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Jorge Martí Moreno
**UIA President
for 2020-2021**



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EVENTS / ÉVÉNEMENTS / EVENTOS

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Information and Disinformation
WEBINAR (EN)

FEBRUARY - FÉVRIER - FEBRERO



Networking, Marketing, and Attracting Clients in Times of Pandemic: Three Perspectives
WEBINAR (EN)

MARCH - MARS - MARZO



From Back Office to Front Office: An Analysis of the Key Legal Issues Arising in Digital Transformation
WEBINAR (EN)



The Role of Bar Associations and Women Lawyers for Fighting Violence against Women
Le rôle des Barreaux et des femmes avocates dans la lutte contre les violences faites aux femmes
El papel de los Colegios de abogados y de las mujeres abogadas en la lucha para poner fin a la violencia contra las mujeres
CAPSULE (EN) (FR) (ES)



Fair Use and Abuse of IP Rights: Finding the Balance between Exclusivity and Competition
WEBINAR (EN)

APRIL - AVRIL - ABRIL



Editing the Living Genome: Technology, Morality, and Law
WEBINAR (EN)



Hot Topics in Testing, Tracing & Treatment for Covid-19: When and How can We Return to a New Normal?
WEBINAR (EN)



Arbitration in Family and Inheritance Law
Arbitrage en droit de la famille et des successions
Arbitraje en Derecho de Familia y Sucesiones
CAPSULE (EN) (FR) (ES)



La promotion législative des droits de l'Homme au niveau international
WEBINAR (FR)

MAY - MAI - MAYO



Updates on Food & Drug Law Worldwide – How Covid-19 Changed Habits and Business Model
WEBINAR (EN)



International Arbitration, Current Perspectives – 4th Edition
Arbitraje Internacional, Perspectivas Actuales – 4^a Edición
BILBAO – SPAIN / ESPAÑA (EN) (ES)

JUNE - JUIN - JUNIO



12th UIA Annual Business Law Forum
WARSAW – POLAND (EN)



Pleins feux sur le secret professionnel de l'avocat
PARIS LA DÉFENSE – FRANCE (FR)



29th UIA World Forum of Mediation Centres
WEBINAR (EN)

JULY - JUILLET - JULIO



Drafting Effective International Contracts - International Sales, Agency and Distribution Contracts
TURIN – ITALY (EN)

SEPTEMBER - SEPTIEMBRE - SEPTIEMBRE



The Fashion Industry 2020-2030: Legal Trends and New Challenges
BARCELONA – SPAIN (EN)



Science & Law: International Law Answers to Scientists' Current Challenges
TRIESTE – ITALY (EN)



Women Leaders of the Bar Day
Journée des Femmes Leaders des Barreaux
Jornada de las Mujeres Líderes de la Abogacía
CAPSULE (EN) (FR) (ES)



Modern Families: Current Challenges, Equal Rights and Ways to Protect their Wealth
Dates to be confirmed
LONDON – UNITED KINGDOM (EN)



Efectos y consecuencias de la pandemia de la Covid-19 en las empresas y medidas que frente a ello ofrece el Derecho de las Insolvencias
VALENCIA – SPAIN (ES)



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UIA President Jorge Martí Moreno with Barcelona Bar President Maria Eugenia Gay Rosell, Luxembourg Congress 2019

Editorial





President's Editorial

I Jorge MARTÍ MORENO

Dear All,

It is with mixed feelings that I am starting my term in office. The joy and enthusiasm with which I took up the post of UIA President has been tempered by the regret that I am unable to meet with you in person, as is customary. Since 1927, the UIA has indeed made a mark in its role as a face-to-face forum. In the context of the Covid pandemic, we have been forced to reinvent ourselves and have succeeded in doing so – an achievement of which I believe we should all be proud. As Emperor Marcus Aurelius said, “the only constant in life is change.” Moreover, according to the Darwinian theory of species selection, it is not the strongest or the most intelligent that survive, but those that best adapt to change.

Thanks to new technologies, the UIA has been able to adapt to the new reality at a moment's notice. Thanks to new

technologies, most lawyers have been able to continue working from home during lockdowns. Despite the magnitude of this change, the UIA was able to integrate new methods rather quickly into the way we communicate and work, thanks to the efforts of our staff and their IT skills, but also thanks to our open-mindedness.

The UIA has also had to change the way it communicates with its members. New mechanisms such as the “CoffeeChats,” or “UIACapsules,” virtual seminars, or “webinars,” have been set up and are expected to be implemented in the long term.

The high point was the organisation of the UIA Congress in a completely virtual manner. I found two moments at this event particularly heartening, as they show perfectly how ingenuity can overcome

obstacles. These two moments were, in order of importance, the cocktail reception following the closing ceremony and the medal award ceremony.

First, during the cocktail, I was amazed to be able to chat with all my UIA friends from my home, together with my wife and one of my children. I was even able to share a more intimate conversation with some members as we left the main hall and went to a separate room, and after a few minutes of one-on-one discussions, we were able to return to the main hall to mingle with more friends again.

The second moment that highlighted this ingenuity was the medal exchange ceremony. Thanks to the professionalism of the cameramen, the distance between President Roth's home in San Francisco and my home in Valencia seemed to disappear and Jerry's hand was able to cross the American continent and the Atlantic Ocean to award me the UIA President's medal. Jerry then bowed his head and I reached out my arms to present him with the UIA medal in honour of his outstanding work. As if by magic, when Jerry looked up, he was wearing the new medal that I had in my hands a second before.

Long live new technology! Long live ingenuity! And long live the UIA!

Following the proverb, “If life gives you lemons, make lemonade,” we were able to face Covid with ingenuity and enthusiasm. This has brought me some comfort and I hope these anecdotes will also make you smile.

We face considerable challenges ahead, but I am sure we will succeed in meeting them. I am counting on you and you can definitely count on me!

Jorge MARTÍ MORENO
UIA President
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Editorial du Président

I Jorge MARTÍ MORENO



Chers tous,

C'est avec un sentiment partagé que je débute mon mandat. La joie et l'enthousiasme avec lesquels j'ai accédé à la présidence de l'UIA ont été nuancés par le regret de ne pas pouvoir me réunir avec vous en personne, comme le veut la coutume. Depuis 1927, l'UIA s'est distinguée en effet par son rôle de forum présentiel. Dans le contexte de la Covid, nous avons été contraints de nous réinventer et nous y sommes parvenus avec une réussite dont j'estime que nous devons tous être fiers. Comme le disait l'empereur Marc Aurèle, la seule constante dans la vie, c'est le changement. Par ailleurs, selon la théorie darwinienne de la sélection des espèces, ce n'est pas le plus fort ni le plus intelligent qui survit, mais celui qui s'adapte le mieux aux changements.

Grâce aux nouvelles technologies, l'UIA a été capable de s'adapter au pied levé à la

nouvelle réalité. Grâce aux nouvelles technologies, nous avons pu continuer à travailler de chez nous au cours du confinement. Malgré l'ampleur de ce changement, nous l'avons intégré rapidement à notre façon de communiquer et de travailler grâce aux efforts de notre personnel et à ses compétences en informatique, mais aussi grâce à notre ouverture d'esprit.

L'UIA a également dû modifier le mode de communication avec ses membres. De nouvelles formules telles que les « *CoffeeChats* » ou « *Capsules UIA* », les séminaires virtuels ou « *webinaires* » ont été mises en place et sont appelées à s'inscrire dans la durée.

Le point d'orgue a été l'organisation du Congrès de l'UIA de façon entièrement virtuelle. Lors de cet événement, deux moments m'ont semblé particulièrement réconfortants, car ils montrent parfaitement comment l'ingéniosité peut permettre de surmonter les obstacles. Ces deux moments

ont été, par ordre d'importance, le cocktail ayant suivi la cérémonie de clôture et la cérémonie de remise des médailles.

Au cours du cocktail, tout d'abord, j'ai été étonné de pouvoir bavarder avec tous mes amis de l'UIA depuis chez moi, en compagnie de mon épouse et d'un de mes enfants. J'ai même pu partager à cette occasion une conversation plus intime avec certaines personnes en sortant de la salle principale et en passant dans une salle séparée. Après quelques minutes en tête à tête, nous avons pu retourner dans la salle principale pour nous mêler de nouveau à nos amis.

Le deuxième moment qui a mis en exergue cette ingéniosité a été la cérémonie d'échange de médailles. Grâce au professionnalisme des cadres, la distance entre le domicile du président Roth à San Francisco et ma demeure à Valence a semblé s'effacer et la main de Jerry a pu traverser le continent américain et l'océan Atlantique pour me décerner la médaille de président de l'UIA. Jerry s'est ensuite incliné et j'ai tendu les bras pour lui remettre la médaille de l'UIA en hommage à son remarquable travail. Comme par magie, lorsque Jerry a relevé la tête, il portait la nouvelle médaille que j'avais dans les mains une seconde avant.

Vive les nouvelles technologies ! Vive l'ingéniosité ! Et vive l'UIA !

Comme le dit le proverbe, il faut faire contre mauvaise fortune bon cœur, et je pense que nous avons été capables d'affronter la Covid avec ingéniosité et enthousiasme. Cela m'a apporté un certain réconfort et j'espère que ces anecdotes vous feront également sourire.

Nous sommes confrontés à des défis considérables mais je suis sûr que nous parviendrons à les relever. Je compte sur vous et vous pouvez compter sur moi !

Jorge MARTÍ MORENO
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Editorial del Presidente

I Jorge MARTÍ MORENO

Queridos todos:

Inicio mi presidencia con el corazón partido. La alegría y el entusiasmo por acceder a presidir la UIA han tenido que incrementarse para compensar la pena por no poder reunirme con vosotros presencialmente, tal como es nuestra costumbre. Desde 1927, la UIA se había caracterizado por ser un foro presencial. En el contexto Covid, nos hemos tenido que reinventar. Y no solo lo hemos hecho, sino que lo hemos hecho con éxito y todos nos hemos de sentir orgullosos por ello. Decía el emperador Marco Aurelio que lo único constante en la vida es el cambio. Por otro lado, en la selección darwiniana de las especies, no sobrevive el más fuerte ni el más inteligente, sino quien mejor se adapta a los cambios.

Gracias a las nuevas tecnologías, en la UIA nos hemos adaptado, si bien de forma abrupta y rápida, a una nueva realidad. Gracias a las nuevas tecnologías, hemos podido seguir trabajando desde nuestros hogares durante el confinamiento. Aunque el cambio ha sido enorme, gracias a nuestro personal, a sus conocimientos en tecnologías de la información y a nuestra apertura de mente hemos integrado rápidamente ese cambio en nuestra forma de comunicarnos y en nuestra forma de trabajar.

También en la forma en la que la UIA se mantiene en contacto con sus miembros. Nuevas fórmulas como los “Coffee chats” o las “Cápsulas”, los seminarios virtuales o “webinars”, se han implantado y parece que no hay vuelta atrás.

El colmo ha sido poder celebrar un Congreso UIA de carácter exclusivamente virtual. Hay dos partes del congreso virtual que me han hecho sonreír especialmente porque son un ejemplo de cómo hacer frente a la adversidad con ingenio. Esos dos momentos, por orden de magnitud, son el cóctel tras la ceremonia de clausura y la ceremonia de entrega de medallas.

En el primer momento, el del cóctel, me pareció curiosísimo poder conversar con tantos



amigos de la UIA viéndoles las caras desde mi propia casa, acompañado por mi mujer y alguno de mis hijos. Algunos asistentes al cóctel pudimos incluso tener una conversación más íntima, saliéndonos de la gran sala y pasando a una sala separada. Tras unos minutos a solas, pudimos volver a la sala grande y seguir saludando a los amigos.

En el segundo momento en el que brilló el ingenio, el de la ceremonia de intercambio de medallas, la profesionalidad de los cámaras hizo que la distancia entre la casa del presidente Roth en San Francisco y mi casa en Valencia pareciera desvanecerse y que los dedos de Jerry cruzaran el continente americano y el océano Atlántico para imponerme la medalla de Presidente de la UIA. A continuación, Jerry agachó la cabeza y yo estiré mis brazos para imponerle la medalla de la UIA en reconocimiento a su buen hacer y, por arte de magia, Jerry levantó la cabeza llevando ya puesta la nueva medalla que un segundo antes estaba en mis manos.

¡Vivan las nuevas tecnologías! ¡Viva el ingenio! ¡Y viva la UIA!

Dice un refrán español que al mal tiempo hay que hacerle frente con buena cara. Pues bien, creo que entre todos hemos sido capaces de hacer frente a estos tiempos de Covid con ingenio y con entusiasmo, y ello me ha hecho dibujar una nueva sonrisa en mi cara, y me gustaría pensar que estas anécdotas también os harán sonreír a vosotros.

Tenemos serios retos frente a nosotros. Estoy seguro de que conseguiremos superarlos. ¡Cuento con vosotros y contad conmigo!

Jorge MARTÍ MORENO
Presidente de la UIA
president@uianet.org



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Message from the Editor-in-Chief

I Barbara J. GISLASON

It is with gratitude to the UIA and my predecessor, the brilliant and talented Nicole Van Crombrughe, that I rise to take on this leadership role as Editor-in-Chief of one of the UIA's treasures, the *Juriste International*. At this historic time, while members are personally threatened with loss of family, friends, co-workers, and for some, their livelihoods, all are searching for what gives their lives meaning.

From the first time I attended a UIA meeting, one where I already had served in leadership roles in the United States, I realized almost immediately that the essence of the UIA was different from anything I had encountered before at an institutional level of other organized bars. While UIA members, of course, wanted to bask in the knowledge and visions shared by great lawyers from around the world, members also embraced fundamental values – an insatiable devotion to human rights and the deeply held desire to vigilantly preserve the Rule of Law. My sense was that these convictions are in UIA members' DNA.

In the spirit of being the protector of the *Juriste International* as an UIA crown jewel, my goal is to cause UIA members to read this publication upon its arrival. They will welcome it because it is multicultural, in three working languages, interesting, informative, useful, at times funny, and ultimately, inspiring.

To bring this publication up to the next level, I have assembled an Editorial Board that is second to none. When you read the names of those who have agreed to serve, you will appreciate that these Editors reflect not only well-respected and high-profile lawyers within the UIA, but in the world at large. You will also notice that we now have an English Deputy Editor, Steven Richman, from Princeton, New Jersey; a French Deputy Editor, Catherine Peulvé, from Paris, France; and a Spanish Deputy Editor, Laura Collada, from Mexico City, Mexico. Temporarily, our list of Editors is

still at the back of this publication. Soon, it will be at the front.

You may wonder why these wonderful people have agreed to serve on the *Juriste International* Editorial Board. They share a collective vision that with many diverse Editors, we are in a unique position to know what legal issues are arising in a region or continent. During our monthly Editorial Board meetings, we will listen to each other to ensure there is an intensified cross-cultural aspect to this publication.

Although the current issue of the *Juriste International* has a lot of English content, we are making significant changes to offer more content in all three of our primary working languages. You can expect a dynamic change in our Table of Contents, too.

Here are a few highlights from this issue: Judge Bernice Donald and Michael Pates analyze how human dignity impacts the law; Chloe Westerman and Kathleen Heycock present a soul-searching article about how Covid-19 and Black Lives Matter is impacting barristers' and solicitors' daily lives; transgender lawyer Ellie Krug describes overcoming hopelessness; Grace Wang describes legal issues for foreign brands entering Chinese e-commerce platforms; Riccardo Cajola discusses legal design and artificial intelligence; Judge Tracie Todd explains better ways to protect those at the courthouse; Steven Richman writes about how professional obligations converge with corporate social responsibility; Elisabeth Zakharia Sioufi writes about the UIA Women Committee; François Moysse presents information about the European Convention on the Legal Profession; Alberto Yelmo describes the criminal defense of those charged with sports corruption; the Dean of the Valencia Bar Association, Auxiliadora Borja Albiol, does a Q&A; the Ambassador of Iceland, and separately, Guillaume Deroubaix are interviewed; and Shahrazad Meerza explores whether a political obligation can be deemed voluntary.

In our next issue, for the first time in the *Juriste International* history, we will devote a special section to the emergence of Animal Law as a subject worthy of study and as a practice area. My friends in the UIA will know I was a pioneer in Animal Law in the U.S., where the subject has now become "normalized."

I take the helm with a salute to Marie-Pierre Richard, the Executive Director of the UIA, Nicole Van Crombrughe, my mentor, and Stephanie Roman, my esteemed legal assistant. Also, I express my gratitude to UIA President Jorge Martí Moreno for his enthusiasm in supporting the modernization of the *Juriste International*.

Barbara J. GISLASON
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Message du rédacteur en chef

I Barbara J. GISLASON

C'est avec gratitude envers l'UIA et ma pré-décesseure la brillante et talentueuse Nicole Van Crombrughe, que j'endosse ce rôle de leader qu'est la rédactrice en chef de l'un des trésors de l'UIA, le *Juriste International*. En ce moment historique, alors que nos membres sont personnellement menacés par la perte de leur famille, de leurs amis, de leurs collègues et, pour certains, de leurs moyens de vie, nous sommes toutes et tous en quête de ce qui donne un sens à notre vie.

Dès ma première réunion à l'UIA, après avoir déjà occupé des postes de direction aux États-Unis et participé à des actions institutionnelles au sein de barreaux organisés, j'ai immédiatement perçu que, dans son essence, l'UIA se distinguerait de toutes mes expériences passées. Si les membres de l'UIA veulent bien sûr profiter des connaissances et des visions partagées par les grands avocats du monde entier, ils adhèrent également à des valeurs fondamentales : un dévouement insatiable aux droits de l'homme et le désir profond de préserver avec vigilance l'État de droit. J'ai alors eu la certitude que ces convictions faisaient partie de l'ADN même des membres de l'UIA.

Avec l'idée de protéger le *Juriste International* comme joyau de la couronne de l'UIA, j'ai pour objectif que les membres de l'UIA lisent cette publication dès qu'elle leur parvient et l'accueillent avec satisfaction car elle est multiculturelle, publiée dans les trois langues de travail, intéressante, informative, utile, parfois amusante et, finalement, pleine d'inspiration.

Afin de positionner encore plus haut cette publication, j'ai réuni un comité de rédaction sans pareil. Lorsque vous lirez les noms de ceux qui ont accepté de siéger au sein de ce comité, vous comprendrez que celui-ci est composé d'avocats non seulement très respectés et très en vue au sein de l'UIA, mais aussi dans le monde entier, et que nous avons désormais un rédacteur en chef adjoint pour l'anglais, Steven Richman, de Princeton, New Jersey, une rédactrice en

chef adjointe pour le français, Catherine Peulvé, de Paris, France, et une rédactrice en chef adjointe pour l'espagnol, Laura Collada, de Mexico, Mexique. Pour le moment, notre liste de rédacteurs se trouve à la fin de cette publication. Bientôt, elle se trouvera au premier plan.

Vous vous demandez peut-être pourquoi ces merveilleuses personnalités ont accepté de faire partie du comité de rédaction du *Juriste International*. C'est parce qu'elles partagent une vision collective selon laquelle, grâce à la diversité des rédacteurs en chef, nous sommes dans une position unique pour appréhender les questions juridiques qui se posent dans une région ou sur un continent donné. Au cours de nos réunions mensuelles, nous nous écoutons les uns les autres pour veiller à ce que cette publication présente un aspect interculturel renforcé.

Si ce numéro du *Juriste International* présente beaucoup de contenus en anglais, nous travaillons pour offrir plus de matière dans nos trois langues de travail. Attendez-vous également à un changement dynamique de notre sommaire.

Dans ce numéro, voici quelques faits saillants : Madame le juge Bernice Donald et Michael Pates analysent l'impact de la dignité humaine sur le droit ; Andrés Szeckay réfléchit à l'équilibre à trouver entre l'intelligence artificielle et le droit ; Chloe Westerman et Kathleen Heycock présentent un article portant sur l'impact de la Covid-19 et du mouvement *Black Lives Matter* sur la vie quotidienne des avocats ; Ellie Krug, avocate transgenre, décrit comment surmonter le désespoir ; Grace Wang décrypte les problèmes juridiques que rencontrent les marques étrangères qui entrent sur les plateformes chinoises de commerce électronique ; Riccardo Cajola propose un aperçu du cadre réglementaire relatif à l'intelligence artificielle en Italie et de son application pour les praticiens du droit ; Madame le juge Tracie Todd explique comment mieux protéger les personnes qui se trouvent devant un tribunal ; Steven

Richman analyse comment les obligations professionnelles et la responsabilité sociale des entreprises se rejoignent ; Elisabeth Zakharia Sioufi nous parle du comité des femmes de l'UIA ; François Moysse présente la Convention européenne sur la profession d'avocat ; Alberto Yelmo décrit la défense pénale des personnes accusées de corruption sportive ; le Bâtonnier du Barreau de Valence, Auxiliadora Borja Albiol répond à une séance de questions-réponses ; Bergdís Ellertsdóttir, Ambassadrice d'Islande mais également Guillaume Deroubaix sont interviewés ; et Shahrazad Meerza s'interroge pour savoir si une obligation politique peut être considérée comme volontaire.

Dans notre prochain numéro, pour la première fois dans l'histoire du *Juriste International*, nous consacrerons une rubrique spéciale à l'émergence du droit des animaux en tant que sujet digne d'être étudié et en tant que domaine de pratique. Mes amis de l'UIA savent que j'ai été une pionnière du droit des animaux aux États-Unis, où le sujet est maintenant « normalisé ».

Je prends donc la barre tout en remerciant Marie-Pierre Richard, directeur administratif de l'UIA, Nicole Van Crombrughe, mon mentor, et Stephanie Roman, mon estimée assistante juridique. J'exprime également ma gratitude au président de l'UIA, Jorge Martí Moreno, pour son soutien et son enthousiasme pour la modernisation du *Juriste International*.

Barbara J. GISLASON
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Mensaje del Redactor Jefe

I Barbara J. GISLASON

Con gratitud a la UIA y a mi antecesora, la brillante y talentosa Nicole Van Crombrughe, asumo mi cargo como Redactora Jefe de uno de los tesoros de la UIA, el *Juriste International*. En este momento histórico en que los miembros sienten la amenaza de perder a sus seres queridos, amigos, compañeros de trabajo, y algunos incluso su sustento, todos buscan aquello que da sentido a su vida.

Desde la primera vez que asistí a una reunión de la UIA, donde ya había desempeñado cargos directivos en Estados Unidos, enseguida me di cuenta de que la esencia de la UIA era diferente de todo lo que conocía hasta entonces desde el punto de vista institucional de otras organizaciones de abogados. Si bien los miembros de la UIA querían, naturalmente, disfrutar de los conocimientos y las visiones transmitidos por grandes abogados de todo el mundo, los miembros también compartían una serie de valores fundamentales: una devoción insaciable por los derechos humanos y el firme deseo de preservar vigilantemente el Estado de derecho. Tenía el presentimiento de que estas convicciones estaban en el ADN de los miembros de la UIA.

Como protectora del *Juriste International*, una joya de la corona de la UIA, mi objetivo es hacer que los miembros de la UIA lean esta publicación en cuanto les llegue. La recibirán gustosos porque esta revista multicultural, que se presenta en tres idiomas de trabajo, es interesante, informativa, útil, en ocasiones divertida y, en última instancia, inspiradora.

Para dar un aire nuevo a esta publicación, he reunido a un Consejo Editorial incomparable. Cuando lean los nombres de quienes han aceptado colaborar, se darán cuenta de que estos Redactores no solo son abogados de prestigio en la UIA, sino en el mundo en general. Verán que ahora tenemos un Redactor Adjunto de habla inglesa, Steven Richman, de Princeton, Nueva Jersey (EE. UU.); una Redactora Adjunta de habla francesa, Catherine Peulvé,

de París (Francia); y una Redactora Adjunta de habla hispana, Laura Collada, de Ciudad de México (México). Por el momento, nuestra lista de Redactores figura todavía al dorso de esta publicación, pero pronto aparecerá delante.

Quizá se pregunten por qué estas personas tan maravillosas han aceptado formar parte del Consejo Editorial del *Juriste International*. Pues bien, compartimos una visión colectiva de que con esta diversidad de Redactores, nos encontramos en una posición excelente para estar al tanto de los temas que surgen en una región o un continente. Durante nuestras reuniones mensuales del Consejo Editorial, nos escuchamos unos a otros para asegurarnos de que esta publicación refleje una fuerte interculturalidad.

Aunque el tema actual del *Juriste International* tiene mucho contenido en inglés, estamos haciendo cambios significativos para ofrecer más contenidos en nuestros tres idiomas de trabajo principales. También verán un cambio dinámico en nuestro índice.

He aquí algunos de los temas destacados de este número: la Jueza Bernice Donald y Michael Pates analizan cómo influye la dignidad humana en el derecho; Andrés Szecskay habla de encontrar el equilibrio entre la inteligencia artificial y el derecho; Chloe Westerman y Kathleen Heycock presentan un artículo que persigue tomar conciencia sobre cómo el Covid-19 y el «Black Lives Matter» están afectando a la vida diaria de los abogados; la abogada transgénero Ellie Krug describe la superación de la desesperanza; Grace Wang describe los problemas legales a los que se enfrentan las marcas extranjeras que entran en plataformas de comercio electrónico chinas; Riccardo Cajola habla de «legal design» e inteligencia artificial; la Jueza Tracie Todd explica formas mejores de proteger a quienes están en los tribunales; Steven Richman escribe sobre cómo las obligaciones profesionales convergen con la responsabilidad social corporativa; Elisabeth Zakharia Sioufi escribe sobre el Comité

de las mujeres de la UIA; François Moysse informa acerca del Convenio europeo sobre la profesión de Abogado; Alberto Yelmo describe la defensa penal de los acusados de corrupción en el deporte; la Decana del Colegio de Abogados de Valencia, Auxiliadora Borja Albiol, presenta una sección de Preguntas y Respuestas; entrevistamos a la Embajadora de Islandia así como Guillaume Deroubaix.

En nuestro siguiente número, por primera vez en la historia de *Juriste International*, dedicaremos una sección especial a la emergencia del Derecho Animal como un tema digno de estudio y un área de ejercicio. Mis amigos de la UIA sabrán que fui pionera en Derecho Animal en EE.UU., donde ahora el tema está «normalizado».

Recojo el testigo saludando a Marie-Pierre Richard, Directora Administrativa de la UIA, Nicole Van Crombrughe, mi mentora, y Stephanie Roman, mi apreciada asistente jurídica. Asimismo, deseo expresar mi agradecimiento al Presidente de la UIA Jorge Martí Moreno, por el entusiasmo con el que apoya la modernización del *Juriste International*.

Barbara J. GISLASON
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Session du Comité des femmes de l'UIA
au congrès virtuel 2020

UIA News

Actualités de l'UIA

Novedades de la UIA





Session inaugurale du Comité des Femmes de l'Union Internationale des Avocats

I Elisabeth ZAKHARIA SIOUFI

Le Comité des Femmes de l'Union Internationale des Avocats (UIA), créé en septembre 2020, a inauguré ses activités en organisant une session de travail qui s'est déroulée sous forme de webinar le 29 octobre, durant le congrès virtuel de l'UIA qui s'est tenu du 28 au 30 octobre 2020.

Dans son allocution d'ouverture, Elisabeth Zakharia Sioufi, Présidente du Comité des Femmes et ancienne Présidente de la commission des droits de l'homme de l'UIA, a précisé que le premier objectif que se donne le Comité est de promouvoir et de renforcer le statut et le rôle des femmes avocates dans la profession. A cet effet, des ateliers de travail et des séminaires seront organisés dans le but d'identifier, dans une approche comparative, les différents problèmes à cibler, puis établir les actions susceptibles d'y remédier et arrêter le plan des actions que le Comité mettra en œuvre avec le soutien de l'UIA et en étroite collaboration avec ses membres individuels et collectifs.

Un autre objectif, et qui n'est pas de moindre importance, que le Comité s'est assigné consistera à œuvrer en vue d'améliorer la condition des femmes partout où il en est besoin, en particulier, éliminer la violence sous toutes ses formes à l'égard des femmes, et cela, en partenariat avec les représentants et les comités nationaux de l'UIA.

