avait des exceptions à la règle, entre autres :

- le consentement « éclairé » des 2 clients, préférablement après avoir obtenu une opinion juridique indépendante, et
- le consentement « présumé » provenant d'institutions qui reconnaissent généralement que les avocats en cabinet privé qui les représentent peuvent agir contre eux dans le cadre d'affaires qui n'ont aucun rapport avec les mandats dans lesquels ils les représentent (paragraphe 28).

De cette règle draconienne découle également une question importante : quelles sont les situations où « l'avocat représente un client dont les intérêts sont directement opposés aux intérêts immédiats d'un autre client » ?

Les intérêts judiciaires

Cette question trouvera une solution dans un arrêt subséquent de la Cour suprême du Canada, *Strother c. 3464920 Canada inc.*[10] La Cour a conclu que les intérêts divergents auxquels elle faisait allusion dans l'arrêt *Neil,* ne sont que les différends de nature juridique et non des intérêts commerciaux divergents : « Les « intérêts » respectifs des clients qui requièrent la protection du devoir de loyauté concernent la pratique du droit et non la prospérité commerciale. » (Paragraphe 55)

Dans l'arrêt *Strother*, les avocats furent déclarés inhabiles parce que les intérêts personnels des avocats étaient en opposition et en conflit avec ceux de leur ancien client selon le principe établi dans l'arrêt *Neil*[11] : *« (…) Un risque sérieux que les intérêts personnels de l'avocat ou ses devoirs envers un autre client actuel, un ancien client ou une tierce personne nuisent de façon appréciable à la représentation du client par l'avocat ».*

La ligne de démarcation nette : une règle absolue ou une présomption ?

Le débat concernant l'application et l'interprétation de « la ligne de démarcation nette » s'est poursuivie après l'arrêt *Strother* donnant ouverture à un débat entre deux associations canadiennes de juristes.

D'une part l'Association du barreau canadien (ABC), dont la mission est particulièrement de veiller aux intérêts des membres, soumettait que le devoir de respecter la ligne de démarcation nette n'empêchait pas de façon catégorique un cabinet d'avocats d'agir directement à l'encontre des intérêts immédiats d'un autre client. L'ABC soutenait que la règle de la ligne de démarcation nette devait être interprétée comme étant une règle générale qui protège contre le risque de gravement entraver la représentation d'un client. En conséquence, le fait de franchir la ligne de démarcation très nette donnerait lieu à une **présomption** de conflit d'intérêts qui pourrait être rejetée en démontrant qu'il n'existe aucun véritable risque que la représentation du client soit gravement entravée. L'ABC soumettait que pour déterminer si un tel risque existe véritablement, il faut examiner différents facteurs, dont le type de client, la nature du mandat de représentations du client, la nature des représentations de la partie adverse et la question de savoir si les avocats du même cabinet agissent dans les deux affaires.

D'autre part, la Fédération des Ordres Professionnels de Juristes du Canada (FOPJC), qui est l'organisme coordonnateur national des 14 ordres professionnels de juristes du Canada qui ont le mandat de réglementer les avocats au Canada et de ce fait, veiller à la protection du public, adoptait plutôt une politique restreinte de l'application de la règle tendant vers l'absolutisme de l'interdiction de représentation simultanée, tel qu'établie dans l'arrêt *Neil.*

Plus récemment, la Cour suprême[12] a réitéré en grande partie les principes émis dans l'arrêt *Neil*. Elle rappelle que la Cour avait déjà décidé que la représentation simultanée de clients aux intérêts opposés était frappée d'une interdiction claire, soit celle de la règle de la démarcation très nette (paragraphes 26 et 27 de la décision) qui est tracée par la règle générale :

- interdisant à un avocat de représenter un client ;
- dont les intérêts sont directement opposés ;
- aux intérêts immédiats d'un autre client ;
- même si les deux mandats n'ont aucun rapport entre eux ;
- à moins que les deux clients n'y aient consenti ;
- après avoir été pleinement informés (et de préférence après avoir obtenu des avis juridiques indépendants) ; et
- que l'avocat ou l'avocate estime raisonnablement pouvoir représenter chaque client sans nuire à l'autre.

Toutefois, la Cour suprême a rajouté que la règle de la démarcation très nette n'est pas une règle d'application illimitée (paragraphes 30 et 32) et que l'on peut ajouter :

- qu'elle ne s'applique que lorsque les intérêts juridiques immédiats des clients s'opposent directement ;
- qu'elle ne s'applique pas lorsque la demande de déclaration d'inhabilité constitue un abus tactique, et
- qu'elle ne s'applique pas dans les cas où il est déraisonnable de s'attendre à ce que l'avocat ne représente pas simultanément des parties adverses dans des dossiers juridiques n'ayant aucun lien entre eux.

Conclusion

La ligne de démarcation nette demeure un standard élevé auquel on peut appliquer certaines exceptions, mais qui demeure une règle qui a pour objet de maintenir la confiance du public à l'égard de la profession d'avocat, qui est un pilier important de tout système judiciaire indépendant ; les exceptions à la règle seront accueillies parcimonieusement parce qu'il y va de la protection du public.

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1 Barreau de Paris, Un peu d'histoire, www.avocatparis.org.

2 Doug Hare, Can Vet J, Volume 41, Décembre 2000, page 903.

3 J. Nightingale, vol. II, The Defence, Part 1, p. 8.

4 Extrait [traduction] tiré de l'arrêt *R. c. Neil*, [2002] 3 RCS 631, paragraphe 12.

5 *Black c. Law Society of Alberta*, [1989] 1 RCS 591.

6 *Manville Canada inc. c. Downs*, 1992 CanLII 411 (BS SC).

7 *Succession MacDonald c. Martin*, [1990] 3 RCS 1235.

8 op. cit. # 7, page 1261.

9 Voir note 4.

10 *Strother c. 3464920 Canada inc.*, [2007] 2 RCS 177.

11 Voir note 4, paragraphe 31.

12 *Compagnie des chemins de fer nationaux du Canada c. McKercher LLP*, [2013] 2 RCS 649.

L'Europe veut porter atteinte à l'indépendance et au secret de l'avocat !

Jean-Pierre BUYLE

Les révélations dans le cadre de l'affaire *Panama Papers* ont fait apparaître la manière dont des sociétés et des comptes non déclarés ont été utilisés pour dissimuler des revenus et des actifs à l'étranger, souvent à des fins de fraude fiscale ou à d'autres fins illicites.

En réaction à ce scandale, les institutions européennes ont réagi.

La Commission européenne a constaté que le cadre fiscal actuel présentait encore des lacunes et a décidé d'y remédier par davantage de transparence.

Le Parlement européen a demandé que des mesures plus strictes soient prises contre les intermédiaires qui interviennent dans des mécanismes de planification fiscale agressive.

Le Conseil du 25 mai 2016 a invité la Commission « *à envisager des initiatives législatives concernant des règles de communication obligatoire d'informations inspirées de l'action 12 du projet BEPS de l'OCDE en vue d'introduire des mesures dissuasives plus effectives destinées aux intermédiaires qui interviennent dans des montages ayant pour objet la fraude ou l'évasion fiscale* ».

Le 5 juillet 2016, la Commission a publié une communication et annoncé diverses mesures en vue de renforcer la transparence fiscale.

Le 12 juillet 2016 la directive 2016/1164/UE sur la lutte contre l'évasion fiscale a été signée. Elle devrait permettre d'éviter certains des types les plus répandus de transfert de bénéfices, grâce à des règles coordonnées.

Le 10 novembre 2016, la Commission a lancé une consultation en vue de recueillir des avis sur les actions que devrait prendre l'Union européenne, à l'égard des « intermédiaires » qui facilitent la fraude et l'évasion fiscales.

Parmi ces « intermédiaires », la Commission visait expressément « *des consultants, des avocats, des conseillers en finance et en investissement, des comptables, des établissements financiers, des courtiers d'assurances et des agents qui créent des sociétés (« prestataires de services aux sociétés et trusts »)*.

AVOCATS.BE a répondu à cette consultation. L'ordre des barreaux francophones et germanophone de Belgique relève que « *Si les États membres s'ingénient à créer des régimes fiscaux particuliers, il est du devoir du professionnel en conseil fiscal d'en prendre connaissance afin de pouvoir donner un conseil correct sur l'application ou non de ce régime à la situation de son client ou de l'informer sur la possibilité d'en bénéficier. C'est la diversité des régimes nationaux qui crée des opportunités – ou des failles – exploitables dans le cadre de l'optimisation fiscale. Les États le savent et se laissent parfois entraîner dans une surenchère.* »

Ce projet de recommandation adopté le 28 juin 2017 est inacceptable.

AVOCATS.BE recommande à la Commission d'encourager les États membres à communiquer, par échange spontané entre leurs autorités compétentes, les informations dont elles ont connaissance et qui peuvent être utiles aux autorités des autres États membres. En outre, AVOCATS.BE estime que la Commission devrait proposer aux États membres de prendre des mesures concrètes visant à une harmonisation fiscale plus poussée, qui permettrait de rendre l'ensemble de l'Union attractive pour les investisseurs étrangers avec une véritable sécurité juridique. L'Union pourrait notamment envisager d'intervenir dans le domaine de la fiscalité directe, comme accessoire à sa politique de libre circulation.

Parallèlement à ces démarches, la Commission a publié le 21 juin 2017 une proposition de directive modifiant la directive 2011/16/UE en ce qui concerne l'échange automatique et obligatoire d'informations dans le domaine fiscal en rapport avec les dispositifs transfrontières devant faire l'objet d'une déclaration.

De son côté, le Parlement a institué une Commission d'enquête sur le blanchiment, la fraude fiscale et l'évasion fiscale (Pana). Cette commission a publié un projet de recommandations au Conseil et à la Commission ainsi qu'un projet de rapport d'enquête.

Le projet de recommandations comporte quelques paragraphes qui portent atteinte à l'État de droit, l'indépendance de la profession et le secret professionnel.

Ainsi, la Commission Pana :

- préconise d'abandonner l'autorégulation pour adopter une supervision appropriée et une réglementation contrôlée par l'État des professions actuellement auto-réglementées, par l'intermédiaire d'un régulateur/superviseur national distinct et indépendant,
- insiste sur le fait qu'en attendant le retrait progressif de l'autorégulation des entités assujetties au niveau de l'Union, la profession d'avocat doit adopter une méthode grâce à laquelle le principe du secret professionnel entre un avocat et son client n'entrave pas les déclarations de transactions suspectes ou la déclaration de toute autre activité potentiellement illégale,
- souligne que les avocats qui prodiguent des conseils aux non-résidents devraient être tenus juridiquement responsables lorsqu'ils élaborent une planification fiscale ou des systèmes de blanchiment de capitaux.

Ce projet de recommandation adopté le 28 juin 2017 est inacceptable. Tout doit être mis en œuvre pour qu'il soit amendé d'ici l'adoption du texte définitif en séance plénière du Parlement à la mi-novembre 2017.

AVOCATS.BE en appelle à la solidarité de tous les barreaux et fédérations d'avocats.

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Common Interest Privilege in Cross-Border Matters: Canada vs. US Law

Dalton W. McGRATH, Q.C. & Michael O'BRIEN

While many tenets concerning the protections afforded by privilege are similar in both Canada and the United States, there are key differences and treatment when it comes to settlement and common interest privilege, as some recent cases highlight.

Common Interest Privilege in Canada

Common interest privilege has been interpreted in Canada to apply to many communications providing the parties share a "common interest" in the underlying subject matter. Typically, a common interest has been applied to enable parties to communicate frankly between themselves without waiving privilege where generally the parties have the same self-interest, share a common goal or are seeking same or similar remedies.

While common interest privilege is most commonly thought to apply to litigation, arbitration or dispute resolution proceedings, some Canadian cases have entrenched that protection in the commercial context in order to allow parties to pursue similar common interest in commercial transactions. For example, the British Columbia Court of Appeal in *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510, accepted that common interest privilege could be claimed where legal opinions are shared amongst and between parties who share a common interest in a transaction as part of due diligence. The court held that where there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions, even in circumstances where no litigation is in existence or contemplated, that protection is afforded. Other Canadian cases have echoed that view.

New York Court of Appeals' Ruling

Recently, the New York Court of Appeals held that the common interest doctrine applies only where a reasonably anticipated litigation is involved.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016), Bank of America and Countrywide claimed privilege over documents involving pre-closing matters of common interest between the parties during a period in which parties signed a merger agreement. The merger agreement in question contained both a confidentiality clause as well as a common interest agreement that was intended to protect communications between the companies regarding matters relating to the merger, including employee benefit plans, legal advice on tax issues, etc.

While the lower courts allowed the common interest exception to apply, the court of appeals reversed the broader application of the common interest doctrine. The end result is that where New York law applies (as choice of law or otherwise), the common interest doctrine does not extend to non-litigation disputes.

Settlement Privilege in Canada

Both Canada and the United States recognize a strong public interest in favour of maintaining

secrecy of matters during settlement negotiations to foster compromise on dispute settlement. This serves to ensure parties feel uninhibited in their communications; however, key differences exist as to the scope and nature of those protections.

In *Sable Offshore Energy Inc. v. Ameron International Corp. (Sable),* 2013 SCC 37, the Supreme Court of Canada (SCC) unanimously affirmed the critical importance of settlement privilege and confirmed that the privilege's scope applies to "settlement negotiations and their fruits." The SCC clarified previously mixed authority in Canada and confirmed that settlement privilege extends to the content of both successful and unsuccessful negotiations and also protects not just the subject of negotiations, but also the ultimate settlement amount in the case of a successful negotiation.

The SCC indicated that settlement privilege is not absolute and can be pierced when a defendant shows that, on balance, a *"competing public interest outweighs the public interest in encouraging settlement."* Those circumstances may include allegations of misrepresentation, fraud or undue influence and serving as a settlement agreement. Those exceptions are generally rare and limited in applications with the court favouring a more broad level of protection from disclosure in Canada.[1]

US Federal Rule of Evidence 408

US Federal Rule of Evidence 408 governs the admissibility of offers to compromise or other settlement-related evidence and provides as follows:

(a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) Furnishing, promising, or offering – accepting, or promising to accept – a valuable consideration in compromising or attempting to compromise the claim.

(2) Conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness' bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Simply put, Rule 408 provides a much narrower range of protection than without prejudice settlement privilege in Canada. Assuming that the evidence fits within the parameters of Rule 408 (i.e. there must exist a disputed claim plus the communications and records must have been created and intended to be a part of negotiations towards compromise), Rule 408 prohibits the use of settlement evidence in circumstances to impeach a prior inconsistent statement or to prove or disprove the validity or amount of a disputed claim. That said, Rule 408 allows the court to admit settlement-related evidence "for another purpose." Imaginative US attorneys have shown a high degree of creativity in finding "other purposes" to admit settlement evidence.

Both Canada and the United States recognize a strong public interest in favour of maintaining secrecy of matters during settlement negotiations to foster compromise on dispute settlement.

Examples exist where settlement-related evidence has been deemed to be relevant and admissible, including in determining when limitation periods began (see the United States Court of Appeals for the Eighth Circuit's 2005 decision, *Kraft v. St. John Lutheran Church of Seward*), and in determining the reasonableness of an award of legal fees (see for example the United States Court of Appeals for the Third Circuit's 2009 decision, *Lohman v. Duryea Borough*). In addition, many US courts have rejected a discovery privilege for settlement-related materials. As a result, it is prudent to assume that settlement-related evidence may be discoverable.

There is also a paucity of reported decisions where US courts have considered whether documents otherwise protected by settlement privilege in Canada are discoverable in a US proceeding (see for example, the United States District Court for the District of Columbia's 2002 decision, *In re Vitamins Antitrust Litigation*). The latter decision recognized settlement privilege based upon Canadian principles; however, its precedential value is uncertain as that case was decided in the context of a Canadian government investigation where principles of international comity and other factors specific to that case may have had a factor.

In short, there are far more instances in the US where settlement documents and information are discoverable in circumstances where the same material would be protected by settlement privilege in Canada.

Counsel engaging in settlement discussions involving cross-border issues with the US should therefore enter into appropriate protocols to ensure that the intended scope of settlement privilege in Canada is properly extended by including, for example, agreeing in advance that all communications and records exchanged shall be deemed confidential and privileged and shall not be used, relied upon, referenced nor adduced as evidence for any purpose, nor shall be discoverable, or admissible, in any dispute resolution process and other legal safeguards are undertaken.

Conclusion

Given the material differences between Canada and the United States as it relates to settlement and common interest privilege, it is critical for legal counsel to keep those important distinctions in mind.

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1 For more information on the *Sable* case, please see our June 2013 Blakes Bulletin: *Supreme Court of Canada Affirms Wide Scope of Settlement Privilege:* http://www.blakes.com/english/resources/bulletins/pages/details.aspx?bulletinid=1762

A Matter of Balance: Confidentiality of Settlement Discussions vs. Effective Dispute Resolution

Guillaume TATTEVIN

La confidentialité des offres transactionnelles et des pourparlers est généralement protégée par la déontologie des avocats ou par des règles de recevabilité de la preuve. Cette nécessaire confidentialité peut comporter un effet pervers : elle protège aussi la partie qui refuse, de mauvaise foi, de résoudre le conflit à l'amiable. Lorsque les règles de procédure n'organisent pas d'elles-mêmes (comme dans certains fors de *common law*) la prise en compte de l'équilibre entre la confidentialité et la nécessité de responsabiliser les parties, les avocats peuvent imaginer des solutions.

When the American Law Institute and UNIDROIT jointly published their *Principles of Transnational Civil Procedure* in 2004, they were expressing hopes in the behaviour of parties to civil litigation, but were clearly not blind either to human nature.[1] The *Principles*, which are meant as a restatement of generally accepted procedural rules, include the following statement about the duties of parties to civil proceedings:

> "*The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors.* ***The court may adjust its award of costs to reflect unreasonable failure to cooperate or bad-faith participation in settlement endeavors.*** » (Art. 24.3 – emphasis added).

The requirement that parties cooperate in the settlement of their own dispute was not always acknowledged in all legal traditions but it should now considered as forming part of the majority trend in dispute settlement – as evidenced by the fact that both the American Law Institute and the largely civil-law inspired UNIDROIT have espoused it. This is the same trend that has been promoting alternative dispute resolution as an efficient alternative to domestic court systems.

The main point of this paper, however, is to be found in the second part of Article 24.3: that courts may sanction bad faith parties for refusal to participate in settlement endeavours. That seems like the logical follow-up to its first part: if parties have a duty to behave in a certain way, then there must be consequences if they do not. If a bad faith party has caused unnecessary expenses by needlessly going the whole way, then it is not unreasonable to apply sanction through the allocation of costs. Thus, this provision is not in fact about the allocation of costs. It is meant as a deterrent against bad faith behaviours. It becomes successful when it is not applied.

Many dispute resolution practitioners will have shared the experience that persuading opposing parties to sit at the same table is the trickiest part of a negotiation or mediation. In that respect, while the threat of a costs order is perhaps not the most elegant way to entice parties to the table, sometimes results must count above all.

Lawyers can argue for civil procedure reform in the future, but the immediate concern of practitioners must be to make use of arrangements already permitted under the existing laws.

However, for results to happen, this costs sanction must be seen to be effective in practice. This is where it comes into direct conflict with a cardinal rule of dispute settlement: the confidentiality of settlement offers.

The following example illustrates the issue: in a typical commercial case, the parties have exchanged written pleadings and their respective positions, strengths and weaknesses are now clear. Having discussed the matter at length with the client, counsel for one side writes to counsel for the other side, under the appropriate confidentiality rules for their respective jurisdiction. An offer is made, perhaps a direct financial offer to settle or simply a proposal to enter into structured negotiation or mediation with a view to settling the matter rapidly. A few days later, counsel for the other side reply that their clients are not interested. Sometimes, they do not reply at all. The case proceeds to a judgment and the first party prevails, some months or years later.

Under the rules of good faith discussed above, the second party should be liable for the costs of the wasted effort, if it can be shown that its refusal to enter into negotiations was unreasonable. However, how does the first counsel then go about proving its opponent's bad faith when all settlement discussions are protected by confidentiality and cannot be produced as evidence?

Indeed, the confidentiality of settlement discussions is one of the most common features of procedural laws. There are very good reasons for this, which a US Court of Appeals described in the following way: "[t]*here exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations.* […] *Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solution cannot be used* [in court]".[2] Often, even the existence of negotiations cannot be mentioned to the court. For instance, Article 21.a) of the Geneva Bar Association Rules of Conduct prohibits counsel from producing confidential correspondence merely "*referring to*" settlement discussions.

However justified these confidentiality rules, their drawback is that uncooperative parties can hide behind them to prevent the court or arbitral tribunal from being made aware of their refusal to enter into good faith negotiations, or of their unreasonable rejection reject a good settlement offer.

How, then, to solve the conundrum?

Relying on Existing Procedural Solutions

Some jurisdictions have specifically tailored their civil procedure rules to ensure that there is no conflict between the parties' duty of good faith in dispute resolution and the confidentiality of settlement offers. Although the civil procedure of Ontario has a recognised claim to having introduced the system first, the best-known of these procedural solutions is probably the Part 36 Offer to Settle of the English Civil Procedure Rules. Under this system, parties make settlement offers at a set time in the proceedings. If no settlement is reached, the offers are kept confidential until after the court reaches a decision on the merits. Only then does the court become privy to the settlement offers and only then does it become able to use them to assign costs against the party whose settlement proposal was less advantageous to the other party than the final judgment. The system combines the necessity for confidentiality of the settlement process with the requirement to penalise parties who exhibit bad faith in the dispute settlement process. By most accounts, it has been very successful.

While not as structured as the Part 36 system,[3] the United States federal rules also includes specific guidance allowing confidentiality to be waived in certain circumstances. Federal Rule of Evidence 498, which sets out that settlement-related evidence is "*in general*" inadmissible, has been held to exclude from confidentiality those documents establishing a plaintiff's "*conduct and demand in settlement negotiations*", with a view to determining the "*reasonableness of an award of attorney's fees*".[4]

For those attorneys practicing in jurisdictions that have not yet introduced similar systems or have not otherwise settled the potential conflict between two equally-important norms, all is not lost. Lawyers can argue for civil procedure reform in the future, but the immediate concern of practitioners must be to make use of arrangements already permitted under the existing laws.

