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JURISTE INTERNATIONAL

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Jacqueline R. **Scott**

PRESIDENT'S MESSAGE

During my presidency, I have had the honor – and pleasure – to attend many of UIA's seminars. I have been so proud of their quality. The topics have been relevant and timely and have ranged, for example, from immigration (Barcelona) to international sales contracts (Czech Republic); from arbitration (Bilbao) and mediation (London) to Agrifood (Valencia); from Human Rights due diligence (Tokyo) to criminal law and the International Criminal Court (Netherlands).

Another source of knowledge and development presented by UIA is the UIAcademy, a brand new venture intended to present UIA members with a catalogue of short practical training sessions that develop practical skills and techniques, checklists, best practices, guidelines, soft skills, etc. on what to do and what to look out for in specific key areas of interest to all of us, as legal practitioners. The UIAcademy short courses are virtual – 1 hour and half including Q&A – and take place through a special platform provided by LexisNexis, UIA's Global Premier Sponsor. The trainings are offered free of charge to UIA members only.

In the coming months, I look forward to meeting many of you at our interesting and engaging UIA events!

LE MOT DE LA PRÉSIDENTE

Au cours de ma présidence, j'ai eu l'honneur – et le plaisir – d'assister à de nombreux séminaires de l'UIA. J'ai été très fière de leur qualité. Les sujets abordés étaient pertinents et d'actualité et allaient, par exemple, de l'immigration (Barcelone) aux contrats de vente internationaux (République tchèque) ; de l'arbitrage (Bilbao) et de la médiation (Londres) à l'agroalimentaire (Valence) ; de la diligence raisonnable en matière de droits de l'homme (Tokyo) au droit pénal et à la Cour pénale internationale (Pays-Bas).

Une autre source de connaissance et de développement proposée par l'UIA est l'*UIAcademy*, une toute nouvelle initiative visant à présenter aux membres de l'UIA un catalogue de brèves sessions de formation pratique qui fournissent des compétences et des techniques concrètes, des checklists, des guides de bonnes pratiques, des recommandations, des compétences relationnelles, etc. sur ce qu'il faut faire et ce à quoi il faut faire attention dans des domaines clés spécifiques d'intérêt pour nous tous, en tant que praticiens du droit. Les formations de l'*UIAcademy* sont virtuelles – 1 heure et demie, y compris les questions-réponses – et se déroulent par le biais d'une plateforme spéciale fournie par LexisNexis, le *Global Premier Sponsor* de l'UIA. Les formations sont offertes gratuitement aux membres de l'UIA uniquement.

Dans les mois à venir, je me réjouis de rencontrer beaucoup d'entre vous lors des événements, toujours intéressants et engageants, de l'UIA !

MENSAJE DE LA PRESIDENTA

Durante mi presidencia, he tenido el honor – y el placer – de asistir a muchos seminarios de la UIA. Me sentí muy orgullosa de su calidad. Los temas tratados eran pertinentes y de actualidad y abarcaban, por ejemplo, desde la inmigración (Barcelona) hasta los contratos de compraventa internacional (República Checa); desde el arbitraje (Bilbao) y la mediación (Londres) hasta la agroindustria (Valencia); desde la diligencia debida en materia de derechos humanos (Tokio) hasta el Derecho penal y la Corte Penal Internacional (Países Bajos).

Otra fuente de conocimiento y desarrollo presentada por la UIA es la *UIAcademy*, una iniciativa totalmente nueva que pone a disposición de nuestros miembros un catálogo de formaciones prácticas de corta duración que les proporcionarán habilidades y técnicas prácticas, listas de comprobación a efectuar, guías de buenas prácticas, recomendaciones, competencias relacionales, etc. sobre qué hacer y a qué prestar atención en áreas clave específicas de interés para todos nosotros, como profesionales del Derecho. Las formaciones de la *UIAcademy* son virtuales – 1,5 horas, incluyendo preguntas y respuestas – y tienen lugar a través de una plataforma especial proporcionada por LexisNexis, *Global Premier Sponsor* de la UIA. Los cursos se ofrecen gratuitamente sólo a los miembros de la UIA.

En los próximos meses, ¡espero encontrarme con muchos de ustedes en los interesantes y atractivos eventos de la UIA!

Jacqueline R. SCOTT
UIA President, Présidente de l'UIA, Presidenta de la UIA
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Barbara **Gislason**

↘ EDITORIAL

During my visit to Kyiv a few years ago, I was struck by a powerful image: a statue of Lenin with a bullet piercing its head. This symbolic act of defiance vividly illustrates the intricate interplay between history, power, and cultural heritage. Reflecting on this experience, I found myself engaged in a discussion at a recent UIA seminar in The Hague, where the conversation delved deep into the heart of a pressing question: whose art and cultural heritage deserves protection in the tumult of conflict?

This question is not confined to academic discourse; it lies at the core of international efforts to safeguard cultural treasures, including in times of war. Legal frameworks, such as Article 18 of the Treaty of Rome and UNESCO's Declaration Concerning the Intentional Destruction of Cultural Heritage, provide avenues for prosecuting those who target cultural heritage. Yet, beneath these legal foundations lies a profound moral quandary: should the artifacts of the powerful be prioritized over those of the marginalized?

Consider, for instance, the contentious issue of Confederate monuments in the southern United States. Erected to honor generals who fought for slavery, these statues are potent symbols of oppression for many. The debate surrounding their fate raises fundamental questions about commemoration and historical memory.

In armed conflicts worldwide, cultural heritage is lost when places of worship are desecrated, iconic buildings reduced to rubble, and museums looted of their treasures. This destruction is not just physical; it is a symbolic erasure of history and identity. It may represent cultural genocide. Moreover, the calculus of armed conflict introduces another layer of complexity. While some risk their lives to protect heritage, others prioritize survival over preservation. This stark reality highlights the human cost of war, measured in lives lost and communities displaced.

Yet, amid the devastation, there remains a glimmer of hope. The timeless essence of art and cultural heritage transcends borders and conflicts, uniting humanity in collective mourning for what is lost. Efforts to document, preserve, and rebuild cultural treasures serve as gestures of resilience and strength against destruction's forces which underscore our shared humanity and commitment to preserving the richness and diversity of human expression for generations to come.

↘ L'ÉDITO

Lors de ma visite à Kiev il y a quelques années, j'ai été frappée par une image forte : une statue de Lénine dont la tête était transpercée par une balle. Cet acte symbolique de défi illustre de manière frappante l'interaction complexe entre l'histoire, le pouvoir et l'héritage culturel. En réfléchissant à cette expérience, je me suis retrouvée engagée dans une discussion lors d'un récent séminaire de l'UIA à La Haye, où la conversation a plongé au cœur d'une question pressante : quel art et quel patrimoine culturel mérite d'être protégé dans le tumulte d'un conflit ?

Cette question ne se limite pas au discours académique : elle est au cœur des efforts internationaux pour sauvegarder les trésors culturels, y compris en temps de guerre. Des cadres juridiques tels que l'article 18 du traité de Rome et la déclaration de l'UNESCO concernant la destruction intentionnelle du patrimoine culturel permettent de poursuivre ceux qui s'en prennent au patrimoine culturel. Pourtant, ces fondements juridiques cachent un profond dilemme moral : les artefacts des puissants doivent-ils être privilégiés par rapport à ceux des marginaux ?

Prenons, par exemple, la question controversée des monuments confédérés dans le sud des États-Unis. Érigées en l'honneur de généraux qui se sont battus pour l'esclavage, ces statues sont, pour beaucoup, de puissants symboles d'oppression. Le débat sur leur sort soulève des ques-

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> *The timeless essence of art and cultural heritage transcends borders and conflicts, uniting humanity in collective mourning for what is lost.*

tions fondamentales sur la commémoration et la mémoire historique.

Dans les conflits armés du monde entier, le patrimoine culturel est perdu lorsque les lieux de culte sont profanés, les bâtiments emblématiques réduits à l'état de ruines et les musées pillés de leurs trésors. Cette destruction n'est pas seulement physique ; il s'agit d'un effacement symbolique de l'histoire et de l'identité. Il peut s'agir d'un génocide culturel.

De plus, le calcul des conflits armés introduit une autre couche de complexité. Alors que certains risquent leur vie pour protéger le patrimoine, d'autres privilégient la survie à la préservation. Cette dure réalité met en évidence le coût humain de la guerre, mesuré en vies perdues et en communautés déplacées.

Pourtant, au milieu de la dévastation, il reste une lueur d'espoir. L'essence intemporelle de l'art et du patrimoine culturel transcende les frontières et les conflits, unissant l'humanité dans le deuil collectif de ce qui a été perdu. Les efforts déployés pour documenter, préserver et reconstruire les trésors culturels sont autant de gestes de résilience et de force face aux forces de la destruction. Ils soulignent notre humanité commune et notre engagement à préserver la richesse et la diversité de l'expression humaine pour les générations à venir.

↘ EDITORIAL

Durante mi visita a Kiev hace unos años, me impactó una poderosa imagen: una estatua de Lenin con una bala atravesándole la cabeza. Este acto simbólico de desafío ilustra vívidamente la intrincada interacción entre historia, poder y patrimonio cultural. Reflexionando sobre esta experiencia, me vi envuelto en un debate en un reciente seminario de la UIA en La Haya, donde la conversación se adentró en el corazón de una cuestión acuciante: ¿el arte y el patrimonio cultural de quién merecen protección en el tumulto de los conflictos?

Esta cuestión no se limita al discurso académico; se encuentra en el centro de los esfuerzos internacionales para salvaguardar los tesoros culturales, incluso en tiempos de guerra. Marcos jurídicos como el artículo 18 del Tratado de Roma y la Declaración de la UNESCO relativa a la destrucción intencional del patrimonio cultural ofrecen vías para perseguir a quienes atentan contra el patrimonio cultural. Sin embargo, bajo estos fundamentos jurídicos subyace un profundo dilema moral: ¿se debe dar prioridad a los objetos de los poderosos sobre los de los marginados?

Consideremos, por ejemplo, la polémica cuestión de los monumentos confederados en el sur de Estados Unidos. Erigidas en honor de los generales que lucharon por la esclavitud, estas estatuas son para muchos potentes símbolos de opresión. El debate en torno a su destino plantea cuestiones fundamentales sobre la conmemoración y la memoria histórica.

En los conflictos armados de todo el mundo, el patrimonio cultural se pierde cuando los lugares de culto son profanados, los edificios emblemáticos reducidos a escombros y los museos despojados de sus tesoros. Esta destrucción no es sólo física; es un borrado simbólico de la historia y la identidad. Puede representar un genocidio cultural.

Además, el cálculo de los conflictos armados introduce otra capa de complejidad. Mientras unos arriesgan la vida para proteger el patrimonio, otros dan prioridad a la supervivencia frente a la conservación. Esta cruda realidad pone de relieve el coste humano de la guerra, medido en vidas perdidas y comunidades desplazadas.

Sin embargo, en medio de la devastación, sigue habiendo un rayo de esperanza. La esencia intemporal del arte y el patrimonio cultural trascienden fronteras y conflictos, uniendo a la humanidad en un duelo colectivo por lo que se ha perdido. Los esfuerzos por documentar, preservar y reconstruir los tesoros culturales sirven como gestos de resistencia y fortaleza frente a las fuerzas de la destrucción. Subrayan nuestra humanidad compartida y nuestro compromiso de preservar la riqueza y diversidad de la expresión humana para las generaciones venideras.

El derecho de **las máquinas**

SANTIAGO SCHUSTER VERGARA

Generative artificial intelligence (AI), to which this article refers, describes a new legal problem for Intellectual Property, which consists in the development of objects that, from the point of view of their form of expression (in copyright law), or their functionality (in patent law), are protected by the normative systems of intellectual property. The non-human factor in the generation of these objects offers a complex dilemma, because if protection is granted, subjective rights would be attributed to machines; while, if protection is denied, a new public domain of objects produced by machines is created, which competes with those created by human beings.

L'intelligence artificielle générative (IA), à laquelle cet article fait référence, décrit un nouveau problème juridique pour la propriété intellectuelle, qui consiste à développer des objets qui, du point de vue de leur forme d'expression (dans le droit d'auteur) ou de leur fonctionnalité (dans le droit des brevets), sont protégés par les systèmes normatifs de la propriété intellectuelle. Le facteur non humain dans la génération de ces objets offre un dilemme complexe, car si la protection est accordée, des droits subjectifs sont attribués aux machines ; si la protection est refusée, un nouveau domaine public d'objets produits par des machines est créé, en concurrence avec ceux créés par des humains.

El factor no-humano en la generación de objetos protegidos por propiedad intelctual

La Corte Suprema de Estados Unidos, recientemente (Abril, 24, 2023)[1], ha denegado revisar la Sentencia dictada por el Tribunal de Apelación del Circuito Federal de los Estados Unidos que había confirmado el rechazo de una solicitud de patente sobre una invención desarrollada por Inteligencia Artificial. La solicitud había sido presentada por Stephen Thaler quien pedía el registro de una invención creada por un sistema de IA de su propiedad, (DABUS) (*teaching a "Neural Flame"* y *teaching a "Fractal Container"*). La Oficina de Patentes de Estados Unidos, (United States Patent and Trademark Office - USPTO) rechazó el registro señalando que solo correspondía aceptar solicitudes de patentes de invenciones creadas por humanos. Esa decisión fue mantenida por un tribunal del circuito de Virginia, y posteriormente confirmado por el Tribunal de Apelación del Circuito Federal.

El interés del solicitante es ciertamente económico, ya que como propietario del sistema de IA reclama titularidad derivada de la obra.

El Tribunal de Apelación señaló que se limitaría a aplicar el estatuto legal de patentes que era muy claro en disponer que solo los seres humanos podrían ser inventores y, por lo tanto, dado que un sistema de Inteligencia Artificial no cumplía con ese requisito, confirmaría la decisión de la United States Patent and Trademark Office (USPTO), y con ello lo decidido por la Corte de Virginia. El mismo Tribunal en su sentencia señaló que si bien en un principio a la Corte pudo parecerle que resolver esta cuestión "implicaría una indagación abstracta sobre la naturaleza de la invención o de los derechos, si alguno cabe, de los sistemas de IA"[2], finalmente, estimó que no necesitaba ponderar estas cuestiones metafísicas, dado que si el estatuto legal pertinente establece que las invenciones protegidas son solo aquellas inventadas por uno o varios seres humanos, eso ya era suficiente para rechazar la solicitud de patente.

El apelante, Stephen Thaler, recurrió a la Corte Suprema de Justicia pidiendo que se revisara la decisión, dada la implicancia que tendría para la protección de las invenciones desarrolladas por IA, cuya tendencia es

1. Petition Denied. Stephen Thaler, Petitioner v. Katherine K. Vidal, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office, et al. https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-919.html

2. United States Federal Court of Appeals for the Federal Circuit. https://cafc.uscourts.gov/opinions-orders/21-2347.OPINION.8-5-2022_1988142.pdf.

creciente. Para esto recibió el apoyo de un equipo de notables académicos y abogados, (Informe de *Amici Curie*) encabezados por Lawrence Lessig, el renombrado catedrático de la Universidad de Harvard, fundador de *Creative Commons*, junto a la profesora Shlomit Yanisky-Ravid, Osman Güçlütürk, investigador visitante en el Proyecto Sociedad de la Información de la Facultad de Derecho de Yale y el Dr. Christopher Mason, catedrático de Genómica, Fisiología y Biofísica en Weill Cornell Medicine.

En su informe, Lawrence y el grupo que elaboró el informe, reconoce que cuando los sistemas de IA inventan de forma autónoma, *ningún humano dirige el proceso ni realiza los cálculos previos y que la única orden que se da a la IA es "inventar"*. Se reafirma entonces que en este tipo de invenciones no hay participación alguna de un ser humano, quien solo ha dado la básica indicación de "inventar" y que luego la máquina, de forma independiente, ha arrojado como resultado una invención. El argumento pragmático, muy propio del utilitarismo, ha sido expresado en el informe *Amici Curie*, razonando que la restricción a la aceptación de las máquinas como inventores, supondrá un freno de miles de millones de dólares en inversión y desarrollo de nuevas invenciones farmacéuticas y biotecnológicas. Estas patentes, basadas en el uso de las invenciones generadas por IA, dice el informe, afectará no solo a la industria farmacéutica sino también del entretenimiento, que dependen en gran medida de la IA para generar productos protegidos por Propiedad Intelectual (PI).

A su vez, la Copyright Office (CO) de Estados Unidos ya había seguido el mismo camino de la USPTO, rechazando el registro de una obra audiovisual (*A Recent Entrance to Paradise*) y aceptando parcialmente el registro – solo en relación al texto y no las imágenes – de una historieta gráfica, (*Zarya of the Dawn*), también creada empleando IA.

Las solicitud del audiovisual, *A Recent Entrance to Paradise,* fue denegada por la CO basándose en la propia declaración del solicitante, que reconocía en su solicitud de registro que el contenido procedía de la operación independiente de su sistema de IA. El examinador consideró que, dado que la obra no tenía su origen en la autoría humana, debía ser rechazada. Tras una serie de recursos administrativos, la Junta de Revisión de la CO emitió una decisión final en la que confirmaba que la obra no podía registrarse porque se había realizado "sin ninguna contribución creativa de un actor humano". En el segundo caso, *Zarya of the Dawn*, la CO revisó un registro que ya había concedido, al constatar que correspondía a un contenido cuyo texto procedía del ingenio humano, y que por tanto estaba protegido por derecho de autor, en tanto respecto de las imágenes, éstas habían sido generadas por el sistema de IA Midjourney, y por tanto declaró que estas últimas no serían consideradas obras protegidas.

La respuesta de la Copyright Office se asume en el contexto de un procedimiento registral. Si el solicitante señala que no ha habido intervención humana y reclama titularidad para la máquina, entonces el órgano de la administración no tiene otra alternativa que rechazar. Eso es rigurosamente coherente con el estatuto legal de PI en Estados Unidos. El interés del solicitante es ciertamente económico, ya que como propietario del sistema de IA reclama titularidad derivada de la obra.

Los presupuestos de la protección de derecho de autor en las obras generadas por IA

El derecho de autor da valor a la diferencia, no a la novedad en sentido absoluto, sino a la diferencia en tanto permite reconocer objetos únicos, nuevos, distintos de otros del mismo género. En esto se distancia claramente del derecho de patentes que exige la novedad absoluta según el estado del arte, respecto de una solicitud de patentamiento.