Dès la session du 29 octobre, le Comité s'est attelé à son premier objectif et a pu commencer à cerner les défis auxquels les avocates doivent encore faire face et qui affectent leur statut dans la profession et réfléchir aux moyens les plus pertinents pour les surmonter. Ces premiers éléments nourriront la réflexion en vue de l'élaboration de programmes et stratégies adéquats pour une réalisation concrète et effective.

Cette session de travail a réuni des consœurs et confrères de différents pays d'Europe et d'Afrique, d'Australie, du Mexique, du Koweït, de Macao, du Brésil et des États-Unis.

Le Président de l'UIA, Jorge Martí Moreno, le Président sortant Jerry Roth, à l'origine de cette initiative dont l'idée avait germé à la suite des trois webinaires célébrant la journée des Femmes Leaders des Barreaux organisés en septembre 2020, et la Vice-Présidente Urquiola De Palacio Del Valle De Lersundi, ont participé aussi à cette session inaugurale et ont tenu à exprimer leur soutien et leur appui au Comité et aux programmes qu'il compte lancer pour remplir ses objectifs.

Quatre oratrices ont pris successivement la parole durant cette session :

- Maria Cronin, Présidente du comité national de l'UIA au Royaume-Uni et ancienne Co-Présidente de la commission de droit pénal de l'UIA,

reaux et associations d'avocats et, surtout, à oser se présenter aux élections pour les fonctions de direction. Elles ont également insisté sur le fait que les femmes ne doivent en aucun cas perdre confiance en elles-mêmes ; bien au contraire, elles doivent gagner en assurance pour pouvoir s'imposer et progresser dans leur carrière.

Elles ont toutefois souligné qu'une évolution dans les structures des barreaux et les mécanismes électoraux était vivement souhaitée afin d'instaurer la parité qui ne peut qu'être bénéfique à la profession et à tous ses membres.

Dans cette perspective, le Comité des Femmes est appelé à organiser des rencontres avec des femmes leaders dans leurs

Reconnaître les compétences et la compétitivité des avocates selon les mêmes critères que pour leurs confrères constitue une priorité dans le processus de renforcement du statut des femmes dans la profession.

- Anna Masiota, Représentante nationale de l'UIA en Pologne,
- Pauline Wright, Représentante nationale de l'UIA en Australie,
- Anne Audrey Ekongolo, Présidente du comité national de l'UIA au Cameroun.

Chacune d'entre elles a exposé le statut des avocates dans son pays, les défis à relever pour promouvoir ce statut et le renforcer, et le rôle qu'elles considèrent que le Comité des Femmes peut remplir à cet égard.

Les interventions ont mis en évidence que, partout, les avocates rencontraient les mêmes défis. Bien plus, partout, et bien que les avocates sont de plus en plus nombreuses, elles sont toujours sous-représentées au niveau de la direction des barreaux, et rares sont celles qui accèdent au statut d'associée dans les cabinets d'avocats.

Les oratrices ont toutes exhorté les femmes à participer davantage aux activités des bar-

reaux en vue de renforcer les motivations des avocates, partager avec elles leur expérience et les accompagner dans leur parcours.

Reconnaître les compétences et la compétitivité des avocates selon les mêmes critères que pour leurs confrères constitue une priorité dans le processus de renforcement du statut des femmes dans la profession. Un changement dans les mentalités et les approches est désormais vivement requis et exige des campagnes de sensibilisation que le Comité des Femmes pourrait mener en partenariat avec les barreaux et les associations d'avocats.

Par ailleurs, s'ajoute une remise en question permanente par la femme de sa capacité à mener de front sa vie professionnelle et sa vie personnelle, notamment en cas de maternité. Ces considérations, sans fondement puisque de l'avis unanime de

nos oratrices, les femmes arrivent à bien gérer leurs obligations professionnelles et familiales quels que soient les efforts que cela leur demande, ne s'appliquent qu'aux femmes et constituent un obstacle et une entrave à leur promotion et à l'avancement dans leur carrière.

Pourtant, et quels que soient les points de vue à ce sujet, il suffirait d'une flexibilité dans les horaires et d'une évolution dans l'organisation des modalités de travail pour écarter toutes idées préconçues et adopter une approche plus juste et plus équitable à l'égard des femmes dans ce domaine.

Cette session, enrichie par l'expérience personnelle des quatre oratrices et leur analyse approfondie des différents thèmes qui y ont été abordés, et les recommandations proposées, a permis de dégager des problèmes d'actualité pressante qui ne peuvent plus être ignorés et qu'il convient de traiter instamment pour renforcer et promouvoir le statut et le rôle des femmes dans la profession d'avocat.

Le Comité des Femmes ciblera chacun de ces problèmes à travers des programmes et des plans d'actions spécifiques qu'il mettra en œuvre en collaboration avec les membres individuels et collectifs de l'UIA, tant la promotion du statut des avocates est un sujet d'intérêt général. Il en est d'autant plus ainsi que seule cette promotion permettra d'instaurer un véritable partenariat entre les avocates et les avocats dont les conséquences seront, de toute évidence, d'une grande importance pour la profession, son évolution et son avenir.

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The Role of Bars in the Promotion of Public Legal Education

Robert BOURNS

This article follows a discussion promoted by the Bar Leaders and Collective Members Committees of the UIA conducted virtually in December 2020.

We were grateful to receive contributions from senior representatives of Bars from Argentina; Azerbaijan; Barcelona; England & Wales; the French National Bar Council and Germany.

Public Legal Education in the context of this discussion focused on the need to increase the literacy of the population as a whole of their rights and responsibilities under the law.

As practitioners we share a concern to protect and promote the Rule of Law and with it, access to justice.

During the meeting we shared our concern for the current standing of the Rule of Law and the independence of practitioners in a number of jurisdictions, although the focus of our discussion was an apparent ignorance in the population as a whole of the significance of the Rule of Law in the maintenance of civil society.

Too often, from across the world and as frequently in "liberal democracies" as anywhere else, we see a casual disregard for or ignorance of the rights and responsibilities that individuals have "under the law". A disregard for the law can lead to populist policies, to the prejudice of individual rights or the exploitation of individuals to the commercial advantage of others.

The purpose of our discussion was to compare views from a number of Bars and to exchange experience and practice in seeking to promote the Rule of Law, with a particular emphasis on "Public Legal Education", raising awareness in the population as a whole, with an appreciation of the importance and value of "the Law".

Those speaking expressed the view that too few citizens understand the legal relationships that they will enjoy, whether in the course of their education, employment,

housing, family life, health and day to day, when buying and selling goods and services.

For example, without a proper appreciation of their rights, individuals may too easily release personal data or other information that has value. They may contract to hire or buy consumer and other goods, without fully understanding the nature of the contractual relationship, the potential liabilities and remedies available if they are unhappy with the service or product.

Lack of knowledge creates a risk of exploitation – for example, the settlement of claims for minor injuries or losses, administered by a retailer or insurance company, without allowing access to independent advice. The use of online services, the "capture" of consumers and the use of algorithms that may themselves contain inherent bias, can each undermine the rights of individuals.

Lack of knowledge very often coincides with other social disadvantage and need. Ignorance risks further disadvantage and increasing inequality.

We considered who has a responsibility for remedying this situation. In many jurisdictions we are aware that governments have reduced provision of publicly funded legal advice. The issues that might previously have led to a legally based resolution, may now go unresolved or be displaced to other agencies. Medical practitioners often complain that the health problem presented by their patients may be caused by a range of other problems – debt, poor housing, domestic violence and often a combination of a number of them. Treatment of the clinical condition, without effective access to advice and representation to unpick and resolve the "legal" issues, will be ineffective. The problem is not always displaced to medical or social services. A survey in England of some 400 "clinics" conducted by Members of Parliament with their constituents, identified that nearly 80% of all the problems raised by constituents concerned a matter that might be resolved through legal process.

Some are inclined to argue that the law is “too expensive”. That lawyers should “be cheaper” and the problem of accessing justice would be resolved. Understanding the real “value” of providing meaningful access to justice and the true cost of leaving social problems without resolution, should encourage legislators to support the legal infrastructure of society. Just as many governments will promote public health, they should encourage and promote “legal literacy”.

Those speaking recognised a wider responsibility, shared across society, but with the profession, having the subject matter expertise, playing an important part. However, without wishing to deflect attention, those speaking considered it important to identify the part played by others.

We recognised the role of educationalists, particularly in schools to ensure that students understand their relationship with the law. It should not be treated as something remote, “for other people” or associated with a small elite group within society, but at the very least a tool available to protect individual rights. There was strong feeling among those who spoke that lawyers should play a part in supporting education in schools. In so doing they would not only raise awareness of the value of the law to all, but also, hopefully, encourage young people to consider a career in the law. Therefore, while promoting a broader knowledge of legal rights and responsibilities, we might also encourage social mobility and wider access into the profession.

Given the nature of the problem, a focus on education in schools was thought to be too limited. Other, older members of the population also need to be informed / “educated” and, encouraged to recognise their capacity to identify a problem as susceptible to legal remedy. Those speaking referred to engagement across community groups to inform them of legal issues and provide access to practitioners who may be able to assist.

The profession recognises and plays its part in promoting the education of the public, raising levels of legal literacy. However, it must not allow others to escape their responsibilities or to present them as principally for resolution by the profession.

We recognise the responsibility of government in promoting public legal education, to encourage a respect for the law and the independence of the judiciary. Governments should ensure the school curriculum includes legal education. It should also make funds available to enable those without means to fund access to advice and representation. Beyond this governments should ensure that legislation is clear, the Court estate accessible and modern. Government should not disparage the Rule of Law and those, including practitioners, who support its administration in the interests of their clients and the public interest.

Beyond governments, we considered the role of the judiciary, in ensuring that process and procedures adopted are no more complicated than is necessary. We recognise that the law is complicated and that language needs to be used precisely to avoid ambiguity. However, unless unavoidable, it should avoid the archaic and obscure.

Likewise the Courts themselves should operate to reduce complication and the barriers that may intimidate or place certain litigants at a disadvantage.

Reflecting on these issues and how they might be resolved, we received illuminating insights from the various speakers. As before there was general agreement as to the nature of the problem, a desire to raise awareness in schools and in the population more widely. We wanted action to provide access to legal advice as early as possible, demonstrating that lawyers are on the side of their fellow citizens, subject always to the practitioner’s duty to uphold the Rule of Law itself.

We heard of practical steps taken by the French National Bar and, in some detail from the Barcelona Bar, which has developed and makes available its on line training materials to the public free of charge. This includes access to the Bar’s extensive library and a system of referral to practitioners who can provide early advice. The Bar also promotes a dispute resolution service, fast track arbitration and a regular newsletter providing guidance. The Bar promotes citizens’ rights and provides reviews with interviews with lawyers and non-lawyers,

emphasising accessibility. The purpose is to remove myths and develop a narrative with the community more widely to emphasise the ability to access advice.

Others spoke of the work of their Bars in using mobile units to take a “legal roadshow” to remoter areas, to enhance knowledge and provide access.

Our conclusion was that the profession has a deep and principled interest in promoting legal knowledge in the population as a whole. It is playing its part, with many members of the profession working tirelessly to defend their clients’ interests, often for very limited personal reward. Unhappily as we see almost daily in news reports from around the world, in too many places, this involves increasing risk to the personal safety of practitioners concerned and their ability to practice. Perhaps a population that has only a limited understanding of the essential value of the Rule of Law is slow to understand the significance of governmental controls of “activist lawyers”.

While working to discharge its own responsibilities, the profession is entitled to remind others of their responsibility to uphold the Rule of Law and promote meaningful access to justice. This requires a citizenry that is informed and a system of justice that is accessible.

It was clear from the range of contributions made, that Bars and their members are working to meet their responsibility, often recognising the social inequality that will be exacerbated by a lack of knowledge and access- “Knowledge is power.” We seek to share ideas on the activities that have the best effect, but should be confident in reminding others of the actions they can and should put in place to ensure that our citizens are increasingly literate in matters of the law.

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UIA 2020 VIRTUAL CONGRESS

Around the Legal World in Three Days



An Exciting Virtual Experience

This year, the UIA took Congress participants on a real adventure: Around the Legal World in Three Days. Our balloon trip, from October 28 to 30, took them to all the continents, where they could meet new colleagues and catch up with old friends. This world tour made "stops" at more than 35 virtual sessions.

The UIA had its own virtual conference centre! The Congress platform was ideal for both formal presentations and casual conversation among colleagues using a variety of technologies, including webinars and one on one or group chats.



Some Figures

- The 64th UIA Congress was the first to be held virtually!
- 471 participants
- 191 speakers
- 59 countries represented
- 37 working sessions
- 21 sponsors
- Up to 4 working sessions taking place simultaneously

Acknowledgments

The UIA expresses its sincere thanks to Jerome Roth, UIA President, and Sebastiaan Moolenaar, Director of Congresses, for their commitment to the success of the first UIA Virtual Congress. The UIA is extremely grateful to the Congress partners and UIAmbassadors for their support. The UIA would also like to thank the organising committee, Commission Presidents, and speakers without whom the success of this Congress would not have been possible.

Asamblea General

El Presidente Jerome Roth presentó las actividades de la UIA en 2020. Un año lleno de desafíos con la crisis sanitaria pero que fueron superados gracias a la energía del equipo UIA y de los miembros activos de nuestra asociación.

La Asamblea General de la UIA confirmó la nominación de Urquiola de Palacio (España) a la vicepresidencia de la UIA.

Urquiola de Palacio asumirá la presidencia de la UIA en noviembre de 2022.

Al final de la Asamblea General, recibimos un mensaje de solidaridad, amistad y camaradería de algunos miembros de la UIA. A pesar de la adversidad, hoy más que nunca, la UIA reúne a los abogados del mundo.

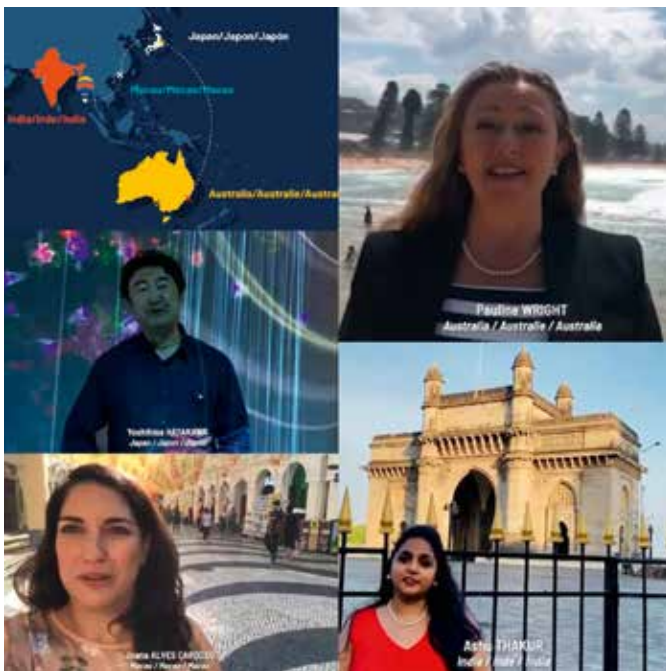




Opening Ceremony

The UIA had the honor of welcoming former United States Attorney General Loretta Lynch and French Minister of Justice Eric Dupond-Moretti for its first Virtual Congress. They gave two vibrant speeches. UIA President Jerome Roth gave an inspiring

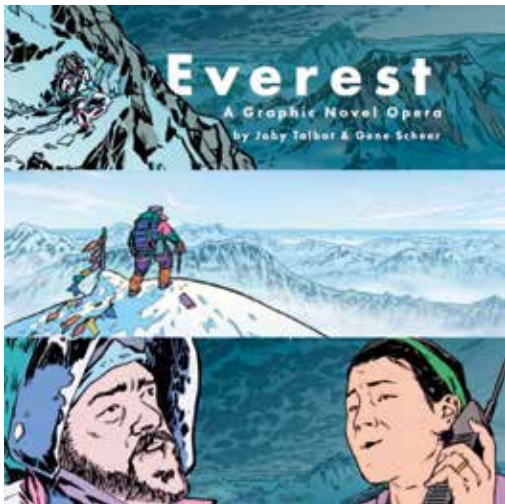
speech about the Rule of Law, racism, and the place of women. The speeches were interspersed with welcome messages and greetings from UIA members all over the world.



Activités sociales

Notre e-aventure a aussi laissé une large part aux interactions et activités sociales : au cours des trois jours de travaux scientifiques, les discussions entre confrères se sont prolongées dans le *networking lounge*.

Les participants ont eu la chance de pouvoir découvrir l'opéra de roman graphique «Everest», une création de la compagnie Opera Parallèle: une expérience théâtrale



innovante grâce à des capteurs placés sur le visage des chanteurs qui reproduisent fidèlement leurs expressions dans l'animation !

Des groupes multiculturels ont également partagé un moment convivial et amusant lors du quiz virtuel. C'est l'équipe Nobel qui a gagné (évidemment, avec un tel nom, ils étaient prédestinés à remporter le prix !)

Enfin, les participants ont pu échanger leurs impressions sur ce premier congrès virtuel autour d'un cocktail virtuel qui s'est tenu à l'issue de la cérémonie de clôture.



Congress Partners

For the first time, the exhibition was accessible 24 hours a day! Congress participants were able to meet and interact with UIA partners as they would have in the exhibition hall of a live Congress. The following exhibitors presented their services and products:

- LexisNexis
- CIAM (Madrid International Arbitration Center)
- Columbia Law School
- FTI Consulting
- DocuCert
- AIJA



Exposition virtuelle - Visages de la Liberté

L'exposition virtuelle « Visages de la liberté » présente les portraits de 12 avocats et défenseurs des droits et libertés qui, chacun dans leur pays, sont poursuivis, menacés et risquent leur vie pour exercer le droit de défendre leurs clients. Cette exposition, présentée pour la première fois

au public à Nantes en France début janvier 2020, a été organisée en partenariat avec le Barreau de Nantes, le Conseil national des Barreaux français et Artlabs. Nous l'avons intégrée à notre congrès virtuel de l'UIA au moyen d'une version vidéo.



UIA Awards



Comité national de l'année

Le prix du comité national de l'année a été attribué au Comité national algérien. Bravo à son Président Fayçal Driouèche et aux membres algériens pour leur dynamisme ! Merci également à Ridha Saim pour son engagement aux côtés de l'UIA. Nous sommes reconnaissants de sa fidélité (25 années d'adhésion : 1995-2020).



Comisión del año

El premio de la comisión del año fue entregado a la comisión Derecho de la Moda presidida por Francisco Javier García. Este premio recompensa el trabajo científico y todas las actividades desarrolladas por la comisión a lo largo del año.

UIA/LexisNexis Rule of Law Prize Awarded to ELIL

European Lawyers in Lesvos (ELIL), a charitable, non-profit organization specialising in asylum law and providing free legal assistance to asylum seekers on the Greek islands of Lesvos and Samos, was awarded the 2020 UIA Rule of Law Award in cooperation with LexisNexis.



The award was presented by Nigel Roberts, Vice President of Global Associations at LexisNexis and Vice President and Secretary of the LexisNexis Rule of Law Foundation, and Jacqueline R. Scott, Director General of the UIA Institute for the Rule of Law (UIA-IROL) at the opening ceremony of the Virtual Congress.



With this award, UIA and LexisNexis recognize ELIL's strong commitment to ensuring effective access to justice to refugees by providing independent and informed legal advice to those who desperately need it. UIA believes that ELIL's collective effort is a remarkable example of the role lawyers and the legal profession play - and can continue to play - in upholding and promoting the Rule of Law.

Working Sessions

Administrative and Regulatory Law | Art Law | Banking and Financial Law & Real Estate Law | Bankruptcy Law | Biotechnology Law, Health Law & Insurance Law | Competition Law

Contract Law, Litigation & International Sale of Goods | Corporate Law and M&A, Management of Law Firms | Criminal Law & Tax Law | Environmental Law & Foreign Investment | EU Law | Family Law

Fashion Law, IT Law & IP | Food Law | Human Rights | Immigration and Nationality Law | Labour Law & Startup and Venture Capital | Media Law

Mediation and Conflict Prevention | Private International Law & Transport Law | Protection of Lawyers | Women's Committee | Young Lawyers' Committee

Commissions' presidents and speakers at UIA virtual congress
Présidents de commissions et orateurs au congrès virtuel de l'UIA
Presidentes de las comisiones y ponentes al congreso virtual de la UIA

YOU MADE IT HAPPEN! *Thank you!*

UIA 2020 VIRTUAL CONGRESS



Thème principal 1

Le financement par des tiers est-il bénéfique ou préjudiciable à l'arbitrage international ? Perspectives contrastées des parties, des arbitres et des financeurs

Laurence Kiffer, présidente de la commission Arbitrage international de l'UIA, a modéré un panel d'experts composé de Nadia Darwazeh, Dana MacGrath et Eduardo Silva Romero.

Main Theme 2

Conventional Courts have seen their Day: It Is Time for a New System

The second day of the Congress saw Hendrik Puschmann and Flora Harragin, from our UIAdvance law firm Farrer & Co, go head to head in a debate. Simon Bruce refereed and tried to show lack of partisanship! It was great to see lawyers from The Democratic Republic of Congo, France, Mexico, and India partake.

Hendrik made a strong argument that traditional court systems have not had their day, nor should they. Hendrik's main points included: the reputation of arbitration,

which cannot replace courts; the unsuitability for many areas of law; and the frustration virtual court business has caused during Covid-19.

Conversely, Flora spoke passionately about the advantages of the new medley of in-person, hybrid, and remote hearings. She argued that remote and hybrid hearings are necessary, just, and fair, they minimise delay, and the prejudice that the delay causes to children's welfare. She also argued that these hearings are cheaper, more convenient, and better for our environment.

Simon summarised that there should be more of an à la carte sorting out of cases, some of which will be suitable for the new system of decision-making; and others, much more significant, should only be dealt with in face-to-face hearings. The aim should be a really slick new normal. Simon declared a score draw between the rival teams of Hendrik and Flora!

Source: Farrer & Co



Dominique Kambala DR Congo, Simon Bruce United Kingdom, Flora Harragin United Kingdom

Main Theme 3

Confronting Issues of Systematic Racism in the Legal System – The Role of Lawyers Around the World

The final main theme panel covered institutional racism in justice systems around the globe. Led by Judge Peter Reyes, a frank and important conversation was held with Paulette Brown (US - Former ABA President), Thiago de Souza Amparo (Brazil - Professor and journalist), and Félix de Belloy (France - pro bono specialist in police arrests). A critical dialogue UIA intends to continue...



Main Theme 3: Confronting Issues of Systematic Racism in the Legal System: The Role...

Comité des femmes

Après les débats passionnants des Journées des Femmes Leaders des Barreaux, le Comité des femmes de l'UIA, présidé par Elisabeth Zakharia Sioufi (Liban), s'est réuni à l'occasion de notre congrès virtuel. Les intervenantes et intervenants ont examiné le statut des femmes dans la profession à travers une approche comparative (Australie, Cameroun, Pologne et Royaume-Uni). Une session spéciale qui a suscité un bel engouement !



Unlimited Online Access to 35+ Sessions

After broadcast, most sessions were available on demand until November 30, so attendees were able to watch them anytime during the Congress or for up to a month afterwards. This is one of the benefits of attending a Virtual Congress!



UIA-LexisNexis Publications

During the Virtual Congress, the eighth, ninth, and tenth volumes of the UIA-LexisNexis Publications Collection were presented. The UIA thanks Carlo Mastellone for his amazing job during these five years! There were ten books published in total. What an achievement! The UIA is truly grateful.



Family Law: Challenges and Developments from an International Perspective

Editor: Federico Prus

A multi-jurisdictional analysis of marriage, custody, and divorce. Discussing differing legal systems and their recognition of relationships.



Environmental Law and Sustainable Development

Editor: Carlos de Miguel Perales

A multi-jurisdictional analysis of environmental legislation. The participants discussed changing trends and emerging issues relating to smart cities, corporate accountability, waste management, and electric mobility.



Fashion Law: Trends and New Challenges

Editor: Fco. Javier García

An exciting and insightful guide was presented for any legal practitioner assisting clients in the world of fashion houses and big branding.



Jorge Martí Moreno, nuevo Presidente de la UIA

Jorge Martí Moreno, socio de Uría Menéndez en Valencia, es el nuevo Presidente de la UIA.

Entre las propuestas que defenderá Jorge Martí Moreno durante su mandato, cabe destacar la implementación de programas internacionales de asesoramiento gratuito entre miembros de la UIA, la creación de los Premios UIA para reconocer el trabajo de jóvenes abogados y estudiantes de Derecho y la implantación de programas de mentoring.

Además, desea consagrar su Presidencia a aumentar el papel de la UIA en el mercado anglosajón e incrementar su

influencia en mercados emergentes asiáticos, como la India y China. Y, también, aprovechar los beneficios de las nuevas tecnologías y las redes sociales en materia de imagen, fortalecer el compromiso de la UIA en la defensa de los derechos humanos y la diversidad, y fomentar el papel de la mujer y de los jóvenes en “una organización inclusiva y global que lucha contra la injusticia y nos permite vivir en una sociedad más justa”.



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El papel de los Colegios de abogados y de las mujeres abogadas en la lucha para poner fin a la violencia contra las mujeres
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Fight Against Systemic Racism

I Jerome C. ROTH

Note from the Editor-In-Chief: as we say goodbye to 2020, the Juriste International Editorial Board thought it important to memorialize this historical letter written by our now Past President, Jerome Roth. 46 members of the U.S. National Committee were signatories.

Dear Members, Dear Colleagues, Dear Friends:

Along with the undersigned members of the United States National Committee of the UIA, I am addressing this letter to our fellow UIA individual and bar association members around the world.

Our country, the United States, is going through an extraordinarily difficult time.

As many of you know, a few weeks ago a white police officer in the State of Minnesota killed an unarmed Black man, George Floyd, by kneeling on his neck for over 8 minutes as three fellow officers stood by and as the man pleaded that he could not breathe. The incident was filmed, and the video clip is horrific. The police officers have been arrested and will be tried according to the law. But the brutality of the incident has given rise to nationwide soul-searching.

The killing follows other instances in which unarmed Black men and women in the United States have been killed by police officers. And it comes at a time when our Black communities are bearing the worst consequences of the COVID pandemic and of the associated financial turmoil.

More broadly, Black and other minority Americans continue to suffer from the systemic racism that permeates our national life, from inferior housing, education and health care, to reduced employment opportunities and salaries, to wealth disparities and voter suppression. The impact of our national history, including centuries of slavery, segregation and legally-sanctioned discrimination, persists in the injustices that occur today.

Over the past few weeks since the killing, the anguish and exhaustion of our fellow Black Americans has been palpable. Protests across the country and across the world, involving people of all races, ages and backgrounds, reflect a renewed determination to confront the situation and to work to rectify it. The time has come for real, lasting change.

I have spoken out often as President of UIA about the Rule of Law. Along with IROL, the UIA Institute for the Rule of Law, I have been vocal in objecting wherever in the world we have seen the Rule of Law endangered, lawyers persecuted, and human rights violated. But the Rule of Law for each of us must start at home. We want to be clear: the killing of George Floyd violates the Rule of Law. He received no due process. He received no even application of fairly promulgated laws. He was brought before no independent judge. He had access to no independent lawyer. He was afforded no protection of his human rights. We denounce those transgressions forcefully and unambiguously. We cannot ask other countries to live up to fundamental principles if we do not demand the same of our own country. We must take action.

A number of us in the UIA-US delegation have agreed to work together to help find solutions which we will be sharing with you. They range from recommending changes to existing police practices to identifying ways to root out racism, implicit bias and unequal treatment in all aspects of our society, including in our legal profession.

When I became UIA President in Luxembourg last October, I promised during our closing ceremony that I would focus on two questions during my term: What is the role of the lawyer in the face of injustice? What is the role of law associations like ours? For the US lawyers signing this letter, the time to answer those pressing questions with action is now.

As UIA lawyers, we have an important role to play. Lawyers have special access

to power, we have a unique opportunity to make our voices heard, and we have a national and international network which, when it works together, can accomplish more than any of us individually.

