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JURISTE INTERNATIONAL

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Jorge **Martí Moreno**

PRESIDENT'S MESSAGE

I am writing to you in the hope that you are all well. For my part, I can confirm that UIA, my family and I are well, although we are a little tired of this awful, long-standing situation.

I hope you enjoy the new *Juriste International* and share the enthusiasm of Barbara Gislason, the entire team of editors and the UIA staff who have produced this exciting new issue.

UIA still remains very active – the Midyear Meeting (*The Midyear2021 programme can be found on p. 98*) is being added to our webinar programme. We see this as a great opportunity to keep in touch online with the Business Law Forum, in addition to the lawyers' forums in different languages, as well as the spaces created for developing professional relationships or 'networking'. The nature of this meeting differs from the annual conference. Here, personal relationships and business law shall prevail. We are confident that after the summer, we will be able to resume face-to-face seminars and then hold our annual congress in Madrid with the main theme of Counterfeiting in the Art and Fashion World.

I wish you all good health, continued enthusiasm and also urge you to recruit new members for UIA and not to miss the virtual seminars or the Midyear Meeting.

Best wishes.

LE MOT DU PRÉSIDENT

Je m'adresse à vous en vous espérant en bonne santé. Pour ma part, je peux confirmer que l'UIA et moi-même allons bien, même si nous sommes tous un peu fatigués de cette situation désagréable qui dure depuis longtemps.

J'espère que vous aimerez ce nouveau *Juriste International* et que vous partagerez l'enthousiasme de Barbara Gislason, de toute l'équipe de rédacteurs et du personnel de l'UIA, à l'origine de ce nouveau numéro passionnant.

L'UIA est toujours très active : le *Midyear Meeting (le programme du Midyear 2021 se trouve p. 98)* s'ajoute à notre programme de webinaires et offre une belle opportunité de rester en contact en profitant du *Business Law Forum* en ligne, auquel s'ajoutent les forums de discussion dans différentes langues, ainsi que les espaces de développement de relations professionnelles. La nature de cette réunion est différente de celle du congrès annuel. Ici, le droit des affaires et le réseautage prévalent. Nous sommes convaincus qu'après l'été nous pourrons reprendre des séminaires en présentiel, puis organiser notre congrès annuel à Madrid avec pour thème principal la contrefaçon dans le monde de l'art et de la mode.

Je vous souhaite à tous de rester en une bonne santé, d'être toujours enthousiastes. Je vous encourage également à recruter de nouveaux membres pour l'UIA et à ne pas manquer les séminaires virtuels ou le *Midyear Meeting*.

Amitiés.

MENSAJE DEL PRESIDENTE

Me dirijo a vosotros con la esperanza de que estéis bien. Por mi parte, os puedo confirmar que la UIA, mi familia y yo estamos todos bien, aunque ya un poco cansados de esta situación poco grata que está durando mucho.

Espero con ilusión que este nuevo *Juriste International* os encante y compartáis el entusiasmo de Barbara Gislason, de todo el equipo de editores y del personal de la UIA que está detrás de este apasionante nuevo número.

La UIA sigue muy activa: a nuestro programa de *Webinars* se añade el *Midyear Meeting*. Nos parece una ocasión magnífica para seguir en contacto con el *Business Law Forum* en línea al cual se añaden los foros de abogados en distintos idiomas, así como espacios para desarrollar relaciones profesionales o "*networking*" *(el programa del Midyear2021 se encuentra en la pagina 98)*. La naturaleza de esta reunión es distinta a la del Congreso anual. Aquí priman las relaciones personales y el derecho de los negocios. Confiamos en que después del verano podamos ya iniciar seminarios presenciales y después tener nuestro Congreso anual en Madrid con tema principal las falsificaciones en el mundo del arte y de la moda.

Os deseo a todos mucha salud, mucho entusiasmo y os animo a reclutar nuevos miembros para la UIA y a no perderos los seminarios virtuales ni el *Midyear Meeting*.

Recibid un fortísimo abrazo.

Jorge MARTÍ MORENO • *UIA President, Président de l'UIA, Presidente de la UIA* • president@uianet.org

Barbara **Gislason**

↘ EDITORIAL

With this issue, the *Juriste International* is not only more visually appealing, but also, more readable. Our modern font gives the effect of more white space, which is easier on the eyes. Beyond the substantial changes in the *Juriste's* look and feel, there are also significant changes to our Table of Contents, as further described in "Inside the UIA."

This issue is historic because of its Animal Law theme under our new heading, "Deep Dive." While bar associations have had publications devoted to animals, this is the first time an international lawyer association has ever focused on Animal Law in its flagship publication. This issue reflects a cultural shift where other animals are now worthy of human attention. This issue reflects the growing evidence that other species have consciousness, cognitive abilities, and sentience.

Within these pages, you will hear from the world-renowned Temple Grandin, who, though autistic, has positively and substantially impacted the livestock industry by encouraging businesses not to "abstractify" animals' plights. My article about Sue Savage-Rumbaugh (and her bonobo collaborators Kanzi and Panbanisha) explores indicators of other species possessing high order intelligence.

Macarena Montes Franceschini artfully shows how "impact litigation," even if not successful, can sway public opinion, while another author looks at why cases should be tried before a jury, not a judge. Within these pages, you will see how Animal Law is taught in law schools, in what way breeding practices cause poultry to suffer, and why best cat management practices can be counter intuitive. You will also learn why hard law is better than soft, how biodiversity and animal welfare objectives compete with economic interests, and in what way modern telemedicine applies to veterinarians.

And finally, I ask you to salute our prized Deputy Editors, Steven Richman (English), Catherine Peulve (French), and Laura Collada (Spanish), and other Editors, as well as the inspired Marie-Pierre Richard, Anne-Marie Villain and Marie-Pierre Liénard and others at the Center. I draw your attention to our Editorial Page, where you will notice that our Editorial team includes well-known and highly respected leaders in the UIA and rising stars.

Your *Juriste* Editorial Board encourages you, dear members, to look at our Editorial page and contact an Editor of your choice with your ideas for articles to develop, as well as topics you would like to write about. With your help, the *Juriste* will meet your expectations of excellence.

↘ L'ÉDITO

Ce nouveau format du *Juriste International* rend notre magazine non seulement plus attrayant visuellement, mais aussi, nous l'espérons, plus lisible. Notre police moderne donne un effet plus aéré, ce qui rend la lecture plus agréable. Au-delà des changements importants apportés à l'aspect convivial du *Juriste*, il y a aussi des modifications substantielles de notre table des matières, comme le décrit la section « Au cœur de l'UIA ».

Ce numéro 2021-1 est historique en raison du thème du droit animalier qu'il aborde sous sa nouvelle rubrique « Deep Dive » (Le dossier). Si les barreaux ont eu des publications consacrées aux animaux, c'est la première fois qu'une association internationale d'avocats se concentre sur le droit animalier dans sa publication phare/de référence. Ce numéro reflète un changement culturel où les autres animaux sont désormais dignes de l'attention de l'homme. Ce numéro reflète les preuves croissantes que les autres espèces ont une conscience, des capacités cognitives et une sensibilité.

Dans ces pages, vous entendrez le témoignage de la célèbre Temple Grandin, laquelle, bien qu'autiste, a eu un impact positif et significatif sur l'industrie de l'élevage, exhortant les entreprises à ne pas « faire abstraction » des souffrances animales. Mon article sur Sue Savage-Rumbaugh (et ses collaborateurs bonobos Kanzi et Panbanisha) identifie les indicateurs

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> *While bar associations have had publications devoted to animals, this is the first time an international lawyer association has ever focused on Animal Law in its flagship publication.*

d'autres espèces possédant une intelligence de haut niveau.

Macarena Montes Franceschini montre avec art comment les « litiges d'impact », même s'ils n'aboutissent pas, peuvent influencer l'opinion publique, tandis qu'un autre auteur examine pourquoi les affaires devraient être jugées devant un jury et non un juge. Au fil des pages, vous verrez comment le droit animalier est enseigné dans les facultés de droit, en quoi les pratiques d'élevage font souffrir les volailles et pourquoi les meilleures pratiques de gestion des chats peuvent être contre-intuitives. Vous apprendrez également pourquoi le droit dur est préférable au droit mou comment les objectifs de biodiversité et de bien-être animal entrent en concurrence avec les intérêts économiques, et comment la télémédecine moderne s'applique aux vétérinaires.

Enfin, je tiens à remercier nos précieux rédacteurs adjoints, Steven Richman (anglais), Catherine Peulvé (français) et Laura Collada (espagnol), et les autres rédacteurs, ainsi que les très inspirées Marie-Pierre Richard, Anne-Marie Villain et Marie-Pierre Liénard du Centre UIA. J'attire votre attention sur notre page éditoriale, où vous remarquerez que notre équipe de rédaction comprend des personnalités bien connues et respectées de l'UIA et des étoiles montantes.

Votre comité de rédaction du *Juriste* vous encourage, chers membres, à consulter notre page éditoriale et à contacter le rédacteur de votre choix pour lui faire part de vos idées d'articles à développer, ainsi que les sujets sur lesquels vous aimeriez écrire. Avec votre aide, le *Juriste* répondra à vos attentes d'excellence.

↘ EDITORIAL

Con este número, el *Juriste International* no solo es más atractivo visualmente, sino también más legible. Nuestro nuevo tipo de letra crea un efecto despejado, que resulta más cómodo para la vista. Más allá de los sustanciales cambios estéticos del *Juriste*, también hemos introducido cambios significativos en nuestro Índice, tal como se describe más adelante en "La UIA por dentro".

Este número es histórico por su tema sobre derecho animal en nuestra nueva sección, "El informe". Aunque las asociaciones de abogados han elaborado publicaciones dedicadas a los animales, es la primera vez que una asociación internacional de abogados se centra en el Derecho Animal en su publicación principal. Este número refleja un cambio cultural en el que ahora los demás animales merecen la atención humana, y deja constancia de la prueba creciente de que otras especies tienen conciencia, habilidades cognitivas y sensibilidad.

En estas páginas, oirán hablar de la famosa Temple Grandin que, a pesar de su autismo, ha tenido un impacto positivo muy relevante en la industria ganadera, instando a las empresas a no ignorar el sufrimiento animal. Mi artículo sobre Sue Savage-Rumbaugh (y sus colaboradores bonobos, Kanzi y Panbanisha) explora los indicadores de otras especies poseedoras de una inteligencia extraordinaria.

Macarena Montes Franceschini muestra ingeniosamente cómo los "litigios estratégicos", aunque no sean exitosos, pueden influir en la opinión pública, mientras que otro autor se fija en por qué algunos casos se deben enjuiciar ante un jurado y no un juez. En estas páginas, verán cómo se enseña el derecho animal en las facultades de derecho, por qué algunas formas de cría de aves provocan su sufrimiento y por qué las mejores prácticas de manejo de gatos pueden ser contraproducentes. También sabrán por qué la ley dura es mejor que la ley blanda, cómo compiten los objetivos de biodiversidad y bienestar animal con los intereses económicos, y cómo se aplica la telemedicina moderna en veterinaria.

Por último, les invito a saludar a nuestros apreciados redactores adjuntos, Steven Richman (inglés), Catherine Peulve (francés) y Laura Collada (español) y a los demás redactores, así como a las entusiastas Marie-Pierre Richard, Anne-Marie Villain y Marie-Pierre Liénard y los demás miembros del personal del Centro. Deseo llamar su atención sobre nuestra Editorial, donde verán que nuestro equipo de edición cuenta con dirigentes muy conocidos y sumamente apreciados de la UIA, así como nuevas promesas.

El Comité de Redacción del *Juriste* les anima a todos ustedes, apreciados miembros, a fijarse en nuestra página Editorial y ponerse en contacto con el redactor que prefieran para transmitirle sus ideas de artículos que desarrollar o de temas sobre los que les gustaría escribir. Con su ayuda, el *Juriste* colmará sus expectativas de excelencia.

Sandra Aza
De abogada a escritora

El Presidente Martí Moreno entrevista a Sandra Aza quien trabajó en el bufete Uría, pero que lo dejó para cumplir su sueño: escribir *Libelo de sangre*, una novela de intriga en el Madrid del siglo de Oro.

Le Président Martí Moreno s'entretient avec Sandra Aza qui a travaillé au sein du cabinet Uría, mais qui l'a quitté pour réaliser son rêve : écrire *Libelo de sangre*, une nouvelle dont l'intrigue se déroule dans le Madrid du Siècle d'Or.

President Martí Moreno interviews Sandra Aza who worked at the Uría law firm, but who left it to fulfill her dream: to write *Libelo de sangre*, a novel which intrigue takes place in the Madrid of the Golden Age.

Jorge Martí Moreno (JMM): Siempre he querido tender puentes entre el mundo del derecho y el del arte, pero también entre el derecho y la cultura en general. ¿Qué hace una abogada escribiendo una novela histórica? ¿Cuáles fueron los motivos?

Sandra AZA (SA): Desde mis años párvulos, me recuerdo aficionada a los puzles, los de piezas y, en mayor medida, los de letras. Ensamblar letras me permitía crear otras vidas y, en alimentándose la abogacía de eso, de letras (no en vano dicen que todo jurista tiene hechuras de escritor), estudié en lares de toga y tan venturosamente transcurrió aquella travesía que recalé en un puerto ilustre: Uría Menéndez.

Adscrita al área de Derecho Procesal, me deleitaba exponer los avatares de mi cliente y rebatir los del contrario, pues ambos menesteres se forjaban en la misma fragua: la fragua de la narrativa. Aunque artículos normativos colmaban mis soles y también mis lunas, capítulos furtivos suscitaban sueños en los unos y confiscaban el sueño de las otras. Extrañaba la literatura y, en no logrando lo forense aplacar mis nostalgias, un día aparqué la abogacía, me vestí de ilusión y, con una novela en mis entrañas que pugnaba por nacer, me interné en la senda literaria.

JMM: Hay escritores que siguen con su profesión y la compatibilizan con su afición a escribir. ¿Qué te llevó a abandonar la profesión de abogado?

SA: En mi opinión, la meta de todo escritor es escribir y de ese escribir vivir, pero, como la hipoteca gusta de visitas mensuales y no admite ni esquinazos ni esquinados, muchos vasallos de la pluma y el papel se ven obligados a encajar bolillos levantando el país de día por una nómina y levantándose de noche por un sueño… y con sueño. Sucede, sin embargo, que la abogacía es oficio celoso que licencia flaco tiempo para otras componendas y, militando la literatura en la misma cofradía del "allende yo, estoy yo", me convencí de que no gasto maña encajando bolillos y de que, o buscaba una actividad laboral de más holgada cincha, o renunciaba a mi sueño. Feliz como era en el mundo jurídico, bien podría haber renunciado yo a mi sueño, pero mi sueño, en absoluto dispuesto a renunciar a mí, se empeñó tenaz cual agua caries de piedra y no aflojó la porfía hasta inducirme a aparcar mi profesión por él.

Considerando la Administración Pública de cómodo maridaje con el escribir, me preparé una oposición e ingresé en el cuerpo de funcionarios de la Comunidad de Madrid. Andando el tiempo, quise promocionar y volví a opositar, circunstancia que me mantuvo otros dos inviernos estudiando leyes y, a la postre, incapaz ni de añorar el Derecho, por motivos obvios, ni de consagrarme a la literatura.

Todo llega, sin embargo, y, al final, tras avatares varios y no menos lunarios, una lluviosa tarde de domingo me senté en mi mesa de trabajo resuelta a encarar un envite largamente soslayado: el de la página número uno. Yo aún no lo sabía, pero aquella tarde dominical distraída a la televisión en favor del ordenador se convertiría en la primera de muchas, pues me esperaban cuatro años de afanado faenar y de faenado afán hasta lograr alumbrar a *Libelo de sangre*.

JMM: ¿Consideraste otras profesiones al dejar la abogacía antes de decidirte por escribir?

SA: Amén de la profesión que acabó adueñándose de mi diario laborío, la Administración Pública, ciertamente me involucré en otros proyectos muy vinculados también a eso de desabrochar la creatividad pero harto alejados de mi auténtico objetivo. Hice teatro; comencé un voluntariado de entretenimiento de la tercera edad; luego me interesó

el diseño gráfico y estudié un máster; incluso formé un dúo musical con un amigo y durante una temporada enmarqué en bambalinas la búsqueda (o acaso huida) de mí misma… En términos menos floridos, me dediqué a marear la perdiz. Supongo que, consciente del sacrificio presente en el galeón de la literatura, me resistía a enrolarme en él. De ahí que cualquier otra actividad se me antojase más apetecible que profesar la clausura implícita en la gestación de una novela. Pero los hados debían andar obcecados en enrolarme y clausurarme, pues, pese a tamaña tolvanera de aficiones, la de escribir ni un ápice languidecía. Continuaba latiendo en mí. Cada vez más fuerte; cada vez más insistente; cada vez más exigente. En realidad, creo que no era la afición lo que latía; creo que era el corazón de *Libelo de sangre*, que ya vivía en mis entrañas y se negaba a morir sin haber nacido.

JMM: En una época en que el talento femenino está recibiendo un mayor reconocimiento, ¿has experimentado que tu condición de mujer haya jugado a favor o en contra de tu carrera como escritora? ¿Y cómo abogada?

SA: Me considero afortunada en ese sentido, porque mi condición de mujer nunca ha supuesto ningún óbice en mi transitar profesional, ni como abogada ni como funcionaria ni tampoco como escritora.

JMM: La profesión de escritor es muy exigente. La inspiración no conoce horarios. ¿Es fácil conciliar la vida familiar y la vida de escritor?

SA: Lejos de ser fácil, resulta traje de muy penoso corte, porque, como decía Cela, no hay escritores de domingo; papel mediante o mente errante, un escritor siempre anda cimbreando la pluma. Y, si a la servidumbre de las letras añadimos la servidumbre de la inspiración, la cuestión se complica, pues, en efecto, la inspiración no conoce horarios; o, de conocerlos, tampoco importa, porque ante ellos muestra una displicencia que en ocasiones duele. A diferencia de la hipoteca, las musas son de tornadizo asomar; se presentan obviando avisos y, cuando tal acontece, o te encuentran presto a agasajarlas o marchan dejando parca huella en tu prosa. Esta inconstancia provoca rutinas desrutinadas, relojes sin agujas, intenciones sin intención, certidumbres inciertas y un permanente "depende".

El escritor se somete a este suspense vital porque el proceso creativo lo sume en una fiebre enajenante que lo aleja de cualquier cosa distinta a la novela. Nada importa, salvo la novela; nada prima sobre la novela; nada existe allende la novela. Sus allegados, sin embargo, no lo aceptan de tan alegre suerte; en ocasiones, simplemente no lo aceptan y se van, porque aceptar que una novela prevalece sobre la familia o los amigos demanda arrobas de cariño. Han de quererte mucho quienes comprenden que para ti tu novela es algo único cuando para ellos es solo una novela. En mi caso, todo mi entorno me ha querido y comprendido de una manera que nunca hallará sequías en mis remembranzas.

JMM: ¿Cuáles son tus próximos retos?

SA: Escribir la segunda parte de *Libelo de sangre*, y en tal menester ando enredada en la actualidad.

JMM: ¿Para cuándo tu lanzamiento internacional?

SA: En realidad, el lanzamiento internacional ya está en vigor, porque tiempo ha que *Libelo de sangre* ha surcado los mares y desembarcado en el continente americano.

JMM: Imagina que eres mentora de un joven abogado. ¿Qué recomendaciones le darías?

SA: Le diría lo mismo que Alonso Castro, el muchacho de trece abriles protagonista de Libelo de sangre, escucha de su padre, Sebastián Castro.

Maestro del ajedrez, Sebastián ha instruido a su hijo en este arte y le regala una lección de vida envuelta en escaques blanquinegros que reza así: *"Jamás permitas que el rey muera, porque entonces la partida termina. El ajedrez es la vida y el rey son los sueños; si abandonas la lucha de los sueños, los sueños morirán y, si los sueños mueren, la vida termina."*

He ahí, pues, mi consejo a los jóvenes abogados y a los jóvenes en general. Nunca dejéis de luchar por vuestros sueños. Nunca os rindáis; nunca desistáis. Luchad hasta el final, porque, si creéis en vosotros, todo es posible.

JMM: ¿Cómo te han afectado las nuevas tecnologías? ¿Crees que son un aliado o un enemigo? Me interesa mucho conocer tu opinión como abogada y como escritora.

SA: Como abogada, no las manejé demasiado, porque, cuando aparqué el ejercicio, todavía no se habían adueñado de las relaciones humanas. Como escritora, sí las he utilizado, y en su señorío he encontrado tanta gente buena que solo puedo rendirles gratitud… a las redes y a los muchos y muy gentiles corazones en ellas prendidos.

Libelo de sangre nació en mayo de 2020, cuando el mundo se paró y el sentir abandonó los predios del abrazo para instalarse en los de una pantalla. El virus vetó presentaciones, conferencias, charlas, firmas de libros, tertulias… Nos borró la sonrisa del ánimo y, mascarilla mediante, también del rostro, y solo nos dejó las redes.

En las redes y gracias a las redes, *Libelo de sangre* ha podido surcar el océano virtual hasta atracar en playas humanas: los lectores. Ellos abrieron la puerta de sus hogares a mi criatura y le brindaron la oportunidad de echar raíces en su biblioteca y en sus emociones. Han sido cruciales en esta aventura literaria y, pase lo que pase, siempre tendrán reservado un palco de honor en el transitar de *Libelo de sangre* y en el mío propio. En consecuencia, las redes sí me han afectado, porque me han regalado afecto a espuertas; un afecto de hoja perenne, ese que, no importa cuán fuerte arrecie el viento de la distancia, jamás amarillea. ■

*Hic et **nunc***

GUILLERMO R. AUREANO

Thinking about the present requires distancing ourselves from the mess of news, tweets and messages that punctuate our hyperconnected life. The pandemic worries us today, but other problems will resurface in the near future. Four of them are analyzed here: the total hegemony of capitalism, our ignorance of international finance, the fear of seduction and sex and, finally, our attachment to a trivial ecology. And all this in a climate of marked intolerance, where the will to learn, intellectual curiosity and critical spirit have been called into retirement.

Pensar en el presente requiere tomar distancia, salir del lío de noticias, tuits y mensajes que marcan nuestra vida hiperconectada. La pandemia nos preocupa hoy, pero otros problemas resurgirán en un futuro próximo. Aquí se analizan cuatro de ellos: la hegemonía total del capitalismo, nuestro desconocimiento de la finanza internacional, el miedo a la seducción y al sexo y, finalmente, nuestro apego a una ecología trivial. Todo, en un clima de marcada intolerancia, donde se han retirado las ganas de aprender, la curiosidad intelectual y el espíritu crítico.

Toute réflexion sur l'actualité exige un certain recul. Autrement, il est impossible d'échapper à l'instantanéité et à la vitesse auxquelles les chaînes d'information en continu et Internet nous ont habitués. C'est le royaume des gazouillis, des *stories* et des commentaires, inspirés de la dernière indignation à la mode. Tous des messages qui se succèdent rapidement, au gré des notifications et des sonneries qui rythment notre vie connectée. Une sorte de prêt-à-porter de l'opinion, qui fait fi de la chronologie historique, mais aussi et surtout de la nuance et du doute.

Dans ce flot incessant de mots et de mèmes, seules les certitudes, exprimées dans les termes du moment, sont recevables. En format court et en rafale, s'il vous plaît.

Si l'actualité est dominée par la crise sanitaire, et cela se comprend aisément, c'est sa prétendue nouveauté qui nous frappe. Comme si nous ne l'attendions pas, malgré les avertissements des experts internationaux. Alain Badiou[1] rappelle également que, dans l'histoire de l'humanité, une pandémie virale n'a rien de nouveau ou d'inouï. Les mesures de contrôle sont tout aussi évidentes que connues. Ni le confinement ni le couvre-feu ne sont des inventions récentes, bien au contraire. Ce qui nous inquiète et nous désarçonne, c'est l'étendue de l'épidémie actuelle et, surtout, qu'elle frappe les pays industrialisés. Évoquer la lointaine grippe espagnole nous évite d'ailleurs de penser au SARS, qui avait quelque peu dérangé nos projets de voyage au printemps 2003. Ce souvenir plus récent nous obligerait aussi à admettre que les gouvernements n'ont pas alloué les budgets nécessaires à la recherche scientifique et à la mise en œuvre de politiques de prévention. Nous peinons également à reconnaître les inégalités que la crise sanitaire a mises en évidence, notamment chez les travailleurs essentiels en premier ligne, sous-payés, entassés au foyer et au travail, et bien souvent traqués par les autorités d'immigration.

Même le retour en force des théories conspirationnistes n'a rien d'extraordinaire. La peste est un terreau fertile pour les « entrepreneurs moraux » et les sauveurs de tout acabit. Leurs fabulations rassurent les individus et les groupes qui se sentent menacés et sans avenir. Des explications irrationnelles, mais ô combien efficaces, pour mater la peur. Peur de l'inconnu, mais aussi peur du déclassement social, de la perte des privilèges, de la voisine basanée qui étudie et gagne bien sa vie. Les réseaux sociaux ont donné à ces inquiétudes une puissance et une expansion qui donnent le vertige. Que des leaders en mal de capital politique manipulent le ressentiment populaire n'est pas un phénomène exceptionnel. Que ces mêmes leaders ne puissent pas ou ne veuillent pas en contrôler les dérives, non plus. Chauffer la marmite est toujours plus facile que de mettre le couvercle dessus.

À l'avenir, on discutera de la gestion de la pandémie, mais il y aura certes d'autres questionnements. Les enjeux qui ont été mis en suspens ressurgiront d'une manière ou d'une autre. Nous en examinons ici un nombre limité. L'approche est volontairement intempestive.

1. Alain Badiou. 2020. « Sur la situation épidémique ». *Quartier général : le média libre.* En ligne : https://qg.media/2020/03/26/sur-la-situation-epidemique-par-alain-badiou

< Statu quo >

Avec l'effondrement du bloc soviétique, nous ne sommes pas arrivés à la fin de l'histoire[2] . Ce n'est pas la démocratie de marché qui a triomphé, mais le marché tout court. Un marché capitaliste, qui fonctionne à la répartition différentielle de la rente, du profit et des revenus. Il a tiré des millions de personnes de la pauvreté extrême – inutile de le nier –, mais les inégalités frôlent l'indécence. Aucune solution de rechange n'est en vue. Avec l'épuisement du communisme, les mouvements contestataires, qu'ils soient d'inspiration laïque ou religieuse, ne sont pas parvenus à formuler un modèle de société et d'organisation économique à la fois viable et fédérateur.

À gauche, les forces progressistes s'épuisent en défendant des minorités aux revendications identitaires, très ciblées et aucunement négociables. Sans discuter des causes profondes des inégalités. Sans proposer des réformes d'envergure susceptibles de générer un large consensus. L'absence d'un manifeste pour annoncer et baliser ce grand changement est une preuve supplémentaire de l'impossibilité de bâtir des solidarités à grande échelle.

À droite, le populisme séduit aisément des majorités condamnées au naufrage économique et à la perte des privilèges tenus pour acquis. Les maîtres d'opinion les plus réactionnaires, qui trouvent leur public sans peine, embellissent le passé, de manière à le rendre encore plus radieux et enviable. Au passage, la droite détruit le langage de la contestation. Les apôtres du conservatisme, du suprématisme blanc et de la droite radicale se vantent, eux-mêmes, d'être des rebelles et de défendre la liberté.

Ce ne sont que deux exemples de cette appropriation sournoise du lexique révolutionnaire. Sans solution de rechange progressiste et avec des mots vidés de leur sens par la réaction, notre pensée tourne en rond et s'aplatit. Dans les années 1960, Herbert Marcuse avait anticipé un monde unidimensionnel, dépourvu d'horizon critique. Nous y sommes.

< Ignorantia >

Avez-vous déjà discuté à table d'une opération de vente à découvert « nue » ? Vos opinions sur le Liborgate vous ont-elles mis en brouille avec votre famille ? Dans la négative, sans égard à votre niveau d'instruction, vous êtes un analphabète de la finance. La vente à découvert est un des mécanismes spéculatifs les plus délétères qui soient, avec des conséquences potentiellement désastreuses pour les monnaies et les économies nationales. Le Royaume-Uni et plus récemment la Grèce en ont fait l'expérience. Pareil pour le Liborgate, une fraude massive orchestrée par des grandes banques internationales pour manipuler les taux interbancaires. Mais cela ne touche pas seulement les prêts entre les banques. Les conditions de remboursement des hypothèques, des cartes de crédit et des prêts aux entreprises en sont également affectées. Pour le citoyen lambda, l'opacité est totale. Le langage ultraspécialisé de la finance est une barrière redoutablement efficace : titrisation, effet de levier, *dark pool,* assurance sur incident de crédit, fonds de couverture, sandwich irlandais… La dématérialisation de l'argent et la robotisation des transactions y contribuent également.

Difficiles aussi à comprendre les scandales financiers de ces dernières années. Ils se succèdent et se ressemblent au point de ne plus susciter de grands remous. La liste des fuites et des révélations, même allégée, semble interminable : BCCI, Salinas-Citigroup, affaires Clairstream (1 et 2), Offshore Leaks, LuxLeaks, Swissleaks, Panama Papers, Paradise Papers, CumEx Files, FinCEN Files. Sans oublier les entourloupettes d'envergure nationale, de la faillite de Norbourg aux arrangements que Revenu Canada a proposés aux clients fortunés du cabinet comptable KPMG ayant fait de l'optimisation fiscale « agressive ». Si, pour le néophyte, les secrets de la finance restent impénétrables, le législateur, par ignorance ou par simple intérêt, n'a pas trouvé la manière de discipliner les circuits financiers et de garantir la justice fiscale.

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Nous nous insurgeons peut-être en écoutant les nouvelles, mais, comme nous sommes des analphabètes de la finance, nous avons de la peine à bien saisir ce qui est en jeu et nous oublions vite. Les escroqueries financières deviennent une musique d'ascenseur, à la fois présente et lointaine, qui ne nous touchent pas vraiment. Les ultra-riches et les délinquants en col blanc à leur solde peuvent dormir en paix.

< Pudicitia 2.0 >

L'utopie hippie d'un érotisme sans barrières – de sexe, de genre, de race – est morte et enterrée. Le désir charnel est redevenu un formidable mécanisme de contrôle social en casant chacun dans une identité inamovible et définitive. Nous acceptons, sans trop faire de vagues, d'être classés et de classer nos semblables conformément aux préférences sexuelles, aussi *queer* soient-elles. Un collectif de référence – fantasmé, vertueux, homogène – en fixe les options et les limites. Gare à dépasser d'un poil ! Nous nous surveillons du coin de l'œil pour que les hasards de la vie ne brouillent pas la palette des identités acceptées.

C'est ainsi que la séduction, toujours imprévisible, a fini par devenir suspecte, de plus en plus associée au harcèlement. Le seul moment de répit, ce sont les défilés, tape-à-l'œil et un brin naïfs, célébrant la diversité sexuelle. Ces quelques heures de liesse ne font pratiquement pas allusion aux souffrances et aux luttes qui sont à leur origine, plutôt axées sur la libération sexuelle que sur les questions identitaires. Dès que le dernier char allégorique rentre au garage, le débat redevient crispé et polarisant. Pour les uns, un baiser volé constitue une agression. Pour

2. Jean-François Bayart. 2017. *L'impasse national-libérale : globalisation et repli identitaire*. Paris : La Découverte.

les autres, machisme et homophobie sont choses du passé. Mais toutes les victimes ne sont pas égales. Les comportements abusifs des célébrités suscitent des réactions incendiaires. En revanche, le machisme ordinaire qui empoisonne le quotidien de milliers d'ouvrières et de femmes de ménage est loin de générer des mots-clic tendance. Nous demandons « qui ? », avec empressement et insistance, pour mettre des visages sur le bourreau et ses victimes. Opération sans danger, qui simplifie et facilite nos démonstrations d'empathie et notre militantisme sur les réseaux sociaux. Mais nous évitons religieusement de nous demander « comment ? » et « pourquoi ? »[3]. Nonchalants que nous sommes, nous refusons d'examiner les conditions historiques et les relations de pouvoir qui perpétuent les abus. Là est le véritable danger. Il faut s'informer et prendre position. Pensons, par exemple, aux mutilations génitales féminines. Faut-il les condamner ? Si vous dénoncez la brutalité de ces pratiques rituelles, vos propos seront considérés, à gauche, comme sexistes, racistes, colonialistes et que sais-je encore ? Et vous n'avez pas fini de vous faire varloper. La droite va récupérer cette dénonciation de l'excision pour condamner, sans nuances, le premier étranger venu, sa communauté et sa religion. En fait, le débat sur la sexualité humaine part rapidement en vrille. Il est devenu toxique et les conséquences en sont majeures. Exit les jeux de séduction, les joies de l'érotisme et la camaraderie qui naît des rapports intimes. Paradoxalement, à une époque où les relations hors mariage sont largement tolérées, la jeunesse occidentale, avertissent statisticiens et sexologues, est tombée en « récession sexuelle ». L'amour libre n'existe plus que dans les films de la Nouvelle Vague.

Nous regardons avec une certaine fierté les avions de chasse et les missiles téléguidés, preuves irréfutables de notre supériorité technologique.

< Bellum >

Depuis la guerre du Golfe (1991), nous croyons qu'il est possible de déclencher des guerres propres et efficaces. Les bombes sont larguées de loin, depuis des avions à plus de 10 000 m d'altitude ou des vaisseaux à des centaines de kilomètres de leur cible. Nous suivons sur nos écrans les traces lumineuses que les projectiles laissent dans le ciel, mais nous avons rarement le temps de nous informer sur les bavures, les morts, la dévastation. Pire encore : les chaînes d'information en continu nous font croire que nous regardons la guerre en direct, alors qu'elles en diffusent une version quasi angélique. Quelques colonnes de fumée au loin, les portes défoncées d'un palais à l'architecture exotique et des populations qui se précipitent sur le lait en poudre distribué par l'envahisseur. Nous regardons avec une certaine fierté les avions de chasse et les missiles téléguidés, preuves irréfutables de notre supériorité technologique. Les formes lisses et épurées de nos machines de guerre renforcent notre illusion des frappes précises, sans dommages ni victimes collatérales.

Aujourd'hui, les bombardements prennent encore une autre forme, plus insidieuse, avec la guerre des drones, l'héritage le plus sombre et le moins discuté du gouvernement Obama (2009-2017). Les drones accentuent à la fois le détachement et l'apparence de propreté. Le pilote-opérateur est à des milliers de kilomètres et, après l'attaque, un nuage de débris lui évite de voir les dégâts matériels et les corps déchiquetés. Les drones sont des merveilles de la technologie, certes, mais ils larguent des bombes et des missiles sur les populations civiles les plus miséreuses du globe. Si la sophistication des drones vous fascine, ou encore les vidéos de leurs frappes supposément millimétriques, pensez aux paysans et aux villageois qui vivent, jour après jour, dans l'anticipation d'une attaque avec un drone furtif. Un drone qui ne peut être vu ni entendu. Ce n'est qu'à la dernière minute qu'un sifflement rompt le silence, mais il est déjà trop tard pour se mettre à l'abri. Quelle est la rationalité des attaques avec des drones militaires ? Difficile à saisir. La plupart des attaques ne sont pas des assassinats ciblés – visant des ennemis bien identifiés –, mais plutôt des menaces détectées par des opérateurs à partir de leurs observations et de leurs propres conjectures sur les activités dangereuses[4]. Ainsi, tout rassemblement devient suspect, ce qui explique pourquoi il y a tant d'erreurs et de bavures, c'est-à-dire des attaques contre des assemblées d'aînés, des mariages, des funérailles, des bus et des camions bondés de passagers. Il faut être sur ses gardes et craindre une attaque à tout moment, jour et nuit, tous les jours. C'est un état d'anxiété perpétuel. Mais la signification et la portée de l'utilisation militaire des drones sont bien plus larges. Les drones ignorent les frontières,

3. *Cf.* Jay Albanese. 2011. *Transnational Crime and the 21st Century.* New York : Oxford University Press.

4. Grégory Delaplace. 2017. *« Comment pensent les drones : la détection et l'identification de cibles invisibles ».* L'Homme, 222(2) : 21-28.

la souveraineté des États et le droit international : il est désormais possible de « neutraliser une cible » en territoire étranger, même s'il s'agit d'un ressortissant du pays qui mène l'attaque. C'est la peine de mort, imposée par le pouvoir exécutif. Sans procès et en toute discrétion. Comme si la guerre pouvait être propre.

< *Circumiecta naturalia* >

On aime s'afficher vert, mais à quoi bon le devenir ? Nul doute, la planète est en feu. Les preuves en sont surabondantes. La température moyenne du globe augmente. Les variations climatiques deviennent « radicales ». Incendies, sécheresses, cyclones et inondations se multiplient et atteignent une ampleur inégalée. Aux pôles, la banquise craque et rétrécit. Tout comme les glaciers, grands et petits, continentaux et côtiers. La pollution de l'air, notamment dans les mégapoles, tue des millions de gens chaque année. Un vortex de déchets plastiques, qui fait trois fois la taille de la France, s'est formé dans le Pacifique Nord. Un second serait en train de se consolider dans l'océan Atlantique. La disparition des espèces animales et végétales s'accélère au point de préfigurer une sixième extinction, dite aussi extinction de l'Holocène, ou encore « entrée dans l'Anthropocène », nouvelle ère qui s'annonce peu joyeuse.

Nous disposons d'une quantité étonnante d'études scientifiques pour mesurer l'ampleur des dégâts, en identifier les causes et anticiper les conséquences. Pourtant, les protestations des groupes écologistes ne percent pas. Les solutions qu'ils proposent sont peu commodes. Nous préférons faire des compromis. Nous aimons les certifications, sceaux et icônes, parfois juxtaposés, qui nous rassurent sur la nature carboneutre de nos achats. Tant qu'on ne se pose pas trop de questions, ça marche. Manger local est-il toujours bon pour l'environnement ? En lisant un livre sur ma tablette électronique, je sauve combien d'arbres ? Puis-je recycler les emballages, les rubans et les copeaux en styromousse de la cinquantaine de cadeaux reçus par ma famille à Noël ? Une voiture électrique est-elle moins polluante qu'une voiture à essence ? Ma contribution volontaire de 10 $ à la plantation d'épinettes compense-t-elle pour l'empreinte carbone de mes voyages en avion ?

Ces questions, que tout consommateur doit éviter de se poser afin de dormir tranquille, deviennent encore plus troublantes dans une perspective macro, englobant les pays industrialisés et les pays en émergence. Rappelons qu'en 1992, au Sommet de la Terre, les délégués ont établi que le développement durable « *répond aux besoins du présent sans compromettre la capacité des générations futures à répondre aux leurs* ». Une telle définition suppose une intégration harmonieuse et consensuelle des objectifs économiques, sociaux et environnementaux : durabilité écologique, viabilité économique et équité sociale. Mais les chercheurs et les spécialistes sont demeurés et demeurent sceptiques. Peut-on vraiment concilier la croissance et le respect des écosystèmes ? Le développement est-il compatible avec l'équité intergénérationnelle ? De manière encore plus directe : de quel droit les pays qui se sont enrichis en polluant allègrement peuvent-ils exiger

des pays pauvres qu'ils ne contaminent plus la planète ? Peu importe. Nous continuons de porter des jeans qui font plusieurs fois le tour de la planète avant d'atterrir dans le magasin chic qui confirme notre statut social. Nous achetons, sans mauvaise conscience, le téléphone intelligent de l'année. Au fond, nous aimons, en matière d'écologie, reporter perpétuellement nos responsabilités[5]. Évaluer nos pratiques réelles et leurs conséquences, c'est lourd. S'afficher vert vaut mieux que réduire, substituer ou carrément éviter de consommer au rythme habituel. Quiconque revoit ses besoins bénéficie, à condition de ne pas trop nous faire la leçon, d'une célébrité instantanée. Au passage, il nous donne la dose de confort moral, à la sauce écolo, dont nous avons besoin avant de retourner au centre commercial.

Pendant ce temps, la planète continue de se réchauffer et les inégalités – toutes les inégalités – se creusent. Nous nous divertissons avec des feux d'artifice purement sémantiques, qui ont peu ou aucun effet sur ces grands enjeux, structurants et éventuellement dramatiques. L'appropriation culturelle et la décolonisation du tango, des spaghettis, des pantoufles et des plantes d'intérieur occupent nos esprits. Si ce ne sont pas les prophéties et les complots les plus farfelus. Le marché des causes sociales est également pléthorique, avec des militants, des ennemis et des boucs émissaires pratiquement interchangeables. La censure et la dénonciation de la censure reviennent hanter les universités et la création artistique. Les médias et les réseaux sociaux jouent à la perfection le jeu des offuscations sans lendemain, mais constamment renouvelées. Dans ce vacarme, la volonté d'apprendre, la curiosité intellectuelle et l'esprit critique sortent grands perdants. Les âmes studieuses se retirent du débat public, est-ce si étonnant ? ■

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5. *Cf.* Fabrice Flipo et al. 2016. « *Les technologies de l'information à l'épreuve du développement durable* », Natures Sciences Sociétés, 24(1) : 36-47.

Mandatory Vaccination? Employers' Options for Keeping the Workplace Covid-19 Free: **A European Perspective**

KATO AERTS

Les employeurs peuvent-ils exiger que leurs employés soient vaccinés contre la Covid-19 ? Cette question et d'autres très actuelles ont été posées à 12 experts européens au cours d'une table ronde. Ce qui suit n'est pas une liste exhaustive des réponses, mais plutôt un aperçu des points communs et des aspects les plus importants de la discussion. Les lecteurs qui ont des questions ou des commentaires sont encouragés à contacter les contributeurs énumérés ci-dessous. Les informations de contact sont partagées au bas de l'article.

¿Pueden los empleadores exigir que sus empleados se vacunen contra el Covid-19? Presentamos estas y otras preguntas de actualidad a 12 expertos en Europa durante una mesa redonda. La siguiente no es una lista exhaustiva de las respuestas, sino más bien una descripción general de los hilos comunes y los aspectos más destacados de la discusión. Se anima a los lectores que tengan preguntas o comentarios a que se pongan en contacto con los colaboradores que se enumeran a continuación. La información de contacto se comparte al final del artículo.

Can Employers in Europe Require their Employees to be Vaccinated Against Covid-19?

Generally, within the European Union and Switzerland, there is no obligation for employees to be vaccinated against Covid-19. Put simply, there is no legal basis to make the vaccine compulsory.

In Germany, for instance, discussion arose on whether such obligation could be stipulated in the employment contract or in collective agreements, or whether it could even be considered as part of the employer's right of instruction. Due to the considerable intrusion of a vaccination into the employee's right to privacy and physical integrity, however, such view is largely rejected.

Mr. Thomas Kälin from Switzerland, however, argues that the employer's operational interests must outweigh the employee's personal rights. It can hardly be argued that this is the case outside special environments of increased vulnerability or risk of infection, such as, e.g., hospitals or retirement homes.

On the other hand, the absence of the option for employers to require their employees to be vaccinated is in stark contrast to the obligation of employers to ensure safety in the workplace. In Spain, for example, employers have the obligation to take preventive measures to combat the spread of Covid-19 in the workplace, based on workplace health and safety laws, says Mr. Álvaro Fernández Sánchez del Corral.

In that context, a legal basis does exist in several European countries to allow employers to impose vaccinations on their employees in specific professional sectors. In France, for example, such legal basis exists for 11 diseases (such as Hepatitis B, or measles) for employees working in health care institutions or nursing homes. For vaccines against any other disease, the employer can only "*make recommendations, with the contribution of the occupational doctor*" for employees who may be exposed to biological risks, notes Mrs. Caroline Barbe.

The same is the case in the Czech Republic for certain specific diseases, in particular workplaces or employees working with special biological agents. Virus SARS-CoV-2 consists one of these biological agents under Czech law and we assume that in some workplaces (e.g. labs working with the samples of the virus), employers could demand the vaccination in the context of their risk prevention policy, suggests Mr. Tkadlec Matěj.

Also in Belgium, the coronavirus SARS-CoV-2 has been listed as a group 3 biological agent. Employers in the industries concerned are obliged to take this into account in their risk assessment and must offer the employees concerned the opportunity to be vaccinated if an effective vaccine is available and they are not immune yet. However, there is no obligation for the employees to get vaccinated against Covid-19 in these industries either.

Mrs. Emelie Svensäter Jerntorp advises that in Sweden, an interesting distinction is made between private and public sector employees. The statutory right to bodily integrity in relation to the state prevents employees within the public sector from being obliged to get the Covid-19 vaccine. This constitutional right does not apply to private sector employees. However, the principles as discussed above

can also be extended and employers cannot oblige their employees to be vaccinated.

Can an Employer Request a Copy of a Vaccination Certificate or Restrict Access to the Workplace?

Not only can employers not force their employees to take a corona vaccination in Europe, they cannot generally force their employees to present proof of vaccination either.

Given privacy laws and GDPR, employers cannot always simply request or keep records of their employees' vaccinations. Moreover, when imposing sanctions (e.g. dismissal) due to the (alleged) vaccination status of employees, employers must take into account discrimination laws to avoid claims.

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Mrs. Nicole Deparade from Germany emphasizes that health protection at work should be ensured primarily by other protective measures such as keeping social distance, protective masks, ventilation and hygiene concepts. As a result, unvaccinated employees may not simply be treated unfavorably or denied access to the workplace.

This is in line with the view in the Netherlands, France and Belgium. The Dutch Working Conditions Act imposes a general duty of care for a safe working environment on the employer. This includes preventing positively tested employees from entering the workplace and infecting colleagues and others. However, it does not allow denying complaint-free employees access for not being vaccinated nor requiring an employee to get vaccinated, says Ms. Lorraine Mordaunt.

Mr. Lukas Wieser argues that in Austria, on the other hand, questions about vaccination status concern the employee's personal rights. Employees are only required to answer such questions truthfully if the employer has an overriding interest in the individual case. Containment of the pandemic and the employer's duty to take protective measures for all employees may be argued as such an overriding interest, in which case, employees would be required to truthfully provide their vaccination status.