Waiving Confidentiality

This is an option that is simpler to apply in jurisdictions where the confidentiality of the settlement discussions is ensured, not through civil procedure rules of admissibility preventing the production of settlement discussions – since these rules would likely require acceptance from the other party to be varied – but through restrictions on the production of correspondence between counsel. For instance, correspondence between French *avocats* is notoriously confidential even towards the attorney's own clients, unless specifically marked as not confidential by the issuing attorney. The Rules of Conduct of the Council of Bars and Law Societies of Europe (CCBE) include the reverse rule that correspondence must be marked as confidential to be considered as such. Both rules lead to the same result: correspondence between lawyers can be made confidential or not. The Geneva Bar Association's rules of conduct even go so far as to specifically provide that an attorney may (and sometimes should) reserve the right to produce correspondence in court. The solution then, is to specify on the settlement offer that the letter is not confidential, to enable the issuing party to rely in court on the offer of settlement, in the event that it is unreasonably denied by the opposing party.

There are two limits to the usefulness of waiving the confidentiality rule. The first is that rules governing "without prejudice" correspondence normally clarify that it is not an option to move out of the "without prejudice" status in the course of exchanges. In other words, if the first correspondence was confidential, then all subsequent related exchanges are confidential as well. Since lawyer might not expect that a request for settlement will not be fruitful, they might thus mark their first correspondence confidential and find that all subsequent exchanges (including the unreasonable rejection of an offer!) are confidential as well. The solution for lawyers wishing to put the other side on formal notice of a settlement offer is to re-issue a non-confidential offer without referencing in any way the previous "without prejudice" exchanges.

Another option can come from the parties themselves. Parties faced with their counsel's rules of conduct preventing the issuance of formal offers can decide to take the matter into their own hands. Although some bar associations have tried to introduce ambiguity on this aspect, clients cannot normally be made subject to their lawyers' rules of confidentiality. They can issue letters to the other party with a view to referring to them in the future.

The second drawback to this solution is that the release of confidentiality works both ways. The opposing party now becomes entitled to rely on the settlement offer in court, with the possible consequence that the court will see the offer as an admission – precisely the reason why settlement offers are normally kept confidential. Conversely, if no amount is set out in the correspondence and the offer is merely a general proposal to enter into negotiations or mediation, the risk is that the court, when asked to rule on costs, will consider that the offer was not serious enough to warrant allocating costs against the other party.

Playing with the Procedural Calendar

When a party manages to waive the confidentiality of its settlement offer, it must aim to place its offer on the record at the latest possible time, when the court has already reached its decision on the merits and only the costs remain to be decided.

However, the civil procedure rules do not necessarily make this desirable solution a possibility. For instance, French courts will not normally make a separate ruling on costs. The costs will be allocated as part of the main judgement on the merits. As a result, unless a party is prepared to put its settlement offer to the court before it rules on the merits – a risky proposal, for the reasons already detailed above – it will not have the option to submit the other party's behaviour to the court, even if it took pains to reserve the right to do so.

The problem could be solved by issuing a new, separate, claim in court after the main case has come to an end, on the basis of the other party's lack of good faith in the initial proceedings. However, few parties of sane and sober minds will consider embarking on a new case to litigate the previous litigation. It would only be justified in the rarest of cases.

Turning to Arbitration

Unlike participants to domestic court cases, parties to arbitration agreements can take advantage of the flexibility of arbitral proceedings to include a contractually-

agreed equivalent to the English Part 36 rules in the arbitration agreement.

An appropriately-tailored arbitration clause can provide a remedy to most of the issues addressed above. It can solve the matter of production of settlement offers by setting out the conditions under which the arbitrators will be entitled to accept settlement offers as evidence. This is an important point to address as the parties do not necessarily know, at the time of drafting an international arbitration clause, from which jurisdiction(s) their potential counsel will hail and to which rules of conduct they will have to abide – they could in fact be wholly different and from different jurisdictions. Confidentiality of settlement should thus be regulated by admissibility rather than by ethical rules of conduct.

An arbitration clause can go further: it can provide the exact time at which parties will make optional or compulsory settlements offers. It can provide that the tribunal will first render its judgment on the merits as a partial award and only then, after reviewing the settlement offers, render its final award on costs. It can even define what would constitute success giving rise to costs reimbursement for a party, or introduce specific schedules of fee reimbursement, depending on the extent to which a party prevails on the other and the time at which the offer was made.

Ironically perhaps, the drawback to making this type of arbitration agreement is costs. By making two awards instead of one and by providing for additional submissions, the proceeding are likely to be more expensive to the parties than a classic arbitration. Nonetheless, it is important that the parties should have that option.

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1 ALI/UNIDROIT Principles of Transnational Civil Procedure <http://www.unidroit.org/instruments/transnational-civil-procedure >. The Principles aim at "*reconciling differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes*".

2 US Sixth Circuit Court of Appeals, *Goodyear Tire & Rubber Co. v Chiles Power Supply,* 332 F.3d 976, 980 (6th Cir. 2003).

3 A system similar to Part 36 exists in US Federal Procedure but is largely limited to fees other than attorney's fees, thereby limiting its practical use.

4 Gerald E. Burns, "Admissibility of Settlement-Related Evidence at Trial", *ABA Business Torts Litigation Journal*, July 2013.

L'associé-investisseur : la fin de la profession libérale

Mario NAPOLI

Le récent Décret sur la concurrence, approuvé en Italie en août dernier (Loi n° 124 du 4/8/2017), à l'issue d'une procédure longue et tourmentée, autorise la participation d'associés purement investisseurs (c'est-à-dire non-avocats) à nos cabinets.

Alors qu'en Italie seules les associations ou les sociétés entre professionnels (avocats, conseils fiscaux, notaires) étaient admises, la nouvelle réglementation prévoit à présent et autorise la participation de purs investisseurs – totalement dépourvus des qualités professionnelles et éthiques propres depuis toujours de la profession libérale – à un cabinet juridique et ce à concurrence d'un tiers du capital social maximum. Ces investisseurs pourront faire partie de l'organe de gestion, et même être délégués par celui-ci.

Je n'hésite pas à penser que cette nouveauté législative conduira à la fin non seulement de notre profession libérale, mais aussi d'une protection effective des droits de la personne.

Il faut considérer que :

- l'investissement d'un associé-investisseur aura comme unique intérêt la répartition la plus significative possible des bénéfices et l'augmentation de la valeur de sa participation ;
- l'acceptation d'un mandat et le temps consacré à ce mandat dépendront exclusivement de la rentabilité que les affaires et les conseils pourront apporter ;
- la précieuse activité de conciliation, que l'avocat sérieux accomplit dans les cas où l'intérêt du client déconseille d'entamer une action, sera contrariée ;
- le conseil extrajudiciaire visant le respect de la légalité, en mesure d'éviter un futur litige, aura encore moins d'importance car il compromettra la réalisation de bénéfices plus significatifs ;
- l'associé-investisseur pourra accéder aux dossiers réservés du cabinet, utiliser les informations contenues pour d'éventuels intérêts personnels ;
- aucune condition d'honorabilité n'est prévue pour l'associé non avocat, ce qui entraîne un risque (voire la certitude dans certaines parties de notre pays) d'infiltration de capitaux illicites directement ou indirectement liés à des organisations criminelles.

La raison de cette nouveauté législative tellement dévastatrice pour le droit de défense et sans aucun avantage pour les personnes est unique et évidente : fondamentalement, elle permettra aux banques, aux assurances, aux grandes entreprises, aux coopératives de renoncer à recourir à des professionnels libéraux puisqu'elles pourront en exercer l'activité en participant à des cabinets professionnels écrans, mais en utilisant de fait le travail de leurs propres services internes. (Il suffira d'ajouter aux statuts une clause de répartition des bénéfices donnant un avantage à qui a apporté l'affaire, indépendamment de la participation détenue). Cette réforme vise à renforcer une partie déjà en position de force, alors que l'intervention du législateur en matière de concurrence devrait avoir uniquement pour but de soutenir la partie la plus faible afin de rééquilibrer le rapport.

Je n'entends pas m'attarder sur la différence mortifiante qui existera vraisemblablement entre l'avocat et l'associé-investisseur (en termes de responsabilité envers le client, de répartition des bénéfices, d'obligation du traitement en matière de prévoyance de la société « mixte »), ni souligner l'hypocrisie du texte de la loi qui semble apparemment protéger la profession libérale alors qu'il en démonte les principes éthiques et économiques. J'aimerais, par contre, souligner que la nouvelle réglementation produira un résultat à l'opposé des objectifs (faussement) déclarés. En effet, elle réduira la concurrence parce que la plupart des 250 000 avocats italiens actuels seront obligés d'abandonner la profession (je ne pense pas qu'il existe un autre marché qui assure la concurrence comme le marché de la profession juridique) et qu'elle augmentera le contentieux (dont on peut affirmer ironiquement qu'il a déjà atteint, dans notre pays, le « seuil d'alerte »), le seul en mesure d'assurer des dividendes spéculatifs pour l'associé-investisseur.

Pour la tranquillité de nos gouvernants, dans le silence de l'opinion publique, seuls les grands centres d'intérêt et de pouvoir seront récompensés, et la profession libérale d'avocat disparaîtra et, avec elle, l'espoir même d'une justice juste.

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What You Should Know About the New French Contract Law[1]

Marie-Christine CIMADEVILLA & Hans-Christian KAST

"*Please consult Napoleon at Sainte Hélène if you have any cause for complaint*" my old master Jean-Claude Woog[2] used to answer to those who questioned his advices.

As a matter of fact most of the provisions of the French civil code have remained untouched since 1804. The recent reform of *Title III the sources of obligations* of the civil code, in force since the first of October 2016, aims at greater clarity, predictability and attractiveness. In other words French contract law is now better fit to rule business relations in a global world, protecting weaker parties and setting new standards of fairness and good faith.

This contribution does not deal with the reform in its entirety, but it presents a selection of some major points of interest to practitioners.

1. General principles of conduct and interpretation

Chapter I "Introductory provisions" and Chapter III "Contractual interpretation" contain rules which permeate all provisions of French contract law, even if the reform does not include general guidelines ("*principes directeurs*") which would prevail as for example in the UN Convention on International Sales of Goods.

1.1. Good faith

French case law applied the principle of good faith to the negotiation of the contract, yet the civil code limited its scope to its performance.

Consistent with the most, main, modern legal systems and the Unidroit principles, Art. 1104 now provides that "*Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy*".

The second paragraph raises the question whether it is a "*loi de police*", leading French judges to apply this requirement of good faith [also] to contracts governed by foreign law.

1.2. Interpretation

The reform granting greater power to judges, the provisions dealing with the interpretation of contracts had to be revised.

Newly created art. 1192 expressly prohibits the interpretation of "*clear and unambiguous terms* […] *as doing so risks their distortion*".

The previously existing mechanisms of interpretation remain with some interesting additions.

Art. 1188 al. 2 provides that "*Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it*".

The new contract law set of rules makes over 10 references to reasonableness : the reasonable behaviour of the parties, reasonable period of time (art. 1123, 1158, 1116, 1117, 1195, 1221, 1226, 1231, 1307-1) or reasonable cost (art. 1222).

Some authors consider the reference to reasonableness as a sign of americanisation of the French contract law, which is not true as it already contains provisions referring to the rule of reason.

The widespread use of group of contracts is specifically addressed in art. 1189, which provides that "*where, according to the common intention of the parties, several contracts contribute to one and the same operation, they are to be interpreted by reference to this operation*".

In case of doubt, protection is granted to the weak party, Art. 1190 providing that : "*In case of ambiguity, a bespoke contract is interpreted against the creditor and in favour of the debtor, and a standard-form contract is interpreted against the person who put it forward*".

1. Precontractual negotiations

The reform fills an important gap by adding a new chapter dedicated to pre-contractual negotiations.

No innovation here as the Cour de Cassation already set the principles governing the negotiation phase.

However, these provisions have great consequences for negotiators.

Art. 1112 recalls the parties' freedom to commence, continue and break-off pre-contractual negotiations but that "*they must mandatorily satisfy the requirements of good faith*" and that they are entitled to compensation in case of breach.

Art. 1112-1 as consequence of the good faith duty establishes a mutual obligation

to disclose all information of decisive importance to the other party's consent. Information *"is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties"*.

This duty to disclose cannot be limited nor excluded, but does not apply to an assessment of the value of the act of performance.

Its breach can lead to the contract's termination.

In practice, it will not always be easy to determine which information has to be provided to the counterpart even if the existing jurisprudence gives some indications.

This broad obligation increases the parties' interest in entering into pre-contractual agreements dealing notably with the exchange of information.

Given the importance of business secrecy, article 1112-2 is crucial as it creates an obligation of confidentiality.

Any party disclosing confidential information received in the course of negotiation incurs liability.

The liability for violating this duty remains extra-contractual.

Again, confidentiality agreements organising the transfer of information are good tools.

2. Formation of the contract

2.1. Contractual offer and acceptance

The reform created a chapter dedicated to offers and their acceptance mainly containing rules previously established by case law.

The issues of validity of general conditions and battle of forms are expressly addressed under art. 1119 opting for the knock-out rule : "*in case of inconsistency between general conditions relied on by each of the parties, incompatible clauses have no effect*".
Art. 1116 notably clarifies the consequences of withdrawing an offer "*before the expiry of any period fixed by the offeror, if no such period has been fixed, the end of a reasonable period*".

The party who withdrew the offer incurs extra-contractual liability. Only damages can be granted, with no obligation "*to compensate the loss of profits which were expected from the contract*".

2.2. Unilateral promise

In contrast, art. 1124 provides that the revocation of a unilateral promise during the period granted to the beneficiary to exercise its option does not prevent the formation of the contract. Thus it can be enforced.

3. Validity of the contract

The new set of rules intends to protect the weak party challenging the validity of the contractual provisions in case of significant imbalance or state of dependency.

The existing jurisprudence has a restrictive approach.

However, beware of too good negotiation results !

3.1. Intentional concealment

The reform adds several new cases of vitiated consent inspired by previous case law.

It recalls the duty to fully inform the other party, Art. 1137 al. 2 providing that "*the intentional concealment by one party of information, where he knows its decisive character*" is fraud.

3.2. Economic duress – state of dependency

Economic duress can also endanger the contract's validity.

Art. 1143 provides that "*there is also duress where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage*".

Even if its admission is likely to remain exceptional due to the requirement of a manifestly excessive advantage this provision could create uncertainty.

3.3. Prohibition of clauses creating a significant imbalance in the rights and obligations of the parties

Art. 1171 inspired by consumer law provides that these provisions are "*deemed not written*".

This provision only applies to "*standard forms*" not subject to negotiation, established unilaterally and in advance by the other party.

It extends the principle established by case law that a limitation or exclusion of liability clause cannot be enforced if it empties the debtor's essential obligation of its substance.

As unfair terms were already cancelled in B to B and B to C relations, this provision should only concern the few situations where the prohibition of unfair terms was not already applicable.

4. Change of circumstances

The admission of hardship, long rejected by French law with some exceptions made by recent Court decisions is a major contribution of the reform.

It is inspired by European and international projects, all having provisions consecrating hardship: PECL (art. 6:111), Unidroit Principles (art.6.2.1 to 6.2.3), Common Frame of Reference (art. III.-3:502), Common European Sales Law (art. 89).

Art. 1195 provides that in the case of an "*unforeseeable change of circumstances*" rendering the contract "*excessively onerous for one party who had not accepted the risk of such a change*", that party may seek its re-negotiation. Should the re-negotiation be unsuccessful, the parties may terminate the contract by mutual agreement or ask the Court to adapt it. If the parties fail to reach an agreement within a reasonable timeframe, one of them may request judicial termination or revision of the contract.

The security of contracts is not endangered even if the judge can only intervene if the parties fail to renegotiate or terminate the agreement.
It is in the parties' interest to insert a carefully drafted hardship clause in their

agreements, but they could also choose to exclude this provision.

5. In conclusion

The new legal framework also modernises specific performance, termination and remedies, giving the non-defaulting party the means to respond to the breach of contract.

Businesses are obviously concerned by the increased power granted to judges and notably the lay judges of the commercial courts. Their practical understanding of business matters is of great value to assessing the issues at hand in contractual relationships.

Again parties should carefully draft jurisdiction clauses and choose either arbitration or commercial courts located in cities which are important business centres.

So, shall we say farewell to Napoleon?

Yes, as it re-shapes the core of contract law.

No, as the reform is a re-codification and reinforces the French written legal system.

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1 This article uses the translation of the new provisions made by the Professors John Cartwright, Bénédicte Fauvarque Cosson and Simon Whittaker and commissioned by the French Ministry of Justice
http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf

2 Pratique Professionnelle de l'Avocat, Jean Claude Woog, Marie-Christine Sari, Stéphane Woog, Claire Goudineau, Ed. Litec.

The Belt and Road Initiative Connecting the World

Fred KAN
& Simone SCHWARZ

L'initiative "Belt and Road" est une stratégie du gouvernement chinois pour connecter l'Asie, l'Europe et l'Afrique grâce à un développement massif des infrastructures et faire de la Chine la force centrale de la production, de l'approvisionnement et de la logistique. C'est l'entreprise politique et économique la plus vaste et la plus complexe jamais entreprise par l'humanité. Il y a beaucoup de défis difficiles. S'ils sont surmontés, à la maturité, l'Initiative se transformera en une force très puissante pour la coopération internationale.

The Belt and Road (formerly known as "One Belt One Road") Initiative is a strategy of the Chinese government to connect China with the rest of the world. The Initiative was first announced by China's President Xi Jinping in September 2013.

The Belt refers to the Silk Road Economic Belt which traces the ancient Silk Road, a network of trade routes travelled by traders and explorers (the likes of the famous Marco Polo and numerous unsung ones) for centuries from before the birth of Christ (see Illustration 1 and Illustration 2).

The Road refers to the 21st Century Maritime Silk Road which, to a great part, traces many of the routes from China to Africa of the 7 voyages of Zheng He, a Muslim Chinese mariner, explorer, diplomat, fleet admiral and court eunuch of the early Ming Dynasty in the 15th century (see Illustration 1 and Illustration 2).

"It is in our shared interest to show that the global econo my can serve all the world's people."

Illustration 1

Economic Corridors & Covered Territories

Under the Belt and Road Initiative, there are to be six proposed international economic co-operation corridors to link core cities and key ports through existing and new transportation routes and infrastructures:

(1) The New Eurasia Land Bridge Economic Corridor which encompasses a network of international railway lines starting from Lianyungang in China's Jiangsu Province through Xinjiang, Kazakhstan, Russia, Belarus and Poland and ending in Rotterdam in the Netherlands.

(2) The China-Mongolia-Russia Economic Corridor which envisages a strengthening of rail and highway connectivity through the renovation of Russia's Eurasia Land Bridge and the proposed development of Mongolia's Steppe Road.

(3) The China-Central Asia-West Asia Economic Corridor which runs from China's Xinjiang to be connected to the rail network of Central Asia and West Asia, covering mainly Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Turkmenistan.

(4) The China-Indochina Peninsula Economic Corridor to be developed in the five countries in the Indochina Peninsula in accordance with Chinese Premier Li Keqiang's "three suggestions" of 1) planning and building an extensive transportation network together with industrial co-operation projects; 2) establishing a new mode of co-operative fundraising; and 3) promoting sustainable socio-economic development. Currently nine cross-national highways are being built, connecting east and west and north and south.

(5) The China-Pakistan Economic Corridor which entails highways, railways, oil and natural gas pipelines and optic fibre networks. The most important are the pipelines connecting Kashgar in Xinjiang to Gwadar Port. This is singularly the most significant strategy for China as China imports most of its oil and gas from the Middle East and the pipelines will save cost, enhance security and, most important of all, relieve China from the stranglehold and perils of the Strait of Malacca.

(6) The Bangladesh-China-India-Myanmar Economic Corridor which was jointly proposed by India and China in May 2013 and initially planned in the first meeting of the Bangladesh-China-India-Myanmar Economic Corridor Joint Working Group meeting in Kunming in December 2013. However due to the recent friction between China and India, the thrust of development has been between China and Myanmar with Chinese companies being awarded contracts for substantial infrastructure developments.

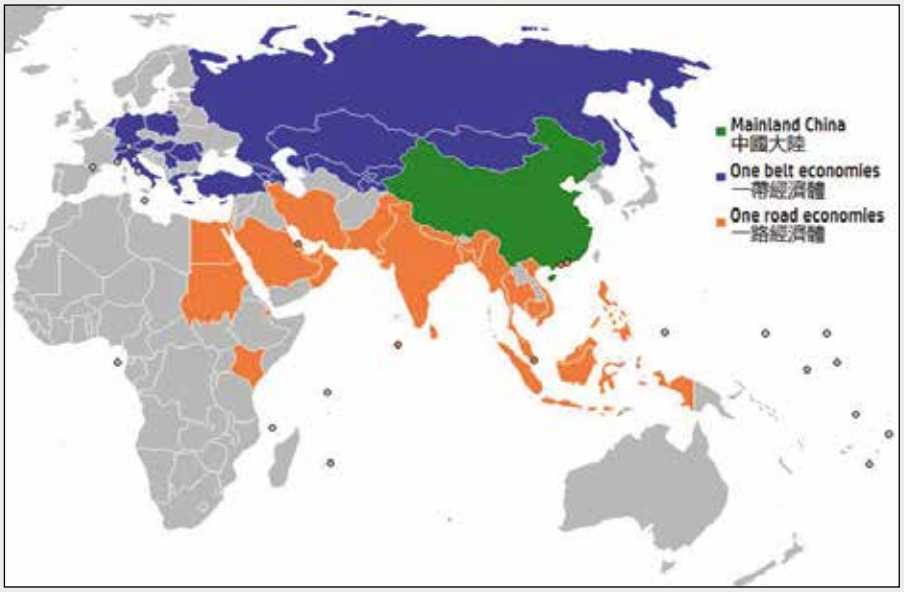

Illustration 2: http://interculturecapital.de/seidenstrasse-zum-erfolg-chinas-one-belt-one-road-initiative
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The Belt and Road Initiative in its original conception envisaged an involvement of 65 countries, including their 4.4 billion inhabitants. The geographical area covered generates about 55% of the global GNP and embodies approximately 70% of the global population. But as it has developed and evolved, the Belt and Road Initiative now embraces all countries which subscribe to the Initiative's core goals of policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds.