We ask you, our fellow UIA members, to join us in our mission to breathe new life into our long-standing UIA values: respect for diversity, collegiality and friendship, exchange of ideas across communities, and protection of the Rule of Law. We want to understand how racism impacts your countries. What steps can be taken to combat racism everywhere it exists? What advice do you have and what help do you need? How do you think lawyers acting together help bring about lasting change?

Please feel free to reach out with your ideas to me personally or to other members listed below. We are committed to working closely with our UIA colleagues, to taking advantage of the opportunities UIA offers us, and to Bringing Together the World's Lawyers in order to eliminate the stain of racism wherever it exists, including in the legal profession we all cherish.

Thank you.

Jerome C. ROTH
President, UIA
June 2020



Human Dignity is the Bedrock of a Just Rule of Law: New ABA Policy Emphasizes Foundational Principles

All human beings are born free and equal in dignity and rights.
Universal Declaration of Human Rights (1948)

I Hon. Bernice B. DONALD & Michael PATES

Human dignity stands for the simple and undeniable proposition that all human beings have worth that is equal, inherent, and inalienable. In the aftermath of World War II, human dignity was universally recognized as “the foundation of freedom, justice and peace in the world.”² Since then, dignity has been recognized in more than ten international human rights treaties, in the constitutions of nearly 160 nations, and innumerable domestic laws. It has also been instrumental in thousands of juridical decisions from international and regional tribunals and from domestic courts on every continent, including at the national and subnational level in the United States.

For decades, the U.S. Supreme Court has invoked dignity as foundational to rights protected under the Eighth Amendment and the Due Process and Equal Protection Clauses. The rights of the accused, the infirm, the transient, and the dispossessed are protected under other constitutional provisions. The right of every person, everywhere, to have his or her dignity respected is the very essence of human rights, justice, and democratic rule of law.

The American Bar Association (“ABA”) therefore formally embraced “dignity rights” in August 2019 in advocating for human rights and a just rule of law domestically and internationally. The act brought the ABA closer to the worldwide standard for human rights and strengthened its position as a leader within the United States in matters of justice, democracy, and the rule of law. The ABA policy resolution reads as follows:

RESOLVED, That the American Bar Association affirms that human dignity — the inherent, equal, and inalienable worth of every person — is foundational to a just rule of law; and

FURTHER RESOLVED, That the American Bar Association urges governments to ensure that “dignity rights” — the principle that human dignity is fundamental to all areas of law and policy — be reflected in the exercise of their legislative, executive, and judicial functions.³

already undergird U.S. law (Part II); and examines the growing recognition of dignity rights in constitutions and courts around the globe (Part III).

I. Dignity Rights Overview

The concept of human dignity means, quite simply, that every person has inalienable equal worth.⁴ This incontrovertible but profound concept has three elements. First, every

In 2017, the Supreme Court invalidated a citizenship law creating different standards for unwed mothers and fathers.

The passage of this resolution has had the immediate effect of strengthening the ABA’s work in several ways. First, it ensures that the ABA is on solid policy ground when it condemns practices, such as torture, humiliation, and invidious discrimination. Second, it provides support for ABA activities that are designed to advance human dignity, policies, and practices that promote the rule of law, democratic and political rights, and other civil rights. Third, it provides a vocabulary for defending liberty and pursuing justice. And fourth, it serves as a unifying principal to reflect what matters most to the Association, as stated in its longstanding slogan: “Defending Liberty, Pursuing Justice.”

This article elucidates the concept of dignity rights and describes its evolution (Part I); details the extent to which dignity rights

member of the human race has value; no one can be dismissed, ignored, mistreated, or abused as if their humanity does not matter. Moreover, every human being has a right to agency, to self-development, and to choose one’s life course. Second, each person’s worth is equal to every other person. No one’s life is more important than any other person’s life. Each person’s right to human flourishing is the same as every other person’s right. Notwithstanding our myriad individual differences, dignity is what unites us: in our humanity, we are all the same. Third, each person’s worth is inherent and inalienable; human dignity exists whether governments recognize it, and powers public and private must be held to respect and promote it.

Over the last century, dignity has been increasingly recognized as a legal right in the United States and throughout the world,

particularly since the creation of the United Nations and the adoption of the Universal Declaration of Human Rights (“UDHR”). This Charter of the United Nations explains that its very purpose is to protect human dignity.⁵ The UDHR recognizes that “the inherent dignity...of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁶ Advancing human dignity is also a central feature of both the International Covenant on Civil and Political Rights (which the United States has ratified),⁷ and the International Covenant on Social, Economic and Cultural Rights (which the U.S. has not).⁸ Together, these instruments are binding on most nations of the world.

Moreover, human dignity serves as a central feature of other human rights instruments, such as the UN Convention on the Rights of the Child,⁹ the Stockholm Declaration on the Human Environment,¹⁰ and the UN Sustainable Development Goals (“SDGs”).¹¹ Human dignity is also a constitutional guarantee in nearly 160 countries.¹²

II. Dignity Rights in the United States

Dignity is increasingly impacting U.S. law. The U.S. Supreme Court has invoked dignity in upholding basic civil and political rights, such as to citizenship (“[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man”),¹³ to equal treatment (the “Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens,”)¹⁴ to treatment when subject to criminal arrest (“the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens”),¹⁵ to fairness in treatment of the poor (“[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders,”)¹⁶ and to dignity in the administration of the death penalty (“The [Constitution] sets forth, and rests upon, innovative principles original to the American experience [and includes] broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees

are central to the American experience and remain essential to our present-day self-definition and national identity.”)¹⁷

The concept of dignity has been attached to constitutional protections in other ways as well. In the early 1960s, U.S. Supreme Court Justice William O. Douglas applied the constitutional right of dignity to “suspect minorities.”¹⁸ In the 1970s, the Supreme Court invoked human dignity as a basis for recognizing rights of aliens,¹⁹ and in the 1980s, of women,²⁰ older Americans,²¹ and people with disabilities.²² This trend has continued (and grown) into the present. In 2017, the Supreme Court invalidated a citizenship law creating different standards for unwed mothers and fathers. In that case, Justice Ginsburg held that the disparity in the criteria for the different genders “cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.”²³

Parenthood of Southeastern Pennsylvania v. Casey decided that the right to choose to terminate a pregnancy was a choice “central to personal dignity and autonomy” and constitutionally protected because “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life...”²⁶ More recently, in *Obergefell v. Hodges*, the Supreme Court observed that the liberties protected under the due process clause “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs” and therefore include the choice to marry a person of the same gender.²⁷ These cases demonstrate the Court’s profound commitment to resting the substantive right to liberty on a foundation of individual human dignity.

Relying on these cases, plaintiffs in the U.S. are beginning to embrace, and advocate for, the recognition of their own dignity in

The Constitution of India includes, as one of its fundamental aims, to assure “the dignity of the individual.”¹

In First Amendment jurisprudence, under the United States Constitution, dignity operates both as a sword (assuring the right to express oneself freely and the right to information to make such expression meaningful) and as a shield (protecting against defamatory and other harmful speech). Thus, defamation laws, as well as laws suppressing hate speech, fighting words, and other speech “which by its very utterance inflicts injury,” might in fact promote individual dignity.²⁴ The free speech case of *Cohen v. California* braided together ideas of political discourse, individual autonomy, and human dignity, holding that the First Amendment puts “the decision as to what views shall be voiced largely into the hands of each of us...in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”²⁵

In substantive due process cases, the Supreme Court has shifted its privacy jurisprudence toward a more textually grounded concept of liberty, undergirded by the recognition of human dignity. A plurality in *Planned*

enforcing other legal rights. The notion of dignity as the development of one’s identity and the ability to make personal choices directing one’s life path has been invoked by the so-called “Dreamers” to maintain the Deferred Action for Childhood Arrivals (“DACA”) policy. The argument is that DACA allows its recipients “to live their lives with the same dignity and liberty that others have: to be gainfully employed and free to be with family and friends and to form the other enduring attachments of normal life.”²⁸

In a case originally brought against President Obama in 2015, a group of child plaintiffs make the claim that their dignity is harmed by the potentially catastrophic effects of climate change and the government’s failure to take action to mitigate it.²⁹ People are beginning to recognize that dignity connects them to legal issues in a way they can understand and ‘own’ and can bolster their arguments as plaintiffs when invoking a specific right.³⁰

Dignity rights are also a feature of subnational constitutions; in the United States, two examples are the State of Montana (“The

dignity of the human being is inviolable. No person shall be denied the equal protection of the laws³¹) and the Commonwealth of Puerto Rico (“The dignity of the human being is inviolable”).³²

III. Dignity Rights around the Globe

Dignity rights have been recognized in the constitutions of nearly 160 countries.³³ Dignity is becoming a universally recognized constitutional value, transcending geographic, cultural, and political boundaries. Today, few constitutions are adopted or meaningfully amended without adding a reference to human dignity, and most protect human dignity in a variety of ways.³⁴

Indeed, promoting human dignity often serves as the very basis for national existence, as is expressed in the Constitution of Peru, which states, “The defense of the human person and respect for his/her dignity are the supreme purpose of the society and the State.”³⁵ The Constitution of India includes, as one of its fundamental aims, to assure “the dignity of the individual.”³⁶ In the more recent Constitution of Tunisia, dignity is an element of the republic’s motto, as well as an enforceable right.³⁷

Moreover, the constitutions of many nations assert that dignity is an independent, enforceable, and substantive right. For example, the German Basic Law of 1949 provides that, “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”³⁸ Such constitutional ‘inviolability’ of human dignity is increasingly common.³⁹ Constitutions also protect human dignity in a way that reinforces or animates other rights. The 1948 Constitution of Italy states, “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.”⁴⁰

The 2011 Constitution of Morocco states, “No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] degrading treatments or infringements of human dignity.”⁴¹ Constitutions also sometimes recognize the dignity of certain vulnerable segments of the population, including women, children, the elderly, and prisoners. Often,

dignity animates several aspects of a single constitution, as in South Africa, Kenya, Colombia, and other countries, where it is recognized as a fundamental value, as well as one or more enforceable rights.⁴²

Because of these provisions, and of the global movement to appreciate the fundamental role that recognition of dignity plays in the application of human rights, more and more cases are being brought before courts around the world demanding the protection of human dignity. And jurists are increasingly embracing the opportunity to give meaning to dignity, even in cases where it is not absolutely needed for the resolution of the case; that is, they are *choosing* to address the human dignity dimensions of the claims, just as the U.S. Supreme Court has done in cases such as those cited above.

In the last few decades, dignity rights have been invoked, interpreted, and applied by courts in thousands of cases and in a wide variety of factual settings. Notable examples include Argentina, where dignity is the foundation for freedom of speech and right of association;⁴³ South Africa, where civic dignity protects voting rights and other rights associated with the political process;⁴⁴ Israel, where it is a

individuals to demarcate the limits of governmental power and expand their own liberty. Courts have used dignity to elucidate when rights are violated and to remedy personal harms. Recognizing dignity does not mean that plaintiffs always win, of course; yet it draws attention to what is at stake in these cases, provides a framework for addressing competing values, and ultimately improves the prospects of achieving justice.⁵¹

Conclusion

Human dignity is the foundation of human-rights protection in the twenty-first century. Because it recognizes and reflects that every person is equal in his or her human worth, and attaches to every person equally—regardless of gender, race, social or political status, talents, merit, or any other differentiator—it represents the commitment to equality and non-discrimination that is fundamental to American law and to a just rule of law anywhere in the world. Because it recognizes and reflects that every person has worth that must be respected, it also represents the law’s affirmation that every person must be treated fairly and justifies the law’s commitment to due process.

Courts have used dignity to elucidate when rights are violated and to remedy personal harms.

“mother right” whose “daughters” include the right of family unity, as well as the right of prisoners to be treated humanely, among many other rights;⁴⁵ Colombia, where dignity is a measure of the state’s obligation to provide health care;⁴⁶ Germany, where the level of pension benefits must allow a person to live in dignity;⁴⁷ Nigeria and Ireland, where the right to live with dignity includes the right to a clean and stable environment;⁴⁸ Pakistan, where the concept of dignity includes climate and water justice;⁴⁹ and India, where dignity guarantees the right to travel.⁵⁰

These cases reveal that human dignity—while an intrinsic and universal human quality—is also a right that governments are bound to respect and that courts are bound to enforce. They show that dignity is a concept that has a defined meaning in law to strengthen democratic institutions while empowering

Nearly more than any other human or legal right, dignity expresses the human experience as individual human beings experience it. People may not think in terms of which rights have been violated; but they know when their dignity has been violated, when a government has allowed conditions that make them feel less than equally human or impair their right to full self-development.⁵² By focusing on what matters most to people—being treated as a person of equal worth—the law of dignity rights reminds us of what is really at stake. The focus of dignity rights on *worth* reminds us that every person matters; its focus on *equality* reminds us that every person matters equally; and its focus on *inalienability* reminds us that no authority has the power to diminish a person’s dignity. The ABA’s affirmation of human dignity as the foundation of a just rule of

law, democracy, and the advancement of human rights in the United States therefore marks an important milestone in the annals of the American legal profession.

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Editor's Note

An exception has been made regarding endnote policy for this extraordinary article.

1. Constitution of India, Preamble.
2. Universal Declaration of Human Rights, Preamble (Dec. 1948).
3. American Bar Association, Res. 113B (Aug. 2019).
4. See generally, Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Penn 2013); Erin Daly & James R. May, *A Dignity Rights Primer*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252694. This report draws from the work of Sara E. Evans and Profs. Erin Daly and James R. May, under the auspices of the Dignity Rights Project at Delaware Law School. See <https://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/signature-programs/dignity-rights-project/>.
5. Charter of the United Nations, available at <http://www.un.org/en/charter-united-nations/>
6. Universal Declaration of Human Rights, 1948, Preamble, available at <http://www.un.org/en/universal-declaration-human-rights/>.
7. Available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
8. Available at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.
9. Convention on the Rights of the Child, UNDRIP. The United States is a signatory to the former.
10. "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." <http://www.un-documents.net/unchedec.htm>.
11. Adopted by all UN member states in 2015, the SDGs "envisage a world of universal respect for human rights and human dignity," recognize "that the dignity of the human person is fundamental," and establish a goal to "ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment." <https://sustainabledevelopment.un.org/?menu=1300>.

12. <https://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/signature-programs/dignity-rights-project/dignity-rights/>.
13. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
14. *Sessions v. Morales-Santana* (2017), 582 U.S. ____ (2017).
15. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).
16. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).
17. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).
18. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 561 (1963).
19. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976).
20. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).
21. *W. Air Lines v. Criswell*, 472 U.S. 400, 410 (1985).
22. *Olmstead v. L.C.* by Zimring, 527 U.S. 581, 609 (1999); *Tennessee v. Lane*, 541 U.S. 509 (2004).
23. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017).
24. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
25. 403 U.S. 15, 24 (1971).
26. 505 U.S. 833, ____ (1992).
27. *Obergefell v. Hodges*, 576 U.S. ____ (2016). See also *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").
28. Reply Brief for the Garcia and County of Santa Clara Plaintiffs in Regents of the University of California, v. U.S. Dept. of Homeland Security, 2018 WL 1951528 (C.A.9), 6-8, citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).
29. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), see Plaintiff's Complaint for Declaratory and Injunctive Relief, 2015 WL 4747094 (D.Or.).
30. Dignity is also increasingly resonating in public discourse. See e.g. David Leonhardt, "Dignity for All Making the case for a new guiding economic principle," *New York Times*, March 12, 2019 (<https://www.nytimes.com/2019/03/12/opinion/democrats-economy-dignity-sperling.html>), discussing Gene Sperling, "Economic Dignity," *Democracy Journal*, vol. 52 (Spring 2019) (<https://www.nytimes.com/2019/03/12/opinion/democrats-economy-dignity-sperling.html>).
31. *Mont. Const. Art. II, § 4* (1972).
32. *Puerto Rico Const. Art. II § 16*.
33. Dignity Rights Project database of constitutional provisions, available at <https://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/signature-programs/dignity-rights-project/dignity-rights/>.
34. *Id.*
35. Constitution of Peru, Article 1.
36. Constitution of India, Preamble.
37. Constitution of Tunisia, Article 4.
38. Basic Law of Germany, Article 1.
39. Constitution of Kosovo, Article 23.

40. Constitution of Italy, Article 3.
41. Constitution of Morocco, Article 22.
42. Constitution of South Africa, Articles 1 and 10; Constitution of Kenya, Article 10(2), 19, 24, and 28; Constitution of Colombia, Articles 1 and 21.
43. *Asociación Lucha por la Identidad Transvesti-Transexual v. Inspección General de Justicia, Argentina Supreme Court of Justice* (21 November 2006).
44. *August and Another v. Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999).
45. *Golan v. Prison Services* (1996) IscrSC 50 (4) 136; *Gal-On v. Attorney General*, HCJ 466/07 (2012).
46. *Sentencia T-292/09* (Constitutional Court of Colombia).
47. BVerfG, Judgment of the First Senate of 09 February 2010 - I BvL 1/09 - paras. (1-220), http://www.bverfg.de/e/ls20100209_lbvi000109en.html.
48. *Nigeria: Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005); *Merriman & ors -v- Fingal County Council & ors; Friends of the Irish Environment Clg -v- Fingal County Council & ors* Neutral Citation: [2017] IEHC 695 at 292, citing Constitution of Ireland (Bunreacht Na Héireann), Art. 40.3.1.
49. *Ashgar Leghari v. Federation of Pakistan* (Lahore High Court, Pakistan, 2018).
50. *Maneka Ghandi v. Union of India* (1978) 2 SCR 621.
51. Other disciplines are catching up to the law regarding the primacy of dignity as an organizing principle. See, e.g., Gene Sperling, "Economic Dignity: We must not lose sight of what economic policy is all about: allowing people to lead dignified lives." *Democracy: A Journal of Ideas* (Spring 2019), available at <https://democracyjournal.org/magazine/52/economic-dignity/>.
52. See, e.g., Lauren Van Metre and Linda Bishai, "Why Violent Extremism Still Spreads," *Just Security*, Mar. 11, 2019 available at <https://www.justsecurity.org/63169/violent-extremism-spreads/> (accessed Mar. 12, 2019). "Violent extremist groups continue to grow from the sense of injustice, futility, and betrayal that stems from predatory state behavior. A comprehensive countering strategy needs to focus squarely on the relationship between citizens and their state by creating leverage for citizens to exercise their democratic power and authority." *Id.* Linda Bishai is former Director of Research, Evaluation, and Learning at the ABA Rule of Law Initiative.
53. Hon. Bernice B. Donald is former Chair of the American Bar Association (ABA) Center for Human Rights (CHR) and currently chairs its Dignity Rights Initiative. Michael Pates is Director of ABA CHR. This article is adapted from the report that accompanied CHR's policy proposal (113B) regarding dignity rights, which the ABA House of Delegates adopted in August 2019. Neither that report nor this article constitutes ABA policy themselves. The authors thank Profs. Erin Daly and James May of Widener University's Delaware School of Law for their major contributions to this article.



Transgender Persons: Understanding Human Authenticity

I Ellie KRUG

Transgender people often face discrimination, including by their own governments. This article describes how the U.S. Administration, in the past four years, systematically targeted and marginalized transgender Americans. The article also explains what it means to be transgender and how one's gender identity is tied to human authenticity.

Realizing that it is extremely risky to begin an article by making a reader inquiry without first providing context for that inquiry, I ask that you read on.

Question: In the period of 2017 to late 2020, apart from immigrants – that is, persons with birth origins outside the United States seeking to live in the U.S. – what other specific group of humans has the United States government regularly targeted for discrimination?

Answer: Transgender persons.

As a transgender woman, and as a former civil trial lawyer of nearly 30 years, I am personally aware of how the full force of the United States government has systematically marginalized my community. Consider the following:¹

- In July 2017, with a Tweet, President Trump declared that transgender people would no longer be allowed to serve in the U.S. military. That Tweet eventually led to an estimated 15,000 service members either leaving the military or hiding their gender identity for fear of being forced out of the service.
- In September 2017, the United States Department of Justice (DOJ) announced that federal employment laws did not prevent employers from discriminating, including employment termination, against transgender people. In fact, the DOJ switched sides to no longer represent the transgender woman and instead, began to represent the funeral home. The employee, hired as a man, later “came out” as a transgender woman. Initially, the

case was prosecuted under the Obama Administration, where the DOJ sided with the fired employee; later, after President Trump assumed office, the DOJ did a head-spinning complete reversal and sided with the funeral home, arguing then that it was not illegal to fire the transgender employee.

- In October 2017, the Trump Administration made it legal for federal contractors to discriminate against and fire transgender employees.
- In February 2018, the United States Department of Education removed legal protections for transgender students that had been put in place under the Obama Administration.
- In May 2018, the United States Bureau of Prisons rolled back protections for transgender inmates, meaning that transgender females like myself could be housed with male prisoners.

- In May 2020, the Department of Education (DOE) announced that it would withhold federal funding from any public school that allowed transgender students to participate in sports. In particular, in Connecticut, the DOE announced that it would withhold \$6 million in federal funding because Connecticut schools permit transgender girls to participate in high school sports.
- In July 2020, the United States Department of Housing and Urban Development advised that transgender women could be barred from women-only homeless shelters that receive federal funding.
- During the four years of the Trump Administration, the Republican-controlled Senate confirmed more than 200 federal appellate and trial court judges, some of whom are wholly intolerant of transgender people. In recent months, several of these appointed federal judges have publicly and consciously misgendered individuals by

I needed to accept who I was – a woman trapped in a male body.

- In October 2018, Trump Administration United Nations representatives worked to remove human rights protection for transgender people at the UN. That effort continues.
- In January 2019, the United States Department of Health & Human Services allowed foster care and adoption agencies to discriminate against transgender people who seek to adopt or serve as foster parents.
- In May 2019, the United States Department of Health & Human Services advised doctors, nurses, and therapists – and health insurers – that federal law no longer protected transgender persons from discrimination; thus, healthcare providers were free to refuse treatment to transgender patients on religious or moral grounds.

actions such as using pronouns tied to one's gender assigned at birth, rather than the gender to which a transgender person identifies. Some of those judges would likely refer to me as “him” or “he” and address me as “Sir” in their courtrooms regardless of my attire or identity.

State-authorized discrimination against transgender people is not unique to the United States. Currently, Hungary and Poland have enacted laws or policies designed to erase transgender people from public life. Moreover, in several African, Middle Eastern, and South Asian countries, transgender people are subject to imprisonment or execution.

On a more positive note, the Biden-Harris presidential administration has signaled that it will roll back the anti-transgender policies and practices that the Trump

Administration put in place. Still, that will do little to ameliorate the intense psychological damage that resulted from four years of relentless government targeting simply because of who you identify as.

At this point, let me explain how transgender people are so often marginalized. Underlying much of the discrimination against transgender persons in the United States is the belief that being “trans” is a “choice.” Additionally, many who discriminate believe that transgender persons are confused and that there is no such thing as having a gender identity (e.g. how one thinks of their gender in their brain) that does not match one’s physical body. Others discriminate on religious grounds believing that “God does not make mistakes” when it comes to a person’s gender.

I know these arguments firsthand; when I transitioned from male to female in 2009 at age 52, people often asked, “Are you sure?” followed by, “But you seemed so happy as a man!”

By 2009, yes, I was certain that I was female, notwithstanding the male anatomy between my legs or the 5:00 shadow that usually appeared on my face at 2:30 in the afternoon. However, for much of my life while I lived as male, admittedly, I too believed that I could choose my gender. That was true even though for decades, there was a voice inside my head saying, *you are not a man; you are really female and need to live as a woman.*

That is the way it is for many transgender people – they have some idea that their body does not match their brain, but often they believe the disconnect between brain and body (technically called “dysphoria”) will go away over time. Before they understand that the disconnect is real and permanent, they build lives around the gender they were born with (e.g. “birth gender”). By the time they figure things out—that is, by the time they realize that being transgender is “real” – they are often stuck.

I am representative of this quandary. As a teen male living in the midwestern state of Iowa during the late 1960s and early 1970s, I secretly imagined being female. However, I pushed those thoughts aside and fell in love with Lydia, a high school classmate. We saw each other as soul mates and together, we built a life that few could ever dream

of achieving – marriage at the law school chapel, two beautiful daughters, a house in the best neighborhood, my own civil trial law firm, country club membership, brokerage accounts, and social stature. Before things fell apart, Lydia and I were together for 32 years.

Throughout much of my career and life-building, I secretly struggled with that voice telling me I was female. Eventually, I sought counseling, but instructed my therapists that I only wanted a mantra that would vanquish the voice in my head so that I could remain married to Lydia, my soul mate. Repeatedly, therapists told me to listen to that voice; in turn, I fired them. There was no way that I was going to hurt my wife or daughters.

Then, one day, I had a moment of truth where I could foresee eventually laying on my deathbed. I realized that come that day, I would have had all the love in the world and the personal riches to go with it. Yet, as my moment of truth unfolded, I also understood for the first time ever that I would look back on my entire life and view myself as a *coward.*

The realization shook me – there was no way that I wanted to end my time on this earth thinking of myself as not having been brave enough to face the reality of who I truly am.

That moment of truth came on the evening of September 11th. It was then that I understood the decades of me denying my true gender needed to end. I needed to accept who I was – a woman trapped in a male body.

It took three years for me to leave my wife, and then another five years after that to transition genders. When my gender transition finally occurred in May 2009, I became the first lawyer in Iowa to do so. While the local legal community was extremely supportive, many of my institutional clients were not; eventually, I was forced to close my law firm. I subsequently relocated to Minneapolis, where I started over with a blank slate.

I started over as the true me, a woman named Ellen – “Ellie” to my many friends.

You may conclude that the story I just shared is unique, or maybe even weird or strange. However, I can assure you that

some people – two? – ten? – twenty? – reading this article are at this very moment struggling with their gender identity just like I did. To those readers, please know this: I care about you and understand your situation. Contact me by email and I will be happy to listen and offer advice. Your life does not have to be filled with hopelessness.

As a result of struggling to understand my true gender, I now have a saying; *Human authenticity will not leave you alone until you listen to it.*

I believe the human spirit – that invisible thing which makes us unique and fills us with passion, purpose, and a sense of worth – comes in many forms. Yes, for some, authenticity is about gender identity or sexual attraction. However, for many others, authenticity shows up as needing to blog or journal or finally write that novel you have been putting off for years.

Alternatively, authenticity can be about singing notes, or playing chords, or crafting a memory book, or being a helper for those in need. Some may even find their authenticity wearing hiking boots or brandishing a fishing rod from an aluminum boat.

Whatever form one’s authenticity takes, it is important to understand that smothering or choking it off will only lead to incredible frustration, despair, and hopelessness. Indeed, it is impossible to ignore one’s authenticity and lead a happy life.

Understanding this makes it even more appalling that a government would see fit to marginalize, if not endeavor to erase, an entire group of humans.

I am real. Millions of others across the world like me are real. We deserve to be treated as anyone else: with dignity, respect, and compassion.

We deserve to be treated as humans.

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1. National Center for Transgender Equality, *The Discrimination Administration: Trump’s Record of Action Against Transgender People*, timeline last dated July 23, 2020, <https://transequality.org/the-discrimination-administration>.



Interview of Iceland Ambassador Bergdís Ellertsdóttir

I Barbara J. GISLASON

Introduction

Ambassador Bergdís Ellertsdóttir says an integral part of her job is to cause others to be interested in Iceland and to help advance Icelandic citizens' business interests in the United States. She was quite enthusiastic while discussing this subject, especially about her interactions with Icelanders now living in the United States.

Early Years

Her diplomatic career began in 1992, when she joined Iceland's Ministry for Foreign Affairs. She was the chief negotiator for the Iceland-China Free Trade Agreement. She headed the Icelandic Mission to the United Nations (UN) as the permanent representative after serving as Iceland's Ambassador to Belgium, the Netherlands, Luxembourg, and Switzerland.

Bergdís Ellertsdóttir became the Ambassador of Iceland to the United States on September 16, 2019. She is the first woman to serve in this position. Iceland is a powerful, yet small country recognized for having one of the world's oldest democracies. Ambassador Bergdís Ellertsdóttir speaks Icelandic, English, German, Danish, and "on a good day," French. The United States is Iceland's biggest trading partner. Iceland has a population of 350,000 people.