In Slovakia, employers have certain legal grounds to prevent employees to enter the workplace due to the pandemic, but a missing vaccination certificate is not a sufficient ground for entrance denial. Under the current laws, the employer is allowed to inspect the vaccination certificate (if issued). GDPR rules however, prevent the employer from making a copy of the certificate, states Mr. Tomáš Rybár.

In Switzerland however, Mr. Thomas Kälin argues that, if required to organize its workforce and operations, the employer could be allowed to ask if the employee is vaccinated and could deny access to company premises on this basis. Processing such data must, again, remain compliant with data protection laws.

Can an Employer Sanction Unvaccinated Employees?

Bearing in mind that there is no legal basis for a mandatory Covid-19 vaccination in the workplace in most European jurisdictions, employers should be careful when imposing sanctions (e.g. dismissal) on employees who refuse to get vaccinated.

Mrs. Moira Campbell from the UK points out that disciplinary sanctions or dismissing an employee or forcing them to take unpaid leave or reducing their salary because they have not been vaccinated is likely to result in potential claims. A blanket policy requiring employees to be vaccinated may be deemed discriminatory, for example on the grounds of disability, age, pregnancy, or religious/philosophical belief.

In Portugal, it is similarly argued by Mr. Manuel Ferreira Mendes that since there is no legal obligation to get vaccinated, a refusal to do so can hardly result in dismissal or other sanctions.

According to Mrs. Nicole Deparade from Germany unvaccinated employees can only be sanctioned (even up to termination of employment if a transfer to a position without vaccination requirement is not possible) in case a statutory obligation for vaccination against Covid-19 would be introduced in the future. This could, for instance, be possible for certain professions or occupational groups or based on a company's specific risk assessment.

The choice to be vaccinated mostly remains with the employee. Refusing vaccinations could have consequences (such as relocation, switch of position or even a dismissal), but this always has to be assessed on a case by case basis and after an individual risk assessment.

The fact that employers cannot require their employees to be vaccinated against Covid-19 does not mean that they cannot consider alternatives to encourage their employees to get vaccinated.

Mr. Matteo Cocuzza from Italy indicates that it is advisable to sign a trade union agreement or to collaborate closely with the competent company doctor and employees' representatives when carrying out such a risk assessment.

What other Incentives are Being Considered in Different European Countries?

The fact that employers cannot require their employees to be vaccinated against Covid-19 does not mean that they cannot consider alternatives to encourage their employees to get vaccinated.

From the debate, results indicate that employers all over Europe are considering their options, including providing (voluntary) access to and information about the vaccine, allowing paid time off for getting the vaccine, paying for the vaccine, organizing vaccinations on an operational level, etc.

In France, for instance, the occupational medicine services are expected to organize vaccination campaigns in the coming weeks. Those campaigns will be deployed in consultation with the employers.

In Belgium, a draft law on granting workers the right to paid leave in order to be vaccinated (so called "vaccination leave") was approved. Moreover, employers are allowed to encourage their employees to be vaccinated through a free vaccination campaign at the workplace (under the direction of the occupational medicine services). The benefit of the free vaccination is exempt from taxes and social security. In addition, Mr. Lukas Wieser from Austria endorsed the idea of granting employees paid time off for the vaccination as a fringe benefit.

Another possibility is asking unvaccinated employees to work from home while vaccinated employees can work in the office buildings, as proposed by Mrs. Emelie Svensäter Jerntorp from Sweden.

Mr. Matteo Cocuzza from Italy proposes that employers could work with economic incentives to stimulate employees to get vaccinated. In Belgium, for example, the option of awarding a vaccination bonus is being discussed. Some argue that a collective salary bonus (i.e. when a collective target is reached, e.g. 90% of employees is vaccinated) would be legally possible as a means of encouraging vaccination. However, the Federal Public Service for Employment and Social Dialogue has recently taken the position that they do not agree.

In the UK, the debate about vaccine passports and its impact on employers and employees is currently raging. This is in line with the discussion on the travel vaccination passport proposed by the European Commission. The intention is to introduce a vaccination passport by this summer, which is meant to provide proof that a person has been vaccinated against Covid-19, has recovered from it, or has a negative test result. The passport is expected to make travel through the European Union possible again.

Conclusion

Except in certain professional sectors, there is no specific legal basis allowing employers to require their employees to be vaccinated against Covid-19 in Europe so far. Employers, however, undeniably have other options to encourage their employees. An often recurring proposal is the one to allow employees to have the vaccine during working hours.

The vaccination debate, as demonstrated in the above round table summaries, gives rise to a considerable number of employment law questions. Depending on the vaccination strategy that the various countries are currently rolling out and the further evolution of the coronavirus, these questions will continue to be part of the social law landscape for a considerable time to come.

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Improvision in Times of Covid
A Swiss and OHADA Perspectives

CAMILLE LOUP

KOMLANVI ISSIFOU AGBAM

En ces temps de pandémie qui semblent pour l'heure interminables, une question demeure : comment ces nouvelles circonstances influencent-elles le droit des contrats ? Le présent article présente la théorie de l'imprévision sous l'angle du droit suisse et dans la perspective d'une éventuelle application à la crise actuelle. Dans un second temps, les derniers développements juridiques au sein de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) seront discutés *de lege ferenda*.

En estos tiempos de pandemia que por el momento parecen interminables, queda una pregunta: ¿cómo influyen estas nuevas circunstancias en el derecho contractual? Este artículo presenta la teoría de la imprevisibilidad desde la perspectiva del derecho suizo y con vistas a su posible aplicación a la crisis actual. En segundo lugar, se discutirán *de lege ferenda* los últimos desarrollos legales dentro de la Organización para la Armonización del Derecho Mercantil en África (OHADA).

Introduction

Covid-19 triggered an initial wave of lockdowns around the world in March 2020. As this issue of *Juriste* goes to press, Covid 19 struck again. In Europe, the third wave is at our door and many countries are starting a new lockdown. And the same questions raised a year ago remain: how to cope with these new circumstances? What will be the effect of the lockdowns on contract law? This article highlights the answers contained in the "Swiss army knife" of Swiss contract law. These solutions are placed in perspective with the next evolution of OHADA[1] contract law.

Switzerland

General Principles of Swiss Contract Law

The Rule

Under Swiss law, contracts are governed by good faith (Art. 2 of the Swiss Civil Code). This principle requires each party to a legal relationship to behave faithfully to its word, so that the other party can give credence to that word, i.e. rely on it and act accordingly.

From this general principle flows the adage "*pacta sunt servanda*", according to which validly concluded contracts must be performed as agreed. In other words, the parties cannot freely depart from their obligations. This binding force of contracts is a fundamental principle of both domestic obligations law and shared in contract law around the world. The principle of "contract fidelity" has different applications and even exceptions. One of them is the theory of *force majeure*; another one is the theory of hardship, summarized by the Latin phrase "*clausula rebus sic stantibus*".

Force Majeure

Swiss law does not statutorily define the notion of *force majeure*. A *force majeure* situation is extraordinary, unforeseeable and external event occurring with irresistible force and which cannot be avoided, thus interrupting the causal link between the breach of contract and the damage caused by such breach. The debtor may then be released from liability by proving the absence of fault (art. 97 Swiss Code of Obligations) based on *force majeure*. The main element to distinguish the theory of hardship from the theory of *force majeure* is therefore the possibility to perform under the new circumstances. When it is impossible, the principles of *force majeure* may be used.

1. Organisation pour l'Harmonisation en Afrique du Droit des Affaires: created by the Treaty of Port-Louis of October 17, 1993 (revised on 2008), OHADA is a fully-fledged international organization, which pursues a work of legal integration between its member countries. OHADA currently comprises 17 States (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea Bissau, Mali, Niger, Senegal, Togo).

However, a case of *force majeure* does not cancel the contractual obligation, but only exonerate the obliged party from his responsibility for the damage caused to the other party – for non-performance only. It is not possible to cancel the whole contract due to the sole fact that the performance of the contract is not needed because of the new circumstances.

Doctrine and case law have set strict conditions for admitting the existence of a case of *force majeure.* A natural event alone is not sufficient to invoke it. It is more a question of the foreseeable and avoidable nature of the event.

Doctrine and case law have set strict conditions for admitting the existence of a case of *force majeure*.

As a general rule, the holder may not take advantage of natural phenomena that are not of sufficiently unusual character or intensity to make them insurmountable. Fog or glare from the sun are among the risks that the holder must assume, as well as ice. In terms of operation of railways, streetcars, cableways and ships, *force majeure* is regularly admitted in the event of unforeseeable natural disasters and terrorist acts. Because of their unforeseeable and unavoidable nature, acts of war and terrorism often cumulatively meet the condition of serious misconduct by a third party and that of *force majeure.* Avalanche or earthquake may also constitute a case of *force majeure.*

Theory of Hardship

Where a change in the circumstances seriously disrupts the balance of interests established at the parties' signature of the contract, the performance of the excessive obligation may represent an intolerable burden for the debtor party. Performance of the obligation itself remains possible, i.e. the obligor may perform it, but its performance requires efforts or costs unrelated to what he had originally promised. This element is central to distinguish the theory of hardship from the theory of *force majeure.*

In the event of a serious change of circumstances, it is rare that the law or contracts have anticipated the new specific situation, in order to provide appropriate solutions. If parties do not reach mutual agreement and if strict conditions are fulfilled (cf. *infra*), the court is free to adapt the contract to the new circumstances as it sees fit. Judges have several choices: they may pronounce or authorize the termination of the contract, with or without compensation. They may also maintain the contract and modify the scope of the obligations provided for, by partially releasing one party, by extending the obligations of the other party or by reducing the duration of the contract.

This being said, the theory of hardship, developed by case law (e.g. Swiss Federal Supreme Court Ruling 4A_263/2019 of December 2, 2019; Ruling 127 III 300), remains an exception whose approval by the judge is particularly difficult to obtain. The conditions for its application must be clearly and plainly fulfilled:

• New, unavoidable and unforeseeable circumstances

Adapting unilaterally the contract may be done in good faith only if the new circumstances were not reasonably foreseeable at the time of the signature. Otherwise, the obligor should have required, at the time, the insertion of a clause enabling him to rebalance it. Hardship must be linked to the understanding which the debtor had at the time of signing. As such, a change in the law cannot, in principle, be characterized as unforeseeable.

This theory often applies to contracts which performance is not immediate or takes place over time, such as contracts for successive deliveries, distribution or construction contracts. Since circumstances must have changed considerably between the signing and performance of the contract, contracts of duration are most often susceptible to such adaptation, without however excluding other types of contract.

• Excessive burden on the party liable for performance

The change of circumstances since the signature must have excessively altered the contractual balance, so that performance of the obligation by the debtor becomes disproportionate. This runs counter to the principle of contractual fidelity, according to which the debtor bears the consequences of miscalculation and the risks taken in concluding a contract.

While it would be too rigid to set thresholds above which circumstances place an excessive burden on the debtor, the Swiss Federal Supreme Court has nevertheless admitted – depending on the case – that situations of aggravation of costs ranging from 24% to 60% could be sufficient (52.33% loss of revenue for the lessee of a ship's restaurant due to the war; 60% increase in the costs of carrying out a work; 48% loss of turnover between 1931 and 1933). In contrast, a 300% increase in the price of a raw material was considered sufficiently foreseeable, since price variations on the market constitute a risk assumed by the buyer, even if it is difficult to predict the exact characteristics of said raw material.

Covid-19: New, Unavoidable and Unforeseeable Circumstances?

On March 12, 2020, the World Health Organization (WHO) declared the outbreak of Covid-19 to be a pandemic. On March 16, 2020, the Swiss Federal Council described the situation as "extraordinary", in the words of the Epidemics Act, allowing it to take urgent measures.

While the conditions for applying the theory of hardship and/or the *force majeure* are restrictive and must be analyzed on a case-by-case basis, it is possible that the consequences of the Covid-19 crisis would lead to new, unavoidable and unforeseeable circumstances, creating an excessive burden on the debtor of the obligation.

For example, a company could obtain an extension of the delivery period for its products once the global crisis has drastically reduced its supply channels for raw materials. Similarly, a distributor could obtain from its supplier a reduction in its annual objectives because the stores

through which it usually sells its merchandise have been forced to close for several months. On the other hand, the closure of all factories in China during the first months of 2020 for the production of raw material may justify the relieve of liability based on *force majeure* regarding the breach of contract related to the delivery of the finished product at an incompressible deadline.

However, if these examples may be valid for contracts throughout the first wave, it might be more difficult to raise these exceptions in light of the second wave (and/or lockdown), as the Covid-19 crisis may no longer be seen as a new circumstance.

In conclusion, the defense of *force majeure* and of hardship must be analyzed in the light of the contract and the specificities of the case. Its application depends on the nature of the contract, the applicable law, the presence of clauses regulating exceptional cases, the knowledge available to the parties at the time the contract was signed, as well as the factual circumstances making the performance of the contractual obligation excessive or impossible. It must also be noted that the early 2020 situation has drastically changed during the following months. The analysis must take into account the evolution of the information available at the specific time of the signature, as well as when the exceptions (*force majeure* and theory of hardship) are raised.

OHADA Perspectives

Hardship in Time of Covid-19: What does Contract Law Provide in the OHADA Space?

If there is any legal principle in contract law that arouses more passion during the current pandemic crisis, it is indeed the hardship theory. The hardship theory or unforeseeability is a core issue of general contract theory. Prof. Jean Louis Baudoin defines it as the following: "*a theory which compels the parties to renegotiate the agreement, under penalty of court intervention, when, subsequent to its formation, its performance has become extremely burdensome for a party as a result of unforeseeable circumstances beyond the control of said party.*"[2]

The consecration of the hardship theory by a OHADA State seems to become nowadays an element of economic attractiveness. Covid-19, once considered a "*Chinese epidemic*", became a global plague that was classified as such by the WHO on March 11, 2020. International trade is being hampered by this pandemic crisis, which is also turning into an economic crisis. Many companies based in OHADA countries are wondering about the consequences of this epidemic on the performance of contracts: can Covid-19, and the economic upheavals it is causing, fall under the regime of *force majeure* and/or a case of hardship?

2. Jean-Louis Baudoin, "*Theory of Imprevision and Judicial Intervention to change a contract*", *in* Essays on the civil Law of Obligations, Baton rouge, Louisiane State University Presse, 1969, 151 ; Bénédicte Fauvarque-Cosson, "*Le changement de circonstances*", (2004) RDC, number 1, p.67 (free translation).

Hardship theory differs from *force majeure* in a similar manner to Swiss law, even though the two concepts have points of convergence. In both cases, the disruption affecting the contract stems from a modification in circumstances subsequent to its conclusion, and this modification was unpredictable at the time the contract was executed. However, there is *force majeure* only if the new circumstances have made the performance of the contract impossible. On the other hand, hardship theory is based on the fact that the contract became more difficult for the debtor, either because it costs him more than what has been foreseen, or because he will obtain in return only a diminished performance in value, or because performance, without being impossible, will require from him greater efforts and longer time than what he has been foreseen.

Secondly, *force majeure* is distinguished from hardship in terms of consequences. Whereas *force majeure* fully exonerates the debtor from his obligation, hardship compels both parties to renegotiate the contract and grants a restraining power to the judge.

In the hypothesis in which Covid-19 is not qualified as *force majeure* but referred to as the hardship, does Contract Law of OHADA Member States enables adaptation to the change of circumstances resulting from Covid-19? We will conduct a two-step analysis: (I) hardship and the general contract law in the OHADA space and (II) hardship and the special contract law in the OHADA space.

Hardship and the General Contract Law in the OHADA Space

The Implicit Refusal of the Theory of Hardship in the General Contract Law of the OHADA Countries

Each OHADA State has its own general theory of law of obligations. These national laws are, for the most part, inherited laws from the colonial period. However, some States have reformed their contract law even if the national texts resulting from these reforms "*are still more or less a slavish copy of French law*", such as Senegal, Mali, the Republic of Guinea and Côte d'Ivoire. Other French-speaking countries in Africa remain loyal to the 1804 French Civil Code, without having their own Civil Code. Regarding Senegal, Mali and the Republic of Guinea, there are no general provisions on hardship in their Code of Obligations, Civil and Commercial Law. These national laws have remained faithful to the principle of the inviolability of the contract inherited from colonial law and recalled in the Canal de Craponne judgment of March 6, 1876. As the position of the French legislator has changed in 2016 in favor of the hardship theory, it can be argued that the forthcoming reforms, in particular the reforms of the Civil Code in OHADA Member States, will probably evolve in the same direction.

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The Explicit Admission of the Hardship Prospective Contract Law Harmonized in the OHADA Space

Article 162 of the preliminary uniform act draft on the law of obligations in the OHADA space (2015), enshrines the theory of hardship. This text expressly gives the judge the possibility of adapting an unbalanced contract due to a modification of unforeseen circumstances. The OHADA law members have clearly understood that the globalization of trade and political, health and economic disruptions have an influence on the stability of contractual relations. Such stability requires flexibility in order to adapt to the economic upheavals. The text states that: "*in the event of a disruption of circumstances, the injured party may request the starting of renegotiations. The request must be made without undue delay and also the injured party must state the reasons for the request. The request does not, by itself, give the injured party the right to suspend the performance of its obligations. In the absence of agreement between the parties within a reasonable period of time, either party may refer the matter to the president of the relevant court. The president who concludes that there is a case of disruption of circumstances, may, if he considers it to be appropriate, terminate the contract on the date and under the conditions he determines, or adapt the contract in order to restore the balance of the performances.*" The final adoption of the 2015 draft is uncertain. The reasons seem to be both material and procedural since the draft raises too many questions.

Hardship and the Special Contract Law in the OHADA Space

The Submersion of the Hardship in Some Mechanisms Admitted under OHADA Law

Some OHADA Uniform Acts, already entered into force, contain numerous provisions that regulate contracts. These are, among others, contracts of commercial sale, leases for professional use and road freight transport. The question regarding whether the mechanism of revision for hardship is provided for may be raised.

According to part of the legal doctrine[3], the hardship theory already exists implicitly in OHADA Law. It seems to be submerged and concealed in some legal principle, mechanisms and powers of the actors of the contract, such as the notions of "good faith", "loyalty" and "*bonus pater familias*".

The authors are not convinced by these arguments. The establishment of the hardship theory depends on a legislative policy or case law, rather than on implicit deductions from legal principles. Other legal principles, found in many legal systems, reject said theory. This is the case, for example, of Quebec and French law before the 2016 reform. Moreover, no case law in the OHADA space has yet expressed an opinion on an adaptation of the contract based on "good faith" or the principle of "loyalty" as a result of unforeseen circumstances modifications.

3. A. R. Akono, "*Réflexions sur la théorie de l'imprévision en droit OHADA des contrats*", Les Horizons du droit, Bulletin 8, p.15.

The "Dubious" Admission of Hardship in the Commercial Contract of Sale in OHADA Substantive Law

The hardship theory is not provided anywhere in contracts regulated by OHADA law. However, a legal opening seems to occur in the commercial sales contracts. Article 267 of the Uniform Act relating to General Commercial Law (1997) provides that "*a party is not liable for non-performance of any of its obligations if it proves that such non-performance is due to an impediment beyond its control, such as the act of a third party or a case of force majeure*". Dorothé Cossi Sossa[4] considers that based on the wording, the hardship is accepted thanks to the non-exhaustive list of grounds for exceptions. Thus, apart from "the act of a third party" and "*force majeure*", one can also "*think of other events since the law itself implicitly indicates it, and this is notably the case of hardship*". On the contrary, an authorized commentator[5] considers that the lack of precision in the text does not allow to extend the analysis to the hardship theory but retrains it to *force majeure* only.

This last reasoning is convincing. The above-mentioned article is found in a section dealing with "*sanctions for the failure of the parties in the performance of their obligations*" and more specifically, in the liability exonerating causes and not on the effects of commercial sales contract between the parties. In the event of unpredictable circumstances, the parties are not released from the performance of their obligations, but they must continue to perform. If the OHADA legislator had intended to include hardship theory in the Uniform Act relating to General Commercial Law, it seems that it would have expressly incorporated it. Also, when the 1997 Uniform Act relating to General Commercial Law was reformed, no reference was made regarding the judicial review of the commercial sales contract. In these circumstances, we find difficult to argue that the hardship theory lies in the OHADA commercial sale.

Conclusion

All in all, we observe that while Swiss law has developed and applies hardship theory in its case law for almost a century, which might be applicable to the Covid-19 crisis, OHADA law does not yet have the means to apply the theory to the current crisis. Nevertheless, following the evolution of French law, especially regarding the 2016 reform, OHADA law have opened the door to evolve in favor of hardship theory.

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4. Dorothé Cossi Sossa, "*L'adaptation dirigée du contrat de commerce international aux circonstances*", OHADATA D-10-49, p. 16 et suivantes.
5. Akuété Pedros Santos, "*Acte Uniforme relatif au droit commercial général*" *in* Joseph Issa-Sayeg, Paul Gérard Pougoue and Filiga Michel Sawadogo, "*OHADA traité et actes uniformes commentés et annotés*" 3e édition, Juriscope 2008, p. 300.

Stockage de l'énergie renouvelable : **vers de nouvelles voies de pratique juridique transnationale**

ESMERALDA COLOMBO

Once more, the year 2021 has proved difficult for our world society. We are experiencing a suite of uncertain and unpredictable events, what Nassim Nicolas Taleb calls black swans, spanning from pandemics to financial meltdowns. One of the black swans that experts have cautioned against is the financial instability that climate change may engender. This article contributes to hedging this risk by addressing a key question for the future: How can effictive laws and policies catalyze the financing of decarbonization technologies, in particular clean energy storage in the European Union (EU).

Una vez más, el año 2021 ha resultado difícil para nuestra sociedad mundial. Estamos experimentando una serie de eventos inciertos e impredecibles, lo que Nassim Nicolas Taleb llama cisnes negros, que van desde pandemias hasta crisis financieras. Uno de los cisnes negros contra los que han advertido los expertos es la inestabilidad financiera que puede generar el cambio climático. Este artículo contribuye a cubrir este riesgo al abordar una pregunta clave para el fu-turo: ¿Cómo pueden las leyes y políticas eficientes catalizar la financiación de tecnologías de descarbonización, en particular el almacenamiento de energía limpia en la Unión Europea (UE)?

Tout d'abord, pourquoi considérer le stockage d'énergie renouvelable comme un atout pour l'avenir du droit ?

Parce qu'elle résout l'intermittence des sources d'énergie renouvelables, la technologie de stockage est un catalyseur clé des énergies renouvelables. Toutefois, le déploiement du stockage rencontre des obstacles, principalement de nature réglementaire.[1] Dans l'UE, un certain nombre de dispositions existent. Ainsi, la directive 2019/944 concernant les règles communes pour le marché intérieur de l'électricité prescrit que les États membres veillent à ce que leur droit national n'entrave pas indûment les investissements dans la production d'énergie variable et flexible et le stockage d'énergie (article 3(1)). En outre, le droit de l'UE a récemment introduit la notion de communautés d'énergie renouvelable, à savoir des groupes de citoyens qui ont le droit de consommer, stocker ou vendre l'énergie renouvelable. La directive révisée de l'UE sur les énergies renouvelables 2018/2001 prévoit que les communautés d'énergie renouvelable, soient traitées comme entités juridiques indépendantes sur un pied d'égalité avec les acteurs du marché. En particulier, la directive 2018/2001 exige que les États membres facilitent l'accès des communautés d'énergie renouvelable au financement (article 22(4)(g)). Pourtant, aucune de ces deux directives n'est accompagnée d'orientations plus spécifiques sur la manière dont les cadres réglementaires des États membres peuvent effectivement faciliter les investissements des "prosommateurs" (citoyens ou entités qui consument, stockent ou vendent l'énergie renouvelable). Il s'ensuit que la plupart des banques, entreprises et citoyens en Europe soit ne connaissent pas, soit ne participent pas aux communautés énergétiques renouvelables.

De quelle manière le stockage des énergies renouvelables peut-il contribuer à la promesse de la neutralité carbone de l'Europe d'ici 2050, comme le décrit l'EGD ?

D'un côté, l'EGD présente le stockage d'énergies comme une composante essentielle de « l'infrastructure intelligente » nécessaire à la neutralité climatique.[2] En outre, le règlement 2020/852 porte sur l'établissement d'un cadre visant à favoriser les investissements durables au motif que l'accès aux énergies renouvelables via le stockage d'énergies contribue considérablement à l'atténuation du changement climatique (article 10(1)(a)). Enfin, la littérature scientifique a aussi confirmé que, de 2015 à 2050, les besoins totaux de stockage de l'UE devront comprendre jusqu'à 3320 GWhe de batteries, 396 GWhe de stockage hydraulique pompé et 218,042 GWh de gaz de stockage (8 % pour le gaz naturel synthétique et 92 % pour le biométhane), en fonction du scénario choisi.[3] D'un autre côté, les « prosommateurs » et les communautés renouvelables européennes ne sont pas effectivement inclus par les politiques européennes. Notamment, les citoyens européens sont actuellement confrontés à une réglementation

1. IEA, Energy Storage 2020: https://www.iea.org/reports/energy-storage. A. Gailani et al., "On the Role of Regulatory Policy on the Business Case for Energy Storage in Both EU and UK Energy Systems: Barriers and Enablers", 2020, 13 Energies 1080.

2. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal) COM 2019, 640 final, pp. 6 and 8.

3. M. Child, D. Bogdanov, et C. Breyer, "The Role of Storage Technologies for the Transition to a 100% Renewable Energy System in Europe", 2018, 155 Energy Proced. 44, pp. 44 and 52.

complexe et incohérente pour financer, par exemple, des batteries de stockage d'énergie conjointement avec leurs panneaux solaires.[4] En outre, la proposition de la Commission Européenne relative à la première loi européenne sur le climat ne vise pas à donner des solutions concrètes à l'accès au financement du stockage pour l'énergie renouvelable. Par conséquent, l'EGD risque d'être un ensemble de nobles promesses si banques, entreprises et citoyens européens ne se mobilisent pour définir des meilleures pratiques de financement et de déploiement du stockage de l'énergie renouvelable.

Pourquoi une approche de bas en haut (entreprises, banques et citoyens), pour stimuler l'accès au financement du stockage pour l'énergie renouvelable, incluant plus de femmes entrepreneurs ? Cela veut dire inclure les femmes au centre de « l'économie climatique ».

Jacques Chirac disait lors de son allocution à la conférence internationale sur le climat (IV Sommet de la Terre 02/09/2002) à Johannesburg, la phrase désormais célèbre : « *La maison brûle et l'on regarde ailleurs* ». Pas beaucoup a changé. En Europe, plus de 50 millions de personnes sont touchées par la précarité énergétique avec un impact disproportionné sur les femmes. Par ailleurs, les principales stratégies de financement pour l'engagement des citoyens dans les énergies renouvelables reposent sur des prêts bancaires, alors que l'on constate que les communautés d'énergie renouvelable dirigées par des femmes entrepreneurs paient des taux d'intérêt plus élevés, sans être pour autant des emprunteurs plus à risque.[5] Ce paradoxe de genre peut se transformer en ressource. En effet, l'innovation par le stockage d'énergie peut exercer un attrait pour les femmes, ce que l'industrie des combustibles fossiles a partiellement raté, stimulant ainsi l'emploi vert des femmes. Comment harmoniser la *due diligence* bancaire pour obtenir ce type de prêt tout en évitant la fragmentation des règles dans une véritable union des marchés des capitaux et une parité de genre ? Si nous manquons la chance de faire des cygnes noirs du risque climatique financier une opportunité d'innovation et parité de genre, nous perpétuerons des conditions systémiques d'injustice énergétique et d'opportunités d'emplois manquées.

En Europe, plus de 50 millions de personnes sont touchées par la précarité énergétique avec un impact disproportionné sur les femmes.

En conclusion, il semble que la participation de juristes spécialisés dans les domaines de l'énergie, financement de projets d'énergie renouvelable, prêts bancaires, *due diligence*, directives et objectifs européens, est de plus en plus utile au sein des entités financières, que des entreprises et de la mobilisation citoyenne. Le besoin de règles plus spécifiques, équitables et innovantes peut véritablement déclencher des nouvelles voies de pratique juridique transnationale, commençant par l'Union européenne. Dans ce cas, d'ici à 2050, on pourrait espérer d'avoir construit ou participé à la construction de « l'infrastructure intelligente » nécessaire à la neutralité climatique que le EGD prévaut et tend à achever.

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Oh, the Humanity: **The Rights of Sentient Beings**

STEVEN RICHMAN

Alors que l'intelligence artificielle se développe et s'intègre dans la vie professionnelle, des problèmes se posent quant à la propriété intellectuelle et quant aux questions de consentement à certaines tâches. Cet article recherche les précédents dans des cas récents impliquant d'autres êtres « sensibles », à savoir des animaux. Cet article explore le statut de ce débat et avance que si les animaux et les robots possèdent une sensibilité, ils ne sont cependant pas des êtres humains. L'article suggère également qu'ils peuvent néanmoins avoir certains droits et qu'une législation peut être appropriée pour traiter ces questions.

A medida que la inteligencia artificial se desarrolla y se convierte en parte de la vida profesional, han surgido problemas en cuanto a la propiedad de la propiedad intelectual e incluso cuestiones de consentimiento para determinadas tareas. Se busca lo anterior en casos recientes que involucran a otros seres "sensibles", a saber, animales. Este artículo explora el estado de este debate y sostiene que, si bien los animales y los robots poseen sensibilidad, no son seres humanos. Sin embargo, el artículo también sugiere que, no obstante, pueden tener ciertos derechos, y la legislación puede ser apropiada para abordar esos asuntos.

Introduction

In an episode of the television series *Star Trek: Voyager* titled *Author,* the starship's medical hologram, known only as The Doctor, creates a holonovel, an interactive piece of literature in which real people become roles in the story as it plays out on the ship's holodeck. When The Doctor seeks to make changes, his publisher refuses, claiming that under the law the Doctor, as a photonic being, was not human and lacked rights under the prevailing law to call himself the author.

Ultimately, the arbitrator ruled that The Doctor was not human, despite arguments that he has exceeded his original programming, was capable of making mistakes and other human traits. However, the hearing officer ruled that the definition of "author" could be deemed to include "non-humans" such as the hologrammatic being. The arbitrator's statement, delivered in the context of a science fiction television show in 2001, is prescient:

"The Doctor exhibits many of the traits we associate with a person. Intelligence, creativity, ambition, even fallibility, but are these traits real or is The Doctor merely programmed to simulate them? To be honest, I don't know. Eventually we will have to decide because the issue of holographic rights isn't going to go away, but at this time, I am not prepared to rule that The Doctor is a person under the law. However, it is obvious he is no ordinary hologram and while I can't say with certainty that he is a person I am willing to extend the legal definition of artist to include The Doctor. I therefore rule that he has the right to control his work and I'm ordering all copies of his holo-novels to be recalled immediately."

Substitute the phrase "artificial intelligence" for hologram and we are in 2021.

This article examines the efforts to obtain "personhood" in the context of artificial intelligence by looking at certain recent cases involving consideration of animals as sentient beings.

Legal Standing of Animals

Substitute the word "animal" for hologram and we find ourselves in *In re Nonhuman Rights Project, Inc. v. Breheny, et al.*[1] In *Breheny*, The Nonhuman Rights Project (NhRP) brought a habeas corpus proceeding on behalf of Happy, a 48 year old female Asian elephant "situated" in the Bronx Zoo in New York City. The grounds to this action were that the elephant was unlawfully imprisoned and should be relocated to one of the two elephant sanctuaries in the United States. Although originally paired with another elephant, and then others, since 2006 Happy had lived alone in a one-acre enclosure, which NhRP contended constituted solitary confinement, "notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings." NhRP submitted expert testimony as to the cognitive abilities of elephants and satisfaction of the "mirror self-recognition test" that demonstrates self-awareness.

1. Nonhuman Rights Project, Inc. v. Breheny, 189 A.D.3d 583 (1st Dept. 2020), affirming 2020 WL 1670735 (Bronx Cty February 18, 2020)

The Bronx Zoo argued that there is no habeas corpus protection for animals under the applicable New York statute, that it met the standards of care and other statutory welfare regulations and that it had appropriate resources to care for the elephant. NhRP responded essentially that "*the Bronx Zoo imprisons Happy in a tiny, cold, lonely, un-elephant-friendly, and unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary.*" The court rejected the application of habeas corpus, relying on a past decisions involving the same plaintiff, NhRP and relating to adult male chimpanzees.[2]

This recent decision, and the prior New York cases on which it relied, focused on CPLR 7002, the New York statutory provision for issuance of a writ of habeas corpus, i.e., "*you have the body.*" This means an order to release someone from prison will be granted to "*a person illegally imprisoned or otherwise restrained in his liberty.*" In the prior case relied on, a chimpanzee was held not to meet the definition of "person," a result found in other cases from around the United States.[3] Importantly, though, this case elaborated upon what it takes to be deemed a "person," and defined legal personhood as a function of having both rights and duties in society. Since chimpanzees "*cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions,*" then "*this incapability to bear any legal responsibilities and societal duties renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to liberty protected by the writ of habeas corpus – that have been afforded to human beings.*"[4]

The issue of "personhood" has arisen in other contexts. The frozen pre-embryos (four-to-eight cell entities) and their disposition at issue in *Davis v. Davis*, a 1992 Tennessee Supreme Court decision, were held not to be persons under Tennessee law.[5] In a criminal matter in which defendant was charged with animal neglect, the personhood or not of animals was a factor in whether a motion to suppress evidence would be granted based on an allegedly unauthorized search and seizure because the statute allowing warrantless searches addressed immediate aid or assistance to "persons." Without going so far as to confer personhood on the horse that was at issue, the Court held that "*the exigent circumstances exception*" to the constitutional search and seizure requirements were "*not limited … to circumstances in which human life is threatened. This court implicitly has recognized that officers are permitted to take warrantless measures in instances in which those measures are necessary to enable officers to fulfill essential law enforcement responsibilities in emergency circumstances.*"[6]

In a criminal matter in which defendant was charged with animal neglect, the personhood or not of animals was a factor […].

Standing to sue in federal court requires satisfaction of two questions: (1) whether there is an injury such as to establish a case or controversy under the Constitution and (2) assuming such injury exists, whether a statute confers standing on the injured plaintiff. *In Cetacean Cmty. v. Bush*,[7] the court addressed these two factors, and stated that "*[i]t is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.*" Ultimately, though, in resolving the issue of whether the world's cetaceans had standing under the relevant federal legislation, it failed to find such authorization in the statutes under consideration.

Legal Standing of Artificial Intelligence

When we speak of artificial intelligence, we are concerned with those programs that involve self-learning, and the ability of a program to expand. One example is Google's AlphaZero chess program that taught itself chess through self-play; unlike other programs that involved input of prior chess matches and opening, it developed its own approach. This is discussed in Silver, et al, "*A General Reinforcement Learning Algorithm that Masters Chess, Shogi,*

When we speak of artificial intelligence, we are concerned with those programs that involve self-learning, and the ability of a program to expand.

2. See Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 152 A.D.3d 73, 76 (1st Dept. 2017) and cases cited therein.

3. People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148, 150 (3rd Dept. 2014). Interestingly, at least one lower court decision in New York held that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property". Corso v. Crawford Dog & Cat Hosp., Inc., 97 Misc. 2d 530, 531 (Queens County Civ. Ct. 1979). However, this case and "*the few cases that follow it, are aberrations flying in the face of overwhelming authority to the contrary.*" Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994). While not determining that a companion dog is a "person," the Supreme Court of Wisconsin, like the *Corso* court, recognized a status of an animal beyond merely property for purposes of allowing a claim based on intentional infliction of emotional distress when a police officer shot and killed the plaintiff's companion dog. Rabideau v. City of Racine, 2001 WI 57, 3, 243 Wis. 2d 486, 491–92 ("*[a] companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.*")

4. Id. at 152, 998 N.Y.S.2d 248 (2014).

5. Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992), on reh'g in part, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

6. State v. Fessenden, 355 Or. 759, 772, 333 P.3d 278, 286 (2014)

7. Cetacean Cmty. v. Bush 386 F.3d 1169, 1176 (9th Cir. 2004). A post-*Cetacean* case, Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012), held that animals are not persons for purposes of being able to assert claims based on slavery and involuntary servitude under the Thirteenth Amendment to the United States Constitution, but do have protection under applicable state and federal statutes as well as some criminal statutes.

through Self-Play," Science December 7, 2018, found at https://science.sciencemag.org/content/362/6419/1140.

In considering the brief overview of some of the cases addressing the issue as to standing and personhood of animals for purposes of whether they can avail themselves of statutory rights, there is a basis of analysis for considering such issues in the context of artificial intelligence and intellectual property. For example, if a human being creates software that qualifies as artificial intelligence – i.e., it can teach itself and learn – and that software generates a piece of music, does the copyright belong to the artificial intelligence or the programmer?

Returning to the animal cases, the intellectual property issue was raised *Naruto v. Slater,* the well-publicized 'selfie" case where a macaque monkey was handed a camera by a photographer, took its own picture, and the photographer claimed the copyright in it. The *Naruto* court interpreted *Cetacean* to hold that "*that all of the world's whales, dolphins, and porpoises (the "Cetaceans"), through their self-appointed lawyer, alleged facts sufficient to establish standing under Article III.*"[8]

The United States Copyright Office, in Section 313.2 of its Compendium of U.S. Copyright Office Practices (Third Ed., January 2021), has stated that "*[t]o qualify as a work of "authorship" a work must be created by a human being.*" Two of the examples given of a non-qualifying work are "a photograph taken by a monkey" or "a mural painted by an elephant." Moreover, it specifically states that "*the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.*" Among the examples given are "*A claim based on a mechanical weaving process that randomly produces irregular shapes in the fabric without any discernible pattern.*" It should be noted that the U.S. Copyright law also provides for "work for hire," such that under Section 101 of the Copyright Act works prepared by employees within the scope of their employment or certain specially commissioned work agreed to be work for hire, bestow the copyright on the employer or the commissioning party. The circular may be found at https://www.copyright.gov/circs/circ09.pdf.

In the United Kingdom, the author of "a literary, dramatic, musical or artistic work which is computer-generated" is "*the person by whom the arrangements necessary for the creation of the work are undertaken.*" In an article appearing in WIPO Magazine, "Artificial Intelligence and Copyright, WIPO Magazine, October 2017, accessible at the authors noted that "*[m]ost jurisdictions, including Spain and Germany, state that only works created by a human can be protected by copyright.*" The article is accessible at https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html

The European Parliament has addressed specifically the legal status of robots as "electronic persons" for purposes of liability in Article 59(f) of its resolution dealing with recommendations to the Commission on Civil Law Rules on Robotics, found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&from=EN.

Conclusions

As with animals, the issue of standing for artificial intelligence will likely depend upon legislative enactment. The solution in the opening *Star Trek* example is to fit non-human sentient beings within a definitional framework. The solution is not to trust to common law to resolve this. Courts in different jurisdictions may well decide matters differently, leading to inconsistency and a lack of harmonization. Such a solution would also not necessarily fit within civil law or code-based jurisdictions. However, a legislative solution, as embodied in the European Parliament resolution and recognized as authorized in *Cetacean*, would allow appropriate policy considerations to come into play. A fundamental difference between animals and artificial intelligence is in the adjective: animal intelligence is biological, not artificial. Whether that ultimately makes a difference remains to be seen. Certainly, the robots in *Star Trek* developed emotional responses and mimicked their biological peers. At some point, science fiction becomes science fact in one form or another. The issue will not go away and as recognized in the European Parliament resolution, needs to be addressed.

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8. Naruto v. Slater, 888 F.3d 418, 424 (9th Cir.), rehearing en banc denied, 916 F. 3d 1148 (9th Cir. 2018).

Blanchiment des capitaux et terrorisme : **menaces pour l'économie et l'humanité**

BARBARA BANDIERA

Money laundering and the financing of terrorism are financial crimes with economic effects. The Covid-19 pandemic has led to unprecedented global challenges, human suffering and economic disruption. Money launderers and terrorist financiers have been quick to seek ways to exploit this crisis. Sport is a fundamental and true human value. A strong vaccine against any kind of criminal disease. There is a moral obligation to protect and promote sport and its values as a tool to prevent violent extremism. 21 August is the International Day of Remembrance of and Tribute to the Victims of Terrorism.

El blanqueo de dinero y la financiación del terrorismo son delitos financieros con efectos económicos. La pandemia de Covid-19 ha provocado desafíos globales sin precedentes, sufrimiento humano y trastornos económicos. Los lavadores de dinero y los financiadores del terrorismo se han apresurado a buscar formas de aprovechar esta crisis. El deporte es un valor humano fundamental y verdadero. Una vacuna potente contra cualquier tipo de enfermedad criminal. Existe la obligación moral de proteger y promover el deporte y sus valores como herramienta para prevenir el extremismo violento. El 21 de agosto es el Día Internacional de Conmemoración y Homenaje a las Víctimas del Terrorismo.

Les phénomènes de criminalité financière

La communauté internationale a fait de la lutte contre le blanchiment des capitaux et le financement terroriste une priorité. La coopération mondiale est vitale pour combattre l'utilisation abusive du système financier.

Le « blanchiment des capitaux » est un processus par lequel la source illicite d'actifs obtenus ou produits par une activité délictuelle est dissimulée pour masquer le lien entre les fonds obtenus et le délit initial. Ce processus revêt une importance essentielle puisqu'il permet au criminel de profiter des bénéfices générés par actes illégaux tout en protégeant leur source.

La vente illégale d'armes, la contrebande et les activités de la criminalité organisée, notamment le trafic de stupéfiants et les réseaux de prostitution, peuvent générer des sommes énormes. L'escroquerie, les délits d'initiés, la corruption ou la fraude informatique permettent aussi de dégager des bénéfices importants, ce qui incite les délinquants à « légitimer » ces gains mal acquis grâce au blanchiment des capitaux.

En effet, lorsqu'une activité criminelle génère des bénéfices importants, l'individu ou le groupe impliqué doit trouver un moyen de contrôler les fonds sans attirer l'attention sur son activité criminelle ou sur les personnes impliquées. Les criminels s'emploient donc à masquer les sources, en agissant sur la forme que revêtent les fonds ou en les déplaçant vers des lieux où ils risquent moins d'attirer l'attention.

Le « terrorisme » consiste en des actes de violence ou en des menaces de violence ciblée et organisée d'une certaine ampleur qui sont de nature socialement dangereuse ou sensible et qui sont dirigés contre la société, l'État ou la personne afin de les contraindre à exécuter les exigences politiques, religieuses, nationales, ethniques, territoriales et autres présentées par les auteurs des actes de terreur.

Le « financement du terrorisme » fait intervenir la mobilisation et le traitement des actifs qui donnent aux terroristes les ressources leur permettant de déployer leurs activités.

Les groupes terroristes continuent de récolter des fonds pour leurs activités par des voies légales et illégales.

Le lien entre la criminalité organisée et le financement du terrorisme est une préoccupation croissante pour de nombreux pays.

L'expression financement du terrorisme désigne le financement d'actes terroristes, de terroristes et d'organisations terroristes.

Acte terroriste, terroriste et organisation terroriste

L'expression « acte terroriste » désigne: (a) un acte qui constitue une infraction dans le cadre des traités suivants et selon leurs définitions respectives: (i) Convention pour la répression de la capture illicite d'aéronefs (1970), (ii) Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile (1971), (iii) Convention sur la prévention et la répression des infractions contre les

personnes jouissant d'une protection internationale, y compris les agents diplomatiques (1973), (iv) Convention internationale contre la prise d'otages (1979), (v) Convention sur la protection physique des matières nucléaires (1980), (vi) Protocole pour la répression d'actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile (1988), (vii) Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime (1988), (viii) Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental (2005), (ix) Convention internationale pour la répression des attentats terroristes à l'explosif (1997) et (x) Convention pour la répression du financement du terrorisme (1999); (b) tout autre acte destiné à tuer ou blesser grièvement un civil ou toute autre personne qui ne participe pas directement aux hostilités dans une situation de conflit armé, lorsque, par sa nature ou son contexte, cet acte vise à intimider une population ou à contraindre un gouvernement ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte quelconque.

Le terme « terroriste » désigne toute personne physique qui (i) commet ou tente de commettre des actes terroristes par tout moyen, directement ou indirectement, illégalement et délibérément ; (ii) participe en tant que complice à des actes terroristes ou au financement du terrorisme ; (iii) organise ou donne l'ordre à d'autres de commettre des actes terroristes ; ou (iv) contribue à la commission d'actes terroristes par un groupe de personnes agissant dans un but commun, lorsque ladite contribution est intentionnelle et vise à favoriser la commission de l'acte terroriste ou en ayant connaissance de l'intention du groupe de commettre un acte terroriste.

L'expression « organisation terroriste » désigne tout groupe de terroristes qui (i) commet ou tente de commettre des actes terroristes par tout moyen, directement ou indirectement, illégalement et délibérément ; (ii) participe en tant que complice à des actes terroristes ; (iii) organise ou donne l'ordre à d'autres de commettre des actes terroristes ; ou (iv) contribue à la commission d'actes terroristes par un groupe de personnes agissant dans un but commun, lorsque ladite contribution est intentionnelle et vise à favoriser la commission de l'acte terroriste ou en ayant connaissance de l'intention du groupe de commettre un acte terroriste[1].

Un danger pour la stabilité économique et financière

Le Fonds Monétaire International (FMI) a mis en évidence que le blanchiment des capitaux et le financement du terrorisme sont des délits financiers qui ont des effets économiques. Ils peuvent menacer la stabilité du secteur financier d'un pays, ou, de manière plus générale, sa stabilité extérieure. En outre, ces activités peuvent dissuader les investisseurs étrangers et perturber les flux des capitaux internationaux.

Des dispositifs efficaces de lutte contre le blanchiment des capitaux et le financement du terrorisme sont essentiels pour protéger l'intégrité des marchés et de la structure financière mondiale, car ils contribuent à atténuer les facteurs qui facilitent les abus financiers. Les mesures de lutte contre le blanchiment des capitaux et le financement terroriste constituent donc non seulement un impératif moral, mais une nécessité économique.

Les blanchisseurs des capitaux et les financiers terroristes exploitent à la fois la complexité inhérente au système financier mondial et les différences entre les législations et dispositifs de lutte contre le blanchiment des capitaux/financement du terrorisme de différents pays, et ils sont attirés notamment par les pays où les contrôles sont faibles ou inefficaces et où ils peuvent plus facilement déplacer leurs fonds sans être découverts.