Si se identifica a la obra musical como una entidad que se distingue de otras, esta diferenciación no niega las influencias de la experiencia creativa de otros seres humanos. Se puede distinguir el Concierto para Piano n° 5 de Beethoven, del concierto para Piano en La Menor Op. 16, de Grieg, y aunque ambos usan los mismos elementos, y podrían clasificarse en un mismo género e incluso advertir influencias del primero en el segundo, puede constatarse que tienen una forma de expresión que los hace diferentes y distinguibles. Cada uno de ellos es único en su género. También percibimos la diferencia entre una obra literaria de Isabel Allende de otra de García Márquez, aunque ambos escritores empleen el estilo del realismo mágico, que caracteriza sus obras.

El dilema estará en que las máquinas invaden el ámbito de la creatividad y toman posesión en el mercado […].

En consecuencia, puede decirse que se está frente a una obra intelectual cuando se reconoce un objeto que es distinto a otros, que no es copia de otros, que no parasita del esfuerzo ajeno, que muestra una nueva entidad que se percibe por los sentidos y que se puede diferenciar de otras.

La evolución del arte es una búsqueda permanente de la diferencia, un escape del hastío de lo que se repite. Pareciera que el ser humano quiere evitar la monotonía y por eso celebra que alguien ofrezca algo diferente. En la creación artística tanto los autores como el público que los sigue, pronto evolucionan a otras formas de expresión: los polifónicos huyen de la monofonía, los románticos abandonan el clasicismo; los surrealistas toman los convencionalismos del renacimiento para expresar algo distinto; y así sucesivamente.

La combinación de los datos en el arte son las palabras, los signos, los trazos, los colores que dan forma a las obras que protege el derecho de autor. Que un alfabeto de veintiocho signos permita formular infinidad de palabras y relatar con ellas un sinnúmero de historias, es equivalente a las combinaciones de una escala de ocho notas que han

sido el insumo de miles y miles de obras musicales. En la mirada desde el derecho de autor, la combinación de estos elementos da forma de expresión a objetos únicos, pero no concede protección a los elementos en sí mismos, (a menos que estos elementos sean obras) y tampoco a las técnicas que utilizan los autores, ni a los soportes en que quedan fijados.

Sin embargo, el arte y las obras intelectuales para la IA son solo datos, información que puede ser procesada y arrojar resultados en infinidad de géneros creativos. Una canción será el producto del análisis de los miles de datos que entregan las plataformas musicales. El dilema estará en que las máquinas invaden el ámbito de la creatividad y toman posesión en el mercado, porque además de nutrirse de la data de las plataformas distribuidoras de música, pueden conocer con mejor precisión los gustos del público y ajustar sus procesos creativos a ese mapa de preferencias.

¿Son obras intelectuales los objetos generados por IA?

La determinación del carácter protegido de una creación proveniente del ingenio humano, tiene como base jurídica dos presupuestos: el de la originalidad y el de la temporalidad. El primero define a la obra intelectual como un producto de la inteligencia humana, que en su forma de expresión reviste características de originalidad. El segundo consiste en el plazo de protección de la obra, que debe encontrarse en vigor, y que tiene una dimensión ligada a la vida del autor.

El modelo normativo también puede ser nefasto y adecuarse solo a los requerimientos de los inversionistas en IA […].

El presupuesto de mayor efecto jurídico-práctico, respecto de la cuestión tratada en este texto, es el de la originalidad en la forma de expresión. Se reconoce la originalidad en la individualidad o singularidad del objeto creado, en su carácter único, que en términos simples consiste en que no sea copia de otra, que sea distinguible de otras obras de su mismo género, como se indicó en los ejemplos anteriores. En el derecho anglosajón o sistema de *Copyright*, se trata como "mínima creatividad" o "altura creativa". La prueba de la originalidad de una obra no es necesaria cuando se reclama protección por infracción del derecho de autor. La originalidad se presume y quien lo controvierta debe probar que se trata de un objeto que no cumple con el presupuesto de originalidad o de mínima creatividad.

Si la máquina puede generar contenido nuevo, único, que ya no es atribuido a la inteligencia humana sino a una forma de procesamiento de información que llamamos inteligencia artificial ¿podría negarse la protección por la no existencia de un ser humano en el proceso generador de contenido? El debate doctrinario sobre originalidad objetiva y subjetiva tiene aquí un valor renovado, pero no es posible abordarlo en la extensión de este trabajo. La respuesta que se pueda ofrecer a esta interrogante remueve todo lo que se ha dicho sobre la originalidad como un presupuesto para la protección de las obras intelectuales.

Si la respuesta es afirmativa: admisión de un derecho de las máquinas

Al menos desde el ámbito del régimen de derecho de autor, si la respuesta a la pregunta sobre la protección de las obras generadas por IA es positiva, se estará ante uno de los más complejos dilemas para la base conceptual del derecho, porque la modificación del sistema que acepta las máquinas como entes creadores colisiona con el fundamento del derecho de autor.

En el origen de toda obra intelectual hay un un ser humano y esta consideración se expresa en dos aspectos centrales del régimen de derecho de autor : el reconocimiento del derecho moral, como un derecho personalísimo, inalienable e imprescriptible; y el plazo de protección, ya mencionado, cuya dimensión es toda la vida del autor y un plazo post mortem. Un plazo que esté desvinculado de la vida del autor será siempre excesivo, porque se aleja del reconocimiento del trabajo creativo de un ser humano, fundamento esencial del derecho de autor.

La aceptación del criterio del grupo de académicos encabezados por Lawrence Lessig, de ignorar el eslabón humano en el proceso invencional o creativo, dado que las inversiones en IA dependen de ese criterio y son fundamentales para la industria farmacéutica, biotecnológica y del entretenimiento, significa aceptar el reconocimiento de derechos de propiedad intelectual sobre obras o invenciones creadas por máquinas. Esto produciría la entrada al mercado de derechos de miles de obras creadas por máquinas, que entrarían en competencia con objetos creados por humanos. Los derechos de las máquinas serían establecidos, cualquiera sea la fórmula que se elija para que tales derechos sean ejercidos.

Si la respuesta es negativa: dominio público emergente de contenidos IA

Si a la cuestión planteada se responde negativamente, como la ha hecho la Oficina de Copyright de Estados Unidos (CO) , en el sentido que los objetos creados por máquinas no están protegidos, entonces se habrá dado nacimiento a un universo de objetos creativos (así los llamaré, aunque lo sean por la acción de las máquinas) que formarán un dominio público inmenso (no protegido) que competirá con el universo de creaciones humanas. Esto abre interrogantes acerca de la necesidad de un marco jurídico para este nuevo dominio público.

La decisión de la CO, rechazando registros por no corresponder a creaciones humanas, es coincidente con el criterio de la USPTO respecto de las invenciones, ya

mencionado. Pienso que ambas posiciones, fundamentadas en el texto expreso del estatuto legal de protección de Estados Unidos, se corresponden a la concepción autoralista de la protección que se tiene en el ámbito de los sistemas de Derecho de Autor europeo-continentales y latinoamericanos. Sin embargo, el criterio del factor no-humano deja algunas preocupaciones, en particular si se tiene en consideración el fundamento utilitarista del sistema norteamericano en relación a la propiedad intelectual, que se contiene en el informe de los juristas que encabeza Lessig, ya referido.

Por su parte, la Corte de Apelaciones del Circuito Federal[3] ha dicho que en su fallo no ha considerado una indagación sobre la naturaleza de la invención o de los derechos, si alguno cabe, de los sistemas de IA, frente a un texto tan claro de la ley escrita. Todavía cabe preguntarse qué ocurrirá si el legislador frente a la apremiante necesidad de asegurar inversiones en IA, modifica el estatuto de protección y concede derechos sobre las invenciones y obras derivadas de un sistema de IA.

Marco Normativo para los productos que genera la IA

La figura de una máquina que desarrolla conductas totalmente independientes es quizás disparatada, aún en el momento actual de la tecnología, pero conviene asentarla en un lugar del análisis, para saber que se debe normar (o debería normar) en torno a los productos que genera la IA, al menos en lo que respecta a la propiedad intelectual. De hecho su discusión ya no es trivial en el ámbito específico del derecho de autor. Frente a las alternativas de modelos normativos que suponen estos desafíos, que pienso son insoslayables, no bastan las expresiones puramente éticas o ideológicas acerca de lo que se debe considerar creación intelectual o artística.

Ante la necesidad de normar, como lo han expresado los responsables de políticas públicas en diversos países, se podría teorizar acerca de las responsabilidades de las máquinas por sus operaciones, con apoyo en la vieja institución de la responsabilidad objetiva por el hecho de las cosas. Sin embargo, la situación de riesgo que causan las cosas inanimadas, parece no ajustarse a la situación que presenta el hecho de una cosa inanimada que toma decisiones sin intervención humana.

Si se concibe la IA como el fenómeno de una máquina que desarrolla conductas independientes, entonces el Derecho debería establecer formas de protección de las personas que puedan ser injustamente dañadas por la operación de una máquina que no responde a una conducta humana. De esta manera, si la máquina dotada de IA crea una canción, podría indagarse si tal realización ha trasgredido derechos de terceros, por ejemplo sustrayendo en forma parcial o completa otras creaciones protegidas. Sería aún discutible la responsabilidad de un ser humano que no ha intervenido en esa conducta, pero sin duda quien pone en situación de riesgo el patrimonio intelectual de otros, es claramente el ser humano que puso en movimiento la máquina.

El modelo normativo también puede ser nefasto y adecuarse solo a los requerimientos de los inversionistas en IA facilitando el reconocimiento del derecho de las máquinas para asumir la titularidad de las obras e invenciones, así lo obtengan a través de formas corporativas de titularidad, pero siempre desplazando al ser humano que crea e inventa.

Pero el derecho de las "cosas" no solo está ligado a las cuestiones de la IA. Tenemos otros ejemplos. Se plantea en otros ámbitos la posibilidad de titularidad de derechos para entidades que hasta ahora para el Derecho son cosas. En la primera propuesta formulada en el proceso constitucional chileno (rechazada en el plebiscito de 4 de septiembre de 2022) se incluían disposiciones que concedían derechos a la Naturaleza (*Art. 18.3 "La naturaleza es titular de los derechos reconocidos en esta Constitución que le sean aplicables" (Capitulo Derechos Fundamentales y Garantías*). Con especial satisfacción los constituyentes proclamaban que esta sería la primera constitución que concedía derechos a la naturaleza, creando al mismo tiempo, con rango constitucional, una Defensoría de la Naturaleza. Con el mismo impulso fundacional, la propuesta incluía el reconocimiento de derechos subjetivos "*a los animales no humanos*" , mediante un estatuto jurídico que les permite también ser titulares de derechos subjetivos.

Si las máquinas consolidan su estatus de cosas inteligentes, que crean contenidos, y si reclaman derechos como la experiencia lo está demostrando, desde la más pura concepción transhumanista, entonces es el momento de discutir sobre un régimen legal que aborde este fenómeno nuevo para los seres humanos.

Es el momento de discutir acerca del marco normativo necesario para abordar los productos generados por las máquinas, con independencia de la intervención humana, y de sus consecuencias jurídicas. Esto implicará decidir, dentro de nuestros sistemas democráticos, si los seres humanos darán curso al reconocimiento de derechos subjetivos a las "cosas". La regulación "es la única vía plausible", dice Luc Ferry, para imponer los límites en que se desarrollará este nuevo momento tecnológico en la Humanidad. Aunque en mi opinión, más que límites, lo que importa es establecer los cauces para que los seres humanos decidan responsablemente la forma en que estos objetos se incorporarán a su cultura. ■

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Universal Jurisdiction: A Complementary Avenue for Justice for War Crimes in Ukraine

PAOLA FUDAKOWSKA

La juridiction universelle est un concept juridique qui autorise, voire oblige, les États à poursuivre ou à extrader les personnes soupçonnées de violations du droit international, telles que les crimes de guerre. En l'absence d'une convention universelle couvrant toutes les parties potentielles, la juridiction universelle peut apporter une solution complémentaire et provisoire. Cet article examine l'évolution et l'application potentielle de ce concept juridique en ce qui concerne l'Ukraine.

La jurisdicción universal es un concepto jurídico que autoriza, e incluso obliga, a los Estados a procesar o extraditar a los sospechosos de violaciones del derecho internacional, como los crímenes de guerra. En ausencia de una convención universal que cubra a todas las partes potenciales, la jurisdicción universal puede proporcionar un alivio complementario y provisional. Este artículo analiza el desarrollo y la posible aplicación de este concepto jurídico en relación con Ucrania.

The Ukraine Context

Since the start of the full-scale invasion of Ukraine on 24 February 2022, the Office of the Prosecutor General (OPG) in Ukraine has reported 108,904 war crimes committed by Russian forces, which include the intentional targeting of civilians, torture, sexual violations, and child abductions[1]. This article explains the principle of universal jurisdiction and explores how it could offer justice in the short to medium term for survivors of war crimes committed in Ukraine and hold those responsible accountable.

Possible Avenues for Justice

Since the start of the invasion, there has been significant international support to hold Russia's political and military leadership accountable for the crimes they committed in Ukraine and those acting under their control in violation of international law. The United Nations General Assembly has called for the establishment of a special tribunal on the crime of aggression[2] to prosecute Russia's political and military leadership and its allies. An ad hoc tribunal is seen as filling a vacuum in international criminal justice

1.https://crsreports.congress.gov/product/pdf/R/R47762#:~:text=As%20of%20September%2029%2C%202023,crimes%20committed%20by%20Russian%20forces

2. https://press.un.org/en/2022/ga12407.doc.htm. On 2 March 2022, the UN General Assembly passed the first of a series of resolutions titled "Aggression against Ukraine." Among other statements, it said that the General Assembly *"Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter."* 141 states voted in favour of the Resolution, with 5 voting against, 35 abstentions, and 12 states absent or not voting.

and complementary to the investigative efforts of the International Criminal Court (ICC), which does not have jurisdiction over the crime of aggression in Ukraine.

On 17 March 2023, the ICC issued arrest warrants for President Vladimir Putin and the Commissioner for Children's Rights in the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova, for the war crimes of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.

Under Articles 86 and 89 of the Rome statute, all signatory states have the legal obligation to cooperate fully with the ICC, which includes the obligation to arrest and surrender any person subject to an arrest warrant who enters their territory. The arrest warrants may substantially limit the ability of subjects to travel internationally, and as the ICC prosecutor's investigation in Ukraine continues, their prosecutorial scope may be expanded to include other international crimes.

In Ukraine, the Office of the Prosecutor General (OPG) is supported to investigate and prosecute war crimes committed on its territory by the Atrocity Crimes Advisory Group set up by the European Union, United Kingdom, and the United States to assist in bringing those deemed accountable to justice. However, it is the under-used principle of universal jurisdiction – complementary to the above international justice mechanisms – which could offer justice to survivors.

Universal Jurisdiction

1. Historical Development

The principle of universal jurisdiction has developed since World War II. It was first codified in Article 49 of the Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field 1949 which provides that state parties must prosecute or extradite those suspected of grave breaches such as war crimes. Since then, this principle has been enshrined in other international conventions (such as the International Convention on the Suppression and Punishment of the Crime of Apartheid; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance) and recognised in an increasing number of national legislations.

Universal jurisdiction is distinct from the ICC's jurisdiction and relates to the ability and obligation of national courts to investigate and prosecute specific international crimes, including war crimes, crimes against humanity, genocide, torture and enforced disappearances (i.e., secret abductions, kidnapping, or imprisonment of persons).

2. In Practice

In some countries, national legislation incorporating universal jurisdiction imposes one or more of the following conditions which limit the application of the principle:

1. That the perpetrator must be present in the country.
2. That the perpetrator is a national or resident of the country where the trial takes place.
3. That the victims are nationals or residents of the country where the trial takes place.
4. That the case is in the national interest or national security.
5. That there is an obligation under international law to bring the case.

In other countries, like Germany, the national law implementing universal jurisdiction has no requirement that the crimes were committed on its territory, nor that the victims or perpetrators are nationals or residents. Germany is building expertise in investigating international crimes through structural investigations conducted by specialised war crime units and a number of universal jurisdiction cases have been heard in German courts.

In 2011, Germany opened the first structural investigation on international crimes in Syria, which in 2022, resulted in the first convictions for crimes against humanity of two former members of the Syrian General Intelligence Services.

The use of universal jurisdiction to secure accountability is gaining momentum, and between 2015 and 2021, the number of newly opened cases on international crimes in Europe increased by 44%. Between 2015 and December 2022, there were 78 convictions, including nine women[3].

3. Investigation

At least 11 structural investigations into international crimes in Ukraine have been opened across Europe and in Canada based on universal or extraterritorial jurisdiction. These structural investigations collect evidence to enable investigators to build cases for future criminal proceedings.

However, it is the under-used principle of universal jurisdiction – complementary to the above international justice mechanisms – which could offer justice to survivors.

Certain East European countries are collecting testimonials from Ukrainian asylum seekers to preserve evidence for future cases. To avoid the risk of duplication, over-documentation, and re-traumatisation of victims, a joint investigation team has been set up by Eurojust – the EU Agency for Criminal Justice Cooperation – with seven European countries and the ICC.

Several specialist civil society organisations are working with Ukrainian investigators who have been documenting Russia's crimes since before the annexation of Crimea in 2014. Satellite, drone, and film footage, as well as witness and victim testimonies collected by local investigators,

3. https://trialinternational.org/wp-content/uploads/2023/04/TRIAL_UJAR_2023_DIGITAL_21_04_Version2.pdf page 12.

is independently verified by the OPG and builds an overwhelming picture of the atrocities committed by Russian military forces.

4. Prosecution

As of 29 February 2024, the OPG has reported 81 convictions[4]. Universal jurisdiction offers a unique opportunity to significantly multiply these efforts through collaboration with national prosecutors in countries with experience bringing such claims in the national criminal courts.

There remains a role for national courts, which can be reactive and bring a claim in a relatively prompt timeframe. For example, the trial in Germany relating to the crimes against humanity committed in Syria started in April 2020, just over a year after the arrest of the two suspects in February 2019. The conviction of one was secured in February 2021 and upheld by the Federal Court of Justice in April 2022[5].

Currently, prosecutions of any Russian military commanders are likely to take place without the alleged perpetrator in the courtroom. However, a court decision recognising war crimes, and the claimants' suffering, can be instrumental in enabling survivors to move on and build a new life in their adopted country.

A court decision may also assist survivors in establishing future claims for reparations and in securing an international arrest warrant in collaboration with the relevant national and international authorities, which is activated when the perpetrators leave Russia to cross borders.