Current Duties

Ambassador Bergdís Ellertsdóttir describes her current duties as bilateral in focus. The topics Ambassador Bergdís Ellertsdóttir says are most often discussed with the United States are trade, security and defense, and more specifically, the Arctic. Americans are aware of Iceland as the United States Navy long had an important base at the "old" Keflavik International Airport.

Ambassador Bergdís Ellertsdóttir expressed her attention to how climate change and pollution affects the Arctic Ocean and described how climate specialists now fear

Iceland's major glaciers will all melt in 100-200 years. She expressed concern that the timetable for when the glaciers are predicted to melt keeps getting worse.

How To Be An Effective Ambassador

When asked how one becomes an Ambassador and what type of training is best, Ambassador Bergdís Ellertsdóttir advocated having a "solid education," including political science and language courses. She emphasized that those seriously considering a diplomatic career should demonstrate curiosity early on about other countries. Participation in student exchange programs, studies abroad, and volunteer efforts are favorably viewed, as is foreign business experience.

She said most Icelandic Ambassadors have held earlier diplomatic positions where they learn about vital subjects, such as trade and security and defense. But in Iceland, much like other smaller countries, Ambassadors typically have significant on the job training.

Regarding how to be effective as an Ambassador, she emphasized that it is all about developing networks. In her current bilateral position, she is developing networks both within the U.S. government, as well as in the private sector.

The Arctic

On a personal note, when asked about the Arctic, she emphasized her deep concerns about the challenges facing the Arctic, where the land and the ocean are rapidly threatened. Both an immediate and near future concern is that climate change may affect fish stocks, the livelihood of Iceland.

The United Nations and Traditional Knowledge

From a human rights perspective, Ambassador Bergdís Ellertsdóttir is aware that the UN Declaration of Human Rights includes economics, social and cultural rights, and the

principle of self-determination is a right now threatened in some parts of the world by climate change. Of importance to her is that the UN's Environment Programme (UNEP) regards climate change in the Arctic as equivalent to the world's climate change barometer.

To her, it is important, as is reflected in Iceland's chairmanship programme in the Arctic Council, to respect the way indigenous people live, taking into account their traditional knowledge and understanding of nature, reflected in their culture and way of life to respect the sustainable way indigenous people live.

Land Mass and Harbors

To Ambassador Bergdís Ellertsdóttir's point, temperatures are rising across the Arctic. While glaciers have long covered one-tenth of Iceland's land mass, the melting of the Vatnajökull glacier and the predicted rising land could affect harbors used by Iceland's fishing vessels.

Arctic Council

Iceland is an Arctic state and currently chairs the Arctic Council, founded in 1996. This intergovernmental organisation involves eight countries with Arctic Circle land. They are Iceland, Finland, Sweden, Denmark, Russia, Canada, and the United States. There are also many countries that have "observer states" to this Council. The indigenous groups impacted by the Council include the Aleuts, the Athabaskans, the Inuit, and the Saami.

Conclusion

I express my gratitude to Ambassador Bergdís Ellertsdóttir for gracing the UIA with this interview. As a direct descendant of Icelanders who migrated to the United States, now known as the "Western Icelanders," I was uniquely appreciative of her knowledge, intelligence, ability, values, and charm.

Interview by Barbara J. GISLASON
Chief Editor, *Juriste International*



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The Lawyer as Advisor: Professional Obligations and Corporate Social Responsibility

■ Steven M. RICHMAN

Lawyers in private commercial practice have ethical obligations to advise their clients as to both soft law and hard law when it comes to business and human rights. This article explores the source of that obligation and discusses the role of lawyer as advisor, as well as other ethical obligations, including competence.

Introduction

Corporate social responsibility or, as now more commonly referred to, business and human rights, is no longer simply aspirational. With the advent of the United Nations Guiding Principles on Business and Human Rights (“UNGP”), there has been increased attention as to the impact of such principles in the private sector. It is and should be of concern to the business law practitioner under various rules of professional conduct as part of counseling clients doing business both internationally and domestically. Corporate political and social agendas are being promoted in visible ways by corporate stakeholders, and indeed corporate chief executive officers are becoming more activist, as exemplified in a *Wall Street Journal* article titled *You’re a CEO – Stop Talking Like a Political Activist* appearing July 27, 2018.

As this article is being written, the United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has been meeting. Established in 2011, this group of five geographically diverse experts has a mandate to promote the effective dissemination and implementation of the UNGP, identify and promote best practices and lessons learned, and other activities to give traction to the principles. It is in that spirit that this article provides a brief overview to the ethical obligations of legal practitioners to advise clients with the regard to the UNGP. This is not just a “big firm” issue; all practitioners, whether solo or in a multinational firm, are bound by their ethics rules.

This article focuses primarily on the role of lawyer as advisor. For more detailed discussion of other ethical issues, I refer you to my article *Ethical issues for Business and Lawyers under the United Nations Guiding Principles*, published in *The International Lawyer*, Vol. 51, No. 2 (2018).

Hard and Soft Law

When we speak of corporate social responsibility, or business and human rights, we are referring to both the soft and hard law responsibilities of actors in the private sectors (law firms as well as corporate entities) to consider the impacts of its decisions and behavior on society and the environment, which also includes taking

statement each financial year. There are two instances in US statutes that require reporting in certain areas as well. These are not exhaustive of such regulations, and there are other related issues that can include government affairs, such as crisis management and anti-corruption issues.

Another example of “hard law” application is the B Corporation. Under traditional statutory and common law, corporate fiduciary responsibilities focused on shareholder profit. The B Corporation include as a matter of law and duty, requirements to consider broader impact of decisions on employees, customers, suppliers, community, and the environment. Currently, over 3000 companies in more

It also must be remembered that counsel in a matrimonial dissolution action must play several roles. These include not only that of advocate, but that of counselor and advisor.

into account shareholder concerns. It is important and growing, and corporations are issuing mission statements, and looking to law firms, that appreciate this, in the same manner clients are looking for law firms that can demonstrate diversity.

While much of CSR deriving from the UNGP still may be considered soft law, there are real “hard law” requirements. For instance, the California Transparency in Supply Chains Act requires reporting of qualifying entities to disclose its efforts to address slavery and human trafficking in their supply chains. By way of another example in the international sphere, the United Kingdom’s Modern Slavery Act 2015 criminalizes slavery, servitude, and forced or compulsory labor as well as human trafficking, and exploitation related to the same, but also provides for reparation orders issued by the court and specifically addresses transparency in supply chains, and requires qualifying commercial organizations to prepare a slavery and human trafficking

than 70 countries across 150 industries are so certified.¹ Currently, the following states in the United States permit B Corporations: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington DC.

Ethical Considerations

Knowledge of both hard law and soft law goes to the competence of a lawyer. Certainly the attorney in private practice or in house, commensurate with their obligations of competence, need to know these statutes, particularly when operating in those jurisdictions. The American Bar Association (“ABA”) promulgates model rules that are not law by themselves, but are adopted by virtually all states in one form or another, and for states that do not adopt them exactly, their commentary and interpretative opinions have persuasive value.

ABA Model Rule 1.1² requires “competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [8] requires the lawyer to “keep abreast of changes in the law and its practice.” As an illustration, the B (or “benefit”) corporation in New York permits formation of a corporation with a purpose of general public benefit to the extent that the in addition to business purposes, there can be a requirement of a “general public benefit” which means a “material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”³ Familiarity with such statutes for a corporate attorney advising a client as to incorporation goes directly to competence.

Similarly, the core value of competence is shared globally. It is recognized in the International Bar Association International Principles on Conduct for the Legal Profession⁴ recognizes in its Principle 9 that “[a] lawyer’s work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.” Notably, competence is addressed beyond just technical skill or purely legal knowledge. The explanatory note adds that “Competence is founded upon both ethical and legal principles.” Competence also remains one of the core principles of the CCBE.⁵ To take but one more comparison, the Japanese ethics rules (Basic Rules On The Duties Of Practicing Attorneys, Adopted at an Extraordinary General Meeting on October 12, 2004), the lawyer must “endeavor to train and familiarize him or herself with laws and rules and legal practices” as well as conduct necessary research in order to handle a matter.

These general shared principles resonate with ABA Model Rules that bear on corporate social responsibility, apart from rules relating to competence, confidentiality of information, and misconduct, primary is ABA Model Rule 2.1, addressing the lawyer’s role as advisor and the need to factor in various social, economic and political factors in rendering legal advice.

This rule specially states:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”

Comment [2] to the rule amplifies this and emphasizes that legal advice given in isolation is of little value:

“Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”⁶

Rule 2.1 and the role of the lawyer as an advisor beyond purely legal advice means that the lawyer must adopt a broader viewpoint which to place otherwise strictly legal advice. One application would be advising a client that a motion may be feasible as a legal matter but not explaining the costs of the motion versus the benefit would be an example of not considering non-legal factors. Another would be where the lawyer advises as to the legal feasibility of naming an additional party but not addressing whether such a course of action might have public relations impact. The choice remains ultimately with the client, and the lawyer need not necessarily be obligated to raise every potential issue, but the point is that legal advice cannot be given in a vacuum.

Case Applications

A case where an attorney was sanctioned, among other reasons, for failing to properly advise a client as to the risks of litigation separate and apart from legal considerations, is found in *Wise v. Washington Cty.*, No. CIV.A. 10-1677, 2015 WL 1757730, at *18 (W.D. Pa. Apr. 17, 2015). In this case, the court cited Rule 2.1 in the context of a civil rights action. Significantly, Wise had a

long-standing seizure disorder. Because he had failed to take necessary medicine he was in a car accident that killed a passenger, and was convicted of manslaughter. Upon release, Wise sued for violation of his rights, including cruel and unusual punishment and assault by doctors and nurses. He was represented by counsel. In the context of a motion for sanctions against the attorney, reciting a litany of applicable rules and statutes, the Court noted: “Similarly, it does not appear that Fisher properly counseled his client as to the attendant risks of this litigation, especially in light of his memory and likely credibility issues. Pa. RPC 2.1 (Advisor).”

While Rule 2.1 is not uncommonly cited in the context of other rule violations, including the need for independence of a lawyer, it is not often explained as to the particular information that was attributable to a violation of Rule 2.1 as opposed to other ethics rules. Wise, above, is an example where there was clarity of the Rule 2.1 violation. Another instance, in a matrimonial context, focused on the “insights” gained by a lawyer into client behavior that were deemed relevant not only in failing to properly advise under Rule 2.1, but also in connection with ABA Model Rule 3.1, which precludes the assertion or defense of a frivolous claim. Specifically, the rule states that:

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

This was discussed in *Henry v. Henry*, No. 531717, 1994 WL 597378, at *3 (Conn. Super. Ct. Oct. 25, 1994), where the court stated: “Counsel often obtain insights into a client’s conduct and behavior which could be relevant and useful in further proceedings. It also must be remembered that counsel in a matrimonial dissolution action must play several roles. These include not only that of advocate, but that of counselor and

advisor. See Rules of Professional Conduct, Rules 2.1 and 3.1.” Similarly, in *Graham v. Prudential Ins. Co. of Am.*, No. CV-05-S-102-NW, 2006 WL 8436807, at *2 (N.D. Ala. July 12, 2006), the Court cited, *inter alia*, Rule 2.1 and noted: “It is rare to see a case still in litigation with such distasteful facts.”

These, however, seem to focus on the evaluation of the legal merits and while they touch on the role of the lawyer as advisor, do not go towards issues of morality or conscience, or even public relations. To an extent, the issue is tied up with whether or not the lawyer was restrained by other factors from giving candid advice. See, e.g., *Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 689 (D. Colo. 2008) (“The Special Master believes there is a substantial question as to whether Rodman violated this Rule by failing to exercise independent professional judgment and render candid advice to Thorne. The Special Master further believes there is a substantial question as to **whether Rodman’s conduct in his representation of Thorne was materially affected by his prior and ongoing relationship with State Farm.**”) (emphasis supplied).

While the rule is on its face clear enough, the application may not be so clear. It is well and good to note the factors that should be conveyed to the client to evaluate legal advice, but on the other hand, the offering of non-legal advice may not be privileged. *In re Cty. of Erie*, 473 F.3d 413, 421 (2d Cir. 2007) (“When an attorney is consulted in a capacity other than as a lawyer as, say, a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.”) Consequently, whatever other factors are discussed and conveyed need to be tied directly to the offering of legal advice.

The Restatement of the Law Governing Lawyers

The concept of a broader approach to legal advice that takes in to account other than purely literal applications of the law is confirmed by the comment to Restatement (Third) of the Law Governing Lawyers § 94 (2000), which generally precludes a lawyer from counseling a client to violate the law, but also has this provision that accommodates Rule 2.1:

“(3) In counseling a client, a lawyer may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects.”

Comment h addresses this, and elaborates that “a lawyer’s advice to a client may properly include the lawyer’s views concerning aspects of a proposed course of conduct that are not narrowly legal in nature. Such advice, when given as part of legal services provided to the client, is within the scope of § 72 [Attorney – Client Privilege – Legal Assistance as the Object of a Privileged Communication] for purposes of the attorney-client privilege, and it is within § 59 [Definition of “Confidential Client Information”] for purposes of the general duty of confidentiality (see § 60) [A Lawyer’s Duty to Safeguard Confidential Client Information]. (Restatement (Third) of the Law Governing Lawyers § 94 (2000) Comment h). Of relevance in the context of business and human rights counsel is the additional admonition in Comment h that: “A lawyer’s advice on significant nonlegal aspects of a matter may be particularly appropriate when the client reasonably appears to be unaware of such considerations or their importance or when it should be apparent that the client expects more than narrow legal counsel.” Restatement (Third) of the Law Governing Lawyers § 94 (2000).

A Sampling of Other Jurisdictions

The admonition to consider moral factors is found in other systems outside the United States.

The Charter Of Core Principles Of The European Legal Profession And Code Of Conduct For European Lawyers⁷ specifically addresses the role of the lawyer in society and notes in 1.1 that “[t]he lawyer’s duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser.

A lawyer’s function therefore lays on him or her a variety of legal and moral obligations

(sometimes appearing to be in conflict with each other) towards” not only the client, but “the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.”

Note that the IBA Practical Guide on Business and Human Rights⁸ makes clear that: “Whether they work in law firms, corporate law departments, or elsewhere, lawyers have specific and legally binding professional responsibilities and obligations, including the duty of independence. The UNGPs do not abridge this duty, which includes the duty to decide, within the limits of the law, how to act in their client’s best interests, independently of expectations and pressures that are external to the lawyer–client relationship, subject of course to adherence by the lawyers with their professional and legal responsibilities.” The IBA document goes on to state: “However, the UNGPs may nevertheless be highly relevant to the advice or services to be rendered the client: ie, where they are within the agreed scope of services (or mandate) to be provided (which may include a range of services, from very specific to highly general); where they are reflected or incorporated in relevant laws, or where they are permitted or encouraged to be considered by lawyers in their independent judgement under applicable professional standards of conduct.”

Similarly, and by way of another example, Article 15 of the Japanese Basic Rules on the Duties of Practicing Attorneys (Participation in Degrading Business) indicates that: “[a]n attorney shall not conduct any business which is against public order and morals or is degrading, participate in such business, or let his or her name be used for such business.”

Conclusion

Corporate social responsibility or business and human rights is part of the overall paradigm of representation of private parties where their behavior and activities may impact others in ways that are legal but may cause other concerns for the client. The ethical rules that command the attorney to consider and advise the client on more than strictly legal matters of what may and may not be done may not go as far as some would like, but they do establish a

baseline for consideration. The distinction between legal advice and business advice for purposes of maintaining the attorney-client privilege needs to be respected. However, as noted in the illustrations above, at least in the United States, Rule 2.1 and the obligation of the lawyer to function as an advisor does have “teeth” in certain factual circumstances, together with other relevant ethics rules. There is no longer a distinction between the private lawyer and the public interest lawyer; all lawyers in advising clients are human rights lawyers just as all lawyers must be attentive to issues of diversity and other societal and political concerns. To ignore such factors is not only a potential

violation of the ethics rules but also goes to the core of competent representation.

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6. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor/ Cf. ABA Model Rule 4.4: Respect for rights of third persons: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

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

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La Convention européenne sur la profession d'avocat : une protection nécessaire

I François MOYSE

Tous les avocats ont entendu parler de situations dans lesquelles des confrères ont été victimes de pressions, de menaces, voire de violences physiques. Certains avocats paient leur engagement pour une cause ou pour un client de leur vie. De telles situations dépassent les cas plutôt isolés de violation apparente ou manifeste des droits de la défense dans l'un ou l'autre Etat, violation pouvant être sanctionnée par la Cour européenne des droits de l'homme sur base notamment du droit au procès équitable de l'article 6 de la Convention Européenne des Droits de l'Homme. Aussi, si certains États européens ont connu des affaires isolées de prise à partie à l'encontre de certains avocats, d'autres pays européens ont connu des développements politiques plus généraux et plus inquiétants, qui mettent en péril la situation des avocats et donc, la bonne marche de la Justice.

Or jusqu'à présent, il n'y a que de la *soft law* qui régit les principes relatifs à l'exercice de cette profession, notamment une recommandation du Comité des Ministres du Conseil de l'Europe (Recommandation n° R(2000)21 sur la liberté d'exercice de la profession d'avocat), ainsi que les Principes de base des Nations Unies d'août 1990 relatifs au rôle du barreau. 2020 voit ainsi célébré le 30^e anniversaire de ces principes adoptés à La Havane.

Aussi, faut-il le rappeler, c'est le 24 janvier 2018 que l'Assemblée Parlementaire du Conseil de l'Europe adoptait une recommandation visant à l'adoption d'une Convention européenne destinée à la protection de la profession d'avocat (la Convention), à la suite du rapport présenté par Madame Sabien Lahaye-Battheu (Belgique).

D'auxiliaire de justice, le statut de l'avocat a évolué aux yeux de la Cour européenne des droits de l'homme, qui souligne son statut spécifique d'intermédiaire « entre les justiciables et les tribunaux » et qui leur fait occuper « une position centrale dans l'administration de la justice », tel que cela ressort de l'affaire Morice c. France du 23 avril 2015.

L'UIA-IROL suit de près les développements relatifs au projet de Convention depuis le début.

Une première étude de faisabilité avait été ainsi lancée en avril 2019, afin de vérifier que la meilleure façon pour les États du Conseil de l'Europe de s'attaquer à ce problème consiste en la rédaction et la conclusion d'une Convention entre les États membres. Cette étude avait été rédigée par Madame Evelyne Serverin, du CNRS français. Elle y concluait à la nécessité de la rédaction d'un instrument particulier en la matière et donc, d'une véritable Convention.

Il a fallu cependant constater que l'unanimité manquait auprès des États du Conseil de l'Europe pour aller de l'avant, puisque ce rapport ne fut pas adopté lors d'une réunion du Comité Directeur de Coopération Juridique (CDCJ) qui s'est tenue en novembre 2019 (au temps pré-Covid-19, où les réunions physiques avaient bien lieu...).

Aussi fut-il décidé de commanditer une deuxième étude de faisabilité, confiée à un juriste anglo-saxon. Elle vise à compléter le premier projet de rapport et à se concentrer sur l'aspect juridique et les aspects politiques de l'élaboration d'une telle Convention.

Entretemps, une résolution 2348 (2020) intitulée « Les principes et garanties applicables aux avocats » a été adoptée par l'Assemblée Parlementaire, montrant la volonté politique du Conseil de l'Europe de protéger le statut des avocats (datant du 23 octobre 2020 ; rapporteur : M. Aleksandr Bashkin).

L'Assemblée parlementaire se dit « préoccupée par les nombreux cas de violations des droits des avocats, notamment des atteintes à leur sécurité et à leur indépendance, commises ces dernières années ». Elle constate encore que « Les avocats continuent d'être pris pour cible en raison de leur intervention dans les affaires relatives aux droits de l'homme' ou 'parce qu'ils dénoncent le manque de transparence ou la corruption du gouvernement, ou

[encore] parce qu'ils représentent certains types de personnes (comme des individus soupçonnés de terrorisme, des membres de l'opposition, des militants de la société civile et des journalistes indépendants). » Enfin, elle dénonce que « Les avocats sont par ailleurs identifiés à leurs clients et, par extension, à l'affiliation politique de leurs clients ou aux infractions qui leur sont reprochées ».

Cette résolution est très satisfaisante, car elle souligne encore que les atteintes à la sécurité et à la liberté individuelle des avocats s'inscrivent bien souvent sur fond général de non-respect de l'État de droit et dès lors, l'Assemblée parlementaire invite instamment l'ensemble des États membres du Conseil de l'Europe à assurer la protection effective de la profession d'avocat.

La deuxième étude de faisabilité a été entretemps rédigée par Monsieur Jeremy Mc Bride.

Et il y a quelques semaines, en novembre 2020, le CDCJ a adopté cette deuxième étude de faisabilité et le projet de mandat pour le futur comité d'experts, chargé de la rédaction de ce projet de Convention. Dès lors, le dossier sera soumis au Comité des Ministres qui devrait se prononcer début 2021.

Gageons que le processus d'adoption de cette Convention ne connaîtra pas d'ancrages dans le futur, ni d'ailleurs d'oppositions frontales de certains États ; en effet, le respect de l'État de droit requiert actuellement que le statut de l'avocat soit cimenté. Toute attaque à son encontre est une tentative de déstabilisation inacceptable du troisième pouvoir que constitue la Justice.

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Création d'un code civil français trilingue

I Guillaume DEROUBAIX



Guillaume Deroubaix, Directeur-Général adjoint de Lexis Nexis France, est interviewé par Catherine Peulvé, Rédactrice adjointe du Juriste International, sur la publication par LexisNexis France d'un code civil français traduit en anglais et arabe. Cet outil pourrait intéresser tout particulièrement les membres de l'UIA.

Juriste International (JI) : Quel cheminement vous a conduit à envisager la publication d'un code civil français trilingue ?

Guillaume Deroubaix (GD) : Plus de 200 ans après sa première publication, le code civil continue de rayonner au-delà des frontières françaises. Il reste le point d'appui de nombreux textes codifiés ou non-codifiés dans le monde. La publication d'un code civil trilingue résulte essentiellement d'un besoin de la part des chercheurs et des praticiens du droit non-francophones d'accéder au code civil français dans sa version la plus récente, puisqu'afin de mieux maîtriser les spécificités d'une juridiction de tradition civiliste, un retour au document source demeure essentiel. Pour que la langue ne soit pas une barrière, nous avons pris l'initiative, avec Sader publishing, co-éditeur de ce code, de réunir dans un seul ouvrage une traduction anglaise et arabe de l'intégralité du code civil français. Ce code s'inscrit éga-

lement dans la volonté de LexisNexis et de son partenaire Sader Publishing de diffuser la culture civiliste auprès des juristes du monde entier et d'encourager internationalement la promotion du *Rule of Law*.

JJ : A quel objectif répond le choix des langues sélectionnées ?

GD : Le choix de l'anglais et de l'arabe comme langues de traduction est avant tout pragmatique : il fallait que le contenu et les concepts du code civil français soient abordables par le plus grand nombre, y compris les juristes de *Common Law* et de droit musulman. Ces deux langues constituaient le meilleur

JJ : Comment est organisé ce code trilingue et son contenu contrôlé ?

GD : L'ouvrage est organisé en trois parties : les parties anglaise et arabe de part et d'autre, la partie française au milieu. Le texte en français est au centre pour en faciliter la consultation lors du recours à l'une des deux versions traduites.

Concernant le contenu, il faut distinguer deux chantiers : la traduction d'une part et l'élaboration du contenu scientifique d'autre part. S'agissant tout d'abord des traductions, la traduction anglaise a été supervisée par le Professeur Michel Séjean, également

Dans son ensemble, l'ouvrage est donc conçu pour accompagner au mieux ses utilisateurs, sur les plans pratique et scientifique.

moyen pour accéder à une communauté juridique la plus large possible. Ensuite, l'anglais et l'arabe sont des langues d'affaires pour une grande partie de la population mondiale. Enfin, Sader Publishing et LexisNexis travaillent dans des régions où ces 3 langues sont pratiquées.

Dans un contexte de mondialisation et de globalisation accélérée des échanges, on parle depuis quelques années de la « mondialisation du droit », concept à l'origine de nombreux débats et polémiques mais dont nous retiendrons essentiellement le partage du droit et l'accès au droit dans des langues universelles, que sont bien évidemment le français, l'anglais et l'arabe.

Enfin, il nous fallait en tout état de cause mettre à jour les traductions du code civil français qui existaient déjà en langues arabe et anglaise, datant respectivement de 2012 et 2013. La préparation d'un code civil trilingue répondait à cet objectif.

J'ajoute que notre traduction anglaise sera gracieusement donnée à Légifrance et ainsi mise à la disposition du public.

Directeur scientifique de l'ouvrage. Elle a été effectuée par les professeurs Alain Levasseur (Louisiana State University, Baton Rouge) et David Gruning (Loyola University, Nouvelle-Orléans), qui avaient déjà traduit en anglais le code civil français en 2013. À ce binôme s'est ajouté le Professeur Randy Trahan (Louisiana State University), tout aussi expérimenté et disposant d'un œil extérieur, contribuant ainsi à bâtir une solide stratégie de traduction. La traduction en langue arabe a été effectuée dans son intégralité par Sader Publishing, par le Dr. Abir Ghanem Larson sous la direction de Maître Rany Sader. Fondée en 1863, Sader est la plus ancienne maison d'édition juridique toujours en activité dans la région du Moyen-Orient. Son savoir-faire et son expertise en font aujourd'hui un partenaire incontournable de LexisNexis pour l'ensemble de son activité éditoriale au Moyen-Orient.

L'ouvrage, réalisé sous la direction scientifique du Professeur Michel Séjean, a été conçu par des auteurs universitaires, avec pour objectif de familiariser le lecteur non

francophone ou non issu de la tradition juridique continentale au code civil français. Ainsi, l'essentiel des branches du droit civil est présenté par des notices introductives explicatives et synthétiques, rédigées par des spécialistes de chaque domaine, qui s'intercalent entre les dispositions du code. Chaque notice introductive est également traduite en anglais et en arabe. Les 10 notices composent ensemble un guide de lecture et d'analyse du code civil trilingue.

Le texte et le guide sont complétés par un index alphabétique inséré à la fin de chaque partie, permettant à l'utilisateur du code de se repérer dans l'ouvrage par rapport à une thématique de recherche précise.

Dans son ensemble, l'ouvrage est donc conçu pour accompagner au mieux ses utilisateurs, sur les plans pratique et scientifique.

Jl : Avez-vous connaissance d'autres initiatives de la sorte ?

GD : Le travail de traduction et d'exportation du code civil français s'inscrit dans la lignée d'une longue tradition. Ainsi, dès son origine, l'ouvrage avait été conçu comme un instrument de politique étrangère. A titre d'exemple, il avait été traduit en latin rapidement après sa promulgation afin d'en permettre une diffusion effective. Au fil des années, le code civil a été traduit dans plusieurs langues : nous citerons principalement les traductions anglaise, espagnole et arabe. Cependant, les éditions des traductions précédentes se sont limitées à des versions bilingues. Le code civil français trilingue anglais-français-arabe constitue donc une innovation. Il s'agit de la première initiative permettant de réunir le texte original en trois langues dans un seul et même ouvrage.

S'agissant de la volonté de LexisNexis et de Sader Publishing d'encourager internationalement la promotion du *Rule of Law*, nous travaillons main dans la main depuis 2008 dans la région MENA sur l'accès à l'information juridique par le biais de la création et la publication de contenus sur-mesure, la traduction de lois de l'arabe vers l'anglais, la mise en place d'outils juridiques en ligne et de plateformes technologiques sophistiquées. Le code civil trilingue constitue donc une initiative parmi plusieurs dans le cadre de notre collaboration avec Sader Publishing favorisant l'accès au droit, mais dont la par-

ticularité réside dans sa vocation globale, au-delà de la région MENA.

Jl : Comment votre initiative traduit-elle l'objectif de rayonnement par le droit poursuivi par la France

GD : La présente traduction s'inscrit en parfaite complémentarité avec l'action internationale menée par le ministère de la Justice : faire rayonner [...] le droit civil [...] et faire ainsi vivre la vocation universaliste qui était celle des rédacteurs du Code civil », précise Nicole Belloubet, ancien ministre de la Justice, dans sa préface du code civil trilingue.