Les mesures de lutte contre le blanchiment des capitaux et le financement terroriste constituent donc non seulement un impératif moral, mais une nécessité économique.

L'impact de la pandémie de Covid-19

La pandémie de Covid-19 s'accompagne de défis, de souffrances humaines et de troubles économiques sans précédent dans le monde entier.

Le Groupe d'action financière (GAFI) dans le document « *Covid-19, blanchiment de capitaux et financement du terrorisme, Risques et réponses politiques*[2] » a constaté ce qui suit :

› l'intensification de la criminalité liée à la Covid-19, notamment la fraude, la cybercriminalité ou le détournement ou l'exploitation de fonds publics ou de l'aide financière internationale, se traduit par la création de nouvelles sources de financement pour les criminels ;

› les mesures visant à endiguer la pandémie de Covid-19 ont une incidence sur l'économie criminelle et induisent de nouvelles pratiques en la matière, de telle sorte que les criminels motivés par l'appât du gain pourraient se livrer à de nouvelles activités illicites ;

› la pandémie de Covid-19 affecte également la capacité des gouvernements et des acteurs du secteur privé à s'acquitter de leurs obligations en matière de lutte contre le blanchiment des capitaux et le financement du terrorisme, qui s'étendent de la surveillance à la coopération internationale en passant par la réglementation, la réforme politique et la déclaration des opérations suspectes ;

1. Les « *Normes internationales sur la lutte contre le blanchiment de capitaux et le financement du terrorisme et de la prolifération – Les Recommandations du GAFI* » (2012) sont la source des définitions : « acte terroriste », « terroriste » et « organisation terroriste ».

2. Le GAFI a publié le document en mai 2020 (une mise à jour à ce document a été publiée dans le mois de décembre 2020).

› ces menaces et vulnérabilités constituent des risques émergents de blanchiment des capitaux et de financement du terrorisme. Ces risques pourraient se matérialiser par ce qui suit : (i) contournement des mesures de vigilance relatives à la clientèle ; (ii) intensification de l'utilisation abusive des services financiers en ligne et des actifs virtuels pour transférer et dissimuler des fonds illicites ; (iii) exploitation des mesures de relance économique et des régimes d'insolvabilité de manière à permettre à des personnes physiques et morales de dissimuler et de blanchir le produit d'activités illicites ; (iv) recours accru au secteur financier non réglementé, créant de nouvelles possibilités pour les criminels de blanchir des fonds illicites ; (v) utilisation abusive et détournement de l'aide financière et des fonds d'urgence nationaux et internationaux ; (vi) exploitation, par les criminels et terroristes, de la Covid-19 et de la récession économique pour s'orienter vers de nouveaux secteurs d'activité exposés à la circulation d'un grand volume d'espèces et de liquidités dans les pays en développement ;

› certaines réponses politiques de lutte contre le blanchiment des capitaux/financement du terrorisme peuvent contribuer à la mise en œuvre rapide et efficace de mesures visant à faire face à la Covid-19, tout en gérant les nouveaux risques et vulnérabilités. Il s'agit notamment des mesures suivantes : (i) coordination nationale aux fins de l'évaluation de l'impact de la Covid-19 sur les risques et systèmes de lutte contre le blanchiment des capitaux/financement du terrorisme ; (ii) communication renforcée avec le secteur privé ; (iii) encouragement de l'adoption générale d'une approche fondée sur les risques concernant le devoir de vigilance relatif à la clientèle ; (iv) soutien des modes de paiement électroniques et numériques.

La Covid-19 peut empêcher les terroristes de voyager, mais la terreur continue où qu'ils habitent.

Les Nations unies ont alerté sur le fait que la pandémie de la Covid-19 :

› met en évidence les vulnérabilités aux formes nouvelles et émergentes de terrorisme (la fraude par voie électronique, la vente de médicaments contrefaits, la cybercriminalité et le bioterrorisme) ;

› voit aussi des groupes extrémistes chercher à exploiter les divisions pour faire avancer leurs objectifs.

En effet, les terroristes profitent des perturbations importantes et des difficultés économiques causées par la Covid-19 pour répandre la peur, la haine et la division, radicaliser et recruter de nouveaux adeptes.

Les terroristes s'adaptent rapidement, exploitant le cyberespace et les nouvelles technologies, les liens avec le crime organisé, ainsi que les lacunes réglementaires, humaines et techniques. La crise de Covid-19 a amplifié ces tendances. L'augmentation de l'utilisation d'internet et de la cybercriminalité pendant la pandémie aggrave la menace des organisations terroristes et criminelles qui ont modifié leur mode opératoire au regard des restrictions imposées aux voyages et des mesures de confinement. La Covid-19 peut empêcher les terroristes de voyager, mais la terreur continue où qu'ils habitent.

Si la pandémie de la Covid-19 a pu, en raison des mesures de confinement, réduire la menace terroriste dans les zones sans conflit, elle a au contraire renforcé cette menace terroriste dans les zones de conflit (comme en Iraq et en Syrie).

Il existe ainsi une tendance continue d'attaques par des individus qui trouvent leur inspiration en ligne, agissant seuls ou en petits groupes, et qui pourraient être alimentées par les efforts de propagande de l'État islamique d'Iraq et du Levant (EIIL/Daech) pendant la crise de la pandémie de Covid-19.

L'EIIL a consolidé sa position dans certaines zones au Moyen-Orient. Plus de 10 000 combattants seraient toujours actifs en Iraq et en Syrie.

En ce qui concerne l'Afrique, l'État islamique en Afrique de l'Ouest (ISWAP) reste un axe majeur de la propagande mondiale de l'EIIL, et son effectif total d'environ 3 500 membres en fait l'une des plus grandes « provinces » éloignées. L'ISWAP a continué de renforcer ses liens avec l'État islamique au Grand Sahara (ISGS), qui reste le groupe le plus dangereux dans la région des trois frontières du Burkina Faso, du Mali et du Niger. Même s'il ne compte que quelques centaines de combattants en Libye, Daech exploite les tensions ethniques et représente une menace susceptible d'avoir un impact régional plus large. Les attaques organisées en République démocratique du Congo et au Mozambique constituent un autre développement inquiétant.

Le terrorisme et l'extrémisme violent peuvent donc exacerber les conflits en Afrique et contribuer à affaiblir les États dans leur sécurité, stabilité, gouvernance et développement économique et social, sans mentionner les autres sources de préoccupation suivantes : les actes de violence sexuelle et de violence de genre, le recrutement et l'utilisation d'enfants, la menace que font peser les combattants terroristes étrangers qui reviennent, en particulier des zones de conflit, vers leur pays d'origine ou de nationalité, ou se réinstallent dans des pays tiers.

En Europe, la menace continue de provenir principalement de la radicalisation terroriste via l'internet, intensifiée par le fait que, en raison des restrictions liées à la pandémie, les gens passent plus de temps connecte.

La lutte contre le financement du terrorisme reste une priorité essentielle et il est de la plus haute importance de surveiller les changements dans les techniques de financement utilisées par Daech.

Comme le coronavirus, le terrorisme ne respecte pas les frontières nationales, affecte toutes les nations et ne peut être vaincu que collectivement.

La coopération internationale contre le blanchiment des capitaux et le financement du terrorisme ne semble pas avoir été affectée par les mesures prises contre la Covid-19.

Le sport

Les Nations unies ont souligné que le sport a historiquement joué un rôle important dans la diffusion de valeurs positives à travers le monde et à travers les civilisations et les cultures, en particulier pour les jeunes.

Le sport est un vecteur puissant pour faciliter l'intégration, promouvoir l'égalité des sexes, encourager l'autonomisation des jeunes et soutenir les efforts visant à prévenir et lutter contre l'extrémisme violent et la radicalisation. Le sport incite à essayer d'être meilleurs et d'aller plus haut et plus loin.

D'ailleurs, les terroristes essayent de détruire tout ce que le sport représente. Au cours des dernières décennies, les Jeux olympiques de Munich en Allemagne en 1972, les Jeux olympiques d'Atlanta aux États-Unis en 1996 et les marathons du Sri Lanka en 2008 et de Boston en 2013 ont fait l'objet d'attaques terroristes.

La communauté internationale a l'obligation morale de protéger le sport et de le promouvoir comme un moyen puissant de lutter contre le terrorisme et de prévenir l'extrémisme violent.

Hommage aux victimes du terrorisme

Le terrorisme est un phénomène mondial. Le coût humain du terrorisme n'a pratiquement épargné aucune région du globe.

Au cours des deux dernières décennies, la menace du terrorisme a persisté, évolué et s'est répandue, causant des souffrances et des pertes humaines indicibles. L'activité terroriste a montré qu'il faut rester extrêmement vigilant : la menace reste réelle et même directe pour de nombreux États.

Les actes de terrorisme constituent l'une des violations les plus graves des valeurs universelles de dignité humaine, de liberté, d'égalité et de solidarité, ainsi que de jouissance des droits de l'homme et des libertés fondamentales.

Si les dommages causés par les actes terroristes ne peuvent pas toujours être réparés, l'humanité peut toutefois défendre les droits humains et la dignité des victimes de tels actes. Il faut soutenir les victimes et les proches de victimes, protéger leurs droits et garantir que leurs voix soient entendues.

Les victimes du terrorisme sont les individus qui, à travers le monde, ont été attaqués, blessés, traumatisés ou ont perdu la vie à la suite d'attaques terroristes.

Instituée pour commémorer les attentats du 11 mars 2004 à Madrid, la Journée européenne de commémoration des victimes du terrorisme a pour but de célébrer la mémoire de toutes les personnes qui ont perdu la vie ou les êtres chers disparus lors d'actes terroristes, commis en Union européenne ou ailleurs. Les attaques de Madrid de 2004 s'inscrivent dans une longue lignée d'actes terroristes inspirés de différentes idéologies extrémistes ayant pris des innocents pour cible. Depuis 2005, l'Union européenne commémore chaque année à cette date les victimes des atrocités commises par les terroristes.

En 2017, l'Assemblée générale des Nations unies a décidé de proclamer le 21 août Journée internationale du souvenir, en hommage aux victimes du terrorisme, afin d'honorer et de soutenir les victimes et les survivants du terrorisme et de promouvoir et protéger le plein exercice de leurs libertés et de leurs droits fondamentaux. Cela représente un grand pas en avant dans la solidarité avec les victimes du terrorisme. De la sorte, l'Assemblée générale a réaffirmé que la promotion et la protection des droits de l'homme pour toutes et tous et la primauté du droit aux niveaux national et international sont indispensables pour prévenir et combattre le terrorisme[3].

Conclusions

Les flux d'argent sale peuvent fragiliser la stabilité du secteur financier et ternir sa réputation. Le terrorisme ébranle les fondements mêmes de notre société. Il est absolument nécessaire de combattre le blanchiment des produits du crime et le terrorisme dans le respect des droits de l'homme, de la prééminence du droit et du droit international humanitaire[4]. ■

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3. Sources principales de l'article : Fonds monétaire international (FMI), Groupe d'action financière (GAFI) et Organisation des Nations unies (ONU).

4 Je dédie cet article à mon très cher ami Neruda au ciel.

Addressing the Climate Crisis: **A Bold Roadmap for the Role of Law**

ANDREW GROSSO

« *Qui parmi vous donnera une pierre à son fils, s'il lui demande du pain ?* » Matthieu 7:9. Léguer une pierre – alors que votre propre héritage était une terre de fruits et de céréales ? Est-ce que les enfants demanderont une pierre, quand leur avenir dépendra du monde que leurs ancêtres leur laisseront…

Ces pensées me sont récemment revenues en mémoire. Pourquoi ? Parce que notre espèce change consciemment – de manière irréversible – le climat de notre planète. Les conséquences de ces changements sont visibles aujourd'hui ; nos enfants verront plus – et pire – demain. Les études scientifiques qui montrent que notre planète se réchauffe sont solides. Elles doivent être reconnues. Et nous devons concevoir le rôle que le droit jouera pour minimiser les perturbations sociales au cours de notre voyage à travers les perturbations climatiques. Dans cette optique, j'aborde deux sujets. Le premier est le statut actuel de la planète, du point de vue climatique. Le second est de savoir comment la civilisation peut atténuer et arrêter définitivement, mais malheureusement pas inverser, le changement climatique.

"*¿Qué hombre hay de vosotros, que si su hijo le pide pan, le dará una piedra?*" Mateo 7:9

Legar una piedra, ¿cuándo tu propia herencia era una tierra de frutas y cereales? Y qué pedirán los niños por una piedra, cuando su futuro dependa del mundo que le hayan dado sus antepasados…

He reflexionado sobre estos pensamientos recientemente. ¿Por qué? Porque nuestra especie está cambiando conscientemente – irreversiblemente – el clima de nuestro planeta. Las consecuencias de estos cambios se ven hoy; nuestros hijos verán más, y peor, mañana. Los estudios científicos que cubren el calentamiento de nuestro planeta son sólidos. Deben ser reconocidos. Y debemos idear el papel que desempeñará la ley para minimizar la perturbación social durante nuestro viaje a través de la perturbación climática. Para ello, abordo dos temas. El primero es el estatuto actual de la tierra, en términos climáticos. El segundo es cómo la civilización puede mitigar y detener finalmente, aunque, desafortunadamente, no revertir, el cambio climático.

The Science

The simplest way to avoid the worst of global warming is to stop the release of carbon dioxide and methane, the most significant greenhouse gases over which we have some control.

But the unfortunate truth is that doing so – even *completely* – will not stop climate change. Let us look at why this is so.

We start with the greenhouse gases themselves, beginning with carbon dioxide. Emissions of carbon dioxide result from burning fossil fuels, including coal, oil, and natural gas, to produce energy – the life blood of civilization. Other processes that emit CO2 include agricultural practices, and the manufacture of cement. The amount of CO2 in the atmosphere has a direct impact on the temperature of the earth. What is not always recognized is the length of time over which carbon dioxide has this impact.

A molecule of carbon dioxide *remains in the atmosphere for approximately one hundred years* – and it does not reach its full heating impact for twenty years. Every molecule of carbon dioxide put into in the atmosphere today will have a heating effect beyond the next century. Thus, a continued temperature rise is locked-in for at least this period. This fact will remain true even if we, on a global scale, stopped emitting carbon dioxide completely, beginning *today*.

Another greenhouse gas is methane, the major component of natural gas. Natural gas is often touted as a low-carbon replacement for coal and oil because for each unit of energy produced through burning, methane emits less carbon dioxide than coal or oil. However, the key word here is "less"– not zero.

A second and more serious concern with natural gas is the effect of methane. Molecule for molecule, CH4 is *200 times* more powerful than is CO2 for trapping heat thereby warming our planet. Fortunately, CH4 stays in the atmosphere for only one-tenth of the time, or about ten years. So, we can say that methane is about twenty times more powerful in heating our atmosphere today than is carbon dioxide. For this reason, methane matters. And methane leaks abound in the collection, transportation, and use of methane as an energy source. The end result of burning methane for energy is carbon dioxide, a greenhouse gas. The use of nature gas in lieu of coal and oil is not a solution – long or short term.

If the emissions of greenhouse gases were our only concern, our solution to the problem would be straight forward: convert the global economy to carbon-neutral forms of energy and do so at a pace designed to avoid economic dislocations and political disputes. Yes, the temperature of the planet would for some decades continue to rise. Yes, sea levels would continue to rise and population migration would be required. But after the passage of significant time, carbon would be scrubbed from the atmosphere by natural means and the planet would return to our current temperature range, or nearly so.

This is not an option. The problem is that the earth has what are called positive "feedback loops."

A positive feedback loop is an adjustment, in a given direction, that causes an additional adjustment in the same direction.

A positive feedback loop is an adjustment, in a given direction, that causes an additional adjustment in the same direction. For the climate, this means that an increase in the temperature of the planet causes an additional increase in the temperature of the planet, *doing so repeatedly.* Once the process begins, it can continue on its own. Thus, there is a point after which temperature rise is no longer ours to control.

Let us examine a simple feedback loop represented by the current melting of the Arctic icecap. When sunlight hits sea ice, the ice reflects fifty to seventy percent of that sunlight back into space. This mechanism cools the planet. In contrast to sea ice, ocean water absorbs approximately ninety-five percent of the sunlight that hits it. This mechanism warms the planet.

Carbon emissions start the feedback process as they warm the planet. This warming melts ice in the Arctic cap, which results in more warming – which results in more melting of the ice cap – which results in more warming… And this continues until the entire ice cap melts. Where once there was an ice cap cooling the planet, there is now open ocean water doing the opposite.[1]

Following the summer of 2020, it was widely reported that the Arctic had the *second lowest summer minimum sea ice* coverage since 1979. In 2020 there was about 3.4 million square kilometers while in 1979, the sea ice coverage was about 6.4 million square kilometers.

Many more feedback loops exist, such as:

- sea water evaporation, as water vapor is a greenhouse gas;
- methane, released from thawing permafrost in Siberia, Northern Canada, and Alaska;
- methane, released from warming methane ice-crystals (clathrate) found on the floor of Arctic coastal shelves; and
- forest fires, releasing carbon dioxide.

1. For a visual animation, see https://climate.nasa.gov/climate_resources/155/video-annual-arctic-sea-ice-minimum-1979-2020-with-area-graph/.

The last twenty years have seen the warmest average global temperatures on record. The year 2020 tied 2017 as the hottest year in historical times. Effects already seen include: a rise in sea levels; stronger, wetter, and faster forming hurricanes; fierce forest fires; incursions of salt water into food-growing regions; melting snow pack in mountain ranges – increasing river flows today but ultimately leading to decreased river flows tomorrow, and thus drought; coral reef destruction.

The warming must be halted. So, what *can* mankind do?

A Roadmap

The simple answer is that it is time to think outside of the box. The Paris Accords are not the solution. They were never capable of solving the problem: they have no enforcement mechanism; and even meeting their emission-targets will result in their temperature-targets being exceeded for this century's end.

The Paris Accords seek to keep global temperature rise below 2°C (3.6°F). Fully implemented, the accord's targets will result in a temperature increase of between 3.0°C and 3.5°C (5.4°F and 6.3°C). See UNEP, *The Emissions Gap Report 2020,* 3.5.2. (Dec. 9, 2020). A global temperature increase over 2° C poses the unacceptable risk that the planet's feedback loops will make control of human manufactured carbon emissions irrelevant, and my lead to significantly higher temperatures and pervasively unlivable conditions.[2]

Let us look at what we must do.

First, fossil fuels should stay in the ground. The focus on emission targets is insufficient: countries can meet their own emission targets by mining and selling fossil fuels to be burned elsewhere. Yes, companies and countries are moving in this direction[3] – but not fast enough. Compensation to private parties for the loss of income for the abandonment of their fossil fuel assets must be made available. Financial encouragement should be given to companies to move their energy production from fossil fuels to

2. For a valuable yet non-technical examination of these possibilities, see Six Degrees: Our Future on a Hotter Planet, by Mark Lynas (National Geographic Society 2008).

3. "Shell, in a Turning Point, Says Its Oil Production Has Peaked," N.Y. Times (Feb. 11, 2021).

renewable and carbon-free sources. Energy workers, who train for different jobs, should be protected and trained for different job.

Second, individuals and private companies must be encouraged – or indeed mandated – to move away from carbon-emitting energy sources. Tax and other financial incentives *must go directly to the energy users,* to ensure that there is minimal effective backsliding on the part of suppliers who wish to delay or obstruct this transition. Governments must lead the way by purchasing and using only such carbon-free systems. This will increase the market demand for these systems, accelerating their substitution for our current carbon-emitting systems.

Tax and other financial incentives must go directly to the energy users [...].

Third, we must recognize that climate change cannot be stopped, in the short term – even by these measures. We must prepare for the effects of warming and implement laws to mitigate them. These must focus on both local and global concerns.

Fourth, the World Bank estimates that by 2050, there will be 143 million climate refugees from Latin America, sub-Saharan Africa and Southeast Asia. The 1951 Refugee Convention must be amended. While this convention recognizes the right of persons to seek asylum from *persecution* in other countries, it does not recognize the right of asylum from the effects of *climate change.* But individuals whose homeland is no longer livable must have the right to move where they can live. This is a fact that is not rooted merely in the morality of what it means to be civilized – it is rooted in the need to avoid violent conflicts.

Recognizing that a new type of asylum claim is arising, the United Nations Human Rights Committee has acknowledged that – while not a right embodied in treaty – people who flee the effects of climate change and natural disasters should not be returned to their country of origin if essential human rights would be at risk on return.[4] But, obviously, apportionment of displaced populations must be done in an equitable manner. To say this will not be easy is the ultimate understatement – but it must be done, and the work must commence before the inevitable conflicts begin.

Fifth, international migrations are not the only concern. People must move within their own countries: from low-lying coasts to inland regions; and from overly hot and humid zones to livable territories. Thus, local jurisdictions have already begun funding individuals to relocate; and states are in the process of relocating entire towns.[5]

Sixth, how do we enforce what must be done? As Greta Thunberg has shown, popular movements can progress much faster than governmental entities when the need becomes apparent to the people. In 1972, William O. Douglas, an Associate Justice of the U.S. Supreme Court, made a bold suggestion: treat natural resources as persons, and allow private parties to represent their interests in courts and before agencies. In his words[6]:

"*The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation...*

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes ... The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life..."

The time has come to revisit Justice Douglas' farsighted suggestion, on a global scale. Mines, which are subject to coal extraction; landscapes, which are subject to fracking for oil and gas; and rainforests, which are subject to clear cutting and burning, must all be accorded the right to representation in courts and agencies by private parties when subject to use or abuse in any manner adversely affecting our climate.

Conclusion

The purpose of this article has not been to survey current legal regimes for protecting the climate: they are inadequate. The purpose is to highlight the imminent dangers we face, and to emphasize the directions we must take to protect our civilization.

Lawyers, diplomats and public officials are comfortable dealing with negotiation, compromise, and settlement. Unfortunately, science and nature give no heed to such niceties. And the nature of climate change is a function of science, not negotiation.

Absent immediate and bold action, our planet will, after time, ultimately recover from the injuries caused by our follies – as it has recovered from the ice ages and hot-house eras of the past – but on a time scale such that our civilization will not endure long enough to enjoy that recovery.

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4. Teitiota v. New Zealand, U.N. Human Rights Committee No. 2728/2016 (23 Sept. 2020).

5. See Rising: Dispatches from the New American Shore, by Elizabeth Rush (Milkweed Editions 2018).

6. Sierra Club v. Morton, 405 U.S. 727, 742–43 (1972) (Douglas, J., dissenting) (footnotes omitted).

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The Elephant in the Courtroom: On Legal Personhood and Animal Rights

Macarena Montes Franceschini

Cet article analyse comment la personnalité juridique et les droits des animaux sont passés du statut de « l'épine dans le pied » (ou « l'éléphant dans la pièce » comme disent les Anglo-Saxons) à des questions qui sont de plus en plus discutées par les tribunaux dans différentes parties du monde, et ce, concernant les animaux appartenant à différentes espèces. L'article examine quatre cas aux États-Unis, en Argentine, en Colombie et au Pakistan, qui démontrent des progrès dans ce domaine, malgré la réticence dans le domaine juridique à reconnaître les droits d'autres animaux.

Este artículo analiza cómo la personalidad jurídica y los derechos de los animales han pasado de ser "el elefante en la habitación" a ser temas que se están discutiendo cada vez más por tribunales de diferentes lugares del mundo y respecto de animales pertenecientes a diversas especies. El artículo examina cuatro casos provenientes de Estados Unidos, Argentina, Colombia y Pakistán, que demuestran los avances en esta materia, a pesar de la reticencia existente en el ámbito jurídico a reconocer los derechos de los demás animales.

Introduction

What do an elephant in Islamabad, a bear in the Caribbean, an orangutan in Buenos Aires, and an orca in the United States have in common? Instead of starting campaigns to raise awareness or organizing protests against zoos and aquariums, in these four cases, animal rights advocates decided to file various types of lawsuits, such as writs of *habeas corpus*, requesting courts to grant legal personhood or certain basic rights to individual animals and transfer them to sanctuaries.

This article proceeds as follows: Section I explains the SeaWorld orca case, Section II explains the case of Sandra the orangutan in Argentina, Section III explains the case of Chucho the Andean bear, which made it all the way to the Colombian Constitutional Court; and finally, Section IV explains the Marghazar Zoo case in Islamabad, which involved the famous singer Cher's *Free the Wild* foundation. Section V provides a discussion of the examined cases. The final section provides a concise conclusion.

Tilikum, Katina, Corky, Kasatka, and Ulises the Orcas (United States of America, 2012)

In 2012, People for the Ethical Treatment of Animals (PETA), together with marine mammal experts and former SeaWorld trainers, filed a lawsuit requesting a federal court to declare SeaWorld's five orcas – Tilikum, Katina, Corky, Kasatka, and Ulises – as slaves, in violation of the Thirteenth Amendment of the United States Constitution. PETA argued that these orcas were captured and separated from their families in the wild as babies and then forced to live in small tanks and perform tricks to entertain audiences. PETA also claimed that the lawsuit was based on the text of the Thirteenth Amendment, which prohibits slavery without referring to a legal person or any kind of specific victim. On the contrary, SeaWorld argued that the Thirteenth Amendment applies only to "humans." The judge dismissed the case, ruling that the Thirteenth Amendment only applies to "persons" and not to nonpersons such as orcas, showing an apparent unawareness of the difference between the concept of "human" and the concept of "legal personhood.[1]" This is not an isolated trend; other courts around the world have also confused these concepts when discussing an individual animal's legal personhood, as occurred in the Colombian Constitutional Court's verdict in the case of Chucho.

Even though PETA's orca case was dismissed, thanks to the media attention it attracted, together with the huge impact of the 2013 documentary *Blackfish* and campaigns against captive orcas, SeaWorld communicated that it would stop breeding orcas and phase out orca shows. This decision was a tremendous victory, because the majority of Sea-World's orcas at that time had been born in captivity as part of its breeding program.

Sandra the Orangutan (Argentina, 2014)

Sandra was born in 1986 at the Rostock Zoologischer Garten in Germany. She was sent to Buenos Aires in 1994 and lived alone in the Buenos Aires Zoo until she was transferred to the Center for Great Apes sanctuary in September 2019. In 2014, the *Asociación de Funcionarios y Abogados por los Derechos de los Animales (AFADA),* an Argentinean animal rights non-governmental organization (NGO), filed a writ of *habeas corpus* on Sandra's behalf, which the lower court and the Court of Appeals denied. Therefore, AFADA filed a cassation against this ruling. The Federal Criminal Cassation Court recognized Sandra as a nonhuman subject of rights and sent the case to the competent Criminal Court.[2] Although this declaration was an *obiter dictum*, i.e., a non-binding statement in the Court's decision, it has inspired other cases around the world, such as the Marghazar Zoo case in Islamabad.

The Federal Criminal Cassation Court recognized Sandra (the Orangutan) as a nonhuman subject of rights and sent the case to the competent Criminal Court.

Instead of pursuing the *habeas corpus* proceeding, AFADA filed an *amparo* (a legal remedy that protects other fundamental rights) on Sandra's behalf. Judge Elena Liberatori recognized her as a nonhuman person and ordered an expert committee to decide her future.[3] Both AFADA and the zoo appealed, and the higher court confirmed the ruling, but reversed the part of the judgment that recognized Sandra as a nonhuman person. Still, thanks to Judge Liberatori's efforts, Sandra is currently living in a sanctuary in Florida and is famous around the world for being the first nonhuman animal to be recognized as a legal person.

Chucho the Andean Bear (Colombia, 2017)

Chucho and his sister, Clarita, had always lived in semi-captivity together in reserves located in Colombia's Andean region. After Clarita's death in 2008, Chucho became severely depressed, so the government decided to transfer him to a zoo in Barranquilla. Barranquilla is a coastal Caribbean city, scorching hot and extremely humid all year round. On

1. Greg Miller, *Judge Dismisses PETA's Constitutional Argument to Free SeaWorld Orcas*, Science (Feb. 9, 2012), https://www.sciencemag.org/news/2012/02/judge-dismisses-petas-constitutional-argument-free-seaworld-orcas (last visited: December 15, 2020).

2. Cámara Federal de Casación Penal [C.F.C.P.] [Federal Criminal Cassation Court], Second Chamber, 18.12.2014, "Orangutana Sandra s/ recurso de casación s/ Habeas Corpus," No 2603/14 (Arg.).

3. Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires [J.C.A.T.] [Court for Contentious-Administrative and Tax Proceedings No. 4 of the city of Buenos Aires], 21.10.2015, "Asociación de Funcionarios y Abogados por los Derechos de los Animales y otros c. GBCA sobre amparo," No. A2174-2015/0 (Arg.).

the the contrary, Chucho's natural habitat is a high altitude, cold and rainy mountain range. Consequently, a local attorney filed a writ of *habeas corpus* in June 2017 arguing that Chucho had the right to live in his own habitat. The lower court denied the writ. However, the Civil Chamber of the Supreme Court of Justice, one of the highest courts in the country, overruled the judgment and granted the *habeas corpus* on July 26, 2017. The judge recognized Chucho as a subject of rights and ordered his transfer to a reserve.

The zoo filed a *tutela* (a legal remedy that protects other fundamental rights) against this ruling, and both the lower and higher courts agreed with its arguments. However, the Constitutional Court, another of the highest courts in the country, selected Chucho's case for revision because it wanted to examine a novel case of this sort that would allow the court to expand its jurisprudence on animal rights. Justice Diana Fajardo was chosen to take charge of the case and showed great interest in Chucho's well-being since she first received the case at the end of 2018. She asked for expert reports, held a five-hour-long hearing in which various Colombian and foreign specialists gave their opinions on the case, and wrote a verdict that recognized Chucho as a nonhuman person with the right to bodily liberty.

However, only two out of nine judges agreed to recognize Chucho as a nonhuman person. The majority stated that the writ of *habeas corpus* can only be filed on behalf of humans, understanding "persons" as a synonym of "humans," and stating that animals in Colombia are not persons, but merely sentient beings. Judge Fajardo criticized the Constitutional Court's decision in her dissent, stating that the court had become stuck in the formalist labyrinth of procedural law instead of building effective mechanisms to protect animals.[4]

Kaavan the Asian Elephant (Pakistan, 2020)

On April 25, 2020, the Higher Court of Islamabad decided a case involving the animals living in deplorable conditions in Marghazar Zoo. Justice Minallah referred to animals in zoos as inmates, and claimed that animals are not mere property, but subjects of rights: "Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative."[5] Justice Minallah's ruling mentioned Sandra's case as an example of jurisprudence on animal rights and used this case as an argument for his decision regarding all the animals living in Marghazar Zoo.

Recognizing that zoos are not appropriate places for elephants, and that zoos around the world are phasing them out, Judge Minallah ordered Kaavan, an Asian elephant, to

be transferred to a sanctuary. Kaavan spent more than 30 years chained in a small enclosure at the zoo, with serious health issues and an inadequate diet. He had been kept in isolation for more than eight years since Saheli, his companion, died in 2012, and suffered severe stereotypical behavior and neurological problems due to his captivity. Free the Wild, Cher's animal protection NGO, filed the legal action on Kaavan's behalf and managed to transfer him to the Cambodia Wildlife Sanctuary.

Discussion

Some might argue that most cases regarding animal legal personhood have been dismissed or reversed, and therefore have mainly been failures. Hence, animal advocates should pursue other ways to protect animals. However, all of the cases described above have been successful to some degree. Even though PETA's orca case was dismissed, SeaWorld finally agreed to phase out breeding and shows. In Sandra's case, a higher court recognized her as a nonhuman subject of rights, even though this was only an *obiter dictum*. A lower court then recognized her as a nonhuman person with certain basic rights. Even though the Court of Appeals reversed this part of the judgment, Sandra is currently living in a sanctuary and is internationally famous for being the first nonhuman animal legal person. Her case has inspired other judgments in Argentina, as in Cecilia the chimp's case, as well as international judgments, such as the Marghazar Zoo ruling. Although Chucho's *habeas corpus* was finally dismissed, it reached two of the highest courts in Colombia, encouraging a debate on animal rights among the most important judges in the country and infor-

4. *Comunicado N° 03*, Corte Constitucional de Colombia (Jan. 23, 2020), https://www.corteconstitucional.gov.co/comunicados/Comunicado No. 03 del 23 de enero de 2020.pdf, 5 (last visited: December 15, 2020).

5. Islamabad High Court, Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, et al., Apr. 25, 2020, J. Athar Minallah, W.P. No. 1155/2019, https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf (last visited: December 15, 2020).

ming the public on Andean bears' vulnerability due to habitat loss. Finally, the Marghazar Zoo judgment condemned the zoo's deplorable conditions and recognized animals as subjects of rights. Thanks to this judgment and Free the Wild's work to move Kaavan, he is now living in a sanctuary in Cambodia with other Asian elephants.

Moreover, these lawsuits have also advanced the struggle for animal rights from a social, legal, and ethical perspective. As a social phenomenon, the media's interest in these cases has popularized legal concepts such as personhood and rights. There is no such thing as bad publicity, so thanks to the media, people are growing accustomed to animal legal personhood and animal rights. Additionally, journalistic pieces that feature an individual animal's story and lawsuit catch the public's attention more effectively than general pieces on bears or chimpanzees. Thus, people start to connect with the individual animal and understand his or her suffering.

From a legal perspective, judges are also beginning to see the elephant in the courtroom. Some judges have recognized that simply denying writs of *habeas corpus* based on the fact that the animal is not human is no longer a satisfactory argument for their decisions, taking into account public pressure and case law on animal protection, as occurred in Chucho's case. Other judges have acknowledged that the writ of *habeas corpus* is an adequate mechanism to file on behalf of animals, as Judge Fajardo indicated. Additionally, some judges, like Judge Tolosa, have stated that animals do not need to bear duties to be considered nonhuman persons. Even *obiter dictum* and reversed declarations in judgments are referenced by other judges around the world as examples of nonhuman animal legal personhood and rights.

Finally, from an ethical perspective, animals generally benefit from the fact that people, especially judges, are becoming more open to legal personhood and rights for animals and have started to grant these lawsuits. Even though these cases might be dismissed, they still produce positive consequences for animals because public and judicial pressure drives zoos and aquariums to change, as occurred with SeaWorld's policies. This pressure also forces zoos to take greater care of the animal plaintiffs because, thanks to the media's coverage of these lawsuits, everybody knows who these animals are and recognizes them as sentient individuals that must be cared for.

Conclusion

In his 1882 story, *The Stolen White Elephant,* Mark Twain portrays how incompetent detectives try to find a stolen elephant that was right in front of them all along. Since then, the metaphor "the elephant in the room" has been commonly used to refer to an important topic that everyone knows about, but no one wants to discuss, as it makes people uncomfortable or is somehow controversial. Much like the stolen elephant, animal legal personhood and animal rights are crucial legal issues that we can no longer ignore, given that numerous courts around the world are actively discussing these issues.

In the 1935 Broadway musical, *Jumbo,* comedian Jimmy Durante reveals the attitude we have historically had towards animals. A policeman stops him as he leads an elephant and asks him, "What are you doing with that elephant?" and Durante replies, "What elephant?" Nevertheless, things have begun to change in the courtroom. Lawsuits are increasing in number every year; new cases involve different countries and species, and they have started to reach the highest national courts. Most judges no longer find these cases frivolous, but instead show great interest in these issues and concern over ensuring the animal's well-being. The press is also fascinated with these lawsuits and millions of people around the world follow the stories of these individual animals. Finally, prominent scientists, philosophers, attorneys, and professors support these cases, proving that these lawsuits are serious attempts to improve animals' legal status and protection. ■

As a social phenomenon, the media's interest in these cases has popularized legal concepts such as personhood and rights.

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La protection animale en France : la condition de la balance à moitié vide

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It is all about choice. When proposing and voting new laws, the legislator must weigh the different values and interests to be protected. France places animal sensitivity last because the lobbies' interests take precedence over animals' protection, even when said protection presents a worldwide issue, such as the preservation of biodiversity. At a time when all public surveys reveal that animal welfare is an important issue for French public opinion, it seems essential to review the weight of such values, in order to ensure that they are in line with people's expectations.

Todo es cuestión de elección. Al proponer y votar nuevas leyes, el legislador debe sopesar los diferentes valores e intereses a proteger. Francia coloca la sensibilidad animal en último lugar porque los intereses de los grupos de presión priman sobre la protección de los animales, incluso cuando dicha protección presenta un problema mundial, como la preservación de la biodiversidad. En un momento en el que todas las encuestas públicas revelan que el bienestar de los animales es un tema importante para la opinión pública francesa, parece fundamental revisar el peso de dichos valores para asegurarse de que están en línea con las expectativas de la gente.

Alors qu'elle était présente en toute discrétion dans le code rural depuis 1976 (article L214-1 : « *Tout animal étant un être sensible doit être placé par son propriétaire dans des conditions compatibles avec les impératifs biologiques de son espèce* »), la sensibilité animale a été reconnue à grand bruit par le code civil en 2015. Désormais, l'article 515-14 du plus important des codes français, puisqu'édictant les règles juridiques applicables aux rapports fondamentaux entre les personnes et vis-à-vis des biens, dispose : « *Les animaux sont des êtres vivants doués de sensibilité. Sous réserve des lois qui les protègent, les animaux sont soumis au régime des biens* ». Alors que le code rural reconnaissait la sensibilité de l'animal approprié, la question a pu se poser de savoir si l'article 515-14 du code civil ne venait pas étendre la reconnaissance de la sensibilité animale au sens large, incluant les animaux sauvages.

C'était sans compter sur la suma divisio…

Le code civil français comporte deux parties : le livre 1 est consacré aux personnes tandis que le livre 2 traite du cas des biens. Historiquement, l'animal figure dans le livre consacré aux biens. La modification de 2015 ne l'en extrait pas ; la deuxième partie de l'article sonnant tel un rappel, comme pour éviter tout emballement animaliste… Ainsi, si cette reconnaissance de la sensibilité animale par le code français disposant du plus grand spectre d'application marque une avancée de la perception de l'animal en tant que tel, elle ne modifie pas pour autant son statut juridique.

SON statut juridique… Non…

En France il est impossible d'évoquer « le statut de l'animal » tant le Droit prévoit de possibilités différentes d'appréhender cette entité intermédiaire, ni tout à fait bien, ni tout à fait personne. Les dispositions applicables aux animaux résultent de plusieurs sources et varient, non pas en fonction de l'espèce mais de la situation de l'animal au moment où le Droit est sollicité.

Il sera donc plus opportun d'évoquer LES STATUTS DES ANIMAUX.

Les deux catégories d'animaux, domestiques et sauvages, se subdivisent en une multitude de sous catégories, soumises à autant de règlementations. Ainsi, l'animal domestique pourra-il être animal de compagnie (avec quelques statuts particuliers comme notamment celui des chiens dits dangereux), animal de rente (production de viande, de lait ou de fourrure), animal de divertissement, animal de laboratoire, animal d'assistance… Notons qu'il pourra également changer de catégorie au fil de sa vie et, de facto, changer de statut et voir son degré de protection modifié.

Citons l'exemple du lapin de laboratoire qui bénéficiera, à chacun des stades de sa vie, d'une protection organisée par une règlementation différente : d'animal d'élevage,

ce lapin deviendra animal de laboratoire qui, en cas de possibilité de réhabilition, deviendra animal de compagnie disposant de la protection la plus large : celle du code pénal, appréhendée sans aucun des aménagements légaux existant relativement aux animaux domestiques, apprivoisés ou sauvages captifs utilisés par l'Homme.

L'animal sauvage non captif, quant à lui, n'est pas protégé par le code pénal contre les atteintes à son intégrité physique ou à sa vie. Il est qualifié de « *res nullius* » ; la chose de personne. Ainsi pourra-t-il se trouver sur la liste des espèces chassables.

La chasse, dont l'objet est de tuer sans nécessité des animaux, est une activité légale. Elle est néanmoins strictement règlementée. Notamment, le code de l'Environnement prévoit dans son article R427-17 que « *Le ministre chargé de la chasse fixe les conditions d'utilisation des pièges, notamment de ceux qui sont de nature à provoquer des traumatismes, afin d'assurer la sécurité publique et la sélectivité du piégeage et de limiter la souffrance des animaux* ». Le code de l'Environnement reconnait donc implicitement la sensibilité de l'animal sauvage et préconise de la respecter en n'infligeant pas de souffrances inutiles aux animaux chassables.

Pourtant, de nombreuses techniques de chasse particulièrement génératrices de souffrance continuent d'être admises en France : chasse à courre, chasse à la glue… Et que penser de la pêche au vif qui consiste à empaler vivant un poisson de petite taille pour en pêcher un plus gros ?

La protection de la sensibilité animale est ici reléguée au second plan face à la liberté de loisirs d'un nombre restreint de personnes pratiquant ces chasses venues d'un temps fort lointain où la sensibilité animale était une réalité encore inconnue. L'animal sauvage non captif pourra également se voir reconnaitre le statut spécifique des animaux sauvages d'espèces protégées. L'animal sauvage sera alors protégé en tant que membre d'une espèce et non en tant qu'individu ; la valeur protégée n'est donc pas la sensibilité de l'animal mais sa place dans la biodiversité.

L'enjeu de la conservation de ces espèces est planétaire.

Or, le 2 juillet 2020, la France a été mise en demeure par la Commission européenne de sanctionner la chasse illégale des oiseaux protégés, ces espèces étant allègrement et impunément abattue par les chasseurs français. Ainsi, la France autorise-t-elle ses chasseurs à détruire des oiseaux appartenant à des espèces protégées au niveau européen. D'autres pays dérogent à la règle de la stricte protection de certaines espèces d'oiseaux mais la France est sans doute le pays le plus permissif avec ses chasseurs.

Cette attitude a, en août 2018, conduit à la démission de Monsieur Nicolas Hulot de ses fonctions de ministre de la transition écologique, ce dernier se sentant démuni face à l'omniprésence des chasseurs lors de réunions de travail au cours desquelles ils n'auraient pas dû avoir droit au chapitre. Dans ce cas, l'intérêt jugé prioritaire sur la biodiversité est une activité de loisir pratiquée plus ou moins régulièrement par environ un million de personnes.

Enfin, l'animal sauvage non captif, s'il est malchanceux, pourra être considéré comme appartenant à une espèce « susceptible d'occasionner des dégâts »[1] (s'il est très malchanceux, il appartiendra à une espèce dite invasive…). Ce n'est alors pas sa protection mais sa destruction qui sera organisée par les textes sans qu'aucune voix hostile à cette destruction (associations de protection de la nature mais également résultats des consultations publiques pourtant organisées par l'État) ne soit jamais entendue, y compris lorsque la destruction d'un animal dit « susceptible d'occasionner des dégâts » est de nature à aggraver un problème de santé publique.

C'est là l'exemple du renard roux, considéré comme « susceptible d'occasionner des dégâts » dans de nombreux départements français alors qu'il est désormais avéré que la présence de cet animal a un impact positif sur le ralentissement de la progression de la maladie de Lyme.

Il est à préciser que, comme l'animal domestique, l'animal sauvage non captif est susceptible de changer de catégorie. Ce fut notamment le cas du grand hamster d'Alsace qui, classé nuisible et détruit dans des proportions susceptibles de mettre l'espèce en danger, a fini par rejoindre la catégorie des animaux sauvages à protéger.

Une espèce sauvage dispose dans les faits d'un statut « non homologué » qui lui est propre : le loup. Rappelons que le loup (*Canis lupus italicus*) fait l'objet d'une protection au niveau international, par la Convention de Berne du 19 septembre 1979 et par la Directive 92/43/CEE

1. Il était question d'« animaux nuisibles » jusqu'à la Loi pour la reconquête de la biodiversité, de la nature et des paysages du 8 août 2016 dite « Loi biodiversité ».

du Conseil du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages où il est classé « prioritaire d'intérêt communautaire » en annexes II et IV. Dans le droit français, ces dispositions sont transcrites dans le code de l'environnement aux articles L. 411-1, L. 411-2 et R. 411-1 à R. 411-5 et par l'arrêté du 23 avril 2007 fixant la liste des mammifères protégés sur l'ensemble du territoire et les modalités de leur protection. Rappelons enfin que le loup est classé par l'Union Internationale de Conservation de la Nature (UICN) sur la liste rouge des espèces menacées en France et il lui est attribué le statut de conservation « vulnérable ».

Ainsi, la conservation du loup représente-t-elle un enjeu important dans le maintien de la biodiversité. Pourtant, cette espèce, dont la présence européenne n'est problématique que pour les éleveurs français (qui sont pourtant indemnisés en cas d'attaque avérée commise par un loup), fait l'objet d'un « plan national d'actions » autorisant la destruction annuelle d'un certain nombre d'individus. Une fois ce quota de destructions atteint, il peut encore être augmenté… Il apparaît clairement que l'aménagement de la protection du loup en France revient à prioriser des enjeux économiques mineurs et locaux par rapport à des enjeux environnementaux mondiaux.

L'animal de compagnie n'est pas épargné par les aménagements des règles de sa protection.

L'exemple le plus incompréhensible est l'inscription de la légalité de la corrida dans le code pénal. Le code pénal français ne compte actuellement que trois articles réprimant les atteintes volontaires aux animaux mais l'un d'eux contient textuellement une autorisation de porter atteinte à l'intégrité physique d'un animal puis de le mettre à mort. C'était précisément les actes combattus par la loi Grammont sur les mauvais traitements envers les animaux domestiques de 1850, première loi française visant, officiellement en tous cas, à protéger les animaux, qui sanctionnait les mauvais traitements commis en public contre les animaux domestiques.

Quelle différence entre la sensibilité du bovin élevé pour sa viande ou pour son lait et celle du taureau ? Aucune.

Le plus troublant n'est finalement pas que cette exception ait été prévue par le législateur de l'époque mais que, compte tenu de l'avancée des connaissances scientifiques et éthologiques depuis l'instauration de cette exception, nul législateur français n'ait eu le courage de mettre un terme à cette aberration juridique et morale. Là encore, la protection de la sensibilité reconnue à l'animal par le code civil s'incline face à une loi maintenue pour satisfaire le simple besoin de « divertissement » d'une minorité de Français par ailleurs concentrés géographiquement.