A Survivor-Focused Approach

The rise in newly opened cases on international crimes in the past decade suggests that the use of universal jurisdiction is gaining momentum. It is an under-utilised legal tool which offers the advantage of justice rendered by national courts, with stable legal systems, in a relatively prompt timeframe. The challenges of delivering justice for the survivors or families of those killed or impacted by crimes committed in Ukraine through international mechanisms remain complex and are likely to take time to set up. Two years since the start of the invasion, universal jurisdiction offers the possibility of a more tangible stepping-stone towards justice for survivors. ■

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4. https://www.reuters.com/world/europe/ukraine-says-it-identified-511-war-crime-suspects-convicted-81-2024-02-29/.

5. https://trialinternational.org/wp-content/uploads/2023/04/TRIAL_UJAR_2023_DIGITAL_21_04_Version2.pdf pages 56-58.

Gender Apartheid

STEVEN RICHMAN

La Sixième Commission (juridique) de l'Assemblée générale des Nations Unies envisage d'adopter le projet d'articles sur la prévention et la répression des crimes contre l'humanité de 2019, qui définit l'apartheid comme un crime contre l'humanité. Cet article traite de l'inclusion de l'« apartheid de genre » et de l'« apartheid racial » dans la définition de l'apartheid dans cette convention ou dans tout autre instrument final de la Sixième Commission ou autre.

La Sexta Comisión (Asuntos Jurídicos) de la Asamblea General de las Naciones Unidas está considerando la adopción del Proyecto de artículos sobre prevención y castigo de crímenes de lesa humanidad 2019, que define el apartheid como crimen de lesa humanidad. En este artículo se analiza la inclusión del "apartheid de género", así como del "apartheid racial", en la definición de apartheid de esta convención o de cualquier instrumento definitivo de la Sexta Comisión o de otro tipo.

Background

While the word "apartheid" has been generally understood to reference the racist policies in the Union of South Africa, it may and should also be understood to encompass other bases of systematic oppression that rises to that level, such as a comparable framework based on gender. There is a current movement to recognize gender apartheid, with contemporary examples found in Afghanistan and Iran, as well as elsewhere. To understand what is meant, reference may be made to The Rome Statute of the International Criminal Court[1] (Rome Statute). By using the word apartheid in this context to accurately describe what is being done is not to detract from racial apartheid, but to build on the legal construct to address comparable behavior.

Article 5 of the Rome Statute brings crimes against humanity within its jurisdiction, and Article 7 further defines crimes against humanity as "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Under Article 7(1), those acts include murder, extermination, enslavement, deportation or forcible transfer, imprisonment in violation of international law, torture, rape and other acts of sexual violence, persecution of an identifiable group in violation of international law, enforced disappearance, apartheid, and similar inhumane acts. Apartheid itself is defined in Article 2(h) as "inhumane acts of a character similar to those referred to in [Article 7] paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."

The International Law Commission of the United Nations, as part of the UN system, was established with the mandate to make recommendations for the development of international law. In 2019, at its seventy-first session, it adopted the Draft articles on Prevention and Punishment of Crimes Against Humanity 2019 (the Draft Articles)[2]. Given the United Nations Charter itself and other international instruments, such as the United Nations Universal Declaration of Human Rights, one may wonder why a new convention was needed. In the commentary to the Draft Articles, this was explained in terms of addressing in a single document the goals of prevention and punishment of crimes against humanity, and providing a mechanism for cross-border cooperation:

The Sixth Committee (Legal) of the United Nations has the responsibility to consider legal questions in the General Assembly.

(1) Three crimes typically have featured in the jurisdiction of international criminal courts and tribunals: genocide, crimes against humanity and war crimes. The crime of genocide and war crimes are the subject of global conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward those ends. By contrast,

1. https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

2. https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard, even though crimes against humanity are likely no less prevalent than genocide or war crimes. Unlike war crimes, crimes against humanity may occur in situations not involving armed conflict. Further, crimes against humanity do not require the special intent that is necessary for establishing genocide.

(3) ... codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered to treaties addressing crimes, as a basis for a possible future convention[3].

Therefore, at the risk of oversimplifying the nuances and details involved, the Draft Articles seek to establish a framework for future conventions relating to crimes against humanity by focusing on prevention, remedy, and cooperation.

The Sixth Committee (Legal) of the United Nations has the responsibility to consider legal questions in the General Assembly. At its 78th Session in November 2023, consideration was given to the pending Draft Articles and the issue of crimes against humanity will continue on the agenda at the Committee's meeting in April 2024. At that meeting, it is anticipated that the Committee will also determine how to move the negotiations forward. This will include input from governments as to whether to commence negotiations for a convention and if so, whether those negotiations will remain in the Sixth Committee itself or move to a specially created diplomatic conference.

As such, woman are segregated from mainstream Afghan society.

3. Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf at page 22
https://endgenderapartheid.today/index.php.

The Impetus for Inclusion of Gender Apartheid

As noted, the current definition in the proposed Draft Articles defines apartheid solely in terms of racial groups. Led primarily by Iranian and Afghan legal experts, a proposal has been set forth to include *gender groups* as well as *racial groups*. While recognizing that the issue is global, this group has focused on Iran and Afghanistan as "outliers on women's rights globally, because of gender apartheid." The rational put forward by this group, End Gender Apartheid Today, is explained on its website:

> *"Situations of gender apartheid could be prosecuted as the crime against humanity of gender persecution. However, recognizing gender apartheid as a crime in and of itself would strengthen tools available for ending apartheid regimes. When substituting gender language for racial language, apartheid definitions are factually accurate descriptions of particularly severe forms of gender-based discrimination. This will help convey the gravity of the harms carried out in gender apartheid regimes and catalyze action to stop these harms*[4]*."*

The Reality on the Ground

In Afghanistan, since the Taliban gained control over the country, women have been banned from public sector and private sector employment, including work with NGOs and the United Nations. Education for them is terminated after sixth grade, if not earlier. Women are forced to travel with *mahram* (male chaperones). As such, woman are segregated from mainstream Afghan society[5].

Other indicia of oppression have been documented in the comprehensive report, "*Afghanistan Under the Taliban: A State of 'Gender Apartheid?*[6]*'*". Particularly serious is the effect on education, as identified in the report, which notes that UNICEF has documented 3.7 million Afghani children are not in school, of which 60% are girls. This will lead to generational gaps in education, not dissimilar to those being observed as a result of disruption in school attendance by children due to Covid lockdowns.

The other identified country, Iran, has also engaged in punitive behavior towards women solely on the basis of gender. The United Nations Office of the High Commissioner on Human Rights "expressed grave concern" over a draft law in Iran that would punish women for failure to wear the *hijab* (headscarf). The law was enacted in September 2023[7].

4. https://endgenderapartheid.today/index.php.

5. "The Taliban's Oppression of Women is Gender Apartheid," Georgetown Institute for Women, Peace, and Security, https://giwps.georgetown.edu/the-talibans-oppression-of-women-is-gender-apartheid/.

6. https://spia.princeton.edu/sites/default/files/2023-02/SPIA_NaheedRangita_PolicyBrief_07.pdf.

7. For information on the law, see https://iranprimer.usip.org/blog/2023/sep/25/parliament-passes-new-%E2%80%9Chijab-and-chas-

While other countries have been identified in the past as engaging in some forms of gender apartheid, Iran and Afghanistan at present are the focus of the effort to address gender apartheid specifically as part of the definition of apartheid as a crime against humanity. The new definition needs to be read carefully; it is directed towards institutional state oppression based on specific acts. As a frame of reference, the International Criminal Court Policy on the Crime of Gender Persecution seeks to address the definition of gender in terms of "sex characteristics and social constructs and criteria used to define maleness and females, including roles, behaviors, activities and attributes."

It is important to bear in mind that rendering gender apartheid a crime against humanity is not meant to address an issue based solely on isolated incidents of discrimination or harassment. The nature of the crime against humanity must be seen in the context of the above factors, and a systematic oppression of one group over another.

Consequently, what is or is not acceptable behavior under a set of religious principles would be evaluated against whether religion is being used as "cover" for persecution, or whether the behavior rises to the level of what would be considered universally unacceptable, and recognizes that "[a]s a social construct, gender varies within societies and from society to society and can change over time."[8] Obviously, interpretations will vary. For now, though, the operative point is that, as the United Nations General Assembly works towards a convention on crimes against humanity and struggles with the definition of apartheid, the notion of inclusion of gender apartheid, with the examples of Iran and Afghanistan focused on by those leading the effort, is an idea whose time has come.

Conclusion

This article has not addressed other issues and concerns to be raised in the context of a completed draft convention or other instruments on crimes against humanity. It simply advocates that in consideration of what is and is not a crime against humanity, gender apartheid needs to be recognized, and in those terms, as part of the overall definition of apartheid[9]. ■

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tity%E2%80%9D-bill#:~:text=On%20Sept.,to%20a%20decade%20for%20violators, and for information on the UN High Commissioner comments, see https://www.ohchr.org/en/press-releases/2023/09/irans-proposed-hijab-law-could-amount-gender-apartheid-un-experts.

8. See generally https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf.

9. The American Bar Association at its February 2024 mid-year meeting passed a resolution condemning gender apartheid and establishes policy for the ABA to argue for inclusion of gender apartheid as a crime against humanity.

Mindfulness:
An Effective Strategy to Cope with Difficult Times

MARCO IMPERIALE

La pleine conscience est un concept souvent mal compris. Les associations populaires avec ce terme ne font qu'effleurer son essence aux multiples facettes. C'est un outil puissant, capable de favoriser la clarté, d'aiguiser la concentration, de libérer la créativité et de nourrir la conscience émotionnelle. La profession juridique a commencé à reconnaître le potentiel de transformation de la pleine conscience, en particulier dans le sillage de la pandémie et de la prévalence croissante de l'épuisement professionnel.

Mindfulness es un concepto a menudo incomprendido. Las asociaciones populares con el término no hacen más que arañar la superficie de su esencia polifacética. Es una herramienta potente, capaz de fomentar la claridad, agudizar la concentración, liberar la creatividad y fomentar la conciencia emocional. La profesión jurídica ha empezado a reconocer el potencial transformador de la atención plena, sobre todo a raíz de la pandemia y la creciente prevalencia del agotamiento.

Introduction

This article ventures to explore the two primary facets of mindfulness and elucidate its manifold applications within the legal realm. The objective is twofold: to enlighten newcomers to the concept and to inspire seasoned practitioners with fresh insights. In doing so, it is underscored how mindfulness can not only enhance the legal profession, but also equip practitioners with practical tools to navigate its rigors more effectively.

Langerian and Non-Langerian Mindfulness

Ellen Langer, a distinguished Harvard professor of psychology and the first woman to achieve tenure at the Harvard Psychology Department, is often hailed as "the mother of mindfulness." Her research on the topic led to her bestseller *Mindfulness*[1] in 1990. Her last book, *The Mindful Body*[2], was published in 2023.

Langer's interpretation of mindfulness, which is non-meditative in nature, aligns with the concept of "active noticing" and "constantly being creative." In essence, it entails remaining perpetually aware of our surroundings, questioning conventional wisdom, and reframing our perspectives. For instance, can we expect identical results at the ophthalmologist if we read an eye chart upside down? Would fasting for two days alter the way we perceive restaurant signs? What if we challenge the assumption that one plus one always equals two, only to realize that combining two pieces of chewing gum creates a larger one?

Langer provides numerous examples of how altering our worldview can significantly impact our productivity and decision-making. Cultivating curiosity, challenging the *status quo*, and embracing disruptive thinking could be the keys to unlocking our full potential. Regrettably, as exemplified by the famous copy machine experiment (where participants fabricated nonsensical reasons to jump ahead in line for photocopying), most of us tend to operate on autopilot, seldom exercising mindfulness.

Even more intriguingly, mindfulness can exert a profound influence on our physical health. In her book, *Counterclockwise*[3], which inspired a BBC documentary, Langer conducted an experiment involving two groups of elderly participants. One group reminisced about their past, while the other role-played their younger selves using old magazines, music, and conversation topics from their youth. The results were astonishing: those who embodied their younger selves exhibited significant improvements in heart rate, muscular flexibility, and reflexes.

Non-Langerian mindfulness is the variant commonly associated with meditation and is the one with which most practitioners are familiar. It entails immersing oneself fully in the present moment and cultivating a heightened awareness of one's emotions and sensations. Mindfulness also encompasses a multitude of activities. Attentively listening to one's heartbeat, focusing on the rhythm of one's breath, or engaging in daily activities such as walking,

1. E. Langer, *Mindfulness*, Da Capo Books, 1990.
2. E. Langer, *The Mindful Body: Thinking Our Way to Chronic Health*, Robinson, 2023.
3. E. Langer, *Counterclockwise*, Ballantine Books, 1999.

showering, eating, or even counting can be transformative. Mindfulness is a way of engaging with the world rather than a specific task. We can become aware of our actions, how our tensions and negative thoughts influence our behaviors, and whether we could provide a detailed account of our emotional state at any given moment.

Moreover, mindfulness is a big umbrella under which we can put many positive activities: reflections on gratitude, acknowledgement of our actions, and self-forgiving practices. Basically, the concept covers everything that helps us live in a more self-fulfilling and thoughtful way.

Unfortunately, the legal world does not foster well-being. Whether it is stress related to jobs, uncertainty for the future, or toxic law firm cultures, lawyers pay the price of not taking care of themselves. And paradoxically, even though most professionals are aware that simple changes could enhance both well-being and productivity, they often take pride in being overwhelmed and inundated with tasks on their to-do lists. Suffering seems to have become an integral part of the legal profession, something lawyers strangely boast about.

From Awareness to Action

The world of mindfulness is revealing its potential to practitioners, and fortunately, there is a burgeoning market of apps, books, and tools designed to facilitate mindfulness in lawyers' daily work. Nevertheless, finding time and committing to lawyer well-being remains a formidable challenge for many. To address this, consider three straightforward strategies:

1) **Avoiding Multitasking:** Lawyers live in an environment dominated by emails, phone calls, and instant messages. Furthermore, clients often expect lawyers to be available around the clock, seven days a week. While this expectation is understandable in a world of on-demand commerce, news, and entertainment, lawyers themselves are frequently unable to set boundaries, driven by fear of competitors, a superhero complex, or a lack of clarity in defining priorities. Research unequivocally demonstrates that multitasking is detrimental to performance, and even self-professed multitaskers can benefit from a serial, rather than parallel, approach. Engaging in one task at a time is not only beneficial, but essential for solving complex issues efficiently.
2) **Fostering Creativity:** Law is commonly associated with creativity, and many lawyers consider themselves creative individuals. However, the reality often diverges from this perception due to the reliance on templates, predefined approaches, and daily routines. In this context, mindfulness would enhance recognizing the distinctions between cases, parties, and situations. It could involve assembling diverse teams for specific disputes, devising new frameworks for structuring thoughts, or altering one's work environment, including working from a different location or changing seating positions. Research indicates that novel environments are conducive to generating creative solutions and improving focus.
3) **Emotional Awareness:** Emotional management is paramount for lawyers, given that clients and colleagues are regularly affected by their behavior. Consider the use of an emotion wheel, which can be readily found online. What does it mean to be "happy?" Is it a blend of joy, enthusiasm, and hopefulness, or something else entirely? Similarly, how is "anger" defined? Is it irritation, guilt, rage, doubt, worry, or a combination of these emotions?

Another technique for heightening emotional awareness involves conducting a "body scan" before beginning the workday or an important meeting. Are our legs crossed or uncrossed? Are our shoulders tense or relaxed? Is our jaw clenched? What is our blood circulation like, and how are we breathing? Even dedicating just five minutes for reflection can profoundly impact the way lawyers organize their thoughts. While many believe that stress triggers their best selves, paradoxically, relaxation can both sharpen focus and enhance the ability to devise creative solutions.

Mindfulness strategies could include maintaining a daily diary, investing time in empathizing with other stakeholders at the table (colleagues, clients, counterparts), or employing devices like Muse, Sensa, or Pulsetto to analyze the connection between mind and body. There is no one-size-fits-all formula. Whatever method proves effective in promoting self-awareness and relaxation is worth appreciating.

[…] Relaxation can both sharpen focus and enhance the ability to devise creative solutions.

Conclusion

In the wake of a post-pandemic world, the toll on our personal and professional lives has been undeniable. However, mindfulness beckons us to move beyond mere contemplation of these challenges; it compels us to wholeheartedly face them, fostering resilience and inner strength. As we reflect on the profound impact of mindfulness practices within the legal profession, it becomes clear that this practice offers not just a remedy for the burdens we carry but a transformation of our very approach to the law.

With the burgeoning interest in mindfulness, we stand on the precipice of a paradigm shift—an era where the legal field embraces a more human-centered ethos. The seeds of change have been sown, and as mindfulness takes root, we find ourselves embarking on a journey toward a profession that prioritizes not only the law, but the well-being of those who uphold it by ushering in an era of greater balance, compassion, and resilience. ■

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Le devoir de vigilance : un nouveau risque juridique à gérer pour les entreprises françaises implantées en zone MENA ?

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French law of 27 March 2017, introduced an innovative principle known as "duty of care" for parent companies and ordering companies. They must to monitor their subsidiaries and regular contractors, whether established in France or abroad, by drawing up a "due diligence plan". If they fail to do so, they can be held liable triggering a risk that all French and European companies operating in the MENA zone need to manage. This liability is subject to a single regime: fault-based liability for personal acts and French case-law will have to define the core elements of the duty of care.

La ley francesa del 27 de marzo de 2017 introdujo un principio innovador conocido como "deber de diligencia" para que las empresas matrices y las empresas ordenantes controlen a sus filiales y contratistas habituales, ya estén establecidos en Francia o en el extranjero, mediante la elaboración de un "plan de diligencia debida". Si no lo hacen, pueden ser consideradas responsables, lo que desencadena un riesgo que todas las empresas francesas y europeas que operan en la zona MENA deben gestionar. Esta responsabilidad está sujeta a un régimen único: la responsabilidad por actos personales basada en la culpa, y la jurisprudencia francesa deberá definir los elementos esenciales del deber de diligencia.

De quoi parle-t-on ?

À la suite des drames de l'Erika, au large des côtes françaises, du Rana Plaza au Bangladesh, le législateur français a souhaité responsabiliser les sociétés mères en instaurant à leur charge une obligation de contrôle des agissements de leurs filiales et des sociétés avec lesquelles elles ont des relations commerciales établies, y compris à l'étranger.

C'est dans ce contexte que la loi du 27 mars 2017, dite « Potier », a instauré un principe novateur en droit français, le « devoir de vigilance » des sociétés mères et des entreprises donneuses d'ordre. Cette loi crée une obligation juridiquement contraignante pour les multinationales d'identifier et de prévenir les atteintes aux droits humains et à l'environnement.

L'article L. 225-102-4 du code de commerce restreint l'application de cette loi aux sociétés commerciales françaises (SA, SAS et SCA) employant, à la clôture de deux exercices consécutifs, en leur sein et dans leurs filiales directes ou indirectes, au moins 5 000 salariés en France ou 10 000 salariés en France et à l'étranger.