La vocation de l'ouvrage de diffuser la culture juridique civiliste fait partie intégrante de la stratégie d'influence par le droit, stratégie entreprise par les ministères français de la Justice et de l'Europe et des affaires étrangères (MEAE). A cet égard, les initiatives entreprises par les deux ministères sont multiples. A titre d'exemple, nous citerons le portail collaboratif Juscoop, développé par la Fondation pour le droit continental à la demande du MEAE, permettant la publication, le partage et l'échange d'informations sur les actions des acteurs français de la coopération juridique et judiciaire à l'international.

Jl : Comment prévoyez-vous de diffuser, promouvoir et suivre l'accueil qui sera fait à ce code trilingue, notamment auprès des pays anglo-américains ?

GD : Nous sommes convaincus que la parution de l'ouvrage comble avant tout un manque, dans le monde anglo-saxon mais aussi dans le reste du monde, celui de l'accès au code civil français. Le code trilingue permet justement cet accès, facilité par les notes explicatives, dans sa version la plus à jour. Nous avons reçu le soutien, les félicitations et les remerciements de nombreuses personnalités à la suite de la publication du code, parmi lesquelles le Président de la République et le ministre des Affaires étrangères, qui se réjouissent également de la mise à disposition de la traduction anglaise sur Légifrance. L'accès à l'ouvrage demeure notre priorité, et c'est la raison pour laquelle nous avons aussi souhaité, avec nos partenaires, que son prix (49€), ne soit pas un obstacle à son acquisition. Notre volonté est d'éliminer toutes les barrières,

linguistique et financière, pouvant empêcher les praticiens du droit à travers le monde d'accéder au code civil français.

Par ailleurs, ce qui caractérise notre traduction anglaise, c'est la volonté de nos traducteurs de refléter les spécificités de la culture civiliste dans le choix des termes en langue anglaise. Comme le disait Michel Séjean dans un entretien accordé à la revue *La semaine juridique – édition générale* (No. 43/2020, LexisNexis), « Le plus important était de traduire le Code civil en deux langues, et non pas en deux droits ». Nos traducteurs ont ainsi veillé à ne pas tenter de trouver des équivalents de *Common Law* aux notions de droit continental. Nous sommes confiants que cette méthode de traduction rencontrera une appréciation particulière dans les pays anglo-saxons auprès des praticiens du droit, qui, au-delà du contenu même du code civil, pourront faire de cet ouvrage un moyen de se familiariser avec l'esprit du droit civil et d'en comprendre les spécificités.

Ceci dit, nous nous aventurons avec beaucoup d'humilité dans cette expérience, puisque comme toute première, cette première édition du code civil trilingue est susceptible de comporter des imperfections et des points d'amélioration, que ce soit dans sa présentation ou dans ses traductions anglaise et arabe. Au fil des années, nous avons appris à associer notre public à nos différents projets, public qui constitue aujourd'hui un partenaire incontournable de toutes nos initiatives éditoriales. C'est pourquoi nous encourageons nos lecteurs à nous faire part de leurs remarques et propositions pour les éditions à venir. Pour LexisNexis et Sader Publishing, il ne s'agit que du début d'un nouveau projet et d'un nouvel engagement.

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Interview réalisée par Catherine PEULVE,
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The United States Court of Federal Claims: A Brief Overview of the “People’s Court”

I Mary Ellen COSTER WILLIAMS

Since its creation 165 years ago, the United States Court of Federal Claims has served as a forum for citizens to sue their government for monetary damages. Due to its unique jurisdiction and propensity for dealing with complex, high dollar claims, the Court often adjudicates high stakes civil litigation that can have significant ramifications for the United States government and its citizens. This article provides a synopsis of the Court of Federal Claims’ history and jurisdiction and illustrates why this Court truly is the “People’s Court.”

Introduction

Referred to as the “People’s Court,” the United States Court of Federal Claims is a federal trial court created by the United States Congress as a forum where individuals may sue the federal government for monetary damages. The role of the Court of Federal Claims in American jurisprudence is significant in that it embodies the fundamental principle of the United States Constitution that individuals have rights against the federal government – a hallmark of democracy. Inscribed on the outside of the Courthouse in Washington, D.C. are the words of President Abraham Lincoln which encapsulate the Court’s mission: “It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.”

For the past 165 years, the Court has afforded citizens an opportunity to be heard and compensated for wrongs committed against them by their government. In deciding these types of cases, the Court must strike a balance between holding the government accountable for its conduct and permitting the government to freely exercise its sovereign responsibility.

The Court of Federal Claims is unique; it enjoys nationwide jurisdiction and, although based in Washington, D.C., the Court’s judges may sit anywhere in the country

for the convenience of the parties. The Court consists of 16 judges appointed by the President and confirmed by the United States Senate for terms of 15 years. Judges who have completed their statutory terms are authorized to continue to serve as senior judges, and this long-term tenure serves as a mechanism to ensure judicial independence and impartiality.

The Court hears a wide variety of civil claims against the United States government for money damages from various litigants, including corporations, defense and civilian contractors, small businesses, landowners, taxpayers, Native American tribes, federal employees, military personnel, patent and copyright owners and inventors, and vaccine recipients. Although the primary form of relief sought by plaintiffs is monetary, the Court may provide injunctive or declaratory relief in certain contract, tax, and military personnel cases.

the United States Congress originally investigated grievances against the government. However, by 1855, Congress had become overwhelmed with the number of claims, so it created the Court of Claims to help relieve its workload. The creation of the court was significant in that the United States voluntarily waived its sovereign immunity and consented to be sued on claims arising out of the Constitution, federal laws, regulations, and contracts. However, at its inception, the court’s judgments were still subject to congressional approval, which prevented the court from operating efficiently or having its decisions reviewed by the United States Supreme Court. Congress subsequently passed legislation allowing the Court to issue final judgments and removed congressional and executive oversight, giving the Supreme Court final and conclusive review over the Court’s judgments.¹

The Court issues comprehensive protective orders to protect businesses’ sensitive competitive information and the government’s deliberative materials.

Because the Court only entertains claims against the government, the defendant is always the United States, represented by counsel from the Department of Justice. The government, as defendant, has all the defenses available to a defendant in commercial litigation, plus defenses exclusively available to the government relating to its sovereign status, such as no justiciability. The Court does not hold jury trials or hear criminal matters. Given the Court’s specialized nature, the majority of its cases are complex, involve claims for large dollar amounts, and frequently require testimony from multiple expert witnesses.

History

In accordance with its obligation under the First Amendment of the Constitution,

The Court continued to experience changes during the late nineteenth century, most significantly with the passage of the Tucker Act of 1887, which codified the Court’s general jurisdiction over monetary claims against the government founded upon the Constitution, statute, regulation, and contract, where there are specific waivers of sovereign immunity. Although federal district courts were given concurrent jurisdiction over claims of up to \$10,000, larger claims may only be heard in this specialized court.

In 1982, Congress passed the Federal Courts Improvement Act, which split the Court of Claims into two separate courts – the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit, the only federal appellate court whose jurisdiction is based on subject

matter – patent and certain government-related disputes – instead of geography. The Act gave the Court of Federal Claims trial court jurisdiction and mandated that the Court be comprised of judges nominated by the President and confirmed by the Senate. Decisions from of the Court of Federal Claims are directly appealable to the Federal Circuit, whose decisions may be reviewed by the Supreme Court.

Jurisdiction

The Tucker Act still provides the Court with its primary basis of jurisdiction and serves as the basis for most claims brought before the Court, so long as there is a separate source of law that mandates payment by the government. In practice, the Act provides jurisdiction over most monetary claims against the government, including contract claims, takings under the Fifth Amendment of the Constitution, civilian and military personnel pay claims, tribal claims, and tax refund claims. Separately, the Court has jurisdiction over patent and copyright infringement claims, Vaccine Act appeals, tax matters, and Congressional reference cases. Federal district courts also have jurisdiction over actions in which the government has waived sovereign immunity, including employment discrimination claims under Title VII of the Civil Rights Act, civil rights violations, Freedom of Information Act claims, tort claims, claims against government agencies under the Administrative Procedure Act, and limited admiralty actions under the Suits in Admiralty Act. At times, the lines are blurred as to which forum has jurisdiction over a given case.

Contract Claims and Bid Protests

Contract claims, the largest component of the Court's jurisdiction, involve a wide range of products and services the government acquires, such as complex missile defense systems, construction or leasing of buildings, and financial and food services. Contractors may sue the government for breach of contract claiming, for example, additional compensation for services or products or delay or interference with performance. Particularly large dollar claims have involved the disposal of spent nuclear fuel, which require utilities to incur substantial costs to

handle and store fuel, and the government's imposition of more stringent regulatory requirements on federally insured savings and loans and the elimination of favorable accounting treatment.²

Contract claims also include breach of implied-in-fact contracts, in which, absent an express contract document, the parties' conduct indicates the existence of a contract. For example, an undercover informant claimed that the government breached an oral agreement resulting in her being kidnapped and held captive for months.³ In these actions, plaintiffs must demonstrate that the government agent had the authority to enter the agreement and bind the government.

The Contract Disputes Act ("CDA") provides the Court jurisdiction over claims arising from federal procurement contracts for property (excluding real property) or services, so long as the contractor complies

information and the government's deliberative materials.

By way of example, earlier this year, in an ongoing bid protest, Amazon challenged the government's award of the potentially \$10 billion Joint Enterprise Defense Infrastructure ("JEDI") contract to Microsoft to modernize the Department of Defense's existing technology infrastructure and move it to the Cloud. Bid protests may also challenge government conduct prior to an award, such as a claim that government specifications are unduly restrictive or favor a particular contractor.

Contract and other actions may necessitate the Court's review of classified information, and guidelines for handling classified information may be found on the Court's website, <https://www.uscfc.uscourts.gov/sites/default/files/REVISED-FINAL-Public-Guide-to-Classified-Information.pdf>.

The Court also resolves certain Native American and tribal claims against the government.

with statutory prerequisites, such as filing an administrative claim. The government may terminate these contracts for default, i.e., failure to perform, or for convenience if, for example, it no longer needs the subject goods or services. Contractors may challenge terminations and denial of CDA claims at the Court or boards of contract appeals. In CDA cases, the government may also file counterclaims for civil fraud, false claims, and forfeiture related to a plaintiff's claim.

The Court also adjudicates challenges to the awards of government contracts and related procurement actions – suits commonly referred to as "bid protests." These bid protests are often emergency cases which must be expedited and typically seek immediate injunctive relief to stop performance of a contract while the Court resolves the protest. The Court has the authority to invalidate contract awards and require the government to re-compete its requirements, but it must consider national security considerations. The Court issues comprehensive protective orders to protect businesses' sensitive competitive

Tax Cases

The Court of Federal Claims has coextensive jurisdiction with the United States Tax Court and district courts over most tax matters. Tactical considerations for plaintiffs filing tax suits include which appellate tribunal will review the trial court's decision. Most tax cases before this Court are tax refund cases. Like claims brought under the CDA, there are strict administrative prerequisites before a tax suit may be filed in this Court. Because plaintiffs usually must pay the tax and timely seek a refund from the Internal Revenue Service ("IRS") prior to suing in this Court, the tax cases are often high dollar cases, and several recent tax actions have involved issues of first impression. The government may assert a counterclaim for any unpaid taxes not barred by the statute of limitations.

Civilian and Military Personnel Claims

Civilian employees may sue in the Court of Federal Claims when they have not received pay or benefits to which they are

entitled under law, such as overtime pay. These cases are often class actions, many concerning the Fair Labor Standards Act. For example, a class of employees claimed that the government violated the Fair Labor Standards Act by failing to pay them on time during a federal government shutdown.

Current and former members of the military may also sue in this Court for wrongful discharge, failure to be promoted, disability or retirement benefits, or other service-related claims entailing monetary relief, and may also seek correction of their military records. The Court's role in military cases is limited to deciding whether an agency committed an abuse of discretion as "judges are not given the task of running the military."

Patents, Takings, and Tribal Claims

Individuals may sue the federal government in this Court for patent or copyright infringement. Patent infringement suits often involve contractors who have provided the government with products that allegedly infringe patents. These contractors can be joined as third-party defendants and may indemnify the government if appropriate. The patents in these cases include cutting-edge technology, such as a robotic hand on National Aeronautics and Space Administration ("NASA") "robonauts" used in outer space, night vision goggles, and humvee engine starters, or more broadly used technology, such as electronic identification or scanning devices in passports.

In the event the validity of an allegedly infringed patent is challenged in a proceeding before the United States Patent and Trademark Appeals Board, the Court may stay the court proceeding pending the Board's determination. The exclusive remedy at the Court for patent infringement is "reasonable and entire compensation." Injunctive relief is not available as it would disrupt the government's ability to procure its needed supplies and services.⁴

When the government takes the private property of an individual for public use, it must provide "just compensation" under the Fifth Amendment of the Constitution. The Court of Federal Claims has exclusive

jurisdiction to hear such "takings" cases, which may involve real or personal property or other property rights, such as water and air rights. The Court hears claims of both physical takings, where property is appropriated by the government for public use, and regulatory takings, where a government statute or regulation deprives a property owner of the right to use his property. Common examples of physical takings actions include preventing access to property, the destruction of property in furtherance of the national defense or a public works project, and class actions involving the conversion of railroad easements to trail use. Regulatory takings matters may involve denial of a permit or government restrictions on development or mining.

The Court also resolves certain Native American and tribal claims against the government. The Indian Tucker Act provides the Court of Federal Claims jurisdiction over Native American and tribal claims, most concerning government mismanagement of tribal trust funds or tribal lands and natural resources. Additionally, the Court has jurisdiction over claims arising under treaties and the Indian Claims Commission Act.

Vaccine Act Appeals

In addition to serving as a trial court, the Court of Federal Claims is an appellate tribunal in cases brought before the Court's Office of Special Masters under the National Childhood Vaccine Injury Act of 1986. Individuals who believe an injury was caused by a covered vaccine must file a petition and supporting medical records with the Office of Special Masters and serve the respondent, the United States Secretary of Health and Human Services. If the Special Master determines that the petitioner is owed compensation, the government will provide compensation via a trust fund maintained through an excise tax on every dose of a covered vaccine sold. This trust fund was created to encourage petitioners to bring claims in this tribunal, instead of against private vaccine manufacturers. Compensation may be awarded for expenses that relate to the health, education, or welfare of the person who suffered the vaccine-related injury. Even if a petitioner's claim is not successful,

attorney's fees are recoverable if the claim was brought in good faith and the petitioner had a reasonable basis to file the petition.

A party who disagrees with the Special Master's decision may file a motion for review at the Court of Federal Claims. The reviewing judge can either sustain the decision, set aside the Special Master's findings and conclusions and issue his or her own decision, or remand the case to the Special Master for further action in accordance with the judge's directive. If either party disagrees with the decision of the Court of Federal Claims, that party may appeal the matter to the Federal Circuit. Because these proceedings are dictated by statute, the Court of Federal Claims must make its ruling within strict statutory deadlines—"within 120 days after the last date for the filing of" the government's response to the petition.

Congressional Reference Cases

Although comprising the smallest portion of the Court's docket, the Court of Federal Claims still maintains jurisdiction over congressional reference cases. Either the Senate or House of Representatives of the United States Congress may refer a bill to the Court for investigation, and the Court reports its findings to Congress for its consideration and disposition of such claims for compensation. For example, the House of Representatives referred a bill to the Court of Federal Claims regarding the Quapaw Tribe of Oklahoma's request for compensation stemming from the government's historical mismanagement of the Tribe's trust assets. In December 2019, the Court issued its report and recommendation that Congress approve the parties' proposed settlement agreement awarding the Tribe \$137.5 million.

Alternative Dispute Resolution

The Court also offers alternative dispute resolution ("ADR") performed by judges, including mediation, early neutral evaluation, outcome prediction, minitrials, and nonbinding arbitration in cases pending before the Court. Sitting judges perform ADR for cases assigned to other judges by agreement of the litigants or qualified outside neutrals may be selected by the

parties. Mediation is the most frequently used technique. ADR is confidential and often successful—saving time and expense, but if settlement is not achieved, the case is returned to the presiding judge for adjudication. Of course, the settlement judge or neutral may not communicate with the assigned judge regarding the case.

Conclusion

In this unique federal trial court, the federal government stands as a defendant and may be sued in civil actions by individuals for monetary redress. As “the Keeper of the Nation’s Conscience” and the “People’s Court,” the Court of Federal Claims embodies the United States’ commitment to the rule of law.

The Honorable
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1. See Act of Mar. 3, 1863, ch. 92, 12 Stat. 765; Act of Mar. 17, 1866, ch. 19, 14 Stat. 9. “The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, article 3, but from the Congressional power ‘to pay the debts . . . of the United States,’ article I, § 8, cl. 1, which it is free to exercise through judicial as well as non-judicial agencies.” *United States v. Sherwood*, 312 U.S. 584, 587 (1941).

2. See *United States v. Winstar Corp. et al.*, 518 U.S. 839 (1996).

3. See *SGS-92-X003 v. United States*, 118 Fed. Cl. 492 (2014).

4. For a primer on the Court’s jurisdiction in intellectual property actions, see The Honorable Mary Ellen Coster Williams & Diane E. Ghrist, *Intellectual Property Suits in the United States Court of Federal Claims*, 10 *Landslide I* (American Bar Association 2017).

5. Senior Judge Williams has served on the United States Court of Federal Claims since 2003. She gratefully acknowledges the contribution of her law clerk, Tyler Brown, to this article. The views and opinions in this article are solely those of Judge Williams and do not purport to reflect the views or opinions of the United States Court of Federal Claims.



Follow the Science: Safely Conducting In-Person Hearings in Covid-19

Tracie A. TODD

The political influence in world-wide approaches to the Covid-19 has created disparate realities and ability to effectively implement court operations. This article explores the varying consequences, but offers guidance for adopting science based approaches for management of court-operations during this pandemic.

Introduction

In the past year, domestic and international courts have struggled to preserve the rule of law amid a global health crisis of historic proportion. The novel coronavirus disease, Covid-19, was declared a pandemic

mitigate problems caused by structural inadequacies of courthouses, courts utilized communication technology more broadly. Emerging and evolving conferencing services increasingly enabled court personnel to work from home. The New Zealand High Court allowed courts to “carry out all its usual scheduled work both from the home and circuit registries that can be safely supported.” In the U.S., most court leadership, like the Alabama Supreme Court, issued orders expanding the use of telephonic and video conferencing for most hearing types. Technology capabilities were upgraded and integrated to create a new case management system.

In countries like the U.S. and Brazil, the government response to the pandemic often aligns with the prevailing political sentiment.

on March 11, 2020. Today, the total number of confirmed cases worldwide has surpassed 72 million. As nations race to flatten respective curves, dichotomies in responses make it clear that this pandemic remains a formidable foe for developed and developing countries alike. Judicial officers in the United States (U.S.) and abroad were forced to reckon in unavoidable terms with systematic inequities, antiquated facilities, underfunded courts, outdated technology, and politics.

Technology as a Public Health Tool

Globally, the pandemic sent shock waves across court systems. Courts scrambled to close courthouses, postpone trials, reschedule hearings and conferences, address other court deadlines, and develop new protocols to address building deficiencies, such as poor ventilation. To

The Intersection of Politics and Public Health

Although video conferencing and telephonic applications are useful for maintaining necessary social distancing, growing pressure has mounted for resuming or expanding in-person hearings. The questions of when and how to resume in-person hearings reveal an interesting divergence in approach that may hinge on local politics. Arguably, public health experts from essential health organizations have been pulled into the political fray, especially in the U.S. and Brazil, which have the first and second highest numbers of confirmed coronavirus cases.

In the U.S., states with rapidly increasing numbers like Alabama, Florida, Georgia, Mississippi, and Tennessee, are led by governments with an affiliated political ideology.¹ Some argue that the politicization

of science during this pandemic has negatively influenced public health guidelines and recommendations. For example, the Centers for Disease Control (CDC) initially estimated that 40% of confirmed cases were asymptomatic and likely contagious. Nonetheless, the CDC, along with the Office of the U.S. Surgeon General, and the World Health Organization (WHO), advised mask wearing only for symptomatic people. The independence of the CDC was specifically called into greater question in August when it revised testing guidelines to advise that, “If you have been in close contact (within 6 feet) of a person with a Covid-19 infection for at least 15 minutes but do not have symptoms, you do not necessarily need a test unless you are a vulnerable individual...” Other health organizations, like the American Academy of Pediatrics, called on the CDC to reverse this position, stating, “In the battle against the Covid-19 pandemic, we must be led by the science, in a fully transparent process that engages the public’s trust and confidence.” In September 2020, the CDC reversed its August 2020 revision and recommended testing for anyone exposed to the virus. Critics argue that the CDC’s repeated and drastic policy revisions correlate with the current political view of the U.S. government. In countries like the U.S. and Brazil, the government response to the pandemic often aligns with the prevailing political sentiment. Perhaps some court responses are susceptible to similar alignment.

Contrasting Approaches

In contrast to the pandemic responses in the U.S. and Brazil, a handful of countries have been touted as model nations for handling the coronavirus. According to *Time.com*, the Taiwanese government reported a total of 443 confirmed coronavirus cases and seven deaths to date. Singapore has reported 35,000 confirmed cases and 25 deaths. North Korea reported a total of 11,000 confirmed cases and 476 deaths. All three of these countries implemented aggressive testing and contact tracing protocols, along with other safety measures. New Zealand implemented a stay at home order between March 26 and April 13, 2020. This mandate, along with other measures, was credited as life and economy saving. It was widely reported that New Zealand went for 100 days without a new confirmed coronavirus case.

Vulnerable Populations

Most court response plans, both domestic and international, detail notions resembling a duty of care assigned to judicial officers when conducting in-person proceedings. In an order issued on May 4, 2020, the United States District Court for Northern Alabama declared that, “Each judge should be mindful of the health and safety of all participants in any such hearing.” The Illinois Supreme Court considered that, “Most individuals do not come to court by choice. As such, courts have a particularly compelling responsibility to make certain that courthouses are safe.” A Ugandan High Court Judge described a similar sentiment in the context of the oath of office requiring judicial officers to “do right to all manner of people.”

Most court pandemic plans require face masks, deep courthouse cleanings between hearings, and encourage hand washing.

The level of response to the pandemic in the court system is significant. Court systems, unlike other essential organizations, struggle uniquely to balance the strictures of justice and the challenges of a public health crisis. The justice system mandates certain substantive and procedural rules and privileges. Judicial officers are given the power to compel an individual’s physical presence in a courtroom to satisfy these mandates, even during a pandemic. The figurative and real power of the court’s pen makes collective and individual decisions concerning public health increasingly critical to maintaining the safety and public trust in the courts.

A determination to resume in-person hearings requires consideration of fundamental facts. Most courthouses are public buildings, and most courtrooms are designed to accommodate large groups. Public health officials have advised that the risk of transmission for the Covid-19 virus is high in large groups. Nevertheless, after months of limited court access for in-person hearings, courts are expanding in-person hearings, which compels the presence of more people in the courthouse, although with spikes in Covid-19 cases in some jurisdictions, this expansion has stalled.

Regardless, this arguably creates an almost incompatible divergence between the administration of justice and the advice of public health experts. In-person proceedings, especially jury trials, are difficult to conduct safely in this pandemic. This dilemma was summarized by a Japanese court official speaking to the *Japan Times* stating, “To be honest, we want to hold jury trials with no spectators for safety from the coronavirus.” For courts that require trial by jury, like in the U.S., the jury pool creates the type of high-risk environment that public health officials caution against. On this point, the Illinois court operating plan advised that, “Procedures that involve large numbers of individuals, such as summoning for jury duty, need to be implemented in a manner that not only assures safety but makes individuals

feel safe before and after they arrive at the courthouse.”

This directive is critical for individuals who are classified as vulnerable to Covid-19. According to the CDC, those at high-risk for severe illness from Covid-19 are people 65 years and older, people who live in nursing homes or long-term care facilities, and people of all ages with underlying medical conditions, such as chronic lung disease or moderate to severe asthma, heart conditions, those who are immunocompromised, those with severe obesity, diabetes, chronic kidney disease, and liver disease.

The *ABA Profile of the Legal Profession 2020* explains that “Roughly 15% of all lawyers – nearly 1 in 6 – are 65 or older.” This means that nearly 200,000 of the 1.3 million lawyers in the U.S. are in a vulnerable class as defined by the CDC. In this same report, the percentage of U.S. lawyers with some degree of disability ranged upward of 33% collectively across law firms of varying sizes. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, acknowledged earlier this year that, “We’ve known, literally forever, that diseases like diabetes, hypertension, obesity

and asthma are disproportionately affecting the minority populations, particularly the African Americans.”

In jurisdictions like Jefferson County, Alabama, where I preside, African Americans make up 42% of the population. According to the Jefferson County Unified Command Center, African Americans accounted for roughly 45% of confirmed coronavirus cases and 39% of Covid-related deaths in April. Sixteen percent of the county’s population is over the age of 65. More than 48% of the population has underlying health conditions. Roughly 70% of the population is considered obese. Clearly, this means that conducting in-person hearings for people in vulnerable categories in my jurisdiction is high risk and requires heightened safety protocols.

For this reason, plans to expand in-person hearings drew legal challenges in the U.S. Three assistant district attorneys in Pennsylvania filed a federal lawsuit in response to expanded in-person hearings citing violations of Occupational Safety and Health Administration (OSHA) regulations. A union representative in another case pointed to the court administration’s lack of communication “when people reported they had symptoms or tested positive.”

In the state of New York, a contingency of public defenders filed suit alleging that in-person hearings during the Covid-19 pandemic violates the Americans with Disabilities Act (ADA).² In a letter to the court, the group argued, “We do not believe there is any legitimate government interest in suddenly forcing hundreds of predominantly Black and Brown people to abandon social distancing protocols that have slowed the pandemic... This would require people to leave their homes – in communities with high infection rates – to attend non-essential and unnecessary court appearances, which increases risks to people appearing, their families, court personnel, and the community.”

More than Masks

As some courts grapple with legal challenges, other courts have expanded in-person hearings with varying degrees of safety protocols. Most court pandemic plans require face masks, deep courthouse cleanings between hearings, and encourage hand washing. Other plans require

temperature checks for anyone entering the courthouse. Some courts have installed plexiglass barriers. But many court plans do not include key measures recommended by public health officials. Many courthouses lack wide-scale testing of all court personnel, effective contact tracing, reliable court-wide notifications procedures, or a well-established self-quarantine plan for confirmed cases and exposure.

Most judges lack authority to implement wide-ranging testing and tracing measures. Equally, enforcement of basic safety mandates, such as mask wearing, is difficult for some courts to manage. This is especially true in the U.S., where mask wearing has been greatly politicized. However, the questions around safely resuming in-person hearings do not rest on the universal agreement among health officials that masks are necessary and effective. In addition to protecting vulnerable populations, the questions include broader public health

court operations. This expansion also required people visiting the courthouse to submit to temperature screening and to answer health questionnaires. Although Phase Four in New York included Grand Jury proceedings, it notably did not include jury trials.

In contrast, Johns Hopkins reported that Mexico and Nigeria, along with Mississippi, Nevada, and Florida, yielded positive percentage rates higher than 15%.³ Alabama courts, like Florida, resumed jury trials despite a 16% test positivity rate.⁴

On this point, the science appears to be simple and clear. In-person hearings that require large groups of people to gather in poorly ventilated courtrooms are high risk events. Courts conducting such hearings in communities with significantly vulnerable populations or high positivity rates without implementation of robust safety protocols may contribute to the transmission of the virus, and ultimately, community spread.

Understandably, courts, like other sectors, face enormous challenges and external influences.

considerations like local test positivity rates.

Let me provide more context. According to public health experts, testing and tracing become the cornerstones for containing outbreaks. An important advantage of testing is determining a locale’s positivity rate, or the percentage of all positive virus tests. In May, the WHO recommended that the positivity rate should remain below 5% for two weeks before governments reopen, and a lower threshold of positivity rates for large gatherings, like jury pools.