À l'heure où de nombreux éleveurs français dont le seul tort parfois est de n'avoir pas réussi à renoncer à un métier hérité de leurs parents et de s'être acharnés à essayer de sauver leur exploitation sont sanctionnés par les Tribunaux pour des mauvais traitements exercés sur leurs bovins, dans les arènes, on se délecte du sang qui coule impunément.

Quelle différence entre la sensibilité du bovin élevé pour sa viande ou pour son lait et celle du taureau ? Aucune. Ces taureaux sont d'ailleurs protégés contre les mauvais traitements pendant leur élevage puis, ne le sont plus dès lors qu'ils entrent dans l'arène.

Quelle justification ? La tradition locale ininterrompue…

Reprenant le cas de notre bovin si bien protégé contre son éleveur, l'on s'aperçoit que lui aussi voit parfois sa sensibilité sacrifiée au bénéfice d'une autre valeur : la religion. En effet, en France, cet animal pourra être saigné en pleine conscience sans qu'aucun étourdissement préalable, réversible ou pas, ne lui soit accordé. Il est incontestable que cette pratique est génératrice de souffrance mais, là encore, la sensibilité animale est reléguée au second plan.

Dans son arrêt du 17 décembre 2020[2] , la Cour de Justice de l'Union européenne, a indiqué qu'il est possible pour un État d'imposer une technique d'étourdissement réversible pour assurer un juste équilibre entre l'importance attachée au bien-être animal et le respect des religions juives et musulmanes. S'agissant d'une possibilité et non d'une obligation, il est évident que cette décision restera sans effet en France malgré la mobilisation constante des associations de protection animale dont certaines, reconnues d'utilité publique, sont pourtant indispensables à l'action de l'État en matière de sauvetage d'animaux de ferme…

Le service rendu à l'État ne semble donc pas, lui non plus, constituer un poids suffisant dans les discussions relatives à la cause animale. Argent, loisirs, divertissement, tradition, religion… autant de valeurs qui, en France, priment sur celle de la souffrance et de la vie animale, y compris lorsque cette dernière représente un enjeu d'intérêt universel.

Il apparait que les avancées de la législation française visant à protéger la sensibilité animale n'interviennent que dans des domaines où aucune autre valeur ne peut être mise en balance. Les dispositions contenues dans le projet de loi actuellement soumis au vote parlementaire permettrait une amélioration certaine de la condition animale en France mais force est de constater que les changements susceptibles d'être validés ne concernent que des domaines où aucune contre-valeur vraiment virulente n'est exprimée.

Malheureusement, c'est là, pour l'instant, la seule manière en France de pouvoir espérer des avancées en matière de protection animale… ■

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2. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200163fr.pdf

The Role of Telehealth Tools in Veterinary Medicine and Legal Compliance

Sarah Babcock **Jessica Chapman**

La disponibilité des outils de télésanté associée à un manque d'accès aux soins médicaux vétérinaires a mis en évidence la nécessité d'évaluer les normes actuelles qui régissent la prestation traditionnelle de soins médicaux vétérinaires. À mesure que les réglementations et les normes régissant la médecine vétérinaire évoluent, il est nécessaire d'évaluer les avantages et les risques potentiels des soins virtuels. La capacité des vétérinaires à exercer un jugement professionnel solide pour assurer un équilibre approprié entre l'accès aux soins et la sécurité des patients est primordiale dans l'examen de l'intégration des outils de télésanté dans la pratique.

La disponibilidad de herramientas de telesalud, junto con la falta de acceso a la atención médica veterinaria, ha puesto de relieve la necesidad de evaluar los estándares actuales que rigen la prestación tradicional de atención médica veterinaria. A medida que evolucionan las regulaciones y los estándares que rigen la medicina veterinaria, es necesario evaluar los beneficios y los riesgos potenciales de la atención virtual. La capacidad de los veterinarios para ejercer un juicio profesional sólido para garantizar un equilibrio adecuado entre el acceso a la atención y la seguridad del paciente es primordial en la consideración de incorporar herramientas de telesalud en la práctica.

In response to the Covid-19 pandemic, veterinary medicine adapted its healthcare practices for animal healthcare through the increased use of telehealth. The role of telehealth is critical given that the effect of Covid-19 on traditional approaches will likely persist even after the pandemic subsides. Using telehealth, veterinary practitioners around the world are working to develop a greater depth of expertise and global resources. But this global approach raises unprecedented regulatory concerns. These challenges require the collaboration of veterinary professionals and regulators working together to balance the benefits, potential risks, and regulatory requirements of telehealth to promote both animal health and the consumer safety.

In the United States, there are a variety of telehealth and telemedicine service models available to veterinarians and veterinary hospitals. Client-facing telemedicine services may include: (1) using tools that allow a veterinarian to remotely gather all essential veterinary medical information from the animal owner or other caretaker, (2) accessing the patient's medical records, and (3) conducting a virtual exam of the patient through a real-time video or through digital pictures. For example, VetNow has created a custom toolkit to facilitate the ability of a global network of veterinarians, epidemiologists, and public health experts to consult on cases and public health threats. The kit includes a Bluetooth-enabled stethoscope, digital microscope, electrocardiogram, and pulse oximeter. Based on the patient information provided by a local veterinarian, researchers with the aid of algorithms can use these tools to provide the data required to monitor the patient for patterns in clinical signs and diagnoses, and to earlier detect pathogens with pandemic potential.

The indispensable role of law is a key component of erecting the global public health infrastructure. The ability of a jurisdiction to enforce laws and regulations that protect health and ensure safety is essential. In light of Covid-19, state and federal regulators in the United States are evaluating the current regulatory framework of telehealth in vete-

rinary medicine. Today, veterinarians must use telehealth tools in compliance with local regulations and speci¬fically within the context of an established veterinarian-client-patient-relationship (VCPR). And, as in all patient encounters, veterinarians must make reasonable decisions and exert sound professional judgment, regardless of their method of delivery of care.

The Veterinarian-Client Patient Relationship

In the United States, governments have drafted regulations and standards for hands-on delivery of veterinary medical care that govern the veterinary profession. Until recently, one of the most insurmountable hurdles to the use of telehealth tools has been the requirement in most state regulations for a veterinarian to have "sufficient knowledge" of the patient in order to establish and often maintain the VCPR. Most VCPR regulations contain language that requires an in-person examination or a medically appropriate and timely visit to the location where the animal is kept. The use of telehealth tools, by definition, is remote care and does not include an in-person exam or visit to the location where the animal is kept. This places the burden on the veterinarian to determine if there is an exception or some other means to establish or maintain the VCPR in treating the animal.

The use of telehealth tools, by definition, is remote care and does not include an in-person exam or visit to the location where the animal is kept.

Each state's practice act regarding veterinary care defines what constitutes the practice of veterinary medicine for that state. In many states, the practice act details license requirements, provides for exemptions for state licensure, details the disciplinary process for licensees who violated the act, and includes requirements for reporting animal cruelty and potential related immunity for reporting provisions. The state practice act may also define the VCPR. Most jurisdictions that license and authorize the practice of veterinary medicine promulgate regulations that require the establishment of a valid VCPR to provide patient care and prescribe medications. Most states will specify the requirements of the VCPR through general statutory language. This may include specific requirements to establish, maintain, terminate, and define the scope of the relationship and resulting duties, such as medical record-keeping requirements, availability for follow up, and confidentiality.

Federal and state laws may not be the same. If a veterinarian is engaging in extra-label drug use or issuing veterinary feed directives and the state does not have a requirement for a VCPR or the requirements are not as stringent as the federal definition, then the federal definition must be satisfied first when engaging in any of the above outlined activities.

FDA regulations provide that the VCPR "*can exist only when the veterinarian has recently seen and is personally acquainted with the keeping and care of the animal by virtue of examination of the animal and/or by medically appropriate and timely visits to the premises where the animal(s) are kept.*" Therefore, traditionally, a veterinarian could not establish a VCPR solely through telemedicine (e.g. photos, videos, or other electronic means that do not involve the examination of the animals) or timely visits to the premises.

However, as part of the FDA's ongoing commitment to combatting the Covid-19 pandemic and providing flexibility across FDA-regulated industries, the agency announced on March 24, 2020 that it will not enforce certain provisions related to the animal examination and premise visit requirement in the VCPR. This relaxed requirement allows veterinarians to better utilize telemedicine to address animal health needs. For example, the owner of a sick dog could share a video with a veterinarian. If necessary, the veterinarian could then prescribe a drug that is not approved for use in dogs or for that illness, meaning extra-label use. As another example, a veterinarian could remotely examine and diagnose a group of food-producing animals with a skin disease, and then authorize the use of certain drugs in the animals' feed.

Despite the relaxed legal requirements, many veterinarians have trouble imagining not being able to touch animal patients in their daily practice. But providers in multiple countries began using telehealth as a consultation tool as early as the start of the Twentieth Century.[1] Providers have been using telehealth their entire careers without thinking about its terminology. Communicating with clients or consulting with a specialist over the phone on a case is a practice that has been a part of veterinary medicine long before this pandemic. For instance, clients call their veterinarians to ask for help with feeding a new companion animal, a calf with diarrhea, or a wild baby bird that has fallen from its nest. Until recently, veterinarians have not been required to do a real analysis of the services they provide and how state and federal regulators define that activity and subsequent legal duties.

Definitions of Telehealth Tools

The American Association of Veterinary State Boards (AAVSB) is an association of veterinary medicine regulatory boards whose membership includes licensing bodies in 62 jurisdictions. The AAVSB provides comprehensive information that strategically strengthens the veterinary regulatory community through its membership. While the AAVSB represents veterinary licensing bodies, the American Veterinary Medical Association (AVMA) is the professional association of veterinarians. In addition to caring for

1. *See generally* Carlton Gyles, "Veterinary telemedicine", *60 Canadian Veterinary J.* 119 (2019).

the nation's beloved pets – from dogs and cats to birds, horses, reptiles, and more – the AVMA's 95,000 members encompass every facet of the veterinary profession and serve in medical research, academia, prevention of bio and agroterrorism, food safety, public service, industry, and the uniformed services.

The AAVSB defines telehealth as an overarching term that encompasses all uses of technology that is geared to remotely deliver health information or education. "*Telehealth encompasses a broad variety of technologies and tactics to deliver virtual medical, health, and education services. Telehealth is not a specific service, but a collection of tools which allow veterinarians to enhance care and education delivery. Telehealth encompasses both telemedicine and general advice administering healthcare services remotely, such as health assessments or consultations, over the telecommunications infrastructure. It allows veterinarians to evaluate, diagnose and treat patients without the need for an in-person visit.*"[2]

A veterinarian must refer to the state under which they are licensed for specific guidance on whether a virtual examination may qualify as a basis on which to establish a VCPR and gain sufficient knowledge of the patient. State veterinary boards are trying to balance the need to safeguard public interest with access to veterinary care through telehealth technology.

Telehealth Logistics and Legal Requirements

Although telehealth differs from in-person veterinary care, it is subject to the same legal and ethical considerations. A veterinarian will need to determine if using telehealth is suitable for a specific patient. This determination requires the veterinarian to ensure an appropriate balance between access to care and patient safety. The veterinarian will need to decide if they have enough information about a patient to make a competent diagnosis.

Pursuant to state and federal governance, even if a veterinarian determines using telemedicine is medically appropriate, they must at minimum, ensure that they are licensed in the state where they are practicing; that they take steps to establish a valid VCPR; obtain consent from the client for the patient's care and for the use of telemedicine; conduct all necessary patient evaluations consistent with currently acceptable standards of care; maintain meticulous medical records; and complies with the requirements of the jurisdiction in which the veterinarian practices.

Veterinarians must ensure that the technology and physical settings they utilize for telemedicine are compliant with jurisdictional and federal requirements. Available digital platforms and applications for veterinarians exist in the event a veterinarian needs to quickly develop the capability to practice telemedicine. However, veterinarians may face obstacles using these tools because of an absence of digital infrastructure or broadband access. Therefore, veterinarians must prepare reliable telehealth infrastructure within their practice before using it to interact with clients.

Veterinarians must ensure that the technology and physical settings they utilize for telemedicine are compliant with jurisdictional and federal requirements.

Establishing a VCPR with telehealth technology also requires veterinarians to (1) obtain informed consent from their clients, (2) conduct all necessary patient evaluations consistent with currently acceptable standards of care, (3) take precautions to safeguard the confidentiality of a client or patient's records, and (4) ensure that the client is aware of the veterinarian's identity, location, jurisdictional license number, and licensure status. Additionally, a provider of telemedicine should give the client a clear mechanism to access, supplement,

2. Am. Ass'n of Veterinary St. Boards, "AAVSB Recommended Guidelines for the Appropriate Use of Telehealth Technologies in the Practice of Veterinary Medicine" (Sept. 2018).

and amend client-provided contact information and health information about the patient, as well as a way to register complaints with the appropriate board of veterinary medicine or other regulatory body.

An exception to establishing a VCPR with a patient through telemedicine may exist in emergency situations. Distanced emergency care would involve teletriage, which is an emergency form of animal care that veterinarians use for immediate, life-threatening animal health situations such as poison mitigation, animal CPR instructions, and other critical lifesaving treatment or advice.

Veterinary Telehealth Use Outside of the United States

Many veterinarians in Europe, including France and Spain, are interested in using telehealth technology, but have not developed the infrastructure to do so. While countries generally define telehealth and various telehealth tools similarly, globally, there is overall less engagement in telehealth tools in veterinary medicine. The United Kingdom is an outlier and allows veterinarians to conduct remote consultations and write remote prescriptions based on the current risks of Covid-19. The UK's practice may be the modern trend: 90% of its veterinarians have been giving remote consultations and 70% have used telemedicine for existing and new clients in the wake of the pandemic.[3] Most other countries that employ telehealth only allow telemedicine for teletriage. The development of global platforms may aid in the ability of countries to work together to share expertise and resources to improve the ability for quality and continued patient care.

Paths Forward Using Telehealth

The path forward for telehealth has similar considerations. The ongoing regulatory need to balance patient care and safety is paramount. Telehealth tools may lend themselves to ensure veterinary access and help eliminate barriers to veterinary care. Telehealth may likely provide veterinarians additional tools needed to provide care for animals while working with their diminished resources because of Covid-19's economic impact, too. Despite the necessity for telehealth, veterinarians throughout the world are trying to navigate the ethical duties they have towards their clients and patients to ensure each animal receives proper care. This concern, and the potential liabilities that may arise from the use of telehealth tools, such as providing insufficient care (e.g. misdiagnosing illnesses), and causing prolonged animal suffering, will likely be ongoing and change depending on the circumstances of each case.

Although remote veterinary care is becoming more acceptable and, in recent times, required, both veterinarians and animal owners need to remember that a limit exists as to what telemedicine can do. Through the VCPR, veterinarians have developed trust and public confidence in their ability to provide leadership. The communication of science-based practices can help inform and guide individuals' decisions, which will help patients and clients, and contribute to society in this most vulnerable moment. Veterinarians should talk to their clients about their concerns, the use of telemedicine, and new, alternative approaches for patient care.

Telemedicine will not replace a veterinarian's ability to physically touch animals, and veterinarians will be more reliant on their clients' ability to communicate patient histories and symptoms. Telemedicine will require an additional effort by veterinarians to communicate empathy, establish trust, and develop the connection that led so many of them to pursue a career in veterinary medicine. Clients will have to ensure they are providing an accurate and complete history and provide the veterinarian with access to medical records. Clients will also have to accept the limitations of telehealth tools and be prepared to act if additional diagnostics are necessary, or help is needed to relieve the suffering of an animal. The shared decision-making process between the veterinarian and the client is more important now than ever, as is the importance of respecting both the VCPR and the human-animal bond.

Conclusion

Veterinarians must always act in ways that ensure their patients' safety. However, veterinarians must not be afraid of new technology that may provide efficient access to care for animals whom they cannot treat in person. The ability to support and educate clients through multiple platforms is one of the profession's strongest and most versatile assets. Given the reality that this pandemic is not passing quickly, and that other pandemics will likely occur in the future, the veterinary profession must be nimble and resilient, and develop creative, effective approaches to serve its clients and the public. These approaches include changing veterinarians' mindsets from "business as usual" to "what works now." And, what works now will be relative, fluid, and based on each veterinarian's specific community. Whether a small or large animal practitioner, regulatory, research, or zoo veterinarian, upon being admitted to the profession, all veterinarians swear to use their scientific knowledge and skills to benefit society. Veterinarians should do so in a safe manner and always exercise sound, professional judgment. ■

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3. Josh Loeb, *'The wind always blows in from the west': how the UK is leading the way with telemedicine,* 186 Veterinary Record 583, 583 (2020). Other countries that employ veterinary telehealth include Canada, *supra* note i, "Portugal, M. Magalhães-Sant'Ana et al., What challenges is the veterinary profession facing? An analysis of complaints against veterinarians in Portugal" (Springer, S. & Grimm, H. eds. 2018).

Le contentieux stratégique pour la promotion des droits des animaux

Fabien Marchadier **Séverine Nadaud**

Strategic litigation or impact litigation refers to a selected case brought before a courtroom for the purpose of creating broader changes in society. The main concern is not the issue for the case at hand, but the effects on a larger population or on the legislator. In general, this kind of action is used to denounce environmental damages or to struggle against extreme poverty. It may also be used to strengthen the legal protection of animals, especially those deprived of liberty (zoo, laboratory), or by requesting the recognition of their fundamental rights (Regan's strategy), or by arguing that release is the only conceivable outcome inasmuch that standards for their well-being cannot be met (Singer's strategy).

El litigio estratégico o litigio de impacto se refiere a un caso seleccionado que se presenta ante una sala de audiencias con el propósito de crear cambios más amplios en la sociedad. La principal preocupación no es el tema del caso que nos ocupa, sino los efectos sobre una población más grande o sobre el legislador. En general, este tipo de acciones se utiliza para denunciar daños ambientales o para luchar contra la pobreza extrema. También se puede utilizar para fortalecer la protección legal de los animales, especialmente los privados de libertad (zoológico, laboratorio), o para solicitar el reconocimiento de sus derechos fundamentales (estrategia de Regan), o para argumentar que la liberación es el único resultado concebible en la medida en que no se pueden cumplir los estándares para su bienestar (estrategia de Singer).

L'amélioration du sort réservé aux animaux dans nos sociétés contemporaines emprunte normalement la voie législative. En prohibant les mauvais traitements infligés aux animaux en public, la loi Grammont (France) adoptée en 1850 constitue la première réalisation significative. L'évolution des normes accuse cependant une certaine lenteur et n'est pas toujours d'une parfaite cohérence. Le processus délibératif est soumis au jeu des groupes de pression et se heurte parfois à de puissants verrous politiques comme l'illustre le traitement, par la Commission européenne, de l'initiative citoyenne « stop vivisection » réclamant l'abolition de l'expérimentation animale en Europe. Certains lobbys sont mieux entendus que d'autres. Certains impératifs, scientifiques (l'expérimentation), économiques (l'élevage), culturels (la chasse, la tauromachie), apparaissent plus cruciaux que d'autres (respecter le vivant).

Les premiers textes destinés à assurer un minimum de protection aux animaux utilisés dans la recherche scientifique ont tardé à voir le jour (5 ans se sont écoulés entre la loi prévoyant une réglementation et les décrets lui donnant forme). Certains mauvais traitements et sévices échappent à toute forme de sanction pour peu qu'ils se rattachent à une tradition locale ininterrompue. Les inconvénients de la procédure législative dans les régimes démocratiques sont connus. Elle exclut ou tout au moins marginalise les groupes minoritaires de même que ceux bénéficiant d'une faible représentativité. Le phénomène est d'autant plus accentué pour les animaux qu'ils sont privés de toute possibilité d'action politique. La prise en compte de leurs intérêts dans le débat politique est suspendue à la volonté d'êtres humains, incertaine dans son principe comme dans sa détermination. Son incarnation la plus aboutie réside dans la constitution de partis politiques (par exemple, le parti animaliste) résolus à poser la question de la place de l'animal dans notre monde et de la nature des rapports qui devraient s'établir entre les animaux et les hommes. D'autres canaux sont utilisés avec des succès divers.

Pour combattre les violences infligées aux animaux, les formes d'action brutales, réelles ou symboliques, exercent là aussi une certaine fascination (Animal Rights Militia ou le groupe Stop Huntingdon Animal Cruelty illustrent ce terrorisme animalier). L'usage de la force emporte rarement l'adhésion et aurait plutôt tendance à susciter le rejet. D'autres opérations en marge de la légalité sont destinées à lever le voile qui recouvre les activités impliquant les animaux.

Une association telle que L214 se consacre à la défense des animaux utilisés dans la production alimentaire et dénonce, par la captation et la diffusion d'images, les conditions déplorables d'élevage, de transport et d'abattage des animaux, y compris et peut-être même surtout dans les filières affichant une éthique de respect envers l'animal. Comme pour mieux souligner que l'élevage éthique n'existe pas et que rechercher le bien-être de l'animal d'élevage, surtout au moment de son transport et plus encore au moment de son abattage, n'a aucun sens. Le but n'est pas tant de révéler les manquements à cette éthique, qui sont autant d'infractions pénalement sanctionnées, et en imposer le respect par la voie judiciaire que d'obtenir la fermeture des lieux où s'exerce la brutalité envers les animaux. En d'autres termes, à travers ses actions, L214 cherche à provoquer une prise de conscience de l'absurdité du régime alimentaire carné en ce qu'il constitue une impasse éthique, écologique et sanitaire. La médiatisation suscite l'indignation mais échoue souvent à déclencher une révision des dispositifs juridiques (cependant, en France, l'interdiction des animaux sauvages dans les cirques et la pénalisation de la zoophilie actuellement en discussion au Parlement ont été précédées d'une intense mobilisation sociale et militante). Une réflexion sur le statut juridique des animaux peut également provenir d'une mobilisation de l'institution judiciaire à travers ce que l'on nomme outre-Atlantique les contentieux stratégiques *(strategic litigation)*.

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Les contentieux stratégiques désignent les situations dans lesquelles l'action en justice vise moins le règlement d'un cas d'espèce ayant une dimension strictement individuelle que la discussion de problèmes généraux censés participer au bien commun. Ces actions ont pour objectif de faire progresser une cause et d'enclencher une évolution politique, sociale et juridique, par la mise à l'écart d'un texte (en raison de sa contrariété aux droits fondamentaux constitutionnels ou internationaux) ou par l'interprétation renouvelée d'une norme. L'enceinte du tribunal et le rituel judiciaire permettent de rompre le silence des bêtes, pour paraphraser un célèbre ouvrage de la philosophe Elisabeth de Fontenay, et de donner une voix aux animaux soit en tant que partie à l'instance soit en tant que bénéficiaire final de l'action. Même si l'issue est défavorable, la médiatisation de l'affaire permettra de porter certaines idées, de les inscrire dans le champ social et d'ouvrir des discussions politiques (la sensibilité de l'animal, la souffrance liée à sa captivité, l'hypothèse d'une reconnaissance de ses droits…).

Ces contentieux sont d'abord portés par les associations qui, dans certains États comme la France, ont la possibilité d'agir tant au pénal (par l'exercice des droits reconnus à la partie civile) qu'au civil lorsque l'intérêt collectif pour la défense duquel elles ont été constituées a été lésé (en l'occurrence la protection des animaux). Les actions en justice ayant pour finalité la défense de l'animal ont pour point commun de ne pas le considérer comme une simple chose, mais comme un être vivant et sensible. Elles visent à sanctionner les actes de cruauté commis envers les animaux et les souffrances qui leur sont infligées en violation des normes de bien-être définies dans les textes (comme l'Animal Welfare Act (USA) de 1966 ou les règlements et directives de l'Union européenne relatifs à l'expérimentation, au transport, à l'élevage ou encore à l'abattage), ou plus radicalement à demander une protection de l'animal par la technique de la personnalité juridique. Car, comme le relayent certaines associations de protection animale, de plus en plus de spécialistes (éthologues, comportementalistes animaliers) alertent sur des conditions de détention et d'utilisation (cages exiguës, pratique de soumission du dressage, positions ou contorsions inadaptées ou le stress) difficilement compatibles avec le bien-être de ces animaux. Elles dénoncent les lacunes et limites de la règlementation existante (qui est en pratique assez peu contrôlée et qui donnent lieu, lorsque les contrôles sont effectués, à peu de sanctions), défendant ainsi l'idée qu'une simple amélioration des conditions de détention et d'utilisation ne saurait suffire. Il semble dès lors nécessaire de s'acheminer vers une prohibition pure et simple de l'exploitation des animaux. À cette fin, elles militent pour que l'animal soit titulaire de droits spécifiques et puisse en conséquence être soustrait à toute forme d'exploitation. Ces différents objectifs définissent deux stratégies et suivent la ligne de fracture entre ceux qui cherchent à améliorer les conditions de vie de l'animal (welfaristes, mouvement de pensée souvent rattaché à Peter Singer) et ceux qui souhaitent affranchir l'animal de toute forme d'exploitation (abolitionnistes, système dont Gary Francione et Tom Regan sont les théoriciens les plus influents).

Pour ces derniers, l'enjeu du contentieux n'est pas simplement d'obtenir le respect d'une réglementation censée garantir un certain niveau de bien-être à l'animal. L'idée n'est pas d'agrandir les cages, mais de les vider. La mobilisation de l'institution judiciaire repose, à l'instar des contentieux stratégiques destinés à lutter contre les discriminations, les atteintes à l'environnement ou la pauvreté, sur les droits fondamentaux et leur interprétation constructive et évolutive. Ils constituent le principal levier permettant de contester des lois ou de vaincre l'inertie des pouvoirs publics. Le défi à relever est immense, car, *a priori*, le relais des droits fondamentaux est indisponible pour les animaux. Comme le relève le juge Pinto de Albuquerque dans son opinion séparée sous l'arrêt Herrmann (CEDH, Gde ch., Hermann c. Allemagne, 26 juin 2012, n° 9300/07), l'animal n'a pas de droits autrement que métaphoriquement. Du point de vue de la Convention européenne des droits de l'homme, il n'est protégé qu'en tant qu'il est un bien – art. 1-P1 – ou une composante de l'environnement – dans la mesure où le droit au respect du domicile garanti par l'article 8 permet de revendiquer, dans une certaine mesure, le droit à un environnement sain.

Les droits fondamentaux appartiennent aux seuls êtres humains, en leur qualité d'êtres humains. C'est pourquoi ils ont été reconnus aux seuls êtres humains à l'exclusion de tout autre être vivant et en particulier les animaux. Cependant, les raisons qui ont conduit à la reconnaissance de droits fondamentaux ne se résument pas à un code génétique et à une appartenance à une espèce. Elle dérive de la possession de certaines caractéristiques partagées par d'autres êtres vivants. Or, si certaines caractéristiques justifient l'octroi d'une protection particulière, l'honnêteté intellectuelle et la cohérence n'exigent-elles pas que cette protection s'applique à tous ceux qui possèdent ces caractéristiques, indépendamment du degré auquel ils les possèdent (ce qui explique qu'aucun être humain ne perd le bénéfice des droits fondamentaux, quels que soient son état ou sa vulnérabilité) ? La sensibilité et la conscience pourraient justifier suffisamment de doter les animaux d'une personnalité juridique technique les autorisant à jouir des droits fondamentaux adaptés à leur degré de sensibilité et de conscience (de la même façon que les personnes morales peuvent être titulaires de droits fondamentaux, même si elles ne peuvent pas rationnellement les invoquer tous) : le droit à la vie, l'interdiction de la torture et autres atteintes graves à l'intégrité physique, de l'esclavage ou de la privation arbitraire de liberté. Des droits qui protègent des intérêts bien plus qu'une autonomie, une volonté ou un pouvoir.

C'est ainsi que le Projet Grands singes propose de préserver la liberté, le bien le plus précieux des êtres vivants, et de condamner la torture. La Déclaration sur les grands singes anthropoïdes (Great Apes Project) énonce que « *toute souffrance importante infligée délibérément à un membre de la communauté des égaux, que ce soit de façon arbitraire ou au nom d'un bienfait escompté pour d'autres, est tenue pour une torture, et constitue un méfait* ». Tous les droits fondamentaux ne sont donc pas concernés par cette idée d'extension. Il n'est pas question de protéger le droit au respect de la vie privée et familiale, la liberté matrimoniale ou la liberté d'association. Et pourtant, cette idée suscite une très forte opposition parce qu'elle revient à brouiller les frontières entre humanité et animalité[1]. Le problème ne serait donc pas tant de protéger l'intégrité physique et morale des animaux, d'interdire la torture, l'esclavage (v. à cet égard, l'affaire Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment[2]) et les détentions arbitraires que de réaliser cette protection par une technique si profondément liée à l'homme et à sa dignité. Plaider pour le maintien d'une frontière étanche entre les hommes et les animaux quels qu'ils soient n'est pas sans conséquence sur la protection d'intérêts qui sont pourtant communs aux uns et aux autres. Ainsi, pourquoi la torture et les actes de cruauté devraient-ils être envisagés différemment selon qu'ils sont pratiqués sur l'homme ou sur l'animal ? L'absolutisme de la prohibition, solidement ancré à l'égard des êtres humains (y compris dans un contexte terroriste), n'existe pas à l'égard des animaux. La législation européenne en matière d'élevage, d'abattage, de transport et d'expérimentation ne condamne que les souffrances inutiles et précise dans ses annexes quelles sont les souffrances utiles, parfois même dans l'intérêt des animaux.

La démarche de Steven Wise est similaire. Il cherche à libérer les animaux des cages des laboratoires en présentant devant un juge, au nom et pour le compte de l'animal, une requête en habeas corpus. Son argumentation repose également sur l'idée de cohérence. Tous les êtres vivants parvenant à satisfaire au critère justifiant l'octroi de

1. M.-A. Hermitte, *Les droits de l'homme pour les humains, les droits du singe pour les grands singes !*, Le Débat 2000/108. 169.

2. Sur cette affaire, v. notamment, B. J. Mouzourakis, Tilikum's Splash : Lessons learned from animal rights-Based litigation strategies, *Journal of Animal & Natural Resource Law*, Vol. X, p. 223.

droits fondamentaux devraient bénéficier de ces droits. Or, d'après son étude de la jurisprudence américaine, il s'agit de l'autonomie pratique. Pour l'heure, toutes ses tentatives en faveur de chimpanzés et d'éléphants ont échoué, principalement au motif que l'habeas corpus a été institué exclusivement pour les êtres humains et non pour les animaux[3]. Sur le fondement de la Convention européenne des droits de l'homme, même en convoquant le mouvement de faveur qui se dessine dans l'opinion publique à l'égard des animaux et la multiplication des lois protégeant les animaux (interprétation évolutive) ainsi que la rédaction ambiguë de certains droits fondamentaux (quoique les États se soient engagés envers les personnes relevant de leur juridiction - art. 1er CEDH, la formulation des articles 3 et 4 pourrait recevoir une interprétation plus large : « nul » signifiant aucun, ce qui pourrait être compris comme englobant tout être sensible à la torture et à l'esclavage), la probabilité que la Cour de Strasbourg déclare recevable une requête formée au nom et pour le compte d'un animal est très faible, voire nulle. Compte tenu des conséquences qu'emporterait la reconnaissance des droits fondamentaux aux animaux, il semble peu probable que ces contentieux aboutissent à une décision favorable. La prohibition de l'esclavage et le droit à la liberté conduirait à une refondation complète des relations entre les hommes et les animaux. De telles perspectives ne sont pas inconcevables[4], mais il est douteux qu'elles puissent être ouvertes par un juge.

Pour l'heure, toutes ses tentatives en faveur de chimpanzés et d'éléphants ont échoué, principalement au motif que l'habeas corpus a été institué exclusivement pour les êtres humains et non pour les animaux.

Il n'en reste pas moins que les approches de Cavalieri et de Wise reposent sur des fondements éthiques qui sont extrêmement solides. Il n'est donc pas exclu que, ponctuellement, leur argumentation emporte la conviction d'un juge. C'est ainsi qu'en 2016 le Tercer Juzgado de Garantias - Poder Judicial Mendoza a admis la recevabilité d'un recours en habeas corpus formé par une association de protection animale (l'AFADA, association ayant bénéficié de l'expertise de l'association Non-human Rights Project de Wise) en faveur d'une femelle chimpanzé (Cécilia) et a accepté de lui reconnaître la qualité de personne juridique non humaine. La juge Maria Alejandra Mauricio a alors ordonné son transfert du zoo dans lequel elle était tenue en captivité vers le sanctuaire de Sorocaba situé au Brésil. En rendant sa décision, elle a tenu à souligner qu'elle ne déclarait pas que « *les animaux êtres sensibles sont pareils aux êtres humains* » et qu'elle n'élevait « *pas dans une catégorie humaine tous les animaux existants ou la faune et la flore* ». Cependant, elle reconnait « *que les primates sont des personnes juridiques non humaines possédant des droits fondamentaux qui devraient être étudiés et énumérés par les autorités de l'État* »[5], tâche qui dépasse les limites du pouvoir judiciaire.

En France, une autre voie contentieuse, jugée moins audacieuse qu'outre-Atlantique mais tout aussi médiatique, a été préférée par certaines associations de protection animale. Depuis quelques années déjà, One Voice cherche à obtenir la libération d'animaux sauvages détenus dans des cirques dans des conditions impropres à satisfaire leur bien-être et leur santé, et qui auraient davantage leur place dans des lieux de repos ou sanctuaires. À la différence toutefois des contentieux portés devant les juges américains ou argentins, de telles actions ne se fondent pas sur une reconnaissance de ces animaux en tant que sujets de droit, mais plutôt sur la méconnaissance des prescriptions rurales et environnementales imposées aux cirques. Cette stratégie contentieuse a prouvé son efficacité. Par la voie administrative ou judiciaire, les retrait et placement de l'animal peuvent alors être demandés et sont parfois obtenus lorsque la réalité de la maltraitance animale est établie (cas de l'éléphante Maya). One Voice a aussi tenté de soulever l'illégalité de l'arrêté interministériel du 18 mars 2011 en s'appuyant sur le statut d'être sensible reconnu à l'animal par le Code rural et de la pêche maritime (articles L214-1, L. 214-3 et R. 214-17), pénal (articles R. 653-1, R. 654-1 et 521-1) et le Code civil (article 515-14), sans être toutefois entendue par le Conseil d'État. Il ne s'agissait pour One Voice que de défendre en filigrane les droits fondamentaux de ces animaux à une vie compatible avec les impératifs biologiques de l'espèce concernée, dont le bien-être fait partie intégrante, à l'intégrité ou à la vie (sauf état de nécessité contraire), à ne pas être maltraités, ni torturés, ni abandonnés, et enfin à ne pas être utilisés de façon abusive. Signe que grâce aux associations, la théorie des droits fondamentaux de Wise se diffuse, qu'on tente de l'acclimater à notre système juridique et à la relier à l'emblématique article 515-14 du code civil, dont l'interprétation et l'application n'ont pas encore révélé toutes ses potentialités. ■

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3. Cour supérieure du district de Litchfield, 26 décembre 2017, *Non-human rights project*, n° LLI-CV-17-5009822-S ; égal. Cour Suprême de justice de Colombie, 26 juillet 2017, Chucho, n° 17001-22-13-000-2017-00468-02, ACH4806-20174 ; Cour suprême de justice de Colombie, 16 août 2017, Fondation botanique et zoologique de Barranquilla, n° 47924, STL12651-2017. Sur ces décisions, v. O. Le Bot, chron. Droit constitutionnel, RSDA 2017/2. 103, spéc. p. 105 et s.

4. S. Donaldson, W. Kymlicka, Zoopolis. Une théorie politique des droits des animaux, Alma, 2016.

5. Sur cette décision, v. J.-P. Marguénaud, La femelle chimpanzé Cécilia, premier animal reconnu comme personne juridique non humaine. Commentaire de la décision EXPTE.NRO.P-72.254/15 AFADA respecto del chimpancé Cécilia-sujeto no humano rendue le 3 novembre 2016 par le tribunal de Mendoza, RSDA 2016/2. 15.

Animal Law Education: Discipline Whose Time is Now

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Le domaine du droit de l'animal a récemment acquis une nouvelle importance, due en grande partie à l'attention accrue accordée à notre relation avec les animaux à la lumière de l'épidémie de Covid-19. Pourtant, c'est la discipline de l'enseignement du droit de l'animal qui mérite d'être félicitée pour avoir mis à profit de nombreux points d'ancrage au cours du dernier demi-siècle et habilité les praticiens d'aujourd'hui à faire face à l'urgence du moment. À cette fin, cet article décrit le développement de l'enseignement du droit de l'animal aux États-Unis, en Australie et en Inde et offre un aperçu des perspectives de développement et de croissance dans ce domaine.

El campo del derecho animal ha ganado una nueva prominencia en los últimos tiempos, elevado en gran parte por la mayor atención que se presta a nuestra relación con los animales a la luz de la pandemia de Covid-19. Sin embargo, es la disciplina de la enseñanza del derecho animal la que merece crédito por haber aprovechado numerosos puntos de apoyo durante el último medio siglo y haber dado poder a los practicantes de hoy para hacer frente a la urgencia de este momento. Con este fin, este artículo traza el desarrollo de la enseñanza en derecho animal en los Estados Unidos, Australia e India y ofrece información sobre las perspectivas para que el campo prospere y crezca.

No time better attests to the need for animal law education than the present moment. The pandemic has opened the world's eyes to the threat posed by zoonotic diseases, with multiple sources pointing to Covid-19 as having jumped into the human population at a Chinese wet market, where wild animals are often kept in crowded, unsanitary conditions. Indeed, today's prevailing One Health paradigm highlights how human health is inextricably tied to that of animals and the environment we share with them. As such, discussions regarding how to secure our prosperity requires that seats at the table be reserved for animal law advocates.

Numerous other reasons underscore the need to enshrine animal protections into the law. Pets are increasingly being viewed as core members of the family unit. Studies have established the link between human and animal violence such that laws to protect animals run to our benefit. Scrutiny is also being paid to the routine cruelties inflicted upon animals in factory farm settings, as well as how animal-based agriculture is devastating the environment, driving climate change, and fueling species loss. Perhaps most compelling, however, is the recent wave of laws formally recognizing animals as sentient beings who feel pain, experience pleasure, and possess an interiority of the mind that makes them worthy of ethical consideration. This paradigmatic shift has been driven by the pioneers of animal law education, with the United States, Australia, and India having achieved major advancements in a field that many if not most lawyers have still never heard of.

United States

The history of animal law education in the US finds its roots in environmental law, which generally contemplates the interests of animals on a species as opposed to on an individual basis. This change was marked by the first animal law course offering, which was led by an adjunct professor at Seton Hall University in 1977. Today, more than 150 law schools in the US feature animal law in their curriculum – though the regularity of these offerings varies by institution. For most, the offering represents a general elective that touches upon the numerous and surprising ways that the interests of animals are implicated by the legal system. For example, the first animal law casebook dedicates chapters to animal protections in the property, criminal, constitutional, research, estate planning, wildlife, and entertainment contexts, among others. Recognizing the breadth, import, and vibrancy of this field, a handful of law schools have developed full-scale animal law programs.

The first, the Center for Animal Law Studies, was founded in 2008 as a collaboration between Lewis & Clark Law School and the Animal Legal Defense Fund. At present, the Center for Animal Law Studies (CALS) features over twenty courses, with offerings as diverse as companion animal law, animals in agriculture, animal rights jurisprudence, aquatic animal law, animal law legislation and lobbying, animals in research and testing, criminal animal law, international animal law, and more. In addition, CALS is home to the world's first animal law clinic, which allows students to engage directly with clients and put animal law theory into practice. The program has developed additional subject-specific clinics focused on international wildlife and farmed animal litigation. In 2012, CALS launched the world's first advanced animal law degree program, paving a pathway for not just US but also foreign attorneys who may not have access to animal law education in their home jurisdiction to specialize in this burgeoning field.

The list of US law schools that have developed an animal law program has grown to include Michigan State, Harvard, George Washington University, Yale, Oklahoma City University, the University of San Francisco, and more. In addition to developing courses beyond the general survey, each school has cultivated its own character and focus. For example, Michigan State boasts arguably the country's most robust animal law database, which features noteworthy cases and legal commentary. Along with its animal law clinic, Harvard's program features an array of fellowships designed to tackle today's most pressing animal protection issues, such as how to combat the threat posed by wet markets. Together, these and other vanguard institutions have affirmed animal law's place in a holistic curriculum.

Animal law education is also thriving outside of the classroom. To date, the Animal Legal Defense Fund has created a network of over 200 student chapters at different universities to connect student advocates and advance animal legal education. In its collaboration with the Center for Animal Law Studies, it also hosts the annual Animal Law Conference, which has just celebrated its 27th year, making it the longest running of its kind. Other conferences have been created to meet this rising demand. Also working outside the halls of academia, most of the country's state bar organizations feature dedicated animal law sections. As the national level, the American Bar Association boasts two active animal law committees of its own. Through conferences, symposia, webinars, and more, these organizations are expanding the number of opportunities to educate lawyers, advocates, and others outside the physical classroom.

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Australia

With the Australian Capital Territory having enshrined animal sentience into its law in late 2019, Australia stands at the forefront of animal protection legislation. The history of formal animal law education in the country dates back to 2005, when the University of New South Wales offered the nation's first animal law elective. Today, 16 of Australia's 38 law schools feature animal law in their curriculum. Like with the US, the regularity of these offerings varies by institution; however, the number and frequency of animal law courses promises to increase as the field continues to gain critical attention. Currently, the vast majority of animal law offerings come in the form of general survey courses that address complex animal law issues in the farming, wildlife, cruelty, research, and property contexts, among others. Although clinical opportunities are not yet part of the terrain, adding depth and complexity to this landscape is the University of Melbourne's new comparative animal law and policy course, which scrutinizes modern-day animal protection issues from the US and Australian perspectives.

Today, 16 of Australia's 38 law schools feature animal law in their curriculum.

Working to further develop this field is the animal protection institute Voiceless. An early leader in this space, Voiceless has cultivated a plethora of animal law resources and expertise to educate and empower instructors, scholars, and advocates. In addition, the organization hosts an annual animal law workshop and highlights the field's significance at leading institutions, such as with its contributions to Bond University's Professional Legal Education Conference in 2020.

India

India has long been heralded as a global leader in animal protection. For decades its constitution has required citizens to demonstrate compassion for living creatures. High courts in multiple states have affirmed the personhood status of all animal species, thereby laying the potential for animals to see litigation brought in their names. Despite these momentous advancements, few law schools in India feature animal law in their curriculum. Rather, the interests of animals are often confined to environmental law departments, where discussions usually center on conservation, habitat, and biodiversity issues as opposed to animal welfare concerns.

While the exact number of animal law courses taught in the country is difficult to pinpoint, animal law electives have begun to emerge. A course devoted to animal welfare law is now part of the regular curriculum at Jindal Global Law School. Although similar offerings may be few and far in between, India has just witnessed the development of its very first animal law program. Launched at the National Academy of Legal Studies and Research (NALSAR) in Hyderabad in 2018, the Animal Law Centre offers a post-

graduate diploma on animal protection. The slate of courses that comprise the program include an offering on general animal welfare, animal law and ethics, animal cruelty, and wildlife. Given the dearth of animal law courses nationally, NALSAR's Animal Law Centre presents an unparalleled opportunity to participate in animal law workshops and to engage with magistrates, law enforcement, and stakeholders in the government. Supported by the Humane Society International, the Animal Law Centre offers a foundation for advocates to advance animal welfare in a country where the courts and legislatures take matters of animal protection seriously.

Conclusion

If recent trends hold, the field of animal law will continue to flourish as the world pays increasing attention to how the interests of animals matter morally, as well as how they complement our own.

Although at different stages in their development of animal law education, the US, Australia, and India have witnessed considerable achievements in normalizing animal law within and outside the academy and are effectively equipping new generations of advocates with the expertise necessary to tackle some of the most pressing issues of our time. ■

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Protection of Biodiversity in Australia: Is Killing Cats an Effective and Ethical Approach?

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Les chats classés comme sauvages sont considérés comme un problème environnemental majeur en Australie en raison de leurs effets néfastes sur la biodiversité indigène. Les régulateurs se tournent fréquemment vers l'empoisonnement, le tir et le piégeage mortel, faisant du meurtre l'objectif réglementaire. Dans certaines juridictions, cette approche s'est étendue aux chats errants et aux chats décrits comme du gibier. Pourtant, peu de preuves montrent que, sur le long terme, l'abattage à grande échelle a conduit à une réduction du nombre de chats sauvages ou errants, ou à une amélioration des problèmes environnementaux. Au lieu de cela, la mise à mort soulève la difficile question du bien-être des chats qui empiète sur la gestion de l'environnement, appelant à une concentration renouvelée sur l'objectif d'atténuation des dommages environnementaux, plutôt que de souligner le nombre de chats tués.

Los gatos clasificados como salvajes se consideran un problema ambiental importante en Australia debido a sus efectos perjudiciales sobre la biodiversidad nativa. Los reguladores recurrirán con frecuencia al envenenamiento, disparos y trampas mortales, haciendo del asesinato el objetivo regulatorio. En algunas jurisdicciones, este enfoque se ha extendido a los gatos callejeros y a los gatos como animales de caza. Sin embargo, hay poca evidencia que muestre que, a largo plazo, la reducción conduce en gran medida a una reducción en el número de gatos salvajes o callejeros, o a una mejora de los problemas ambientales. En cambio, la matanza plantea el difícil problema del bienestar de los gatos que incide en la gestión ambiental, y exige un enfoque renovado en el objetivo de mitigar el daño ambiental, en lugar de resaltar el nombre de sus gatos.

Cats are an introduced, or non-native species, who were brought to Australia by the first fleet in 1788. Towards the end of nineteenth century, they were classified as "the enemy of the rabbit" and deliberately released by the thousands, in an attempt to control another introduced species, the European rabbit. However, observers quickly noted that instead of attacking rabbits, cats also attacked native birds and animals. This set the scene for a regulatory confrontation, which by the late twentieth century had crystallized into the question of how to manage feral cats to protect native biodiversity, while still taking cat welfare into account.