Seules les grandes sociétés commerciales sont donc concernées par ce devoir de vigilance.

Le devoir de vigilance impose aux sociétés mères de surveiller leurs filiales (les sociétés sur lesquelles elles exercent un contrôle capitalistique ou autre) et leurs cocontractants habituels (sous-traitants et fournisseurs et ceux de leurs filiales avec lesquels elles entretiennent une relation commerciale établie), qu'ils soient établis en France ou à l'étranger, en établissant un « plan de vigilance ».

Ce plan de vigilance doit répondre à cinq objectifs listés par l'article L. 225-102-4 du code de commerce, à savoir :

- une cartographie des risques destinée à leur identification, leur analyse et leur hiérarchisation,
- des procédures d'évaluation régulière de la situation des filiales, des sous-traitants ou fournisseurs avec lesquels les filiales entretiennent une relation commerciale établie, au regard de la cartographie des risques,
- des actions adaptées d'atténuation des risques ou de prévention des atteintes graves,
- un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société,
- un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité.

L'établissement d'un tel plan nécessite que la société mère dispose d'informations précises sur ses filiales et, ce qui est plus difficile, sur ses sous-traitants et ses fournisseurs afin de pouvoir identifier et prévenir les risques engendrés par leur activité. De telles informations peuvent néanmoins s'avérer compliquées à récolter et se heurter au secret des affaires ou de fabrication.

Malgré les contraintes, si une société mère, ne parvient pas en vertu de la loi à établir, publier ou mettre en œuvre de façon effective un plan de vigilance, toute personne « justifiant d'un intérêt à agir » peut la mettre en demeure de respecter ses obligations, et ainsi engager sa responsabilité.

Le texte prévoit la possibilité de sanctionner l'entreprise si elle ne satisfait pas à ses obligations dans un délai de trois mois après une mise en demeure infructueuse : elle peut être enjointe, le cas échéant sous astreinte, c'est-à-dire une somme journalière à payer, de les respecter. Elle devra donc indemniser les victimes des atteintes aux principes protégés par ce dispositif commises par ses filiales ou par ses fournisseurs et sous-traitants.

L'absence ou l'insuffisance de plan de vigilance est ainsi constitutive d'une faute, consistant en réalité en un défaut de vigilance.

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On précisera, enfin, que la loi pour la confiance dans l'institution judiciaire du 22 décembre 2021 a introduit dans le code de l'organisation judiciaire un nouvel article L. 211-21 qui confère au tribunal judiciaire de Paris un monopole pour connaître des actions relatives au devoir de vigilance fondées sur les articles L. 225-102-4 et L. 225-102-5 du Code de commerce.

Le régime particulier de responsabilité indirecte induit par le devoir de vigilance

Le devoir de vigilance implique deux formes de responsabilité :

- la responsabilité dite « directe « , qui concerne les dommages directement causés par l'activité propre de la société mère ; et
- la responsabilité dite « indirecte » qui s'applique aux dommages causés par l'activité des filiales, sous-traitants et fournisseurs d'une société.

Il convient cependant de relever que l'article L. 225-102-5 du Code de commerce, ne prend pas en compte cette distinction, puisqu'il appréhende indistinctement les deux cas de figure pour les soumettre à un seul et même régime : la responsabilité pour faute, du fait personnel. À cet égard, le renvoi exprès aux articles 1240 et 1241 du Code civil s'avère sans équivoque.

Si la responsabilité directe répond aux conditions classiques du droit civil, et n'appelle pas de commentaires détaillés de notre part, la responsabilité indirecte, semble quant à elle appeler quelques observations.

Traditionnellement, on rappellera que le régime applicable à la responsabilité indirecte est celui de la responsabilité sans faute.

Or, au cas particulier, le législateur a préféré soumettre les sociétés mères qui manqueraient à leur obligation de vigilance au régime de la responsabilité du fait personnel, pour faute, et non à la responsabilité du fait d'autrui, même si le dommage venait à être causé par leur filiale ou leur prestataire.

En évinçant de la sorte le fait d'autrui au profit de la faute (de vigilance), le législateur a consacré un régime de responsabilité dont la nature pour le moins originale tient à son caractère non seulement hybride mais, de surcroît, ambigu.

Il apparaît ainsi que le législateur a bien institué une responsabilité du fait d'autrui (de la filiale, du sous-traitant ou du fournisseur), mais dont la mise en œuvre se trouve conditionnée à la preuve d'une faute préalablement commise par la société mère ou donneuse d'ordre.

En définitive, l'écran de la personnalité morale exerce encore toute son emprise (et c'est d'ailleurs l'une des justifications de cette hybridation) : certes, une société peut désormais voir sa responsabilité engagée pour des dommages qu'elle n'a pas directement causés, mais c'est toujours en raison d'une faute qu'elle a personnellement commise.

Pour obtenir réparation de son dommage sur le fondement des articles L. 225-102-4 et L. 225-102-5 du Code de commerce, la victime n'a qu'une seule faute à prouver : la faute de vigilance de la société mère ou donneuse d'ordre. Il n'est pas nécessaire d'établir, en outre, un fait générateur de nature à engager la responsabilité de l'auteur direct du dommage (la filiale, le sous-traitant, le fournisseur), seul un fait causal est nécessaire.

[…] L'imputation du dommage subi par la victime à la faute de vigilance de la société mère ou donneuse d'ordre n'apparaîtra pas avec évidence.

Ce régime semble avantageux pour la victime, toutefois, sa mise en œuvre pourrait se voir entravée par un obstacle de taille, à savoir, la preuve du lien de causalité entre la faute de la société mère ou donneuse d'ordre et le préjudice subi par la victime, lorsque celui-ci a été causé par une filiale, un sous-traitant ou un fournisseur.

De l'avis de nombreux auteurs, la preuve de ce lien de causalité peut en effet s'avérer difficile à rapporter, notamment dans l'hypothèse d'une responsabilité indirecte. Dans ce cas, le dommage n'est pas directement causé par la faute de vigilance de la société mère ou donneuse d'ordre : il a d'abord et avant tout été généré par l'activité de la filiale, du sous-traitant ou du fournisseur.

Dans l'analyse rétrospective et contrefactuelle du processus dommageable, l'imputation du dommage subi par la victime à la faute de vigilance de la société mère ou donneuse d'ordre n'apparaîtra pas avec évidence.

Certains auteurs, évoquent le concept de perte de chance pour surmonter cette difficulté : dès lors qu'elle aurait manqué à son devoir de vigilance, la société mère aurait fait perdre une chance à la victime d'éviter la réalisation de l'événement dommageable causé par l'activité de sa filiale. Cependant, l'article L. 225-102-5 précise que la responsabilité de la société vise à réparer le préjudice « que l'exécution de ces obligations (définies à l'article L. 225-102-4) aurait permis d'éviter » mais il ne mentionne aucunement la « perte de chance » d'éviter ce préjudice.

Il reste donc à savoir si les juges s'attacheront à cette interprétation littérale du texte ou si, dans l'intérêt des victimes, ils accepteront malgré tout de reconnaître l'existence d'une perte de chance (qui n'est en réalité que la réparation d'une probabilité et non pas de l'intégralité du dommage).

Ainsi, bien que l'article L. 225-102-5 du code de commerce opère un renvoi à la responsabilité du fait personnel, le régime de responsabilité fondé sur le devoir de vigilance déroge, sous plusieurs aspects, au droit commun de la responsabilité extracontractuelle, de sorte qu'il peut, à plusieurs titres, être considéré comme un régime très spécial, que la jurisprudence aura la lourde tâche de compléter au gré des cas qui lui seront soumis.

En définitive, il reviendra à la jurisprudence de dessiner les contours d'éléments centraux du devoir de vigilance, comme l'intérêt à agir, la profondeur des obligations de vigilance ou le lien de causalité.

Où en est-on aujourd'hui ?

La quasi-absence de jurisprudence française relative au fond du droit, s'agissant du nouvel article L.225-102-4 du code de commerce, n'aide pas à cerner avec précision les obligations découlant de la loi sur le devoir de vigilance ou sur le contenu des plans devant être établis par les sociétés concernées.

Plusieurs affaires sont néanmoins en cours ou ont trouvé un terme récent : l'on citera notamment une action menée contre TotalEnergies concernant un projet pétrolier en Ouganda, une autre intentée contre Casino mettant en jeu sa responsabilité pour la commercialisation en Amérique du Sud de viandes bovines produites sur des terres déforestées, ou encore celle contre BNP Paribas s'agissant du risque climatique ou, plus récemment, contre La Poste relativement aux travailleurs sans-papiers qui seraient employés par des sous-traitants.

Le 28 février 2023[1], le tribunal judiciaire de Paris s'est ainsi prononcé pour la première fois, en référé, sur l'application du devoir de vigilance issu de la loi n° 2017-399 du 27 mars 2017 dans une affaire relative au méga projet pétrolier mené par TotalEnergies et ses filiales en Ouganda et en Tanzanie, à la suite de l'assignation de différentes organisations non gouvernementales françaises et ougandaises.

Après plus de trois ans de procédure, et bien que le tribunal ait fait preuve de pédagogie au sein de son jugement de référé particulièrement extensif (24 pages – ce qui est

1. TJ Paris, 28 février 2023, n° 22/53942.

pour le moins rare pour une procédure de référé), la juridiction des référés a finalement déclaré les demandes des ONG irrecevables.

La même juridiction a, en revanche, enjoint au groupe La Poste, le 5 décembre 2023, de compléter la cartographie de ses risques, d'adapter les procédures d'évaluation des tiers en résultant et d'assurer une meilleure publication des dispositifs de suivi.

Dans cette décision[2], le tribunal judiciaire de Paris a estimé que « *l'étape initiale de la cartographie des risques destinée à leur identification, leur analyse et leur hiérarchisation* (...) *n'était pas conforme aux exigences légales en raison de son imprécision.* »

Le tribunal en a déduit que « *le plan de vigilance ne permettait pas de mesurer si la stratégie d'évaluation* (...) *était conforme à la gravité des atteintes et couvre réellement les risques identifiés comme prioritaires.* »

Il demandait en conséquence à La Poste « *d'établir des procédures d'évaluation des sous-traitants en fonction des risques précis identifiés par la cartographie des risques.* »

Cette injonction répondait donc à une nécessité de précision – pour laquelle les *compliance officers* devront apporter une particulière vigilance à l'avenir, sans mauvais jeux de mots à cet égard.

Sur cette affaire, il convient néanmoins de préciser que la juridiction avait eu à connaître des plans de vigilance mis en place par le groupe La Poste en 2019 et 2020, et qui ont été largement complétés depuis.

C'est d'ailleurs la raison pour laquelle aucune astreinte financière n'a été prononcée contre ce groupe par la juridiction parisienne, qui a au passage constaté « *que la Poste faisait preuve d'une démarche dynamique d'amélioration de son plan de vigilance chaque année* ».

Les pays voisins ne sont, par ailleurs, pas en reste.

Bien que la France soit en effet pionnière dans l'adoption du devoir de vigilance des entreprises, certaines juridictions étrangères, notamment celles du Royaume-Uni, ont eu l'opportunité d'appliquer le concept de *due diligence* pour engager la responsabilité délictuelle de sociétés mères pour négligence, y compris au regard d'activités menées par une filiale étrangère.

Dans une affaire dite « *Chandler* », la Cour suprême britannique a pu établir la responsabilité de la maison mère alors même que le dommage avait été subi par un employé de sa filiale, et ce sans qu'il ait été nécessaire de lever le voile de la personnalité juridique de cette dernière.

La Cour britannique a, en effet, décidé dans cette affaire que la seule société mère était redevable d'un devoir de diligence à l'égard des salariés de sa filiale dans la mesure où elle était nécessairement consciente des risques auxquels les salariés de sa filiale étaient exposés (la maison mère ayant elle-même exploité le site de la filiale exposé à l'amiante) et qu'elle aurait dû informer sa filiale de la nécessité de prendre des mesures pour prévenir les effets de ses activités sur la santé de ses salariés[3].

Dans une autre affaire, les faits mettaient en présence quelque 1 826 citoyens zambiens privés de leur accès à l'eau potable du fait d'une pollution par des matières toxiques de la mine de cuivre de Nchanga exploitée par une filiale du groupe Vedanta, attraite aux côtés de la maison mère constituée et domiciliée au Royaume-Uni et de la société publique constituée en Zambie, KCM, également filiale du groupe Vedanta.

La Cour suprême considéra ici que l'affaire n'était pas fondamentalement différente de l'affaire *Chandler* bien que la société mère intervenait très peu dans les activités de sa filiale zambienne.

Or, ce fut précisément ce qui fut reproché à la mère dans la mesure où elle s'était engagée publiquement à superviser les activités de ses filiales. Dans cette affaire, c'est donc la communication publique de la mère qui est à l'origine de son *duty of care* et du fait qu'elle aurait dû superviser les activités potentiellement polluantes de ses filiales, ce qui, *in fine*, engage sa responsabilité[4].

Bien que la France soit en effet pionnière dans l'adoption du devoir de vigilance des entreprises, certaines juridictions étrangères, notamment celles du Royaume-Uni […].

La jurisprudence française devra nécessairement délimiter les contours du devoir de vigilance dans un avenir proche, afin que puisse être engagée (ou évitée) la responsabilité délictuelle des entreprises concernées et la jurisprudence étrangère pourrait se révéler être une importante source d'inspiration.

On soulignera d'ailleurs que la jurisprudence française pourrait subir à très court terme une influence européenne, si les pays de l'Europe parviennent à se mettre d'accord sur un devoir de vigilance européen (cf. communication du Parlement européen du 14 décembre 2023).

En un mot donc, la vigilance est désormais un risque à rapidement gérer par l'ensemble des entreprises françaises et européennes implantées en zone MENA et l'assistance de professionnels ne pourrait s'avérer que vertueuse dans ce cadre. ■

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2. TJ Paris, 5 décembre 2023, Sud PTT c/ La Poste (RG n°21/15827).

3. Cour suprême britannique, *Chandler v Cape plc*, 2012, EWC Civ525.

4. Cour suprême britannique, *Lungowe v Vedanta Resources plc*, 2019, UKSC20.

Résolution des différends, entrepreneuriat et investissement étranger au Maroc : le risque d'une justice à deux vitesses[1]

Samy RAIS

Morocco has made entrepreneurship and foreign investment key drivers of its economic development. The Kingdom thus promotes partnerships between local entrepreneurs, particularly SMEs, and foreign companies, often from developed countries. This article analyzes the dispute resolution methods applicable to these partnerships, which are sometimes the source of imbalances in the relations between local and foreign companies, as well as the impact of recent reforms adopted in Morocco in resolving these imbalances.

Marruecos ha hecho del espíritu empresarial y la inversión extranjera motores clave de su desarrollo económico. Así, el Reino promueve las asociaciones entre empresarios locales, en particular PYME, y empresas extranjeras, a menudo procedentes de países desarrollados. Este artículo analiza los métodos de resolución de litigios aplicables a estas asociaciones, que a veces son fuente de desequilibrios en las relaciones entre empresas locales y extranjeras, y el impacto de las recientes reformas adoptadas en Marruecos en la resolución de estos desequilibrios.

1. L'entrepreneuriat et l'investissement étranger, deux leviers du développement du Maroc

L'économie du Maroc a connu ces dernières années une croissance considérable. En un peu plus de deux décennies, le Royaume a vu son Produit Intérieur Brut (PIB) tripler, pour atteindre la cinquième place au classement des puissances économiques africaines.

Ce développement économique a été marqué par des projets emblématiques tels que le premier port à conteneurs de la Méditerranée en volume (Tanger Med), la première ligne de train à grande vitesse d'Afrique, etc.

Au-delà de ces chantiers phares servant de vitrine à l'économie marocaine, le développement du pays dépend de paramètres plus larges. On peut, par exemple, se référer au Nouveau Modèle de Développement du Maroc de 2021, qui propose une stratégie visant à assurer un développement «*centré sur la satisfaction des besoins des citoyens*». Ce Modèle compte parmi ses objectifs

(i) la progression de la «*dynamique entrepreneuriale et la prise d'initiative*», notamment, via la création de petites et moyennes entreprises (PME), et

(ii) la «*concrétisation de la vocation du Maroc en tant que hub régional attractif pour les investissements*»[2]. Ces deux leviers sont en effet considérés comme cruciaux pour le développement, étant sources de création d'emplois et d'innovations.

Ainsi, le gouvernement marocain a, au cours des dernières décennies, mis en place une série de mesures pour encourager l'entrepreneuriat et, dans le même temps, promouvoir l'investissement étranger. Plus de 93.000 entreprises ont été créées au Maroc en 2022, et le flux net d'investissements directs étrangers a atteint 2.15 milliards de dollars la même année. Les principaux investisseurs au Maroc proviennent des régions les plus riches du monde, telles que l'Europe (notamment la France, le Royaume-Uni ou l'Espagne), les États-Unis ou les États du Golfe.

Cet article s'intéresse à la rencontre entre ces deux moteurs du développement marocain, c'est-à-dire aux relations entre les investisseurs étrangers – et, de manière plus générale, les entreprises étrangères faisant du commerce au Maroc – et l'entrepreneuriat marocain – et plus précisément les PME qui représentent environ 30% des entreprises du Royaume. Les partenariats avec les entreprises étrangères, y compris les sociétés multinationales, ne sont, en effet, pas la chasse gardée des grandes entreprises marocaines. Les PME (et tout particulièrement les entreprises de taille moyenne, dont le chiffre d'affaires

1. Les opinions exprimées dans cet article sont celles de son auteur et ne reflètent pas celles de son employeur. L'auteur se réserve le droit de changer sa position.

2. Commission Spéciale sur le Modèle de Développement, *Rapport Général – Le Nouveau Modèle de Développement* (Avril 2021), pp. 38, 95.

varie entre 50 et 175 millions de dirhams (soit presque 17 millions d'euros) selon les critères de l'Observatoire marocain de la très petite et moyenne entreprise (TPME) entretiennent communément des relations d'affaires avec les entreprises étrangères (notamment celles établies dans des pays plus développés), dans les secteurs industriels et de la fabrication, entre autres domaines.

Dès lors que l'entrepreneuriat et l'investissement étranger sont perçus comme décisifs pour la croissance du Maroc, il est important pour le pays de promouvoir les relations entre investisseurs étrangers et entreprises locales. D'un point de vue de l'environnement des affaires, il est nécessaire, notamment, d'assurer que l'environnement juridique et judiciaire du Maroc soit propice au développement de ces partenariats. En examinant ces relations, on peut néanmoins constater que les sociétés étrangères et PME marocaines se détournent régulièrement du système judiciaire marocain pour le règlement de leurs différends.