The Johns Hopkins Bloomberg School of Public Health reported that in July 2020, Australia, South Korea, Uruguay, New York, Maine, and Connecticut fell below the 5% positive percentage rate threshold, with 1% of tests or fewer yielding positive results. After almost four months of stay at home directives, the state of New York began to ease restrictions in June 2020. The following month, New York announced the courts’ transition to Phase Four of its Covid-19 operation plan, which expanded in-person

Adapting Best Practices

Digesting this information in the context of the court system exposes more than ever the extreme antagonism that Covid-19, in its villainous role, creates in the administration of justice and protecting the public. Presumably, most judges are determined to complete all that can be accomplished through virtual platforms. During this pandemic, one goal for judicial officers should be to manage, if not prevent, virus transmission. In answering the critical questions of how and when to resume in-person hearings safely, decision makers should look to those who have managed the pandemic best and adopt those practices. Courts should consider approaches that have yielded positive results, including:

Testing, Tracing, Screening, and More

- Court-wide testing and contact tracing to identify infected and exposed personnel and detainees. Reliable tracking methods to ensure that

affected personnel and detainees are quarantined.

- Weekly correspondence or briefings on confirmed cases and the state of court operations, including participation by local medical officials when possible.
- Layered use of personal protective equipment (PPE) to include masks, face shields, and gloves for parties appearing in person. Additional PPE requirement for detained litigants, including hazmat suits or single use surgical gowns.
- Medical grade air purifiers with needlepoint ionization technology or UV-C light and hospital grade disinfecting protocols.
- Robust health screenings for all entering visitors, personnel, and detainees, including health questionnaires, temperature checks, and rapid result smell tests.

Limit Courtroom Participants

- Large screen television monitors for remote participation.
- Limiting the number of people physically in the courtroom to no more than ten at a time.
- Designated waiting areas marked for social distancing.
- Paging, text, or telephone systems for notifying litigants when to report to the courtroom from the waiting area.

Staggered Work Schedules and Siloed Teams

- Division of judicial officers, staff, and other necessary employees into groups that report for in-person proceedings or administrative activities in designated groups on staggered schedules.
- Testing, tracing, and quarantining the entire group when a group member becomes infected.

Broader Perspectives

Clearly, this is a bare bones summary of a broader construct that requires considerable planning. Such a design requires access to significant resources, which are in limited supply around the world. Most importantly, an effective court response to this pandemic also requires all stakeholders to shed political motivations and cultural dogmas that have proven to be counterproductive.

During these trying times, it is a mortal miscalculation to mischaracterize measures prescribed by doctors and healthcare experts. Understandably, courts, like other sectors, face enormous challenges and external influences. However, courts should not yield to harmful rhetoric or half measures that advance an inadequate court response to a deadly virus. Undoubtedly, the conscious decisions of some in the court system to marginalize or ignore expert advice during this pandemic will likely be judged harshly in retrospect.

Illustrative of this point, cases across the globe are rising exponentially. Community spread is rampant. The death rate is overwhelming, particularly in the U.S. International and domestic government officials are reinstating more restrictive public health measures aimed at containing community spread. But despite the ominous trends domestically and abroad, some courts are racing with unfettered speed to resume, maintain, or enlarge in-person hearings and jury trials without adequate precaution. Repeatedly, I ask myself, “Am I misunderstanding the public health warnings?”

Conclusion

In normal times, the consequences of judicial decisions are real and have lasting effect on others. But in this crisis, the once inconsequential decision to conduct in-person hearings is now markedly significant. Safely resuming in-person hearings is most certainly possible, but only

when guided by science. Litigants, lawyers, court personnel, and the public deserve as a human right to appear in courts that are quantifiably safe. As the cavalry is arriving in the form of a vaccine, the gravity assigned to a decision to conduct in-person hearings should be hefty for any judicial officer. Because what decision can be more solemn than a decision that may expose someone to the possibility of serious illness – or even death? The key to incremental progress in expanding court operation is basic. Courts, like other institutions, should follow the science for safely managing in-person hearings during the Covid-19 pandemic.

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1. <https://www.brookings.edu/blog/the-avenue/2020/10/08/as-election-day-nears-covid-19-spreads-further-into-red-america/>.
2. <https://news.bloomberglaw.com/us-law-week/court-reopening-plans-face-pushback-as-coronavirus-surges>.
3. The positivity rate Jefferson County, Alabama had a 15% positivity rate over a two-week testing period in July. <https://www.al.com/news/2020/07/the-state-of-coronavirus-testing-in-alabama.html>.
4. However, a chief judge in one circuit ordered a delay in resuming jury trials because of an increasing number of confirmed cases. <https://www.floridatoday.com/story/news/2020/07/20/jury-trials-postponed-due-coronavirus-spike-numbers-florida/5471742002/>. <https://coronavirus.jhu.edu/testing/individual-states/alabama>.
5. Circuit Judge for the State of Alabama Tenth Judicial Circuit – Criminal Division.



La voz de los Colegios de Abogados

Miembro desde 1998

Ilustre Colegio de Abogados de Valencia

icav

Ilustre Colegio de Abogados de Valencia

Marc Gallardo entrevistó a la Decana del Ilustre Colegio de Abogados de Valencia (ICAV), Auxiliadora Borja Albiol, sobre lo que es más importante para ella en su papel de líder. El ICAV es miembro de la UIA desde 1998.

1. Por favor, hablemos del Colegio de Abogados de Valencia

El Colegio de Abogados de Valencia tiene 261 años de antigüedad, es el primer colegio de abogados de la Comunidad Valenciana y el tercero de España. Su sede principal esta sita en la Plaza de Tetuán nº 16 de Valencia, pero tiene 16 delegaciones en diferentes probaciones de Valencia. Es un colegio moderno, dinámico y adaptado a las nuevas tecnologías.

En estos momentos somos más de 12.000 colegiados y colegiadas, la gran mayoría ejercientes y en los últimos años ha habido un aumento considerable de mujeres igualando casi en estos momentos a los hombres.

Los servicios colegiales prestados por casi 90 trabajadores/as son muchos y muy diversos, entre ellos, los departamentos de Formación, Deontología, Honorarios y turno de oficio. Además, el ICAV dispone de una Oficina de atención al colegiado y al ciudadano (OACC) en la que se prestan multitud de servicios. El Colegio de Abogados de Valencia tiene además un Tribunal de Arbitraje (TAV) y uno de los Centros de Mediación de referencia Nacional el CMICAV.

Los colegiados y colegiadas del ICAV voluntariamente se integran en secciones sobre la materia que les interesa profesionalmente, sección de laboral,

mercantil, penal, de derecho de familia etc., desde las que proponen actos formativos al ICAV y asisten a congresos y otros en la materia que les compete.

El ICAV ha creado el primer Observatorio de Igualdad, con dos objetivos, conseguir la igualdad de género en la profesión y conseguir zanjar cualquier ataque a la igualdad de nuestros abogados y abogadas por razones de discapacidad, religión, raza, etc.

Para el ICAV la responsabilidad social es fundamental tanto con fines de ayuda a las personas colegiadas, a través de la Fundación D. Eduardo Calabuig-ICAV, como con las múltiples acciones que se desarrollan en beneficio de los más desfavorecidos, entre estas todos los años el ICAV entrega a diferentes asociaciones el 1% de nuestro presupuesto.

Desde el 12 de diciembre de 1943, en el ICAV está la Real Academia Valenciana de Jurisprudencia y Legislación, que ejerce sus funciones en el ámbito de la Comunidad Autónoma Valenciana, aspirando a integrar al más alto nivel, los distintos sectores de la vida jurídica Valenciana en una común tarea científica. Sus fines son la investigación y la práctica del Derecho y de ciencias afines, debiendo contribuir a las reformas y progresos de la legislación española y en especial de la Comunidad Autónoma Valenciana.

2. Describa sus antecedentes, incluyendo si era inusual o se esperaba ejercer como Abogada

Empecé en el tercer año de carrera a trabajar en un despacho que asesoraba jurídicamente a empresas. Cuando termine la carrera, valore el hacer oposiciones, pero me gustaba el trabajo que realizaba

en la asesoría y se me daba bien, así que finalmente decidí ejercer la abogacía.

3. Al momento de iniciar sus estudios de Derecho ¿cuál fue su sentido de propósito o vocación y cómo se manifestó?

Cuando empecé mis estudios de derecho, no estaba convencida de que me gustara, también pensé en estudiar periodismo, pero mis padres me dijeron que estudiara lo que quisiera, siempre que pudiera cursar mis estudios en Valencia y estando en casa, y periodismo entonces no podía estudiarlo en Valencia, me tenía que desplazar a vivir a Madrid.



4. ¿Hubo alguna persona influyente que desempeñar un papel importante en el desarrollo de sus ideas sobre la moral y la ética? Por favor, descríbala.

Mi padre siempre me decía lo importante que es dormir tranquilo. Él era un Señor y me inculco importantes valores.

5. ¿Qué temas legales le intrigaban más y por qué?

Me intrigan mucho las nuevas tecnologías, como pueden influir en nuestro futuro.

6. ¿Sus primeros ideales sobre la profesión jurídica y el Estado de Derecho se ajustaban a sus experiencias después de finalizar la Licenciatura en Derecho? ¿Podría explicar las diferencias?

El estado de derecho que estudie, se ajusta a la realidad bastante,

Solo la vida te enseña que no hay verdades absolutas, que no todo es blanco o negro, que existen muchas variables y otras perspectivas que te hacen ver las cosas de otra manera.

7. ¿Tuvo un mentor y, con el tiempo, se convirtió usted en uno para los demás, incluidos los jóvenes abogados? Por favor, describa ambos papeles, si procede.

Mi padre fue mi mentor, el me ayudo a iniciarme en esta profesión.

Yo he ayudado principalmente a mis hijas, que también ejercen la abogacía y les inculco los valores que mi padre me transmitió a mí.

8- Mirando hacia atrás en su vida, ¿de qué está más orgullosa?

De mi familia.

9. ¿Cuáles son sus objetivos como Decana de un Colegio de Abogados y cómo planea alcanzarlos? Para ello, ¿cómo podrían ayudar los miembros de la UIA?

Como decana, mi interés es aportar una mayor modernidad a un Colegio que en estos momentos despunta a nivel nacional. En primer lugar, acercando más el colegio



a los colegiados y colegiadas, pero también acercándolo a la Sociedad. Para la Abogacía es imprescindible la formación, tanto al inicio de su andadura profesional como durante el desarrollo de la misma, en esto, en la formación la tecnología nos ha permitido durante la crisis sanitaria poder llegar a los despachos mediante formación on line y por streaming con participación directa de los receptores, esto es de la Abogacía.

Tengo una apuesta personal por culminar lo que mis decanos anteriores hicieron en lo referente a las formas alternativas de conflictos, apuesto por el arbitraje y por la mediación. Es la manera menos agresiva, mas confianza, y a su vez más rápida y económica de atajar en profundidad las contiendas.

Ayudar a los colegiados/as en su día a día, haciendo que todas o casi todas sus necesidades colegiales se puedan llevar a cabo sin desplazamientos y por vía telemática. Ser su voz y su apoyo en los conflictos con la Administración, de hecho, hemos creado una APP en la que se pueden realizar quejas o notificar incidencias para con rapidez y eficacia poder solucionar las cuitas diarias de las personas colegiadas. Establecer un protocolo de suspensiones por razones de maternidad, paternidad, o bajas médicas.

En los dos años que llevo de decana, con mi Junta de Gobierno se han hecho muchas

cosas, espero y deseo en los dos años que me quedan poder tener la satisfacción, de que he contribuido a un Colegio mejor.

10. Describa su experiencia más significativa como Decana y si pudiera hacer un solo cambio en la profesión legal, ¿cuál sería?

La experiencia más significativa es estar llevando el decanato y mi despacho, en pleno confinamiento con el COVID, tener que reinventarme en cada acto que realizo para adaptarme a las necesidades sanitarias, haber celebrado elecciones en mi Colegio este mes de octubre de forma presencial pero con voto electrónico, y organizar todos esos eventos, convocando a tanta gente y al mismo tiempo que no hubiera peligros de contagio.

Liderar a todo el equipo del Colegio con esta nueva situación que la pandemia provoca, y no suspender la actividad normal y habitual, es complicado, ya que lo fácil es con la excusa del Covid, paralizar y suspender la actividad habitual y hacer lo imprescindible.

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Striking a Balance Between Artificial Intelligence and Law

I Dr. Andrés SZECISKAY

Les avocats sont menacés par l'image de l'Intelligence Artificielle, étant le conquéreur du domaine juridique depuis de nombreuses années. En regardant la montée des sociétés LegalTech et Predictive Analytics, sans parler de l'introduction de juges robots, il peut sembler que l'avenir de la profession soit en danger. Réagissant à cela, le but de cet article est de vérifier la réalité derrière certaines inquiétudes liées à l'IA et de souligner le rôle de soutien que la technologie peut jouer dans la vie des praticiens du droit. Cet article vise à peindre un tableau équilibré des risques et avantages potentiels liés à l'utilisation de la technologie dans la justice et dans la vie des cabinets d'avocats.

Introduction

The year 2020 will be remembered as an unprecedented time, filled with extraordinary demands and challenges, a time when video-conferencing software applications like Zoom, MS Teams, Skype, and many others played a pivotal role in both personal and professional lives. From rethinking teleworking and client meetings, to virtual coffee breaks, a preview was provided about how useful technology can be. This Legal-Tech should be differentiated from systems with Artificial Intelligence (AI), which are systems that use intelligent behavior to analyze their environment and take actions, with various levels of autonomy, to achieve specific goals. However, Legal-Tech can be the gateway for AI.

The question arises whether the experience of the pandemic will encourage legal practitioners to adapt new technologies more broadly—and more fearlessly—in the future, even after the pandemic is over. Indeed, this could bring the shift aspired to by many. According to a survey¹ conducted by AIJA in 2018, half of European lawyers rated resistance to innovation as the first biggest threat to the legal profession. It is time to be bold and think outside the box,

while not giving up the lawyer and human mentality. Be skeptical and perfectionists, even towards AI.

Artificial Intelligence and Justice

“The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law.” (Jerome Frank, *Law and the Modern Mind*, p. 111)

In light of Frank's thought, one could easily assume that a neutral and unprejudiced algorithm is more capable of ensuring the right to a fair trial than a human being. Or, at least it can be a remarkable tool to free up human judges so they can focus on more complicated cases in the future. As an example of this, in 2019, Estonia announced its plan to introduce an 'AI judge' in small-claims disputes of less than €7,000. It would examine documents uploaded by both sides of a dispute and deliver decisions that can be appealed to a human judge.²

costs, impartiality, and consistency through automated decision-making. On the other hand, new technologies might pose certain risks to judicial systems. To mitigate these risks, the European Commission for the Efficiency of Justice (CEPEJ) adopted five fundamental principles on the use of AI in judicial systems: (1) respect for fundamental rights; (2) non-discrimination; (3) quality and security; (4) transparency, impartiality, and fairness; and (5) that it is “under user control.”⁴

Trustworthy Artificial Intelligence

The use of AI must be considered with the greatest reservations to prevent discrimination, especially in criminal courts. To avoid perpetuating existing and systemic bias, trustworthy AI systems are needed. Obviously, even with the best intentions, AI systems may show – and might even continue – the current inequalities in a society. In other words, AI systems are

[...] AI systems are only as good as the data and information provided to them.



only as good as the data and information provided to them. Also, for the avoidance of doubt, discussions should be had about who owns the algorithm and who is responsible for its decisions – its developer or the state.⁵

In 2018, a coalition of more than 100 civil rights, digital justice, and community-based organizations released “A Shared Statement of Civil Rights Concerns,” a publication that highlighted issues with the adoption of algorithmic-based decision-making tools. The contested risk-assessment tools can predict a person’s likelihood of appearance at future court dates and the risk of repeat offenses.⁶

Although algorithms can be excellent tools in straightforward decision-making processes, they are not able to provide neutral predictions about the future – yet. Judging is a mix of skills, including a logical way of thinking, empathy, and creativity. The use of AI could be among the tools used and considered by a judge. By playing a secondary role, it might support a court in the management of cases or in the analyzing of court performance.

Artificial Intelligence and Law Firms

“In the 2020s law firms will have a very clear choice: they will either compete with machines or they will build the machines (themselves) that will compete with other machines.” (Richard Susskind)

While previous technologies principally replaced clerical and support staff, AI and machine learning threaten to displace lawyers themselves. Despite how intimidating it may sound, let us try to dig into the question with an open mind.

Machine Learning

For now, Legal-Tech helps law firms support clients and win. AI systems cannot deal with data they do not know or measure emotional states. Since one key part of lawyering is the skill of assessing unstructured human interactions, AI systems can only take over the tasks that are more routine in their nature, while client-sophisticated advice is typically performed by a lawyer.

For instance, ContractPodAi® is an AI-based Contract Lifecycle Management

(CLM) system. It is a platform that can generate contracts, review third-party documents, and run reports on existing contracts all in one place. In 2019, ContractPodAi® secured nearly €49 million Series B funding led by Insight Partners along with participation from Eagle Proprietary Investments. Another great example is Luminance®, which is an AI platform that uses machine learning to read, analyze, and form an understanding of documents much like a human does. While a lawyer might get bored after reading the hundredth page of a document, the AI never does, thus saving money and time while improving efficiency and client service.

Fast Train Is Coming!

People usually do not realize that their issue is a legal one or, even if they do, they seek the help of the internet first. Disposing of property upon death is an ordinary, but excellent example here. Farewill is a will-

here. Its software analyzes not only the judges and courts by mining public court documents, but also counsels’ winning rates and their experience before specific judges and courts.

Conclusion

As Alan Kay said, “The best way to predict the future is to invent it.” AI influences the demands for legal labour. It can expand the client base and increase the billable hours of a lawyer. It depends on humans whether—or when—to take advantage of it. Keep in mind however, that the driver remains the human being, so why don’t people choose the faster car if it is possible and available?

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Despite how intimidating it may sound, let us try to dig into the question with an open mind.

writing service that provides a platform for people to write online wills, organize probate services (such as sorting out death duties and taxes on a person’s property), and order cremations. Farewill won ‘best social innovation’ award at the 2020 Europas and raised £20 million in funding.

Consequently, law firms should realize the promises of AI in their marketing. There is a vast pool of potential clients out there. Law firms should be able to collect data on their prospective clients through social media platforms and web searches, and to exploit those data commercially.⁷

Predictive Analytics

Predictive analytics can save countless hours for law firms while revealing hidden connections between entities through powerful visualization tools. Predictive analytics is basically a prediction on how a judge or court will rule in a particular case based on research on previous decisions. Lex Machina® is a remarkable example

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Artificial Intelligence in Italy: An Overview of the Regulatory Framework and its Application for Legal Practitioners

■ Riccardo G. CAJOLA

Introduction

By using the wording “Artificial Intelligence” (“AI”), or “*Intelligenza Artificiale*,” reference is made to software and hardware systems capable of achieving complex goals, operating in physical or virtual dimensions, perceiving the surrounding environment, acquiring and understanding and inferring data through knowledge continuously acquired (reasoning and machine learning), and then utilizing it in adopting decisions, and choosing solutions in given or extemporary situations. AI is defined as a “dual” technology as it can apply to both civilian and military scopes.¹

Essentially, AI refers to a technology ecosystem based on highly performing calculations, mobile broadband technologies, nanotechnologies, and the so-called Internet of Things (“IoT”). The further development of these sectors will allow for a more synergic interaction among them, mainly due to blockchain, cloud computing, and the operativity of 5G frequency bands. AI is not “rote” technology.

The Current EU and National Legal Framework

At the European Union level, AI projects are being developed in the energy, automotive, construction, agriculture, and public administration, and infrastructure areas, among others.² In this context, AI experts in Italy have highlighted the need for the country to deepen its commitment to pan-European AI initiatives by creating or diversifying government, social, and investment programs that would allow access to the larger EU market for Italy-based AI projects. Experts note that Italy should put into place stronger incentives to attract foreign AI researchers and entrepreneurs.

In Italy, in July 2018, a group of higher education institutions created the Artificial Intelligence and Intelligent Systems Lab with the aim of strengthening the country’s “basic and applied research in AI, support the country’s ICT industry

by promoting technology transfer from research to entrepreneurship, and promote the adoption of AI solutions in the public administration.”³

In March 2018, the Agency for Digital Italy published a White Book on Artificial Intelligence that describes the current status of AI in Italy. The White Book calls on all stakeholders to improve access to AI in Europe and Italy, proposes a new common culture for innovation in public services, and sets forth challenges related to AI for the Three-Year Plan for Information Technology in the Public Administration, published in 2017.⁴ These challenges include: (1) potential areas of application of AI initiatives; (2) ethical and technological challenges; (3) AI competency

of government agencies; (4) data storage and sharing; (5) development of an appropriate legal framework for AI; and (6) promotion of key principles for advancing AI initiatives, including human dignity and equality.

In particular, the White Book emphasizes that the government’s interest in facilitating the adoption of AI strategies and approaches at public agencies has the effect of providing the general public with faster and more efficient services in the areas of public health, education, the judicial system, public security, and more. The White Book recognizes the need to update the legal and regulatory framework for AI in Italy by balancing public and private interests and abiding by the principle of transparency of administrative acts, protecting privacy and copyright, fostering accountability, and establishing an effective system of social control for the protection of the fundamental rights of the person.

To this end, the White Book includes ten recommendations for consideration by the government. They include the creation of a “National Competence Center and a Transdisciplinary Center on AI,” the development of a national platform to promote the collection of annotated data, and the creation of measures to disseminate AI-related skills through the public administration.

AI is deemed by both the Italian government and the European Union as one of the key technologies for a new industrial revolution to be realized through the transition to the digital world. Consequently, Italy has implemented a national strategy on AI within the framework of the European Coordinated Plan on AI which constitutes the domestic contribution to a synergic action among the EU member states.⁵

Currently, there are no planned, discussed, or implemented sectorial statutory regulations in Italy on the use of AI in the legal profession or services [...].

The national strategy for AI comprises an initial chapter called Vision that targets the following nine targets:

1. Improving investments, public and private, on the AI and relating technologies.
2. Enhancing research and development in the field of AI.
3. Supporting the adoption of digital technologies based on AI.
4. Increasing educational efforts at different levels to bring AI to support workforce.
5. Developing the data use potential driven from the AI.
6. Consolidating the legal and ethical frameworks which regulate AI development.
7. Promoting awareness and trust on AI among citizens.
8. Improving the public administration sector and making public policies more efficient.
9. Favoring the European and international

cooperation for an accountable and inclusive AI.

The following seven key sectors have been given the utmost priority in the allocation of resources: manufacturing industry, agrofood, tourism and culture, infrastructures and energy networks, healthcare and social security, and smart cities, as well as mobility and public administration.

AI for Legal Practitioners

In general terms, current applications of AI in the legal practice can be envisaged in six major categories:

1. Due Diligence – Litigators perform due diligence to uncover background information. Other uses include contract review, legal research, and electronic discovery.
2. Prediction Technology – AI software forecasts litigation outcomes.
3. Legal Analytics – Lawyers use data points from past case law, win/loss rates, and a judge's history to predict trends and patterns.
4. Document Automation – Law firms use software templates to fill out documents based on data input.
5. Intellectual Property – AI users analyze large intellectual property portfolios and draw insights from the content.
6. Electronic Billing – Lawyers' billable hours are computed automatically.

Currently, there are no planned, discussed, or implemented sectorial statutory regulations in Italy on the use of AI in the legal profession or services that are traditionally rendered by lawyers. In the Italian legal world, however, lawyers are already using AI software in their practice. This software is mostly meant to simplify lawyers' work, setting them free from repetitive work, which can slow down their professional activity. This software can assist lawyers in finding applicable statutory regulations and performing court case searches, as well as the revision of contracts.

For example, "Ross" is an AI software that simplifies the work of lawyers by helping with research. "Ross" can search statutory regulations and court cases. It is based on "Watson," an IBM software program capable of understanding human language. In addition to performing searches on single cases, "Ross" is capable of helping lawyers interpret the implications of a specific case and enables

the lawyer to problem solve accordingly. Several Italian law firms, particularly in Milan, have begun using "Ross."

"Ross" is not the only AI software lawyers use. Another example is called "Kira," which is a software with expertise in contracts. "Kira" cuts down time spent on analyzing hundreds of pages of contracts. "Kira" automatically finds, extracts, and reviews significant contract information in minutes. This software is meant to enhance visibility into contract terms. "Kira" rapidly responds to a change in law, anti-bribery review, or a force majeure event. According to its provider, "Kira" can jump between summary text and the original scanned page. It analyzes contracts, extracts their most relevant sections, and highlights their material provisions. "Kira" is also capable of analyzing documents based on the inclusion or absence of specific provisions and can extend its search and analysis functions to contracts drafted in different languages.

An interesting bot machine used for legal data privacy protection was commercialized by LT42, the Italian company that focuses on "legal-tech" innovation. This Italian software supports enabling Data Protection Officers ("DPO") complying with the EU GDPR Regulation on privacy. LT42 can provide support both through an online platform and through a customized consulting service. It can also monitor and help comply with the norms established by the EU.

Contract Intelligence ("Coin") is another bot machine able to substitute 360,000 annual working hours performed by lawyers. It has been tested by JP Morgan. "Coin" runs on a machine learning system that is powered by a private cloud network used by a bank. Apart from shortening the time it takes to review documents, "Coin" has also helped JP Morgan decrease its number of loan-servicing mistakes. According to the program's designers, these mistakes stemmed from human error in interpreting 12,000 new wholesale contracts every year.⁶

Another example is "DoNotPay," a mobile phone app AI software developed to appeal parking ticket citations, cancel a service or subscription, or sue in small claim courts, such as for delayed or cancelled flights. The company running this business now claims that "the DoNotPay app is the home of the

world's first robot lawyer." It also states that this app allows a person to "Fight corporations, beat bureaucracy and sue anyone at the press of a button."

In Italy, an AI software called "Flightright," provided from a German company called "Flightright GmbH," is frequently used by travelers. This air passenger claims management software offers passengers assistance and advisory services to obtain compensation from airlines when a flight is delayed or cancelled. "Flightright" tells customers whether they are entitled to compensation by simply typing in their flight details and whether there was a delay, cancellation, rebooking, or a missed connection.

Conclusion

The Italian Bar Associations will play a material role in providing ethical rules and guidelines for the use of AI in the legal profession. Civil proceedings have been digitalized over the last decade, and the way lawyers, judges, and court clerks work has dramatically changed. It is difficult to predict how the transition to legal AI will occur. On one hand, large law firms can be expected to drive initial adoption as they are most capable of affording AI-based tools and integrations. On the other hand, smaller law firms can also likely begin with an automated, efficiency-driven approach, as long as they do not deal with the same overhead of larger firms, and will be able to level the playing field. Time will tell.

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A Year for the History Books: The UK Legal Profession in 2020

Chloe WESTERMAN & Kathleen HEYCOCK

A brief overview of how the UK's legal sector has been affected by two seismic events in 2020: the global pandemic and the Black Lives Matter movement.

Introduction

2020 has been a year to remember. For the last nine months, the world has been turned upside down by an unprecedented global pandemic that has seen total lockdowns of nations around the world. In the United Kingdom (UK), the pandemic has touched all aspects of society including how, if at all, legal businesses operate.

By way of background, England and Wales has a split system with a division of labour between two types of lawyer: solicitors and barristers. Barristers tend to specialise in courtroom representation, whilst solicitors mainly perform legal work outside court. Solicitors are employed by law firms, whereas most barristers are self-employed and are grouped together with other barristers in offices known as chambers.

The Pandemic

The immediate impact of the pandemic on the UK legal sector was sobering. On March 23, 2020, the UK government announced the first national lockdown and solicitors' firms and chambers were forced to close. As the first lockdown dragged on, firms across the UK announced pay cuts and pay freezes for trainee and associate solicitors and delayed or cancelled distribution of profits to partners. Trainee solicitor intakes were

delayed and various firms, such as Reed Smith and Freeths, initiated redundancy consultation processes. In July, the Bar Council reported that 75% of chambers had had their court work reduced by over half since the beginning of the pandemic and that, even with the support of government measures, 58% of chambers did not think they would survive 6-12 months.

but following the easing of restrictions in June, law firms began to bring back furloughed staff with solicitors' offices and barristers' chambers tentatively reopening. However, on November 4, 2020, a new national lockdown was introduced in the UK, and therefore the outlook for the legal profession, as well as other sectors, remains uncertain.