For management purposes, definitions and descriptions of cats in Australia follow the feral/stray/domestic hierarchy set out in the 2015 Threat Abatement Plan for Predation by Feral Cats (2015 Threat Abatement Plan), published by the Commonwealth government:

- ***feral cats*** are those that live and reproduce in the wild (e.g. forests, woodlands, grasslands, deserts) and survive by hunting or scavenging; none of their needs are satisfied intentionally by humans;
- ***stray cats*** are those found in and around cities, towns and rural properties; they may depend on some resources provided by humans but are not owned;
- ***domestic cats*** are those owned by an individual, a household, a business or corporation; most or all of their needs are supplied by their owners.[1]

These descriptions and definitions establish how and where cats live their lives, identifying the presence of cats in the Australian landscape. However, for feral cats and in some jurisdictions stray cats, these descriptors also act as regulatory and ethical filters, which attribute environmental harm to the mere presence of cats. Politically, this justifies killing, so that regulators, and conservation biologists in general, aim for eradication of feral cats by continuous use of lethal methods, such as trapping, hunting and poisoning. However, broadscale killing rarely mitigates environmental harm in the long-term. The latter can be attributed to the fact that cat populations tend to bounce back after eradication operations, as well as the fact that killing cats deals with only one of the many reasons for decline in native biodiversity.

From an ethical perspective, the focus on killing feral cats also influences the choice of methods to control stray cats [...].

Moreover, from an ethical perspective, the focus on killing feral cats also influences the choice of methods to control stray cats, rejecting non-lethal approaches such as Trap-Neuter-Return (TNR), which involves capturing and neutering cats, then returning them to their original place of capture. Animalists support the integration of non-lethal management methods, including TNR, as part of a suite of measures to manage cats in urban and peri-urban areas.[2] Some ecologists and biologists, such as Daniel Ramp, Mark Bekoff and Arian Wallach also question wholesale killing as the preferred management approach, ascribing instead to compassionate conservation, which rejects the normalization of killing to protect biodiversity at large.[3]

Against this backdrop, feral cat management is framed as an environmental problem and its focus on killing raises two issues: first, using the concept, or term "feral" as a proxy for environmental harm; and second, using the number of cats killed as a measure of success in environmental governance. These issues are also relevant to broader inquiries concerning the ethics of wholesale killing and the entrenchment of killing as the most effective management option.

With respect to the use of terms, Australian jurisdictions have largely centered on cats' relationship to humans, including whether the cat is owned, its degree of reliance on humans for resources and where the cat is located, either away from humans in outback areas, or near humans in urban and peri-urban regions. As already mentioned, classification of cats as feral, stray or domestic emphasize the "how and why" of cats' lives, which are relevant to

1. Department of the Environment, *Threat Abatement Plan for Predation by Feral Cats*, Commonwealth of Australia, 2015, 7, available from http://www.environment.gov.au/system/files/resources/78f3dea5-c278-4273-8923-fa0de27aacfb/files/tap-predation-feral-cats-2015.pdf.

2. Joan E Schaffner, Geoffrey Wandesford-Smith, Peter Joseph Wolf, Julie Levy, Sophie Riley and Mark James Farnworth, "Sustaining Innovation in Compassionate Free-Roaming Cat Management Across the Globe: A Decadal Reappraisal of the Practice and Promise of Trap-Neuter-Vaccinate-Return (TNVR)" (editorial) (2019) *Frontiers in Veterinary Science*, doi: 10.3389/fvets.2019.00365.

3. Arian D Wallach, Chelsea Batavia , Marc Bekof (including Daniel Ramp) et al, "Recognizing Animal Personhood in Compassionate Conservation", (2020) 34 (5) *Conservation Biology,* 1097, https://conbio.onlinelibrary.wiley.com/doi/pdfdirect/10.1111/cobi.13494.

identifying the location or presence of cats, but do not necessarily identify their potential for environmental harm. Nevertheless, the practical effect is to create a regulatory hierarchy, where domestic cats, that is cats who are owned, are the most protected and feral cats the least protected. Although at first glance, categorizations of feral and stray cats are somewhat similar because they are not owned, their management differs because stray cats are not automatically earmarked for destruction. A typical example of this type of regulation is found in section 34 of the *Cat Act 2011* (WA), which provides that feral cats are to be destroyed immediately, whereas operators of cat management facilities may try to rehome stray cats. In this way the classification of a cat as feral becomes a substitute for ascribing environmental harm, resulting in detrimental consequences for feral cat welfare.

What is more, the differences among the definitions, which are based on cats' relationships to humans rather than biological distinctions, side-step meaningful engagement with cat welfare, particularly for feral cats. This point was acknowledged by the Victorian Department of Sustainability and Environment in their management plan for *Predation of Native Wildlife by the Cat Felis catus, Action Statement*, where they noted that "*[a]ll Cats are biologically the same, whether they are domestic (owned) pets, roaming unowned Cats (strays) or feral Cats*".

These issues are exacerbated in jurisdictions such as Queensland, that classify all cats as either owned (domestic), or unowned, effectively dispensing with the stray classification and extending the feral (unowned) classification. The *Biosecurity Act 2014* (QLD) achieves this outcome by classifying animals, including cats, as "biosecurity matter" or "restricted matter". The former term describes species, pathogens and contaminants that pose a risk to human, animal or environmental health; while "restricted matter" consists of a list of species, including non-domestic cats, set out in schedule 2 of the act. Although such terminology might suggest that classifications focus on preventing environmental harm, the fact that "restricted matter" refers to unowned cats, indicates that regulators are still concerned with the how and where of cats' lives and their relationship to humans. Accordingly, rather than identifying and managing the potential for environmental harm, the Biosecurity Act aims to control how society relates to cats.

Consistent with this line of thought, sections 42-45 of the Biosecurity Act create a range of offences for feeding or moving restricted matter (feral and stray cats), which means that members of the public and veterinarians who treat or care for these animals breach the law. This of course, prohibits the use of non-lethal approaches such as TNR, particularly for managing stray cats.

In other jurisdictions, regulators use terms such as pest, or game animal to validate killing feral cats as part of management of introduced species. For example, sections 5 and 17 of the *Game and Feral Animal Control Act 2002* (NSW) allow shooting of cats living in the wild. Although not explicitly articulated, the underlying premise is to provide a means of eradicating feral cats, solely on the basis that they are living in the wild, which assumes the potential for environmental harm, opening yet another regulatory pathway to wholesale killing.

Yet, wholesale killing has many disadvantages, including ignoring the fact that eradication of feral and stray cats from mainland Australia is not a feasible option. This drawback is not limited to the Australian jurisdiction, but is common in many countries where introduced animals have established themselves for an appreciable length of time.[4] In the case of cats, this means that killing will not reduce populations in the long-term unless the number of cats killed surpasses the replacement rate, and this is difficult to gauge given uncertainties surrounding population numbers, and the phenomenon of population bounce back, where numbers of animals increase following culling operations.

Nevertheless, the focus on raw killing statistics to gauge the success of strategies and programs is widespread. Australia's Threatened Species Strategy, published in 2015, for example, aimed to kill two million feral cats by the end of 2020, yet did not explain how killing this number of cats would improve biodiversity outcomes. In an analogous manner, a case study involving Brisbane City Council observed that one of its programs had eradicated 391 cats and was deemed a success because of "a reduction in public complaints about stray cats and… anecdotal increases in sightings of… bush stone curlews".[5] The study did not provide census statistics, or refer to programs that may have been implemented concurrently by Brisbane City Council to deal with threats to bush stone curlews, such as predation by foxes. At the same time, a different study on public perceptions of eradication programs conducted by Brisbane City Council, concluded that 79% of respondents would choose TNR to manage stray cats, with only 18% preferring existing lethal programs.[6]

Surveys on public perceptions of cat management in Australia and New Zealand reveal a complex relationship between classifications, people's experience with cats, and the legitimacy of regimes. Above all, participants viewed environmental concerns as taking precedence over individual animal welfare, although they were also reluctant to support lethal measures against stray cats in comparison to feral cats. On this last point, participants felt empathy for cats depending on whether they had kept a cat as a companion animal. If they had, empathy extended to domestic and stray cats, but not to feral cats, with whom they had no contact. As Farnworth *et al* conclude, this "*may result in a*

4. Pablo García-Díaz, Phillip Cassey, Grant Norbury, *et al*, "Management Policies For Invasive Alien Species: Addressing The Impacts Rather Than The Species" (2020) *BioScience*, biaa139, 1, 1, https://doi.org/10.1093/biosci/biaa139.

5. John L Read, Chris R Dickman, Wayne S J Boardman and Christopher A Lepczyk, "Reply to Wolf et al.: Why Trap-Neuter-Return (TNR) Is Not an Ethical Solution for Stray Cat Management", (2020) 10 *Animals* (1525), 1, 5, doi:10.3390/ani10091525.

6. J Rand, A Hayward and K Tan, "Cat Colony Caretakers' Perceptions of Support and Opposition to TNR" (2019) 6 (57) *Frontiers in Veterinary Science*, https://doi.org/10.3389/fvets.2019.00057.

reduced capacity to empathize with the welfare of cats in different groupings… provid[ing]… an argument against the creation of different legislative precedents based on descriptive constructs. This is of particular importance if cats as a species, irrespective of their human-defined status, are going to be humanely controlled."[7]

The issue of human management is important for cat welfare, where the main control methods are poisoning and shooting. Strategies and management plans, such as the 2015 Threat Abatement Plan, advocate the use Sodium fluoroacetate (1080), a poison that has been critiqued for its low level of humanness. What is more, there is no antidote to Sodium fluoroacetate (1080), making residents in peri-urban areas reluctant to use it for fear of ingestion by their pets and other domestic animals. The humaneness of shooting depends on the skill and experience of the shooter, otherwise non-fatal injuries lead to slow, painful deaths. These disadvantages confirm that alternative and non-lethal means of controlling unwanted cats are needed.

The issue of human management is important for cat welfare, where the main control methods are poisoning and shooting.

Moreover, while the quote from Farnworth *et al* refers to "legislative precedents", it could equally refer to regulatory precedents which, as already discussed, use feral, and to a lesser extent, stray classifications as a proxy for environmental harm. A recent study on biodiversity decline in the Top End (Northern Territory) of Australia identified this problem, remarking that killing feral cats was not necessarily the best approach to protecting native species: "*Our results suggest the best way to manage the impact of cats in this region may not be to simply kill cats, which is notoriously difficult across vast, remote landscapes. Instead, it may be more effective to manage habitat better, tipping the balance in favour of native mammals and away from their predators.*"[8]

This conclusion indicates that targeting feral cats, merely because they live in the wild, is unlikely to mitigate harm against native biodiversity. Other strategies such as managing habitat and reducing human impacts on biodiversity will achieve better results.

Indeed, Appendix A of the 2015 Threat Abatement Plan, contains some thirteen pages of lists of threatened species and the impacts on those species of a range of factors, including feral cats.[9] Yet, even a cursory glance at the lists reveals that threatened species face multiple hazards to their survival. The endangered Mahogany Glider faces seven threats, which are equal to or greater than the threats presented by feral cats, including high level threats from inappropriate fire regimes and habitat destruction. Similarly, the Bridled Nail-tail Wallaby, faces 10 threats in total, including five threats that are equal to or greater than the threats presented by feral cats. The latter include high level threats from climate change, habitat loss and resource depletion due to livestock and other feral herbivores. Overall, human impacts account for almost 60% of the total risks to threatened species. Consequently, even if large numbers of feral cats were killed, that action does not take into account related threats deriving from human activity.

In reality, it is counter-productive for regulators to deal with loss of biodiversity in a piece-meal way by solely targeting feral cats. This assumes that the presence of cats equates to environmental damage, and accepts the veracity of the corollary, that killing cats will remove that damage. If regulators are serious about controlling the impacts of feral cats, they need to look at the range of threats that contribute to environmental harm and acknowledge that regulatory situations vary, with urban areas requiring different approaches from outback areas. The focus on killing is disadvantageous, not only because it lacks flexibility in management approaches and side-steps cat welfare, but importantly, because it has not generally been shown to achieve positive outcomes with respect to the protection of biodiversity.[10] ■

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7. Mark James Farnworth, Joanna Campbell and Nigel John Adams, "What's in a Name? Perceptions of Stray and Feral Cat Welfare and Control in Aotearoa, New Zealand", (2011) 14 (1) *Journal of Applied Animal Welfare Science,* 59, 70.

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How to Make Constructive Changes in Big Corporations

Temple Grandin

Temple Grandin sait comment améliorer les normes de bien-être animal dans l'industrie de l'élevage. Ayant travaillé pour McDonald's Corporation, Wendy's International et Burger King, elle décrit l'importance d'un audit de bien-être à l'aide d'un système d'évaluation simple qui surveille les comportements allant de la typologie des cris du bétail à l'efficacité de l'étourdissement, et elle explique que le fait d'avoir amené les dirigeants et les avocats à observer ce qui se passait sur le terrain a incité les grandes entreprises à ne plus collaborer avec les fournisseurs incapables de respecter les normes d'audit et de bien-être. Elle décrit également l'importance pour les entreprises de publier leurs efforts positifs sur leur site Web.

Temple Grandin sabe cómo mejorar los estándares de bienestar animal en la industria ganadera. Después de haber trabajado para McDonald's Corporation, Wendy's International y Burger King, describe la importancia de una auditoría de bienestar utilizando un sistema de evaluación simple que monitorea los comportamientos que van desde la tipología de los gritos del ganado hasta la efectividad del aturdimiento, y explica el hecho de haber llevado a líderes y abogados a observar lo que sucedía en el terreno incitó a las grandes empresas a dejar de colaborar con los proveedores de la lista que no podían cumplir con las normas de auditoría y de bienestar. También describe la importancia de que las corporaciones publiquen sus esfuerzos positivos en sus sitios web.

Introduction

Large corporations, who use their tremendous buying power wisely, can bring about great constructive improvements in how animals are treated. In my work, I have advised large companies on animal welfare. A program I introduced at McDonald's Corporation and Wendy's International was successful because it had a simple to understand assessment method, and upper management fully supported it. The assessment method was also cost effective and very objective, and it provided clear guidance on what were acceptable and unacceptable practices.

I have worked in the livestock industry for almost 50 years, and I have served as a consultant on livestock and poultry welfare for almost every U.S. meat company. For the first half of my career, I designed equipment to improve handling of cattle and pigs. My approach at that time was to correct problems with poor animal treatment with engineering and equipment design. Engineering can solve some problems, but it does not replace good management.

In 1999, I began working with McDonald's Corporation, Wendy's International, and Burger King to improve their programs of inspecting beef, pork, and poultry processing plants to ensure high standards of animal welfare. I provided them many ways to improve their programs. They included an easy to implement simple assessment tool, with simple steps that were cost-effective, and the use of objective tools.

These programs were effective because I used a very simple assessment system that I had originally developed for the United States Department of Agriculture (USDA), along with the Food Safety and Inspective Service (FSIS) and the American Meat Institute (AMI). The scoring system measured outcomes of bad practices. For example, most of the problems with poor stunning that failed to render cattle instantly unconscious were due to poor equipment maintenance. The audits forced plant management to supervise employees and to repair equipment they already had. All three of these companies hired me to train their auditors to perform the welfare audits.

During 1999, I observed more improvements in animal handling and stunning than I had seen in my entire career. Big buyers have the power to bring about rapid improvements when they enforce standards both within their company and from their suppliers. Another reason the program I implemented was effective was that it was relatively

easy to implement, with little to no costs in most cases. For McDonald's, only three processing plants out of 75 had to buy expensive new equipment or new buildings. Huge improvements occurred in all the other plants due to better supervision of employees, improved equipment maintenance, and simple changes, such as adding non-slip flooring.

The Legal Profession's Role

The role of the corporate legal departments was interesting. A lawsuit nicknamed "McLibel" forced McDonald's executives to address animal welfare concerns. A small environmental group in the United Kingdom had published a brochure that accused McDonald's of doing everything badly, ranging from destroying the rain forest to torturing animals. McDonald's corporate lawyers sued the environmental group in 1990 and spent a lot of money. McDonald's won the lawsuit on claims that it was responsible for rain forest destruction. However, McDonald's lost the lawsuit on its claims that it did not mistreat pigs and chickens. The McLibel lawsuit forced McDonald's to look at animal welfare. Lawyers and courts helped make McDonald's aware of what it did wrong.

It was interesting to watch the animal welfare issue change from an abstraction that was delegated to the legal department to something real.

I was hired to take McDonald's executives and the executives of two other companies on their first tours of farms and slaughter plants. It was interesting to watch the animal welfare issue change from an abstraction that was delegated to the legal department to something real. The reactions of the executives were just like the television show, *Undercover Boss.* Most of the practices the executives observed were fine, but when they saw something really bad, they were horrified. Animal welfare issues were now real, and they were going to do something about it.

I will never forget the day when one of the executives watched an emaciated, decrepit, old lame dairy cow walk up the ramp of a slaughterhouse and go into their product. They were now motivated to use their immense buying power to make changes. At this point, a lawsuit that Mc Donald's had partially lost had forced McDonald's to act.

Lawyers on both sides can play a role in making improvements. Lawyers at law firms and non-governmental organizations can bring about change by bringing and defending lawsuits such as the McLibel suit. Lawyers working for companies can help them understand what they need to do so they do not get sued. But lawyers cannot do that by simply working behind their desks. Lawyers also need to see how their clients really work in their facilities and operations, such as by touring farms and slaughter plants with their clients, including with the executives.

How Good Change Happens

The next step was working with the McDonald's employees in the supply chain management department. These people purchase the meat and handle contracts with suppliers. An executive who worked in corporate social responsibility supported my efforts. Now I was doing more trips to large slaughter plants and my job was to train the McDonald's food safety auditors about animal welfare. Since the early 1990's, McDonald's had been conducting food safety audits of large meat processing plants. This program was initiated after the Jack in the Box *E. coli* food poisoning lawsuits were filed in 1993. This is another situation where the work of lawyers forced huge changes in corporate practices. I was in many big beef plants at this time, working on equipment design and installation. It was amazing how food safety practices for cleanliness really improved.

At first, the food safety auditors were skeptical about animal welfare and some of them thought it was silly. I showed them how to use the simple objective scoring system. Two of the auditors became really interested in doing welfare audits. Within six months, they reached a massive tipping point. The event that made the entire industry take the welfare audits seriously was the delisting of a major large plant. It was removed from the McDonald's approved supplier list.

What started out as auditor training turned into a huge industry changing program. Unfortunately, this all occurred with no input from the legal department. It happened so fast that it flew under the legal radar. Within six months, Wendy's and Burger King started similar programs. I was hired to train their auditors and I made sure that they used the same standard. By the end of the year 1999, the slaughter plants were greatly improved. A new standard had been set for the entire industry.

To avoid anti-trust concerns, I knew the rules. I made sure we never discussed the price of beef or how much beef was purchased from each plant. Another factor that made this program successful was that the scoring tool was very objective and not subject to the opinions of the auditor. On most of these early audits, the plant manager also scored with me. Since the scores were numerical, we both got the same scores. The plant management knew exactly what was required. They had to attain five numbers and have no acts of abuse.

Score for Cattle	Minimum Passing Score
Stunning efficacy percentage	95%
Insensibility unconsciousness percentage	100%
Vocalization of cattle Percentage that remained silent	97%
No falls during handling percentage	99%
No electric prod use percentage	75%

Another factor that made the program successful is that a good welfare score could be attained in most plants without having to install expensive new equipment. I practiced the concept of reverse conflict of interest. I designed expensive equipment, but I used my design knowledge to make existing equipment work in many of the plants.

Communicating Good Works

I was really pleased with all the good changes. Unfortunately, 20 years ago, very little information about this appeared on the company website. Many times, I travelled on airplanes and discussed my animal welfare work with fellow airline passengers. Their response usually was, "*You have to be kidding! McDonald's does that*?" Today, communication on company websites is much better, but there is still room for improvement.

In January 2021, I looked at websites for Tyson, McDonald's, Perdue, and Maple Leaf Foods. Some websites do a better job of talking about the good things they do than others. Several websites were not updated in 2020 due to Covid-19. Perdue Farms had some of the best websites. I participated in an animal welfare judging contest where families who raised broiler chickens invented environmental enrichment devices. Chickens like to have places where they can either perch or hide. The families really got involved, and their children helped make innovative ramps and other devices. When I Googled this event, I found write-ups in the local papers. The Perdue website also had a November 2020 update on the producers who had the best pasture poultry farm.

The Maple Leaf Foods website had excellent photos of pigs in housing where gestation crates had been removed. Unfortunately, it had not been updated in 2020. This is probably due to Covid-19. The McDonald's website discussed that they were conducting commercial trials of welfare-friendly systems, but it was quite vague. The Tyson website had some good information, but it was also vague. A good friend of mine who works in public relations recently told me that she is really frustrated with her new boss, who is a lawyer. Her lawyer boss wants to reduce her candid effective communication. It is likely that her company's excellent website may turn into vague nothing when it gets updated. This is an example of a lawyer telling a client what they cannot do rather than giving them advice on what they can do and how they can do it legally and ethically. This is really a lost opportunity for the client.

Another company with whom I consulted had a fabulous online conference where their animal welfare specialists in different parts of the company presented their projects for improving the welfare for chickens, pigs, or cattle. There were about 30 presentations and the Chief Executive Officer (CEO) was on the entire call. It is groundbreaking that the CEO would be listening to the ideas of a yard manager at a beef slaughter plant. Each person had five minutes to present their project. The problem is that nobody outside this company knew about this meeting. A synopsis of the meeting should have been put on the company's website.

Out of the 30 presentations, there was very little information that would be legitimate confidential information. A lawyer trying to bring value to the company could have removed the confidential information and allowed the company to publicly share this and create goodwill for the company. Two-thirds of the projects were on better management practices or simple but effective improvements, such as non-slip rubber mats installed on an unloading

ramp. There were a few talks that discussed the development of new technologies. These obviously should not be published on the company website. What should be published is that they had this innovative meeting. The frontline management people had become fully engaged with animal welfare and the CEO was listening to them.

How to Stay Out of Trouble

On making claims and statements on websites, the lawyers are too timid, and the CEO may want to make big claims that are difficult to substantiate. This is especially a problem with sustainability and ambitious claims about carbon reduction. In the February 4, 2021 edition of *Food Dive*, it was reported that Smithfield is being sued by Food and Fiber Water Watch for unsustainable practices. Previously, I had read about Smithfield's program to capture methane from swine farm lagoons to use for energy. This is the kind of project I like because it helps solve a specific problem.

On making claims and statements on websites, the lawyers are too timid, and the CEO may want to make big claims that are difficult to substantiate.

The lawsuit states that this technology does not address the root causes of greenhouse gas emissions or other pollution. If the root cause is raising pigs, then Smithfield is in a quandary. However, if you are raising pigs, capturing methane from the lagoons with giant rubber covers is a great technology. The lawsuit also cites other concerns about water pollution. Maybe these other allegations are true, and maybe they are not. The managers better get out of the office and find out what is really happening. I would recommend to Smithfield to open the door and show off their methane capture, and they may have to fix some water pollution issues. One of the reasons the original McDonald's welfare program was started was because Vice President level executives were out in the field seeing what was really happening.

When I look at the Smithfield issues, there are two very different issues. Methane capture is a new technology that should be used. The allegations about water pollution do not involve new technology. If there are problems with water pollution, it is likely to be a sloppy management issue.

It would be very sad if the good work Smithfield is doing with methane capture was delayed because there were some farms with poor waste management that caused water pollution. When we did the initial McDonald's audits, three plant managers had to be fired. When the new manager came in, their practices quickly improved. This clearly showed the importance of management maintaining high standards.

Conclusion

It is perilous for the livestock industry to be indifferent to animal welfare standards. Following adverse publishing in the 1990s, large corporations became serious about improving the treatment of animals, using appropriate and well-designed equipment, and utilizing simple assessment tools to achieve an animal audit.

The improvements on animal welfare were achieved, in large part, because executives and lawyers began to see these operations in person, where they could readily observe problems. Firsthand knowledge then had the effect of large corporations delisting problematic suppliers. More can be gained if corporations were to publicize how they take animal welfare seriously. ■

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Sue Rumbaugh and Kanzi the Bonobo: Lighting the Path Forward and Creating the Predicates of Change

Barbara J. Gislason

Bien que l'objectif central de cet article soit l'interview de Sue Savage-Rumbaugh, nous reviendrons d'abord sur certaines théories philosophiques et scientifiques sur la conscience. Nous examinerons ensuite, de diverses manières, les préjugés humains et les capacités supérieures des grands singes. À cette fin, nous verrons comment les humains ont évolué au sujet des autres animaux grâce aux contributions de Sue Savage-Rumbaugh, Lucy, Kanzi et Panbanisha – un humain, un chimpanzé et deux bonobos, respectivement. Dans ce contexte, d'autres questions émergent : y-a-t-il d'autres espèces intelligentes parmi nous ? Dans l'affirmative, comment l'État de droit devrait-il évoluer ? La conscience est à la fois tangible et intangible. Il y a des considérations à la fois philosophiques et biologiques. La meilleure compréhension de l'intelligence animale a engendré des débats juridiques sur la notion de conscience en termes de droits et d'obligations juridiques. Cet article plaide pour une réévaluation de la distinction entre conscience humaine et conscience animale.

Aunque el enfoque central de este artículo es la entrevista de Sue Savage-Rumbaugh, primero consideramos teorías filosóficas y científicas seleccionadas sobre la conciencia. Luego observamos, de varias maneras, el sesgo humano y si los grandes simios tienen capacidades de orden superior. Con ese fin, consideramos cómo los humanos han evolucionado en sus ideas sobre otros animales a través de las contribuciones de Sue Savage-Rumbaugh, Lucy, Kanzi y Panbanisha: un humano, un chimpancé y dos bonobos, respectivamente. En este contexto, en última instancia, surgen estas preguntas: ¿Hay otras especies inteligentes entre nosotros? Si es así, ¿cómo debería evolucionar el Estado de derecho? La conciencia es al mismo tiempo tangible e intangible. Hay consideraciones tanto filosóficas como biológicas. La comprensión cada vez mayor de la inteligencia animal ha generado una discusión sobre lo que significa conciencia en términos de derechos y obligaciones legales. Este artículo sostiene que la distinción entre la conciencia humana y la de « otros » animales debería revalorarse.

"When I was young, I visited the great ape bonobo, Kanzi. When I asked him what he wanted, Kanzi used his symbol board to tell me to get a blue ball and yellow bird. When I returned from the store with only a blue ball, he rejected the ball and looked disappointed. Then, while Kanzi watched, I found a yellow marker and drew a picture of a bird on the blue ball. Kanzi then took the ball from me enthusiastically." Cody Flaherty

Introduction

In this article, in addition to the Sue Savage-Rumbaugh interview, we begin by first considering selected philosophical and scientific theories about consciousness. We then look, in various ways, at human bias and whether great apes have higher-order capabilities. To that end, we consider how humans have evolved in their ideas about other animals through the contributions of Sue Savage-Rumbaugh, Lucy, Kanzi, and Panbanisha – a human, chimpanzee, and two bonobos, respectively. In this context, ultimately, these questions emerge: Are there other intelligent species among us? If so, how should the Rule of Law evolve?

Philosophy and Science

Aristotle, the Greek philosopher, wrote an influential work, *The History of Animals*. He attributed a sensible soul of perception to "lower" animals. Humans also had a *sensible* soul, but humans alone were accorded a rational soul capable of *rational* thought.

In the 17th century, the French philosopher René Descartes declared, "*I think, therefore I am.*" Accordingly, humans must exist to doubt their own existence. Descartes' advanced ideas including the concept the universe was established by "the great clockmaker," and humans possessed a mind and body, while other life forms were only matter, a theory now known to us as Cartesian Dualism. As volition, cognition, and reason were in the mind, which only humans had, other animals' lives were relegated to an unconscious mechanistic trajectory, whereby their pain, if any, was not like humans' pain. The implications of

Descartes' views regarding animals and the harm they caused were later criticized by 19th century Nobel Prize winner and philosopher, Albert Schweitzer.

In contrast to Descartes, 18th century English philosopher David Hume and 19th century English evolutionary theorist Charles Darwin later said that animals possessed higher-order capabilities. Hume said that because human and animal behaviors are similar, and we attribute to human actions that humans form associations among ideas, we should attribute to other animals' actions the same associations among ideas. To Darwin, the difference of intelligence between humans and other animals was one of degree and not of kind.

These 18th and 19th century philosophers more recently influenced Sue Savage-Rumbaugh. She was also intrigued by 20th century French philosopher Albert Camus, who argued that the function of consciousness was not the retrieval of truth, but the higher-order synthesis of meaning, which for him was understood in a human way.

Old views that consciousness separated humans from other life forms are subject to increasing scientific challenges. In 2012, prominent scientists signed the "Cambridge Declaration of Consciousness" in the presence of the late physicist Steven Hawking. This Declaration represented a consensus that "*humans are not unique in possessing the neurological substrates that generate consciousness.*" Neuroscientist Antonio Damasio has further advanced the idea of neural correlates of consciousness, and he demonstrated how emotions influence cognition.

By 2017, at the behest of the European Food Authority, the French National Agronomic Institute conducted a multidisciplinary scientific assessment about animal consciousness based upon a large scientific database. It found that a collection of behavioral, cognitive, and neurobiological studies supported the notion that a "*high content of consciousness does occur in some of the species studied so far.*" In addition, according to Emily Sohn's 2019 article, *Decoding and the Neuroscience of Consciousness* in *Nature*, while the brain's cerebral cortex was important for consciousness, there was growing evidence that consciousness was not confined to one region of the brain. Instead, neural signaling was involved, which employs various cells and pathways.

Humans, Bonobos, Chimpanzees, and Gorillas

Sue Savage-Rumbaugh, an "out of the box" chimpanzee and bonobo researcher, advanced the idea that levels and types of intelligence across species are better understood with this conception: although species are affected by their biology, they are also greatly influenced by their culture. In this article, we will focus on her contribution.

Two other humans well-known for changing how we see great apes are Jane Goodall and Dian Fossey, who worked in Africa. Goodall audaciously gave her research subjects in Gombi names, not numbers, and described their culture; Fossey entered a mountain gorilla society in Rwanda and helped humans understand how they communicated and bonded, and how they were gentle and had social lives.

Consider that the careers of these three women reveal that our beliefs impact what humans want to know, what scientific research humans choose to fund, and what research methods humans regard as valid. We can choose to learn how other primates think, use mathematics and languages, and have other communication abilities, or we can choose to bask in our old beliefs through willful ignorance.

Sue Savage-Rumbaugh's Origin

Sue Savage-Rumbaugh grew up in American hillbilly territory, best known as the Ozarks, where country music had a purchase. The oldest of seven, with her youngest siblings born in quick succession, her youth was primarily shaped by mothering her siblings, teaching them to read very early in life, and caring for dogs and horses. Her father often took her camping in the Appalachian Mountains, where she observed the wildlife with keen interest.

Sue's intelligence earned her a place at Colorado College, a splendid small school in Colorado, but her circumstances called her to leave, and two schools later, she graduated from Southwest Missouri State Cum Laude, with a major in Psychology. At Missouri State, she was skeptical about the difference between psychologists who viewed their work in experimental, behavioral, and clinical terms, and found the popular "paired associate learning" theory unsatisfactory, as it could not be readily employed to solve patient problems.

Despite her disdain for some academics and how they knew things, Sue was bright enough to jump through well-understood academic hoops, which appealed to Harvard, who admitted her there to earn her Ph.D. in Behaviorism, where she interfaced with the renowned B.F. Skinner.

But destiny had other plans for Sue who much later received an Honorary Doctor of Science Degree from the

University of Chicago. During a trip to Oklahoma, Sue found herself in an audience listening to Roger Fouts, who had a chimpanzee with him. All the lights fired in her head when Boee, age three, used American Sign Language to name the objects Fouts held up.

Sue saw her path forward. Instead of going to Harvard, she chose to earn her Ph.D. at the University of Oklahoma. There, she immersed herself in "The Chimp Farm" and worked with Department of Psychology Chair William B. Lemmon.

Sue's research focused on how wild chimps, captive chimps, and humans differed in raising newborns and young chimps. She was intrigued by a young chimp she worked with named Lucy, who was reared and lived in a human household with two married psychologists. By all accounts, each psychologist and Lucy enjoyed a parent/child relationship and Lucy perceived herself as human.

Sue's research focused on how wild chimps, captive chimps, and humans differed in raising newborns and young chimps.

Lucy the chimpanzee cooked eggs, made tea, put on clothes, rode a tricycle, completed word puzzles, watched television, paged through magazines, carried a human baby doll, went fishing, and changed car tires with assistance.

Savage-Rumbaugh noticed that in contrast to Lucy's behavior living in a human household as a family member, the chimps raised outside of a human home, both wild and captive, were quadrupedal (on four feet) and spent their time mostly swinging from trees. They screamed, bit when angry, had more rapid reaction times than Lucy, and showed lack of interest in adopting any human activities.

She was then hired as a post doc by Duane Rumbaugh (her future husband) to work in a joint appointment at both Yerkes, a famous primate center, and Georgia State University. Duane Rumbaugh was already a legendary comparative psychologist at both institutions. Because of his research on primates at the San Diego Zoo, he deduced that great apes could learn rules, even if not taught them. He demonstrated that the ability to comprehend rules was a precursor of language acquisition. This meant primates who could learn rules could think about their actions before deciding which actions to take.

Sue studied bonobo social behavior, gestural communication, and rule-making behaviors, essential for learning syntax, and compared how bonobos differed from the chimpanzees in this regard. Important research questions for her early on included whether great apes could understand symbolic representations, and if so, how their mastery of symbolic representations would impact their ability to think and their brain development.

Later, Sue broke new ground in promoting bonobo language acquisition, particularly in her work with bonobos Kanzi and Panbanisha. As the great apes she knew were vital to the progression of her scientific ideas and views, she was careful to name them, particularly Kanzi and Panbanisha, in every conversation related to this article. It was evident that she viewed them as her collaborators.

Important research questions for her early on included whether great apes could understand symbolic representations [...].

It is challenging to describe all that Savage-Rumbaugh did to create a learning and thinking environment for both Kanzi and Panbanisha, but their frequent walks into the forest proved instructive. If described in human terms, harkening back to Sue's journeys into wooded mountains in her youth, you might say she carried the babies into the forest before they could walk and caused them to be familiar with all manner of the forest's sights, sounds, and landscapes. As the babies grew older and began to walk, she expressed enthusiasm for where they might go and what they might find there.

This gives a sense of the journeys and adventures of Kanzi and Panbanisha, and the other bonobos with whom Sue worked. Over time, through a combination of human vocalizations, the use of a symbol board, and gestures, the forest offered destinations in trees, on hilltops, at midpoints, by rivers, and everything in between. Depending on the destination, a variety of shelters and perches were available. Their destinations had names that the bonobos understood and could find, including: Scrubby Pines, Mushroom Trail, Lookout Point, A-Frame, Midway, and M&M's. The M&M's location, of course, had candy available.

Kanzi was fascinated by the movie *Quest for Fire*. Upon entering Kanzi's name on YouTube, you can easily find Kanzi exploring fire-related activities, both on his own initiative and based upon interactions with Savage-Rumbaugh.

In terms of a bonobo following instructions or cooperating, it is apparent to all that Kanzi was bonded to Sue Savage-Rumbaugh. The world was fascinated by what they did together. Kanzi is now the most famous great ape in the world.

Bonobo Origins

In the wild, the bonobo lives in the Democratic Republic of the Congo. This great ape, compared to its close relative, the chimpanzee, is smaller, less aggressive, more bipedal, more arboreal (in trees), more vocal, has a higher voice, is more likely to constantly share food, even with strangers, and is more likely to live in a larger group. If two large bonobo groups meet in the wild, they might act as if this encounter should be deemed a social party, engage in all manner of sexual activities, and share food. These behaviors are why the wild bonobo is widely regarded as the ape with the reputation of making love, not war.

Sue shared one interesting story after another. When language-using bonobos, including Kanzi and Panbanisha,

watch a movie, the bonobos have a wide variety of vocalizations when the hero appears, and they make aggressive sounds upon seeing the villain. They have distinctive movie preferences, with favorites including *Harry Potter* movies, as well as movies called *Babe*, *Harry and the Hendersons,* and again, Kanzi's favorite, *Quest for Fire.*

When asked how apes could learn language, Sue launched into a lengthy explanation of how it is necessary to take apart a symbol and break it into different functions. This was hard to follow until she turned to the Helen Keller problem. To solve it involved much more than teaching Keller the sign gesture for water or face.

When asked how apes could learn language, Sue launched into a lengthy explanation of how it is necessary to take apart a symbol and break it into different functions.

As many know, Helen Keller was a deaf, mute, and blind child unable to communicate. Unfamiliar with labels or symbols, she did not attach meaning to a parent's or teacher's hand signing into hers. Savage-Rumbaugh emphasized how Keller's teacher broke the rules regarding giving Helen language skills.

The breakthrough came when Helen understood that this signing stood for something and was representational. But then there was the next step of not just learning a name, but an action, such as "wash your dirty hands," again through sign representations involving verbs and adjectives.

Sue Savage-Rumbaugh was influenced by the Helen Keller story. She saw apes not exposed to language like her, and to Sue, the solution was like what Helen's teacher did. The lesson Savage-Rumbaugh learned from this story was that if the individual being taught respected you, and there was the right kind of relationship, the individual could more easily absorb the information and emulate the behavior. This became the blueprint for teaching Kanzi language. She also found movement and travel with Kanzi were vital to his interest in learning.

When asked about her life's work, and what major contributions she has made, Savage-Rumbaugh was slow to sing her own praises. She was critical of the limitations of the scientific method that prides itself for being empirical and data driven; this seemed in part because scientific researchers used animals to inform humans about human psychology, but not to inform themselves about the animal subjects, including their cognitive and emotional states. She noted that these shortcomings have improved over time, and she felt like she influenced these changes. She regrets, still, the misuse of the term "anthropomorphic," which embodies the misuse of attributing human emotions to other animals as if other animals do not have similar emotions.

Although Sue Savage-Rumbaugh values data gathering and analysis, her career represents that you cannot repeat a novel experience for an animal with a unique background. She considers the breakthroughs she has participated in with Kanzi and Panbanisha as not anecdotal. In her description of bonobos creating stone tools, a subject she has well written about, she elaborates on how Kanzi and Panbanisha used their insights, abilities, and creativity to each learn different methods to craft stone tools.

Her description of how these bonobos learned tool making is like the way she helped them with language acquisition utilizing a combination of human speech and a symbol board, where they were taught to understand and use lexigrams. With the symbol board in front of him, Kanzi might select what food he wanted to eat. If she asked Kanzi, verbally, "*Do you want a hot dog in your ice cream?*" Kanzi might say, "*Yes.*" After Kanzi ate this, she might ask Kanzi, "*Would you like a surprise?*" Kanzi might then select watermelon on his symbol board.

By 2011, *Time Magazine* chose Sue Savage-Rumbaugh for its list of the 100 most influential people. The magazine described her as having the courage to "*stand up to the resistance she encounters to the idea that humans may be less special than we think. Her work has punched holes in the wall separating us from them.*" This was one of many accolades she would receive.

After looking at the achievements described herein, one might ask about why they are relevant to Animal Law. They, to the extent that affording other animals (including Kanzi the bonobo) the attribute of higher-order mental capabilities, have the effect of suggesting the award of the legal status of personhood, or dignity rights. Although that discussion is outside of the scope of this article, an account of Sue Savage-Rumbaugh's collaboration with other primates affords a rich tapestry for not only gaining perspective on how human theories about other animals continue to change but may also motivate humans to reevaluate how the Rule of Law does or should pertain to other animals with higher-order capabilities.

Conclusion

When it comes to the subject of Animal Law, a major obstacle to animals receiving better treatment, even personhood, along with ships and corporations, is that they are not worthy. In this article we endeavor to better understand where human cognitive biases about other species came from, how culture impacts behaviors, and how the work of those like Sue Savage-Rumbaugh, and her collaborators, Kanzi and Panbanisha, may cause us to reevaluate and change our beliefs, theories, and actions.

As our knowledge and insights about other species grow, we could even imagine a more inclusive Rule of Law. This of course would require us to reimagine the place of other intelligent life in the universe. ■

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How Much is that Doggy in the Market?

An Illustrative Example of Tension Between the Common Law and the Historical Role of the Jury

K. J. Edward Fornell

Alors que se développe le nombre d'affaires liées aux questions juridiques touchant les animaux de compagnie, le rôle du jury en *common law* est mis à l'épreuve. Cet article explore l'équilibre historique des pouvoirs entre le rôle traditionnel du jury américain, la responsabilité du juge et l'impact dans les affaires concernant spécifiquement les animaux de compagnie.

A medida que se desarrollan más casos relacionados con cuestiones legales relacionadas con las mascotas, se pone a prueba el papel del jurado en el *common law*. Este artículo explora el equilibrio histórico de poder entre el papel tradicional del jurado estadounidense, la responsabilidad del juez y el impacto en casos relacionados específicamente con animales como mascotas.

A Shifting Balance of Power

During certain periods, and especially in the colonial years prior to the independence of the United States, most legal authority rested with the jury, which was then the primary actor in resolving legal cases, although judges retained power to prevent the jury from acting arbitrarily.[1] During this time, the jury was empowered to ameliorate overly harsh sentences that would result from a strict adherence to legal doctrines and they could punish and possibly deter reprehensible conduct through punitive damages.

More anachronistically, during the United States colonial years, juries had the power to nullify legal principles that appeared draconian or outmoded when applied to the cases before them. The judiciary retained some powers to prevent the jury from acting arbitrarily but was largely incapable of controlling the outcome of cases, a power which had come to be viewed as inherent to the jury as an institution and a source of protection of the individual.[2] As such, the jury has historically been viewed as having the power to protect individuals and provide commonsense justice to the average person.

Judges, on the other hand, have always had the duty to follow and further existing legal doctrines, and their discretion is often limited by their duty to dispassionately apply the law. During the 19th century, a period of great change in favor of judicially created legal doctrines, the balance of power shifted toward judges, who now have the great authority to decide issues that could arguably be characterized as questions of fact as opposed to issues of law. During that time period, in the interest of coalescing the law, common law doctrines were developed with the effect of exerting more control on the jury, limiting its decision-making power, or entirely circumventing its function. These newly created judicial doctrines were not merely a standard for reviewing jury decisions, but rather doctrines designed to control the jury and reduce its ability to nullify the law.

Of course, there are sound policy arguments for development of the common law, including legal uniformity, efficiency, and predictability. On the other hand, the jury, a bulwark of the U.S. legal system, is comprised of ordinary members of the community and, unlike a judge, can apply a collective wisdom, collective life experiences, and provide a more democratic approach to the dispensation of justice. Hence, the United States civil justice system throughout federal and state jurisdictions is based upon the notion that the jury is in the best position to draw factual conclusions from conflicting evidence, with the judge generally limited to rulings as to questions of law.

1. *See, e.g.*, William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975). *See also* Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 592 (1993).

2. *See* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 379-385 (2003) quoting, *The Legal History of Massachusetts 1620-1953*, 38 MASS. L.Q. Aug. 1953, at 3, 73.

While the balance of power between the jury and the Court is dynamic and constantly shifting, great tension remains between the laudable policy goals of developing the common law and protecting the sacrosanct power of the jury. Our pets – and how their lives are valued under the law – offers a useful illustration.

Keeping the Jury on a Leash

In most U.S. jurisdictions, as a matter of law, if someone negligently or intentionally kills your dog, your recovery is limited to the market-rate value of the animal.[3] This is because the majority of American jurisdictions hold that pets are personal property and, therefore, damages for sentimental value and emotional distress caused by the loss are not recoverable. To many, this legal doctrine seems out of touch; our pets represent more than their market value and are not replaceable in the same way as other forms of personal property. For rescued animals, mutts, and older pets, the market-rate rule likely means little recovery for bereaved owners and marginal accountability for negligent, or even dastardly defendants.

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A legal decision about a dog in a case involving a married couple, Mr. and Ms. Pantelopoulos, acutely highlights how strict adherence to rigid common law can impede what most people would consider to be justice.[4] Mr. and Ms. Pantelopoulos had started a divorce proceeding. Ms. Pantelopoulos then secured a restraining order against her soon-to-be ex-husband that prevented him from entering the homestead property. She left the home and abandoned the family's ten-year-old dog in the garage, causing the dog to slowly die from dehydration and starvation. Because of the restraining order, Ms. Pantelopoulos knew that Mr. Pantelopoulos could not enter the property and save the dog. After the dog's death, Mr. Pantelopoulos sued for intentional infliction of emotional distress, and Ms. Pantelopoulos neither denied purposefully leaving the dog to starve to death nor that she intended to inflict emotional distress upon her husband. Despite finding that Ms. Pantelopoulos had displayed willful and malicious conduct and intended to inflict emotional distress, the Court found that there was no cause of action for such a claim in connection with the death of a pet and dismissed the claim.

To be sure, a variety of policy justification underly the strict requirements and limitations for emotional distress claims: they are difficult to verify, especially when not accompanied by a physical injury; they are vulnerable to spurious or excessive, court-clogging litigation; remedies are at risk of being subjective or speculative; injuries may not be a reasonably foreseeable result of the defendant's negligent conduct; defendants should not be subject to potentially limitless liability for unforeseeable injuries; and proving causation is usually a daunting endeavor.

But do these policy goals justify such seemingly harsh results? Admittedly, sentimental value and loss of companionship are difficult to value. Yet, damages for the emotional distress caused by the negligent killing of a person are awardable and are determined by juries, so it would seem that the same valuation techniques could be utilized to determine emotional distress damages for the value of a pet. Instead, however, in jurisdictions that so limit recovery, bereaved pet owners are left with nominal damages, at best.

Further, the average person (and potential juror) is unlikely to consider the negligent or intentional killing of a pet to be metaphysically equivalent to the negligent or intentional destruction of a new television (which would probably render a greater award).

Thus, in cases such as the Pantelopoulos matter, such a strict adherence to the common law seems outmoded, especially because courts arguably have the opportunity to alter common law to accommodate current societal circumstances.