China's Aim: Connect the World

"The most dramatic transformation of the world economy since the industrial revolution"

China's President Xi Jinping launched the idea of the Belt and Road Initiative in 2013. However until today, there is no solid legal or political basis. It is a "loosely defined framework" on China's unilateral initiative. It covers not only trade agreements, but it also aims for economic integration, by investing up to US$850 billion in developing infrastructures in foreign countries. About 900 individual projects are envisioned, such as building new roads, high-speed railroads and deep-sea ports along the routes, constructing gas-pipelines through Central Asia's steppes and deserts. This project is revolutionary. If successfully carried out, it could well unleash – through infrastructure, trade and investment – the most dramatic transformation of the world economy since the Industrial Revolution.

The Chinese government announced its strategy in a "Vision and Action plan" in 2015. It is the only definitive statement that has been made about the Belt and Road Initiative. The 5 major goals of the plan that are aimed to be implemented by 2049 – the 100th anniversary of the People's Republic of China – are: policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds.

Policy coordination among the concerned jurisdictions predicates on political communication to enhance mutual trust, to agree on a consensus, to deepen common interests and to leverage comparative strengths. This connectivity will have a multiplying effect, and will stimulate and accelerate growth.

Connection between countries will also be extended and strengthened through infrastructures created, linked and improved along the routes. This entails investing in the building of highways, railways, energy and transportation networks and the spread and application of communication technology.

Unimpeded trade means the establishment of free trade zones, removal of trade barriers and facilitating trade and investment. Having created a safe environment for investment, China hopes to win over private investors to the cause.

It is crucial for the success of the Belt and Road Initiative to deepen financial integration and for countries to join hands to establish common financial institutions, like the Asian Infrastructure Investment Bank (AIIB).

Like all human endeavours, winning the people's support is absolutely essential. This will be achieved by promoting extensive cultural and academic exchanges, expanding the scale of tourism, cooperation on medicine and health care, as well as technology and the sciences.

First Achievements

President Xi took the occasion of the opening ceremony of The Belt and Road Forum for International Cooperation held in Beijing on May 14, 2017 to report on the achievements in the first four years of the Initiative.

He pointed out the enhanced coordination with policy initiatives of relevant countries and cited the examples of the Eurasian Economic Union of Russia, the Master Plan on ASEAN connectivity, the Bright Road Initiative of Kazakhstan, the Middle Corridor initiative of Turkey, the Development Road of Mongolia, the Two Corridors, One Economic Circle Initiative of Vietnam, the Northern Powerhouse Initiative of the UK and the Amber Road Initiative of Poland. Under the Belt and Road Initiative, complementarity is promoted between China's development plan and those of Laos, Cambodia, Myanmar, Hungary and other countries. China has signed cooperation agreements with over 40 countries and international organizations and carried out framework cooperation on production capacity with more than 30 countries.

To realize its major goal of regional integration, China has enabled and empowered multilateral investments through the creation of new funding institutions.

The **Silk Road Fund (SRF)** was established in December 2014 by China's Administration of Foreign Exchange, the Export-Import Bank of China, the China Investment Corporation and the China Development Bank. There was an initial funding of US$40 billion to foster increased investment in countries along the Belt and Road routes. The SRF has invested in many projects including the construction of the Mombasa-Nairobi Standard Gauge Railway, the Karot Hydropower Project and other hydropower projects in the China-Pakistan Economic Corridor, and the Yamal LNG Project in Sabetta on the Yamal Peninsula in Northern Russia.

Furthermore, China initiated the founding of the **Asian Infrastructure Investment Bank (AIIB)** which came into operation on Christmas Day in 2015. AIIB is a new multilateral financial institution, established to bring countries together to address the daunting infrastructure needs across Asia. 57 states are its Founding Members. Its capital is US$100 billion, equivalent to 2/3 of the capital of the Asian Development Bank and about half that of the World Bank. Good governance is the hallmark of AIIB with the highest possible standards in transparency and accountability. China is AIIB's largest shareholder and it currently holds 27.5 percent of the bank's voting rights. AIIB is purposely a demonstration of the willingness and readiness of the Chinese government to abide by international financial standards and practices. Among AIIB's many approved projects are the Gujarat Rural Roads (MMGSY) Project, the Nuremberg Hydropower Rehabilitation Project in Tajikistan, the Batumi Bypass Road Project in Georgia, the Natural Gas Infrastructure and Efficiency Improvement Project in Bangladesh, the Regional Infrastructure Development Fund Project in Indonesia, the Trans Anatolian Gas Pipeline Project in Azerbaijan (co-financing with the World Bank), the Railway System Preparation Project in Oman and the Myingyan Power Plant.

Meanwhile, China is already building expressways, inter alia, in the Middle-East and up to Europe (Madrid, Spain and Duisburg, Germany), several deep-sea harbours in the Indian Ocean and the largest harbour in Tanzania, Africa. It invested in the port of Piraeus (Athens, Greece), coupled with investment in high-speed railway from Piraeus to Budapest (Hungary), thereby opening new trade routes.

The most telling project is the construction by China Railway Group and the China Civil Engineering Construction Corporation of the railway from Addis Ababa to Djibouti, a lifeline of the landlocked Ethiopia to a seaport and a strategic goal to allow Ethiopia a sustainable and stable economic growth. Funding was secured from the Export-Import Bank of China, China Development Bank and the Industrial and Commercial Bank of China. 20,000 Ethiopians and 5,000 Djiboutians were hired for the construction.

Reasons for Initiating the Belt and Road Initiative

It goes without saying that China does not embark on the Belt and Road Initiative solely for altruistic reasons.

China has developed in just 30 years from a poor introspective agricultural nation into a global manufacturing powerhouse. It has become the world's second largest economy. But its economy is slowing. China's top priority is therefore to stimulate its economy.

As a result of China's economic growth over the last years, it has accumulated vast overcapacities in the industrial sector, such as steel, cement and aluminum. By helping other countries to further develop themselves via infrastructure, China can distribute those overcapacities, open new trade markets and maintain its economic growth.

China can export more to its neighbours. So far only a small percentage (9.06%) of China's export goods reached neighbouring countries. Whereas in Germany, also being a country surrounded by various nations, it is 36.98%. New trade routes mean better sales opportunities (see illustration 3).

The Asian Development Bank has estimated that there is an US$800 billion annual shortfall for infrastructure needs in the Asia-Pacific countries. China is banking its future on responding, via the Belt and Road Initiative, to its neighbours' huge infrastructural needs.

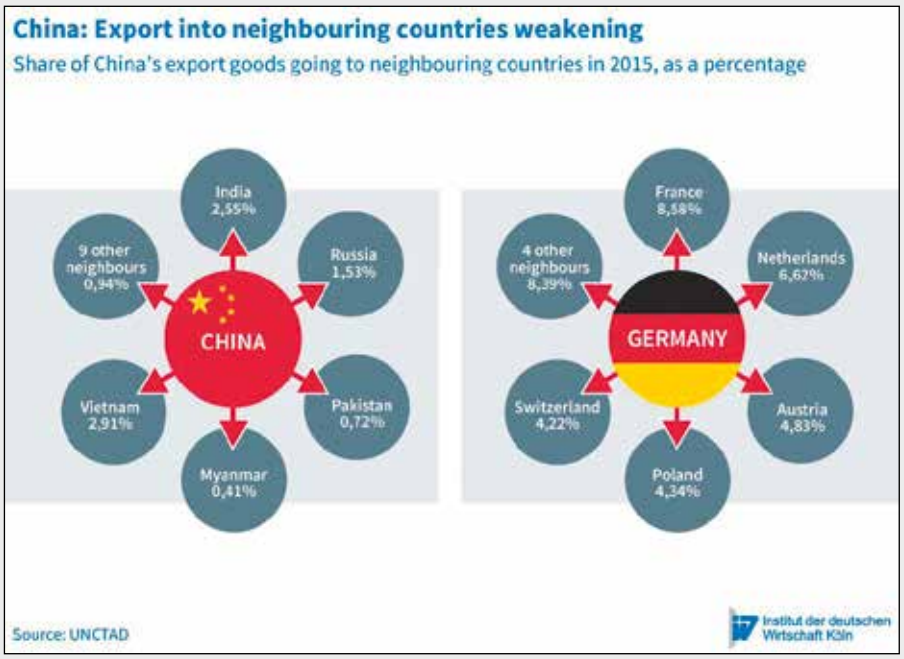

Illustration 3: https://www.iwkoeln.de/en/studies/beitrag/thomas-puls-one-belt-one-road-china-s-new-silk-road-302612
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The Belt and Road Initiative was conceived at a time of trade-war jitters. It is seen to be a counter measure to the exclusion of China in the Trans-Pacific Partnership (TPP) and its companion, the Transatlantic Trade and Investment Partnership (TTIP), the Eurasian Economic Union (EEU) and the EU-Japan Economic Partnership Agreement. These trade agreements have comprehensive liberalization agendas. Exclusion of China from these trade agreements has the potential of increasing China's trading costs. China needs to avoid isolation and reverse the process by opening up new trade opportunities.

The Belt and Road Initiative can be viewed as China's "Second Opening-up" of its economy, following the one in the 1970s, which boosted the prosperity of the coastal provinces. China's north-western and central areas remained less developed. Socio-economic imbalances occurred within the country, leading to emigration and unrest in the north-west. By installing over-land trade routes, the north and central regions of China would acquire access to wider international markets. Hence they would become independent from the maritime routes that are used for trade with Europe.

China is not a strong naval power. Learning from the experience of the Second World War (when its capital and population had to move west), developing the western parts of the country means a lifeline in times of war.

The Belt and Road Initiative is of great geopolitical significance to China. Although China claims not to have any political strings attached, one cannot dismiss the fact that once being supported by Chinese investments, receiving funds for infrastructure and being provided with consumer goods, the receiving countries are likely to be favorable to China in international and other affairs.

Critics and Challenges

Like all human endeavors, particularly when they touch on economics and politics, the Belt and Road Initiative inevitably attracts detractors and skeptics.

Quite a number of countries on the Belt and Road routes are developing countries, often poor and politically unstable. Is the Belt and Road Initiative up to the task of traversing territories fraught with political and geopolitical uncertainties? Regimes come and go. Will there be consistent and concentrated political will to sustain focus on the Initiative's projects?

Certain countries or powers have historically exercised their dominance or influence over others. Is the Belt and Road Initiative a disruptor of the geopolitical *status quo*? Will it generate instability?

Will the Belt and Road Initiative open the floodgates to an influx of Chinese labourers and cheap Chinese products? Will unemployment rate increase? Will wages decline to stay competitive?

China is seen to have political motives. Western countries, concerned with human rights and transparency, are therefore skeptical and at times prescribe political conditions that need to be fulfilled before expanding trade with China.

So far, Europe has not agreed on a common policy in regard to the Belt and Road Initiative. China has completed agreements only with individual countries, *inter alia* Switzerland, Greece and Hungary. There is a suggestion which is gaining ground that if the EU could agree on a consensus, it could influence the process and have a control over it, instead of being played-off *à la façon* "divide and rule".

The biggest challenge and the litmus test for the Belt and Road Initiative are in attracting private sector participation. Funding needs for infrastructures cannot forever be met by China or a collection of countries. Funding from the private sector is essential.

The prime concern of private companies is profits. But where in the Belt and Road Initiative is the attraction for the private sector?

Even with governments in the lead, for large-scale infrastructural projects, the involvement from the private sector cannot be taken for granted.

The Trans-European Transport Network is a case in point. This project was recognized in the Maastricht Treaty in 1992 which included "30 priority projects" (railway projects, nixed railroad projects, waterway transport projects etc.). Private sector support is part of the financial strategy. However, private

involvement in the projects has been very limited despite a special loan guarantee instrument established in 2008 to offset early-period risks of demand and revenue uncertainty. Efforts have been taken to look into technical and financial implementation so as to reduce investment risk and to make the projects more attractive to private investors. A cost-benefit analysis has also been conducted to select those projects out of the 30 which would be of common interest to a broader spectrum of investors.

Therefore, to attract private investments, China needs to demonstrate profitability through various selected projects undertaken and to ensure that proper corporate governance, market principles, procurement policies and environmental standards will not be compromised.

Going Forward

President Xi announced at the Belt and Road Forum for International Cooperation that China will steadfastly follow the Initiative's five core goals of connectivity. To go forward China will, inter alia, scale up its financial support for the Initiative; will endeavor to build a Belt and Road free trade network; will launch the Belt and Road Science, Technology and Innovation Cooperation Action Plan and will offer 2,500 short-term research visits to China for young foreign scientists, train 5,000 foreign scientists, engineers and managers, and set up 50 joint laboratories; will provide assistance worth RMB 60 billion to developing countries and international organizations participating in the Belt and Road Initiative to launch more projects to improve people's well-being; and will also develop a network for cooperation among the NGOs in countries along the Belt and Road as well as new people-to-people exchange platforms.

The Belt and Road Initiative is the most expansive and complex political and economic undertaking ever attempted by mankind. It is much massive in scope than the Marshall Plan.

It is a long and winding road, taking decades to accomplish. There are numerous formidable challenges. However, if these formidable challenges are overcome, upon maturity the Belt and Road Initiative will develop into a most powerful force for international cooperation.

The Belt and Road Initiative is a vision of world peace and prosperity.

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Challenge to Divorce Law in England

Anna SHADBOLT & Floriane LARUELLE

Note: This article was written in January 2017, Since then the reform discussed in this article has been rejected by Parliament.

Introduction

Significant change may be on the horizon in England and Wales in respect of our divorce law. Unlike many jurisdictions, the only way at present for a couple to divorce without waiting for at least two years of separation is to blame the other party for the irretrievable breakdown of their marriage, either alleging unreasonable behaviour or adultery. Many argue that the practice of alleging fault is outdated and unnecessary. There is a strong voice calling for reform, to allow divorce on the basis of mutual consent. Further reform is actively being implemented with online divorce systems being piloted. This article discusses the proposed reforms and objections, and provides a comparison with our neighbours across the sea in France, where it could be argued that divorce has effectively adapted to meet both changing societal attitudes and the public purse.

Proposals for Reform

A change to the law allowing couples to divorce without having to attribute blame or having to wait for a period of separation to pass (at least two years) has been sought by opponents of the current law for years. The current campaigner for reform is Member of Parliament Mr. Richard Bacon, whose "No Fault Divorce Bill" proposes amendment to the current legislation to allow a joint petition to be presented to Court on the basis that both parties agree their marriage has broken down.

The arguments for no fault divorce can be summarised as follows:

1. There is no "intellectual honesty" in the current law. This was the view expressed by the President of the Family Division of the High Court, Sir James Munby, who says that many couples have to fabricate examples of the other party's unreasonable behaviour to get a divorce quickly, which makes a nonsense of the law. A YouGov survey found that *"more than 27% of couples citing behaviour admitted that their claims were not true but were the easiest way of getting a divorce"*.

2. The existing law is out of sync with the current Government's intentions to encourage couples to resolve their divorce and financial matters by way of alternative dispute resolution (usually mediation) and without needing to engage in expensive litigation which causes an already strained Court system to bow under the pressure. The need to allege fault only increases the chances of a divorce petition being defended and litigated.

3. There is a plea for change by numerous family lawyers in England and Wales, who experience every day the difficulties caused by the need to acknowledge fault (increased hostility, the potential for costly negotiations regarding the examples of behaviour and so on), which do not help when trying to navigate already challenging proceedings in an efficient and cost-effective manner.

4. There is also a desire for reform in the general public. Many couples do not realise that there is a need to attribute fault when seeking a divorce without having already been separated for some years. It can therefore be a nasty surprise to find out that you have to come up with a list of unpleasant things to say about your spouse, especially if you are trying hard to maintain an amicable relationship. Further, the distaste with which many people view the current divorce law is a reason for not getting married.

5. The proposed reform does not remove any of the existing grounds for divorce; it merely opens up another option. A party seeking a divorce can still rely on the spouse's intolerable behaviour or adultery in support of a belief that the marriage has ended.

6. The current fault-based options do not generally affect the division of the assets and liabilities in the financial proceedings. The time spent arguing over who did what is wasted, given that allegations in a divorce petition are not considered when deciding what capital and income orders should be made.

Arguments against no fault divorce are:

1. Allowing this reform (and also the new online divorce system) would make separation and divorce easier, which could lead to an increase in the number of divorces. This could then lead to destabilisation of the family unit and the

consequent long term negative effects. Whilst it is acknowledged that a system which reduces acrimony would assist in the short term, the long term impact of increased divorces is problematic.

2. Divorce should not be an easy process. It should be unhurried and measured so that couples give their marriage everything they have got before deciding it is at an end. If it is easy to divorce then couples may not make full use of counselling or relationship therapy. (At present, there is no separation in English law between divorce and financial matters; generally financial proceedings cannot be instigated until a divorce petition has been issued which means that it is often necessary to push ahead with a quick divorce so that, for example, the family home can be sold under a Court order and both parties can afford to re-house without experiencing economic difficulties caused by waiting for two years).

France

Where a proposed reform presents so much controversy it can often assist to look overseas and see how other jurisdictions have fared when implementing similar provisions. Being one of our closest neighbours, but one with an entirely different legal system (the Romano-Germanic civil law system as opposed to common law), France is an obvious example. In France, a jurisdiction where mutual consent has been one of four grounds for divorce since 1975, a process of modernisation of the institution of divorce is also being carried out. It aims to simplify and accelerate divorce proceedings and 'unclog' the Courts.

France has moved more quickly than England and Wales. Divorce on the basis of mutual consent is already available to couples so long as they agree on both the principle of getting divorced and the consequences of the divorce (financial and personal). The parties are required to draft a 'convention' (a contract which deals with all the consequences of a divorce including finances and children matters) reflecting their agreement. France then goes a step further. Even where there is a lack of agreement on all the consequences of the divorce, couples still may make use of separate divorce provisions that are available without having to blame the other party or having to wait two years, so long as they agree that in principle their marriage has broken down. Previously, to utilise this ground the parties had to make a statement that their life together had become intolerable. One of the first steps towards a modernised divorce system was taken on 26 May 2004 when legislation was brought in which removed the need to state that the couples' life together had become intolerable. It is argued that this amendment in the law has gone a long way in pacifying the relationship between the parties and has led to a faster and smoother divorce process.

The French have also moved forward in ways that the English jurisdiction have thought about but not yet reached consensus on. For example, it was decided that there should be less intervention by the judiciary in cases of divorce by mutual consent. The number of appearances in front of a judge was reduced to one single appearance right at the end of the process, simply to allow a judge to approve the convention. Then, from January 1, 2017, couples wishing to divorce on the basis of mutual consent found that this ground has been replaced by an even more contractual version where all judicial involvement has been removed.

Importantly, these changes have not been made without safeguards being put in place. The changes were not the result of a rash decision on the part of the French. The convention still needs to be checked by each party's lawyer (previously one lawyer for both parties could be used) and then reviewed by a Notaire in order for it to be enforceable. The Notaire plays a greater role, taking responsibility for ensuring that the convention is in the proper form and that the reflection period of 15 days between the parties receiving the draft convention and signing it has been respected.

Conclusion

The two jurisdictions of France and England/Wales are arguably too different in some respects (for example the division of assets on divorce) for worthwhile comparisons to be drawn. However, this cannot be said to be the case with divorce proceedings. Both jurisdictions suffer from a need to reduce pressure on the Court system, and also a desire to provide couples with a mechanism for formally ending their marriage which does not increase acrimony or lead to unnecessary legal costs. France has in many ways adapted to meet these needs whilst England drags behind. In France, there does not appear to have been an opening of the floodgates following the changes to its law, which is the concern of many opponents of no fault divorce. The appetite for change is currently strong in England and Wales. It is hoped that the experience of our French neighbours can be drawn upon as a useful resource by those who are continuing their efforts for reform both in Parliament and in the family law profession.

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Cesión en globo de NPL's y el erróneamente denominado retracto de créditos litigiosos

Francisco GAMBOA

The Spanish economy has been badly affected by the economic downturn. In comparative terms, the impact of the global financial crisis in the Spanish lending institutions has been worse than the one registered by many of their European industry peers. However, such scenario has left them important opportunities to free up capital on their balance sheet and for investors to buy *non-performing loans* (NPL) portfolios at a significant discount and therefore make a profit. Undoubtedly, distressed debt transactions have appeared as an attractive deal for the proper investor willing to purchase the right volume of debt. However, a major legal burden now seems to jeopardise such a profitable business. We refer to article 1.535 of the Spanish Civil Code which, should certain conditions apply, might potentially free debtors by paying a discounted amount of the original outstanding debt. Will this have the effect of cooling off – or even putting to an end – the thriving Spanish distressed debt market?

1. El contrato de cesión de *non-performing loans*

Introducción

Como consecuencia directa de la grave crisis financiera mundial, y de la excesiva flexibilidad de las entidades financieras españolas a la hora de conceder financiación en los años previos a la misma, los balances de éstas se han visto colapsados e incapaces de cumplir con las exigencias normativas de solvencia, debido al gran número de activos "tóxicos" contenidos en sus balances, tales como inmuebles y créditos fallidos.

Las operaciones de cesión masiva de carteras de créditos fallidos deben enmarcarse necesariamente en tal contexto, ya que surgen como una respuesta de adaptación a un medio tan radical como incierto. Se trata de las conocidas comúnmente como operaciones de *Distressed Debt* o compraventa de carteras NPL (*Non-Performing Loans*).

Concepto

El tipo de préstamos que generalmente forman parte de las carteras NPL incluye préstamos hipotecarios, préstamos a pequeñas y medianas empresas (tanto con o sin garantías), préstamos a particulares (con y sin garantías) y créditos al consumo en todas sus variables.

En virtud de estas operaciones, la entidad financiera cede cada uno de los créditos que componen la cartera, eliminando el riesgo de impago inherente a los mismos, lo cual indudablemente conlleva el saneamiento de su balance. El cesionario, por su parte, habitualmente un fondo de inversión extranjero, aprovecha la coyuntura y el contexto concretos para obtener del cedente un importante descuento, con las miras puestas en el posterior recobro de los créditos pendientes de forma masiva.

Ausencia de Deber de Notificación al Deudor

Debe resaltarse que, conforme a la legislación española vigente, la cesión de cualquier crédito implica la existencia de un negocio bilateral cuya eficacia no precisa del conocimiento previo del deudor.

La **notificación** al deudor, en caso de efectuarse ésta, únicamente tiene como fin poner en su conocimiento la existencia de un nuevo acreedor, siendo a este último y no al acreedor originario, a quien deberá satisfacerse el derecho de crédito. Tanto es así que el cedente tampoco viene obligado a recabar del deudor su **consentimiento** para la cesión, pudiendo llevarse a cabo la misma incluso en contra de su expresa voluntad.