[...] Many junior lawyers enjoy working from home, others report feeling isolated and overwhelmed by their workload without the in-person support of supervisors.

The UK government has implemented various measures to shore up businesses during the pandemic, the most significant being the Coronavirus Job Retention Scheme (CJRS), which was first announced in March 2020 and has since been extended to March 31, 2021. Although the terms of the scheme have changed over time, the aim of the scheme is to enable UK employers to access a grant to continue paying part of the salary of employees who would otherwise have been laid off or made redundant as a result of the coronavirus crisis. Under the CJRS, employers can ask employees to stop working, while keeping them on their pay roll. These individuals are described by the scheme as "furloughed." Barristers are largely self-employed so they cannot access the CJRS, but the UK government has introduced an equivalent scheme for the self-employed.

Various solicitors' firms made use of the CJRS during the first national lockdown,

Although the pandemic has clearly been a catastrophe, one positive by-product of the national lockdowns in the UK has been that working from home has been shown to work, and work well. The benefits of working from home for employees have long been known and include greater geographic independence and more time to spend with family or pursuing other passions. However, the pandemic has been a unique opportunity for law firms, traditionally resistant to change, to test the efficacy of working from home. The successes of remote working during the pandemic have now prompted firms, such as Linklaters, DLA Piper, and Baker McKenzie, to embrace a permanent shift towards increased remote working.

Remote working requires greater adoption of technology, and the pandemic has acted as a catalyst for the UK legal sector's adoption of technological solutions. In August, LexisNexis reported a 45% since the pandemic began in

law firms using teleconferencing software, and it is not just law firms that are finally going digital. The pandemic has also forced the UK's court system to use online tools with hearings being conducted remotely using video and phone calls. Much like remote working, remote hearings look set to stay with the Lord Chief Justice, Lord Burnett, telling the House of Lords constitution committee in May that there will be "no going back" to pre-pandemic days for the courts in their use of technology.

Although the move to remote working and the accompanying use of technological tools clearly have benefits, there are downsides to the new way of working prompted by the pandemic. Junior lawyers in particular report concerns about missing out on office networks and mentoring. Although experiences vary and many junior lawyers enjoy working from home, others report feeling isolated and overwhelmed by their workload without the in-person support of supervisors. Others are concerned about the impact of remote working on their career development as they find it harder to build professional relationships with their colleagues over video. Many senior lawyers share these concerns, and so although the sector has embraced working from home and the benefits it can bring, the need for

some time in the office is also clear. It is likely that these issues are common across a range of jurisdictions.

Black Lives Matter

The other seismic event of 2020 has been the revitalisation of the Black Lives Matter (BLM) movement, sparked by the tragic death of George Floyd, who was killed by white Minneapolis police on May 25, 2020.

BLM has touched every aspect of society and has rightly shaken the business world, including the legal profession. Much like the #MeToo movement, BLM has prompted corporate soul searching and forced corporates to confront uncomfortable truths about their past. BLM has also shone a spotlight on the enduring inequalities of the legal workplace today. The Bar Standards Board's report, *Diversity at the Bar 2019*, which was published in January of this year, found a marked disparity between the overall percentage of Black, Asian, and Minority Ethnic (BAME) barristers across the profession (13.6%), and the percentage of BAME QCs (the most senior level of barrister) (8.1%). In March of this year, the UK's Solicitors Regulation Authority reported that "both black and Asian

lawyers are significantly underrepresented in mid to large size firms (those with six or more partners). The largest firms (50 plus partners) have the lowest proportion of BAME partners – only 8%."

BLM has empowered employees to call out these injustices and since May 2020, UK employment lawyers have seen an uptick in the number of race discrimination complaints being raised in the workplace, which mirrors the flurry of sexual discrimination and harassment claims prompted by the #MeToo movement in 2017. BLM has also galvanised businesses into tackling race discrimination and following Floyd's death, over 30 leading UK law firms signed the Race Fairness Commitment (RFC), which measures the signatories' hiring and the progression of BAME lawyers when compared to white colleagues.

Although the direction of travel is encouraging, further action is needed. Studies show that the pandemic has had a disproportionate effect on the black community and indeed the Bar Council's survey of all barristers in England and Wales (published April 27, 2020) concluded that "Diversity and social mobility at the Bar are likely to decline as a result of the (*pandemic*) crisis. Black, Asian and Minority Ethnic and state-educated barristers are doubly hit – by being more likely (i) to be in publicly funded work and (ii) to face greater financial pressures."

The last nine months have been a unique moment in history and have prompted great change in how people work. For the traditional legal sector, change can be challenging, but as 2020 draws to a close, the UK legal sector appears to have mainly adapted well to the new normal and is embracing the need for future change.

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Highlighted Legal Issues for Foreign Brands on Entering Chinese E-Commerce Platforms

I Grace WANG

Introduction

China's cross-border e-commerce businesses have been booming in recent years and growing even more rapidly under the situation of the Covid-19 pandemic. "Retailary" consumption, in which consumers spend more to make up for forced cuts during the lockdowns due to the pandemic, has risen. Cross-border shopping has significantly overcome the global impact of the pandemic and maintained rapid growth.

Forecasts published in April 2020 by the International Monetary Fund indicate that China is the only economy expected to achieve significant growth for the year 2020. With Covid-19 effectively under control in China, the Chinese economy is forecasted to recover from the second quarter and continually grow in the third and fourth quarters. As a result, more and more foreign brands are entering China's e-commerce market to establish long-term businesses. Cross-border e-commerce is seen as an ideal choice to expand in the Chinese market, but certain issues remain.

With the rapid growth of the Chinese e-commerce platforms in recent years, the huge market potential is drawing more and more foreign brands to engage in business with them. Reports show that by the end of 2017, 16,000 overseas brands were introduced in China from 68 countries and regions by Tmall Global, a well-known cross-border e-commerce platform in China. Many new brands are entering the Chinese market for the first time. For the enormous consumer market of China, e-commerce platforms provide an ideal solution for cost-saving in comparison with the conventional distribution channels. With the development of oversea warehouses, not only the inventory turnover rate can be improved, but also the delivery time shortened. Nowadays, the trend of globalization for cross-border e-commerce has become much more mature.

In the meantime, the E-Commerce Law of the People's Republic of China (hereinafter

referred to as "E-Commerce Law") is the first comprehensive legislation in the field of e-commerce in China, and it is of great significance in the development of the e-commerce industry. This article will evaluate and analyze the content of the E-Commerce Law and provide corresponding guidance and suggestions for foreign brands to land on China's e-commerce platforms.

The Background and Highlights of the E-Commerce Law

The E-Commerce Law came into force in China on January 1, 2019, with clear provisions on e-commerce businesses, the formation and performance of e-commerce contracts, settlement of e-commerce disputes, promotion of e-commerce, legal liability, and other supplemental and general provisions. This is a key step in regulating e-commerce market in China, which promotes the sustainable and healthy development of its e-commerce industry. The following is a brief introduction to the content that now has substantial influence on e-commerce businesses.

unless no registration is required by laws or administrative regulations. In addition, the e-commerce platform business shall submit the identity information of in-platform businesses and information related to tax payment to the administrative authorities. Therefore, before introducing a foreign brand to a Chinese e-commerce platform, the owner shall conduct a thorough tax planning, as well as choosing the appropriate market participant registration, and develop a legal tax avoidance plan.

Default Tie-In Sale is Prohibited

Article 19 of the E-Commerce Law stipulates that, for the tie-in sale of commodities or services, an e-commerce business shall advise consumers in a conspicuous manner that said tie-in sale will not be set aside as a default option. Therefore, the e-commerce businesses must make clear, while publicizing the tie-in sale of commodities and services that the commercials shall be displayed in a prominent place on the page, to ensure that consumers are well informed for tie-in sales before purchasing the required products or services.

The notice to the e-commerce platform shall include prima facie evidence that the infringement has been committed.

Obligation of Tax Payment for E-Commerce Business

Prior to the E-Commerce Law, tax evasion was most frequently found in e-commerce businesses. The E-Commerce Law states the obligation of tax payment for e-commerce businesses. An e-commerce business shall complete market participant registration according to the law, except for (1) the individual selling agricultural or sideline products produced by it, or products of a cottage industry, or using its own skills to engage in public convenience services, or occasional and low-value transactions, for which no permit is required by law, or (2)

"Notice-Deletion" Rule for Intellectual Property Infringement

Prior to the E-Commerce Law, disputes of intellectual property infringement in e-commerce platforms were resolved under relevant provisions in the Tort Liability Law. The E-Commerce Law now sets forth in detail complaint procedures which pertain to e-commerce platforms.

Where the owner of an intellectual property right considers that the owner's intellectual property right has been infringed

upon, that owner shall have the right to notify the e-commerce platform business to take necessary measures, such as deletion, blocking, or disconnection of links and termination of transactions and services. The notice to the e-commerce platform shall include *prima facie* evidence that the infringement has been committed.

An e-commerce platform business may, upon receipt of the notice forwarded, give a declaration of non-existence of infringements to the e-commerce platform business. The declaration shall include *prima facie* evidence of non-existence of infringements. The e-commerce platform business shall, upon receipt of the declaration, forward it to the owner of the intellectual property right that gives the notice, and advise the owner that said owner may file a complaint with the relevant competent authority or bring an action in the people's court.

If the e-commerce platform business does not receive notice within 15 days after the forwarded declaration reaches the owner of the intellectual property right that the owner has filed a complaint or sued, the e-commerce platform business shall promptly terminate the measures it has taken. This means the e-commerce platform businesses must strengthen their own compliance after receiving an intellectual property infringement notice, take required measures immediately after receiving notices from e-commerce platforms, and submit the appropriate proof of the non-existence of infringements. This way, the platform may avoid its commodity and service links being removed and financial damages determined.

Data Security

Enormous amounts of data or user information are being generated in the operation of e-commerce. The e-commerce businesses must abide by the provisions of laws when collecting and using user information. The E-Commerce Law stipulates that an e-commerce business shall provide relevant e-commerce data and information that the relevant authorities require according to any law or administrative regulation. The relevant authorities shall take necessary measures to (1) protect the security of the data and information provided by e-commerce businesses, (2) strictly keep the individual's information, privacy, and

trade secrets therein confidential, and (3) not divulge, sell, or illegally provide said data and information to any other person. During business operation, operators often have access to consumers' personal information. If user information is used for more than reasonable purposes, this act may constitute invasion of personal privacy or even a crime.

Successful Experience of Foreign Brands Settling in Tmall Global

Another legal issue relating to foreign brands entering the Chinese e-commerce market involves protection of trademarks. Dutch jewelry brand TISENTO successfully entered the Chinese Tmall Global platform. Founded in 2003, TISENTO is a European

registered the TISENTO trademark in China prior to TISENTO's trademark registration. This prior registration led to the rejection of all trademark applications filed by TISENTO to the China Intellectual Property Office. If TISENTO's trademark could not be obtained, it would not only cause the establishment of online stores to be suspended indefinitely, but it would also cause the risk of liability for trademark infringement in the sales of TISENTO products in China.

Intellectual property is one of the most important issues that all enterprises need to pay close attention to when doing business in China. TISENTO filed a cancellation request for the prior trademark that had not been used for three years, but the application was eventually rejected because the trademark owner provided the required proof of use.

Another legal issue relating to foreign brands entering the Chinese e-commerce market involves protection of trademarks.

light luxury brand based in Amsterdam, the Netherlands, which focuses on high-end silver accessories. After more than ten years of continuous operation, TISENTO has gradually attracted attention in the Chinese consumer market. In the past, TISENTO's products were only distributed through a purchasing agency among a small audience in China. Now with the opening of TISENTO Tmall, Chinese consumers can purchase TISENTO's products on the Internet. TISENTO has a dedicated central warehouse in China so that consumers can receive authentic goods from overseas more quickly and efficiently.

Since 2018, TISENTO had planned to enter the Chinese e-commerce market. However, it found that the biggest obstacle to opening in China was with respect to their own trademark in China. To ensure that Chinese stores do not infringe intellectual property rights of others, the e-commerce platform requires that store owners provide purchasers with a trademark rights certificate or trademark license to prove that the store has the right to use the trademark.

Although TISENTO has registered trademarks in other countries, it has not obtained a valid trademark in China because a third party

It turned out that the third party, who registered the earlier TISENTO trademark, had also registered a series of trademarks the same as those of international well-known jewelry brands. In addition, it publicly sold the registered trademarks on many trading platforms.

In accordance with the Trademark Law, any registration act suspected of disrupting the order of trademark registration, damaging public interests, or seeking illegitimate interests by improperly occupying public resources shall be declared invalid according to Chinese law. Accordingly, TISENTO filed a trademark invalidation application to the Trademark Appeal Board. Ultimately, the two sides finally reached a settlement. TISENTO successfully obtained the registered trademark, and the Tmall Global store was successfully opened.

Do's and Don'ts for Foreign Brands While Entering E-Commerce Platforms in China

With the rapid growth of cross-border e-commerce in China, necessary legal due diligence is an important preemptive means to

prevent violation of local laws and regulations before entering the Chinese e-commerce market. The following practical considerations should be understood by foreign brands as they are of critical importance when entering the Chinese market.

Design of Operational Legal Framework

The choice of business arrangement determines the legal responsibility of the business entity of each party. The most common business arrangements include product consignment, product direct-sale, and brand agency.

Product consignment is a business arrangement in which a business, also referred to as a consignee, agrees to pay a seller, or consignor, for merchandise after the item sells. With product consignment, foreign brands do not participate in the management and operation of online stores, but only sell the goods to the buyers, which is like the typical offline retail store that specializes in a particular type of consumer product. Foreign brands only have contractual relationships with the consignee, but not with the end consumers. Any product disputes with the third-party shall be settled between the consignee and the third party.

Product direct sale refers to the arrangement that the seller operates the online shop sales in its own name, and products are sold directly by the brand owner to end consumers. In this arrangement, the consumer contract is formed between the brand owner and the consumer, and the brand owner is liable for the contractual responsibility and product responsibility. In addition, the brand owner can also enter consign agreements with experienced business operators to act as store agents, but the contractual relationship is still formed with consumers by the brand seller. In case of any misconduct by the agents, the brand seller may only hold the agents liable in accordance with the contract or applicable legal provisions.

Brand agent refers to an arrangement where a brand owner authorizes a third party to be its product agent, which operates in a similar way as product consignment, with the difference being

that the brand owner authorizes agents to utilize the brand resources, and use special promotional materials, while the agent is required to achieve the agreed to amount of sales within a certain period. The brand resources granted to the agent may be sufficiently broad so the agent may sell, produce, or reauthorize other third parties to manufacture and sell and brand.

Store Content Management

Store content management refers to the oversight of the contents displayed in online stores, including the use of text, pictures, videos, and other contents. Once the contents are improperly displayed, claims for intellectual property infringement and other claims may be brought.

Intellectual property infringement disputes most commonly arise from the copying of another's photographs, descriptions, and even fonts in the design of a store display.

Intellectual property infringement disputes most commonly arise from the copying of another's photographs, descriptions, and even fonts in the design of a store display. The best way to prevent this risk is for the brand owner to provide proof of the original designs and photographs and other content used. If it is agreed that the agent shall undertake the design and create the copyrightable works, a security deposit shall be required to prevent possible misconduct during an online store operation, so as to safeguard the brand owner's interests against contractual liability when there is an infringement claim from a third party.

In disputes where there is a complaint for intellectual property infringement, the first step is to promptly analyze whether the alleged infringement occurred. If it is highly likely there was infringement, necessary measures should be timely taken to mitigate efforts and prevent further damage, including the immediate deletion of the alleged photographs, trademarks, videos, etc.

If an infringement was unlikely, the brand owner should provide relevant supporting evidence to appeal to the platform. Our team has helped enterprises to successfully deal with complaints of intellectual property

infringement and stopped the deletion or blocking of the alleged product links from the store.

Intellectual Property Rights

As noted in the example above regarding trademarks, before entering the Chinese market, the brand owner should carry out due diligence for the relevant intellectual property. In particular, the foreign entities with the same brand name and corporate name entering the Chinese market should acquire the trademark right in China as early as possible, and thoroughly investigate whether there are similar trademarks in the same or similar product or service category, so as to avoid the risk of trademark infringement.

The Civil Code of the People's Republic of China, issued in 2020, stipulates the provision of punitive damages for intellectual property rights, that is, where any harm caused intentionally by a tort to the intellectual property rights of another person has serious circumstances, the victim of the tort shall have the right to require corresponding punitive damages.

The Trademark Law of the People's Republic of China stipulates that if the infringement is committed in bad faith with serious circumstances, the amount of damages for infringement shall be up to five times the amount of determined damages with conventional methods.

Jurisdiction

In China, legal jurisdiction regarding online shopping contract disputes has clear rules. Article 20 of the Interpretation of the Supreme People's Court on Application of the Civil Procedural Law of the People's Republic of China says that for a sales contract concluded on an information network, if the subject matter is delivered on the information network, the buyer's place of domicile shall be the place where the contract is performed. If the subject

matter is delivered by any other means, the place of receipt shall be the place where the contract is performed, unless the parties have agreed otherwise on the place of performance in the contract.

Generally, there are no other agreements on the place of contract performance in the transactions concluded with stores and consumers. Consumers can choose the place of receiving goods or the place of the defendant's residence as the jurisdiction of disputes, meaning consumers can file lawsuits in courts of all regions of the country, which will greatly increase the cost of responding to lawsuits for e-commerce businesses.

If the e-commerce business intends to stipulate special clauses for the place of performance to exclude the above-mentioned legal jurisdiction, it shall remind the consumer to pay attention to such clauses by means of highlighting, overstriking, or underlining, the content. In accordance with Article 31 of the Interpretation of the Supreme People's Court on Application of the Civil Procedural Law of the People's Republic of China, when a business enters into a jurisdiction agreement with a consumer by using standard clauses without reminding the consumer in appropriate ways to pay attention to such clauses, the consumer may nullify the jurisdiction agreement and the consumer's claim shall be supported by the people's court.

Conclusion

China's business environment has been continuously optimized, and measures have been taken to gradually integrate its business practices with other countries in the world. In recent years, the Chinese consumer market continues to expand. Brands that have achieved cooperation with Chinese e-commerce platforms have gained highly efficient and convenient channels and broad space for growth in the Chinese market, which has also become a competitive place for global consumer goods.

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Legal Design: A New Way of Delivering Legal Services

I Marco IMPERIALE

"I have only made this letter longer because I have not had the time to make it shorter."
- Blaise Pascal

Introduction

One of the main topics in legal innovation is a non-technological one, and it is legal design. Legal design is a new way of considering legal services, lawyers' relationships with clients and institutions, and the communication of complex content in a clear, simple, and linear way.

According to Margaret Hagan, one of the main players in this field and Professor of Design at Stanford Law School, legal design is "a way of assessing and creating legal services, with a focus on how usable, useful, and engaging these services are." However, and mainly because it is a new discipline, the

Considering the continuously evolving attitude of legal design, a discipline started less than ten years ago, a good way to understand its core begins with recognizing what legal design is not. Legal design is not marketing, even if—like marketing—the perspective is always focused on the final user, meaning the citizen, the client, or the consumer. Legal design is not design, because the legal element, with its complications, is a crucial part of the process. Legal design is not legal tech because it can also lack the technological part.

Bringing in Designers

Legal design is a groundbreaking way of considering law. Many are comfortable with Uber, Netflix, and Amazon, which are all customer-starting platforms, but most lawyers are still not ready to conceive the next generation of legal services in the same way.

There are many reasons to think about embracing legal design in the lawyer's profession.

definitions are variable. For Richard Mabey, a CEO at Juro, legal design is "a mindset as much as a discipline. It means starting with the end user of legal services of all kinds and working backwards." For most practitioners, it is a way to make law user-friendly, and to apply the design thinking methodology well-known in the innovation field to the legal profession.

What Does Legal Design Mean in Practice?

Looking at the results, legal design can be a simplification of a contract (e.g., less pages, less clauses, plain language), a visual wording for the internal policy of a company, or the use of a flowchart to describe steps of a civil trial. But the core of legal design is not the utilization of visual elements. It is the process that leads to rediscovering needs and priorities of the final user.

Legal designers often think "what if" or "what could happen if." The willingness to challenge ourselves, and the status quo, is a core part of sprint sessions, with their long and exhausting sessions where players, through post-it notes, markers, and dashboards, try to redefine legal services with a user-centric focus.

Lawyers working with major companies on legal design issues commonly rely on a team of project managers, designers, and information technology professionals to make legal concepts clearer. Together, and possibly including in-house counsel and/or marketing and sustainability professionals at the table, a better understanding can be learned about how to work on specific agreements, terms of policies, and contracts. For example, are all these clauses needed for the non-disclosure agreement (NDA)? Can a drawing be used to represent this topic? What is the process that leads to a specific



article? The answers to these questions can sometimes redefine a lawyer's role and the way a lawyer's added value is conceived.

Reasons to Introduce

There are many reasons to think about embracing legal design in the lawyer's profession. The following are among the most relevant.

Firstly, there are normative reasons. For example, Article 12.7 of the General Data Protection Regulation 2016/679 (GDPR) allows the use of standardized icons to give in an easily visible, intelligible, and effective meaningful overview of the intended processing. Even the European Court of Justice, with its Rules of Procedure (31/1/2014), states that "in the interests of the proper conduct of the procedure as in the interests of the parties themselves, the written pleadings or observations must therefore be drafted in clear, concise language, without use of technical terms specific to a national legal system. Repetition must be avoided and short sentences must, as far as possible, be used in preference to long and complex sentences which include parenthetical and subordinate clauses." Authorities in many

countries are sued by companies for their lack of transparency toward consumers. Perhaps legal design could help redefine their relationship with them.

Secondly, there are sustainability reasons. Parameters, such as 10 and 16 of the United Nations Paris Agenda, can be strictly related to legal design, which fosters better relationships between citizens and institutions. Legal design can also be a relevant tool for social and integrated reporting, which are being released by most companies to show their sustainability efforts and work on Environmental, Social, and Governance Parameters (ESGs).

Thirdly, there are neurological reasons. The world is affected by a decrease in attention span, meaning the capacity to focus on specific matters, and cognitive load limits, meaning the amount of data processed in a specific timeframe. Multitaskers need to grasp a large amount of data as information is processed much faster than text. Following psychologist and economist Daniel Kahneman's principle that images can refer to our first brain and not to our second one,¹ legal design can be a relevant tool to being better understood. It is clear, however, that reasons to adopt a designer mindset could go way beyond those mentioned above. How about engaging

clients more, having a better relationship with citizens, strengthening the trust with stakeholders, and having an easier and more transparent approach?

Becoming a Legal Designer

Becoming a legal designer requires lots of effort and a can-do attitude, but more than anything, it requires the willingness to sit at a table with different personalities and to be interested in learning from them. There is no limit to the use of creativity. Being a legal designer could mean creating a quick video to explain money laundering or a comic book explaining privacy or using a timeline for the steps of due diligence. The tools are endless. From using the graphic-design tool Canva to the online collaborative whiteboard platform Miro, to the digital platforms used in daily work, everything can be utilized to develop a better relationship with clients, and for institutions, a better relationship with their stakeholders. Legal design is a complex work. Even famous painter Leonardo DaVinci considered simplicity as the most sophisticated form of art.

Speaking in practical terms, the first step might be working on text. For example,

text could use less and clearer words, a shift from complex to plain language, and colors to highlight specific concepts. A reflection about the use of bullet points, spaces, and format could also be made. The book *Typography for Lawyers*² is a great starting point.

The second step is to ask for feedback because what is clear to the designer could be unclear to the reader. How about starting with surveys and listening sessions, where clients are asked for feedback and suggestions on how to develop a better relationship with them? Colleagues could also be asked for transparent feedback on reports before submitted, or an external reader could provide an honest opinion about whether they understood a specific paragraph as readers tend to understand only 20-30 percent of the written content of a particular webpage.³

The third step involves thinking bigger. Can the board minutes or meeting agenda be drawn? How about making the power of attorney visual? What is the most complex and awful agreement ever worked on? Let us try to develop a better version for it!

Conclusion

There are many reasons why a lawyer should consider becoming a legal designer, or at least adopt a designer attitude. The first is certainly a redefinition of the relationship with key stakeholders. It is impressive how many clients have reached out to express gratitude or feedback, or for a welcoming message. Especially in these turbulent times, it is important to reconsider client relationships. Secondly, there is a growing necessity of

communicating complex content in a quick way. The world is moving faster, and more information needs to be grasped and opinions need to be delivered on complex matters in a shorter time. Legal design can be an amazing tool to face these difficult challenges by preserving and enhancing the meaningfulness of legal communication and its effectiveness. Last, but not least, legal designers know that form and content are just two different sides of the same coin. Therefore, working on the form of written content will help designers become better lawyers.

Legal design will represent a new wave in the legal profession in the coming years. Whether for juridical, social, or simply neurological reasons, it is worth it to start considering the communication of legal content in a clearer and more linear way. Or, even better, play with a marker, post-it notes, and some pencils. Small steps can lead to great outcomes.

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1. According to Daniel Kahneman, Nobel prize winner and author of the bestseller, "Thinking Fast and Slow," we are provided with two modes of thought: the first, fast, emotional and instinctive, and the second, more rational and effortful. Usually, legal languages because of their complexity are more suitable for our second mode, which consumes more energy and requires slow analysis. However, with legal design, we could refer directly to the first one

2. Available for free at <https://typographyforlawyers.com/>.

3. Harald Weinreich, Hartmut Obendorf, Eelco Herder, and Matthias Mayer: "Not Quite the Average: An Empirical Study of Web Use," in the *ACM Transactions on the Web*, vol. 2, n° 1 (February 2008), article #5.

REQUIREMENTS

- No tax residency in Italy before the option.
- Case by case analysis to verify if the tax regime is applicable and convenient.

TAXATION RULES

- Yearly substitute tax of € 100,000 on foreign income.
- Additional substitute tax of € 25,000 on foreign income for each family member.
- Ordinary taxation rules for income produced in Italy.

OPTION FOR THE FAVOURABLE REGIME

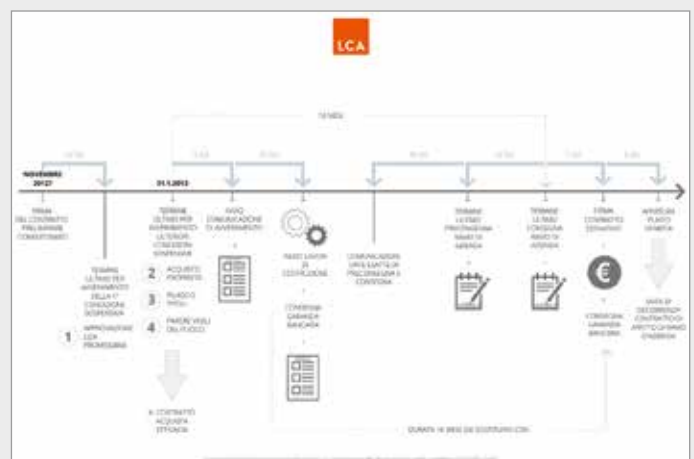
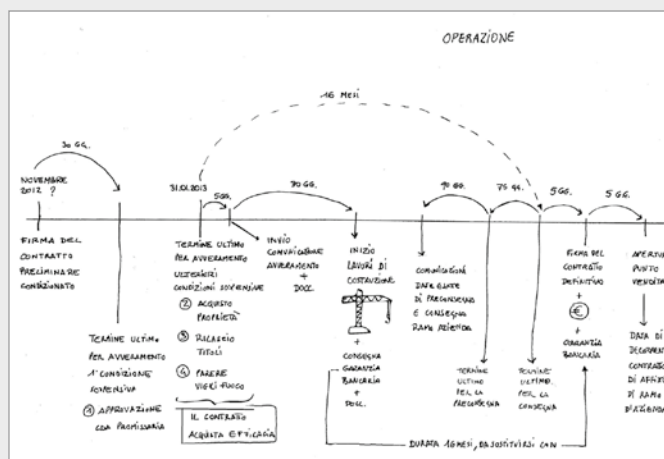
- Automatically renewed each year, for up to 15 years.
- Freely revocable before its expiration.