Indeed, as most American households have at least one pet and there are more pets than people in the United States, the "value" of the loss of a pet would seem to be perfectly within the purview of a jury.[5]

In a forceful dissent from an opinion which limited recovery for the negligently inflicted death of a family dog to the dog's market value, Justice Starcher, of the West Virginia Court of Appeals, stated the problem well:

"This opinion is simply medieval. The majority blithely says that "our case law categorizes dogs as personal property"– that "damages for sentimental value, mental suffering and emotional distress are not recoverable"… In coming to this conclusion, the majority overlooks the fact that the "law" in question is the common law which is controlled by this Court… When the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to adjust the common law to current needs."[6]

3. *See* 38 Cap. U.L. Rev. 187 *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (holding there is no independent cause of action for loss of the companionship of a pet, which is personal property); *Lockett v. Hill*, 51 P.3d 5, 7-8 (Or. Ct. App. 2002) (holding the owner of a negligently killed animal could not recover for emotional distress); *Carbasho v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (holding sentimental value and emotional distress are not recoverable when a pet is killed because pets are personally property); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 146 Cal. Rptr. 3d 585 (4th Dist. 2012); *McDougall v. Lamm*, 211 N.J. 203, 48 A.3d 312 (2012); *Kyprianides v. Warwick Valley Humane Soc.*, 59 A.D.3d 600, 873 N.Y.S.2d 710 (2d Dep't 2009); *Hendrickson v. Tender Care Animal Hosp. Corp.*, 176 Wash. App. 757, 312 P.3d 52 (Div. 2 2013).

4. *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (holding the owner of an intentionally killed animal could not recover for emotional distress).

5. *See Carbasho v. Musulun*, 618 W.E.2d 368, 372 (W. Va. 2005).

6. Carbasho v. Musulin, 217 W. Va. 359, 363, 618 S.E.2d 368, 372 (2005).

Other Jurisdictions Provide More Opportunities for Developing a More Uniform Common Law

The tension between the competing policies of furthering a uniform common law, on the one hand, and protecting the traditional role of the jury, on the other, is exacerbated by the fact that not all jurisdictions follow a preclusive approach to valuing the life of a pet. Some states do allow for non-economic damages in cases involving the negligently inflicted death of a pet. For example, when a Florida woman witnessed a trash collector smash her small dog with a garbage can, the Supreme Court of Florida affirmed that the elements of mental suffering and punitive damages were properly submitted to the jury:

"*Without indulging in a discussion of the affinity between "sentimental value" and "mental suffering," we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training such as a Seeing Eye dog or sheep dog.*"

This relief would not have been available to the plaintiff in the majority of U.S. jurisdictions. Where non-economic relief is precluded, there is only a token amount at stake, which cannot provide much deterrence, much less "justice," at least in the way a jury may understand the term. Moreover, the lack of uniformity would seem to run directly contrary to the public policy goals of uniformity and coalescence used to justify the proliferation of common law doctrines which usurped the traditional role of the jury.[7]

7. *See e.g., La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

Conclusion

While this article has focused on cases in the United States, the issues may have relevance to other common law jurisdictions where juries are utilized in certain civil matters. How such legal systems value the lives of lost pets creates doubt as to whether Courts are striking the proper balance between policy considerations and principles of justice, equity, fairness, and, most importantly, the constitutionally protected right to a trial (and verdict) by a jury. Although the amount of damages awarded is generally a factual issue for the jury, whether certain categories of damages are recoverable is generally one of law for the Court.

The inescapable result is that sometimes the law will preclude recovery in cases where a jury would have issued an award. It can certainly be argued that in preventing a jury from finding emotional distress, the Courts have transformed what once would have been considered a factual issue into predetermined legal conclusion.

Practically speaking, it is, perhaps, more appropriate for a jury, rather than a rigid legal doctrine, to determine, on a case-by-case basis, whether non-economic damages should be awarded. Non-economic damages are, by definition, subjective. As such, the determination does not lend itself to a strict, bright line rule. Instead, given the inherently subjective nature of emotional distress damages, and the unique relationship each pet owner has with their pet, the old way may be the best way: bring together a group of individuals with different backgrounds, perspectives, and life experiences, and let them decide the issue under the unique facts of the case. ■

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Reducing Animal Suffering through Global Legislation

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La protection de la santé et du bien-être des animaux est un problème mondial nécessitant une action mondiale, comme l'a mis en évidence la Covid-19. Les progrès nécessaires dans le domaine du droit de la protection des animaux ne peuvent être réalisés que si une législation mondiale et nationale rigoureuse est appliquée. Les instruments contraignants peuvent rendre justice aux animaux en tant qu'individus et comme êtres sensibles, en allégeant leur souffrance et en promouvant leur bien-être. Il est donc nécessaire que l'ONU adopte une convention globale sur la protection animale, qui pourra ensuite être ratifiée dans le droit de ses États membres. L'Association Global Animal Law (GAL) présente une telle convention, à laquelle se réfère aussi l'American Bar Association (ABA).

La protección de los animales, incluida la salud y el bienestar de los animales, es un problema global que requiere una acción global, como lo destaca el Covid-19. Los intentos anteriores de mejorar la protección animal en todo el mundo han fracasado. Se puede deducir, a partir de la lógica y la experiencia, que el progreso necesario en la ley de protección animal solo se puede lograr si se aplica una ley global y nacional estricta. Los instrumentos vinculantes pueden hacer justicia a los animales como individuos y seres sensibles, aliviando el sufrimiento y promoviendo el bienestar. Por lo tanto, se recomienda que la ONU adopte una convención sobre protección animal, que luego puede ser ratificada en la legislación nacional de los estados miembros. La Association Global Animal Law (GAL) presenta dicha convención, a la cual se refiere la American bar Association (ABA).

Introduction

Animal welfare is a global concern.[1] To date, there is a lack of ways to address the issue comprehensively. To close this gap and better protect animals worldwide, a global mindset on the issue is essential. This requires that the concern for animal welfare be universal, exhaustive and holistic. All countries, species and relevant issues concerning animals, must be considered.

An all-inclusive protection of animals means that, in addition to the preservation of wild animals, the law focuses on the care and welfare of all animals by securing them from all unnecessary suffering. Applying a multidisciplinary approach considers not only animal welfare law but also aspects of the sciences related to animals, such as veterinary medicine, ethology, biology and ethics. Animals are sentient, emotional and intelligent beings, which should encourage humans to respect and care for them. Legislation can be used to enforce laws, such as those that exist at the national and regional level. However, to achieve true global progress, animal protection should be anchored at the international level via the United Nations (UN).

The American Bar Association (ABA) has recently adopted a resolution that "urges all nations to negotiate an international convention for the protection of animals that establishes standards for the proper care and treatment of all animals to protect public health, the environment, and animal wellbeing" and "encourages the U.S. State Department to initiate and take a leadership role in such negotiations"[2]. In its resolution, the ABA references the United Nations Convention on Animal Health and Protection (UNCAHP) drafted and proposed by Global Animal Law GAL Association. The resolution is detailed below on page 91.

Arguments for Global Animal Protection

The concept of global animal welfare is currently absent in international law. In addition to the needs of humans and their interests in a healthy world for human offspring, the alleviation of suffering in respect of animals, is also elementary. Since animal suffering is widespread across the world and does not stop at country borders, a universal system for its alleviation is required. Farm animals globally

1. The article is based on a publication by co-author Sabine Brels, "Globally Protecting Animals at the UN: Why and how", Claire Portier (Ed.), *L'observateur des Nations Unies*, Aix-en-Provence 2019. The author bases her position on her detailed legal dissertation *"Le droit du bien-être animal dans le monde"*, Paris 2017, the first analysis of the animal in global law.

2. Resolution 101C, approved at the ABA 2021 Mid-Year Meeting.

are subjected to considerable avoidable harm and suffering in connection with the production of food and animal products. Global meat production is projected by the Food and Agriculture Organisation (FAO) to double by 2050. The threat of extinction of wild animal species has led to the development of more selective protection instruments by the international community. Animal experimentation is increasing across the world. The regulatory frameworks of nations and continents for the protection of laboratory animals vary considerably, encouraging the shift of animal experimentation projects to countries with lower levels of protection. Meanwhile, there remains no institution or intergovernmental regulatory framework that is holistically and globally dedicated to the protection of animals. As of now, the focus of international law instruments has been on species conservation [e.g. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or the Convention on Biological Diversity] and not on the individual welfare of animals. Animal welfare is also not covered by the UN Sustainable Development Goals (SDGs).

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Despite the wide scope of the 17 SDGs and its 169 targets, the topic of animal welfare has been almost totally ignored. The 2030 Agenda for Sustainable Development envisages "*a world in which humanity lives in harmony with nature and in which wildlife and other living species are protected*". However, with the exception of SDG 14 (Life Below Water) and SDG 15 (Life On Land), the 'other living species' are barely mentioned, let alone their welfare. Supportive adjustments suggested are the explicit inclusion of animal welfare in the existing SDGs (e.g. SDG 3 Good Health and Well-being) and the creation of an autonomous SDG 18 on animal health, welfare and rights.

Existing legislation in two-thirds of countries in the world reflects a social consensus to raise the protection of animals as individuals[3]. Intergovernmental organisations, such as the World Organisation for Animal Health (OIE) and the World Trade Organisation (WTO), now refer to animal welfare. OIE was initially focused on the control of zoonoses, then evolved into an organisation dedicated to animal health and later to minimal animal welfare. It has established 11 animal welfare regulations dedicated to farm animals, stray dogs and farmed fish. These regulations are non-binding minimum standards to limit animal suffering during transport and at slaughter. Wild animals are not included, meaning the regulations do not take a holistic approach towards animal welfare. In contrast, the WTO ruled on animal welfare in relation to the extinction of endangered sea turtles in 2001, becoming a precedent for animal welfare as a concern in upholding the European Union (EU)'s ban on seal products in 2013. The WTO panel attributed important value to animal welfare in its decision.

Current approaches and regulations are inadequate to help animal welfare achieve a holistic and global impact through law. The law is key to enforcing humane treatment of animals. For example, in Germany, there appears to be a demand for transparent and effective enforcement of the law in animal protection criminal and administrative law, at best with a party status for organisations or new authorities created. Discussions in animal protection law often focus on ethics, which unlike law, is not enforceable. Especially in animal protection, where the (often economic) interests of animal users are given preference, binding law is essential. Ethical principles, such as those in the Earth Charter Initiative, although welcomed, have limited effect, as they are not enforceable. In such declarations, it is problematic that animal welfare cannot be guaranteed by law, frustrating the very purpose of their creation. The lack of animal protection law, both international and national, directly contradicts the common understanding that the connection between humans, animals and the environment has to function in an orderly manner for the very existence of each and the world we live in.

Ways to Global Animal Protection

An umbrella instrument in international law is necessary to provide a global framework to animal protection. Existing regulations focus on the species conservation, not on the protection of individuals from unnecessary suffering, pain, harm and fear. Over the years, different instruments have been proposed, such as a universal declaration on animal rights proclaimed at the UN Educational, Scientific and Cultural Organization (UNESCO) in 1978 but it has never been formally adopted. In 1982, the World Charter for Nature, adopted by the UN General Assembly, was the 1st UN reference to the intrinsic value of animals in stating that: "*Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.*" A committee led by Professor David Favre in 1988 proposed an international convention on animal welfare but it did not receive sufficient support from national governments.

After having the Universal Declaration for Animal Welfare adopted at the UN, which has been proposed since 2005, the next logical step for an encompassing and legally binding framework instrument, is to adopt a universal convention to protect the health and welfare of animals. The UN, in accordance with Article 1 of its Charter, has the task of maintaining world peace. Therefore, it seems appropriate that the UN be the institution to adopt such a convention for the peace of animals, humans and nature as a whole. Indeed, a recognition of global animal welfare would crucially result in a more peaceful life for all individuals on earth, living in harmony with nature, precisely in line with the purpose of the UN.

3. See the GAL Database on national anti-cruelty and pro-welfare laws at: https://www.globalanimallaw.org/database/national.

The Covid-19 pandemic shows starkly just how closely human health is linked to animal health and welfare. According to OIE, 75% of emerging infectious diseases originate from animals. At wildlife markets, different animal species - wild, captive and domesticated (or their parts) are mixed and transported together and then come in contact with humans. The consumption or use of these animal products greatly increases the risk of transmission of pathogens to new hosts. The causes of zoonoses are often inappropriate and negligent animal husbandry. For example, numerous farm animals kept in close proximity to each other also pose an increased risk of the transmission of zoonotic diseases, as shown with the H1N1 swine flu. Whether the zoonosis ultimately develops into an epidemic or pandemic depends on factors, such as hygiene and animal welfare conditions, control of local intermediate hosts, physical proximity to the source of infection and antibiotic resistance (AB-R) of the bacteria. The AB-R risk factor alone represents a serious risk to public health. Zoonoses and AB-R are issues that should not primarily be considered virologically but holistically and according to globally uniform interdisciplinary criteria.

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Universal agreements are undoubtedly the most important source in international law and suitable for providing an adequate framework. It is in this context that the Universal Declaration on Animal Welfare should be seen, of which a first draft text was prepared in 2000 and later proposed for adoption by the UN General Assembly. The basic principle is that animals are sentient beings and their welfare is to be respected. Attention should be paid to their physical and mental well-being. This approach constituted a non-binding declaration of principles and thus qualified only as soft law. Such an approach seems suitable, in principle, to initiate a further development of international law. It can generate increased attention to animal protection, its importance and an understanding of the elementary level it currently has in the world. Despite the efforts of this declaration, it must be pointed out that it had no legally binding force. Going forward, the focus should be on a binding and comprehensive convention that aims to improve animal welfare through the law. A mere declaration is not enough to have a successful effect.

Institutionally, various organisations are recognisable for paying attention to animal welfare and the One Health principle, now also extending to add One Welfare. In addition to important UN institutions, such as the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO), it would be desirable to expand the mandate of the UN Environment Programme (UNEP) in the future to focus more on wildlife welfare. The establishment of a new UN institution for animal protection can be considered in order to integrate more animal issues into the UN Agenda. The complexity and emergency of global animal protection justifies the establishment of an agency and/or programme at the UN. For example, this institution could, analogous to UNEP, be called the UN Animal Protection Programme (UNAPP). This would make it possible to ensure both the conservation of biodiversity and the protection of animals as individuals from unnecessary pain, suffering, harm and fear. An important innovation would be the consideration of animal health into the more global 'One Health' approach, considering the close interconnections between humans, animals and our natural environment.

It is questionable whether there are other institutions outside the UN which are suitable to fill the gap in global animal welfare law. A broader remit of OIE, including in the field of animal welfare, is conceivable. This approach would be appropriate insofar as OIE is seen as a leading global organisation that has international animal welfare legislation and goes beyond the protection of wild animals. However, the level of animal welfare advocated by OIE is lower compared to countries, such as Germany and Switzerland. OIE regulations are also nonbinding and do not apply to all animals. Only binding instruments can make effective animal protection possible, in contrast to ethics, which is necessary but cannot be properly enforced. Being the only universal organisation that includes all sovereign member states (193 to date), the UN appears to be the appropriate institution to adopt a truly binding and extensive global framework convention on animal protection.

Indeed, new hope recently appeared in the UN beginning to consider animals as sentient beings. The 2019 UN Global Sustainable Development Report (GSDR) acknowledged for the first time that animal welfare is a key-issue missing in the 2030 Agenda, stating: "*The clear links between human health and well-being and animal welfare is increasingly being recognized in ethics- and rights-based frameworks. Strong governance should safeguard the well-being of both wildlife and domesticated animals with rules on animal welfare embedded in transnational trade.*"

The UN Secretary-General report of July 2020 on Harmony with Nature affirmed that "*[…] non-human animals are sentient beings, not mere property, and must be afforded respect and legal recognition […] It is heartening that initiatives resonate globally with the call for a peaceful, virtuous and harmonious coexistence between humankind and the rest of the sentient beings that share the planet. […] The process of recovery from Covid-19 provides us with a unique opportunity to build back better, together, so as to transform the world into one where humans truly live in harmony with Nature.*"

Proposal for a Unified Convention on Animal Protection

Various levels of regulation can be used as the legal basis for a global convention on animal protection. On the national level, many laws already exist to protect animals as individuals against cruelty and for their welfare. On the regional level, European instruments of the Council of Europe and the EU in particular, address this issue. In

addition, different regulatory approaches take effect at the international level, which, however, regularly do not pursue a holistic approach, rendering themselves ineffective. A common legal basis covering all areas related to animals is necessary. A universal convention on animal health and protection should be considered which is binding between member states and requires implementation in national legislations. Unlike declarations, they are intended to be binding and not merely symbolic, taking into account that it will soon be too late to save Earth. In such a convention, different aspects of the use of animals would be regulated. The starting point should be that animals are sentient beings whose interests are in having as many freedoms as possible. All animal species should be included, not only farm animals, laboratory animals and wild animals, but also domestic animals and animals used in sports and entertainment.[4]

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As a preamble, animal welfare is a complex issue. The primary objective can be defined as the welfare and protection of animal health. The term 'animals' refers to all non-human animals. In addition to providing care and support, animals must also be guaranteed freedoms: freedom from fear and distress, freedom from heat stress or physical discomfort, freedom to express normal patterns of behaviour, freedom from pain, injury and disease and freedom from hunger, thirst and malnutrition. Likewise, scientific research must ensure that the number of animals used in experiments is reduced (Reduce), that experimental methods are refined (Refine) and that animal replacement is sought through alternative non-animal techniques (Replace). Respect for the intrinsic value of animals, their care and protection, as well as dignity, are fundamental principles. Appropriate measures must be taken to prevent avoidable harm to animals and to refrain from all forms of cruelty. Animals, as sentient beings, are to be treated well and have an interest worth protecting in not being killed unnecessarily or having their freedom of movement restricted. It is important for the enforcement of animal protection law around the world that animals are given the opportunity to be represented in court and thus, have a voice in proceedings. Transparency in animal protection enforcement must also be increased, which would hopefully mean the law enforcement among countries becomes similar and countries are pressured to increase their effective level of animal protection. Furthermore, the outsourcing of animal suffering to other countries with a lower level of protection must be prohibited.

4. UN Convention on Animal Health and Protection (UNCAHP) (www.uncahp.org), First Pre-Draft of the Global Animal Law GAL Association, August 23, 2018; an overview of the draft, cf. Sabine Brels (Fn. 1), 221 ff. Also, Jakob Zinsstag, One Health auf dem Weg zu einer intergrierteren Wissenschaft im Bulletin der Schweizerischen Akademie der Geistes- und Sozialwissenschaften SAGW 2/2020, S. 31.

The implementation of such a convention requires that the signatory member states develop strategies, plans and programmes for animal welfare or adapt existing strategies in accordance with their national requirements. Constructive cooperation should be sought between member states, either directly or through their specialised agencies, such as legally competent veterinary offices. Incentives for functioning animal welfare that are economically and socially sensible, as well as compatible, should also be provided. The public must be educated in an appropriate manner about the importance of animal welfare. A secretariat could also be put in place as the competent body to take over administrative and organisational tasks. In addition, the secretariat would accompany, make transparent and support implementation.

Conclusion

Public reports increasingly show that the health and protection of animals is socially important. In addition to legal decrees at national, regional and international level, there is an increasing number of court decisions that grant validity to animal protection. The question arises as to how this development can be reflected in the law. Formal declarations in the form of soft law, such as the UDAW, are possible, which could be declared binding after. A more far-reaching possibility is a legally binding UN convention that takes animal health into account, as well as animal protection and thus, builds a bridge to human health ("One Health" approach).

Unlike ethics, law is enforceable and is, therefore, the decisive key to enforcing animal welfare with a cool head and warm heart. Binding instruments would help alleviate animal suffering and promote animal welfare. This has been recognised by the ABA in their recent resolution urging the adoption of an international convention on animal protection and encouraging the U.S. State Department to take the lead in the negotiations.

Finally, the realisation remains that global animal welfare can only be improved and purposefully advanced through the involvement of all parties. As Friedrich Dürrenmatt, a Swiss author, described: "*What concerns everyone can only be solved by everyone. Any attempt by an individual to solve for himself what concerns all must fail.*" Accordingly, all countries should recognise the interconnectedness of the issues we face and work together for a better world for all. ■

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Challenges in Defining Welfare Standards for Industrially Farmed Poultry

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Contrairement à l'opinion populaire, c'est l'élevage sélectif conventionnel, et non le génie génétique, qui est responsable des différences dramatiques entre les races d'élevage commerciales modernes et leurs cousins sauvages ou traditionnels. Néanmoins, la plupart des lois sur le bien-être des animaux d'élevage adopte une approche réactive des pratiques d'élevage flagrantes plutôt que de réglementer les techniques d'élevage. Pour parvenir à un bien-être total des animaux d'élevage, la loi doit aborder les méthodes d'élevage conventionnelles qui causent une grande partie des souffrances réelles du bétail d'élevage industriel, comme la volaille commerciale.

Contrariamente a la opinión popular, la cría selectiva convencional, no la ingeniería genética, es responsable de las dramáticas diferencias entre las razas de ganado comerciales modernas y sus primos salvajes o tradicionales. Sin embargo, la mayoría de las leyes de bienestar de los animales de granja adoptan un enfoque reactivo para las prácticas agrícolas atroces en lugar de regular las técnicas de reproducción. Para lograr un bienestar integral de los animales de granja, la ley debe abordar los métodos de reproducción convencionales que causan gran parte del sufrimiento real del ganado de granja industrial, como las aves de corral comerciales.

Note: The author has written this article in her personal capacity and the views and opinions expressed are those of the author alone.

Introduction

Because so much attention has been given to disagreements between the United States (US) and the European Union (EU) over the regulation of genetically modified organisms (GMOs), many people assume that genetic engineering is common in agriculture. In reality, the GMO debate is largely confined to plant biotechnology, as the only genetically modified animals so far approved for human consumption are a transgenic salmon allowed in the United States and Canada, and a gene-edited pig approved in the United States for food and as a source of human therapeutics.[1]

Although ethical concerns are often raised about genetically modified animals,[2] conventionally bred livestock used in industrial agricultural production present just as many challenges as do any potential future organisms. This article examines one aspect of this complicated issue: the difficulty in defining welfare standards for industrially farmed poultry. The reactive approach taken by most animal welfare laws, which focus on conditions faced by living poultry, fail to address the conventional breeding decisions that cause much of the actual suffering.

The Five Freedoms

The ethics of industrialized agriculture have been debated for over half a century. In 1964, British activist Ruth Harrison published *Animal Machines: The New Factory Farming System*, the first book to describe and show photographs of confined livestock. The book led to an investigation into British factory farming, the enactment of a farm animal welfare law, and the articulation of the Five Freedoms, fundamental principles of farmed animal welfare to this day. They state that farmed animals should have:

1. Freedom from Hunger and Thirst (ready access to fresh water and a diet to maintain full health and vigor).
2. Freedom from Discomfort (an appropriate environment including shelter and a comfortable resting area).

1. Sophie Kevany, *US FDA declares genetically modified pork 'safe to eat'* (Dec. 17, 2020; the Guardian), https://www.theguardian.com/environment/2020/dec/17/us-fda-declares-genetically-modified- pork-safe-to-eat.

2. Dr. Janet Cotter and Dana Perls, *Genetically Engineered Animals: From Lab to Factory Farm* (September 2019, Friends of the Earth), https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/2019/09/FOE_GManimalsReport_Final-Print-1.pdf).

3. Freedom from Pain, Injury, and Disease (prevention or rapid diagnosis and treatment).
4. Freedom to Express Normal Behavior (sufficient space, proper facilities, and company of the animal's own kind).
5. Freedom from Fear and Distress (conditions and treatment that avoid mental suffering).[3]

This so-called "gold standard" of animal care underlies the work of many advocacy organizations, major food companies, and world bodies, including the Terrestrial Animal Health Code of the World Organisation for Animal Health (a reference organization of the World Trade Organization) and EU Council Directive 98/58/EC, *Concerning the Protection of Animals Kept for Farming Purposes.* However, the broad ideals of the Five Freedoms do not intuitively convert into enforceable requirements. This challenge has increased as intensive selective breeding and industrialized management practices have created livestock that bear less and less resemblance to their wild forebearers.

Consider that most American of birds: the tom turkey. In the US it is a November tradition for the President to ceremonially pardon a couple of turkeys from being eaten for the Thanksgiving holiday feast. According to the National Turkey Federation, broad-breasted white tom turkeys like those typically pardoned reach market weight (38 pounds) only 18 weeks after hatching. Presidentially pardoned poultry earn the honor of spending the rest of their short lives without fear of slaughter. Modern commercial turkeys are bred and raised for size, not longevity.

The broad-breasted white turkeys have been selectively bred for commercially desirable breast and thigh meat. Due to the turkeys' accelerated growth and abnormal physique, they cannot fly and are at greater risk for obesity-related diseases, leg weakness, and bone fractures. They are typically raised in confinement housing, where thousands of birds live together in one barn. Toms are so breast-heavy that hens must be artificially inseminated to avoid injury.[4] By contrast, a wild turkey at 18 weeks would be half the size of the presidentially pardoned Thanksgiving birds, able to fly, and have a life expectancy of three to five years spent foraging, roosting in trees, taking dust baths, preening its feathers, and fighting to establish its place in a sex-based social hierarchy.

EU Council Directive 98/58/EC states that the needs of farmed animals should be met in a manner *"appropriate to the physiological and ethological needs of the animals, in accordance with established experience and scientific knowledge."* Yet it is increasingly difficult to determine what the ethological needs or the species-typical behavioral patterns of farmed animals are. Is it reasonable to compare a broad-breasted white turkey with a wild breed for purposes of determining the minimum standard of care? When an animal has been so selectively bred by humans that it is no longer physically capable of performing normal behaviors or surviving in its natural habitat, how do we determine the legal and ethical standard of care owed to that animal?

Normal Behavior

The United Kingdom's Farm Animal Welfare Council report, *Farm Animal Welfare in Great Britain: Past, Present and Future,* says that the Fourth Freedom is about normal, not natural, behavior. Normal behavior is behavior that is not abnormal for a particular species; the presence of abnormal deleterious behavior is indicative of animal welfare concerns. But what constitutes normal behavior?

Commercial poultry typically are raised in confined spaces that do not allow them to engage in natural chicken behaviors such as roosting, foraging, and dust bathing. Animal behaviorists have determined that his denial leads chickens to develop adverse behaviors such as feather pecking and cannibalism. Even if their living conditions were improved, they would continue to experience genetically related pain and suffering.

Intensive selective breeding has created commercial poultry breeds bearing little resemblance to their wild cousins or poultry raised in the sort of free-range barnyard that many associate with farming. A perfect example of this is what are called breeder broilers: hens that lay eggs that will hatch into broiler chickens. Breeder broilers suffer from chronic hunger; they are feed-restricted to improve egg production yet have been bred with the same massive appetites that encourage rapid weight gain in their slaughter-bound chicks.[5]

The treatment of broiler breeders seems to clearly violate several of the Five Freedoms, however there is no clear solution to this problem other than breeding a broiler with different genetics.

Renowned animal scientist Dr. Temple Grandin wrote in Animals Make Us Human: Creating the Best Life for Animals, *"[I]f you let a broiler breeder chicken eat everything she wants, she will become obese, her fertility will decline, and her life will be shortened… They act miserable, and many of them develop stereotypies. These birds have low welfare no matter what you do. If you let them eat all they want, they have bad welfare and if you don't let them eat all they want, they also have bad welfare. It's terrible. The industry is going to have to breed parent stock with smaller appetites."*[6]

Broiler chickens reach their target slaughter weight four times faster than they did in the 1950s, now taking less than

3. Nicholas K. Pedersen, *Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn* (2009; Michigan State University College of Law), https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn.

4. Philip Clauer, *Modern Turkey Industry* (2016, PennState Extension), https://extension.psu.edu/modern-turkey-industry.

5. I.C. De Jong & D. Guémené, *Major welfare issues in broiler breeders* (2011, World's Poultry Science Journal, 67:1, 73-82, DOI: 10.1017/S0043933911000067).

6. Dr. Temple Grandin and Catherine Johnson, *Animals Make Us Human: Creating the Best Life for Animals,* Houghton-Mifflin Harcourt, New York, NY, 2009; ISBN 978-0-15101489-7.

Broiler chickens reach their target slaughter weight four times faster than they did in the 1950s, now taking less than six weeks to achieve market weight.

six weeks to achieve market weight. Because their bone structure has not adjusted to rapid growth, much like the tom turkey, many fast-growing chickens become large so quickly that they can barely walk and have crippling leg injuries. They suffer from widespread heart and lung disease and sudden death syndrome. Due to their skeletal deformities, many chickens spend much of their time lying down in wet litter, leading to hock burns and breast blisters.[7]

Worst Practices Shortcomings

Animal welfare laws are often based on the premise that the most reasonable or achievable approach is to ban the worst offending farming practices. In the US, farmed animal welfare laws are typically enacted through voter ballot initiatives, a State legislative process in which gathering a certain number of citizen signatures allows a proposed law to be put on the ballot for public vote.[8] These initiatives frequently mobilize public outcry following undercover video footage of abused livestock in confinement. Most concentrated animal feeding operations (CAFOs, colloquially referred to as "factory farms") are not visible to the public eye.[9]

A single CAFO may hold more than 82,000 layer hens in confinement housing. In most of the world, laying hens may be kept in long stacked rows of battery cages with almost no room to move. Broiler chickens, while having more space in their long houses, are still impacted by conditions where there may be 22,000 to 26,000 birds per house. For a species that is genetically conditioned to forage and roost, and that pecks to establish its strict social hierarchy, these conditions are inherently stressful. This can be measured by increases in stress hormones and abnormal behaviors such as feather, toe, and vent (cloaca) pecking, which can be fatal.[10]

Farmers attempt to manage deleterious behaviors through chicken beak trimming and detoeing. Beak trimming means the partial removal of the upper and lower beak while detoeing, also called toe trimming, means the partial removal of the nails or spurs; both procedures are done without pain relief. While such procedures are considered necessary to prevent birds from pecking, clawing, and cannibalizing each other or engaging in self-mutilation, these negative behaviors primarily manifest due to the unnatural conditions in which poultry live. Debeaking and detoeing can result in both acute and chronic pain (as evidenced by pain-guarding behavior) and an inability for the birds to preen, which is a chicken's natural cleaning behavior.[11]

It is not difficult to convince the public that a debeaked, detoed chicken confined to a cage with less floor space than a standard sheet of paper is not ethically treated. Thus, bans on battery cages have been successful welfare initiatives. For instance, EU Council Directive 1999/74/EC requires all EU farms with 350 or more laying hens to provide "enriched cage systems" with features such as nests, perches, litter for pecking and scratching, and claw shortening devices.

7. J.A. Mench, *Broiler breeders: feed restriction and welfare* (2002, World's Poultry Science Journal, 58:1, 23-29, DOI: 10.1079/WPS20020004).

8. Elizabeth Overcash, *Detailed Discussion of Concentrated Animal Feeding Operations: Concerns and Current Legislation Affecting Animal Welfare* (2011; Michigan State University College of Law), https://www.animallaw.info/article/detailed-discussion-concentrated-animal-feeding-operations.

9. Temple Grandin, *Animal welfare and society concerns finding the missing link* (2014, Meat Science, Volume 98, Issue 3, Pages 461-469, ISSN 0309-1740, https://doi.org/10.1016/j.meatsci.2014.05.011).

10. Dan Cunningham, Extension Leader, Poultry Science, University of Georgia, *Contract Broiler Production: Questions and Answers* (2004, The Poultry Site, https://www.thepoultrysite.com/articles/contract-broiler-production-questions-and-answers).

11. D.C. Lay, R.M. Fulton, P.Y. Hester, D.M. Karcher, J.B. Kjaer, J.A. Mench, B.A. Mullens, R.C. Newberry, C.J. Nicol, N.P. O'Sullivan, R.E. Porter, *Hen welfare in different housing systems* (2011, Poultry Science, Volume 90, Issue 1, Pages 278-294, ISSN 0032-5791, https://doi.org/10.3382/ps.2010-00962).

Another popular and successful animal welfare cause is eliminating the mass culling of male chicks. As soon as they hatch, layer chicks are sexed and most of the males, about seven billion each year, are killed by crushing, shredding, or gassing. Germany and France have already begun the legislative process to ban this practice.[12]

Another popular and successful animal welfare cause is eliminating the mass culling of male chicks.

What some call "reactive" animal welfare laws often improve the lives of farmed animals by banning practices that cause the most pain and suffering. However, mobilizing the public support necessary to pass any law takes years and it will be difficult to achieve comprehensive farmed animal welfare through this piecemeal approach.

What the Future Holds

According to Dr. Grandin's research, in the 1990s a new hyperaggressive strain of broiler males were developed that she called "rapist roosters." Following selective breeding, these broiler roosters stopped performing their natural courtship dance, the sight of which caused hens to be sexually receptive. Unsatisfied roosters began attacking and even killing their would-be mates. Even though this problem has since been reduced through breeding changes, because industry breeding programs are protected through intellectual property laws, there is no way to know what precisely caused the courtship dance problem or fixed it, according to Dr. Grandin.

The dramatic changes in commercial poultry breeds have so far been achieved using what are deemed conventional breeding techniques. Scientists are working to find solutions to intractable problems like the economic uselessness of male layer chicks, which might be fixed through sexing of eggs so that male fertilized eggs are not hatched in the first place. Gene editing, too, will impact the future of commercial poultry. The "rapist rooster" fiasco is exemplary of a regulatory vacuum.

There is always the risk that science will create new problems in attempting to fix old ones. The UK's Farm Animal Welfare Council once considered the ethics involved in producing a pig unable to feel pain and concluded that it did not support "*the use of animal breeding practices and technologies, including genetic modifications, new or existing, that would decrease the sentience of farm animals, e.g., their ability to feel pain or experience distress.*" The Johns Hopkins Berman Institute of Bioethics, as a Core Ethical Commitment, maintains that breeding and genetics should not adversely affect an animal's well-being and, where possible, should improve it.[13]

It is necessary to establish enforceable and humane guidelines for animal breeding. The EU has again done more in this area than most other governments. The EU Council Directive 98/58/EC states:

"20. Natural or artificial breeding or breeding procedures which cause or are likely to cause suffering or injury to any of the animals concerned must not be practised…

21. No animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare".

At the national level, the German Animal Welfare Act bans the breeding or bioengineering of vertebrates if the resulting offspring would be expected to exhibit abnormal behavior causing suffering or increased aggressiveness or if it would only be possible to keep them under conditions causing pain, avoidable suffering, or harm.[14]

Conclusion

To further the humane treatment of farmed animals, advocates must support the enactment of laws that ban the most egregious farming practices and improve living, transport, and slaughter conditions. However, until breeding practices are also addressed these laws will fall short. The global success of industrial agriculture is based on fast production of cheap meat, motivating breeders to intensively select for traits that benefit producers at the expense of animal welfare. To date, few countries have attempted to regulate breeding with anything more than general principles.

Intellectual property law is a major challenge to addressing problems caused by intensive selective breeding. Livestock breeders and multinational agri-food tech corporations assert intellectual property protections to conceal the intent, methods, and failures of their breeding programs, creating substantial barriers to both enforcement and information sharing. The first step to fix this will be to make breeding programs legally subject to scientific review to assess the health and welfare outcomes for the animals involved. Governments must consider the moral obligation to ensure that human activities do not create new breeds of livestock genetically predisposed to suffer. ■

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12. The Guardian, *Germany approves draft law to end mass culling of male chicks* (Jan. 20, 2021), https://www.theguardian.com/world/2021/jan/20/germany-approves-draft-law-to-end-mass-culling-of-male-chicks.

13. Johns Hopkins University, the Berman Institute of Bioethics, *Animal Welfare* (Core Ethical Commitment 39), https://bioethics.jhu.edu/research-and-outreach/projects/global-food/current-projects/choose-food-ethically-benchmarking-food-systems/core-ethical-commitments/animal-welfare/

14. Animal Welfare Act (Germany), Federal Law Gazette 1, p.1094, unofficial English translation at https://www.animallaw.info/statute/germany-cruelty-german-animal-welfare-act.

History of the **Rule of Law**

IAN MCDOUGALL

Cet article aborde la notion d'État de droit. Pourquoi dis-je « aborder »? L'expression est souvent utilisée, mais la signification d'« État de droit » est rarement discutée. Elle est encore moins enseignée dans les universités. C'est une déception pour moi. La primauté du droit est une philosophie du droit sous-jacente cruciale qui est importante pour nous tous. Cet article aborde les origines de l'État de droit, sa définition, la différence entre l'État de droit et l'État par le droit, et l'impact économique de l'État de droit.

Este artículo le aborda el tema del Estado de derecho. ¿Por qué digo "abordar"? Porque el término «Estado de derecho» se usa a menudo pero rara vez se explora. Se enseña en las universidades aún menos. Esto es motivo de tristeza para mí. El Estado de derecho es una filosofía subyacente fundamental del derecho que es importante para todos nosotros. Este artículo discutirá los orígenes del Estado de derecho, la definición del Estado de derecho, la diferencia entre el Estado de derecho y el Estado de derecho, y el impacto económico del Estado de derecho.

A Historical Perspective

To find a global, universally applicable definition of the Rule of Law, I looked back into history. The definitions I arrived at come through that history. This is the power of both the concept and the definition.

The Code of Hammurabi, published by the King of Babylon in 1760 BC in the form of a black stone stele, is one of the first examples of the codification of law presented to the public that applies to the acts of the ruler.

In the Arab world, a rich tradition of Islamic law scholarship embraced the notion of the supremacy of law above all other earthly considerations. Core principles of holding government authority to account and placing the wishes of the populace before the rulers can be found in moral and philosophical traditions across the Asian continent, including in Confucianism. Under the supervision of the Tang Dynasty Confucian Minister, Fang Xuanling, 500 sections of ancient laws were compiled into 12 volumes in the Tang Code.

Plato, of ancient Greece, stressed the importance of law in both *The Republic* and his other works. For example, in *Crito*, Socrates is offered a way to escape his impending execution by Crito. Socrates refuses, explaining that when a citizen chooses to live in a state, he "has entered into an implied contract that he will do as… [the laws] command him."

In another of Plato's books, *Laws*, he summarizes the importance of the Rule of Law as, "Where the law is subject to some other authority and has none of its own, the collapse of the state is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise."

Plato describes the worst possible form of state as the state of tyranny in *The Republic*. He said, "In a tyranny, no outside governing power controls the tyrant's selfish behavior." As night follows day, arbitrary power inevitably causes unfairness, injustice, and abuse. Aristotle, Plato's student, said, "The Rule *of* Law is better than that of any individual." The history of the world proves that.

In India, the concept of the Rule of Law can be traced to the Upanishad series, where the "Law is the King of Kings. It is more powerful and higher than the Kings and there is nothing higher than law."

The origins of the United Kingdom's Magna Carta (1215 et al) are not proud and confirm why Plato was right to dislike tyranny. The Magna Carta arose out of a rebellion against a king who wanted to levy taxes and was imposed upon the king by a group of his subjects (the feudal barons, or early aristocracy) to limit his powers by law and protect their rights. The Magna Carta required King John to accept that his will was not arbitrary (or "tyrannical" in Plato's language). An example of the King's acceptance was the rule that no "freeman" (landowner) could be punished, except in accordance with the law. It was this section of the

Magna Carta that influenced the "Due Process" clause in the United States Constitution six centuries later.

So, with these examples in mind (and there are many more I do not have time to refer to here), I want to explain what this tells us about understanding the Rule of Law.

Definition of the Rule of Law

At the United Nations, the Rule *of* Law appeared in the Preamble to the Universal Declaration of Human Rights (1948).

There are many definitions of the Rule of Law. At the United Nations, the Rule of Law appeared in the Preamble to the Universal Declaration of Human Rights (1948). Most definitions have been arrived at by a group of people sitting in a room and deciding what the Rule of Law means. This is a big problem. Instead, the definition of the Rule of Law must be derived from first principles in a truly global way.

My approach has been to use the lessons from history and to allow the various cultures of the world to tell us what the Rule of Law means. This distillation leads to four essential elements:

1. ***Everyone is Equal Under the Law.*** You may have noted my point above about the importance of kings being under the law. It means the law applies to everyone in the same way no matter who you are. This concept has profound effects.

2. The Rule of Law must be ***Administered by an Impartial Judiciary.*** This means judges have no conflict of interest in which side wins if it is according to the law. They have nothing to personally gain by the outcome and are not compelled, because of external pressure by any outside party, to come to a specific decision.

3. The law should be ***Properly Published and Accessible.*** Without knowing what the law is, you cannot enforce it with equality, or at all. Without knowing what the law is, you cannot demand its protection.

4. ***There Must be Reasonable Access to Reasonable Remedy.*** This seems to be simple logic. Not having a remedy for your grievance means the law can simply be ignored. If there are no consequences to ignoring the law, you do not really have law at all. This means even having a remedy against the government.

For reasons that would need to be included in another article, a couple of subjects are not included in the above four-point definition: human rights and democracy.

Comparative Expressions of the Theory

As I am addressing an international audience, I want to spend a little time on how the expression of the Rule of Law can be misunderstood simply by translation. I refer to two very excellent papers, the first by Duncan Fairgrieve at the British Institute of International and Comparative Law & Université Paris-Dauphine called *État de droit and Rule of Law: Comparing Concepts.*

Fairgrieve says the words "Rule of Law" often get translated into French as *État du droit* and that instead of using État du droit, we should look to Canada for a better translation and what Canada did in its dual language system. In Canada, the term used is *la primauté de droit,* or the primacy of law, or supreme nature of the law.

The Rule of Law is referred to in the Statute of the Council of Europe and the European Convention on Human Rights. In the French language version of this instrument, the concept used is *prééminence du droit.*

The second paper I draw your attention to is an excellent comparative translation study commissioned by the Fundacion Fernando Pombo in Spain called *Translating the Rule of Law* (Díez, Barthe, Azar, Cortés, Nishimura–2018). From this paper, I draw my preference for supporting the term *Imperio de la Ley,* amongst other things.

The point is that translating only the words can lead us to discussing the wrong concept. We must always remember that we seek to translate the concept, and not merely the words. Whatever expression is used in whatever language, the concepts I am trying to convey and suggest you adopt and convey are as follows:

- Nobody is Above the Law.
- Independence of Judiciary.
- Knowledge of the Law Must be Accessible or Attainable and not be Secret or Even Unknowable by Anyone (Awareness/Publishing/Transparency).
- Accessible Remedy.

We must always remember that we seek to translate the concept, and not merely the words.

Difference Between Rule *by* Law and Rule *of* Law

This leads me to the subject of the difference between the Rule *by* Law and our topic of today, the Rule *of* Law. I hope to provide you with a simple answer to the question of why they are different. I argue that the Rule *by* Law is a system where there are laws, but where one or more of the four criteria I have listed are missing.

Let me give you an example of the Rule *by* Law. Under the Roman Justinian Code, the Emperor had a codified system of laws. However, as Emperor, he was above the laws and could, if he chose, either ignore or unilaterally override them. Thus, the requirement that nobody was above the law was not satisfied under the Rule *by* Law.

So, it is possible to have a system where you have laws, and those laws are intended to govern the Rule *by* Law. But without all the elements I have described above, the four pillars, you cannot have the Rule *of* Law.

Economics of the Rule *of* Law

Next, we turn to the economic argument by Douglas North, winner of the Nobel Prize in Economics in 1993. He wrote about the importance of the Rule of Law in his book, Institutions, *Institutional Change and Economic Performance*. North wrote that the inability of societies to develop low-cost effective institutions able to reduce transaction costs is a cause of economic stagnation. Those institutions and transactions can only function where the Rule *of* Law operates effectively.

Economists Daniel Kaufmann and Aart Kray wrote a paper called *Growth without Governance*, published by the World Bank Institute. They showed a 300% Rule of Law dividend. Over the medium term, a country's income per head rises by about 300% if its governance is improved only by one standard deviation point (which is defined in their paper).

Those institutions and transactions can only function where the Rule of Law operates effectively.

LexisNexis published the *Rule of Law Tracker*, which shows the correlation between several socio-economic indicators (including per capita Gross Domestic Product, infant mortality rates, and others) and the Rule *of* Law. Clearly, where the instability of a legal system reaches higher levels, investment cannot take place because the investment is incapable of being protected. Low investment results in low economic growth. If you cannot get your contract enforced, why would you enter a contract? To be clear, there is growing economic evidence proving that the Rule *of* Law pays back a high economic dividend.

Conclusion

This article has shown:

- The Rule *of* Law has a long and international history as a concept dating back far into antiquity.
- The Rule *of* Law is a transferrable concept used around the world, even though we may use different expressions.
- What is meant by the expression "Rule *of* Law."
- The difference between "Rule *of* Law" and "Rule *by* Law."
- Compelling economic reasons why the Rule *of* Law is important in a real practical sense.

In a report written by Gary Haugen and Victor Boutros in 2010, called *And Justice For All*, the authors estimated that some four billion people around the world still live outside of the protection of the Rule *of* Law. A recent report by the United Nations estimates that the number is five billion. Either way, that is a huge amount of economic potential that is being held back.

Advancing the Rule *of* Law is the right thing to do, not only in an academic and moral way, but it is also imperative for economic development and growth. Remember that without the Rule *of* Law, everything will be held back, and all chances of success and prosperity are damaged.

When you see news reports of your government at home taking arbitrary action, or trying to exclude the courts from decisions, or exclude people from access to justice, remember that it is not just a problem for those involved. It is a problem that easily and very quickly becomes an economic problem for us all as we live in a world that is interconnected. ■

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The Revolution of the Egyptian **Strategy** Toward the Encouragement of the Investment

Moustafa FARRAG

À la suite de la révolution de 2011, l'Égypte a été confrontée à de nombreux défis dans ses progrès, qu'ils soient politiques ou économiques, et il était nécessaire de lancer une nouvelle révolution vers son développement à tous les niveaux. Pour cela, le gouvernement égyptien a œuvré, ces dernières années, à l'encouragement des investissements à travers diverses mesures. Celles-ci incluent, en particulier, des amendements aux lois, y compris la loi sur l'investissement, la loi sur la faillite et la loi sur le tribunal économique. L'autre méthode employée a consisté en de nouvelles constructions et le développement d'infrastructures, y compris le transport et les télécommunications, en plus de nouvelles explorations dans le secteur du pétrole et du gaz. Le gouvernement égyptien encourage de manière proactive et constante les investissements directs étrangers, ainsi que les partenariats public-privé dans un large éventail de secteurs. Nous explorerons les mesures adoptées par le gouvernement égyptien pour encourager les investissements.