Por supuesto, sobra decir que, en el supuesto de ausencia de conocimiento de la cesión por parte del deudor, se reputará como válido y legitimo el pago hecho por éste al cedente (ex Art. 1.527 del Código Civil).

2. El problemático derecho reconocido en el artículo 1.535 CC

Una vez aclarado que el deudor ostenta una posición externa respecto de la cesión del crédito, pudiera pensarse que el mismo carece enteramente de facultad alguna más allá de las propiamente inherentes a su posición y nacidas con anterioridad a la cesión. Pues bien, este razonamiento, aunque lógico, no resulta acertado en ciertos casos. Ello es así a consecuencia del contenido del artículo 1.535 CC, que dispone:

> Considero que el derecho contenido en el artículo 1.535 CC resulta aplicable respecto a las cesiones masivas de créditos litigiosos efectuadas en un solo acto (cesión en globo).

Artículo 1.535 CC. Venta de crédito litigioso

Vendiéndose un crédito litigioso, el deudor tendrá derecho a extinguirlo, reembolsando al cesionario el ***precio que pagó, las costas que se le hubiesen ocasionado y los intereses*** *del precio desde el día en que éste fue satisfecho.*

Se tendrá por litigioso un crédito desde que se conteste a la demanda relativa al mismo.

El deudor podrá usar de su derecho dentro de nueve días, contados desde que el cesionario le reclame el pago.

Como puede comprobarse, los efectos derivados de la aplicación del artículo 1.535 CC, tras la perfección del contrato de cesión de carteras NPL, son potencialmente devastadores para el fondo cesionario. Máxime, teniendo en cuenta la inaplicabilidad

a tales supuestos de cualesquiera de las excepciones expresamente previstas en el artículo 1.536 CC subsiguiente. Así, de resultar aplicable en el supuesto concreto el ejercicio del derecho contemplado en el artículo 1.535 CC, ello implicaría, por ejemplo, que un deudor que lo es por 100.000 euros, pudiera extinguir su crédito tras la cesión de éste al fondo por parte de la entidad financiera, abonando para ello la irrisoria cantidad de poco más de, pongamos, 30.000 euros. Esta cantidad comprende el precio que el cesionario pagó por la compra del crédito fallido, así como las costas ocasionadas y los intereses correspondientes.

No obstante, a fecha de redacción del presente trabajo, los principales aspectos relativos a la aplicabilidad del referido derecho en las ventas de portfolios compuestos por NPL no se encuentra aún resuelta de forma unánime por los tribunales españoles. No obstante, de diversos tribunales menores proliferan cada vez con más recurrencia, heterogéneas y contradictorias resoluciones en uno y otro sentido. Esta situación ha provocado un indudable clima de inseguridad jurídica que incluso podría deparar en el fin de las operaciones de carteras NPL en España, ante la evidente imposibilidad de recobrar íntegramente un gran número de los créditos adquiridos.

3. Tribunal supremo, tribunal constitucional y TJUE: una cuestión pendiente de resolver

Resulta por tanto imperante la necesidad de una resolución que, emanada de un órgano judicial jerárquico de suficiente vinculación, aclare la correcta interpretación de la deficiente redacción del artículo 1.535 CC para el supuesto de cesión de créditos de forma masiva.

Es cierto que el Tribunal Supremo se ha pronunciado acerca de la interpretación del referido artículo en contadas ocasiones. Si bien tales pronunciamientos, o bien resultan de tal antigüedad que devienen inaplicables a la actual coyuntura negocial de compraventa de carteras NPL[1], o bien, interpretan el artículo 1.535 CC de forma puntual, sin entrar a efectuar una interpretación integral del referido derecho, ni mucho menos de su aplicabilidad concreta respecto de las ventas en globo de *non-performing loans*[2].

Por otro lado, ciertos juzgados españoles han remitido cuestiones, tanto de inconstitucionalidad, al Tribunal Constitucional[3], como prejudiciales, al Tribunal de Justicia de la Unión Europea[4], para la emisión por éstos de un pronunciamiento sobre la aplicabilidad del artículo 1.535 CC. No obstante, ambos órganos han evitado pronunciarse sobre el fondo de las referidas cuestiones, amparándose en un deficiente planteamiento de las mismas.

4. Desliende conceptual crítico

1.1 Como respuesta a la situación de incertidumbre jurídica en torno al contenido, eficacia y aplicabilidad derivadas de la interpretación del artículo 1.535 CC, a continuación, se exponen una serie de opiniones que, desde una óptica crítica, pretenden deslindar algunos de los más importantes conceptos que componen la referida norma.

(a) La Errónea denominación de retracto

El derecho reconocido en el artículo 1.535 CC es denominado comúnmente, incluso por el propio Tribunal Supremo, como "*retracto de crédito litigioso*". No obstante, considero que dicha descripción no se corresponde con su verdadera naturaleza, por cuanto que el mismo **carece de subrogación, tal y como requiere el retracto**.

El ***tanteo*** debe entenderse como "*el derecho que tiene su titular para adquirir con preferencia una cosa que proyecta enajenar su propietario*". El ***retracto***, por su parte, es "*el derecho que tiene su titular para subrogarse en las condiciones establecidas en el contrato en el lugar del que ya ha adquirido una cosa a título oneroso, por compra o dación en pago*". Por lo tanto, mientras que el tanteo ha de ejercitarse antes de que se haya originado el contrato traslativo que lo origina, el retracto se ejercita después, una vez perfeccionado dicho contrato, quedando caracterizado este último por la necesaria subrogación subjetiva y la continuación del contrato perfeccionado.

Caracteres estos que no se constatan en el derecho reconocido en el artículo 1.535 CC, toda vez que una vez ejercitado el mismo, no sólo no existe subrogación alguna, sino que ésta no podría existir por cuanto que el derecho hasta ese momento existente se extingue.

El efecto derivado del artículo 1.535 CC se presenta más bien como un derecho reconocido *ope legis* al deudor para que este pueda optar por realizar un pago parcial de su deuda con plenos efectos liberatorios (lo que podríamos denominar como una quita por imperativo legal).

(b) Aplicabilidad a la Cesión en Globo

Considero que el derecho contenido en el artículo 1.535 CC resulta aplicable respecto a las cesiones masivas de créditos litigiosos efectuadas en un solo acto (cesión en globo). Entiendo esta como la conclusión lógica y conforme al espíritu de la Ley, máxime tras la amplia interpretación del vocablo "*crédito*" efectuada por el Tribunal Supremo en su sentencia 976/2008, de 31 de octubre de 2008. En la mima, viene a afirmar, respecto del referido vocablo contenido en la redacción del artículo 1.535 CC, que "*debe entenderse que el precepto se refiere a todos los derechos (y acciones) individualizados y que sean transmisibles*".

(c) Operaciones de Modificación Estructural o Intervención del FROB

No obstante, conviene resaltar que el régimen contenido en el artículo 1.535 CC no resulta de aplicación respecto de **operaciones de restructuración empresarial sujetas a la Ley 3/2009**, de 3 de abril, sobre modificaciones estructurales de las sociedades mercantiles. En este sentido se pronunció el Tribunal Supremo, mediante su sentencia 165/2015 de 1 de abril de 2015, en la que negó la aplicabilidad del derecho que aquí se debate respecto de una cesión de créditos enmarcada en una operación mercantil de segregación de las previstas en el artículo 71 de la Ley 3/2009. Si bien, de la fundamentación de la propia sentencia parece extraerse que la excepción predicada responde a motivos de orden público, por el especifico contexto en el que se desenvolvió la operación analizada. No considero oportuno extender dicho razonamiento a, por ejemplo, una adquisición onerosa de una cartera de créditos fallidos.

Tampoco resulta de aplicación el derecho contenido en el artículo 1.535 CC a las operaciones enmarcadas en el procedimiento administrativo especial de resolución de entidades de crédito regulado mediante la **Ley 11/2015, de 18 de junio, de recuperación y resolución de entidades de crédito y empresas de servicios de inversión**. Ello resulta indubitado por cuanto que es la propia Ley 11/2015 la que se refiere expresamente a dicha excepción mediante la redacción de su artículo 29. Ap. 4. Letra b).

(d) Concepto de Crédito Litigioso: especial mención a la Ejecución Forzosa

Resulta oportuno precisar que, por supuesto, **no todos los créditos que componen una cartera de *distressed debt* deben ser considerados como litigiosos**, y por tanto susceptibles de extinción mediante el abono del precio de compra satisfecho por el cesionario.

En este sentido, aunque también existe cierta discrepancia jurisprudencial al respecto, resulta esencial establecer con claridad que créditos dentro de la cartera no ostentan la cualidad de "*litigiosos*" conforme al artículo 1.535 CC. En concreto, resultando claro que la existencia de un crédito litigioso presupone la pendencia de un litigio cierto, se hace preciso analizar si por "litigioso" solo cabe hablar de un procedimiento declarativo o cabe también aplicar dicha figura jurídica a los procedimientos de ejecución.

Esta cuestión es de crucial importancia práctica ya **que es cada vez más habitual encontrar deudores que, a pesar de encontrarse inmersos en procesos de ejecución, aprovechan el trámite de sucesión procesal** para hacer valer el derecho reconocido en el artículo 1.535 CC.

Por mi parte considero que, siempre que haya existido un procedimiento en el que el deudor hubiera **cuestionado la validez y exigibilidad del crédito** y habiendo recaído una resolución firme respecto del mismo declarándose la existencia y exigibilidad del crédito, deberán desplegarse los efectos propios de la cosa juzgada conforme a lo dispuesto en el artículo 222.1 de la Ley de Enjuiciamiento Civil (LEC), quedando excluida la posibilidad de un ulterior proceso con el mismo objeto. Dicho de otro modo, el hecho de que un deudor inicie otro procedimiento posterior, pretendiendo ignorar la fuerza de cosa juzgada del previo procedimiento, no lo convierte, de nuevo, en litigioso, toda vez que ya no es precisa, ni posible, una nueva resolución judicial acerca de la certeza del crédito.

(e) Determinación del Precio

Uno de los ejes fundamentales sobre los que se sustenta el derecho reconocido en el artículo 1.535 CC reside, indudablemente, en el **precio abonado por el cesionario**. La determinación con exactitud de la referida cantidad servirá para identificar el precio a abonar por el deudor para proceder a la extinción total de la deuda.

La cuestión del precio abonado por el cesionario, cuando se trata de cesiones en globo, implica una importante colisión conceptual entre la determinación de un precio cierto individualizado y la concepción de las economías de escala. Como resulta indubitado, el precio real abonado por el fondo cesionario para la obtención del crédito concreto goza de un más que significativo descuento debido a la tremenda magnitud de créditos que componen la cartera. Dicho descuento, por tanto, aunque tiene un claro reflejo en el precio final del portfolio, nunca será predicable respecto de cada uno de los créditos individualizados. Ello es así toda vez que, de haberse adquirido el crédito concreto de forma aislada, el precio a abonar hubiera sido extraordinariamente superior.

Por tanto, no cabe duda de que el cesionario que ha puesto en conocimiento del deudor la existencia de la cesión de su crédito (por ejemplo, mediante notificación o mediante la solicitud de sucesión procesal) será extremadamente receloso de informar acerca de la referida cantidad. No obstante, los órganos jurisdiccionales españoles se las han ingeniado para persuadir a los fondos cesionarios, incluso incumpliendo la legalidad vigente, con el objetivo de que estos últimos les proporcionen el importe exacto al que asciende el precio abonado por el crédito litigioso concreto. Estas tácticas de persuasión, de insoslayable aceptación en el ordenamiento jurídico español, se pueden agrupar en dos subtipos:

(i) Requerimiento de aportación del precio de compra individualizado con apercibimiento de no aceptar la petición de sucesión procesal[5]. Existen ocasiones en las que el juzgador de instancia, ante la negativa del fondo cesionario de informar acerca del precio abonado por el crédito litigioso, amenaza con desestimar la petición de sucesión procesal, ignorando por completo el contenido del artículo 540 LEC, lo que equivale a vetar o, al menos, cercenar cualquier posibilidad de recobro del crédito por parte del cesionario; o

(ii) Requerimiento de aportación del precio de compra individualizado con apercibimiento de determinar y tomar por cierto el valor abonado por el fondo cesionario mediante prorrateo. Es decir, dividiendo el precio total abonado por la totalidad de la cartera entre el número total de créditos transmitidos.

Las prácticas arriba descritas implican, en mi opinión, la oficialización del ejercicio del derecho reconocido en el artículo 1.535 CC. Es decir, una cosa es que ante la venta de una cartera de créditos el deudor pueda hacer uso del derecho que le reconoce el artículo 1.535 CC y otra, muy distinta, es que el ejercicio del retracto sea impulsado de oficio por el juzgador de instancia, exigiendo, como requisito esencial para continuar con la ejecución que al acreedor justifique el precio pagado por el crédito.

(f) *Dies a quo*

Existe unanimidad doctrinal acerca de la consideración del **plazo de 9 días** descrito en el artículo 1.535 CC como **plazo de caducidad** y, en ningún caso, plazo de prescripción.

Por cuanto respecta al ***dies a quo*** para el cómputo del plazo indicado, parece sensato que, siempre que el crédito se encuentre en situación de litispendencia respecto de la reclamación judicial instada anteriormente por el cedente (no por el cesionario), el plazo comience desde el traslado entre procuradores del requerimiento instado por el cesionario solicitando la sucesión procesal conforme a lo dispuesto en el artículo 540 LEC.

Respecto de aquellos procedimientos iniciados *ex novo* por el fondo cesionario, no cabe duda de que será el primer emplazamiento al deudor el que dé comienzo al cómputo de 9 días conforme al artículo 1.535 CC.

No obstante, no es difícil encontrar criterios discrepantes a las tesis anteriores[6]. Incluso aquellas que consideran que el *dies a quo* únicamente se iniciaría mediante la notificación expresa y completa al deudor.

(g) Conclusiones

Resulta apasionante comprobar como una norma dictada en el siglo XIX puede resultar de tan rabiosa actualidad y ocasionar, en su caso, tales consecuencias en el actual panorama jurídico-negocial actual. Si bien, su defectuosa redacción obliga a efectuar una interpretación ciertamente crítica de su aparente contenido y utilidad.

Esta, en última instancia, es tarea de los tribunales de más alto rango que serán los que deberán arrojar una interpretación única y cierta acerca de esta importante norma que, sin lugar a dudas, a nadie deja indiferente. Esto no es ni será tarea fácil, puesto que la correcta interpretación del referido artículo, puesto en contraposición con las operaciones de cesión de NPL en globo, precisa indudablemente poner en balance conceptos tan dispares como el acuñado en la célebre expresión de Justiniano, al comentar la Ley 23 del Codea, "*tam humanitatis, quam benevolentiae plena*" y la necesaria dosis de seguridad jurídica que debe amparar el legítimo objetivo lucrativo del cesionario que suscribe un contrato de cesión de créditos fallidos, cuya vigencia y legalidad en nuestros días resulta del todo indubitada.

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1 Valga por todas las STS de 16 de diciembre de 1969.

2 Valgan por todas las STS 976/2008, de 31 de octubre de 2008 y la STS 165/2015, de 1 de abril de 2015.

3 Cuestión de inconstitucionalidad número 2209-2016 interpuesta por el Juzgado de Primera Instancia núm. 38 de Barcelona e inadmitida por Tribunal Constitucional mediante su Auto 168/2016, de 4 de octubre.

4 Cuestión prejudicial remitida por el Juzgado de Primera Instancia nº 11 de Vigo y resuelta por el Tribunal de Justicia de la Unión Europea (TJUE) mediante Auto de 5 julio de 2016. Asimismo, se encuentra pendiente de resolución por el TJUE la cuestión prejudicial interpuesta en el mismo sentido por el Juzgado de Primera Instancia núm. 38 de Barcelona.

5 Este es el supuesto, por ejemplo y entre otros, al que aboca el Auto dictado con fecha 18 de noviembre de 2016 por el Juzgado de Primera Instancia de Llanes.

6 Esta es la opinión, por ejemplo, Notario Gomá Lanzón, quién aboga por situar el *dies a quo* en una necesaria notificación al deudor "en condiciones decentes".

Is 4 the New Norm for Agents?

Stephen SIDKIN

Determining compensation due to an agent on an agency contract termination is not straightforward. The Commercial Agents (Council Directive) Regulations which implement into English law the EU Agents Directive (86/653/EC) fail to provide a definitive formula. But is this changing after a fourth judgment which has applied a multiplier of 4 or so?

It is established law that compensation is the amount which a notional third party purchaser would pay for the agency at the date of termination on the open market. Further the valuation, reflecting reality, can be determined by reference to the agent's net income stream and consider factors such as the agency's health and the product market at the time of termination.

Yet there remains an issue as to the multiplier (that is the measure of the risk of investing in an agency business) to apply to an agent's net income stream when calculating the agent's compensation.

In Monk v Largo Foods [July 2016] valuation of an agency in the retail food sector was considered.

The agent's expert evidence was that a multiplier of 7 was correct. Whilst the principal's expert's initial report did not provide an opinion on the matter, during re-examination at trial she put forward a multiplier of 2.5 to 3 - which the judge rejected!

The agent's expert's basis for a multiplier of 7 included considerations as to the agency's small business size; the expert further relied on a London Business School risk measurement service report that *"assessments of relative market risk in the food sector were low"*. But the judge thought a multiplier of 7 too high given the principal's strong presence in the Irish market, having its own label and its branded business. Whilst economic conditions were considered a neutral factor, Mr. Monk's personal connections to high level contacts in the industry were a relevant factor.

In using a multiplier of 4, the judge rejected the principal's claim that the agency had "no value" but accepted that the agency was a small business and so the high level contacts would remain with Mr. Monk rather than with the agency, so lowering the multiplier from 7 to 4.

Software Incubator Limited v Computer Associates UK Limited [July 2016] concerned the valuation of a software industry agency. The case concerned a 12 month renewable contract terminable with 3 months' notice. The principal's expert claimed that the valuation should assume that the agency would have ultimately ended after a 12 month period. The agent's expert's evidence was to assume a 12 year agency as the product's shelf-life was 12 years.

The judge rejected both arguments. He applied a 4 year period to a discounted cash-flow valuation based on the market's "immature nature" as the product's very nature meant that customers with perpetual licences would only spend money on maintenance and upgrades. Despite rejecting the experts' overall calculations, the judge found the method underlying the principal's calculations more logical and reasonable and used it for the final compensation figure. This involved calculating the average value of each deal done and then the average annual customer spend over 4 years. To produce a value, the judge used the principal's expert net figures calculated in this manner and added a further £90,000, being the saving of costs due to a professional employed to run the agency.

Alan Ramsay Sales & Marketing v Typhoo Tea [March 2016] concerned a tea trade agency. The agent's expert thought the multiplier should be 5 rather than the principal's multiplier of 3.5. The agent's arguments for the higher multiplier were that the agency was profitable, it was a fixed retainer not a percentage commission dependent on sales, and the principal's business was secure and its brand was successful. The judge agreed with the agent's assessment but reduced the multiplier to 4 reflecting the principal's evidence that its market share was in decline. The judge also considered it relevant that the likely purchaser of the agency would be a small business.

Invicta UK v International Brands [June 2013] concerned the valuation of an agency in the wine trade. The principal's expert argued for a multiplier of 2. The agent's expert said 7. The judge considered the agent's expert valuation more appropriate but, with the qualification that *"one must be cautious not to overstate what a willing purchaser would pay for a future income stream"*, he used a multiplier of 4.5 times the agent's annual net income. The judge highlighted that the agency was a fixed fee contract, and so offered a prospective purchaser more income certainty, against the fact that conversely the contract did not provided an opportunity to increase revue by earning commission on increased sales.

What do we take from all this?

The judges' considerations that lead them to use a multiplier of 4 in all four cases are mostly coincidental. In contrast each decision was fundamentally determined by commercial realities. Whilst the Regulations exist to protect agents, 4 is not the default multiplier. Depending on the strength of the agent's business a default multiplier of 4 could result in an agent receiving too little or too much compensation.

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Dossier spécial droit et terrorisme
Sección especial derecho y terrorismo

Remedies for Terror Victims: Learning from the US Experience after 9/11

Jerome ROTH

One of the main themes at the UIA's 2017 Toronto Congress will explore remedies for terror victims under different legal systems. The panel, consisting of experienced practitioners and academics from around the world, will review the different approaches adopted in Canada, the US, the EU (including France and Italy) and elsewhere. It will examine legal claims available to victims against a variety of potential defendants including the nations that sponsor or foster terrorism as well as third parties such as banks, charities, social media and others who are often alleged to have facilitated terrorism. The panel will also consider the permanent compensation funds established in a number of countries such as Italy which make payments to terrorism victims with monies collected from taxes and other sources and will contrast them with more *ad hoc* approaches to victim compensation.

One of the key case studies for compensating victims of terrorism, from which lessons continue to be learned by lawyers, legislators, and judges, is the US experience after the 9/11 attacks in 2001. What remedies were and continue to be made available to victims of the attacks, and how have those remedies played out legally over the past 16 years? The answer to those questions is sometimes surprising, and in many cases the matter is still evolving. This article explores a number of issues that have arisen in connection with compensation for 9/11 and some of the controversies that the compensation process has given rise to.

The 9/11 attacks on the World Trade Center and the Pentagon in 2001 remain the worst terrorist attack on the US soil. The attacks killed over 3,000 people and injured hundreds of others, including passengers on the planes that were used by the terrorists, the workers and others present in the buildings attacked, and first responders who rushed to the scene to assist. In the immediate aftermath of the attacks, public sentiment in the US and around the world was raw and confused. But amid the emotional upheaval, there arose nearly universal accord that the federal government should play significant a role in assisting victims and their families. Yet unlike certain other countries, the US had no standing fund or other permanent mechanism to provide compensation of any sort at either the federal or state level. Instead, in the normal course, victims would have been expected to retain counsel, identify potential defendants, and bring lawsuits in state or federal court, either individually or using common procedural mechanisms such as class or mass actions, and pursuant to normal rules of jurisdiction and venue.

Those alternatives would have presented their own challenges, of course. The legal responsibility of potential defendants was unclear as was their capacity to pay massive judgments that could be anticipated – how could liability be assigned for such a massive event involving so many complicated components. Lawsuits could drag on for years, especially in light of this complexity, with uncertain outcomes a decade or more in the future. Equally important, politicians, economists and others openly feared that legal claims arising out of 9/11 could be a death blow to the US airline industry, which was already reeling from losses arising out of the attacks including the precipitous drop in air travel that continued for months and years afterwards.