2. La résolution des différends entre PME marocaines et sociétés étrangères

Bien qu'il soit difficile d'établir des statistiques, en se penchant sur les contrats conclus entre sociétés marocaines – tout particulièrement les PME – et étrangères – surtout celles provenant de pays développés à l'origine de la plupart des investissements directs étrangers du Maroc – il est courant de trouver des clauses de résolution des différends donnant la compétence :

(i) À des tribunaux arbitraux internationaux siégeant dans l'une des places principales de l'arbitrage (Paris, Genève, Londres, New York etc.) ;

(ii) Aux juridictions nationales de l'État d'origine de la société étrangère cocontractante ; ou

(iii) Plus souvent, à des juridictions occidentales (Suisse, France, Angleterre etc.), considérées comme « neutres », n'étant pas situées dans l'État de l'un ou l'autre des cocontractants.

Ce phénomène n'est pas propre aux contrats impliquant des sociétés marocaines. Il est en effet commun de voir ce type de clauses de juridiction dans les contrats entre sociétés de nationalité différentes, et tout particulièrement entre sociétés établies dans des pays en développement et sociétés venant de pays développés. Pour ces dernières, ces clauses visent, notamment, à éviter que les litiges découlant de leurs contrats soient soumis à la compétence des tribunaux des États de leurs partenaires locaux, parfois par manque de confiance envers ces derniers.

Concernant le Maroc, les institutions internationales de financement du développement font état de faiblesses du système judiciaire marocain qui entraveraient l'attractivité du pays auprès des investisseurs[3]. Dans son dernier rapport *Doing Business* de 2020, la Banque Mondiale classait ainsi le Maroc en 60e position des pays pour l'exécution des contrats, catégorie qui mesure la qualité et l'efficacité des procédures judiciaires pour la résolution des différends commerciaux[4]. Malgré des progrès certains et bien que la justice marocaine soit en avance sur beaucoup de ses voisins de la région Moyen-Orient et Afrique du Nord (MENA), il lui est reproché, parfois, un défaut de transparence, des carences en termes de formation et de spécialisation des magistrats et auxiliaires de justice, des lacunes concernant les procédures d'exécution des jugements étrangers et sentences arbitrales, un retard dans la digitalisation, ou encore un manque d'uniformisation dans l'application des règles de droits par les différents tribunaux.

[…] L'entrepreneuriat et l'investissement étranger sont perçus comme décisifs pour la croissance du Maroc.

Il est intéressant de noter que les défauts du système judiciaire marocain ne sont pas perçus comme affectant seulement l'investissement étranger, mais également l'autre levier du développement économique du pays qu'est l'entrepreneuriat national. Le Nouveau Modèle de Développement mentionne ainsi le «*risque d'insécurité et d'arbitraire du système judiciaire*» comme une limite aux initiatives entrepreneuriales[5].

Dans ces conditions, le recours à d'autres options pour la résolution des différends dans les contrats entre entreprises étrangères et marocaines, comme décrit ci-dessus, s'impose parfois comme une solution alternative face aux incertitudes que comporte le système judiciaire marocain.

3. Les défis de la résolution des différends entre PME marocaines et sociétés étrangères

Si elles constituent une alternative au système judiciaire marocain, les méthodes de résolution des différends préalablement exposées sont susceptibles de causer ou de renforcer les déséquilibres déjà présents dans les relations entre PME marocaines et sociétés étrangères, tout particulièrement les sociétés provenant de pays développés et disposant de plus de moyens. En effet :

(i) Le recours à l'arbitrage international peut s'avérer onéreux pour les PME marocaines. C'est, particulièrement, le cas lorsque la procédure est conduite sous l'égide des institutions d'arbitrage les plus impor-

3. J. Chauffour, *Le Maroc à l'horizon 2040, Investir dans le capital immatériel pour accélérer l'émergence économique*, Banque Mondiale, 2018, pp. 213-222.

4. Banque Mondiale, *Doing Business – Morocco*, 2020, pp. 50-55.

5. Commission Spéciale sur le Modèle de Développement, *Rapport Général – Le Nouveau Modèle de Développement*, avril 2021, p. 38.

tantes, dont les frais sont souvent élevés, ou que le siège de l'arbitrage se situe dans l'une des principales places d'arbitrage ou que les procédures d'annulation de la sentence se déroulent à l'étranger ;

(ii) Le choix des juridictions nationales étrangères communément opéré par les parties dans les contrats internationaux induit des coûts qui, bien que généralement moins élevés que ceux de l'arbitrage, peuvent paraître dissuasif pour les PME marocaines ;

(iii) Les procédures devant les juridictions du pays d'origine de la société étrangère cocontractante, en plus du coût potentiel qu'elles génèrent, n'assurent pas la «neutralité» de l'arbitrage international et des juridictions de pays tiers ;

(iv) À cela s'ajoute la complexité que peuvent représenter des procédures arbitrales ou judiciaires à l'étranger, notamment pour des PME n'ayant pas l'habitude de ces juridictions ou méthodes de résolution des conflits.

Tous ces obstacles présentent le risque de décourager les PME marocaines d'exercer leurs droits aux titres de leurs contrats. Il n'est pas rare, en effet, de voir des PME marocaines hésiter fortement, voire renoncer, à des demandes considérables, parfois de plusieurs centaines de milliers voire de millions d'euros, en raison de ces difficultés.

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Du côté des sociétés étrangères, l'adoption des méthodes de résolution des différends décrites plus haut n'est pleinement satisfaisante pour régler leurs litiges avec les sociétés marocaines que si elle s'accompagne de processus d'exécution efficace des jugements étrangers et sentences arbitrales étrangères au Maroc.

Aussi, des réformes sont-elles nécessaires pour pallier ces déséquilibres, tant pour présenter au PME des solutions plus viables en termes de résolution des litiges que pour rassurer les investisseurs sur la capacité du système judiciaire marocain à soutenir leurs actions en justice. Dès 2018, le ministre de la justice marocain déclarait donc que «[l]*a modernisation du dispositif juridique dans le domaine des finances et des affaires est un chantier prioritaire à même de renforcer la place du Royaume en tant que destination attractive pour les investissements*», mais également pour «*mettre en place un cadre juridique clair à même de protéger les transactions commerciales et de développer et moderniser l'entreprise marocaine*»[6].

4. Les réformes récentes au Maroc

Au cours des deux dernières années, le Maroc a accéléré ses efforts pour améliorer son système judiciaire et le traitement des affaires commerciales, avec plusieurs projets notables.

On peut, notamment, mentionner la loi 38.15 sur l'organisation judiciaire, entrée en vigueur en janvier 2023, qui permet l'établissement de nouvelles sections spécialisées en matière commerciale au sein des tribunaux de première instance, ou encore l'introduction en janvier 2024 de délais indicatifs de traitement des affaires judiciaires par le Conseil supérieur du pouvoir judiciaire marocain, en application d'une modification récente de la loi organique de ce dernier.

Cependant, la réforme récente la plus importante du système judiciaire marocain est probablement le nouveau projet de Code de procédure civile, soumis au parlement en no-

6. MAP, M. Aujjar, *La modernisation du dispositif juridique, un chantier à même de renforcer l'attractivité du Maroc pour les investissements*, 1er mars 2018.

vembre 2023, qui vise à moderniser la procédure judiciaire du pays et à augmenter son attractivité auprès des investisseurs étrangers et des entreprises marocaines. Le texte entend améliorer l'efficacité des procédures judiciaires sur toute leur durée, notamment, en fixant les compétences du juge chargé de la mise en l'état du dossier ainsi que celles du juge d'application des peines responsable de l'exécution forcée, et en digitalisant la procédure judiciaire.

Le projet introduit aussi, pour la première fois, des règles de compétence internationale dans la législation marocaine, aux termes desquelles les juridictions marocaines sont, notamment, compétentes pour connaitre des actions intentées contre des marocains (même résidant à l'étranger), des étrangers domiciliés au Maroc, ainsi que des affaires concernant les biens situés au Maroc et les obligations nées ou exécutées sur le territoire marocain. Ces dispositions pourraient ainsi rapatrier devant les juridictions marocaines de nombreux différends impliquant les sociétés marocaines et les transactions opérées dans le Royaume.

Cependant, l'importance donnée à la nationalité du défendeur afin de déterminer les tribunaux compétents, là où la plupart des juridictions optent pour une évaluation plus globale des critères matériels de rattachement de l'action, pourrait susciter des conflits de compétence et une insécurité juridique. Par ailleurs, le projet de réforme est silencieux sur les clauses de compétence contractuelles. Aussi, l'application de ces règles doit-elle être clarifiée, et accompagnée d'une résolution efficace des affaires par les juridictions marocaines, qui seraient amenées à être compétentes sur de nombreuses affaires. Dans le cas contraire, le Maroc court le risque d'accroitre la mauvaise perception par les investisseurs étrangers de la justice marocaine et de compromettre ainsi leurs relations avec les entreprises marocaines.

Le projet pose également des conditions d'exequatur des jugements étrangers (qui ne s'appliquent pas aux sentences arbitrales) plus strictes que celles actuellement prévues. Ces conditions passeraient de trois à sept, et exigeraient notamment de vérifier (i) le respect de la compétence exclusive des tribunaux marocains et (ii) la présence d'un lien substantiel entre le litige et l'État où le jugement a été rendu. Ces règles semblent destinées à empêcher la résolution de différends revenant aux juridictions marocaines par des tribunaux étrangers.

Une autre réforme importante, récemment adoptée au Maroc, concerne l'arbitrage, avec la promulgation en mai 2022 de la nouvelle loi 95-17 relative à l'arbitrage et la médiation conventionnelle. Cette loi vise à moderniser les règles qui gouvernent la procédure arbitrale afin de promouvoir l'arbitrage au Maroc, ce qui pourrait rétablir un certain équilibre entre les PME marocaines et sociétés étrangères tout en assurant une résolution neutre et efficace des différends, en dehors du système judiciaire marocain.

Cependant, certaines dispositions de cette loi pourraient porter préjudice à l'efficacité de la procédure arbitrale. C'est notamment le cas de l'article 32, qui, bien que situé dans le chapitre concernant l'arbitrage interne, pourrait également s'appliquer à certaines procédures internationales en vertu de l'article 75. Il prévoit que les tribunaux arbitraux doivent se prononcer par ordonnance sur leur compétence et la validité de la convention d'arbitrage avant tout examen au fond, et permet également le recours contre ces décisions devant le président du tribunal judiciaire compétent sous 15 jours, à compter de leur prononcé. Cet article impose ainsi un contrôle judiciaire additionnel sur la procédure arbitrale. De plus, cet examen de la compétence du tribunal arbitral risque de faire doublon (ou donner lieu à des décisions contradictoires) avec les décisions des cours d'appel sur le recours en annulation de la sentence finale au fond, qui sont également amenées à traiter de certaines questions liées à la compétence du tribunal aux termes de la nouvelle loi.

Outre ces réformes, les secteurs public et privé marocains sont à l'origine de plusieurs initiatives visant à améliorer le traitement des litiges commerciaux entre sociétés marocaines et investisseurs étrangers. On peut notamment citer la création du Centre International de Médiation et d'Arbitrage de Casablanca (CIMA), une institution pratiquant des frais d'arbitrage plus abordables que beaucoup d'institutions internationales. On peut également mentionner le travail de la Confédération Générale des Entreprises du Maroc, représentant du secteur privé auprès des pouvoirs publics, et des diverses chambres de commerce dans l'accompagnement des sociétés marocaines et étrangères dans la résolution de leurs différends commerciaux.

Une autre réforme importante, récemment adoptée au Maroc, concerne l'arbitrage […].

Conclusion

Trouver un équilibre entre des sociétés étrangères parfois réticentes à confier leurs litiges aux tribunaux marocains et les PME marocaines dont l'accès aux solutions alternatives peut s'avérer difficile, est un exercice délicat. Quelle que soit la méthode de résolution des différends adoptée, la promotion du commerce entre PME marocaines et sociétés étrangères nécessite un système judiciaire efficace au Maroc, tant au niveau de la résolution des litiges que de l'exécution des jugements étrangers et des sentences arbitrales étrangères. Les réformes récentes, qui visent à moderniser la procédure judiciaire et arbitrale au Maroc, vont dans ce sens. Certaines incertitudes, liées notamment à la compétence des juridictions marocaines ou à leur contrôle sur la procédure arbitrale, gagneraient cependant à être clarifiées. ■

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Islamic Financial Transactions

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"Bottom line, having a customer-centric culture is more than just a good thing - It's become a matter of survival." Jim Marous

Note from Editor-in-Chief: To understand business transactions in MENA countries, it is essential to understand the fundamentals of Islamic financial transactions. This is the first of a two-part series, where Part I consists of an overview of Islamic finance, along with its historical development, including how Islamic transactions were influenced by Western institutions, followed by principles governing Shari'ah standards. In Part II, the author goes into detail regarding the instruments of Islamic finance, including the difference between Musharakah and Mudarabah contracts, as well as describes auxiliary transactions and Sukuk investments.

Dans cet article, nous découvrons l'importance du respect de la charia/des lois islamiques dans la finance islamique. Les principes directeurs ont évolué depuis les années 1970, sous l'influence des institutions occidentales.

En este artículo se explica la importancia de respetar la sharia/ley islámica en las finanzas islámicas. Los principios rectores han evolucionado desde los años setenta, influidos por las instituciones occidentales.

Understanding Islamic Finance

The legal standards followed by a country majorly depend on the secular aspects of a person's life, whereas the Shari'ah standards are based on a religious perspective that includes a bedrock of principles to be followed in religious and other walks of life, such as those pertaining to finance, family matters, the political sphere, and personal obligations. The underlying jurisprudence of Islamic economics is the requirement to be a productive human and the prohibition of a wide variety of matters considered to be unethical and unsocial[1].

Islamic banking or transactions, commonly referred to as Islamic finance or Shari'ah-compliant financing, refers to the financial activities that adhere to Shari'ah/Islamic laws. The norms and values of such an Islamic finance industry are based on the teachings of the noblest of Prophets, Heavenly books, and religious codes of Islam[2]. Over the years, norms were progressed to fit the practices and customs of the people and the adherence to the rules and principles of the Shari'ah standards i.e. the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) which is the first and foremost authority of Islamic financing. The sector of financing under such standards includes financial contracts and its products, loans (*Qard*), syndicated financing, insolvency, insurance, capital markets, investment banking, and such others.

Historical Development

The principles of justness of exchange and prohibition of usury were the guiding principles for Middle Eastern tradesman during the medieval era, and soon, systems which shared risks, based on the Shari'ah laws, were established. Through practice, the principles were defined, and the trading counterparts started establishing banks.

According to contemporary scholars and historical books, some form of banking, like modern Islamic banking, was in practice during the early years of Islam. During the 12th

1. M. Khan, N. H Han, S. B Hoi, J. H Bae, *"Good faith principle of contract law for the Islamic banking system," Utopía y Praxis Latinoamericana*, vol. 24, núm. Esp.5, pp. 239-251, 2019, Universidad del Zulia.

2. Zulfahmialwia, Rika Dwi Ayu Parmitasari, Alim Syariati (2021) *"An assessment on Islamic banking ethics through some salient points in the prophetic tradition," Heliyon* Volume 7, Issue 5, May 2021, e07103.

Century BC, the Islamic empire started to decline due to internal and external factors, and soon, Western colonization influenced and altered the model of banking and branches of foreign banks and brought new Western style banks in many Islamic countries. This trend continued until some Islamic countries were liberated from the colonization.

The concept of Islamic banking re-emerged in Egypt during the 1960s and since then, the growth of Islamic banking was rapid and continues to grow within international finance. The first modern financial company based on Shari'ah principles was established in 1963 in Mit Ghamr in Egypt. An interest free bank called the Nasser Social Bank was established in Egypt in 1971 by a Presidential Decree, and in 1974, a convention on the establishment of Islamic Development banks was held with the presence of all finance ministers of Islamic countries.

Banks were set up in the 1970s, where one focused on assisting in the mobilisation of funds for investment purposes, and another was established as a joint stock company. The International Association of Islamic Banks was established in 1977, with headquarters in Makkah, and the International Institute of Islamic Banks and Islamic Economics was established in 1981.The aim of the International Association was to strengthen cooperation and increase coordination among Islamic banks, whereas the latter was established in response to the sustained growth of Islamic banks and the need for qualified staff.

Many large conventional banks began offering Islamic finance. For instance, HSBC, one of the British multinational banking and financial services companies, had been offering Islamic financial services in Malaysia since 1994 and introduced Islamic banking globally in 1998. Similarly, Standard Chartered provided Shari'ah-compliant banking solutions under its brand name, Saadiq Islamic Banking. U.S. headquartered financial institutions J.P. Morgan and Citigroup also had windows that ran and operated Islamic investments and banking.

The rampant growth and demand of Islamic transactions and authorities caused a need for a codified set of principles called Shari'ah standards to be followed by authorities and institutions offering such transactions. The standardisation of products across different countries was a challenge, and the AAOIFI, based in Bahrain, became successful in delivering standards in 1991. The AAOIFI standards related to auditing and accounting standards and issued 54 Sharia standards dealing mostly with the contractual aspects of Islamic financial transactions.

Many countries, authorities, and institutions adopted these standards, including the Kingdom of Bahrain through Resolution n° (18) of 2020 regarding the Standards governing transactions subject to the provisions of Islamic Sharia, which necessitated that institutions follow AAOIFI standards while dealing in Islamic financing[3]. In 2002, the Islamic Financial Services Board (IFSB), established in Malaysia, began issuing supervisory and regulatory standards and guidelines.

Principles Governing Shari'ah Standards

The legitimacy of Islamic financial products and services is contingent on compliance with Shari'ah requirements, and there are various principles commonly followed in this regard, irrespective of the region where it is practised The major principles that form the backbone of Shari'ah standards are the principles of (i) Equity, (ii) Participation, and (iii) Ownership.

Equity is the major principle governing Islamic finance, and it strengthens the weaker party of a transaction. Basing the rationale on this principle, the predetermination of payments (Riba), or an increase in wealth, is prohibited, and the asymmetry of information is also to be avoided. It further necessitates the requirement of distributing wealth to the needy, by levying a percentage of the amount from the income earned for their benefit. The principle of participation stipulates that the investment return must be earned in congruence with the risk that is undertaken, and the principle of ownership suggests that asset ownership is to be secured before transacting.

Instruments of Islamic Finance

As in the case of conventional banking, the loan and its derivatives play an important role in Islamic financing. However, the difference lies in its mechanism, and it is only a form of financial assistance that is offered to the most needy, without charging any fee. Apart from these regular products, all other related Islamic transactions are not termed as loans, but rather as a mode of financing.