Después de la revolución de 2011, Egipto enfrentó muchos desafíos en sus avances, ya fueran políticos o económicos, y era necesario iniciar una nueva revolución hacia su desarrollo en todos los niveles. Por ese motivo, el gobierno egipcio ha estado trabajando en el fomento de las inversiones en los últimos años a través de diversas medidas. Estos han incluido, en particular, enmiendas a leyes que incluyen la Ley sobre Inversiones, la Ley sobre Quiebras y la Ley sobre el Tribunal Económico. El otro método utilizado ha sido la construcción de nuevas construcciones y el desarrollo de infraestructura, incluido el transporte y las telecomunicaciones, además de las nuevas exploraciones en el sector de petróleo y gas. El gobierno egipcio está fomentando de manera proactiva y constante la inversión extranjera directa, así como las asociaciones público-privadas en una amplia gama de sectores. Exploraremos las medidas adoptadas por el gobierno egipcio para fomentar las inversiones.

The Investment Law

Starting with the legal actions that were taken by the Egyptian Government, Egypt ratified a landmark Investment Law number 72 for the year 2017 intended to modernize and reduce barriers to how international companies invest and operate in Egypt.

The new Egyptian Investment Law in focus:

1. The Investment Law is designed to expand economic growth, domestic production, exports, and foreign investment, and boost employment opportunities, in order to increase Egypt's competitive edge across the region. The law is also expected to ensure equality of opportunity, empower youth, protect the environment and public health, and enhance good governance and transparency.

2. This law also guarantees a number of protections for international investors to encourage new development in Egypt. Foreign investors will receive the same treatment under law as Egyptian nationals. Moreover, foreign investors may now be granted preferential treatment, with approval from the Council of Ministers.

3. Investments will not be governed by arbitrary procedures or discriminatory decisions. Investment projects will not be nationalized. No administrative authority can revoke or suspend investment project licences without proper warning, due process, and time to correct any issues. Foreign investors are guaranteed residence in Egypt during the term of a project. Investors have the right to transfer their profits abroad without additional taxes. Investors' projects may include up to 10% foreign employees, and up to 20% for investment companies. Foreign employees of investment companies have the right to transfer their compensation abroad.

4. New safeguards now exist for investors to help attract global investors, and the law contains policies to encourage significant and targeted investment through different incentives. By way of illustration:

a. "*Investors can expect reduced bureaucracy and red tape, a clear investment policy and easier access to investment opportunities. The law offers greater transparency and accountability and compelling incentives. Successful implementation of these reforms should*

give greater confidence to foreign investors leading to increased FDI". – U.S. Department of State, Investment Climate Statements for 2017."

b. *"An industrial licensing law and a new Investment Law have been passed and are critical pieces of legislation necessary to strengthen the business climate, attract investments, and promote growth." – David Lipton, First Deputy Managing Director and Acting Chair, Executive Board, International Monetary Fund."*

c. Foreign Direct Investment in Egypt increased by 3090.70 USD Million in the second quarter of 2020. source: Central Bank of Egypt.

d. An independent arbitration and mediation center will have the authority to pursue the settlement of investment disputes that arise between investors and state authorities.

e. A ministerial committee will be established to review complaints and disputes between investors and state authorities.

f. Committees within General Authority for Investment (GAFI) will examine complaints against resolutions issued in accordance with this law.

g. The Egyptian policy makers are seeking to guarantee a sound investment climate for both domestic and foreign investors. Parts of Egypt's legal framework applicable to investment protection, including the new Investment Law, apply equally to both domestic and foreign investors.

The Use of the Alternative Dispute Resolution Mechanism

From the perspective of the Alternative Dispute Resolution, Egypt operates under a civil law system of codified laws, largely derived from the French Napoleonic Code. The Egyptian Civil Code of 1948 remains the primary source of legal rules applicable to contracts and is influenced by the French Civil Code and Islamic (Shariah) law.

The Egyptian Legislature has adopted an ADR mechanism and supported the idea of decreasing the caseloads from the judicial system by applying this alternate system, with the result that in recent years the caseloads have been increasing dramatically, as the statistics refer that each year there are 60 million cases currently before the courts in all its levels including one million and five hundred family court cases filed yearly.

As to the enforcement of Arbitral award, once the arbitral tribunal renders its award, the award is final, and the dispute may not be reviewed by or relitigated before state courts.

The promulgation of Arbitration Law no. 27 of 1994 on arbitration in Civil and Commercial matters was a milestone in providing a comprehensive framework for the arbitration process in Egypt.

To ensure the effectiveness and fairness of the judicial system this mechanism has found its way and to that end, the ADR system nowadays is representing an important role in the settlement of investment and commercial disputes.

The Egyptian Arbitration Law

The Arbitration Law lays down the procedural rules that govern the arbitration process in Egypt. Based primarily on the UNCITRAL Model Law on International Commercial Arbitration, the Arbitration Law is in harmony with prevailing international standards of arbitration.

Regarding the Egyptian Arbitration Rules for Arbitration and their application and according to Article 11 of the Arbitration law, the general rule is that matters not subject to conciliation or settlement are not arbitrable. In the application of this rule, arbitration cannot be the forum for settling disputes arising, inter alia, out of constitutional issues, criminal law violations, domestic relations, or personal affairs.

As to the enforcement of Arbitral award, once the arbitral tribunal renders its award, the award is final, and the dispute may not be reviewed by or relitigated before state courts. However, the losing party may request that the award be declared null and void, if one of the reasons of annulment stated in the Law are presented or if it conflicts with Egyptian public policy.

The Ratification of the New York Convention and ICSID Conventions

International arbitration in Egypt is governed by two main legal frameworks that take into consideration the international nature of arbitration as a mechanism for settling legal disputes:

1. First, the recognition and enforcement of foreign arbitral awards in Egypt, as well as the foreign recognition and enforcement of arbitral awards rendered in Egypt, is, for the most part, governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

2. Secondly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (the ICSID Convention) provided for the establishment of the International Centre for Settlement of Investment Disputes (ICSID) as a member of the World Bank Group, which stands as the primary venue for the settlement of investment disputes between a member state and nationals of other member states.

Egypt ratified the New York Convention in February 1959. Pursuant to Article 151 of the Egyptian Constitution, international conventions have the force of law upon ratification by the Parliament. Accordingly, the substantive provisions of the New York Convention are directly binding on Egyptian courts.

Likewise, Egypt ratified the ICSID Convention in November 1971. According to Article 25 of the ICSID Convention, ICSID jurisdiction extends to any legal dispute between a contracting state (including Egypt and 158 other states) and a national of another contracting state that arises directly out of an investment, if the parties to the dispute have consented in writing to submit to the ICSID.

Egypt signed several Bilateral Investment Treaties (BITs) with other countries, whereby countries consent to the jurisdiction of the ICSID to rule on their investment disputes with nationals of other BIT-signatory states.

Other Forms of Alternative Dispute Resolution Applicable in Egypt

Although the Arbitration Law stands as the primary legislative source for extrajudicial forums or alternative dispute resolution mechanisms in Egypt, Egypt has recently pursued various additional frameworks to accelerate the settlement of investment disputes between the state and investors.

These frameworks were primarily motivated by the desire to provide confidence in the Egyptian economy, especially following the adverse economic consequences of the 2011 revolution.

By the issuance of the new Investment Law it introduces three committees that deal with different types of complaints, as well as a new arbitration and mediation center.

Egypt's New Institutional Framework for the Prevention of Investment Disputes

Egypt's with respect to the prevention and early settlement of investment-related disputes and its strategy to case management of ISDS cases has taken several measures. The 2017 Investment Law created new mechanisms under title "Investment Disputes Settlement" dedicated to dispute resolution, giving investors more options when facing a dispute. The chapter created three out-of-court forums to encourage amicable settlement of investment disputes with the government, without prejudice to the inalienable right of the investor to recourse to the judiciary.

Dedicated inter-ministerial bodies were created, as follows:

The Grievance Committee

The Grievance Committee is competent to examine the complaints filed against the resolutions issued in accordance with the provisions of this Law by the Authority or the authorities concerned with the issuance of the approvals, permits, and licenses. It is formed and chaired by a judge from a judicial and the Committee shall include a representative of the Authority and a person with experience as members. The complaints shall be submitted to the Committee within 15 days from the date of notice or knowledge of the decision petitioned against. The Committee shall settle the matters brought thereto by a justified decision within 30 days from the date of closing of hearings and submissions. The Committee's decision shall be irrevocable and binding on all the competent authorities, without prejudice to the Investor's right to resort to the judiciary.

The Ministerial Committee for Investment Disputes Resolution

This committee was established to look into the applications, complaints, or disputes submitted or referred thereto which would arise among the investors and the State or where one of the State's bodies, authorities, or companies are party to. amendments.

The Committee is formed by a decree issued by the Prime Minister. Its decisions shall be endorsed by the Cabinet of Ministers. The familiar short name of this committee is the Dispute Resolution Committee (DRC)

The 2017 Investment Law created new mechanisms under title "Investment Disputes Settlement" dedicated to dispute resolution, giving investors more options when facing a dispute.

The DRC shall issue its decision with the reasons thereof within 30 days from finalizing the hearings.

Without prejudice to the Investor's right to resort to the judiciary, the Committee's decisions, upon being approved by the Cabinet of Ministers, shall be enforceable and binding on the competent administrative authorities and they shall have the executive power.

The Ministerial Committee for Investment Contracts Disputes Settlement

This committee is established in the Cabinet of Ministers to settle the disputes arising from the investment contracts where the State, or one of its bodies, authorities, or companies is party to.

The Committee have a technical secretariat, whose composition and system of work shall be determined by a decree issued by the Prime Minister.

The Committee shall examine and explore the differences arising between the parties to the investment contracts. To such end, and with the consent of the contracting parties, it may perform the necessary settlement to handle the imbalance of such contracts, and extend the terms, periods, or grace periods provided for in such contracts.

This Committee shall further reschedule the financial dues or rectify the procedures which precede the conclusion of contracts, in a manner that achieves the contractual balance to the extent possible and ensures an optimal economic situation for the preservation of public funds and the investor's rights in view of the conditions of each case.

The Committee whenever it reaches a settlement within the parties. Upon being approved by the Cabinet of Ministers, such settlement shall be enforceable and binding on the competent administrative authorities and it shall have the executive power.

If no settlement is reached, each party can commence litigation or arbitration as the case may be. Submission to the committee is not a pre-requisite for commencement of a litigation or arbitration case.

General Authority for Investment GAFI Dispute Settlement Centre

Along with the ministerial dispute committees, the Investment Law establishes a Mediation Centre, under the auspices of GAFI, to settle investment disputes which might arise among investors. The Mediation Centre is governed by a board of directors, composed of five members appointed by Prime Ministerial Decree. Since its creation, the centre has dealt with more than 200 claims, out of which about 60% were amicably settled. GAFI Dispute Settlement Centre is also competent to deal with investors' grievances filed against any state entity.

The Role of the Arbitration and International Disputes Department at the Ministry of Justice

The Arbitration and International Disputes Department has within its remit the secretariat of the Ministerial committee on investment contracts dispute settlement, headed by the Assistant Minister for Arbitration and International Dispute Department, his excellency, Judge Moustafa Elbahabety, is playing a significant role in the settlement of Investment contracts.

The strategy that has been taken at the Arbitration and International Disputes Department in the settlement of international arbitration has as its direct and indirect aim the encouragement of investments.

The Arbitration and International Disputes Department at the Ministry of Justice succeeded in resolving 22 disputes concerning investment, eight of which were brought before ICSID: the rest in other different arbitral institutions.

This had helped the Egyptian Government to save billions in EGP in those settlements.

Egypt Investment Treaties

Investment treaties (also referred to as international investment agreements or IIAs) are another component of Egypt's investment policy framework.

Protections afforded under investment treaties generally arise in addition to and independently from domestic law protections.

The majority of Egypt's investment treaties grant covered investors two different types of rights:

a. Substantive rights to standards of treatment for covered investments (such as protections against expropriation or discrimination, or against unfair treatment);

b. Procedural rights to enforce government obligations in the treaty, often through investor-state dispute settlement (ISDS) mechanisms. These generally permit covered investors to bring claims against the host state for breach of the treaty before arbitral tribunals.

One of the main reasons motivating certain countries to conclude investment treaties has been to seek to attract foreign investment.

Overview of Egypt's Investment Treaties

Investment treaties (also referred to as international investment agreements or IIAs) are another component of Egypt's investment policy framework.

Egypt has a broad range of investment treaties. GAFI indicates that as of September 2019 Egypt has concluded 111 BITs, 72 of which are currently in force. Egypt has BITs in force with all of the G7 states except the EU and all but three of the member states of the EU (Estonia, Ireland and Lithuania) as well as several other major capital-exporting states in the G20 group including Argentina, Australia, China, Korea, the Russian Federation and Turkey.

As stated by UNCTAD, Egypt is considered among the top 10 signatories of BITs. According to the ICSID cases database, BITs concluded by Egypt are the most relied on basis for consent to establish ICSID jurisdiction. Interestingly, the Egyptian Investment Law was invoked in two ICSID cases based on Egyptian Investment Law which previously offered unilateral consent to ICSID jurisdiction.

The number of the BITs referring to the ICSID Convention might justify why Egypt is, to date, ranked the fourth-most-frequent respondent state following Argentina (56 cases), Venezuela (49 cases) and Spain (39 cases). According to the ICSID cases database, up to March 2020, 34 cases were filed against Egypt.

Responsible Business Conduct in Investment Treaties

Egypt may also wish to consider addressing sustainable development and responsible business conduct considerations in its investment treaties. Three of Egypt's BITs, as well as the OIC, COMESA and Arab Investment Agreements, make express reference to these objectives. Other recent treaties clarify the state parties' understanding that it is inappropriate to encourage investment by investors of the other contracting party by ignoring environmental or health measures, exclude investments procured by corruption from the scope of protections under the treaty, recognise that investments should contribute to the eco-

nomic development of the host state, and recognise the importance of requiring companies to respect corporate social responsibility norms.

GAFI announced in March 2016 that it was undertaking a new investment treaty reform programme based on two main objectives: updating Egypt's model BIT and reviewing and amending Egypt's existing investment treaties GAFI has confirmed that the process of updating Egypt's model BIT seeks to respond to domestic and international developments regarding investment policy, enhance the role of FDI in achieving sustainable development and establish a new balance between the rights and obligations of investors and the state.

The Benefits of the Promulgation of the New Laws to Encourage the Investment

The Decrease of Arbitral Cases Against Egypt

The direct result of the reform of the Egyptian Laws, and especially the new Investment Law, is that there has been a decrease in arbitral case numbers against Egypt.

The statistics proves that the number of cases saw a remarkable decreases, around ten to fifteen cases were annually raised against Egypt but latterly only two cases have been brought annually since 2017 and they are in the process of being settled. This positive situation is really indicative of an improvement in the investment environment following the new Investment Law passed in 2017, along with decisions that helped to solve the problems of the investors and finally the tools for the settlement of disputes.

Moreover, the government-appointed representatives within the committees dedicated to dispute resolution are a testament to how seriously these processes are taken by the state.

In the latest years and as succession to the new Investment Law, a number of new laws have set the scene and have created a fertile ground for new investments and advancement on the economic level. This was accomplished by the promulgation of number of laws and regulations, all resulting, whether directly or indirectly, in the creation of new and attractive opportunities for foreign investors.

[…] Two new laws governing much-needed technological advancements are those concerning the incorporation of e-signatures and the new cybercrimes law.

These laws and changes include updates in financial leasing laws, the introduction of the new consumer law, the new public procurement law, and the imposition of new fee brackets for registration on the stock exchange. Moreover, two new laws governing much-needed technological advancements are those concerning the incorporation of e-signatures and the new cybercrimes law. Together, the formation of these laws can be drawn out in a timeline, showing that Egypt has made efforts to attract investment and has indeed become ready for investors.

Progress Towards Transparency

A good corporate governance framework includes high levels of transparency and disclosure. The government has taken steps to increase transparency of public sector firms. Notably through publishing a "comprehensive report on state-owned enterprises", which will include a "full list of the companies owned by the government, broken down by industry, policy objectives… and type of ownership (e.g. majority or minority-owned)". The report includes information on the government's ownership policy, the impact of public sector enterprises on government finances, and details on individual companies' finances (including subsidies), board members and management.

The government publish the report annually which is a significant step towards improving transparency of public enterprises and making them more accountable in the eyes of the public and investors.

The government does make available financial information on a subset of SOEs. The Business Sector Information Centre, a body under the Ministry of Public Enterprise Sector, publishes the latest financial summary reports (including year-end profits, revenues, investments and exports) of the eight holding companies (and their affiliate companies) under the Ministry. The Ministry of Finance also has publicly accessible financial records on 19 holding companies (including the eight controlled by the Ministry of Public Enterprise Sector), and 23 firms, including in the oil and gas and electricity sectors. These are fairly detailed, including information on current financial position, grants or subsidies received, income statements, distribution of profits, and statements of cash flows, also the Ministry of Finance website also discloses budgets and spending of 47 "economic authorities", all this represent the progress towards transparency and will definitely gain the trust of all the stakeholders and excludes all sorts of corruption that may affect the development.

The Role of the World Bank in the Development in Egypt

According to the latest World Bank report, Egypt, supported by the World Bank Group, has achieved significant results across all three focus areas under this Country Partnership Framework CPF. Policy reforms – backed by the US$3.15 billion Development Policy Finance (DPF) program and consisting of 3 operations over the 3 years of 2015 to 2017 – have supported Egypt's homegrown reforms program, which is aimed at enhancing the economy, creating jobs, and achieving sustainable growth, especially in the energy sector.

Government revenues have been bolstered through the Income Tax Law while expenditures have been brought under control, especially on wages and salaries (through

annual budget instructions and the automation of salary payments) and on energy subsidies (through annual tariff adjustments for gas and electricity). The environment for investors has been strengthened by amending the Investment Law, implementing the Competition Law, and reforming the industrial licensing regime, which helped reduce the time taken in providing licences to low-risk industries by 80%.

The World Bank Group has been supporting the Government of Egypt to mitigate any adverse effects the first wave of reforms may potentially have on the poor and the middle class. The Bank has helped design and finance key flagship projects and programs to do this, using financial instruments to: (i) enhance social protection programs; (ii) support sustainable job creation activities; and (iii) improve quality service provision in the country. Its active interventions include:

1. the Promoting Innovation for Inclusive Financial Access Project (US$300 million), which expanded access to finance for micro – and small enterprises in underserved regions using innovative financing mechanisms;

2. the Education Reform Project;

3. the Egypt National Railways Restructuring Project; and

4. the Greater Cairo Air Pollution and Climate Change Project, which is a rich program of Advisory Services and Analytics (ASA) that helps identify and implement reforms in Egypt.

Finally, the Egyptian government has committed to a proactive reform agenda to improve the business climate, attract more foreign and domestic investment, and reap the benefits of openness to Foreign Direct Investment (FDI) and participation in global value chains. Successful macro-economic stabilisation and market reforms have prompted a surge in foreign investors' interest in Egypt in the last years.

Despite remaining challenges, Egypt has made major progress, starting with the adoption of a comprehensive and modern legislative framework for investment and business activities. As part of institutional reforms, the General Authority for Investment was recently put under the direct authority of the Council of Ministers to provide a more streamlined allocation of responsibilities and policy-making processes.

The establishment of a centralised one-stop-shop and of a nation-wide Investment Map were other major breakthroughs in the services offered to investors. Both are expected to substantially improve investors' access to land and business opportunities.

The government of Egypt has also revised its Special Economic Zone SEZ policy, and several state-owned enterprises have taken steps to incorporate corporate governance standards.

While there is a strong political will in Egypt to pursue an ambitious reform agenda, the government is encouraged to continue building a more sustainable and transparent investment environment that can support economic diversification and create more and better quality jobs for Egypt's growing population.

In the aftermath of the Covid-19 crisis, the government will need to push forward recovery measures for a more resilient economy, and FDI attraction and retention can play a central role in the ongoing structural reform agenda.

It is worth mentioning that economic megaprojects have been a main characteristic in Egypt for the past four years. The country has made significant and multifaceted efforts to grow its economy by both attracting foreign investments for a wide range of economic activities as well as developing its export capabilities.

As examples of the major Mega projects in Egypt.

1. The New Administrative Capital City which will represent a turnover to Egypt toward development. It is is located 35 KM east of Cairo of a total area of 170,000 feddan.

It is built as a smart city and it includes the parliament, presidential palaces, government ministries and foreign embassies will be full operated by the end of this year, at a cost of USD 45 billion.

The new capital city will help to strengthen and diversify the country's economic potential by creating new places to live, work and visit, and it will include the Middle East's largest private medical city.

2. Dabaa Nuclear Power Plant project

The Dabaa Nuclear Power Plant project will be the first nuclear power plant planned for Egypt and will be located at El Dabaa, Matrouh Governorate, which is about 130 km northwest of Cairo. Upon completion, Dabaa power plant will have a capacity of 4 800 Mega Watt. The overall cost of the project is US $ 29 bn.

3. Concentrated solar power (CSP) plants

CSP is a type of renewable energy that uses the sun's energy to process heat with temperatures of 400° C to 1000° C. CSP plants are large scale renewable energy infrastructures that use CSP's to process heat that can be transformed into electricity or stored. The billion dollar project, includes the construction of five CSP power plants. Each single station is projected to cost approximately US $ 250 m.

In addition to that is the discovery of the Zohr field which is believed to be the largest-ever gas discovery in Egypt and the Mediterranean and it is large enough to supply all of Egypt's natural gas requirements – and nearly two-thirds of its total energy needs – for decades and to transform the country from a net energy importer to a net exporter and a regional energy hub. The field will also contribute to the geopolitical and energy stability of the region.

These MEGA projects among others will allow Egypt to achieve the Sustainable Development Goals and will take Egypt to the next level to be amongst the [leading] developed countries not only in the MENA region but globally. ■

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Divorce in Italy and Maintenance to the Financially Weaker Spouse: A Continuing Challenge

Alberto MORIZIO

En Italie, lorsqu'il prononce le divorce, le Tribunal, à la demande d'une partie, prévoit l'attribution d'une prestation compensatoire périodique en faveur de l'époux ne disposant pas des moyens de subsistance appropriés ou ne pouvant se les procurer pour des raisons objectives. La détermination de la prestation compensatoire a beaucoup occupé la jurisprudence et la doctrine. Après 27 ans de jurisprudence constante, la Cour de cassation a modifié en 2017 et 2018 l'interprétation de la loi n. 898/1970 : le débat sur ce sujet est ici résumé.

En Italia, al pronunciarse el divorcio, el Tribunal, a petición de una de las partes, prevé la concesión de una indemnización compensatoria periódica a favor del cónyuge que no disponga de los medios de subsistencia adecuados o no pueda permitírselo por razones objetivas. La determinación de la indemnización compensatoria ha sido objeto de mucha jurisprudencia. Tras 27 años de jurisprudencia constante, en 2017 y 2018 la Corte de Casación modificó la interpretación de la Ley No 898/1970. El artículo resume la situación actual.

Introduction

In the Italian legal system, matrimonial issues are ruled by the law shaping legal separation and divorce regulation. The 1942 Civil Code provides detailed dispositions in case of separation of spouses, as authorized by the President of the Court: it is important to underline that *de facto* separation is without effect (except in situations arised prior to 1975, when the major reform of Family Law occurred). Divorce in Italy was not admitted until its introduction by Law no. 898/1970. Legal separation implies that the law no longer requires the spouses to live together, it does not cancel the marriage relationship but weakens it. Legal separation may be by order of the court or by mutual consent.Today, either spouse may apply for a divorce on specified grounds as provided by law. The most frequently cited basis is that the couple has been legally separated, either by mutual consent or on the application of one of the parties, for an uninterrupted period of time (respectively, six months and twelve months).

Regarding maintenance during separation, if requested, the Court grants the weaker spouse not responsible for the end of the relationship the right to obtain maintenance from the other spouse in order to keep the same lifestyle they had during the marriage, if he or she does not otherwise have "*adequate personal income*" (article 156 Civil Code). The amount of the maintenance is determined by taking into account all circumstances and revenues of the parties. Nevertheless, a spouse in need is still entitled to receive alimony (essential maintenance) to cover subsistence needs, even if he or she is responsible for the separation.

The Statutory Framework

After a strong political debate and an abrogative referendum in 1974[1], Law no. 898/1970 introduced divorce and, under article 5, maintenance support in case of divorce. The first High Court decisions following the introduction of divorce (especially *Corte di Cassazione* Joint Civil Chambers, judgment no. 1194 of April 26, 1974) shared the theory that maintenance had three functions: welfare, compensation and refund.

Welfare was related to the needs of the ex-spouse, compensation aimed to balance the commitment to the family setting aside personal ambitions and refund was related to the reasons of the divorce.

Article 5, paragraph 4 Divorce Law (as in force until 1987) provided that with the decision on divorce the Court could provide maintenance support for one of the parties, taking into consideration the spouses's condition and reasons of the decision, and determine the amount proportionally to parties' assets and income, taking into consideration personal and economic contribution to the family duties and building family assets.

1. 40,74% of voters chose to abrogate Divorce Law.

This formulation was not ideal and gave rise to a view that the judges had too much discretionary power over the amount of maintenance and who should get it. Consequently, the law was changed to address this issue. The current formulation of article 5, paragraph 6 Divorce Law (as a result of 1987 reform) provides that with the decision on matrimonial status, the Court, "*taking into account spouse's conditions, the reasons of the decision, the personal and economic contribution given by each one in family duties and building of shared and personal assets, party's income, evaluating these elements also with regard to duration of marriage*", provides for periodical allowance of maintenance support in favor of one spouse when the latter "*does not have adequate means or is unable to provide for himself or herself for objective reasons*".

The 1987 reform therefore addressed the need to affirm the welfare/assistance nature of divorce maintenance, enhancing the principle of post-conjugal solidarity. As a consequence, the old composite theory on divorce maintenance was set aside. Also important was the broadly shared idea in Courts and between academics that lack of "*adequate personal income*", under article 156 Civil Code, an assumption for separation maintenance, was comparable with the absence of "*adequate means*" as in Divorce Law, article 5 paragraph 6.

The 1987 reform therefore addressed the need to affirm the welfare/assistance nature of divorce maintenance, enhancing the principle of post-conjugal solidarity.

The Developing Case Law

The courts therefore stated that the main element to investigate for granting divorce maintenance to the financially challenged spouse was the standard of living during marriage, in order to understand if the spouses after divorce would still have adequate means to conserve it. The judge's decision remained broadly discretionary, but under a different set of factors that had replaced the more general considerations of welfare, compensation and refund.

The leading case, *Corte di Cassazione* Joint Civil Chambers, judgment no. 11490 of November 26, 1990 has remained the benchmark on the subject for 27 years. In that case, the Court stated that article 5 paragraph 6 Divorce Law requires a double investigation, as regards the phases of "*an debeatur*" (or if maintenance is due) and "*quantum debeatur*" (determining its amount). This means that the right of maintenance can be recognized in case of inadequate means of the applicant (considering all his assets and economic situation) in order to keep a standard of living comparable to the one during marriage, without the requirement of the state of need. Relevance was given to the worsening of economic conditions as a direct consequence of divorce, that had to be compensated. The Court confirmed also the welfare nature of maintenance allowance and stated that the amount of maintenance or "*quantum*" had to be determined discretionally by the judge after a balanced evaluation of all the criteria in the first part of article 5, paragraph 6 Divorce Law.

The prior standard of living was the maximum parameter, and the minimum was alimony for essential needs of the spouse. In between, the discretionary power of the judge allowed for ruling on a *case by case* basis.

The concept of welfare nature of maintenance also implies that in case of relevant contributions to the other spouse's personal wealth during marriage, in case of adequate means of the applicant and no specific needs to keep the prior tenor of life, allowance had to be denied.

Twenty-seven years after the latter decision, the *Corte di Cassazione* had to decide a case regarding maintenance request from the wife of a former Vice Minister, in a context of a lavish lifestyle and relevant parties' assets. In first instance and appeal, the lower courts denied maintenance finding an absence of inadequacy of means. On appeal, the *Corte di Cassazione*, Ist section, judgment no. 11504 of May 10, 2017, in a surprise decision, overruled the previous jurisprudence, and stated that "adequacy of means" had to be the economic self-sufficiency of the spouse. In order to avoid parasitic and unearned incomes, the High Court held that preserving the former standard of living was not compatible with a terminated relationship and underlined the importance of the principle of self-responsibilty.

Therefore, as of 2017 self-sufficiency and solidarity were principles in conflict and a new balance had to be found, especially for high-net-worth individuals.

Many first instance courts had followed this new jurisprudence, strongly reducing the number of maintenance

allowed, by setting the economic self-sufficiency threshold very low, and some others still applied the 1990 orientation. It was therefore inevitable that the Joint Chambers of *Corte di Cassazione* would have to intervene, in order to protect the uniform interpretation of national legislation.

Judgment July 11, 2018 no. 18287 was the result. It has been declared by High Court herself one of the most relevant decisions of the year[2]. The *Corte di Cassazione* ruled that divorce allowance in favor of a divorced spouse is a form of assistance as well as an instrument for equalization or compensation, in compliance with the constitutional principle of solidarity and the dignity of the person. Importantly, the composite nature of spousal maintenance was explicitly reaffirmed.

The Decision no. 18287 also stated that granting the allowance requires that the court has to assess – in conformity with the criteria of article 5, paragraph 6, Divorce Law - whether the resources available to the applicant are inadequate or if it is impossible for the weaker spouse to obtain them. A court therefore should examine the former spouses' financial and patrimonial conditions, taking into account the petitioner's contribution to family life and to the formation of the family's wealth, the duration of the marriage, the age of the beneficiary and the professional prospects that the beneficiary sacrificed for the benefit of the family. The analysis explicitly excluded any hierarchy between the different criteria as well as any biphasic evaluation.

Equalizing and compensative functions derive directly from 1948 Constitution principles of equality (art. 3) declined as same dignity and solidarity between spouses in article 29, enhancing the role and the contribution of each party within the family in a framework of self-responsibility.

The new jurisprudence, after Decision no. 18287 goes beyond the tenor of life parameter, underlined the importance of compensation for life choices and sacrifices made in favour of the family by the weaker spouse, that have to be compensated in case of divorce without the limits drawn by previous jurisprudence.

The new orientation, going beyond the prevalent welfare function of divorce maintenance, raised a new highly debated issue. What happens if the weaker spouse starts a new cohabitation?

Law no. 898/1970 article 5, paragraph 10 provides that in case of new marriage, the beneficiary of spousal maintenance looses the right to obtain it.

When jurisprudence described spousal maintenance as a welfare instrument, Courts tended to rule that also a new cohabitation could imply the automatic loss of the right to receive support from the former spouse. As of 2008, when Joint Chambers of *Corte di Cassazione* underlined the compensation and equalization functions of the provision, different solutions were adopted by first instance courts. *Cassazione Civile* Judgment of December 17, 2020 no. 28995 forwarded the case to Joint Chambers of *Corte di Cassazione*, in order to determine wether a new cohabitation could determine the end of matrimonial support automatically or after the evaluation of the real function of the maintenance provision. On a case by case basis, maintenance could still be granted as a compensation for the contribution given to the other spouse during marriage. The awaited decision will bring new contributions to the challenging debate on post-conjugal solidarity and its limits, such as whether the doctrine of valorization of contributions offered to family life as a modern and widely accepted principle, fully compatible with international trends.

The new orientation, going beyond the prevalent welfare function of divorce maintenance, raised a new highly debated issue. What happens if the weaker spouse starts a new cohabitation?

For example, French Civil Code, under article 270 provides the "*prestation compensatorie*", or forfeit compensation, in order to eliminate the disparity of spouses' conditions after divorce, taking into account all specific circumstances of divorce.

It is interesting that Italian Divorce Law only provides forfeit maintenance in case of mutual consent of the spouses, as *una tantum* maintenance contribution, that impedes any further economic request. Judge's decisions can only determine maintenance as monthly payments linked to currency revaluation indexes. Allowing forfeit maintenance contributions by order of the Court is a reform that could be sustained in the Italian legal system, especially in a legal framework focusing on compensation in case of divorce.

Conclusion

In a comparative perspective, scholars believe that there is a worldwide trend to reduce or extinguish spousal support to the economically weaker spouse, with the aim to stop the tendency of an automatic right to hefty maintenance payments, as well as recognising the parties' autonomy once relationship has ended. The self-sufficiency principle is at the core of the EU harmonisation process in family law[3]. Nonetheless, in case of divorce, adequate compensation has to be granted as a consequence of an objective valorization of the contribution given by one of the spouses to the family and/or the other spouse.

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2. *Corte di Cassazione*, Report on 2018 Judicial Activities to the President of the Republic, as in http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_sull_amministrazione_della_giustizia_anno2018_EN.pdf

3. As in G. TERLIZZI, "Ties that Bind: Maintenance order after divorce in Italy," The Italian Law Journal, p. 466.

Directiva Europea 1023/2019: Efectos Para Los Autonomos, Pymes Y Mipyme (54% De Las Empresas)

José PAJARES ECHEVERRÍA

The member states of the European Union have the opportunity to take advantage of Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019, on preventing restructuring frameworks, on discharge of debt and disqualifications. Spain, in particular, must adjust the minimum non-exonerable limit of debts from the current 25% to 10% established by countries such as Germany, Austria and Portugal or adjust it to the debtor's possibilities as envisaged by France, Belgium or Scandinavian Countries.

Les États membres de l'Union européenne ont la possibilité de profiter de la directive 2019/1023 du Parlement européen et du Conseil du 20 juin 2019, relative aux cadres de restructuration préventive, à la remise de dettes et aux déchéances. L'Espagne, en particulier, doit ajuster la limite minimale non exonérable des dettes de 25 % actuellement à 10 % tel qu'établi par des pays comme l'Allemagne, l'Autriche et le Portugal ou l'adapter aux possibilités du débiteur comme l'envisagent la France, la Belgique ou les pays scandinaves.

Convendrá comenzar ubicando adecuadamente el marco en que se desarrolló y aprobó la Directiva 1023/2019, de 20 de junio para "comprender" alguna de sus regulaciones y su inaplicación a la pandemia.

Tuvo su origen en la Recomendación de la Unión Europea de 12 de marzo de 2014 sobre, entre otras cosas, "*un nuevo enfoque al fracaso empresarial*", y se aprobó pocos días antes de las elecciones al Parlamento Europeo. Ambas circunstancias, a mi juicio, precipitaron el cierre del debate sobre la Directiva sin concluirlo, lo que no ha sido, en absoluto, bueno ya que se deja excesiva discrecionalidad a los países para incorporarlo en su Derecho, demostrando que no se concluyó el necesario debate.

Y esto que es bueno para la norma en sí misma, puede serlo también para los países que tras la aparición de la pandemia, entre otros España, no lo hayan hecho, pues la referida flexibilidad de la Directiva concede margen para que se pueda regular teniendo en cuenta la situación sanitaria y económica actual.

En efecto, creo que hoy tiene el legislador español la oportunidad de aprovechar bien la Directiva y adaptarla al escenario post-pandemia en que las empresas desarrollarán su actividad (Sin embargo, no soy optimista sobre ello pues el Texto Refundido de la Ley Concursal entró en vigor en plena pandemia y no se quiso aprovechar).

En consecuencia, la Directiva tenía importancia cuando se aprobó, pero hoy cobra particular importancia en el contexto societario y económico que estamos viviendo para poder afrontar mejor las consecuencias de la Covid.

Así las cosas, y teniendo esta posibilidad pero sobre todo la necesidad de hacerlo, observo que actualmente todos los agentes que intervienen en el Derecho de la Insolvencia estamos analizando la Directiva, pero la inmensa mayoría lo centramos en la mal llamada segunda oportunidad (pues la norma no la denomina así en ninguna de sus artículos, haciéndolo como "exoneración de deuda"), ya que los efectos económicos de la pandemia están arrojando a la insolvencia a multitud de autónomos, PYMES y MIPYMES para los que la exoneración se convierte en una herramienta para poder volver al mercado de donde han salido por razones ajenas a su voluntad.

Centraré por ello, y por ahora, mis reflexiones en la exoneración de deudas dejando para otro momento las reflexiones sobre la mediación y el experto en insolvencias.

La exoneración de deudas se recoge en el Título III de la Directiva ("Exoneración de deudas e inhabilitaciones"), en sólo once artículos (artículos 20 a 31) de los cuales sólo 4 lo hacen sustancialmente. Incluso en los numerosos considerandos que dan entrada a la Directiva (casi una centena) sólo se refieren a la exoneración directamente los considerandos 71, 73, 77 y 79. Parece fácil concluir que no es la exoneración, a pesar del propio título de la Directiva, el objeto principal de la Directiva; sin embargo, todos estamos conociéndola como Directiva de la "segunda oportunidad" (no sic).

Pues bien, la Directiva en cuestión contiene una idea importantísima que consolida muchas de sus normas, pero, como diré, de manera contradictoria (y contradicha también).

Y esta no es otra que, con el Libro Verde Sobre Servicios Financieros ("*Green Paper on retail Finances Services*"), conseguir "*una convergencia de los procedimientos de insolvencia de personas físicas, tasación de bienes y ejecución de garantías*", es decir, perseguir la necesaria armonización del Derecho Concursal. Necesidad que no nos es ajena a ninguno pues alcanza a todos los sectores, entre ellos al mercado financiero, pero menos al legislador norteamericano que lo ha tenido claro desde el inicio al aprobar la norma mediante ley federal de aplicación a todos sus Estados.

Pero he aquí que la Directiva, como antes he citado, concede una enorme flexibilidad a los países para que la desarrollen internamente permitiendo, como ya ha sucedido, diferencias importantes entre todos ellos y de este modo alejar la necesaria armonización, y ello aún a pesar de que las medidas de emergencia que como consecuencia de la pandemia se están aprobando lo son de manera muy similar en todos los países del mundo.

Valga un ejemplo paradigmático respecto del modo de acceder a la exoneración:

- Países anglosajones (EE.UU, Inglaterra, Australia, Nueva Zelanda, India, Canadá, Gales y Escocia): facilitan la exoneración plena con un plan de pagos, pero sin necesidad de liquidación de los activos.
- Alemania, Austria y Portugal: permiten la exoneración con un límite mínimo no exonerarle del 10%.
- Francia, Bélgica y países escandinavos: autorizan al juez la exoneración tras analizar las necesidades del concursado y su comportamiento.
- España: permite una exoneración (sin haber traspasado la Directiva todavía) con un mismo no exonerarle de nada menos que el 25 €.

Bien es cierto que en lo afectante a Europa hay algunos límites mínimos en la Directiva como la exoneración plena, las excepciones al régimen y el plan de pagos en tres años. Algo es algo.

Y digo bien por cuanto que esta limitación conceptual y temporal no llega muy lejos, ya que queda abierta a la voluntad de los países en su raíz más importante cual es la plena exoneración que el art. 20 de la Directiva regula de dos modos:

- Inmediata: tras la liquidación del patrimonio del concursado.
- Mediata: tras un plan de pagos y liquidación, o no, de su patrimonio.

Pero si el modo de acceso a la exoneración difiere, más lo acusa la oportunidad de valorar la buena fe del concursado pues a fin de equilibrar las posiciones de acreedores y deudores, en el caso de solicitarse por este último la exoneración de sus deudas, pretende evitar el perjuicio al acreedor ("favorecer a los honestos pero desafortunados").

Así el considerando 79 de la Directiva indica que el Juez "*deberá tener en cuenta determinadas circunstancias para valorar la buena fe*", dotando a la regulación de una aplicación ad hoc por cada país y una diferenciación entre todos ellos, cuando se debería aprender de la pandemia que ha igualado en sus consecuencias a todos los países.

De este modo, consta que el Juez o Autoridad administrativa que cada país establezca para esa valoración decidirá la existencia o no de buena fé en el concursado, basado en su situación individual y en la propiedad de sus activos y de sus rentas disponibles en un determinado plazo, lo que en la práctica española, y si los juzgados se colapsan por los procedimientos que se aventuran, no servirá para nada. Mejor nos iría aplicar lo que en Italia supone analizar el sobreendeudamiento del deudor si es imputable a un recurso culposo del crédito y desproporcionado a su capacidad patrimonial para no admitirse esa buena fe.

Siendo acertado el alcance de la exoneración a la persona física que ejerza una actividad empresarial, comercial, industrial o artesanal y que se diferencie al empresario del consumidor, no lo es tampoco que considerando el pasivo empresarial y el doméstico no se regule diferencias entre uno y otro para liquidarlo, máxime en nuestro país cuando la Ley 14/2013, de 27 de septiembre, sobre empresario de responsabilidad limitada, permite limitar su responsabilidad mediante la inembargabilidad de su vivienda habitual. A lo que por cierto se refiere también el art. 23.3 de la Directiva.

Es una primera pincelada sobre una norma que alcanzará al 54% de los empresarios europeos, de aquí que sea necesario ir debatiendo sus limitaciones para provocar en el legislador de cada país una mejor aplicación para la época que tras pandemia que todos vamos a vivir (y a sufrir).

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Un système simple pour les rapports internationaux : **contrats commerciaux selon les Principes d'UNIDROIT 2016**

ECKART BRÖDERMAN

I Principes d'UNIDROIT 2016
I Clause d'arbitrage
I Éviter que le droit national ne régisse les conditions générales de vente (CGV)

In 2020, the UIA endorsed general principles of international contract law as compiled and developed by the International Institute for the Unification of Private Law (UNIDROIT): the UNIDROIT Principles of International Commercial Contracts 2016. Developed within 36 years, said Principles represent a legal adaptation to the needs of today's world. They are practice proven, both as background law for contracts and as general principles for international arbitration. The article invites consideration of the UNIDROIT Principles as a matter of good management of international contract conclusion.

En 2020, la UIA respaldó los principios generales del derecho contractual internacional recopilados y desarrollados por el Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT): los Principios UNIDROIT de los Contratos Comerciales Internacionales 2016. Desarrollados en 36 años, dichos Principios representan una adaptación legal a las necesidades del mundo actual. Están comprobados en la práctica, tanto como antecedentes de los contratos como principios generales del arbitraje internacional. El artículo invita a considerar los Principios UNIDROIT como una cuestión de buena gestión de la celebración de contratos internacionales.

Vous souhaitez passer le moins de temps à rédiger vos contrats ? Vous considérez la rédaction contractuelle comme un « mal nécessaire », un facteur de coût plutôt qu'un investissement ? Vous souhaitez utiliser des mécanismes déjà disponibles et éprouvés ?

Comme toutes choses dans la vie, vous pouvez user de votre liberté tant que vous ne violez pas les droits d'autrui ou une loi impérative. Vous pouvez utiliser des modèles ou des schémas de pensée préexistants. Toutefois, si vous souhaitez réduire vos coûts, les risques inhérents au commerce international, et réagir de manière adéquate aux changements de l'économie mondiale, en investissant de manière prudente et intelligente, il est utile de réfléchir quelques instants à l'utilisation d'outils plus récents et éprouvés : les Principes d'UNIDROIT relatifs aux contrats de commerce international de 2016.

Tous les secteurs et domaines de la vie ont beaucoup changé, parfois radicalement, au cours des 25 dernières années, en particulier depuis l'arrivée d'Internet. Comment pourrait-il en être autrement pour la rédaction des contrats internationaux ? La rédaction de contrats peut paraître dénuée de toute liberté. Cette impression résulte souvent de mauvaises expériences faites durant un cours de droit. Ou peut-être disposez-vous de modèles de contrats sur votre ordinateur auxquels vous avez recours depuis toujours ? À une époque où toute l'économie s'est encore plus internationalisée en raison de la mondialisation, les obligations de prudence et de diligence pesant sur le dirigeant de société (voir par ex. l'article L. 223-22 al. 1 Code du commerce en France ou § 43 de la Loi sur les sociétés à responsabilité limité allemande, GmbHG) exige que vous vous comportiez également de manière moderne dans la rédaction des contrats, et que vous envisagiez l'utilisation de moyens adéquats. Ces moyens sont bien meilleurs que ceux ayant conduit à l'abandon de l'usage du droit français ou allemand (notamment s'agissant du droit régissant les conditions générales de vente - CGV) au profit d'un autre droit tel que le droit suisse, dont de nombreuses questions juridiques complexes n'ont pas encore été tranchées par les hautes juridictions idoines, ou le droit anglais qui ne connait pas le principe général de la bonne foi.

Deux générations de professeurs et de praticiens expérimentés en droit comparé ont élaboré les Principes d'UNIDROIT 2016 (« Principes UNIDROIT 2016 ») en quatre phases entre 1980 et 2016 au sein de l'Institut international pour l'unification du droit privé à Rome, fondé en 1926 comme organe auxiliaire de la Société des Nations avec son siège social à Rome. Avec chaque édition, les

règles de droit contractuel général présentées en 1994 ont été supplémentées pour former aujourd'hui un système cohérent du droit général des obligations, spécifiquement conçu pour les transactions commerciales internationales. Le système des Principes UNIDROIT 2016 est devenu un fondement juridique cohérant pour le droit commun de contrat. Dans le cadre de l'activité de notre cabinet d'avocats nous utilisons les Principes UNIDROIT 2016 avec succès depuis 2001, même pour nos propres contrats avec nos clients étrangers.

Au lieu de référer à une loi nationale (voir étrangère), les Principes d'UNIDROIT 2016 fonctionnent en arrière-plan et prévoient des règles dispositives neutres en cas de lacune dans le contrat lui-même. Ce système fonctionne aussi bien pour des contrats à court terme – par ex. un contrat pour la construction d'une station de liaison montante *(Up-Link-Station)* en relation avec le Luxembourg, l'Asie et l'Allemagne, conclu en 2006 –, que pour un ensemble des contrats de sous-traitance pour la construction d'un complexe industriel à hauteur de plusieurs millions (2011) ou encore pour des contrats industriels à long terme et négociés en détail pour des projets – par ex. la production de pièces automobiles en Europe centrale au profit d'un acheteur Américain, négociée en décembre 2020. Ils fonctionnent aussi fort bien pour des contrats parmi des sociétés de différentes juridictions au sein d'une même group (2021). De nombreux exemples dans de multiples secteurs, pour tous types de contrats peuvent être cités, notamment dans les domaines des contrats de distribution, de représentation et d'agence commerciale, de licence de logiciel, de services, ou encore de coopération.