Under these circumstances, the United States Government was able to accomplish something that many now consider extraordinary. On September 22, 2001, less than two weeks after the 9/11 attacks, Congress passed the Airline Safety and System Stabilization Act, and it was signed into law by the then-President George W. Bush. Title I through III of the Act were all directed at protecting US airlines: they provided for federal credits for the airlines, limitations on employee actions, special insurance protections and tax allowances. Title IV of the Act created a $7 billion Victims Compensation Fund (the VCF or 9/11 Fund) and laid out a set of procedures for victims to follow to access the Fund with the dual purpose of ensuring prompt compensation while protecting the airline industry from potentially massive claims.

The statute provided for the Attorney General's appointment of a Special Master with enormous power. He or she would review claims for compensation that could be filed by anyone physically injured or killed by the 9/11 airline crashes or, in the case of those who had perished, their families. The Special Master would determine in the first instance whether the claim was valid, whether to provide compensation from the Fund, and in what amount. Claimants who disagreed with the decision had the right to appear before the Special Master regarding their claim, could have counsel of their choosing, and could present evidence, with any other "due process" to be determined by the Special Master whose decision on all matters was final with no right of appeal.

Most critically, claimants were required to agree not to file or to continue with any lawsuits against any third parties, including but not limited to lawsuits against the airlines. In other words, claimants had to waive their litigation claims. In a separate provision, the law provided that any actions specifically against the airlines brought by victims who chose not to avail themselves of the Fund were to be brought exclusively under federal law (thereby displacing potentially applicable state law) in federal court in Manhattan (a logical venue for the World Trade Center victims but not necessarily for the Pennsylvania air crash or Pentagon victims). The law also provided that liability would be limited to the amounts of the airline's insurance coverage.

In short, the law provided – specifically in an *ad hoc* response to 9/11 – what essentially amounts to a sort of binding arbitration procedure, allowed the government (not the parties) to choose the arbitrator, set forth legal standards for the arbitrator to follow and factual issues to be considered, provided federal tax money to fund awards, and created strong incentives to pursue arbitration by placing significant legal limitations on lawsuits outside the arbitration process. Many saw in this extraordinary legislation tacit acknowledgement of the benefits of arbitration over litigation, while others criticized the law as running counter to basic precepts of the US legal system and to plaintiffs' rights at a time they were most in need.

The Attorney General promptly appointed Ken Feinberg as the Special Master. Feinberg, a well-regarded lawyer and mediator with prior stints in government service, had handled the tangle of compensation claims arising from the decades-long Agent Orange litigation brought by, among others, army veterans who claimed to have been injured by the US government's use of the defoliant during the Vietnam War. He has since played a major role in compensation schemes arising from the international banking crisis, the BP oil disaster in the Gulf of Mexico, and other major events. In view of these assignments, he has come to be seen by many as one of the preeminent arbitrators/mediators in the United States who has had a historic hand in some of the most historic events of the past few decades.

Feinberg has written extensively on the challenge he faced of wielding his significant power in a fair and equitable way, especially difficult in the emotionally wrought circumstance of compensation for the families of victims killed in one of the defining tragedies of US history.

He has explained the effort that went into reviewing and making initial decisions about heart-rending claims by victims. The "hearings" for claimants who disputed his initial determinations were primarily informal meetings around a conference table, often with victims' families bearing painful witness to the loss they had suffered, both emotional and financial. Because one of the key determinants of award amounts was the amount of income lost to the family as result of the death of the victim, there were significant gaps in the amounts provided to families to restaurant workers, office and janitorial staff, and responders, on the one hand, and well-off investment bankers and other financiers who made up a large part of the WTC victims, on the other. These decisions generated discontent among those who felt the process was inequitable, and favored the wealthy over the less fortunate – even as they recognized that the US legal system itself traditionally bases compensation at least in part on the anticipated earnings of the victim that were eliminated as a result of the incident.

But despite early criticism of the process, and complaints about Feinberg's unchecked authority, inequitable awards, and what some perceived to be insensitivity of the process, that criticism waned, and the VCF is now widely considered to have been successful. Over $7 billion was awarded to the 97% of victims who opted for the Fund procedure rather than pursuing claims on their own. The average award was approximately $1.8 million, ranging from several hundred thousand dollars for workers to over $7 million for some of the highest-paid bankers. Awards were made far more promptly than could have been hoped for in lawsuits, with most claims resolved by 2004. And of course the US airlines survived the 9/11 attacks, one of the principal goals of the legislation. While the US still does not have a general terrorism victim fund, the 9/11 experience suggests that in the face of another comparable event, the VCF will be seen as precedent for establishing a comparable scheme – assuming that Congress can act as speedily and with the unity it demonstrated in 2001 (an assumption some consider overly optimistic in light of the current political situation).

But the original payments made by the VCF is not the end of the story. Just under 100 claimants chose to bring lawsuits against the airlines in federal court in Manhattan, as permitted by the legislation, instead of seeking compensation from the fund. The lawsuits were hotly litigated for a decade and gave rise to a host of legal issues and challenges for both plaintiffs and defendants. For example, applicable law provided that the pain and suffering of a wrongful death victim had to be caused by the same factor as the death itself; the airlines argued that since the victims were killed instantly by the crash and any suffering was caused by the hijacking instead, such damages should not be available. The judge hearing the case indicated he disagreed and would likely permit such evidence and damages.

On the other hand, plaintiffs sought to show that the airlines' security provisions did not meet state law due care standards. They filed a lengthy report in the public court record that detailed evidence they had uncovered during the discovery process calling into questions many aspects of the airlines' security procedures – for example, that security inspectors did not speak sufficient English, did not know how to identify basic weapons such as mace, were inadequately trained on detecting threats, and did not treat security with sufficient care. But the judge ultimately held that the only issue to be tried to the jury was whether the airlines's security procedures had met federal regulatory requirements (even if plaintiffs considered those requirements to be overly lax). Given this limitation, some plaintiffs felt that they had been deprived of the opportunity to tell their story and that the burden of proof had been shifted in favor of defendant airlines. In the end, all of the cases settled by 2011 without a trial for undisclosed amounts estimated to total approximately $500 million, meaning an average of about $5 million per plaintiff, significantly more than the average VCF award, but after significant delay – almost a decade later.

Another set of claims also has generated controversy that will be one of the subjects of the Toronto Congress. A small number of plaintiffs brought actions against the nation of Saudi Arabia, arguing that while it was not on the list of state sponsors of terrorism that were expressly permitted to be sued under US law for terrorism damages under

earlier legislation, it had in fact facilitated the 9/11 attacks and should be held accountable in any event. Among other things, plaintiffs' counsel faced challenges in gathering information which the United States government insisted was classified and successfully resisted producing. Most important, they ran up against claims of sovereign immunity by Saudi Arabia which ultimately led to the initial dismissal of the suits. But as public and political sentiment turned against Saudi Arabia, Congress ultimately enacted legislation waiving that immunity, controversial leglisation that Saudi Arabia vigorously resisted and that then-President Obama vetoed, only to have his veto overridden by a wide majority of legislators from both parties. Those lawsuits still continue in federal court in New York.

By 2011, new issues had arisen, particularly relating to health issues of surviving responders and those who worked on the lengthy process of debris removal from the WTC and Pentagon sites. Many of those involved claim to suffer from diseases brought on by exposure to asbestos and other toxic materials present in the unprecedented debris the attacks generated. With the VCF closed years before, and the deadlines for filing claims long passed, a coalition of politicians, journalists, and even some television celebrities (including most notably the comedian Jon Stewart) aggressively lobbied Congress to reopen the fund. This time, unlike in 2001, the issue became a political hot potato, partially mixed up in the ongoing national healthcare debate, with fiscal conservatives opposing additional federal funds for compensating health impacts. In the end, the fund was successfully reopened based on a political compromise involving the lowering of certain taxes, and was extended again in 2016. Claims for compensation by victims may be brought till 2020, and federal healthcare funding will remain in place until 2090. The renewed Fund, managed by a different Special Master, employs many of the same procedures as the original VCF, although issues have recently arisen regarding potential conflicts of interest in light of relationships between a deputy master and her law firm which was awarded lucrative contracts in connection with Fund activities.

In the end, as terrorism continues to plague society, and the number of victims and their families continues to grow with each horrific event, the 9/11 experience provides lessons regarding one *ad hoc* approach. But it is far from the only approach. A key subject at the Toronto Congress panel will be a comparison of this model to permanent funds established in other countries as well as to lawsuits against third parties that have proceeded under various legal systems. And the answers to the questions these comparisons raise are critical as nations around the world continue to work to find solutions to compensation of victims.

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Le dispositif français d'indemnisation des victimes du terrorisme face aux attentats de grande ampleur

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La vague d'attentats commis sur le territoire français dans les années 1980 a conduit le législateur à mettre en place un dispositif spécifique d'indemnisation. La réparation des atteintes aux biens relève des garanties assurantielles. La réparation des atteintes à la personne repose sur un mécanisme de solidarité nationale. Elle est confiée au Fonds de Garantie des Victimes d'Actes de Terrorisme (FGVAT) par la loi du 9 septembre 1986[1], devenu par l'extension de sa mission à l'indemnisation des victimes d'infraction de droit commun[2] Fonds de Garantie des victimes d'actes de Terrorisme et d'autres Infractions (FGTI).

Le dispositif, créé en 1986[3], a été fortement sollicité depuis les attentats des 7, 8 et 9 janvier 2015 : il a, depuis le début de l'année 2015, pris en charge autant de victimes du terrorisme qu'il en avait indemnisé durant ses 28 premières années de fonctionnement.

Si le cadre juridique de l'indemnisation des victimes d'actes de terrorisme par le FGTI est sensiblement le même que lors de sa création, les attentats de grande ampleur ont conduit à repenser les modalités de financement et à rénover les pratiques pour améliorer le service rendu aux victimes.

1. Un financement renforcé et complété par la garantie de l'État

L'indemnisation des victimes d'actes de terrorisme repose sur un mécanisme de solidarité nationale financé par un prélèvement obligatoire sur les contrats d'assurance de biens.

Ce prélèvement, d'un montant nominal de 3,30 euros jusqu'en 2014 a été porté à 4,30 euros en 2015 et à 5,90 euros en 2017.

La contribution des assurés a représenté 285 millions d'euros en 2014, 395 millions d'euros en 2016 et sera plus importante encore en 2017.

Pour compléter l'augmentation des ressources[4] du FGTI par la hausse de la contribution et face à la persistance du risque terroriste, l'État s'est engagé, par une convention cadre tri annuelle conclue le 16 mars 2017 à garantir, en cas de nouvel attentat de grande ampleur, les indemnités à régler aux victimes du terrorisme dès lors que leur montant excèderait 160 millions d'euros par année.

Ces deux mesures, hausse de la contribution des assurés et garantie de l'État, ont ainsi répondu aux inquiétudes qui s'étaient exprimées sur la viabilité du modèle financier, notamment après les attentats du 13 novembre 2015 d'une ampleur jusqu'alors inconnue du FGTI.

Pour les attentats commis dans un lieu ouvert, le problème de l'identification des victimes et de leur recensement exhaustif est particulièrement complexe.

2. Une indemnisation amiable

La loi du 9 septembre 1986 qui a créé le dispositif d'indemnisation des victimes du terrorisme était à l'origine un texte répressif auquel un volet « indemnisation » est venu s'ajouter.

Si le code pénal définit l'acte de terrorisme[5], si le code de procédure pénale prévoit les règles dérogatoires de poursuite et de jugement, les règles relatives à l'indemnisation sont codifiées dans le code des assurances[6].

Le dispositif d'indemnisation, qui place les victimes ou leur conseil et le FGTI dans une relation directe, pose en premier lieu la question du recensement des victimes en lien avec l'autorité judiciaire (ou consulaire).

2.1 Le recensement des victimes

Le souci d'épargner aux victimes d'avoir à accomplir de multiples démarches ont conduit le pouvoir réglementaire à charger le Procureur de la République (ou l'autorité consulaire) à transmettre au FGTI, dès la survenance de l'attentat, l'identité des victimes[7].

Cette transmission de l'identité des victimes a été étendue à d'autres acteurs de la prise en charge par une instruction interministérielle de 2008 depuis plusieurs fois révisée, la dernière version étant celle du 13 avril 2016[8]. Est alors apparue la notion de liste unique des victimes, dite LUV, établie par le Parquet.

Il est cohérent de confier aux acteurs de la procédure pénale le soin de recenser les victimes des infractions en relation avec une entreprise terroriste qu'ils ont la charge de poursuivre. Cependant, le temps de l'enquête et des nécessaires vérifications s'avère, en cas d'attentat de grande ampleur, trop long au regard de la célérité attendue pour la mise en œuvre de l'indemnisation.

Si l'identification des victimes décédées et des victimes physiquement blessées peut être relativement rapide, les lésions constituant à elles seules la preuve de la qualité de victime, le recensement des victimes sans lésions physiques mais psychiquement blessées, peut-être plus long et la preuve plus difficile à rapporter.

Pour l'attentat commis le 13 novembre 2015 au Bataclan, la production du billet a été considérée par le FGTI comme valant preuve de la présence dans la salle de concert et donc de la qualité de victime.

Pour les attentats commis dans un lieu ouvert, le problème de l'identification des victimes et de leur recensement exhaustif est particulièrement complexe.

Dans les jours qui ont suivi l'attentat commis à Nice le 14 juillet 2016, il est apparu que la détermination par l'autorité judiciaire des victimes sans blessures physiques serait très longue.

Ce constat a conduit le conseil d'administration à définir des critères géographiques et à délimiter sur la Promenade des Anglais, des zones pour lesquelles il pouvait être considéré qu'il s'agissait de zones de danger. Les personnes présentes dans les zones de danger sont des victimes au sens pénal du terme car elles sont victimes potentielles d'une tentative d'assassinat.

Les critères étant posés, il est ensuite nécessaire d'examiner les dépositions des personnes s'étant manifestées auprès des services de police, de croiser les dépositions des personnes déclarant s'être trouvées ensemble sur la Promenade des Anglais et dans certains cas de solliciter des précisions complémentaires.

Au-delà des difficultés pratiques liées à l'ampleur des attentats et au nombre de personnes concernées, la question de la force juridique de la LUV, initialement destinée à permettre au FGTI d'être proactif vis à vis des victimes d'attentats est devenu plus prégnante dès lors que de cette inscription a commandé l'ouverture d'autres droits, dont une prise en charge dérogatoire par les régimes de sécurité sociale[9].

Pour autant, en l'absence d'une décision juridictionnelle, l'inscription sur la liste des victimes a valeur indicative[10].

Toute personne s'estimant victime qui ne serait pas inscrite sur cette liste a le recours de la constitution de partie civile dans la procédure pénale et un possible recours au juge civil – sans nécessairement attendre l'issue de la procédure pénale – pour les aspects indemnitaires et pour le cas où le FGTI n'admettrait pas amiablement un droit à indemnisation[11].

Pour toute personne, inscrite ou non sur la liste des victimes, à qui le FGTI reconnaît un droit à indemnisation, la procédure est initiée. La loi a fixé pour mission au FGTI la réparation intégrale des atteintes à la personne pour les victimes de terrorisme[12].

2.2 La réparation intégrale et ses modalités

Le volet consacré à l'indemnisation de la loi du 9 septembre s'est fortement inspiré des dispositions de la loi du 5 juillet 1985 relative à l'« amélioration de la situation des victimes d'accidents de la circulation ; accélération des procédures d'indemnisation » dite loi Badinter, qui fût l'une des premières lois d'indemnisation.

La procédure amiable d'indemnisation met à la charge du FGTI une obligation de réactivité : paiement d'une provision à valoir sur l'indemnisation définitive dans le délai d'un mois à compter de la demande, délai de trois mois pour présenter une offre définitive d'indemnisation à compter du moment où la justification des préjudices a été fournie.

Cette offre détaille les postes de préjudices, l'indemnisation se faisant selon les règles de droit commun de la réparation du dommage corporel[13][14].

L'offre contient en plus une majoration de l'indemnité, le conseil d'administration du FGTI ayant décidé d'allouer aux victimes du terrorisme une somme forfaitaire au titre du préjudice exceptionnel spécifique des victimes du terrorisme, afin de prendre en compte le caractère particulier des attentats.

La réparation intégrale se définit comme la réparation du préjudice, tout le préjudice, et rien que le préjudice, ou encore sans perte ni profit pour la victime.

L'indemnité n'est donc pas plafonnée (tout le préjudice), et l'offre du FGTI doit prendre en compte les indemnités[15] reçues par ailleurs au titre du même préjudice (rien que le préjudice).

Au-delà de ses obligations légales, et sur décision du conseil d'administration, le FGTI, au moment de l'offre amiable, règle à la victime 80 % du montant de l'offre (déduction faite des provisions déjà réglées).

L'accord sur le montant de l'indemnité est matérialisé par un procès-verbal de transaction, assorti d'un délai de quinze jours accordé à la victime pour se rétracter. À l'expiration de ce délai, le FGTI doit régler les sommes dues dans le délai d'un mois.

À défaut d'accord, la victime doit saisir le tribunal de grande instance d'une demande indemnitaire formée contre le FGTI.

Jusqu'à 2015 et la survenance des attentats de grande ampleur, le contentieux a concerné 3 % des indemnisations.

Bien que le contentieux soit très faible, le nombre des victimes depuis 2015 a créé des attentes nouvelles et conduit le FGTI à modifier ses pratiques.

3. Une prise en charge rénovée

Le retentissement des attentats de janvier 2015 (principalement contre *Charlie Hebdo* et le magasin Hyper Cacher, mais aussi à Montrouge) et le nombre des victimes des attentats du 13 novembre 2015 ont placé le FGTI au cœur de polémiques médiatiques, malgré la réactivité dont les équipes du FGTI ont fait preuve.

Au-delà de la question de la pérennité du financement, qui a pu être mise en doute dans la grande presse, le dispositif d'indemnisation a été jugé opaque, conduisant ainsi le FGTI à rénover ses pratiques.

Le FGTI, déjà présent à la cellule interministérielle d'aide aux victimes, a envoyé des chargés d'indemnisation à Nice après le 14 juillet 2016 au contact des victimes et de leurs familles, et plus récemment, une personne dédiée à l'indemnisation des victimes les plus gravement blessées à Barcelone dans les jours qui ont suivi les attentats.

Un guide pour l'indemnisation des victimes d'actes de terrorisme a été publié au début de l'année 2017[16], détaillant la procédure d'indemnisation et contenant les référentiels indicatifs chiffrés utilisés, rendant ainsi l'indemnisation plus compréhensible et plus transparente.

Un médiateur a été désigné, que peut saisir toute personne d'une réclamation relative à la procédure d'indemnisation ou aux modalités d'accompagnement.

La réflexion s'engage également sur des sujets tels que la réparation en nature et le retour à l'emploi dans le but d'améliorer le service rendu aux victimes.

Enfin le FGTI, conformément aux engagements pris vis à vis de l'État, s'est doté d'une procédure de gestion de crise.

4. Une dimension internationale

La législation française protège largement les victimes d'actes de terrorisme car le FGTI a pour mission d'indemniser toutes les victimes d'attentats commis sur le territoire français et les victimes françaises à l'étranger, ainsi que leurs ayants droit quelle que soit leur nationalité[17].

La notion d'attentat commis sur le territoire national a dû être récemment précisée par la Cour de cassation, des ressortissants allemands victimes de l'attentat commis en 2012 contre la synagogue de Djerba demandaient à être indemnisés par le FGTI en tirant argument de la commission d'actes préparatoires sur le territoire français.

Le lieu de commission de l'acte de terrorisme, au regard de l'obligation de réparation des atteintes à la personne, est celui où survient cette atteinte[18].

La question de l'articulation du dispositif français avec d'autres dispositifs se pose (en l'espèce les victimes allemandes avaient reçu des indemnités du ministère de la justice allemand) de façon accrue du fait des attentats commis en France en 2015 et 2016 : on recense 53 nationalités différentes parmi les victimes de l'attentat de Nice.

Le FGTI a donc entamé une démarche de cartographie de ses « homologues » européens et au-delà (ministère de la justice, de l'intérieur, de la santé selon le pays) et les rencontrera d'ici la fin de l'année pour des échanges de bonnes pratiques.

Au-delà du défi du nombre, la dimension internationale du terrorisme va nécessairement amener à adapter et harmoniser la prise en charge des victimes.

Indemnisation des victimes d'actes de terrorisme en chiffres

- 2014 : 6,5 millions d'euros
- 2015 : 23,4 millions d'euros
- 2016 : 56,5 millions d'euros

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1 Loi n° 86-1020 du 9 septembre 1986.

2 Loi n°90-589 du 6 juillet 1990.

3 Compétent pour les actes de terrorisme commis postérieurement au 31 décembre 1984 – Article 10 de la loi du 9 septembre 1986.

4 Étant rappelé que ces ressources ne sont pas affectées aux seules victimes du terrorisme mais à toutes les victimes que le FGTI prend en charge dans le cadre de ses missions légales.

5 Article 421-1.

6 Articles L126-1, L422-1 à L422-3, L211-15 à L211-18 et R422-6 à R422-8.

7 R422-6 du code des assurances.

8 N°5853.

9 Articles L169-1 et suivants et D169-1 et suivants du code de la sécurité sociale.

10 Un pourvoi en cassation est toutefois pendant sur ce point.

11 Article L422-3 du code des assurances.

12 Article L422-1 du code des assurances.

13 Postes de préjudice issus de la nomenclature « Dintilhac ».

14 Une réflexion est en cours sur les modalités de prise en charge des préjudices d'angoisse de mort imminente des victimes et d'attente et d'inquiétude des proches.

15 Sont déduits les rentes accident du travail, les capitaux-décès, les indemnités au titre d'un contrat d'assurance… A contrario les dons ou aides en provenance d'associations ne sont pas déduits.

16 www.fondsdegarantie.fr.

17 Article L126-1 du code des assurances.

18 Cour de cassation, 2e chambre civile 24 mars 2016 15-13.737.

Compensation to Victims of Terrorist Acts
The Italian Perspective

Nicoletta CAPONE

This chart shows the evolution of terrorism in Western Europe from 1970 to the present day.