The concept of Islamic banking re-emerged in Egypt during the 1960s and since then, the growth of Islamic banking was rapid and continues to grow within international finance.

Musharakah and *Mudarabah* are types of cash facility transactions in which the profit and loss is shared between the parties. It is a partnership that subsists between the parties without the security of a guarantee. In *Musharakah* contracts, two or more partners jointly provide capital, either on a permanent or diminishing basis. The partners to *Musharakah* contracts can either be active participants or sleeping partners, and if they jointly work, then each is considered an authorized agent of the other in all matters of business.

The returns earned in these contracts are based on the yield of actual profit and the risk elements involved as the financier may suffer loss if the venture fails to produce the desired results. The literal translation of the word

3. The text of the resolution mentioned herein is available at https://cbben.thomsonreuters.com/sites/default/files/net_file_store/Resolution_18_of_2020_Arabic.pdf.

Musharakah means "sharing", and it can be roughly understood as a partnership business, which is also used as a substitute for regular overdraft in conventional banking. The bank offers overdraft protection upon signing a *Musharakah* agreement, and the bank acts as a partner. This allows the bank to share the profits in proportion to the number of days the account was over drafted.

Mudarabah is a partnership in profit whereby one party provides capital (*Rab al-Mal*) and the other party provides labour (*Mudarib*)[4]. Shari'ah standard n° (13) deals with *Mudarabah* contracts and explains the rules for unrestricted and restricted Mudarabah (perhaps related to location or other factors under AAOIFI standards), depending on whether Islamic banks are acting in the capacity of a *Mudarib* (entrepreneur) or in the capacity of an investor. In simpler terms, *Mudarabah* is an investment partnership and translated in English as profit and loss sharing[5]. In both these types of contracts, it is not permitted to require from a manager in *Mudarabah,* an investment agent, or one of the partners in these contracts, to guarantee the capital or even to promise a guaranteed profit. Thus, these transactions do not result in a debt owed by the client unless a transgression has occurred.

Once a customer has expressed an interest to acquire an item, the institution will act on the customer's behalf to acquire the asset.

For financing consumer and corporate credit, as well as asset rental and manufacturing, certain products different from the above-mentioned profit loss sharing products are used. These include the *Murâbahah* transaction, where the bank will purchase the good and deliver it to the customer, with payment to be completed at a later agreed upon date.

All the requirements that need to be observed, commencing from the transfer of ownership of goods to the customer, are explained in detail in the Shari'ah standard n° (8) of AAOIFI. Once a customer has expressed an interest to acquire an item, the institution will act on the customer's behalf to acquire the asset. Once the offer is accepted, there cannot be any variation in the amount agreed upon and the bank is also casted with the liability of delivering a defective product. The permissible limits and the exceptions to this rule, as well as the formats of notices to be exchanged between the banks and the customers, are all outlined in the standards issued in 2002. The loan, or any credit revolving facility offered by the conventional banking system, can be roughly equated to *Murâbahah* transactions for perceiving the concept. In actual working, the bank loan and the *Murâbahah* are two different concepts, wherein the bank loan is classified as an interest-based lending and the latter is a sales contract for profits.

Ijarah is another type of contract detailed in Shari'ah standard n° (9). Through *Ijarah* contracts, the customer is given the right to use an asset for a stipulated period of time, beginning with the promise to lease and concluding with the repossession of the asset by the lessor. In some situations, the ownership of the asset is transferred to the customer within or by the end of the lease term and is another form of *Ijarah,* known as *Ijarah Muntahia Bittamleek.* The element of risk involved in such transactions is that the lessor remains the owner of the asset until completion of payment by the lessee and hence the lessor also has a responsibility towards the leased asset.

According to Shari'ah rules, a lessor cannot delegate these tasks to the lessee, but it might delegate them to an agent. The lessee or an affiliate may be designated as the financier's agent to carry out these responsibilities, with the rent adjusted to cover the agent's expenses.

Ijarah is one of the most widely used financing tools, particularly in real estate, and the concept of *Ijarah* is more or less similar to conventional leasing, where an asset is placed at the disposal of the lessee for a period of time, in return for regular payments to the lessor. *Salam* contracts and *Istisna'a* contracts also belong to this category of non-profit and loss sharing products. In *Salam* contracts, which are sales contracts, once payment is made in full, the transaction is commenced. In exchange, the delivery of goods will be deferred to a later date as agreed.

The manufacturing or supplier contract, known as *Istisna'a,* is different from a *Salam* contract and relates to a transaction involving a commodity even before it has come into existence. The bank acts as an intermediary between the manufacturer/supplier and the customer. As per the Central Bank of Bahrain (CBB) Rule book, *Istisna'a* contracts are primarily used in project finance and are not tradeable securities, as the underlying asset is not yet existing. Shari'ah standards n° (10) and (11) deal with the *Salam* and *Istisna'a* contracts respectively.

In addition to the above, there are other products that stand auxiliary to main transactions and are simpler transactions that yield fees or commissions. These services use three types of contracts, namely *Wakalah, Kafalah,* and *Ju'ala*. In a *Ju'ala* contract, one party (the *Ja'il*) offers specified compensation (the *Ju'l*) to anyone (the *Amil*) who is to achieve a predetermined result within a stipulated period, if any. In principle, the *Ju'ala* is not a binding contract and can be revoked unilaterally until the work is commenced.

A *Wakalah* is a contract of agency, where one party acts in the interest of the other. A *Kafalah* is a personal guarantee contract whereby the bank pledges to a creditor that the debt or personal liability of the client will be covered by the bank on behalf of the debtor. These auxiliary

4. Ibid, Shari'ah Standard n°. (13): *Mudarabah* (This Standard was issued on 4 Rabi' I, 1424 A.H., corresponding to 16 May 2002 A.D. ay 2002 A.D.).

5. "*Mudarabah*", Institute of Islamic Banking and Insurance. Available at: https://www.islamic-banking.com/explore/islamic-finance/shariah-rulings/question-answers-shariah-rulings/mudarabah, Last accessed on: 22/02/2022.

transactions rely upon such contracts that are valid according to Shari'ah laws and include *Kafalah, Wakalah*, and *Qard* (Loan). The permissibility for applicable credits is derived from the contract of mortgage (*Rahn*), as this contract ensures the payment security.

Other Derivatives of Islamic Financing

The Islamic financial industry is dominated by Islamic banks and accounts for about 80% of total assets in the industry. On the other hand, the continuing growth of other Shari'ah compliant assets, such as Islamic funds and insurance, also need to be considered.

The *Sukuk* market is another area which has been growing in the last decade. *Sukuks* are used by financial institutions to secure ownership in real assets to earn a return from those assets[6]. Investment *Sukuks* are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct, and other services. These securities have both the characteristics of a bond and a stock. The cardinal principal of risk sharing is present, and that makes *Sukuks* stand apart from conventional bonds offered by traditional banking systems.

The category of investment *Sukuks* includes the ownership of the leased assets, ownership of usufructs, ownership of services, *Murabahah, Salam, Istisna'a, Mudarabah, Musharakah*, investment agency and sharecropping, irrigation, and agricultural partnerships. These *Sukuks* do not represent a debt that is owed to the issuer by the certificate holder and rather represents a common share in the ownership of assets made available for investments. The owners of *Sukuk* certificates have the responsibility of sharing the profit and loss in proportion to the number of certificates of which they are in possession.

6. The Sukuk Handbook, A Guide To Structuring Sukuk Second Edition, *Latham & Watkins LLP*, https://www.lw.com/thoughtLeadership/guide-to-structurings-sukuk, Last accessed on 02/02/2022.

Overall Growth of the Islamic Banking Sector

The worldwide Islamic finance industry has been steadily expanding, with a Compound Annual Growth Rate (CAGR) of 7.8 percent between 2014 and 2019. The industry has benefited greatly from significant investments in halal industries, infrastructure, *Sukuks*, and Islamic funds, particularly through electronic channels of operation in all products and services. The ratings agency predicts that worldwide issuance of Islamic bonds, or *Sukuks*, will reach $140-155 billion, up from around $140 billion in 2020, due to sufficient liquidity and ongoing financing demands among corporations and governments.

The rapid success of Islamic banking relies on many factors, such as the notion and inclusion of ethical, moral, and social elements in such transactions, as opposed to the profit-making business format of the conventional banking system. The Islamic system, which is Shari'ah compliant, is not any different than the conventional system as far as risks are concerned. All the market, credit, liquidity, operational, and legal risks pertain to both systems. There are various mechanisms and products used for the mitigation of risks which are both conventional and unique in nature. The conventional measures are suitable for risk management, and as the Shari'ah compliant laws are also to be considered, certain unique features are also required to mitigate those risks when it comes to Islamic financing.

The Islamic financial industry is dominated by Islamic banks and accounts for about 80% of total assets in the industry.

Though the system has its own advantages, cross-border transactions are still not standardised as there are differences in these products, depending on the country of operation. Therefore, in order to ensure and enhance the financial stability of Islamic systems, it is necessary to strengthen supervisory and regulatory frameworks. Numerous agencies provide rules in this regard, and the missing part that is required is ensuring that such standardized terms are followed properly. The global popularity for Islamic finance and investment funds, as a viable alternative to the conventional system, is growing. Apart from the traditional Islamic markets of Middle East and Malaysia,this increased focus from several non-Muslim countries, attempting to access this mode of Islamic finance could result in exponential development in this sector especially once this enhanced attention finds traction and accomplishment of the requisite legal reforms. ■

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Chinese Investors Conduct Equipment Lease Activities in the UAE

Yading JIANG

Pour réaliser et faciliter la gestion des contrats de location d'équipement aux Émirats Arabes Unis (EAU), les investisseurs étrangers, en tant que preneurs, doivent se constituer correctement en société afin d'avoir le pouvoir et l'autorité nécessaires à l'exécution d'un contrat de location. Les règles et réglementations des EAU n'imposent pas l'enregistrement de la propriété des biens meubles loués si le preneur a obtenu une licence qui inclut l'activité de négoce d'équipements, de machines et de pièces détachées, lui permettant de louer, de vendre et d'échanger ces articles. En ce qui concerne la loi applicable et les litiges, les parties sont autorisées à appliquer la loi applicable et les clauses de résolution des litiges qu'elles ont convenues et qui sont compatibles avec le contrat de location.

Para llevar a cabo y facilitar la gestión del arrendamiento de equipos en los Emiratos Árabes Unidos (EAU), los inversores extranjeros, como arrendatarios, necesitan constituirse correctamente para tener el poder y la autoridad para ejecutar un contrato de arrendamiento. Las normas y reglamentos de los EAU no obligan a registrar la propiedad de los bienes muebles arrendados si el arrendatario ha obtenido una licencia que incluya la actividad de comercio de maquinaria de equipos y piezas de repuesto que le permita arrendar, vender y comerciar con estos artículos. En el caso de la ley aplicable y cualquier disputa, se permite a las partes seguir la ley aplicable acordada y las cláusulas de resolución de disputas coherentes con el contrato de arrendamiento.

With the launch of the Belt and Road Initiative by Chinese Pres. Xi Jinping in 2013, China has developed massive infrastructure investment projects across Eurasia, Latin America, and Africa, aimed to enhance economic connections and collaborations in the target regions. Among those major regions, the Middle East, especially the United Arab Emirates (UAE), has become an increasingly popular land for Chinese investors to expand their overseas business. Middle Eastern countries and regions not only differ from China in terms of the political system, legal system, social environment, culture, language, etc., but also differ greatly from those regions where Chinese enterprises traditionally have invested in before, such as Europe, North America, and Southeast Asia. In the fields of infrastructure and energy, Chinese enterprises have carried out financing leasing and operational leasing of large-scale/heavy equipment, including the lease mode of direct leasing and after-sales leaseback. The method of conducting the leasing business can be establishing an entity, including the type of limited liability company and a branch that qualifies as an independent to carry out business, and the company registration number needs to be updated once a year. As for Chinese companies, they also need to complete procedures such as overseas direct investment registration (ODI) with the competent Chinese authorities within the People's Republic of China (the PRC).

This article provides a brief outline of the legal framework regarding leasing activities over movable assets such as heavy equipment in the UAE, considering the role of the lessee as a foreign investor.

1. Market Access in the UAE

Foreign investors can undertake most activities in the UAE, except for some enterprises and institutions that

involve security and military matters, telecommunications, banking, finance, insurance, and educational and religious activities, which are restricted from being established solely by foreign investors.

To further attract foreign investment, the UAE issued Federal Decree 26 of 2020 on 27 September 2020. The new law amended the 2015 Commercial Companies Law and abolished the 2018 Foreign Direct Investment Law. The major positive impact of the new law on foreign investment was the abolition of the original restrictions on foreign shareholding ratios, allowing foreign investors to own 100% ownership of onshore companies, unless it is carrying out activities with "strategic impact."[1] Under previous laws, only companies registered in free trade zones of the UAE (the offshore companies) were not subject to equity ratio restrictions.

Corresponding to the previous equity ratio restrictions, the common practice for the foreign investments fell either into the restricted or prohibited categories. Under such nominal shareholding structure practice, the organizer is usually a nominal shareholder who does not actually contribute to the UAE onshore company. More specifically, foreign investors sign a nominal shareholder agreement or similar agreement with the organizer, entrusting the equity held by the nominal shareholder and corresponding rights and responsibilities to foreign investors to ensure that they are the actual and/or sole beneficiaries and decision-makers of the company. Although this contractual arrangement is commonly adopted by foreign investors in the UAE, its legal consequences are highly uncertain, and local judicial rulings on the effectiveness and enforcement of nominal shareholder agreements or similar agreements vary. After the enactment of this new law, foreign investors can now establish onshore companies in the UAE without any shareholding restrictions, with a maximum shareholding of 100%, unless they are engaged in activities with strategic impact.

In addition, it is worth mentioning that, after abolishing many restrictions on onshore companies, multiple existing free trade zones, as the registered destination for offshore companies in the UAE, may remain attractive to foreign investors due to their mature supporting operations and other factors such as tax incentives.

For the leasing of heavy machinery and equipment, the UAE law allows foreign investment without any equity-ratio restrictions and does not require special licenses and requirements for the type and scale of business of the enterprises as a lessee. However, it is a requirement to have the specific leasing activity registered within the license to enable the practice of the trade and leasing demands, while it is not a mandatory requirement by the UAE law or free trade zone regulations to register or transfer the ownership of the leased equipment.

Therefore, if a foreign invest enterprise has followed and abided by the rules and regulations required to incorporate the company in the UAE and its activities fall within the scope of the license which includes the activity of equipment trading, leasing, and selling, such foreign investor will have the legal power and authority in the UAE to lease equipment and no other mandatory registration of heavy equipment is required.

2. Heavy Equipment is Eligible as the Leased Movable Property under the UAE Law. Registration of the Ownership of the Leased Equipment is not Mandatory but Highly Recommended due to the Registration of Interests and Enforcing Security Interest against Third Parties

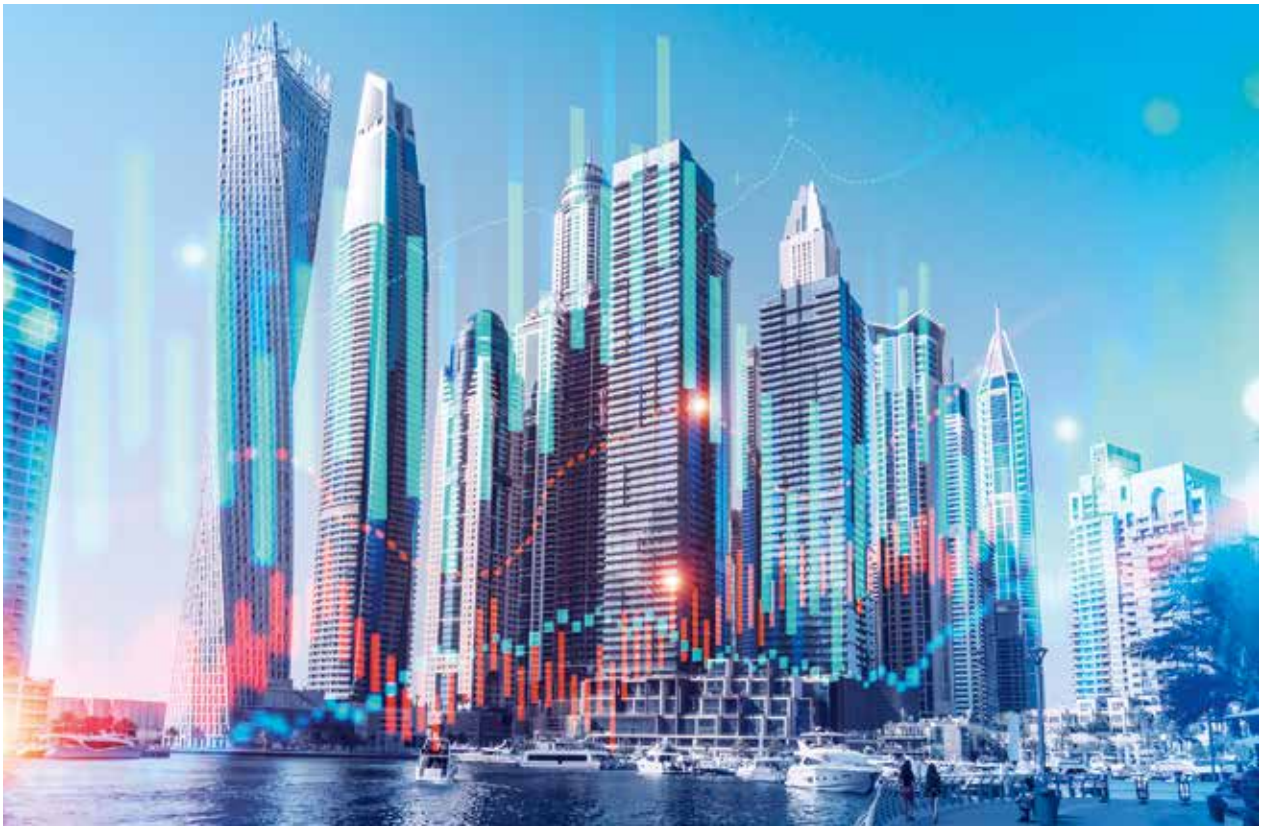
As distinguished from the requirement for registering the ownership of the real estate, to lease the property legally it is not mandatory to register the ownership of the leased heavy equipment, as movable assets, to be completed by the laws and regulations of the UAE. Nevertheless, registration of the ownership of the movable assets are still highly recommended as the registration cannot only indicate the title in the goods, especially when the goods have been used on lease or are not in possession of the party who is interested in selling or leasing such property. This practice also enforces the security interest against third parties or subsequent interests.