BENEFITS

- Exemption from tax monitoring rules, taxation on foreign immovable properties and financial assets held abroad, inheritance and donation tax on assets held outside of Italy.
- "Cherry picking" clause.

Tip: Advanced Tax Ruling is highly recommended!

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Obeying the Law: A Voluntary Obligation

I Shahrazad A. MEERZA

At first glance, the term “obligation” is perceived as an absence of voluntary action, while on the other hand “voluntarism” is seen as a direct contradiction to “obligation”, precisely in terms of an individual’s obligation to obey the laws of their society. However, jurisprudence has evidently shown that the two contradictory concepts in fact exist simultaneously: with jurists such as Simmons establishing that the theory of political “obligation” is voluntarist in *itself* considering that an individual’s moral obligation to obey the law is based on that individual’s voluntary action. For that reason, many jurists have concluded that voluntarism is an evident problem within an individual’s obligation to obey the law, and that no plausible theory for the obligation to obey the law can successfully avoid this problem.

In this article, I will be examining how voluntarism is an evident problem in finding an obligation to obey the law, in light of Fair-play Theory’s essence and application, as well as a brief consideration in regards to philosophical anarchism. This article will highlight how no plausible theory for the obligation to obey the law can successfully avoid the problem posed by voluntarism due to the conflict between political authority and finding an obligation to obey the law, and how voluntarism is deeply rooted within “obligation”.

In its lay-understanding, “obligation” automatically indicates the absence of wilful conduct, whereas when something is “voluntary”, a wave of relief washes over because there is an option of opting out. However as lawyers, jurists and academics, there is always an intricate scope to what seems to be a straightforward notion. This article will be examining how our obligation to obey the law is inevitably voluntarist and how no plausible theory for finding an obligation to obey the law can avoid voluntarism. This will be assessed in light of

Fair Play theory as well as considerations of philosophical anarchism, in reference to the writings of jurists: A John Simmons, John Rawls, Robert Nozick and Richard Dagger.

First, it is essential to highlight the fundamentals of voluntarism and Fair-Play theory: Voluntarism in its general understanding is an individual’s participation as a result of free will and voluntary action. What seems to be a straightforward notion has posed various difficulties to the jurisprudential theories that show an obligation to obey the law. In regards to an obligation to obey the law, A John Simmons explains that a theory of political “obligation” is voluntarist because it “is

to the rules have a right to the “fair distribution of the burdens of submission”.

American moral and political philosopher John Rawls’ established conditions for generating a fair-play obligation to obey the law: The first condition is that there must be an active scheme of social cooperation, and that this “scheme” must be mutually beneficial and just. The second being the restriction of one’s liberty in order to ensure effective cooperation under said scheme, the third and final condition is that the benefits of the scheme may be received in at least some cases by someone who does not cooperate when their turn comes, which is also known as the ‘free riding problem’.

This is important considering that realistically: an individual’s contribution is dependent on their capabilities and free will, therefore people contribute to different extents.

simply a moral requirement that arises from the performance of a voluntary act”. The jurisprudential Consent Theory suffers the most from voluntarism, which is evidently seen in how one of the conditions of consent is that it must be given voluntarily. This is an evident problem because in application, those who are obeying the law “voluntarily” have not actually given their consent, nor given the chance to provide such consent.

Fair-play theory entails that alongside promises and deliberate consent, the acceptance of benefits that arise as a result of a community’s cooperative schemes generate the rights and obligations to obey the law. While the theory has not been specifically defined by British philosopher H.L.A Hart, American political philosopher A John Simmons explains that the theory had been implied, explaining that a beneficiary has an obligation to do their ‘fair share’ by submitting to the rules when required and those who have previously cooperated

Here is where the controversy starts:

The distinction between mere benefaction and positive acceptance is the essence of finding our obligation to obey the law because only the latter is sufficient in finding said obligation. The difference between mere benefaction and positive acceptance in fair-play theory is crucial because the latter is one of the evident ways in which voluntarism is a problem in finding an obligation. The difference between the two is that the individual must have already wanted the benefit, has made some sort of effort to obtain the benefit, or at least *not attempted* to avoid the benefit. Therefore, only if the benefits have been voluntarily accepted, can the principle of fair-play work.

Individuals obeying the law under fair-play theory, can only have such an obligation if they have voluntarily accepted the receipt of the benefits obtained from others’ obeying of the law. This stance is accepted and supported in the writings of American philosopher, Robert Nozick.

Additionally, voluntarism is unavoidable in fair-play theory in terms of determining the extent of distribution of benefit. Nozick states that the benefits received should be the result of “at the very least...the benefits to a person from the actions of others are greater than the cost of him doing his share”. Moreover, Simmons explains the importance of not confusing ‘doing one’s part’ with ‘doing an equal share’ because ‘doing one’s part’ is proportionate to the extent of the benefit received.

This is important considering that realistically: an individual’s contribution is dependent on their capabilities and free will, therefore people contribute to different extents. This can be seen in the fact that individuals base the extent of their cooperation within a system based on the extent of the benefits they receive. Not everyone receives the same benefit, therefore not everyone feels the need to fully cooperate. An individual that has benefitted very little, is not bound to cooperate at the same level as someone who has benefitted very much. Taking the voluntary acceptance of benefits in consideration, this is because an individual has chosen to positively accept specific benefits, and because they have chosen to accept those particular benefits from the “sea” of benefits, they are bound to cooperate to the extent that would give them those benefits, exactly and only.

Mere association or membership within a scheme is not sufficient to amount to ‘insider’ status, therefore an individual must seek positive action to become an insider. This poses a problem for the successful operation for fair-play theory because it suggests that only through an individual’s voluntary action amounting to consent, can the principle successfully bind its “insiders”.

On the other hand, Simmons provides a counter argument that the principle of fair-play does not necessarily fall into the principle consent, because alongside those who have consented to being bound, those who have accepted the benefits from the scheme, without directly expressing consent, are also bound, thus reinforcing fair-play theory’s essence. Simmons’ example for this is how free riders have not expressly consented to being bound by the principle. Which as previously stated, do not implicate the operation of the theory.

Simmons continues to provide that the lack of a voluntary element in this particular argument implicates fair-play theory’s application, however removing the “acceptance” element of the theory’s application would result in the theory falling into a theory of consent. While this angle does not particularly show another voluntarism problem in the theory, Simmons’ “dropped into” analysis will be the basis for our counter argument, which will now be discussed.

Simmons explains that individuals are “dropped into” a political scheme. The scheme has benefits that individuals choose whether or not to accept based on their attitudes and feelings towards those benefits. This could be seen as another problem posed by voluntarism, however Simmons explains that having certain attitudes towards the benefits an individual may receive is not realistic. He explains that realistically, most citizens fall into either “those who have not “accepted” because they have not taken the benefits (with accompanying burdens) willingly, and those who have not “accepted” because they do not regard the benefits of government as the products of a cooperative scheme”.

Additionally, Dagger also provides different strategies responding to the limiting argument, however the most significant is both an agreement with and criticism of Simmons. He is in agreement with Simmons in regards to the argument we last clarified, through stating that “*the typical citizen of a body politic qua cooperative enterprise does not voluntarily accept the benefits of the political order*”. However the criticism is that individuals do not voluntarily accept these benefits because they “grow into” a political community and are not “dropped into” it, contrary to what Simmons has suggested.

This is the closest approach to reality because while the cooperative system we are born into is not something we have specifically chosen to be a part of, it is not foreign to us, unlike Simmons’ approach. We are able to live and grow because of the benefits that the cooperative system provides for us, which are able to be given to us as a result of others’ cooperation. As infants and those of young age, these benefits are merely received, however as an individual grows older, they become more aware of the cooperative system’s operation and thus seek to take advantage of the benefits provided, as well as contribute.

We are able to live and grow because of the benefits that the cooperative system provides for us, which are able to be given to us as a result of others’ cooperation.

On the contrary, American professor Richard Dagger provides his approval of the theory even after affirming that there is in fact a difference between mere receipt of benefits and positive acceptance of benefits. He also explains the problem with the ‘acceptance’ element of the theory, considering that realistically, most citizens merely receive benefits. It has been previously discussed that the root of the voluntarism problem in fair-play theory comes from the fact that only positive acceptance of the benefits can generate an obligation to obey the law under fair-play theory, and that such positive action, undoubtedly, must be voluntary. Dagger explains that emphasizing the importance of the distinction between mere receipt and positive acceptance is difficult and limits the applicability of fair-play theory in a political context, he refers to this as “the limiting argument”.

Dagger asserts this through explaining that individuals grow into membership in a system, the same way they grow into the exercise of autonomy and capacity of choice, which can only be achieved with the assistance of others, who have formed, continue to form and reform the practices and institutions. Therefore by fairness and reciprocity, not voluntary acceptance or action, those individuals are who the obligation to obey the law under fair-play theory is owed to.

Philosophical anarchism has frequently been considered as an attempt to overcome voluntarism. While it is brought forward as a solution to the problem, its essence is entirely focused on voluntarism. Simmons explains that philosophical anarchists retain the voluntarist theory of obligation and disregard the belief that existing governments

have de jure authority over citizens. Voluntarism is used as a double edged knife in this context considering that the lack of truly voluntary consent to being bound by authority is the reason philosophical anarchists exercise their voluntariness to choose to not be bound.

Similar to fair-play theory, anarchism also faces the problem of 'free-riders'. Simmons explains that one of the main benefits a government provides is protection of the citizens' interest from any threats an "independent" may pose. The benefits provided to citizens can be denied to independents in various ways, however independents still receive those benefits, either by voluntarily going out of their way to receive those benefits, or merely "spillover benefits" from the obeying of others, that would not pose an additional cost to paying members. Therefore proposing anarchism as a solution to the problem of voluntarism is inadequate, because voluntarism is unavoidable, even by a theory that does not acknowledge an obligation to obey the law.

In conclusion, the question to be asked now is: Can our obligation to obey the law only exist if voluntarism is present? The answer is No. Per

Simmons, membership within a society is only genuinely voluntary, if there is an option of non-membership. In reality this is false because the option of immigration and those who become naturalised citizens, does not make membership voluntary for remaining citizens. Therefore it is evident that the ties between political authority and obligation, render political obligation as largely voluntarist.

This is due to the fact that no plausible theory for our obligation to obey the law can successfully avoid the problem posed by voluntarism because ultimately, it is the tie between political authority and finding an obligation to obey the law. Even if founded on the principle of fairness, voluntarism is still prevalent, which can be seen in how Fair-Play theory tremendously suffers from voluntarism due to the fact that it is present in several areas within its essence, such as the requirement of positive acceptance, which leads to determining the extent of the distribution of benefit. In contrast, certain theorists provide that voluntarism can be successfully avoided, as seen in Dagger's bringing forward the argument of "growing into", and Simmons' stating that philosophical anarchism is an evident solution to the problem. Despite this,

voluntarism is still an unavoidable problem because it is deeply rooted within finding an obligation to obey the law, which can clearly be seen in how the free-riding problem is an ongoing predicament within fair-play, and even philosophical anarchism- a theory that does not support the existence of an obligation to obey the law.

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Defensa penal frente al delito de corrupción deportiva en España

I Alberto YELMO BRAVO

I. Tipicidad penal en España de la denominada corrupción deportiva

Desde el año 2010, el amaño de partidos se trata de una conducta delictiva que en España se encuadra entre los delitos de corrupción en los negocios, específicamente dentro del denominado delito de corrupción deportiva (art. 286 bis 4° del Código Penal español, en adelante C.P.), que prevé, tras la reforma del tipo penal en el año 2015, el alcance penal “de aquellas conductas que tengan por finalidad predeterminar o alterar de manera deliberada y fraudulenta el resultado de una prueba, encuentro o competición deportiva de especial relevancia económica o deportiva”.

De esta forma, el legislador español “ha considerado conveniente tipificar penalmente las conductas más graves de corrupción en el deporte”, castigando “todos aquellos sobornos (...) encaminados a predeterminar o alterar de manera deliberada y fraudulenta el resultado de una prueba, encuentro o competición deportiva, siempre que estas tengan carácter profesional”.

En relación con los casos de amaño de partidos de fútbol profesional enjuiciados en España hasta la fecha, el presente artículo se centra en el análisis de algunas cuestiones relevantes relativas a la defensa penal de las personas físicas y jurídicas en supuestos de corrupción deportiva, tomando como referencia las recientes sentencias¹ emitidas en los casos *Levante - Zaragoza* y *Osasuna - Betis*, ocurridos en La Liga española de fútbol profesional en las temporadas 2010/2011 y 2013/2014.

II. Defensa penal de las personas físicas: acreditación del amaño y problemática de la prueba indiciaria

Siguiendo lo establecido en el referido art. 286 bis 4° C.P., para que una causa penal por corrupción deportiva pueda tener un resultado condenatorio resulta

imprescindible la plena acreditación de la forma concreta en la que el resultado de la prueba, encuentro o competición deportiva ha sido predeterminado de manera deliberada y fraudulenta, lo que habitualmente deberá realizarse, a falta de prueba directa del soborno, por medio de la denominada prueba indiciaria.

En este sentido, salvo que se produzcan signos claros y evidentes durante el desarrollo del partido amañado, normalmente resultará imposible distinguir, mediante su mero visionado, si el resultado del mismo se encuentra predeterminado deliberada y fraudulenta o, por el contrario, es consecuencia del desempeño natural, muchas veces errático, de los propios jugadores participantes en el encuentro. Por ello, como concluía la Audiencia Provincial de Navarra en el caso *Osasuna - Betis*, “para poder valorar la manipulación del resultado hemos de acudir, por tanto, a otro tipo de datos” (Fundamento de Derecho 29°, primer párrafo), indicios que, conjuntamente considerados, podrán dar lugar a la plena acreditación de la conducta delictiva o bien a la absolución de los acusados, esto último si dichos indicios no resultan concluyentes del delito de corrupción deportiva y excluyentes de otras alternativas plausibles.

A este respecto, en el caso *Osasuna - Betis* logró acreditarse plenamente que “con el fin de evitar el descenso de categoría de Osasuna, los miembros de la Junta Directiva D. (...), D. (...) y D. (...) mantuvieron una reunión en la que también participó el gerente (...). En dicha reunión todos decidieron llegar a algún tipo de acuerdo económico con el Real Betis para que ganara al Real Valladolid en la jornada 37 y se dejara ganar en Pamplona contra Osasuna en la jornada 38. (...) A tal efecto D. (...) y D. (...) quedaron encargados de realizar las gestiones pertinentes para ello y en cumplimiento de las citadas gestiones mantuvieron una reunión el día 9 de mayo de 2014 (...) con los jugadores del Real Betis D. (...) y D. (...) acordando abonarles una cantidad total de 650.000 euros por ganar al Real Valladolid y por dejarse

ganar contra Osasuna en Pamplona” (Hecho Probado 9°, primer párrafo).

Por el contrario, en el caso *Levante - Zaragoza*, el Juzgado de lo Penal de Valencia concluía que “no se ha acreditado que los acusados pertenecientes al Real Zaragoza llegaron a un acuerdo con los jugadores del Levante que están acusados en esta causa para que éstos se dejaran ganar el último partido de liga que debía disputarse en el campo del Levante el día 21 de mayo de 2011, destinando a la compra del partido todo o parte de la suma de 1.730.000 euros que habían salido, días antes, de los fondos del Real Zaragoza en la forma que se ha descrito, ni que todo o parte de dicha cantidad fuera entregada antes del comienzo del partido a los jugadores del Levante, a cambio de que éstos, dejándose perder, asegurasen la victoria del Zaragoza, evitando, con ello, que el club descendiera a segunda división.” (Hechos probados, último párrafo).

Así, según recordaba el Juzgado de lo Penal de Valencia, “en esta tesitura, amén de lo que ya se ha expuesto sobre la concurrencia de una hipótesis alternativa razonable” – posible delito de insolvencia punible – “resultaría finalmente aplicable, en todo caso, el principio *in dubio pro reo*”, que “debe entrar en juego cuando exista una duda racional sobre la real concurrencia de los elementos del tipo penal o la participación del acusado.” (Fundamento de Derecho 5°, último párrafo).

Adicionalmente, respecto a la necesaria individualización de la responsabilidad penal derivada de los hechos enjuiciados, el Juzgado de lo Penal de Valencia concluía que «nada se ha probado acerca de las circunstancias en las que se habría perpetrado el delito de corrupción deportiva, ni acerca de las personas que participaron materialmente en el amaño, ni cómo se negoció, ni quiénes o cómo lo ejecutaron, de una o de otra parte», lo que dio lugar a la absolución de todos los acusados, “no habiendo razones objetivas y fundadas para discriminar entre unos y otros jugadores, distinguiendo quiénes pudieran haberse corrompido y quiénes se

quedaron al margen, bien por no haber recibido la oferta de compra del partido, bien por haberla rechazado, circunstancia que, en sí misma, nos abocaría a la absolución de todos ellos.” (Fundamento de Derecho 5º, penúltimo párrafo).

Por su parte, en el caso Osasuna - Betis, la participación en la conducta delictiva del vocal y el gerente del Club Atlético Osasuna, así como de dos de los jugadores del Real Betis, resultó plenamente acreditada (en gran parte gracias a la confesión del gerente del club), siendo estas cuatro personas – dos por parte del club corruptor y dos por parte del club corrompido – las que personalmente se reunieron, llevaron a cabo las negociaciones fraudulentas, alcanzaron el pacto delictivo de doble alcance y realizaron las entregas de dinero acordadas. En cuanto al presidente y al vicepresidente del Club Atlético Osasuna, se concluyó asimismo que “no hay duda del conocimiento que tenían de la actuación llevada a cabo en relación a los partidos que nos ocupan. Ambos han reconocido haber encargado al [Gerente] que hiciera gestiones con la ayuda del [Vocal] para incentivar a los jugadores del Real Betis.” (Fundamento de Derecho 31º, primer párrafo). Todos ellos resultaron condenados por el delito de corrupción deportiva.

Sin embargo, en cuanto al director de la Fundación Osasuna, también acusado, si bien recibió el encargo de obtener financiación urgente para el Club Atlético Osasuna por ser necesaria para atender gastos urgentes del club, tanto el gerente como los directivos acusados coincidieron en afirmar que no conocía el verdadero destino del dinero que debía conseguir. Asimismo, en relación con el préstamo personal concedido por éste al club, tampoco se acreditó que “en el momento en que él mismo presta los 60.000 euros conociera que su destino era hacer un pago a los jugadores del Real Betis.”

Por el contrario, “es en el momento en que recibe el encargo de trasladar de manera urgente una cantidad total de 400.000 euros en efectivo a Sevilla cuando podríamos considerar que, o bien conocía el destino real del dinero o bien se colocó en una ignorancia deliberada, puesto que no es imaginable ningún pago urgente a gremios que el club tuviera que realizar en esa ciudad un viernes por la noche. No obstante, hemos señalado que el

delito de corrupción deportiva es un delito de mera actividad que quedó consumado en el momento en que se realizó el ofrecimiento a los jugadores del Real Betis y éstos aceptaron tal ofrecimiento. Por tanto, la participación del [Director de la Fundación] trasladando el dinero para hacer efectivo el pago es posterior a la consumación del delito, por lo que no cabe ya hablar ni siquiera de una cooperación necesaria para su consumación.” (Fundamento de Derecho 32º, primer párrafo).

Finalmente, en relación con el tesorero del Club Atlético Osasuna y miembro de la Junta Directiva, también enjuiciado, “no se ha acreditado que tuviera efectivo conocimiento de los tratos llevados a cabo con los jugadores del Real Betis, ni del alcance de los mismos ni de los pagos realizados (...). La mera pertenencia a la Junta Directiva no es suficiente para considerar a sus miembros responsables de los hechos acontecidos. Es preciso además que existan pruebas que permitan concluir la participación en los mismos o al menos el conocimiento suficiente sobre los hechos imputados que nos permitan apreciar en su conducta una ignorancia deliberada.” (Fundamento de Derecho 32º, segundo párrafo).

Por ello, a diferencia de las seis personas mencionadas anteriormente, que sí resultaron condenadas por su participación de primera mano o de forma intelectual en la comisión del delito de corrupción deportiva, tanto el tesorero del Club Atlético Osasuna como el director de su fundación, responsables directos sobre gran parte de los fondos utilizados para materializar el soborno, fueron finalmente absueltos tras lograr acreditarse plenamente su desconocimiento del mismo en el momento de la consumación del delito.

III. Responsabilidad penal de los clubes profesionales de fútbol

Asimismo, resulta de interés analizar el sistema penal español en relación con la posible responsabilidad penal de los clubes deportivos (art. 288 C.P., en relación con el art. 31 bis C.P.) como consecuencia de los amaños investigados judicialmente, siendo el caso que resulta de mayor interés a estos efectos el del Club Atlético Osasuna, ya que tanto el Juzgado de Instrucción de Pamplona como la Audiencia Provincial de Navarra tuvieron que pronunciarse expresamente



sobre la imputación a esta entidad, como persona jurídica, del delito de corrupción deportiva, lo que exigió realizar un doble análisis sobre la concurrencia de un actuar imputable a título de dolo o culpa de la persona jurídica, así como de la existencia de una actuación delictiva en provecho del propio club.

En cuanto al primero de los requisitos, el Auto del Juzgado de Instrucción de Pamplona nº 2, de 11 de enero de 2016, concluía que “los dos sistemas previstos en los Estatutos del Club Atlético Osasuna (...) y el control externo impuesto por la normativa deportiva de aplicación pueden considerarse, en principio, suficientes para prevenir la comisión de hechos delictivos como los que son objeto del presente procedimiento.” (Fundamento de Derecho 6º, primer párrafo).

Efectivamente, el primero de estos sistemas de control lo constituía la figura del gerente, quien tenía encargado, por disposición expresa de los estatutos sociales, la función de advertir de las posibles irregularidades cometidas por parte de los distintos órganos del club. En segundo lugar, los referidos estatutos contemplaban la existencia de una Comisión Económica, órgano colegiado con funciones fiscalizadoras, la cual igualmente tenía suficientes facultades como para efectuar un cierto control, autónomo e independiente, sobre los aspectos económicos más relevantes de la entidad.

Adicionalmente, junto a estas dos medidas internas, el Juzgado de Instrucción consideró que la entidad contaba con un tercer sistema de control, externo en este caso, consistente en la auditoría impuesta por el Reglamento de Control Económico de

La Liga, que tiene por objeto establecer las normas de supervisión y control económico-financiero aplicables a los clubes profesionales.

Según el Juzgado de Instrucción, partiendo siempre del deficiente funcionamiento de estos mecanismos de control, debía examinarse sin embargo si ello resultaba justificativo de un reproche penal al Club Atlético Osasuna, ya que *“si la persona jurídica no ha actuado culpablemente, es decir, si ha puesto todos los mecanismos legal o extralegalmente exigidos para, desde un juicio ex ante, evitar o minimizar de forma notable el riesgo de la comisión de delitos por parte de sus directivos o empleados, no podrá existir responsabilidad penal en ésta.”* (Fundamento de Derecho 7º, primer párrafo).

En este sentido, se negó la culpabilidad de la persona jurídica puesto que *“dichos delitos se cometieron, presuntamente, por parte de determinados directivos o con su colaboración, adoptando medidas para ocultar dichas actuaciones a la masa social y a los órganos, internos y externos, que tenían como función el control de la actuación de los órganos de dirección.”* (Fundamento de Derecho 7º, tercer párrafo). Además, *“la palmaria y evidente extralimitación en sus funciones de los presuntos autores de los delitos de corrupción deportiva investigados impedirían, igualmente, imputar culpablemente al Club Atlético Osasuna los mencionados delitos.”* (Fundamento de Derecho 9º, primer párrafo).

En apoyo de la decisión del Juzgado de Instrucción de Pamplona, el Auto de la Audiencia Provincial de Navarra nº 91/2016, de 22 de marzo, consideraba que de los hechos referidos no podía deducirse la responsabilidad penal de la persona jurídica, «máxime si tenemos en cuenta que los hechos imputados cometidos por miembros de la directiva del C.A. Osasuna son acciones, en principio, totalmente alejadas de la finalidad y objeto social del propio club, sin que la falta de control (que es necesaria acreditar su concurrencia) pueda deducirse sin más de la comisión de un presunto ilícito penal cometido sin conocimiento de todos los miembros de la Junta Directiva e incluso con ocultación» (Fundamento de Derecho 6º, último párrafo).

En cuanto al segundo de los requisitos aplicables a la responsabilidad penal de

la persona jurídica, debía analizarse si el delito de corrupción deportiva cometido, entonces indiciariamente, por los directivos y el gerente del Club Atlético Osasuna, tenía como finalidad beneficiar – directa o indirectamente – al club, siendo que, como exponía el Juzgado de Instrucción, *“dicho provecho ha de ser eminentemente objetivo, en el sentido de que no bastaría para apreciar la concurrencia de este elemento con la mera intención subjetiva del autor material de proporcionar un beneficio a la entidad.”* (Fundamento de Derecho 10º, segundo párrafo).

A este respecto, tras un extenso análisis de la – previa – Circular 1/2011 de la Fiscalía General del Estado relativa a la responsabilidad penal de las personas jurídicas, el Juzgado de Instrucción recordaba que, a efectos de imputación, *“la acción debe ser valorada como provechosa desde una perspectiva objetiva e hipotéticamente razonable, con independencia de factores externos que puedan determinar que la utilidad finalmente no se produzca”* (Fundamento de Derecho 10º, último párrafo), considerando finalmente que *“la posibilidad de que Osasuna mantuviera la categoría era tan remota y dependía de tantas variables incontrolables y, a la par, estadísticamente improbables, que dicha circunstancia excluye que quepa considerar que los directivos y empleados de Osasuna (...) actuaran en provecho del club desde un punto de vista objetivo.”* (Fundamento de Derecho 11º, primer párrafo).

IV- Conclusiones

Como puede comprobarse, desde la introducción del delito de corrupción deportiva en el Código Penal español en el año 2010, varios han sido los casos objeto de enjuiciamiento ante las autoridades judiciales competentes, los cuales han afectado tanto a personas físicas (fundamentalmente directivos y deportistas) como a personas jurídicas (los propios clubes participantes en los partidos presuntamente amañados).

En cuanto a las personas físicas, los casos analizados demuestran que el punto clave de los procedimientos penales por corrupción deportiva se encuentra en la plena acreditación del pacto ilícito y la concreta individualización de los partícipes en el mismo, siempre teniendo en cuenta que estamos ante un delito de mera actividad

que queda consumado en el momento en el que se realiza el ofrecimiento ilícito y éste se acepta.

Por tanto, cualquier participación en los hechos posterior a la consumación del delito sería irrelevante a efectos penales, puesto que ya no cabría hablar, ni siquiera, de cooperación necesaria. Por otro lado, a efectos de poder considerar una posible ignorancia deliberada por parte del acusado, sería necesaria la existencia de pruebas concretas que permitan concluir, al menos, un conocimiento suficiente de los hechos, sin que de la mera pertenencia a la junta directiva o a la plantilla del club presuntamente involucrado en el amaño se pueda concluir, sin otro tipo de evidencias, la existencia de una conducta de carácter delictivo.

En lo que respecta a las personas jurídicas, tras la precisión del modelo español de responsabilidad penal en el año 2015 (con posterioridad a los casos analizados), la posible condena de los clubes por el delito de corrupción deportiva estará condicionada razonablemente a la acreditación de una actuación de la persona física dirigida de manera directa o indirecta a beneficiar a la entidad deportiva, así como de un incumplimiento de los deberes de supervisión, vigilancia y control en el seno de la misma.

Reconocidos estos requisitos como fundamento esencial de la responsabilidad penal de la persona jurídica, debe enfatizarse consecuentemente la trascendencia de la existencia de sistemas de control adecuados en el seno de los clubes deportivos, ya que, por la propia naturaleza del delito de corrupción deportiva, debe entenderse razonablemente que éste será cometido, en la mayoría de los casos, con el fin de proporcionar un beneficio (p.ej., evitar el descenso a categorías inferiores) a la propia entidad deportiva.

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1. Sentencia nº 454/2019, de 9 de diciembre, del Juzgado de lo Penal nº 7 de Valencia y Sentencia nº 111/2020, de 23 de abril, de la Audiencia Provincial de Navarra.



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