You can see here the total number of people who died each year because of terrorist attacks, as well their distribution over the various countries. In other words you can see both the changes in the scope of the attacks and the countries with the most active groups.

As you can see, Italy is sadly represented in the 1970s and 1980s.

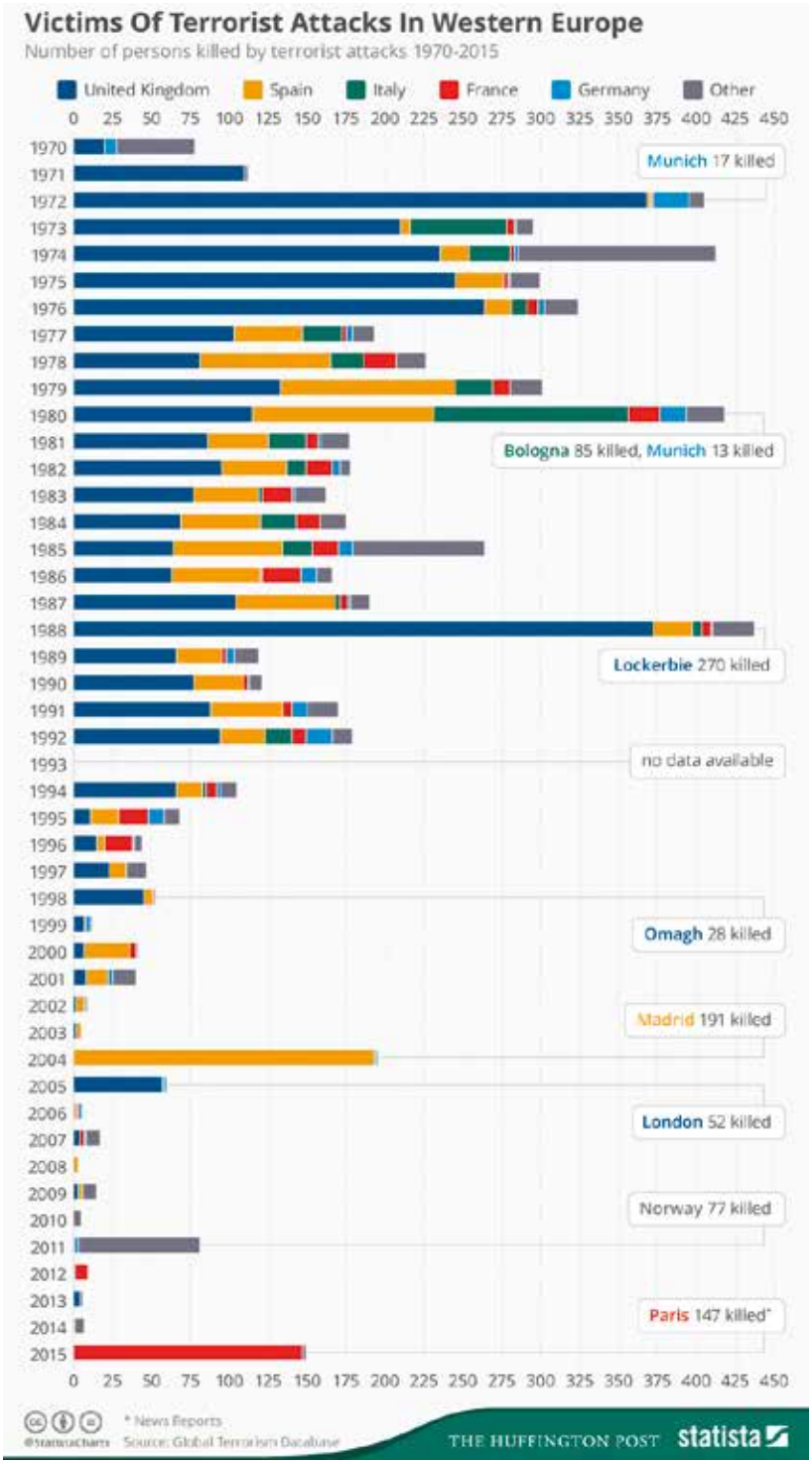
On August 2, 1980, a bomb exploded at the central train station of the city of Bologna, killing 85 people. Another two attacks struck the Rome Fiumicino airport in 1973 and 1985, and two more targeted trains in 1974 and 1984. Equally serious is the series of crimes, kidnappings and homicides that were perpetrated in Italy during the so-called "years of lead", when Italy was hit by a wave of terror at the hands of a number of both right-wing and left-wing extremist groups. After a break of less than two decades, political terrorism up surged again, with sporadic if impressive actions, between the end of the nineties and the beginning of the millennium.

The concept of a victim is outlined in the most recent well-known EU legislation (Directive 2012/29 /EU) as "*a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence*" and extends to "*family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death*".

The underlying spirit of Directive 2012/29/EU moves from the renewed consideration of the crime not only as a disservice to society, but also as a violation of the individual rights of those who suffer.

Some preliminary general remarks on the subject seem useful for the identification of triggers of its irruption on the political and legal scene.

The phenomenon has sprouted in context and is characteristic of the second half of the twentieth century, particularly the enhancement of Fundamental Rights of individuals, including those who had suffered as a result of a crime.



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Specifically, it is possible to identify three contributing factors that help explain the progressive centralisation of the victim in criminal and current criminal policies:

a) The first relates to the expansion of the number of victims of illegal behaviour, as the majority of citizens in western society has possession which are attractive for criminals, thus making them vulnerable;

b) The second relates to the gradual awareness of the victim as a subject with rights and interests to be respected, requiring the intervention of the courts, and actively participating in criminal proceedings; and

c) The third reason lies in the tendency of the executive and legislative powers to tackle as a priority the consequences of the criminal phenomenon rather than its causes.

Over time, this approach has always proved less convincing and effective; the concatenation of different circumstances and events have resulted in extremely favourable conditions for the victim to play a central role.

Consequently the courts and government operators have found it necessary to design a new way of dealing with victims via both individual and organised movements and with bodies and representative associations. The intensification of the government's efforts in this regard has also given rise to compensation programmess for victims, that is, forms of compensation paid by the State.

In Italy the concept of being a victim of terrorism is outlined in some special legislation; essentially, victims of terrorism are those citizens, whether Italian, foreigners or stateless persons, who are killed or injured during terrorist acts that have taken place in the Italian territory as of January 1, 1961. Similar protection is given to Italian citizens who are killed or injured during terrorist acts that occur in extraterritorial areas as of this date too. The injured are those who remain permanently disabled because of acts of terrorism and the subversion of democracy.

The issue began to be regulated by law in the 1980s. The fundamental law is, however, L. n 206 of the 2004 "New rules in favor of victims of terrorism". This law is important for two reasons: it systematically introduces a set of economic, tax, and social security for citizen victims of acts of terrorism or murder, and it provides that those benefits are also aimed at the surviving family. It is a very complex, complicated and even intricate piece of legislation, guided by reasons and principles of solidarity and oriented to recognize allowances for military service members and law enforcement members affected while carrying out their duty.

Over the years, different and more extensive benefits or special gifts have been granted in favour of these categories of citizens who are victims of acts of terrorism.

Rules and regulations have gradually increased by providing various forms of compensation for victims of terrorism and criminal acts. Legislation has undergone a series of changes and additions (particularly around 2007) essentially trying to compensate, albeit in a very partial way, and protect all citizens who are victims of terrorism or organised crime, as well as their surviving family members in case of the death of the subject.

Over the years, different and more extensive benefits or special gifts have been granted in favour of these categories of citizens who are victims of acts of terrorism.

They can, in summary, be divided into economic benefits (among them the main is the so-called "fair compensation", a special donation to the fullest extent of €200,000.00, or a non-reversible tax-exempt living allowance) and non-economic benefits (exemption from charges for medical services, a "privileged pension", i.e. pension benefits in scope, additional pension annuities, increases in pensionable earnings, "figurative increases" of contribution payments, mandatory employment with priority and preference to equal qualifications, reserve places for recruitment at all levels and qualifications, scholarships, counselling, exemptions from stamp duty, legal aid in the proceedings).

The process to access non-economic benefits for victims of terrorism is as follows: if you belong to one of the above categories who can enjoy these benefits, you can submit a special application to the Prefect.

The Prefect will then deal with the investigation to obtain the benefits and will issue a certificate acknowledging the status of the victim of acts of terrorism (or organised crime), which is necessary to obtain the non-economic benefits provided by current legislation.

The Ministry of Justice, according to its competence, carries out the allocation of donations and annuities in addition to the Ministry of Interior.

The Ministry of Defence is responsible for those who belong to the Army, specifically, the Directorate General of Security Force and Service amongst its other duties, and also serves to allocate welfare benefits and special donations.

Given the current situation, it is desirable to simplify the process in order to ensure the rapid and effective protection of victims of terrorism.

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How International Terrorism is Changing Criminal Law in Italy

Marina INFANTOLINO

I- Emergencies and Law – the "Criminal Law of the Enemy"

In the last fifteen years the European normative production in response to terrorist attacks has been impressive and effective. New crimes, based on the principles of prevention and repression, have been introduced by many European Countries including Italy, to face, in particular, the threat of Islamic terrorism. The need, rightly felt since 2001, to stop a terrorist cell before the attack, induced many Governments to prosecute individuals on the basis of the simple belief that they, if not stopped before, may commit devastating terrorist attacks.

In Italy it is thought that terrorism has changed criminal law and the rules that until now had inspired it, to the point that we now wonder if is still possible to conduct the fight against terrorism by the means of normal criminal law.

In short, since any fight involves an enemy, anti-terror law, such as, in the past, the anti-mafia, has created a separate system, which goes under the definition of "criminal law of the enemy" (definition coined by a German jurist, Gunter Jacobs, who first developed the concept). The criminal law of the enemy, as you probably know, is the use of criminal law to fight against the suspect, instead of against the single criminal fact.

This is what happens when criminal law is not used to prosecute facts, but to pre-empt a danger. The Mafioso and the terrorist are the most basic type of suspects, persecuted for what they are, more than for what they did (i.e. the crimes that have committed).

The typical tool of criminal law of the enemy is the prosecution of criminal association; in Italy, we have different crimes related to associations, i.e. criminal association (416 C.P.), criminal mafioso association (416 *bis* C.P.), and different kind of terrorist association (270 *bis* e 307 c.p.). All these crimes punish the fact itself of being associated, if done with the aim of committing crimes. Another typical tool of the so called criminal law of the enemy is the criminalization of preparatory acts, punished as proper crimes in themselves.

Indeed the prevention strategy against terrorism led Italy to provide crimes that go far beyond the same association for purposes of terrorism and end up punishing not only the preparatory acts of a terrorist attack but also the preparatory acts to the preparatory acts of the actual terrorist attack.

II- The Italian Legislation on Terrorism

In October of 2001, right after the 9-11 attacks, the crime of association for the purpose of terrorism (Art. 270 *bis* c.p.) was rewritten, including the incrimination of the facts against a foreign State, a foreign or international institution, and introducing the conduct of financing a terrorist association (L. n. 438 of 2001). This law also introduced the crime of assistance for associates (Art. 270 *ter* c.p.) which punishes all those who give hospitality or provide food, means of transport or means of communication to people who participate in the terrorist association; this also applies in the case of a close relative (270 *ter* c.p.).

In July 2005, in reaction to the dramatic attacks in London, a new law was approved that introduced in the Italian Penal Code the criminal offenses of recruitment (Art. 270 *quater* C.P.) and training (270 *quinquies* C.P.) with the purpose of terrorism (L. n. 155 of 2005)[1].

The last reform of the Italian anti-terrorism legislation was in February 2015.

Following the tragic events of Charlie Hebdo, this law in 2015[2] extended the punishment to the persons who have been recruited (the so called "foreign fighters") and to the people self-training to commit a terrorist action, and also introduced the new crime of travelling for the purpose of terrorism (Art. 270 *quater.1* C.P.).

This last law also provides for a more severe penalty for the crime of apology and incitement of terrorism, aggravated if committed by computer or other electronic tools (Art. 414 C.P.).

The concern of this last reform was to adjust the response of the Italian criminal law to the phenomenon of people acting on their own and to face the problem of people immigrating to foreign countries in order to engage in terrorist activities.

In February 2015 an Additional Protocol to the Warsaw Convention on prevention of terrorism established more incriminating obligations for Member States (such as "receiving training for terrorism", "travelling abroad for the purpose of terrorism", "funding travelling abroad for the purpose of terrorists", as well as "organising or otherwise facilitating travelling abroad for the purpose of terrorism").

In short, following the new 2015 laws, almost any action consisting of preparatory acts or facilitation of a terrorist offence is now punishable in Italy. In Italy it is now a crime to fund, train (and self-train), recruit (also for the recruited person) or travel for terrorism, as well as to incite or excuse terrorism. Moreover, anyone can be punished by giving terrorists any type of support: money, teaching, food, hospitality, means of transport, communication tools, organising or helping to organise the transfer of persons to a foreign country to carry out terrorist activities there.

> With the absolutely reasonable aim to catch terrorists before they can act and to isolate them, we now criminalize actions that are really far away from what we used to consider a crime.

The threshold of criminalisation has been moved back so far that even actions in preparation of preparatory acts to the actual terrorist acts are punishable. The crime of apology for terrorism openly punishes ideas in themselves.

With the absolutely reasonable aim to catch terrorists before they can act and to isolate them, we now criminalize actions that are really far away from what we used to consider a crime.

The objective of the punishment is not merely punitive: it serves to take a number of procedural interventions (wiretapping, searches, interrogations, catches) before there is any evidence of an offense.

In conclusion, this is how terrorism is changing criminal law in Italy and the rules that until now had inspired it.

III- The "Fatima" Case

A practical example can be offered with a recent case in Italy last February, usually referred to as the "Fatima case" [3].

The Judge for Preliminary Investigations of Milan, in a judgment dated the February 23, 2016, condemned an Italian family to up to 5 years 8 months imprisonment for the crime of participating in a terrorist association.

In short, after the conversion to Islam, this Italian family wanted to join Isis in Syria. They were arrested while still in Italy preparing their journey (selling the house, quitting jobs and preparing the documents for travel).

As you can see, these people have been punished with years of imprisonment in the absence of any violent action or even preparing a violent action. No weapons or explosives have been found. There is no doubt that their conduct is far away from the actual terrorist attacks, and indeed is also far from the preparation of them, and as such constitutes what we call "attempted crime". It is not even certain if these people, upon arrival in Syria, would have acted in a violent way or cooperated with a terrorist attack. To be honest it seems to me that the conduct of participating to a terrorist association had not been proved, since they had not actually joined any terrorist association at the time of the arrest. What was probably proved was the aim; the purpose of joining it, and this obviously represents a typical structural weakness in such proceedings: it is not easy to prove a purpose, though trying to distinguish it from intention. Anyway it seems there is no room to go any further down this road.

There is no conduct lightly connected with ISIS that is not punishable in Italy at the moment, everything in that field is already a crime in Italy. The crime of a telephone call to an ISIS member has not been provided yet, but it may be introduced in the near future.

IV- Conclusion

The emergency and the seriousness of terrorist threats justify exceptional measures, and there is no doubt that anti-terror laws must have specific characteristics, that distinguish them from common criminal law.

No one seriously believes that to face terrorism, criminal law should be limited to applying ordinary law for murder, taking of hostages, possession of weapons and explosives, or that exceptional investigative means shouldn't be used. However, we can't go further than we did in the last decade with criminal implementation, without the risk of putting the democratic State in contradiction with the very principles on which democracy is founded. To punish someone after a terrorist act has been committed is one thing, to punish him before, and regardless of the commission of the act is another.

To cope with the specifics of Islamic terrorism the democratic State should use its instruments without denying the very basic principles of democracy; first of all the rule of criminal law as a guarantee of all against the abuse of public power, and always with the right to a fair trial.

As a famous Italian professor said during the most dramatic period of terrorism in Italy "*dark times we live: but the means to get out of it should not be totally unfit for a democratic society causing indiscriminate compression of individual freedom in the name of emergency reasons*"[4].

Probably what must be done now is not in the field of criminalizing new behaviours, but in the implementation of international cooperation in investigation which is lacking at the moment. Investigations regarding terrorism seem to have very serious problems in Europe, mainly related to the transnational nature of the phenomenon. The international cooperation, which is essential in this situation, is complicated by the fact that certain governments do not want to go public with their cooperation. As it has been discovered the organizations make use of contacts in the European country where the attack is planned and often they are European citizens. According to the good intentions expressed several times by European leaders, cooperation in criminal matters must move to a higher level. But these words do not seem to be followed by facts. It seems to be missing a frank, empirical and objective, valuation of the state of the operation (and especially of non-operation) of the existing instruments for European cooperation in investigation[5]. We should probably end nationalist jealousy in investigations; if a crime has transnational characteristics it must find a response at transnational level. Terrorism moves beyond national borders and thinking of defeating it with national criminal policies and in particular with the introduction of new incriminations is a dangerous illusion.

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1 This law has also introduced in 2005 in our legal system along with the definition of terrorism (art. 270 *sexies* C.P.), modelled on the definition provided by the Warsaw Convention.

2 Following the indications of Convention of the Council of Europe on the Prevention of Terrorism of Warsaw of 2005 (L. n. 43/2015).

3 The story involved a family living in the surroundings of Milan; the mother, father and two daughters converted to Islam in July 2009.

After the conversion, the two daughters (Marianna and Maria Giulia) came into contact with a study group of Islamic religion through Skype and embraced the most radical vision of Islam. The younger sister Maria Giulia, who took the name of Fatima Zahra after the conversion, wanted to marry a Muslim man to share with him the Islamic faith and the plan of moving to Syria. She married an Albanian Muslim boy named Aldo, helped by a number of people who provided their contribution with the organization of the marriage, preceded by the meeting between the two (because Aldo at that time was in Albania and so needed to be housed by people in Italy before the marriage).

After the marriage, the two left for Istanbul and then reached the part of Syria occupied by ISIS (Aldo was sent to a training camp and Maria Giulia to attend a preparatory course on the Islamic faith). Maria Giulia, in contact through Skype with her sister Marianna, tried to convince her and her parents to go in Syria too (Marianna agreed immediately to the invitation and then tried to convince their parents; they were hesitant).

Eventually Marianna and the parents were all arrested while preparing for the journey to Syria (selling their house, quitting jobs and preparing the documents for travel) as were the people who helped with the marriage.

In short, Marianna was punished with the penalty of five years and four months imprisonment (judged on summary trial that allowed a discount of a third of penalty) on the basis of the crime of taking part in terrorist association (art. 270 *bis* c.p.) which provides a penalty from five to ten years imprisonment for the participation to terrorist association, identifying it in the supranational Islamic State ISIS.

The other people implicated, who collaborated in the recruitment and organization of the marriage and of the travel of Aldo from Albany to Italy, one of them for having given hospitality to Aldo for a few nights, were punished with penalties ranging from two years and eight months of imprisonment to three years and eight months of imprisonment.

4 Guido Galli, *The criminal policy in Italy in the years 1974-1977*, Cortina ed., 1978.

5 In the Maastricht Treaty of 1992 the fight against terrorism was considered a very important objective of EU policy (Art. K1) and Cooperation among European States has, in Europe, effective tools.

Often we hear of difficulties which have arisen in the effective, fair and complete exchange of information about crime reports between different Authorities. National authorities don't always work together effectively as would be expected from the principle of mutual trust.

According to many national authorities the same flow of information to Eurojust appears insufficient and sometimes reticent.

Réponse au terrorisme ou la tentation de la peine de mort

Raphaël CHENUIL-HAZAN

Across the world, barbaric and abject terrorism touch civilians every day. Terrorism seems to cause our requirements in terms of human rights and the right to life to retreat. One can witness the erosion of the absolute prohibition on torture, as for arbitrary arrests, extrajudicial executions and the increase in vague anti-terrorism laws allowing for application of the death penalty after unfair trials. They seem to be increasingly accepted by people in the name of the right to security. At the same time, the abolition of death penalty constantly progress over the years. What is the real situation?

Plus d'une décennie d'attentats sanglants à travers le monde n'aura pas encore ébranlé totalement nos valeurs démocratiques mais les aura quand même bien mises à mal, avec comme point de départ le 11 septembre 2001 et le commencement d'une nouvelle ère internationale enchainant succession d'attentats terroristes atroces et réponses étatiques, qui rythmera la géopolitique mondiale de ces 15 dernières années.

Ces réponses seront diverses et variées. Elles seront d'abord militaires avec les guerres en Afghanistan, en Irak et maintenant au Sahel ou en Syrie. Suivra une période de zones floues où le droit et le non-droit se côtoieront allégrement comme dans la prison de Guantanamo (qui n'est toujours pas fermée malgré la promesse d'Obama). Elles prendront une tournure extra-judiciaire, en pleine zone grise en matière de légalité, souvent portées par des commandos d'élites, autour d'opérations secrètes. La réponse des services secrets marocains vis-à-vis des cellules terroristes sur le territoire chérifien en est un exemple flagrant. Ou encore la multiplication des attaques de drones américains sur les différents théâtres d'opération ou les « opérations Homo » (pour homicide) de l'armée française au Sahel se situent à la frontière entre la nécessité de neutraliser les terroristes et celle de se venger. Il est un fait que l'armée française ne fait que très peu de prisonniers dans cette région du monde. Mais cela reste encore une fois dans les frontières floues du cadre légal des conflits armés et du droit international humanitaire (DIH). On pourrait citer comme point d'orgue de ces actions extra-judiciaires l'exécution de Ben Laden le 2 mai 2011 qui a été comparé par plusieurs chefs d'États de l'époque parmi lesquels Obama, Sarkozy ou Merkel comme l'expression même de la justice. J'avais déjà relevé, à l'époque, l'incongruité d'utiliser ce terme quand *« la vraie justice aurait été d'avoir eu l'occasion de juger Ben Laden et ses acolytes pour leurs crimes dans un tribunal. Cela aurait été aussi une formidable occasion de montrer la force du droit et sa primauté sur la violence, et à travers celle-ci, la force des valeurs de nos démocraties »*[1].

La dernière réponse des États touchés par le phénomène se situe donc sur le volet judiciaire par l'intermédiaire de renforcement des textes de loi voire la mise en place de lois d'exception dites souvent lois anti-terroristes. C'est dans cette dernière réponse que la tentation de la peine de mort est posée de manière prégnante, même si comme le rappelle inlassablement mon ami, Robert Badinter : *« L'État de droit n'est pas l'état de faiblesse ».*

Un contexte sensible autour des symboles

Le terrorisme actuel est mondialisé, transnational et touche tous les continents et toutes les cultures et civilisations. Ce terrorisme islamiste, aujourd'hui personnalisé par Daech (Al-Qaïda hier) se caractérise par une ultra-violence et par une stratégie choisissant stratégiquement les cibles visées, les lieux et les moyens mis en œuvres.