The major positive impact of the new law on foreign investment was the abolition of the original restrictions on foreign shareholding ratio [...].

To ensure a party's interest is protected with effective registration, the Emirates Integrated Registries Company LLC (EIRC)[2], a subsidiary of the Emirates Development Bank of the UAE, was established as a security registry to gather and publicize information concerning security interests over movable assets. The main function of the EIRC is to collect data and the declaration of rights made by the rights holder, manage the registry system, archive files and

1. "Strategic Impact" Activities: Pursuant to the Decree 26 of 2020, the UAE Cabinet will establish a committee composed of representatives from the economic development departments of each emirate to determine what constitutes "strategically influential" activities, as well as the additional legal requirements each emirate may have for foreign investors to participate in such activities.

2. Previously named as the Emirates Movables Collateral Registry (EMCR), an online security registry established pursuant to the previous Movables Pledge Law to register the security interests over movable assets.



documents, and grant public access to the information declared in this platform. The public cannot only request information of the rights and interests of movable properties through EIRC platform, but also indicate the priority over unregistered security interests, while ensuring the priority order of security interests over the same asset. As it is an online registry open to the public, the interested parties such as the lenders, borrowers, parties leasing equipment or other movable property, can readily access EIRC to conduct searches or make registration concerning any security interest over moveable assets, tangible or intangible. The information can also be obtained in a hard copy or soft copy, and such copy of report has a binding force once ratified by the registrar[3].

Registration of the ownership of the movable assets are still highly recommended [...].

However, as a platform gathering information, EIRC is not in the position to take responsibility for any incorrect information in the register platform. The accuracy of the EIRC registration would solely depend on the authenticity of the information declared by the rights holder.

3. UAE Federal law Number 4 of 2020 on Securing Interest over Movable Assets.

3. The Lessee may be Required to Provide Certain Credit-Enhancement Measures to Secure its Ability to Perform. This Guarantee is Widely Used in Leasing and Other Commercial Activities in the UAE

The guarantees (including counter-guarantees) issued by foreign banks to the UAE mainly appear in industries such as energy and engineering manufacturing and include bid guarantees, performance guarantees, and certain other non-financial guarantees specified under UAE law.

A bank guarantee is a joint liability under the default UAE law, which has independence from the underlying contract. The guarantor's payment obligation to the beneficiary is unconditional and the guarantor cannot refuse to make payment to the beneficiary due to the guarantor's relationship with the applicant or beneficiary, or the underlying contract.

The letter of guarantee and counter-guarantee often state that the laws of a certain Emirate of the UAE apply to such a guarantee. If both parties agree, the Uniform Rules for Demand Guarantees of the International Chamber of Commerce (URDG758) may also be applicable.

More specifically, the UAE domestic banks typically require the foreign banks to provide counter-guarantees including the following terms: 1) the counter-guarantee bank will undertake and guarantee compliance with its domestic foreign exchange control policies; and 2) the counter-guarantee needs to include an «extend or pay» clause, which means that when the issuing bank receives an extension request from the beneficiary under the guarantee, the counter-guarantee bank promises to extend the validity of the counter-guarantee as an alternative to immediate payment.

Further, there is no mandatory provision in the UAE law with regards to the validity period of the guarantee, which means that the guarantee can specify an expiration date or not. If the guarantee specifies the expiration date and the beneficiary's claim is not received before the expiration date, the guarantor may release itself from its obligations to the beneficiary, unless the guarantor explicitly agrees to extend the validity period of the guarantee before its expiration. This situation well explains why the local banks would require that the counter-guarantee bank to incorporate the "extend or pay" clause into the counter-guarantee as discussed above.

In addition, except with the written consent of the guarantor, the beneficiary shall not transfer any rights already generated under the guarantee to any third party. Nevertheless, the guarantor can agree to the terms of the transfer of the guarantee through an agreed-upon method to give the beneficiary the right to transfer the guarantee when issuing a guarantee.

4. The Applicable Law and Dispute-Resolution Method of Such Lease Management is Allowed to be Agreed upon Between the Contracting Parties.

When two or more parties enter a legally binding contract with each other, they are given the discretion to choose their preferred applicable law and method of dispute resolution as well as the jurisdiction in which they will resolve the dispute(s). They are not bound to follow a specific resolution method to resolve any arising disputes, whether that be through court proceedings or outside of court settlements and arbitrations.

The Federal Constitution of the UAE is the basis for the laws of the various emirates in the UAE. Without conflict with the first mover, each emirate has the power to make laws and regulations on internal affairs by the Constitution. Disputes over foreign economic activities can be submitted to three arbitration centres in the UAE: the Dubai International Arbitration Centre, the Abu Dhabi Commercial Arbitration Centre, and the Dubai London Arbitration Centres, all jointly operated by the Dubai International Financial Centre and the London International Court of Arbitration.

Although the UAE maintains stringent exclusive jurisdiction in certain areas and matters, there is a lot of flexibility for the parties to choose which applicable laws they wish to use in relation to the establishment and regulation of their contractual transactions, along with resolving any disputes that may arise from such. This flexibility was further enhanced after the UAE became one of the member states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This resulted in arbitration awards granted by other member states, i.e., the PRC, to be recognized and enforced in Dubai allowing for the provisions of the applicable law and dispute resolution agreements to be valid, binding, and enforceable under the laws and regulations in the UAE. This is further evidenced by the Federal Law n° 6 of 2018, amended by Federal Decree-Law n° 15 dated 4 September 2023, which discusses and specifies arbitration tribunal, proceedings, and enforcement[4].

When two or more parties enter a legally binding contract with each other, they are given the discretion to choose their preferred applicable law and method of dispute resolution as well as the jurisdiction in which they will resolve the dispute(s).

Meanwhile, it should be noted that, for an arbitration clause to be valid and effective in the PRC, it should be clear. There must be a written arbitration agreement between the parties and the intention to submit the dispute to arbitration should be clearly expressed in the arbitration agreement. Secondly, the parties should clearly specify the specific disputed matters to be submitted to arbitration in the arbitration agreement, as well as the selection of a clear, specific, and unique arbitration commission. Therefore, it is preferable to add a seat of arbitration as per the clause and the choice of seat is also subject to the parties' discretion. ■

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4. The new arbitration law applies to any arbitration conducted in the UAE, any international commercial arbitration conducted abroad (if the parties chose this law to govern such arbitration), and any arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by UAE law.

The United States of America and Israel, an Intellectual Property Tale of Two Countries

David POSTOLSKI

En tant que conseil en brevets américain vivant en Israël, je suis devenu très conscient des différences subtiles et des vastes similitudes du droit de la propriété intellectuelle en Israël. Mais tout d'abord, il convient d'expliquer brièvement pourquoi, de tous les pays du Moyen-Orient et de l'Afrique du Nord, c'est Israël qui est au cœur de cet article.

Como abogado de patentes estadounidense residente en Israel, soy muy consciente de las sutiles diferencias y grandes similitudes de la legislación sobre propiedad intelectual (PI) en Israel. Pero antes de nada, quisiera explicar brevemente por qué, de todos los países de Oriente Medio y el Norte de África, Israel es el tema central de este artículo.

Intellectual Property (IP) rights preserve and encourage creative and innovative concepts. IP is the physical embodiment of intellectual efforts. It is the single and only way to stop someone else from doing what you are doing, from creating what you have created, etc., by being awarded the right to exclude others from using your IP. Intellectual Property is a broad category that encompasses many forms of intangible creations with four distinct categories: copyrights, trademarks, patents, and trade secrets.

The majority of MENA countries possess hyper local industries, with limited capabilities and with little internal research and development.

In the MENA countries and specifically in the Arab culture, it is a compliment to an artist or to a creator's work to copy it. This is very rarely considered an accusation of IP theft and the need for protection is therefore diminished. In the U.S. and in Israel (a MENA country) it is the direct opposite in terms of culture.

The MENA region is young in terms of IP laws. Many of the countries are trying to update outdated IP laws, introduce new IP laws, and/or implement regulations to harmonize with the rest of the world's IP laws. Most MENA countries do not have the benefit of foreign IP rights holders filing in their countries due to culture, immature markets and economic practices, and courts that do not have years of IP infringement litigation history. In MENA countries, the absence of specialized courts for handling IP matters, and in particular patent matters, have led to foreign IP rights holders to simply not attempting to file their IP in many MENA countries. The Gulf Cooperation Council (GCC) for the Arab States of the Gulf, also known as the Gulf Cooperation Council, is a regional, intergovernmental, political, and economic union comprising Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. The GCC has a system for a unitary patent which includes all six GCC member countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) but does not have a unified court system to hear such matters. The majority of MENA countries possess hyper local industries, with limited capabilities and with little internal research and development. Also in the GCC countries, laws require that any international business must have a national partner that owns more than 51% of the business to be allowed to use and protect their trademarks. This may be possible for large companies, but for the start-up or entrepreneur looking to enter into their local and international markets, this becomes a barrier of entry not worth pursuing. Fortunately, the situation is evolving every day and eventually many other MENA countries will rise to the forefront of the IP stage. One stand-out in this region is Israel.

As a U.S. Patent Attorney, I am a fervent supporter of educating and empowering others of the steep history of IP law in the U.S. I am proud to point out the presence of the IP Clause of the U.S. Constitution. The IP Clause, also known as the "Patent and Copyright Clause" refers to Article I, Section 8, Clause 8 of the U.S. Constitution, which grants Congress the enumerated power *"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."* This clause gave Congress the power to enact legislation

governing patents and copyrights. For patents, the clause gave Congress the power to grant inventors exclusive rights of enforcement to their discoveries, allowing inventors to recoup their investment, and capitalize on their research. Similarly, the Commerce Clause, also an integral part of the U.S. Constitution (Article I, Section 8, Clause 3), states that the U.S. Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

This is the grandfather of trademark law in the U.S. The U.S. founding fathers knew that, in order to industrialize the country, it would need inventors, authors, creators, and businesses to share their intellectual ideas with the government in exchange for exclusive rights. These exclusive rights or property rights would be in the form of the categories of IP. These clauses have led to various Acts and Statutes that now codify IP Law in the U.S. and have made the U.S. a haven for start-ups, entrepreneurs, and emerging companies.

But Intellectual Property is not always embedded in the Constitution of a every new nation. For example, Israel's Intellectual Property law are not constitutional rights as Israel does not possess a constitution. Instead, Israel enacted laws such as the Israeli Designs Law, the Trademarks Ordinance and the Israeli Copyright Law very early in its new nation status. All the same, Israel's moniker as the Start Up Nation is the only one of its kind awarded to this small country in the Middle East. Israel is known for its cybertech, medical devices, national and military security innovations, agtech, desertech, and other fields such as foodtech, biotech, and high technologies. Though Israel may not influence major economic developments that affect Europe or America because of its small size and unique location and due to the entrepreneurial character of its people, Israel is much more agile in making changes needed to confront adverse situations than bigger countries.

The U.S. gained its independence in 1776 and the notion of IP was written into the Constitution in 1790 (14 years later). The state of Israel was born in 1948. Just 17 years later, the Office of the Chief Scientist was established in 1965. It was renamed the Israel Innovation Authority in 2016. The main aim of the Authority is to increase economic empowerment within the civilian sector of the Israeli economy. The Israel Innovation Authority is an independent, publicly funded agency and created to provide a variety of practical tools and funding platforms aimed at effectively addressing the dynamic and changing needs of the local and international innovation ecosystems. This includes providing support to start-up and early-stage entrepreneurs, mature companies developing new products or manufacturing processes, academic groups seeking to transfer their technologies to the world market, global corporations interested in collaborating with Israeli technology, and Israeli companies seeking new markets abroad. Very few countries possess such resources to enable the creation of IP and if they do now it is usually because they modeled themselves after what Israel was able to accomplish in such a short period of time.

The U.S. and Israel are both members of the most important multilateral international IP treaties.

The U.S. and Israel are both members of the most important multilateral international IP treaties, such as the Patent Cooperation Treaty (U.S. joined in 1978 and Israel in 1996), the Paris Convention for the Protection of Industrial Property (U.S. joined in 1887 and Israel in 1950), the Madrid Protocol for the International Registration of Trademarks (U.S. joined in 2003 and Israel in 2010), and The Berne Convention for the Protection of Literary and Artistic Works (U.S. joined in 1989 and Israel in 1950). For more of the unique differences in IP protection, we will explore each type of IP below:

Utility Patents

It should be noted here that, in the U.S., the term "patent attorney" identifies and is reserved for attorneys at law who has passed the U.S. Patent Bar Examination. Thus, a U.S. patent attorney is an attorney who not only possesses knowledge of state and federal laws, but also federal patent regulations. In contrast, a "patent agent" is someone who has passed the U.S. Patent Bar but is not an attorney at law. In Israel, the term patent attorney (which is widely used) is an individual who is not an attorney at law but rather is the equivalent of a patent agent in the U.S. This unique difference between the two countries is important as the practice of patent law in the U.S. is very much intertwined with the U.S. Federal District Courts.

The United States Patent and Trademark Office (USPTO) is the federal agency responsible for granting U.S. patents and registering trademarks. On July 31, 1790, they

issued their first patent. The Patent Act of 1790 was the governing law at the time and today it is Title 35 of the United States Code that governs patent law. The sections of Title 35 govern all aspects of patent law in the United States and was created in 1953. In 1982, the court formally known as the United States Court of Customs and Patent Appeals became the United States Court of Appeals for the Federal Circuit (the Federal Circuit). Above this Court is the highest court of the U.S., i.e., the U.S. Supreme Court. Below the Federal Circuit are the U.S. District Courts. The Federal Circuit can accept appeals from all of the U.S. District Courts and certain administrative agency decisions, including those from the U.S. Trademark Trial and Appeal Board and the U.S. Patent Trial and Appeal Board. Thus, in the U.S., any attorney can bring a cause of action for patent infringement in a U.S. District Court. In Israel, patents are governed by the Patents Act of 1976. Unlike the U.S. Israel has no specialized patent court. In Israel, patent infringement proceedings may be brought before any district court, which is Israel's highest court of first instance and such lawsuits cannot be brought by an Israel "patent attorney" unless that patent attorney was also an attorney at law (which the majority are not!).

Obtaining a patent in the U.S. and Israel are very similar […].

Obtaining a patent in the U.S. and Israel are very similar given that both countries are in fact signatories to the Patent Cooperation Treaty of 1970. That is, in order to obtain a patent in both countries, one must prove that the invention possesses novelty; the invention cannot be obvious or possesses an inventive step; the invention must be adequately described and enabled; and it must possess utility or a useful purpose. But there are also important differences between the two countries' patent laws. The U.S. does allow for the protection of procedures for therapeutic treatments on the human body. Israel does not. The U.S. does allow for the protection of new varieties of plants or animals. Israel does not. The U.S. does allow for the protection of computer algorithms and software. Israel has yet to codify such as patentable subject matter.

Another similarity between the U.S. and Israel in Patent Law, which is not found in the majority of other countries, is what is known as "the duty of disclosure". Similar to the U.S., the Israel Patents Act provides that, until the patent is granted, the patent applicant must keep the Patent Office informed of any publications or documents that were available to the public prior to the date of the application, or that are known to the applicant and directly connected (material to the patentability of the invention). This includes any patents, publications, or documents on which patent authorities in other countries relied on when examining the corresponding applications. Not satisfying this duty both in the U.S. and Israel can lead to the invalidation of your patent application.

The United States Customs and Border Protection (CBP) has the authority to detain, seize, forfeit, and ultimately destroy merchandise seeking entry into the United States if such imports infringe on the patent rights that have been registered with the United States Patent and Trademark Office (USPTO) (and for that matter the United States Copyright Office (USCOP). The owner of a U.S. Patent has the entire border of the U.S. as their property line from which others cannot cross. Unfortunately, Israel does not possess border control measures for patents, yet.

Design Patents

A utility patent is a federal or national right in the utilitarian features of an invention, i.e., an invention of a new and useful process, machine, manufacture, or composition of matter, or a new and useful improvement. A design patent is federal or national right in the ornamental aspects of an invention. A design patent protects the way something looks as opposed to a utility patent, which protects the way something works! As early as 1952, a U.S. design patent, unlike a utility patent, limits the inventor's patent protection to non-functional aspects of an ornamental design of the article.

The design patent laws in Israel was based on old legislation from the days of the British Mandate, before the state of Israel was even established. However, in 2017, the new Israeli Designs Law was introduced. The new law provides various new features that did not exist previously. One of the most advanced new features is the ability to protect an unregistered design for a total of 3 years. The U.S. does not protect such unregistered designs! In the U.S., a design falls under the patent system and if registered only lasts for 15 years. No further fees are paid, and no renewals are allowed. In addition, trade dress protection, a derivative of trademark protection in the U.S. is also available for designs and which can be renewed in perpetuity if use of the design in interstate commerce continues.

In Israel, a registered design is valid for an initial 5 years and can be renewed for additional 5 year periods for a maximum term of 25 years. The U.S and Israel (and other MENA countries) all require the same thresholds to be proven about your design, that of novelty and non-obviousness which is also referred to as having an individual character. The major influence of the U.S. on Israel has led to other similarities in the new Israel Design law. For example, under Israel's old Design law only tangible assets (objects) were protected. Today, intangible assets such as products can be protected. In Israel and in the U.S. design patent registrations can now extend to fonts, icons, screen displays, and computer animations.

Design patents are classified in Israel and in the U.S. according to their purpose as it relates to specific goods or products based on the 31 classes (with various sub-classes) that mostly conform with the International Locarno Classification System. Unlike utility patents in

Israel, there are specific provisions in the Designs Law and the Customs Ordinance empowering the Israel Customs authorities to arrest goods suspected of infringing registered designs, upon receipt of a request from the owner of the design along with the required details, initial evidence, and a self-guarantee in an amount determined by the Customs Director. This is standard practice in the U.S. as well.

Trademarks

Trademarks are a legal protection granted to individuals or businesses who create a source identifier of the goods and/or services they are selling that appeal to one or more of the five senses of a consumer. Thus, a trademark can be a word, a slogan, a logo, a smell, a sound or even 2 or 3 dimensional object.

The British controlled the U.S. before it gained its independence. Similarly, the British ruled Israel between 1917 and 1948 and the British empire's view of trademarks still exists in some form in both the U.S. and Israel. For example, both countries possess the notion of an unregistered trademark, also known as a common-law trademark. A trademark, albeit not registered as a federal or national right, still has some limited power.