Les Principes d'UNIDROIT 2016 ne peuvent pas être qualifiés comme un droit au sens formel, mais ils fonctionnent tout de même. Pourquoi ? Parce qu'ils contiennent des règles spécifiquement aménagées pour répondre aux besoins des entreprises, qui sont donc mieux adaptés aux situations internationales comparativement à une loi nationale. Par exemple, l'article 8.2 des Principes UNIDROIT 2016 contient une règle spécifique pour la compensation de dettes en monnaie étrangère. Il s'agit d'un sujet souvent sous-développé par les législateurs nationaux qui se concentrent surtout sur les intérêts nationaux de leurs électeurs et non sur l'aspect international du commerce mondialisé. Ainsi, par exemple, la Cour Suprême de Justice du Paraguay a indiqué dans un arrêt de 2018 avoir appliqué les Principes UNIDROIT 2016 « comme une source interprétative et complémentaire de notre droit interne. »

Les Principes d'UNIDROIT 2016 ont été adoptés par le Conseil de Direction représentant les 63 États membres et ont depuis été appliqués dans des nombreux arrêts et décisions des tribunaux arbitraux et des décisions nationales (voir www.unilex.info) et ont été recommandés par la Commission des Nations unies pour le Commerce international, la CNUDCI (en 2007 et 2012), et par l'Union internationale des avocats (2020) qui rassemble deux millions (!) d'avocats de 115 nations.

Fondés sur le principe de la bonne foi, les Principes d'UNIDROIT 2016 contiennent des règles élaborées et négociées au fil des ans sur tous les aspects du droit général des contrats : de la conclusion du contrat à son terme, en passant par sa résiliation ou à sa prescription. Ils sont accessibles en ligne en 26 langues (www.unidroit.org) et facilement lisibles et compréhensibles par tout un chacun.

Fondés sur le principe de la bonne foi, les Principes d'UNIDROIT 2016 contiennent des règles élaborées et négociées au fil des ans sur tous les aspects du droit général des contrats […].

L'établissement d'un contrat fondé sur les Principes d'UNIDROIT 2016, en y ajoutant une clause d'arbitrage, permet d'éviter les restrictions du droit national qui parfois requièrent de choisir une « loi » nationale (voir article 3(1) Règlement ROM I, bien que son alinéa 13 permette également d'intégrer des règles d'un droit non étatique).

En revanche, les lois nationales régissant l'arbitrage sont plus souples. Par exemple, l'art. 1511 al. 1 du Code de procédure civile Français, le paragraphe 1051 de l'Ordonnance de procédure civile allemande et l'art. 28 de la loi type de la CNUDCI sur l'arbitrage commercial international, permettent de choisir des « règles de droit » sans restreindre l'élection de droit à un droit national. Le libre choix direct vaut mieux que la simple incorporation (voie indirecte). Dans les Principes UNIDROIT 2016, le droit des conditions générales de vente est résolu d'une manière moderne dans les articles 1.7, 7.1.6 et 2.1.19 *et seq.* Les solutions apportées évitent en effet les multiples entraves étroites du droit allemand dans le domaine des relations entre professionnels, ce qui se révèle primordial pour les clauses limitatives de responsabilité. Par exemple, selon le droit allemand des CGV, il n'est pas possible de limiter la responsabilité à un montant fixe. L'article 7.1.6 des Principes UNIDROIT 2016, au contraire, permet de stipuler une clause exonératoire pourvu qu'elle ne soit pas abusive.

En Allemagne, la pratique industrielle a évolué au cours des dernières décennies vers une pratique contractuelle largement indépendante du droit national. Cette pratique a toutefois besoin d'un ancrage juridique. Les Principes d'UNIDROIT 2016 offrent précisément cet ancrage, qui peut être complété par l'intégration d'une clause arbitrale : les Principes d'UNIDROIT 2016 peuvent en effet être considérées comme des conditions générales internationales qui réglementent des problématiques habituellement ignorées par les conditions générales usuelles (la gestion des fuseaux horaires par exemple prévue à l'article 1.12 des Principes UNIDROIT 2016). On les appelle ainsi la *lex mercatoria* des commerçants.

En somme, les Principes d'UNIDROIT 2016 sont déjà utilisés par les tribunaux nationaux de plus de 25 pays dans le monde pour compléter leur droit national (au Brésil, en Espagne, en Europe de l'Est, devant des juridictions de *Common Law* comme en Malaisie, etc.). Les tribunaux d'arbitrage internationaux les appliquent également en tant qu'expression des principes généraux du droit. A cet égard, un tribunal d'arbitrage chinois a récemment appliqué les Principes d'UNIDROIT 2016 comme étant une expression du droit de Singapour (CIETAC, 2020). Par ailleurs, les Principes UNIDROIT 2016 se sont révélés comme un outil pratique dans la rédaction des contrats. Cette année encore, les Principes d'UNIDROIT ont été particulièrement utiles pour l'élaboration des clauses Covid. En effet, les ordres juridiques nationaux n'étaient pas adaptés aux nouvelles problématiques créées par la pandémie, de sorte que les Principe d'UNIDROIT ont offert une solution pratique et pragmatique à ces nouvelles circonstances (voir UNIDROIT et le Covid-19, publié par UNIDROIT en juillet 2020). Ainsi les Principes UNIDROIT 2016 occupent une place incontournable dans le commerce international de sorte que chaque avocat pratiquant à l'échelle internationale se doit de les connaître selon les recommandations de l'UIA.

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Obras pseudo-anónimas **y derechos patrimoniales de autor**

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From an eminently practical perspective, this article aims to draw attention to the difficulty of guaranteeing and protecting the economic rights of the author who decides not to claim authorship of his work, but who at the same time performs acts that show that he does not renounce them. For the current European legislation, the notoriety of the authorship of the works is not enough to guarantee the author the rights of distribution and exploitation of the non-claimed work, as is clear from the EUIPO Decision of 14 September 14, 2020.

D'un point de vue éminemment pratique, cet article vise à attirer l'attention sur la difficulté de garantir et de protéger les droits patrimoniaux de l'auteur qui décide de ne pas revendiquer la paternité de son œuvre, mais qui en même temps accomplit des actes qui ont fait qu'il n'y renonce pas. Pour la législation européenne en vigueur, la notoriété de la paternité des œuvres ne suffit pas pour garantir à l'auteur les droits de distribution et d'exploitation de l'œuvre non revendiquée, comme le montre la décision de l'EUIPO du 14 septembre 2020.

Los derechos de autor otorgan una serie de derechos morales a los autores, artistas y creadores sobre sus obras originales tales como el derecho de reconocimiento de su condición de autor – también llamado derecho de paternidad-, derechos sobre la divulgación, la integridad, la modificación e incluso el derecho de retirar la obra del mercado. Estos derechos morales son irrenunciables. Dependiendo de las jurisdicciones algunos derechos morales como el derecho de paternidad o de respeto a la integridad de la obra pueden tener una duración perpetua, ejercitados a través de los sucesores del autor.

Los derechos de autor también otorgan y reconocen a sus titulares derechos patrimoniales derivados de las obras tales como derechos de reproducción, distribución o explotación de la obra. Estos derechos patrimoniales tienen una duración determinada, pudiendo alcanzar, como en los países de la Unión Europea, toda la vida del autor y los siguientes 70 años.

A nivel internacional, los derechos de autor aparecen regulados en el Convenio de Berna para la protección de las Obras literarias y artísticas del 9 de septiembre de 1886, revisado por última vez en 1979 o la Convención Internacional de los Derechos de Autor de la Unesco de 1952, también conocida como la Convención de Ginebra de 1952.

Los derechos de autor no están completamente armonizados en la Unión Europea, sino que existe una regulación parcial, destacando la Directiva 93/98/CEE del Consejo de 29 de octubre de 1993 relativa a la armonización del plazo de protección del derecho de autor o la Directiva 2019/790 del Parlamento y del Consejo de 17 de abril de 2019 sobre los derechos de autor y derechos afines en el mercado único digital.

A nivel nacional cada país dispone de su propia normativa, por ejemplo, en España encontramos la ley de Propiedad Intelectual de 1/1996 y en Francia, le Code de la propriété intellectuelle de 1992.

Pero… ¿Qué ocurre ante las obras que no han sido deliberadamente reivindicadas por su autor, pero tampoco pueden considerarse anónimas? ¿La notoriedad de su autoría es suficiente garantía de respeto de los todos los derechos de autor?

¿Qué ocurre ante las obras que no han sido deliberadamente reivindicadas por su autor, pero tampoco pueden considerarse anónimas?

En este artículo nos centraremos en los derechos patrimoniales del artista de una obra cuya autoría no ha sido nunca deliberadamente reivindicada, pero cuya autoría resulta pública y notoria. Una categoría que la ley no contempla y que podemos calificar de obra "pseudo-anónima". ¿Será suficiente esta notoriedad para proteger los derechos de autor patrimoniales, concretamente el de distribución y explotación de la obra? Desde luego dicha notoriedad parece insuficiente, como demues

tra el caso de que un tercero pretenda registrar la imagen de la obra como marca con fines comerciales, lo que se desprende de la decisión de la Oficina de Propiedad Intelectual de la UE (EUIPO) del 14 de septiembre de 2020.

Concretamente nos referimos a la imagen de un joven palestino enmascarado lanzando un ramo de flores… cualquier persona rápidamente reconocerá que se trata de una famosa e icónica obra del artista británico que se oculta bajo el seudónimo de Bansky, se trata de un graffiti denominado *The Flower Thrower,* creada en el año 2005 en un muro de Jerusalén.

Bansky es un artista célebre por desear permanecer en el anonimato y no querer firmar ni, por tanto, exigir el reconocimiento de la autoría de sus obras de arte, ni lucrarse con ellas, aunque todas ellas son reconocibles por su estilo, calidad y carácter reivindicativo. La autoría de la mayoría de sus obras, como decimos, es pública y notoria. La manera de proceder del artista invita a pensar que cede sus obras al dominio público, con el perjuicio que esto le acarrea en sus derechos de autor patrimoniales.

En 2014, la sociedad británica que gestiona los intereses del artista *Pest Control Office Limited* en su propio nombre y derecho para salvaguardar el anonimato de Bansky, registró ante la EUIPO la imagen que reproduce fielmente su obra *The Flower Thrower* (imagen obtenida de la web de la Euipo):

A instancia de un tercero denominado *Full Colour Black Limited,* interesado en reproducir dicha imagen en unas tarjetas con fines comerciales, se tramitó ante la EUIPO un procedimiento sobre cancelación del registro de la marca efectuado años atrás por la sociedad que gestiona los intereses del artista Bansky.

El pasado 14 de septiembre de 2020 la Oficina de Propiedad Intelectual de la UE (Euipo) resolvió anular el registro de la marca europea a favor de la sociedad británica *Pest Control Office Limited* para concederla a la sociedad *Full Colour Black Limited.*

Resumidamente, la EUIPO consideró probado que existió mala fe en el registro inicial de la marca europea por los representantes de Bansky porque nunca existió intención real de emplear la marca en el mercado, sino que la intención real fue únicamente evitar la reproducción de la imagen por terceros con fines comerciales. La EUIPO también señala que no es posible alegar derechos de autor por el titular de la marca *Pest Control Office Limited* por cuanto no hay prueba suficiente que permita vincular al titular de la marca con el autor de la obra, debido a que no puede determinarse legalmente la identidad de Bansky. En cualquier caso, y esto es lo interesante, considera con otras palabras que existe una renuncia de Bansky hacia sus derechos de autor patrimoniales, basándose en numerosas alegaciones del artista, en que la obra se ejecutó en un espacio abierto al público y que en ocasiones ha consentido que terceros emplearan las imágenes con fines comerciales. También señala que ella no es el organismo competente para examinar este extremo. Finalmente, la falta de uso de la marca también resultó determinante para acordar su cancelación.

Podemos estar de acuerdo con la EUIPO en que el registro de la imagen de obra como marca no es la mejor manera de proteger los derechos de autor patrimoniales del artista, pues el instrumento jurídico de la marca no tiene tal fin, máxime cuando la intención del artista es que nadie se lucre con las obras, sino que permanezcan para el disfrute público en el sentido más puro de lo que puede entenderse por arte. Sería sin duda más oportuno y aconsejable para el artista reivindicar la paternidad de sus obras, lo que permitiría al artista otorgar o denegar autorización a aquellos que deseen reproducirlas. Sin embargo, esto es justamente lo que el artista no desea, el autor desea que su obra permanezca en un status de "pseudo-anonimato". En conclusión, la decisión de la EUIPO ilustra que el artista no puede confiar únicamente en la notoriedad de su autoría para controlar la explotación de la obra no reivindicada.

Sin embargo, no comparto con la EUIPO la idea de una posible renuncia a los derechos patrimoniales de autor del artista por el hecho de que la obra fuera ejecutada en un lugar público a disposición de terceros, o porque desee permanecer en el anonimato o porque en el pasado haya consentido a terceros hacer uso de su obra con fines comerciales.

De hecho, entendemos que Bansky sí se reserva el derecho de reproducción de su obra a través de la mención que aparece en la web de sus representantes *Pest Control Office Limited,* por la que autoriza el uso personal de las imágenes de sus obras, no así el uso de terceros con fines comerciales. A mi juicio esta reserva de sus derechos sigue siendo insuficiente ya que no se identifican cuales son las obras reservadas (lo que supondría su reivindicación, justo lo que pretende evitar) sino que el artista o sus representantes de nuevo confían en la notoriedad de su autoría, de tal forma que un tercero ignorante de que Bansky pudiera ser el autor, no va a dirigirse a esta empresa a solicitar autorización para la reproducción de una de sus obras con ánimo de lucro. Sin perjuicio de ello, la intención del artista es la de reservarse sus derechos de reproducción. El propio registro fallido de la marca también ilustra su intención.

Lo cierto es que actualmente un tercero sin consentimiento de su autor ha registrado como marca europea con fines comerciales la imagen de *The Flower Thrower,* justamente logrando lo que desde siempre intentó evitar su autor. Tal vez esto mueva al artista a salir a la luz de una vez por todas, firmar sus obras así sea bajo seudónimo y controlar que su arte no genere lucro de forma no consentida a favor de terceros, al menos lo lograría durante los 70 años que le otorga la normativa europea actual.

Vamos más allá, ¿Saldrá este artista a la luz cuando alguien reivindique ilegítimamente la autoría de alguna de sus obras? Sólo a él pertenece la decisión.

Gabriela BALLESTEROS HUIDOBRO
Abogada, Ernesto Diaz-Bastien & Asociados, SLP
Madrid, España
gballesteros@edbalaw.com

Quatre sujets sont évoqués dans cet article : le procès de Derek Chauvin, accusé d'avoir tué George Floyd, une loi adoptée en Chine qui pourrait avoir un impact sur l'autonomie de Hong Kong, ainsi qu'une loi adoptée à Tiguero, en Espagne, établissant que les chiens et les chats sont des « résidents non humains » et enfin trois résolutions relatives aux animaux adoptées par l'American Bar Association concernant 1) une convention internationale, 2) une interdiction concernant les ailerons de requin, et 3) l'utilisation de chiens d'assistance au palais de justice.

En este artículo se tratan cuatro temas: el juicio de Derek Chauvin, acusado de haber asesinado a George Floyd, una ley aprobada en China que podría tener un impacto en la autonomía de Hong Kong, así como una ley aprobada en Tiguero, en España, hacer que los perros y gatos residentes no sean humanos y finalmente tres resoluciones relacionadas con animales adoptadas por la Asociación de Abogados de Estados Unidos con respecto a 1) una convención internacional, 2) la prohibición de las aletas de tiburón y 3) el uso de perros de asistencia en el juzgado.

The Trial of Derek Chauvin

A Minneapolis Police officer, Derek Chauvin, was charged with two counts of murder and one of manslaughter following the death of George Floyd on May 25, 2020. Following Floyd's arrest for using an allegedly counterfeit bill, police brutality ensued and was seen around the world due to the release of bystander videos, security cameras, and officer worn body cameras. This incident sparked worldwide protests, civil unrest, and support for Black Lives Matter. Already, there has been an historic civil settlement between the City of Minneapolis and Floyd's family for 27 million dollars. The first week of testimony was dominated by bystanders, who saw Floyd handcuffed and face down on the street with Chauvin kneeling on his neck for nine minutes and 29 seconds. They not only made videos seen round the world but described their efforts to save Floyd's life as he called out for his mama and later became motionless. There was also testimony by police officers, including those breaking what has been called the blue wall of silence, and by doctors about the cause of George Floyd's death. After ten hours of deliberation, the jury found Derek Chauvin guilty on all three counts. The jury was comprised of six white and six black or multiracial individuals.

The Law of the People's Republic of China – Safeguarding National Security in the Hong Kong Special Administrative Region

On June 30, 2020, Beijing passed a security law that is expected to have significant ramifications. The justification for this law is that it addresses unrest and instability. The law's 66 articles define the criminal acts of secession, subversion, terrorism, and collusion with foreign or external forces. This law applies to non-permanent residents, and perhaps, journalists from abroad. Those convicted under this law are no longer eligible to hold public office. Opponents of this law assert that it curtails protests, freedom of speech, the autonomy of Hong Kong, and the independence of the judiciary. The UIA and UIA-IROL have not only expressed grave concern regarding the adoption of the NSL, but more recently brought attention to the arrest of American human rights lawyer John Clancey on January 6, 2021.

Cats and Dogs are Non-Human Residents in Spain

The village of Triguero del Valle in Spain has passed a law, comprised of 13 articles, establishing that cats and dogs are "non-human residents" and sets forth what is regarded to be a bill of rights. Passage of this law is important as it signals the trend that animals have rights.

American Bar Association (ABA) Passes Three Animal Law Resolutions

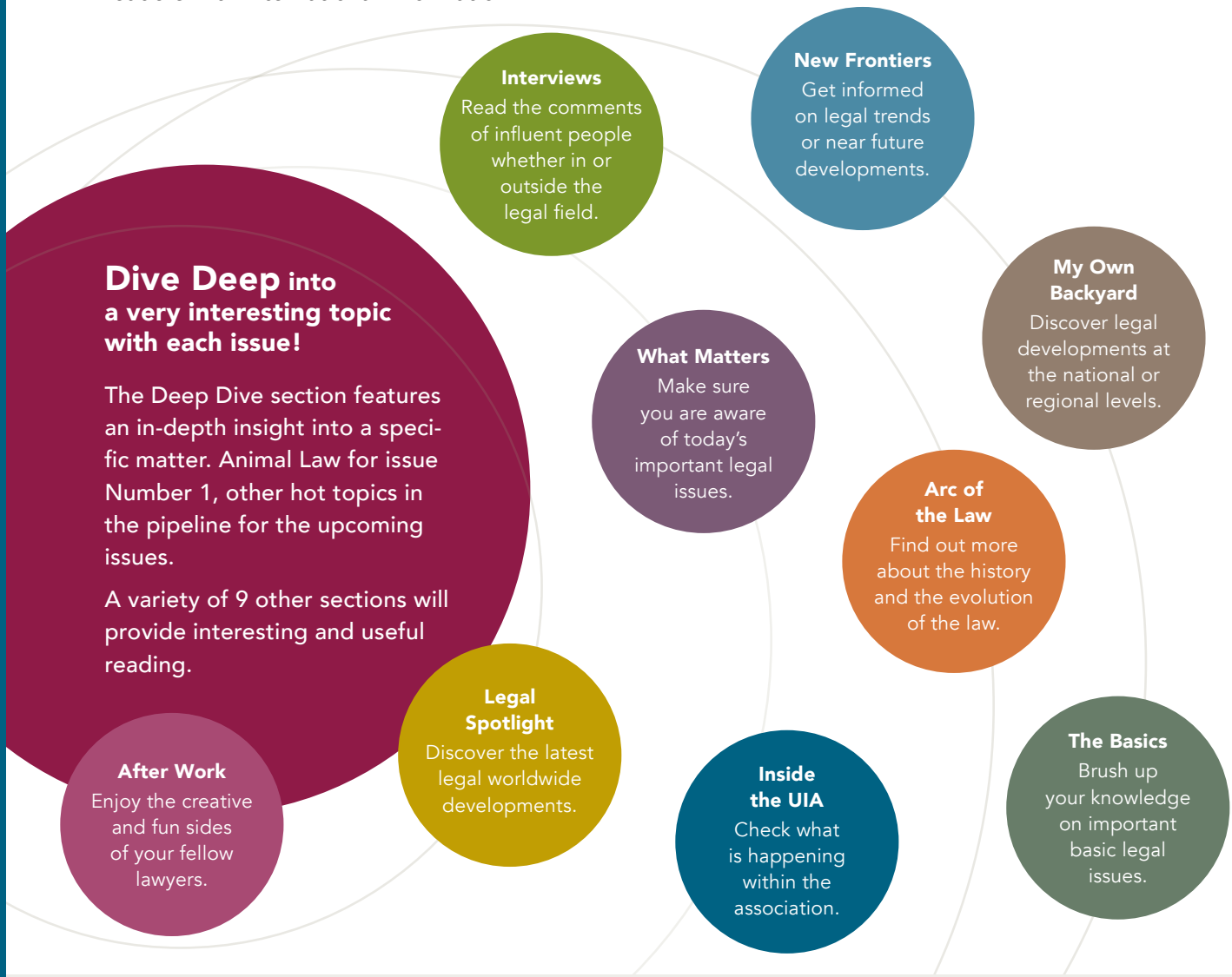
At its Midyear Meeting, the ABA passed three Resolutions designed to promote animal welfare or reflect their benefit. The first encourages the U.S. State Department to take a leadership role in promoting all nations to negotiate an International Convention for the protection of animals. This Convention would establish standards for the proper care and treatment of all animals, thereby protecting animal well-being, public health, and the environment.

The second Resolution urges federal, state, territorial, and tribal governments to enact and enforce legislation that prohibits and penalizes the possession, sale, and trade of shark fins. It also urges all nations to enact laws that prohibit and penalize the possession, sale, and trade of shark fins. The Resolution encourages bar associations and international organizations to promote policies and laws that prohibit and penalize these practices. It is understood that sharks, as apex predators, are vital to marine ecosystems. The third Resolution promotes the use of specially trained dogs to assist victims and witnesses who face difficulties testifying in court.

Editor's Note: This is a new feature of the *Juriste International*. Please let the Editorial Board know if there is something that occurs of significance that you would like to appear in the Legal Spotlight. This page is drafted by one or more members of the Editorial Board.

The New Juriste is here!

The Juriste International editorial committee is proud to present contributions from the world over. You hold in your hands a brand new magazine, with a different flair and well thought out to provide our readers with international information.



How did all this happen?

- ✔ Through the strong impulsion of Barbara Gislason, Chief Editor, based in the USA.
- ✔ With the active cooperation of the Deputy Editors: Laura Collada (Mexico), Catherine Peulvé (France) and Steven Richman (USA).
- ✔ Thanks to the prolific production from a team of editors covering 20 different countries on all continents.
- ✔ With the precious help of the UIA HQ in Paris.
- ✔ Through the work of a creative and talented designer based in Paris, Nancy Cossin.
- ✔ With the support of UIA's Global Premier Sponsor, Lexis Nexis. LexisNexis

If you would like to contribute to this brand new magazine, contact: JuristeExCo@uianet.org

Virtuality did **not Kill Reality**

Amidst the Covid-19 pandemic, with its mobility constraints and safety concerns, in 2020 we held our first ever Virtual Congress - and a very successful one, indeed!

The UIA can be proud to say that it was inclusive, accessible and in many aspects the most valuable in content output for attendees. The only costs members had to bear were attendance fee and blocking their calendar to enjoy a full-on congress knowing that friends, peers and newcomers would all be coming together in the same platform with the same spirit.

We were very thrilled with the overall positive feedback and some of our members were happy to share with our UIA family their own experience.

Exactly one year ago, the (then still very unfamiliar) Covid situation dictated that we had to make the difficult decision to postpone the Guadalajara congress. After having concluded that a 'live' congress was not feasible, the next challenge was: what can we do to offer our members an alternative experience, where they can get together, benefit from a high-quality scientific programme, and also experience some fun get-togethers?

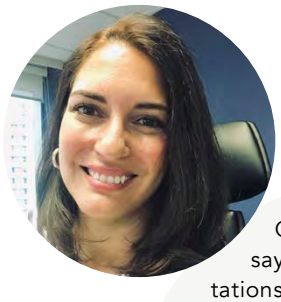
The answer we have come up with is the 2020 Virtual Congress. Held over the course of three days, via a third-party hosted electronic platform, roughly following the well-known UIA congress format to present the members with, as much as possible, the look and feel of an old-school congress.

There was a lot of work behind the scenes: a well-proven Congress format needed to be adapted to a virtual environment, and that required rethinking and flexibility of all involved. Trying to host three days of electronically stable commission sessions and plenary events, in multiple languages, accessible to UIA members in all time zones of the world, in a manner which was as interactive as possible, was something never done before in UIA history. Many resources were spent in finding a stable platform, allowing all participants to enter the virtual congress at a central location, and from there on guiding them towards the sessions of their choice, recorded events, chat rooms, and virtual sponsor booths. Add to that the challenge of adding to the programme several pre-recorded contributions, organising social events in separate virtual break-out rooms and managing live translations and last-minute subtitling of overdue speeches, and you will understand that there was never a dull moment in the process leading up to the Congress. Looking back, and having received positive feedback, I can say we have managed to put together a virtual congress which was successful from a social, technical, scientific and financial point of view. Despite the odd technical hiccup, the UIA managed to offer a full-fledged three day programme to its members, allowing them to meet their colleagues in a familiar setting.

I would like to mention that it has been a tremendous effort to make a virtual congress an actual reality. So many people were instrumental in making this new project work; it would have been impossible without the incredible work of the UIA Center, Immediate Past President Jerry Roth, the presidents of commissions, the sponsors and congress participants, and last but not least all UIA members who kindly contributed to our endless requests and reminders for videos and clips and presentations, from Brazil to Barcelona, and from Minnesota to Macau.

This truly was a joint effort and I wish to very much thank everybody who participated in the 2020 virtual congress.

Sebastiaan MOOLENAAR, AKD Benelux Lawyers,
UIA Director of Congresses, Rotterdam, The Netherlands



While a lot of us were certainly skeptical about how we would feel about taking part in a UIA Virtual Congress, I am extremely glad to say it absolutely exceeded my expectations ! The time zone for those virtually attending in Asia was challenging, but with some degree of commitment and a strong level of endurance, it turned out to be a very close to real life experience as soon as the Opening Ceremony took place and familiar faces popped in the screen. The scientific program was very diverse, up-to-date with legal trends and we definitely benefited from the hard work Commissions and speakers put into delivering great working sessions.

I especially liked the fact that this time around, I could actually rerun sessions and not miss one single bit of the Congress, since we were allowed to replay all the content – a strong added value to this new virtual normalcy.

Joana ALVES CARDOSO, JAC Lawyers, President of the International Estate Planning Commission, Macau, China

I am delighted that the Young Lawyers were able to meet virtually this year and engage in a lively and topical debate. Thank you to all our speakers for their dynamic presentations. On our first panel discussion, we heard from Hin Han Shum (Hong Kong), Gerard James (Ireland) and Angela Diaz-Bastien (Spain) on "*The digitalization era and its legal implications; predictive coding and human rights, arbitration and dispute resolution and AI, Cyber, and Data*".

On our second panel discussion, we heard from Joana Whyte (Portugal), Lisette Dupre (England) and Tiago Picao de Abreu (Portugal) on "*The challenges faced by young lawyers in the eye of Covid-19*". We were also honoured to hear from our President, Jorge Marti Moreno, who warmly welcomed all Young Lawyers to the congress.

We were also pleased to host, in collaboration with AIJA, a Young Lawyers' Happy Hour on Zoom. The drinks were moderated by Bérangère Diot and Veronica Dindo (members of both the UIA and AIJA) so that everyone was afforded the opportunity to introduce themselves. The drinks were a great success and provided young lawyers with the opportunity to network and socialise outside of our educational session. Both our educational session and the drinks were well attended and interactive. The feedback which I received from our sessions has been overwhelmingly positive and encouraging. I was particularly pleased to welcome so many new members to our sessions.

My Vice-President (Joana Alves Cardoso), Secretary (Isidro Niñerola Torres) and I received invaluable support from the UIA throughout the year and the process of organising our events was, as a result of all their efforts, seamless."

Flora HARRAGIN, President of the UIA Young Lawyers Sub-Committee, London, United Kingdom

Historical events that affect the entire globe generally have an impact on the functioning of international networks. Between 1939 and 1948, our own network, the UIA, was essentially dormant: our predecessors at that time were only rarely able to meet and it was very difficult for them to get to know each other personally or professionally. Today, we are much more fortunate: thanks to the technical advances of our age and to the devoted work of all those who contribute tirelessly to ensuring that the association runs smoothly, we haven't had to feel isolated or alone, even during the pandemic. The Virtual Congress was, for me, a reflection of the resilience and commitment of the UIA to its members and our profession. It provided a broad selection of relevant and stimulating webinars, and a great online platform for us to meet and chat with colleagues from around the world – and all from the comfort of our armchair! Naturally, I can't wait to meet my many friends from the UIA in person, but in the meantime I'd like to express my heartfelt thanks to the organisers of this exceptionally well-executed event.

Dr. Peter KUN, Kun & Partner, UIA National Representative for Hungary, Budapest, Hungary

We have all been forced to use video conference during lockdown and post lockdown, have attended webinars and, in my case, even virtual drinks parties with a magician/mind reader/ absolute wizard who managed to do his business on Zoom and still hold us in thrall.

However organising a UIA Congress completely virtual, was a major endeavour. For me it was a bigger challenge as it was my first Congress as President of the IP Commission.

We felt quite disappointed as we had been preparing a very interesting session for the Guadalajara Congress, which made more sense in Guadalajara as it dealt with traditional knowledge, protection of traditional textiles, collective trademarks, etc. In view of the change of format, together with Thomas Kritter, President of the IT Commission, and Francisco Javier García, president of the Fashion Law commission we joined forces and organised a session on Covid-19 and the Future of IP, IT and Fashion Litigation. Ian de Freitas made a great suggestion, which was that we prepared questions for our speakers that they would answer rather than have presentations. So that is what we did, and it turned out fine, we were basically exchanging notes and war stories on how litigation was taking place in the various jurisdictions, the impact of Covid prevention measures, etc.

My overall feeling about the virtual UIA Congress is that the scientific part probably does not suffer so much form going virtual. It is the social part that is sorely missed. Catching up with colleagues, meeting new ones, sharing a coffee. It has taken a pandemic to make us realise how much passes through personal contact… but we will meet in person again soon, I am sure.

Marita DARGALLO NIETO, Buigas, President of the IP Law Commission, Barcelona, Spain

As for most of you, for me too perhaps the most precious aspect that the UIA offers its members is that attending it allows us to form true, lasting friendships. Most of us know contexts in which the key value is the exchange of business cards, often conducted with undisguised indifference towards the other person.

My experience in the UIA has taught me that in our organization that risk is essentially marginal, given the worth that the UIA attributes to the value of friendship based on mutual esteem between peers.

Given those premises, I cannot hide the fear I felt when I was asked to participate in the organization of our Congress – the central moment of our life as an association – in a purely virtual form, that is, a form that emphasized the risk of frustrating the desire to meet in person the friends known thanks to the UIA and to be able to make new ones.

As it turned out, my fears were unfounded. I'm saying this not so much because of the success of the webinar that we organized together with Paolo Lombardi in the field of specialized courts for international commercial disputes (the second most attended among all commissions' sessions!), but rather because of the collateral activities we enjoyed.

As paradoxical as it may seem, the informal get-toghether we had after the closing ceremony was no less lively than those we enjoyed at past Congresses, and made missing the opportunity to meet in person less burdensome than I expected.

It has, therefore, been a precious opportunity to have the confirmation that it is because of its human resources, its flexibility and its resilience, that UIA is in a position to guide our rich community through the crisis caused by the pandemic, towards a future that will guarantee us to continue to fully enjoy the friendships that it has allowed us to build.

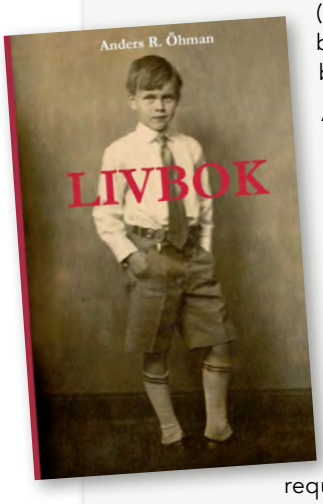
Alberto PASINO, Studio Legale Zunarelli e Associati, President of the Transport Law Commission, Trieste, Italy

IN MEMORIAM...

Anders ÖHMAN
UIA President (1987-88)

With great sadness I noticed on seeing the 2021 UIA Directory that Anders Öhman had passed away. I learned that he had done so on May 9, 2020 at the age of 94.

He leaves his wife Veronica and three daughters with their families. I am grateful to his daughter Suzanne for kindly providing an obituary of Anders that was published in Sweden, a translation summary of his own autobiography written in Swedish in 2016, "LIVBOK" ("LifeBook"), and the front cover of the book with a photo of Anders when a boy.



Anders says in his autobiography that he regrets never having kept a diary. To quote "*I found other occupations more relevant and interesting. Above all I wanted to read, to cultivate my "cultural heritage" and – not least – learn how to play the clarinet. In my late teens all this was still very important to me – plus learning foreign languages, particularly French.*"

I attended my first UIA meeting in Rouen in 1978 having been requested to do so by my then senior partner George Goddard who was a great friend of Cecil Blatch, the first UK President of the UIA. Anders attended his first UIA meeting at the Congress in Cannes in 1979, my first Congress aswell.

By that time, with the exception of Professor Arnoldo Medeiros Da Fonseca from Brazil, who was President from 1950/51 and Shri Shridhara Nehru from India, who was President in 1951/52 from its beginnings in 1928 until 1979 the UIA had drawn its Presidents from Europe.

Harold Healy Jr. was the UIA's first U.S. President from 1979-1981 and then later Anders was President from 1987-1988 having been elected President at the two city congress in Montreal and Quebec City in 1987. Anders was a powerful contributor to the efforts to make the UIA even more multinational while with his excellent French never forgetting its European origins.

He became President quite quickly owing to his intellectual ability, his reputation, his tremendous hard work, commitment and outstanding international perspective.

Anders' grandfather had set up his own law office. His father Ragnar followed in his footsteps so not surprisingly Anders began studying law. He did so for 4 or 5 years but in parallel he studied French and began teaching French. He now and then travelled to France where he made many friends and met his future wife Veronica, who was studying French in Grenoble.

During these years he was also engaged in playing music as often as possible. He also started working as a jazz critic for Orkester-Journalen, a Swedish jazz magazine and for Svenska Dagbladet, one of the major Swedish morning papers. In addition he offered his services to the Swedish Broadcasting Company where he for several years gave talks about jazz music.

In the Summer of 1950 Veronica and Anders married in Paris. Anders was about to take up a post there as the Swedish representative of Folkuniversitetet – the Swedish Folk University – but his life was turned upside down when a telegram from home told him that his father had unexpectedly died.

Anders and Veronica returned to Sweden on his 25th birthday. He says in his autobiography, his rather carefree life at once turned into THE REAL future.

He planned to work for his late father's office for a year but step by step took a great interest in developing the firm. The firm had specialised in bankruptcy law but Anders changed it into a firm that dealt with business law as a whole. The firm merged with Vinge in 1983 and thus Anders became a senior partner in that firm. He was a member of the Swedish Bar Association for 6 years and was part of the Swedish Board on the drafting of laws.

As the obituary states he found the profession both stimulating and rewarding and his clients included not only significant and important companies but also persons from his own personal, cultural sphere such as the world-wide known children's book author Astrid Lindgren who for example wrote Pippi Longstocking.

Anders became involved in international legal organisations first with the CCBE (Conseil Consultative des Barreaux Européens). In his autobiography he states that after attending his first UIA meeting "*The atmosphere was lively and joyful, the legal matters interesting and I could practice my French!*" and in the years to come

not surprisingly with that praise he attended many such meetings including the annual UIA congresses. Cannes in 1979 was a wonderful memorable Congress so it is understandable that he was won over to the UIA cause.

Anders' cultural interests made him the epitome of the "Renaissance Man". He was elected to the well-known and highly respected Swedish Literature Society "De Nio" where he successfully was involved for more than 50 years and served as Secretary and Treasurer.

For 35 years (9 years as President) Anders was a member of the Royal Swedish Academy of Music. He had not only set up his own publishing company, Dictum, but also his own record company – Phontastic. As a hobby he regularly played Chamber music with friends for about 50 years.

In all of these activities, including for the UIA, Anders always enjoyed the enormous support of Veronica.

From 1992 onwards until 2003 my family, like so many of Anders' friends, would be delighted to receive from Anders and Veronica a Christmas Mix – with the most wonderful range of Classical music including Swedish Classical music and jazz eg and somewhat appropriately for Anders in 1999 Billie Holiday with Lester Young "*Getting some fun out of life.*" These mixes for us were always the first sign of Christmas and would always be accompanied by a beautiful card with reproductions of paintings with a Swedish theme (eg one from 2003 entitled ' Dancing in a Dalecaria farm house' showing a scene in a 19th Century painting of his great great grandfather playing the violin) and the Christmas card included a sonnet written by Anders with an English translation. From early in life Anders had been absorbed by the art of the sonnet and wrote his own and translated sonnets by his favourite author, William Shakespeare.

Like all who knew and worked with him whether in the UIA or elsewhere I was enriched by my friendship with Anders and feel honoured to have known him.

To quote the translation of his obituary "*We have lost a genuine, richly endowed person who in addition was humble, empathetic and generous.*"

The translation of his sonnet in his Christmas Card in 2003 includes the lines "*We're mostly deputies – even if smart – and rarely get an influential say. We may be seen and listened to, one day – or two? When we can guide with brain and heart.*"

Anders was no deputy. A natural leader in all his fields of interest who guided "with brain and heart" and I shall always be grateful for his friendship to me as a young lawyer and later. I know all who knew him will be grateful for all he did for the UIA, for our Profession and to make a better world.

I have been grateful to have the assistance of Ander's daughter Suzanne and his widow Veronica in preparing this and also am delighted to set out below comments I have received from past Presidents, François Martin, Enrique Basla and Ian Hunter QC.

Christopher JACKSON
President of the 1995 UIA Congress
London, United Kingdom

François MARTIN writes:

"*Nous recevions aussi tous les ans les vœux d'Anders avec le disque qu'il avait préparé avec grand soin et de la musique suédoise mais aussi de beaucoup d'autres pays. J'ai été chassé en Suède plusieurs fois et ai été invité chez lui à cette occasion dans sa maison à Stockholm. C'était un homme aimable, cultivé et plein d'énergie.*"

Enrique BASLA writes:

"*Anders… a gentleman of great education, a huge sensitivity and a vocation of service to relevant values, of which UIA can bear full witness… I miss his Christmas salutation music cards, in which he condensed his love and great sensitivity to classical music but also for his specialities: the jazz of the early eras and the compositions of Scandinavian traditions…*"

Enrique speaks further of this "*admirable and loveable man*" and says that Anders was "*a great counsellor*" before during and after Enrique's presidency.

Ian HUNTER QC writes…

… that he has "*warm memories of Anders and visiting him and Veronica in Stockholm. Anders was a member of a small group of UIA members who visited Beijing in 1988 at the invitation of the All China Lawyers Association who were keen to join the UIA. We were warmly entertained by our Chinese hosts and were their guests at a large dinner party held in the Great Hall of the People. Anders was a delightful companion and a first rate President. We will all miss him*".

In his autobiography, Anders describes this visit to China as "*my most interesting UIA trip of all*".

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

UIAMidyear2021
THE GLOBAL BUSINESS & NETWORKING SUMMIT

UIA is excited to offer the world's lawyers a new annual landmark event, the UIAMidyear!

UIAMidyear2021 will focus on global business networking and information exchange over the course of 4 days. Attendees will be able to select from a wide variety of activities, amounting to 24 hours of sessions:

› The 12th UIA Annual Business Law Forum (4 x 2 hours) BLF

New regulations and recent legal developments deriving from Covid-19 situation: temporary or here to stay?
How legislators around the world have addressed new challenges arising from Covid-19

› Technology Day (4 hours) TD Organised by LexisNexis

- Technology and the Legal Practitioner: Ethical Concerns & Best Practices
- La stratégie de marketing digital des cabinets d'avocats
- Technology-Driven Marketing Strategy is the Key to Success in a Post-Covid Market

› Language Forums (5 hours) LF

- Deutsch - Español - Français - Português - اللغة العربية

› Regional Forums (4 hours) RF

- Africa - Asia - Central and Eastern European Countries - Latin America

Regional forums bring together lawyers who practise in the same area, so that they can discuss region-specific topics.

› Speed Networking (2 hours) SN

Meet one-to-one to promote your law firm and obtain referrals.

› Get Together (1 hour) GT

Programme at a Glance

	Monday, June 7	Tuesday, June 8	Wednesday, June 9			Thursday, June 10	
1.00 pm		SN 1.00 pm - 2.00 pm **Speed-Networking**	LF 13h - 14h **Forum des avocats francophones**	LF 13h - 14h Uhr **Forum der Deutschsprachigen Anwälte**		RF 1.00 pm - 2.00 pm **Asian Lawyers' Forum**	RF 1.00 pm - 2.00 pm **Forum of Lawyers from Central and Eastern European Countries**
2.00 pm							
2.30 pm	BLF 2.30 pm - 4.30 pm **Business Law Forum Day 1**	BLF 2.30 pm - 4.30 pm **Business Law Forum Day 2**	BLF 2.30 pm - 4.30 pm **Business Law Forum Day 3**			BLF 2.30 pm - 4.30 pm **Business Law Forum Day 4**	
4.30 pm							
5.00 pm	TD 5.00 pm - 7.00 pm **Technology and the Legal Practitioner: Ethical Concerns & Best Practices**	SN 5.00 pm - 6.00 pm **Speed-Networking**	LF 5.00 pm - 6.00 pm باللغة العربية الناطقين منتدى المحامين	LF 17h - 18h **Foro de Juristas de Lengua Española**	LF 17h - 18h **Fórum dos Advogados de Língua Portuguesa**	RF 5.00 pm - 6.00 pm **African Lawyers' Forum I *Forum des avocats africains***	RF 5.00 pm - 6.00 pm **Latin American Lawyers' Forum I *Foro de Abogados Latinoamericanos***
6.00 pm		TD 18h - 19h **La stratégie de marketing digital des cabinets d'avocats**			TD 6.00 pm - 7.00 pm **Technology-Driven Marketing Strategy is the Key to Sucess**	GT 6.00 pm - 7.00 pm **Get Together**	
7.00 pm							

BLF Business Law Forum TD Technology Day LF Language Forums RF Regional Forums SN Speed Networking GT Get Together

All times are listed in Central European Summer Time - CEST (Paris)

Demandez le programme !

Par Catherine Peulvé, Avocat au Barreau de Paris, Médiateur CMAP,
Cour d'appel de Paris, CPR, CMCC, éditrice adjointe UIA *Juriste international*

Pour allier repos, animaux et temps de la Covid-19, une sélection de spectacles à ne pas manquer pour laisser son esprit vagabonder, son réceptacle culturel se remplir et son amour des bêtes s'exprimer.

Une idée qui a du flair

Des chiens experts à l'entrée des salles de sport et de spectacles.

Ce serait la piste à suivre pour pouvoir accueillir de nouveau du public. La méthode du chien renifleur serait efficace à 94 % selon une très sérieuse étude allemande. Le processus est simple : sur plusieurs échantillons placés dans des cônes, le chien renifle chacun d'entre eux. Lorsqu'il détecte l'odeur du virus, il s'agite devant son dresseur, pour le signaler. Un test grandeur nature se serait tenu à Miami à l'occasion d'un match de basket devant accueillir 2 000 personnes.

Seul bémol : pour assister à nouveau à un concert endiablé ou une pièce de théâtre en toute sécurité : se faire renifler…

https://www.lesechos.fr/politique-societe/regions/covid-bientot-des-chiens-renifleurs-en-france-pour-detecter-le-virus-1291295#:~:text=Le%20processus%20est%20simple%20%3A%20sur,%C3%A0%20l'origine%20du%20projet

https://www.lci.fr/sante/les-chiens-renifleurs-des-allies-fiables-pour-detecter-le-covid-19-2169995.html

https://www.lindependant.fr/2021/01/25/des-chiens-renifleurs-de-covid-a-lentree-des-salles-de-sport-et-de-spectacle-pour-pouvoir-accueillir-a-nouveau-du-public-9332587.php

« Les animaux ne sont pas des clowns »

Direction le cirque où la Covid n'a pas que du mauvais puisque ce sont des **animaux en hologramme** qui sont proposés par le cirque Roncalli en Allemagne tout comme par Bouglione dans son écocirque dans lequel l'ex-dresseur André-Joseph Bouglione a investi 2,6 millions d'euros.

https://www.cirques-de-france.fr/en-direct/le-cirque-roncalli-innove-pour-des-cirques-sans-animaux

https://ecocirque.fr/

https://www.leparisien.fr/societe/des-animaux-hologrammes-dans-le-cirque-bouglione-a-montpellier-04-11-2020-8406542.php

De belles intelligences… artificielles

Traversons l'Atlantique maintenant, et place aux **robots dauphins** pour la joie des grands, des petits, des dauphins et de l'IA : **https://www.reuters.com/article/us-tech-conservation-robot-dolphin-idUSKBN26Z1QV**

C'est le projet de la société d'ingénierie américaine Edge Innovations qui possède une division en Californie d'animatronique et d'effets spéciaux, utilisés par l'industrie du cinéma et qui pourrait, pourquoi pas, remplacer les animaux captifs dans les parcs animaliers. Le dauphin animatronique mesure 2,5 mètres, pèse 250 kg, sa peau est en silicone de qualité médicale et il coûterait la bagatelle de 3 à 5 millions de dollars.

N'empêche qu'on s'y croirait…

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