La symbolique de la mort qui sous-tend les attaques du 11 septembre à New York, l'Hyper-Cacher, Charlie Hebdo ou le Bataclan à Paris, une école à Toulouse, à Peshawar, à Garissa au Kenya ou à Chibock au Nigéria, le métro à Londres ou Bruxelles, un marché à Tel Aviv ou Beyrouth ou des

zones touristiques à Bali, Barcelone ou Nice font de ces attaques le summum de l'imaginaire de la terreur.

Une des conséquences est ainsi d'avoir marqué l'imaginaire collectif mondial, avec comme particularité, la médiatisation des actions terroristes, la gestion quasi-professionnelle de la communication allant jusqu'à l'utilisation de vidéos et autres moyens de propagande. Les séances macabres de décapitations de prisonniers au milieu du désert, ou la mise à mort de ce soldat jordanien brulé vif dans sa cage font maintenant parti de la mémoire collective, Nous avons tous l'impression d'avoir vu et revu ces images, alors que la grande majorité des gens n'en ont aperçu que de rapides évocations édulcorées. Mais l'horreur est maintenant inscrite dans nos têtes. Cette violence portée à l'extrême est solidement ancrée en chacun de nous.

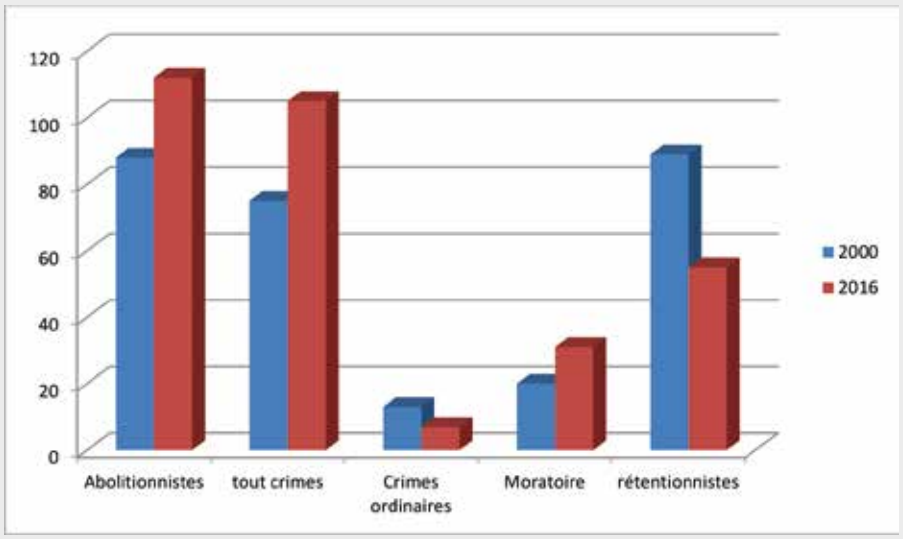
La peine de mort comme châtiment ultime devient alors la réponse dans l'esprit de beaucoup. Car, symboliquement, à cette horreur, nous nous devons de répondre par le châtiment suprême.

Y a-t-il aujourd'hui une réelle tentation de la peine de mort comme réponse au terrorisme au niveau mondial ? Quelle est la situation internationale actuelle ?

En préalable, il est important de rappeler que la peine de mort régresse sans cesse dans le monde depuis ces 30 dernières années. En 1977, seuls 16 pays avaient aboli la peine de mort en droit pour tous les crimes (en 1981, la France était le 35e État à abolir la peine de mort), deux tiers des pays représentés à l'ONU étaient alors considérés comme non-abolitionnistes. Aujourd'hui la tendance est inversée dans les mêmes proportions : 143 pays l'ont abolie de droit ou de fait, soit près de trois quarts des pays représentés à l'ONU.

En 2000, il y avait 88 pays abolitionnistes de droit (75 pour tous les crimes et 13 pour les crimes de droit commun), 20 pays observaient un moratoire de fait et 89 pays étaient rétentionnistes (ayant procédé à une exécutions dans les 10 dernières années). En 2016, selon les chiffres d'Ensemble contre la peine de mort (ECPM), 112 pays ont aboli la peine de mort (105 pour tous les crimes et 7 pour les crimes de droit commun), 31 sont en moratoire de fait et 55 sont rétentionnistes. En 16 ans, 34 pays ont donc aboli de droit ou de fait la peine capitale !

Dans le contexte de ces 16 dernières années, particulièrement touchées par le terrorisme sanglant, les États démocratiques abolitionnistes n'ont à aucun moment parlé de réintroduire la peine capitale. En Europe, seules de très rares voix isolées et presque inaudibles ont demandé la réintroduction de la peine de mort. Quelques leaders extrémistes de l'UKIP en Grande-Bretagne ou du Front National en France ont appelé à la tenue d'un référendum sur le sujet, mais cela n'a pas ou peu dépassé les frontières des partis populistes. L'Europe, mais aussi beaucoup d'autres pays d'Amérique du Sud ou même d'Afrique, sont devenus fers de lance dans le combat international pour l'abolition universelle. Citons des pays comme la France, la Norvège, la Suisse, l'Espagne, la Belgique, la Grande-Bretagne, l'Australie, le Mexique, l'Argentine, le Chili, le Rwanda, le Bénin ou la Côte d'Ivoire qui sont autant d'exemples de pays portant l'abolition comme valeur fondamentale des droits de l'homme malgré le contexte terroriste mondial. La Turquie d'Erdogan a même sponsorisé en juin 2016 le 6e Congrès mondial contre la peine de mort d'Oslo organisé par ECPM, quelques semaines avant les déclarations tonitruantes de son président concernant sa réintroduction possible, montrant par là-même l'ambiguïté de certains chefs d'Etats, illustrant une dérive dépassant largement le cadre de notre sujet (nous pourrions également citer dans une moindre mesure les cas de la Hongrie ou de la Pologne).



Car, en matière de peine de mort, on est parfois éloigné du droit et plus proche du populisme. En effet, la tentation de la peine de mort est une réponse à faible coût et à bon compte aux manquements des services de sécurité, aux difficultés sociales et aux faiblesses de l'État de droit dans un pays.

Cela a été particulièrement vrai dans de nombreux pays non-abolitionnistes. Ainsi, ces dernières années, nous avons assisté à des retours en arrières marquants de pays qui observaient pourtant un moratoire (certains depuis de nombreuses années) et qui ont repris les exécutions du jour au lendemain : Gambie (2012 après 27 années de moratoire), Jordanie (2012 après 9 ans de moratoire), Tchad (2015 après 10 ans de moratoire), Pakistan (2014 après 7 ans de moratoire), Inde (2012 après 8 ans de moratoire), Indonésie (2015 après 6 ans sans exécution). Chaque fois, les reprises des exécutions ont été justifiées comme une réponse de fermeté exceptionnelle soit par rapport au terrorisme (Jordanie, Pakistan, Tchad, Inde), soit par rapport au trafic de drogue (Indonésie).

D'après le dernier rapport de la Coalition mondiale contre la peine de mort pour la Journée mondiale contre la peine de mort 2016[2], 65 pays maintiennent la peine de mort dans leur législation pour des crimes liés au terrorisme au cours des 10 dernières années (2006 – 2016).

Dans 15 États rétentionnistes, au moins une personne a été exécutée pour des crimes liés au terrorisme : Afghanistan - 2016*, Arabie Saoudite - 2016*, Bélarus - 2012*, Chine - 2015*, Égypte - 2015*, Émirats Arabes Unis - 2015*, Guinée équatoriale - 2010*, Inde - 2015*, Indonésie - 2008*, Irak - 2016*, Iran – 2015***, Jordanie - 2015*, Pakistan - 2016*, Somalie - 2016*, Tchad - 2015*

Dans 12 pays, au moins une personne a été condamnée à mort pour des crimes liés au terrorisme au cours des 10 dernières années mais aucune exécution pour terrorisme n'a été recensée : Algérie - 2015**, Bahreïn - 2015**, Cameroun - 2015**, États-Unis d'Amérique - 2015**, Éthiopie - 2012**, Koweït - 2015**, Liban - 2015**, Mali - 2011**, Maroc - 2012**, Mauritanie - 2012**, Tunisie - 2016**, Soudan - 2009**

Enfin, 38 pays prévoient la peine de mort pour des crimes liés au terrorisme dans leur législation mais n'ont procédé à aucune condamnation ni exécution pour terrorisme au cours des 10 dernières années : Bahamas, Barbade, Bangladesh, Brunei Darussalam, Burkina Faso, Centrafrique, Corée du Nord, Corée du Sud, Cuba, République Démocratique du Congo, Érythrée, Gambie, Guatemala, Guinée, Guyana, Japon, Kazakhstan, Laos, Liberia, Libye, Malaisie, Maldives, Niger, Nigéria, Oman, Ouganda, Palestine, Qatar, Sainte-Lucie, Singapour, Sud Soudan, Syrie, Tadjikistan, Thaïlande, Trinidad et Tobago, Vietnam, Yémen, Zimbabwe.

Que se cache-t-il derrière ces chiffres ? Entre instrumentalisation politique et populisme en totale opposition au droit international et aux droits de l'homme

L'instrumentalisation de la peine de mort à des fins politiques est une réalité flagrante. En effet, un certain nombre de pays comme, par exemple, l'Égypte, la Chine, la Jordanie, le Cameroun, le Tchad ou la Tunisie ont utilisé l'excuse du terrorisme pour criminaliser un certain nombre d'actes soit politiques, soit procédant d'un durcissement extrême des qualifications pour terrorisme. Ainsi, dorénavant, participer au Cameroun à toutes manifestations publiques portant atteintes à la sureté de l'État peut être assimilé à un acte de terrorisme et donc passible de la peine de mort. La notion de complicité a été également retenue en Jordanie ou en Irak élargissant ainsi les actes passibles de la peine capitale. La tentation de la peine de mort dans le contexte terroriste est également largement utilisée afin de mater toute opposition politique ou ethnique ou museler la société civile comme c'est le cas en Égypte ou en Iran.

Enfin le cas du Pakistan[3] est particulièrement intéressant dans le sens où ce pays (qui avait dans sa législation déjà une loi anti-terroriste prévoyant la peine de mort) a relancé les exécutions après sept années de moratoire suite au massacre dans l'école militaire de Peshawar le 16 décembre 2014, de 141 personnes, dont 132 enfants, attaque revendiquée par le Mouvement des Talibans du Pakistan (Tehrik-e-Taliban Pakistan ou TTP). C'est sur la base de la définition vague du terrorisme[4] inscrite dans l'article 6 de la loi anti-terroriste de 1997 (Anti-Terrorism Act ou ATA, 1997, amendé en 1999) que de nombreuses condamnations à mort sont prononcées. Mais selon les chiffres recueillis par Justice Project Pakistan (JPP) et l'ONG anglaise, Reprieve, 86 % des accusés inculpés pour des crimes relevant de la loi anti-terroriste de 1997 le sont en fait pour des infractions sans lien avec le terrorisme. D'après les statistiques de National Action Plan datant d'octobre 2015, sur les 246 individus exécutés au Pakistan de décembre 2014 à octobre 2015, 62 avaient été condamnés à mort en vertu de la loi anti-terroriste de 1997 et 184 sur le fondement du Code pénal. Selon les derniers chiffres, entre janvier 2015 et mai 2017, il y a eu 465 exécutions, faisant du Pakistan le 5e pays exécuteur au monde après la Chine, l'Iran, l'Arabie saoudite et l'Irak.

Mais que dit le droit international ?

Depuis les années 60, les Nations Unies ont élaborés dix-neuf instruments juridiques internationaux[5] dans le cadre de la lutte contre le terrorisme. Pourtant, la question même de la définition du terrorisme a toujours posé problème malgré différentes tentatives de la communauté internationale. La définition d'un acte terroriste peut être extrêmement variable d'un pays à l'autre et très souvent liée au contexte national et/ou régional et politique.

Quoi qu'il en soit de nombreux textes internationaux limitent l'utilisation de la peine de mort aux crimes les plus graves. Le Pacte international relatif aux droits civils et politiques (PICDP)[6] des Nations Unies faisant autorité en la matière rappelle en premier lieu (Art. 6.1) que *« Le droit à la vie est inhérent à la personne humaine. Ce droit doit être protégé par la loi. Nul ne peut être arbitrairement privé de la vie »*, et de préciser (Art. 6.2) que *« dans les pays où la peine de mort n'a pas été abolie, une sentence de mort ne peut être prononcée que pour les crimes les plus graves »*, en rappelant aussi s'il est nécessaire (Art. 6.6) qu'*« aucune disposition du présent article ne peut être invoquée pour retarder ou empêcher l'abolition de la peine capitale par un Etat partie au présent Pacte. »* Le Secrétaire général de l'ONU et les rapporteurs spéciaux des Nations Unies sur la torture et sur les exécutions extrajudiciaires ont restreint la notion de « crimes les plus graves » à l'homicide volontaire. Le Haut-Commissariat aux droits de l'homme (HCDH) des Nations Unies a également organisé un panel de haut-niveau, intitulé « Peine de mort, drogues et terrorisme » à l'occasion du 13e Congrès des Nations Unies pour la prévention du crime et de la justice pénale à Doha en avril 2015, mettant au cœur des discussions cette question. La Commission interaméricaine des droits de l'homme (CIDH), dans son Rapport sur le terrorisme et les droits de l'homme[7], qui commente la protection du droit à la vie dans le contexte des « Normes et principes du droit international des droits de l'homme et du droit humanitaire applicable aux situations de terrorisme », rappelle dans l'article 4 que *« la peine de mort ne peut en aucun cas être infligée pour des crimes politiques…et être réservée pour les crimes les plus graves »*. Il en est de même pour la Commission africaine des droits de l'homme et des peuples (CADHP) dans son Observation générale n°3 à la Charte africaine des droits de l'homme et des peuples sur le droit à la vie, adoptée le novembre 2015.

Et les droits de l'homme dans tout ça ?

Finalement se pose à chaque fois la question du respect des normes internationales, des droits de l'homme et du droit à un procès équitable. Comme nous l'avons précédemment vu, l'interprétation large de la notion de terrorisme, l'extension aux manifestations politiques des nombreuses

lois anti-terroristes qui ont vu le jour ces dernières années, ainsi que la pratique dépassant largement les cas de terrorisme (mais se justifiant par la lutte anti-terrorisme), montrent combien l'instrumentalisation de la peine de mort dans le cadre des réponses contre le terrorisme dans de nombreux pays est réelle. Le cas du Tchad est, sur le non-respect des normes de procès équitable, frappant. En effet, l'exécution le 29 août 2015 de dix membres présumés du groupe islamiste Boko Haram, moins de trois semaines après l'arrestation des condamnés ont fait légitimement dire à Christopher Heynes, le Rapporteur spécial des Nations Unies sur les exécutions extrajudiciaires, sommaires et arbitraires, que *« Ces exécutions ont eu lieu après un procès qui n'aurait pas été organisé dans les normes internationales requises »*. L'incarcération au secret et isolement total des prévenus au milieu du désert dans le bagne de Koro-Toro est, là encore, un manquement total aux droits des prisonniers. Enfin, comme l'a rappelé Ra'ad Al Hussein Zeid, Haut-commissaire aux droits de l'homme des Nations Unies lors du 6e Congrès mondial contre la peine de mort à Oslo en juin 2016, *« Certains États se heurtent au soi-disant comportement terroriste qui est en fait un prétexte pour éteindre toute opposition politique. De manière déplorable, ils cherchent à criminaliser l'exercice légitime des libertés fondamentales en les incluant dans une législation de lutte contre le terrorisme trop vague. Soyons clairs : la participation aux manifestations pacifiques et à la critique d'un gouvernement, que ce soit en privé, sur Internet ou dans les médias, ne sont ni des crimes ni des actes terroristes. La menace ou l'utilisation de la peine de mort dans de tels cas est une violation flagrante des droits de l'homme. »*.

En conclusion

Le juste droit des États de protéger ses citoyens d'un terrorisme barbare ne peut en aucune manière servir au rétablissement de la peine de mort. Cela ne doit pas non plus être une excuse pour bafouer l'État de droit et les droits de l'homme fondamentaux. La peine de mort est non dissuasive. Cela paraît encore plus vrai dans le cadre du terrorisme, engendrant au contraire plus de vocations et d'appels au « martyr ». La peine capitale n'est que le principe millénaire d'un besoin de vengeance, souvent au nom des victimes. Pourtant celles-ci ne réclament souvent pas vengeance, mais simplement l'application de la justice[8]. La peine de mort n'apporte aucun réconfort, empêche souvent la résolution des crimes d'aller jusqu'au bout. Elle inscrit les sociétés dans un cycle infernal de violences (le nombre des attentats en Irak est directement corrélé avec l'augmentation des exécutions) et enfin transforme les victimes en tueurs en partageant les valeurs de ceux que l'on combat.

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1 Tiré de la Tribune « Une justice qui tue n'est pas la justice », parue dans *Libération* du 4 mai 2011, signée par Raphael Chenuil-Hazan et Olivier Déchaud, http://www.liberation.fr/planete/2011/05/04/une-justice-qui-tue-n-est-pas-la-justice_733233.

2 http://www.worldcoalition.org/media/resourcecenter/FR_WD2016_Factsheet.pdf.
* Année de la dernière exécution pour des crimes liés au terrorisme / ** Année de la dernière condamnation à mort connue pour des crimes liés au terrorisme / *** Année de la dernière exécution pour des crimes liés au terrorisme considérée comme « inimitié à l'égard de dieu (moharebeh) », source Rapport d'Amnesty International et Death Penalty Worldwide.

3 Actes numériques du 6e Congrès mondial organisé par ECPM, http://actes2016.ecpm.org/fr/. Death Penalty Worldwide, Death Penalty Database, Pakistan, Crimes and Offenders Punishable By Death, www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan.
Refworld, Amnesty International, Report 2014/15 – Pakistan, 25 février 2015, www.refworld.org/docid/54f07db215.html.

4 Art. 6 : *« Le terrorisme désigne l'usage ou la menace de l'usage d'une action (…) visant à contraindre et intimider, ou impressionner le gouvernement, ou la population, ou une partie de la communauté, ou à créer un sentiment de peur ou d'insécurité dans la société ; ou à soutenir une cause religieuse, sectaire ou ethnique »* ; Art. 7 : *« Quiconque commet un acte terroriste sera, si cette action a provoqué la mort d'une personne, puni de la peine de mort. »*

5 Liste complète de ces instruments disponible sur http://www.un.org/fr/counterterrorism/legal-instruments.shtml

6 http://www.ohchr.org/FR/ProfessionalInterest/Pages/CCPR.aspx

7 Report on terrorism and human rights (rapport sur le terrorisme et les droits de l'homme), OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 octobre 2002.

8 Témoignages de victimes du terrorisme AFVT/WCADP http://www.worldcoalition.org/media/resourcecenter/FR_WD2016_FactsheetVictimsTerrorism.pdf

Une loi pour remplacer l'état d'urgence est-elle compatible avec les droits de l'homme et les libertés publiques ?

En France, focus sur le nouveau projet de loi « renforçant la sécurité intérieure et la lutte contre le terrorisme »

Fabian HINCKER

Introduction

Pour structurer les évolutions successives de nos sociétés, les droits de l'homme n'ont cessé de s'étoffer. Progressivement, des droits sociaux se sont constitués autour de la base que constituaient les droits politiques. Enfin, une troisième génération de droits humains, plus subjectifs, a vu le jour : les droits collectifs – ou droits de solidarité. Le droit à la sécurité fait partie de cette génération et constitue une revendication légitime au regard des droits de l'homme. Cependant, la recherche effrénée d'un sentiment de sécurité ne risque-t-elle pas de nuire aux libertés publiques ?

I- La nécessaire différence entre l'état d'urgence (loi d'exception) et la loi ordinaire

L'état d'urgence est un régime d'exception issue de la loi du 3 avril 1955. Il a été instauré en France depuis le 14 novembre 2015, à la suite des attentats de Paris et de Saint-Denis. Prorogé à six reprises, l'état d'urgence devrait prendre fin le 1er novembre 2017 à la condition que le **projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme (INTX1716370L) soit adopté définitivement par le Parlement français.**

A- L'encadrement de la loi par la Constitution

Ce projet de loi prévoit de modifier le code de sécurité intérieure, une législation ordinaire et permanente, pour y intégrer les principales mesures du régime d'exception de l'état d'urgence (législation d'exception et temporaire).

Or il convient de rappeler qu'en France, la Constitution possède une valeur supralégislative, et qu'elle prévoit notamment en son article 34 alinéa 1er que : « *La loi fixe les règles concernant : les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques ; la liberté, le pluralisme et l'indépendance des médias ; les sujétions imposées par la Défense nationale aux citoyens en leur personne et en leurs biens* ». La Constitution encadre limitativement la matière législative.

La loi ordinaire ne devrait donc pas pouvoir réguler les mesures exorbitantes du droit commun, réservées jusqu'à présent aux lois d'exceptions : état d'urgence, état de siège, et pouvoirs exceptionnels du Président de la République. Les limites traditionnelles des sphères de l'exception et de l'ordinaire relevant respectivement des domaines du temporaire et du permanent, seront dès lors obsolètes, et à refonder.

B- Le point de vue des juridictions françaises et de la Cour européenne des droits de l'homme

La Convention européenne des droits de l'homme (CEDH), garante des droits de l'homme et des libertés publiques, prévoit en son article 15 une dérogation à certains de ses principes en cas d'état d'urgence. Cet article prévoit des exigences de fond (danger public menaçant la vie de la nation, mesures prises adéquates) et de forme (acte formel et public de dérogation, informations et motifs sur les mesures prises).

La France a fait des demandes de dérogation adressées au Secrétaire général du Conseil de l'Europe à chaque prorogation de l'état d'urgence. C'est ainsi qu'elle peut déroger à certaines garanties de la CEDH depuis novembre 2015. La CEDH a déjà eu l'occasion de se prononcer sur l'utilisation de cet article 15, notamment dans l'arrêt *A. et autres contre Royaume-Uni* du 19 février 2009 où la Cour a admis qu'il y avait un danger public menaçant la vie de la Nation après avoir eu connaissance éléments tendant à démontrer l'existence d'une menace réelle d'attentats terroristes. Au regard de la jurisprudence de la cour et de la lettre de la Convention, il ne fait aucun doute que la déclaration de l'état d'urgence en France du 14 novembre 2015, suite aux attentats de Paris, est compatible avec la définition que la Cour donne du danger public menaçant la vie de la nation.

Cependant la mise en œuvre des mesures prises par dérogation à la CEDH peuvent être contestées. Les personnes vivant en France continuent à avoir accès à la Cour européenne des droits de l'homme et ont la possibilité d'y déposer des recours. La requête sera étudiée au regard de l'article 15, en veillant à ce que les dérogations à la Convention mises en œuvre par l'État membre sur son territoire le soient dans le respect des conditions imposées par cet article. Des perquisitions sans lien avec le terrorisme, comme celles pratiquées chez des militants écologistes pourraient ainsi, à titre d'exemple, faire potentiellement l'objet d'une condamnation.

Dans son avis du 15 juin 2017, le Conseil d'État a validé le projet de loi énonçant que « *la conciliation n'est pas déséquilibrée entre la prévention des atteintes à l'ordre public et le respect des droits et libertés reconnus par la Constitution ainsi qu'aux esigences issues de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales* ».

Le Conseil d'État estime que le degré de contrainte pour l'application des mesures prévues dans le projet de loi est significativement plus important que celles prévues dans la loi d'exception du 3 avril 1955, qui a instauré le cadre légal de l'état d'urgence actuel.

Certaines organisations internationales telles qu'Amesty International France, Human Rights Watch, la Ligue des droits de l'homme et le syndicat de la magistrature, ne sont pas pour autant de cet avis.

II- L'incompatibilité de la loi avec les libertés publiques

C'est un fait, pendant la période de l'état d'urgence, les libertés publiques sont malmenées, la liberté d'aller et venir (Art. 4 DDHC), le droit au respect de la vie privée

et familiale (Art. 8 CEDH) ou encore la liberté de réunion et d'association (Art. 11 CEDH) sont notamment menacées par ce régime d'exception. La nécessité de déroger à la CEDH en est la preuve.

Malgré tout, le projet de loi a, entre les lignes, pour but d'inscrire le régime d'exception de l'état d'urgence dans le marbre, par le biais d'une loi permanente.

A- Des pouvoirs exorbitants dans le droit commun

Cette banalisation de l'état d'urgence revient à introduire dans le droit commun des pouvoirs jusqu'ici considérés comme exorbitants du droit commun.

Les mesures phares de l'état d'urgence sont reprises dans le projet de loi. Bien que la forme ait été quelque peu retravaillée, le fond reste globalement identique.

A titre d'illustration, la perquisition administrative est rebaptisé « visite » (Art. 4 du projet de loi), l'assignation à résidence rebaptisée quant à elle « mesure individuelle de surveillance » (Art. 3 du projet de loi), est élargie à un périmètre plus large que le seul domicile, et la possibilité du port d'un bracelet électronique peut permettre d'éviter l'obligation de se rendre aux services de police ou de gendarmerie, limité à une fois par jour le cas échéant.

Les changements à noter sont la limitation de ces pouvoirs « aux seules fins de prévenir des actes de terrorisme » et que ceux-ci doivent être autorisés par l'ordonnance motivée du juge des libertés et de la détention près le tribunal de grande instance pour les visites et saisies. Le Ministre de l'Intérieur reste seul maitre s'agissant des assignations à résidence améliorées.

La nation subit les événements et les pouvoirs législatifs et exécutifs ne font que réagir au fur et à mesure selon la situation. Les six prorogations de l'état d'urgence permettent de comprendre que ce régime exceptionnel s'est indiscutablement inscrit dans la durée.

Si l'état d'urgence semblait légitime après les attentats de novembre 2015 pour stopper les terroristes, il n'apparaît pas adéquat pour combattre en profondeur le terrorisme. La nuance est importante. Pour autant, l'opinion publique n'y semble pas sensible, aveuglée par un climat de peur et d'insécurité. Le gouvernement semble pris au piège, et le prisme de la communication tend à phagocyter les libertés publiques.

B- La consécration de la logique du soupçon

Le projet de loi est dangereux en ce qu'il pérennise des dispositifs qui permettent de mettre en cause des personnes sur des critères flous, sur la base de vagues soupçons, une motivation insatisfaisante au regard du droit, en amont de preuve déterminante de préparation, commencement d'exécution ou commission d'un acte de terrorisme.

Le simple fait d'être « en relation de manière habituelle avec des personnes « incitant » à des actes de terrorisme, de « soutenir» ou d'« adhérer » à des thèses incitant à la commission d'actes suffit pour fonder une « visite », anciennement nommée perquisition administrative. Cette régression de l'État de droit, soutenue par la consécration d'une logique de suspicion introduite dans le droit positif favorise stigmatisation et division, tend à docilement servir le dessein des terroristes.

Le projet de loi étend son champ à l'instauration de fichiers sur les passagers aériens et maritimes, aux écoutes hertziennes et aux contrôles frontaliers élargis. Toutes ces dispositions, sous couvert d'élargir la marge d'action des services de police et gendarmerie, consacrent l'immersion de notre société dans un climat légitimé de suspicion et d'intrusion, incompatible avec nos libertés publiques.

Le projet de loi « renforçant la sécurité intérieure et la lutte contre le terrorisme » passera en consultation à l'Assemblée nationale en octobre 2017. En cas de validation par le processus législatif, la loi devrait entrer en vigueur le 1er novembre 2017, au moment où prendra fin, purement symboliquement donc, le régime d'exception que connaît la France depuis novembre 2015, l'état d'urgence.

Le projet de loi visant à sortir de l'état d'urgence aurait dû tendre vers la restauration d'un régime ordinaire, bâti sur le socle juridique fondamental du respect des libertés publiques.

Or, en l'état, le projet de loi s'érige à contre-courant de cet objectif.

Conclusion

Toute la question, bien sûr, est de savoir alors comment dans une démocratie peut s'articuler un juste équilibre entre ces deux exigences fondamentales que sont le droit à la sécurité, d'une part, et le respect des libertés individuelles et collectives, d'autre part.

Dans nos sociétés modernes, ce sont essentiellement Hobbes au XVIIe siècle, puis Kant au XVIIIe siècle et enfin Michel Foucault au XXe siècle qui ont réfléchi à la légitimité du droit à la sécurité dans un État moderne.

Hobbes est le penseur qui a érigé la sécurité en principe politique fondant la possibilité même du vivre-ensemble.

Pour des philosophes humanistes tels que Kant, la sécurité n'est plus une fin en soi, mais seulement le moyen d'assurer et de garantir la liberté individuelle de chacun, liberté morale qui seule a valeur de fin en soi. Alors que pour Hobbes, l'État de droit est nécessaire pour la préservation de la vie. Pour Kant, l'État de droit n'a de sens que si les moyens de violence légitime accordés sont nécessaires pour rendre possible l'expression de la liberté de chacun. Et Kant de conclure, dans la septième proposition, que l'exigence de la raison pure pratique est que « doit être établi un *état cosmopolitique de sécurité publique* entre les États ». En distinguant la notion d'état avec l'État, Kant notifie la coexistence pacifique, à l'échelle mondiale, entre les différentes nations, qui gardent pourtant leurs spécificités. Il s'agit-là de la première préfiguration systématique d'une « société des nations unies » chargée de garantir la sécurité mondiale.

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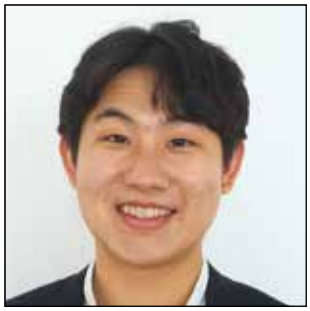

Addressing the Abuse of Social Media Platforms by Terrorist Organizations: Ongoing Lawsuits and Debates

Jake KIM

Virtually all of us use social media in some form every day, and we see our friends, relatives, business associates, celebrities and politicians doing the same, for reasons ranging from personal to commercial to political to whimsical. But we sometimes forget that social media is available to and all too often used by a whole range of wrongdoers for criminal purposes as well – from scammers to thieves to worse. Recent events have made clear that terrorists are no exception. Evidence shows that they have exploited social media to communicate with each other to plan, organize, and execute attacks, to attract recruits, to engage in financial transactions that support their terrorist activity, and to boast to associates and the world at large about their actions for personal and ideological purposes.

According to a 2012 article by the Canadian Broadcasting Corporation (CBC), University of Haifa Professor Gabriel Weimann has noted that "about 90 per cent of organized terrorism on the internet is being carried out through social media."[1] And we can assume that percentage has only increased since 2012 with the growing prominence of such companies as Facebook, Twitter, and YouTube in our daily lives.

The US Senate Report in July 2016 attests to the rising influence of social media on terrorist activities: "In 2002, just 37 percent of Americans attempting to travel to join terrorist groups were influenced by the internet in some way, compared to 83 percent in 2015."[2]

The reasons are many. As the Foreign Policy Association has observed, social networking websites "are cheap and accessible, facilitate quick, broad dissemination of messages, [and] allow for unfettered communication with an audience without the filter or "selectivity" of mainstream news outlets."[3] By disseminating clear, simple and impassioned messages in colloquial English that will be understood by many readers around the world, especially young people, terrorist groups are able to send out broad-based appeals as well as targeted messaging to individual Twitter or Facebook users.[4] They can also communicate with each other in real time and through a variety of media in the planning or implementation stages of an attack, and can do so silently and efficiently (taking advantage of group texts, locational aids, and the shorthand that has become a virtual new online language), in a manner that would have been inconceivable only a few years ago. They can also access maps, financial resources, security information, weather, phone numbers, and other critical information at the press of a key.

ISIS

As perhaps the most infamous but by no means only example, the Islamic State of Iraq and the Levant (ISIS) uses social networking websites as its primary means of recruiting fighters. It maintains accounts on Twitter, YouTube, and Facebook through which it often directly messages people who it has reason to think may be susceptible to its ideology, including in areas in which it seeks to launch attacks which would otherwise be difficult or impossible to access.

ISIS also uses social media for training. For example, by means of so-called "mujatweets," "ISIS members use [social media] to post instructional guidelines and promotional videos."[5] One egregious example that drew media attention was the "Flames of War" video featuring violent footage of ISIS capturing a Syrian army base.[6] Disseminated by ISIS sympathizers in September 2014, the video helped ISIS spread its message, recruit and train new members, and enhance its "brand."

The June 8, 2014 "twitter storm" is another example. Through hashtag campaigns in which thousands of ISIS members repeatedly tweeted "hashtags at certain times of day so that they [would] trend on Twitter," ISIS was able to vastly increase its number of followers.[7]

One of the most troubling uses of social media by ISIS has been to raise funds. Appeals for money appear conspicuously on ISIS websites and in ISIS messaging. Twitter posts such as "If 50 dinars is donated, equivalent to 50 sniper rounds, one will receive a 'silver status'" and "Support the Mujahideen with financial contribution via the following reliable accounts" illustrate that terrorist organizations not only ask for funding but also provide incentives and overt instructions to secure these funds.[8] In fact, in one campaign, ISIS was able to raise 26,000 Saudi Riyals (close to $7,000) just from donations via Twitter.[9]

ISIS's exploitation of social media has not gone unnoticed by the press. There have been numerous and consistent reports in a variety of media outlets.

CNN, for example, has reported extensively on ISIS's use of Twitter. In June 2014, for example, it reported that ISIS has been raising "money for weapons, food and operations" through tweets.[10] It also aired an interview with Seth Jones, Associate Director of the International Security and Defense Policy Center, who pointed to terrorist groups' wide use of Twitter "to collect information, fundraise and recruit," concluding that "[s]ocial media is where it's at for these groups."[11]

And the coverage has often been critical, raising questions about whether social media companies bear responsibility for

> In short, the companies have invoked freedom of speech and expression as a core and desirable value that necessarily comes at a price.

such misuse of their sites. In September 2014, as quoted in a Time Magazine article, terrorism expert Rita Katz asserted: "For several years, ISIS followers have been hijacking Twitter to freely promote their jihad with very little to no interference at all… Twitter's lack of action has resulted in a strong, and massive pro-ISIS presence on their social media platform."[12] Likewise, Facebook allows anyone "to create groups and to send secure payments through its Messenger application," which makes it"the perfect platform for illegal deals."[13]

Politicians have joined in the criticism. Former Secretary of State Hillary Clinton, for example, urged companies like Twitter and Facebook to respond to the problem, arguing that they "cannot permit the recruitment and the actual direction of attacks or the celebration of violence by this sophisticated Internet user [ISIS]. They're going to have to help us take down these announcements and these appeals."[14]

Lawsuits against Social Media

More recently, terrorism victims seeking compensation for their injuries have brought a number of legal actions against social media companies, especially in the United States. Cases have been brought arising from the 2016 Orlando nightclub shooting, the 2016 Brussels bombings, the 2015 San Bernardino massacre, and the November 2015 Paris attacks.

By way of example, victims of the San Bernardino shooting filed an action against Facebook, Twitter, and Google in connection with the attack by Syed Rizwan Farook and Tashfeen Malik, a married couple, who opened fire on Farook's colleagues during a holiday gathering, killing 14 and injuring 22 people. Among other things, the plaintiffs alleged that Facebook, Twitter, and YouTube played a crucial role in the radicalization of the two shooters and the shooting would not have occurred but for the companies' inaction in preventing abuse of their networks. Victims of the Orlando nightclub shooting made a similar assertion.

To date, plaintiffs in the United States have been unsuccessful, and the cases filed have been dismissed, on the basis of a particular legal obstacle: Section 230 of the Communications Decency Act. This federal law "protects websites from civil liability when they engage in the traditional editorial functions of a publisher – such as deciding whether to publish, remove, or edit posts, tweets, or content generated by third parties" instead of authoring the content themselves.[15] Primarily based on this statute, to date, no lawsuit has "advanced beyond the preliminary phases."[16]

As a policy matter, social media companies have argued that the "unbounded theory" of liability asserted by these plaintiffs "would have staggering consequences, exposing every online platform to possible liability for terrorist violence anywhere in the world, at any time, simply because terrorists who committed the attack may have been loosely affiliated with some of the platforms' billions of users."[17]

Countering those arguments, plaintiffs have adjusted their strategy, often avoiding simple claims of facilitation and alleging that social media companies have affirmatively profited from terrorists' use of their websites.

They claim that the companies insert advertisements alongside users' written posts and videos. A lawsuit arising from the November 2015 Paris attacks, Gonzalez et al. v. Twitter, for example, claims that sites like Google (YouTube) share with the terrorists themselves revenue generated from ads viewed alongside terrorist postings.[18]

Statements by media companies about how they handle advertising have bolstered these allegations. According to Google, it specifically approves each video posted on YouTube for monetization and then "place[s] ads inside or near the video."[19]

In addition, "new lawsuits argue that social media has designed specific algorithms to finely target advertising based on users' shared data."[20] In other words, plaintiffs claim that because social media companies are generating a specific ad for each user, they are the sole authors of the advertisement content on each page (since advertisers themselves do not determine where Google, for instance, advertises their content). In fact, advertisers such as Johnson & Johnson in the US and L'Oréal in Europe among others have expressed concern about these placements and have withdrawn their ads once they discovered that the ads appeared alongside controversial posts or videos.[21] This type of allegation could succeed in recasting social media companies as the "author" rather than publisher of content and thus eliminate the liability shield provided by Section 230.

Core Arguments on the Role of Social Media

The response of social media companies has been mixed. In 2011, Twitter co-founder Biz Stone and former Twitter General Counsel Alex Macgillivray laid out their company's philosophy and ideology in a blog post entitled "The Tweets Must Flow." They wrote: "We don't always agree with the things people choose to tweet, but we keep the information flowing irrespective of any view we may have about the content."[22]

In short, the companies have invoked freedom of speech and expression as a core and desirable value that necessarily comes at a price.

More recently, social networking companies appear to have adopted a more nuanced approach. For example, Twitter altered its position from its blog post in 2011 by writing another post a year later entitled "Tweets still must flow." It declared: "Starting today, we give ourselves the ability to reactively withhold content from users in a specific country."[23] But this reactive approach has been criticized by some as more of an effort to comply with government restrictions on free speech in selected countries than a genuine attempt to monitor criminal postings by terrorists or other wrongdoers.

Technology experts insist that social media companies are capable of doing more, without infringing on innocent users' freedom of expression. Katz and Hany Farid, who developed with Microsoft a system to track child pornography, insist, for example, that Twitter has the ability to prevent offensive content.[24] Among other things, according to the New York Times, Twitter could easily identify instances in which the same group repeatedly regenerated an account in response to content take-downs; one pro-ISIS group used 335 accounts with names like @TurMedia333, then @TurMedia334, and then @TurMedia335.[25]

Meanwhile, ISIS makes use of a system to contacts its followers to ask them through a bot to reconnect through a new account, allowing it to maintain its base of supporters.[26]

But free speech advocates have sided with the companies. Civil Liberties Director at the influential Electronic Frontier Foundation, David Greene, has stated: "We don't believe that law enforcement should delegate their responsibilities to private enterprise... especially ones that haven't sought out that role."[27]

There are also risks to companies getting involved in sifting through political ideologies to decide which ones are problematic. In a noteworthy example, CloudFlare, a US company providing Internet security services, received backlash from Internet users for keeping supposedly pro-ISIS websites online only to later discover that the sites were pro-Kurdish and critical of ISIS.[28]

According to Matthew Prince, chief executive of CloudFlare, companies such as his "are not certified policy experts."[29]

Others have pointed out that removing offensive content can help shield their authors. Tech executives have testified that at times, they were asked to keep such content on their websites "so that law enforcement agents can monitor terrorist networks or because the content was created by law enforcement agents to lure terrorists into divulging information."[30]
Others raise privacy concerns.

Recently, for example, Facebook removed a post by Tashfeen Malik, one of the two terrorists in the San Bernardino attack, by tracking down her e-mail. Scholars like Zeynep Tufekci at the University of North Carolina questioned whether Facebook should have the authority to browse through all individual users' accounts to ferret out terrorist activity through methods that are increasingly invisible to the public.[31]

Finally, some believe that efforts by social media companies are futile. Stephanie Carvin, assistant professor of international affairs at Carleton University, suggested that tighter regulation of individual websites will have the result that terrorists will move on to different apps so that their influence and support base remain intact. According to Carvin, if terrorists "feel they are under pressure under one [website], they are opportunistic, they will simply use another."[32]

Moreover, Carvin opposed the weakening of encryption of social media websites proposed by Theresa May, Prime Minister of the UK, to facilitate the discovery of terrorist organizations online. "The issue is that when you weaken encryption to fight terrorism, you're also weakening it for everyday people who depend on it in order to do their banking, for governments to actually talk to each other," noted Carvin.[33]

In short, there is a tension between freedom of expression and regulation. Josh Earnest, former White House press secretary, underscored that tension at a White House briefing in December 2015: "We are going to resist the urge to trample a bunch of civil liberties, [but] we don't want terrorists to have a safe haven in cyberspace."[34]

Conclusion

As is often the case, the legal landscape on the issue of compensation for terrorism victims is shifting along with public policy. It remains to be seen whether the flurry of lawsuits against social media companies will be able to overcome the obstacles presented by policy concerns regarding free speech and statutory protections such as Section 230. At the same time, technology continues to evolve and may provide new means for companies to weed out and prohibit criminal conduct without infringing the civil liberties of innocent users. Even if the lawsuits do not succeed, they may advance that effort and motivate companies to develop additional protections. The lawsuits also raise important questions about whether people need to understand and involve themselves more in technology policy to be able to propose and implement new strategies themselves.

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1 "Terrorist groups recruiting through social media", CBC, Jan. 2012.

2 United States Senate, "Combat Terrorist Use of Social Media Act of 2016: Report of the Committee on Homeland Security and Governmental Affairs", US Government Publishing Office, Washington, July 2016, p. 3.

3 Calvin Dark, "Social Media and Social Menacing…", Foreign Policy Association, Dec. 2011.

4 Ibid.

5 "Reynaldo Gonzalez, Individually and as Successor-in-Interest of the Estate of Nohemi Gonzalez v. Twitter, Inc., Google Inc., and Facebook, Inc.", United States District Court: Norther District of California, June 2016, p.8.

6 Meira Svirsky, "ISIS Releases 'Flames of War' Feature Film to Intimidate West", Clarion Project, Sep. 2014.

7 Gonzalez, p. 14.

8 Ibid., p. 10.

9 Ibid.

10 Ibid., p. 16.

11 Ibid.

12 Alex Altman, "Why Terrorists Love Twitter", Time, Sep. 2014.

13 Gonzalez, p. 19.

14 Lily Hay Newman, "Should Facebook turn in ISIS supporters?", New Scientist, Dec. 2015.

15 Nina Iacono Brown, "Should Social Networks Be Held Liable for Terrorism?", Slate, June 2017.

16 Dan Whitcomb, "Families of San Bernardino shooting sue Facebook, Google, Twitter", Reuters, May 2017.

17 Matt Hamilton, "Families of San Bernardino attack victims accuse Facebook, Google and Twitter of aiding terrorism in lawsuit", LA Times, May 2017.

18 Gonzalez, p. 26.

19 Ibid.

20 Brown.

21 Ibid.

22 Biz Stone, Alex Macgillivray, "The Tweets Must Flow", Twitter, Jan. 2011.

23 Twitter Inc., "Tweets still must flow", Twitter, Jan. 2012. 24 Gonzalez, p. 24.

25 Nicole Perlroth, Mike Isaac, "Terrorists Mock Bids to End Use of Social Media", NY Times, Dec. 2015.

26 Gonzalez, p. 25.

27 Perlroth, Isaac.

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

32 Lynn Desjardins, "More debate about social media and terrorism", RCI, June 2017.

33 Ibid.

34 Perlroth, Isaac.

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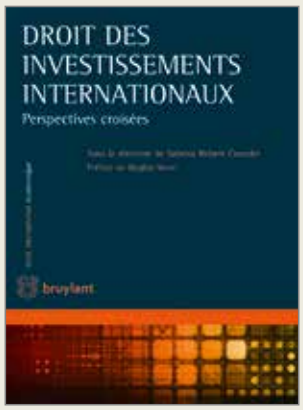

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