In the U.S. and in Israel (and most of the MENA countries) a trademark should be distinctive, meaning it should not be made up of generic words or use words that describe the goods or services the entity is trying to protect. Distinctive trademarks should be suggestive, at a minimum, and cause a consumer to question what the entity is selling. Better yet, the trademark used by an entity should possess an arbitrary meaning in connection to what the entity is selling. The best type of distinctive trademark is what is referred to as a fanciful trademark, a trademark that the entity has made up and/or coined. These categories of trademark distinctiveness are all found in the U.S. under The Lanham Act, which was enacted by Congress in 1946. The Act provides for a national system of registration and protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion inter alia. In Israel, the 1972 Trademark Ordinance governs trademarks.

The major influence of the U.S. on Israel has led to other similarities in the new Israel Design law.

The international framework for trademark classifications is referred to as the Nice Classification. The Nice Classification has been implemented by more than 150 countries, including the United States and Israel. This system organizes a trademark's goods and services into 45 different classes. Classes 1-34 cover a trademark's goods and classes 35-45 cover a trademark's services. All trademark filings must be filed in at least one class.

One of the biggest differences between the U.S. and Israel (and most MENA countries) is that in the U.S. you must prove you are using your trademark in interstate commerce in order to achieve (or hold on to) your trademark registration. Thus, proof of your trademark usage in the U.S. is required by the U.S. Trademark Office before your

trademark can be registered. The U.S. Trademark Office also allows an applicant the ability to file a U.S. trademark as an intent to use application, wherein an applicant is declaring their bona fide intent to use their trademark in interstate commerce within a prescribed period of time. This allows an applicant to file and obtain their trademark protection even though they are not yet in use in interstate commerce. Proof of use of your trademark s not required in Israel. You can obtain a registration if you pass examination but do not have to prove actual use in Israel. However, it should be noted that a trademark in Israel may be revoked or cancelled if that trademark has not been used for more than 3 years. Similarly, this is also the case in the U.S. once you have already proved use and your mark is registered.

Unlike patents in Israel, there are border control measures for trademarks.

Unlike patents in Israel, there are border control measures for trademarks. The Israel Customs Administration randomly inspects the shipments of goods arriving in Israel and is entitled to detain imported goods that it suspects to be infringing a trademark in Israel. As mentioned above this is a well-known and often-used measure in the U.S. to stop infringing goods that have a registered U.S. trademark.

Copyright Law

A copyright protects a work of authorship that is an original literary work, artistic work, dramatic work, audio visual work, musical work that is original; sufficiently fixed in a tangible medium, and that excludes content that is not protected such as facts, statutory texts, and regulations.

On 31 May 1790, the first copyright law was enacted under the U.S. Constitution. The 1790 Copyright Law was limited in scope and merely protected books, maps, and charts for only 14 years. Copyright law in the U.S. is now governed by federal statutes, namely the Copyright Act of 1976. The Copyright Act prevents the unauthorized copying of a work of authorship. Since 1976 and with technology moving at the speed of light, the U.S. government has created numerous amendments and supplements to the 1976 Copyright Law, including but not limited to the 1992 Amendment to the Copyright Act of 1976 relating to Fair Use and the 1998 Digital Millennium Copyright Act (DMCA), which addressed the relationship between copyright and the internet.

Similarly, Israel has had to also amend its outdated British inspired Copyright Laws to address new forms of creative works in the same way the U.S. and other countries around the world did. Until May 2008, copyright laws in Israel were based on the Israeli Copyright Act of 1911 and the Copyright Ordinance. In May 2008, the new Israel Copyright Act came into force. The new Act in Israel, similar to the copyright legislation in the U.S., grants the owners of creative works a list of actions they are entitled to perform exclusively in what we refer to as a bundle of rights in the U.S. These bundle of rights allow a copyright owner to control the copying, distribution, displaying, performing (such as broadcasting), and the right to control the creation of derivative works through licensing and other types of transfers. Another important right now found in Israel, and always present in the U.S., is the moral copyright right, i.e., the right to be credited and the duty not to use a work in a way that harms the creator's reputation. Conducting any of the above actions in the U.S. and in Israel without the creator's consent may be considered copyright infringement and grounds for legal actions.

Copyright laws in Israel and the U.S. also provide a list of defenses against copyright infringement claims. One of the most popular defenses is the fair-use defense. Although it was borrowed from the U.S. fair-use doctrine, the Israeli fair-use defense is different from the U.S. Fair use permits a party to use a copyrighted work without the copyright owner's permission for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. The fair-use doctrine in Israel includes purposes such as *"private study, research, commentary, review, journalistic report, quotation, or teaching and examination by an educational institute."* Another defense to copyright infringement that is present in both countries is the concept of innocent infringement. Innocent infringement requires parties to prove that they not only were unaware of their copyright infringing acts but that they also had no reason to believe they were doing anything wrong and that it was indeed impossible to know that the work was protected.

Both Israel and the U.S. are parties to the international Berne Convention which gives full faith and credit to works that are created in one country but published in another country that may or may not have codified copyright laws of its own. Registering the foreign work in a country that does have a copyright system is recommended for maximum rights in that country.

As per the Global Innovation Index of 2023, the United States ranks 3rd while Israel ranks 14th. It is an inspiration to see such a small country emerge onto the world IP stage. Similar to the U.S. in many ways, it is no wonder that, given Israel's history, its entrepreneurial spirit, culture and knowledge, and its respect of IP rights locally and internationally that it is side-by-side with some of the largest IP players in the world. ■

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Children's Rights and Protection of the Future Generation Through the Kuwaiti Child's Rights Law

Jumanah A. BEHBEHANI

S'appuyant sur l'ancien traité des droits, incluant les droits de l'enfant, et sur la Constitution koweïtienne moderne adoptée en 1962, la loi n° 21 de 2015 sur les droits de l'enfant au Koweït traite plus avant de la manière d'atteindre les valeurs partagées des enfants en matière de droits fondamentaux et de protection. Un aspect important de cette nouvelle loi traite les enfants différemment dans quatre groupes d'âge, et la loi dispose également de mécanismes d'application et de contrôle bien structurés pour garantir l'application.

Sobre la base del antiguo tratado de derechos, incluidos los derechos de los niños, y la moderna Constitución kuwaití aprobada en 1962, la Ley núm. (21) de 2015 sobre los derechos del niño en Kuwait aborda más a fondo la forma de lograr los valores compartidos de que los niños tengan derechos y protecciones fundamentales. Un aspecto importante de esta nueva ley trata a los niños de forma diferente en cuatro grupos de edad, y la ley también cuenta con mecanismos de aplicación y supervisión bien estructurados para garantizar su cumplimiento.

Background

In Islam, almost 1300 years ago, the treatise of rights by Imam AL Sajjad[1] (PBUH) addressed the youngster right, stating that it is the right of younger persons to love them by bringing them up and educating them properly; and to forgive them and cover their faults, be kind to them and help them cover up the mistake committed because of their young age, as this (love and sympathy) is a means of their repentance; and forbear with them and do not quarrel with them, because it is nearer to their guidance.

Kuwait is a Gulf nation based on Islamic principles. It gained independence from the United Kingdom on June 19, 1961, following the termination of the Anglo-Kuwaiti treaty of 1899 through an exchange of communications. Being the first country in the Gulf to establish a constitution, which was on 11 November 1962, wherein both men and women enjoy equal rights, Kuwait holds a distinctive position in the region. It also boasts a parliament and, well ahead of its time, ensured educational equality between men and women. In the 1970s and 80s, other Gulf countries sent their scholars to Kuwait University for advanced education.

Kuwait's constitution, adhering to ideas regarding youngster rights, emphasized the affirmation and support for the protection and advancement of children's rights. Notably, this constitutional child protection predates the UN Convention on the Rights of the Child, which was adopted by the General Assembly on November 20, 1989, and entered into force on 2 September 1990.

The Kuwaiti Constitution, especially in its initial articles, demonstrates a commitment to the welfare of families and children. Article 9 underscores the family as the foundation of society, rooted in religion, morals, and love for the homeland, with the law dedicated to preserving its existence, strengthening bonds, and safeguarding motherhood and childhood. Article 10 reinforces the state's responsibility in caring for young people, shielding them from exploitation, and safeguarding against moral, physical, and spiritual neglect. Furthermore, Article 13 also asserts that "Education is an essential pillar for the progress of society, guaranteed and sponsored by the state."

The Kuwaiti Constitution, especially in its initial articles, demonstrates a commitment to the welfare of families and children.

To consolidate the constitutional provisions prioritizing the welfare of children and to adhere to international treaties concerning child rights ratified by the State of

1. Risala al-Ḥuqūq, narrated by Ali bin Al Hussain bin Ali bin Abi Talib, who was born in Medina in 659 AD and died in 713 AD, this treatise contains over 50 duties of any individual.

Kuwait, legislation specifically addressing child rights was introduced. This legislation, enacted in May 2015, was not created in isolation, but rather built upon the earlier foundation, including the Kuwaiti Constitution, and various provisions within existing laws dedicated to the protection of children.

Child's Rights Law n° 21

Prior to the implementation of the Child Rights Law in 2015, Kuwait already had in place laws and regulations addressing various aspects related to children. Each of these laws tackled specific issues individually and recognized the child's vulnerability and emphasized that their care and protection are collective responsibilities shared by the family, society, and all state institutions.

Importantly, the Law n° (21) of 2015 on Child's Rights outlines several key rights and protections for children in Kuwait.

For example, Law Decree n° (15) of 1979 regarding the Civil Service and the amendments thereto, and Law N° (6) of 2010 regarding working in the private sector, and the amendments thereto, ensure that children are protected from exploitation in the workplace and that they are not subjected to hazardous or harmful work conditions. Law n° (3) of 1983 regarding Juveniles Affairs provides for the establishment of juvenile courts and the appointment of specialized judges to handle cases involving children. This law also outlines the procedures for the protection, care, and rehabilitation of children in conflict with the law.

Law n° (8) of 2010 on the Rights of Persons with Disabilities, and the amendments thereto, ensures that children with disabilities have equal access to education, healthcare, and other services, and are protected from discrimination. Furthermore, Decree n° (401) of 2006, regarding the establishment of the Supreme Council for Family Affairs, and its amendments, and Law n° (112) of 2013, concerning the establishment of the Public Authority for Food and Nutrition, demonstrated the government's commitment to promoting the well-being of families and children through the provision of social, health, and nutritional services. Overall, these laws and decrees worked together to ensure that children in Kuwait were protected from harm, had access to essential services, and were able to exercise their rights to education, healthcare, and other basic needs.

Emerging from the moral and social principles deeply ingrained in Kuwaiti society, a comprehensive review of the legal, health, educational, and cultural rights bestowed upon children became imperative. To enact these principles, a dedicated legislation on children's rights was crafted, encompassing comprehensive protection across health, social, educational, cultural, and penal dimensions. The initial segment of this law set forth overarching provisions, elucidating the definition of a child, delineating age groups, and outlining the general rights and responsibilities of others applicable to children. An essential focus within this new legal framework pertained to establishing guidelines, based upon the age group of the child, for when their complaints would be acknowledged and investigated, as stipulated:

1. From birth until the age of four years.
2. Four years to seven years, listening to them and their complaints and verification thereof.
3. Seven years to fifteen years, their opinion is considerable and shall be heard and taken if necessary.
4. Fifteen to eighteen years, they are allowed to work according to the Labour Law under conditions and controls.

These age group classifications address a novel and significant aspect that was absent in other legislations.

The Law n° (21) of 2015 on Child's Rights

Importantly, the Law n° (21) of 2015 on Child's Rights outlines several key rights and protections for children in Kuwait, including:

1. The right to life, survival, and development in a safe and supportive family environment, protected from all forms of violence, neglect, and exploitation.
2. The right to non-discrimination, regardless of their place of birth, parentage, sex, religion, race, disability, or any other status.
3. The right to express their views freely and to have their opinions taken into account in all matters affecting them, including judicial and administrative proceedings.
4. The right to education, including compulsory education for all children, and the right of access to quality education that promotes their intellectual, social, and emotional development.
5. The right to health, including access to healthcare services, preventive measures, and a healthy and safe environment.
6. The right to a name and nationality, and the right to know and be cared for by their parents, unless it is contrary to their best interests.
7. The right to protection from all forms of exploitation, including child labour, trafficking, and sexual abuse.
8. The right to privacy and protection of their personal information.
9. The right to legal representation and a fair trial in all legal proceedings affecting them.
10. The right to social and financial assistance, including support for children with disabilities and those in need of special protection.

11. The right to participate in cultural and recreational activities that promote their physical, mental, and social development. The law also outlines specific measures for enforcing and monitoring the implementation of these rights and protections, including the establishment of Child Protection Centres, penal procedures against violators, and a confidential register for recording cases of child harm.

Enforcement and Monitoring Measures

For these laws to help children, specific measures were put in place for enforcing and monitoring the implementation of child rights. They are:

1. Child Protection Centres: These centres are responsible for taking necessary measures to treat children exposed to any kind of harm, conducting studies and research on the child's vulnerability to harm, and developing plans and programs to protect children against harm. Each centre includes specialists in psychology, social work, medicine, and law, as well as representatives from relevant government ministries and public benefit organizations concerned with children's issues.
2. Penal Procedures: The law outlines penal procedures against any person who prevents a child from obtaining their rights, violates provisions related to child protection, or intentionally makes an incorrect statement when reporting a newborn. These penalties include imprisonment and fines.
3. Monitoring and Review: Child Protection Centres periodically monitor the procedures and results of the implementation of measures taken with respect to children. They may recommend that measures be reviewed, changed, or suspended to ensure that the child is kept with their family environment and not separated from it, except as a last solution and for the least possible period of time.
4. Confidential Register: Child Protection Centres establish a special register in which all cases of the child being harmed by any party shall be recorded confidentially and may not be disclosed or accessed without permission of the Public Prosecution, the Investigations Department, or the competent court, as the case may be.
5. Hotline: A hotline is provided to receive all complaints of child endangerment. A noteworthy aspect of this law is the establishment of child protection centers and a dedicated hotline, reachable at 147. This hotline allows individuals encountering situations of child endangerment to promptly report to the centers.
6. Child Protection Measures: Child Protection Centres may take several measures to protect the child, including keeping the child with their family upon commitment of their parents to take necessary measures to prevent the risk promptly, organizing methods of social intervention from the concerned party to provide social, educational, and health services necessary for the child and their family, and recommending to the competent court that the child be temporarily placed in one of the Child Protection Centres at their area of residence until the danger ceases.

As we review the measures that Kuwait has carefully adopted to enforce and monitor a child's right, an essential consideration about safety endangerment arises: How does a child safeguard themselves from violence, and is violence singular or multifaceted? The response underscores the child's entitlement to voice their concerns and be heard. Violence is deemed a risk in any form, be it physical, psychological, emotional, or sexual harm, neglect, or when a child is exposed to situations jeopardizing their safe and proper upbringing.

Alongside this legislation, there are additional mechanisms that address offenses or transgressions that may harm a child because of encounters with social media. In Kuwait, the Juvenile Prosecution enacted a resolution in 2018 to govern the utilization of social media platforms by children. The minimum permissible age for using social media sites is set at 13 years, and platforms specifically designed for children are excluded. Furthermore, the regulations explicitly forbid capturing and posting photos of children for the sake of gaining fame. The responsibility for compliance with posting rests on parents, legal guardians, or custodians.

Punishments for Violations of Children's Rights

The law outlines several punishments for violations of children's rights, including:

Sr. n°	Article	Penalty
1.	**Article 80**	Imprisonment for a term not exceeding one year and a fine of not less than 2,000 Kuwaiti Dinars or one of them for anyone who prevents a child from obtaining their rights contained in Articles (3) and (6) of the law.
2.	**Article 81**	A fine not less than 500 Dinars and not exceeding 5,000 Dinars for violating the provisions of Articles (11, 12, 13, 14, 16, 17) of the law.
3.	**Article 82**	Imprisonment for a period not exceeding one year and a fine not less than 100 Dinars and not more than 500 Dinars or one of these two penalties for anyone who intentionally made an incorrect statement of the data required by the law when reporting the newborn
4.	**Article 83**	Imprisonment for a period not exceeding six months and a fine not exceeding 1,000 Dinars or one of these penalties for each guardian, custodian, or person lawfully in charge of a child's care who neglects vaccinations, serums, and inoculums against any childhood and infectious diseases.
5.	**Article 88**	A penalty of not less than two years and not exceeding three years and a fine of not less than 10,000 Dinars and not exceeding 50,000 Dinars for anyone who imports, issues, produces, prepares, displays, prints, promotes, acquires, or transmits any child pornography or sexual exploitation of the child.
6.	**Article 91**	Imprisonment for a period not exceeding one year and a fine not exceeding 2,000 Dinars or one of these penalties for any person who practices any form of violence, psychological abuse, neglect, cruelty, and exploitation against the child.
7.	**Article 92**	A fine not less than 10,000 Dinars and not more than 50,000 Dinars for any person who publishes or broadcasts to the media any information or data, any images or pictures related to the identity of the child during investigation by the concerned authorities on being exposed to danger or being violated the law.
8.	**Article 94**	In addition to these punishments, the law also provides for doubling the penalty prescribed for any crime against the child if committed by one of their parents, guardians, custodians, or persons responsible for their care.

Conclusion

Numerous challenges persist in ensuring the enforcement of child rights, primarily stemming from the novelty of the newest laws and resolutions and the entities responsible for its implementation. Overcoming these challenges requires heightened community awareness, enhanced understanding about children among the authorities associated with this law, and swift responses to help children by addressing reported complaints. As the proverb goes, it takes a village to raise a child. Despite all efforts, with the fast pace and broad access of the internet in all countries, we need to develop more attention to the future of the nation, the child. ■

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Navigating the Legal Landscape of the Emerging Sports Law in the Middle East

Dr. Ghada M. DARWISH KARBON

Les sports ont toujours joué un rôle expressif dans le tissu culturel et sociétal du Moyen-Orient, à savoir : Bahreïn, Koweït, Oman, Qatar, Arabie Saoudite et Émirats Arabes Unis. Des activités traditionnelles à la transition vers les sports modernes, la région a connu une évolution significative de son paysage sportif. Le Moyen-Orient est devenu une plaque tournante pour les manifestations sportives internationales, attirant ainsi des athlètes prometteurs et exceptionnels du monde entier. Parallèlement à cette transformation, le cadre juridique régissant les sports est devenu de plus en plus important. Cet article donne un aperçu du droit du sport au Moyen-Orient et examine les principaux aspects et tendances qui façonnent le paysage juridique.

El deporte siempre ha desempeñado un papel expresivo en el entramado cultural y social de Oriente Próximo: Bahréin, Kuwait, Omán, Qatar, Arabia Saudí y Emiratos Árabes Unidos. Desde las actividades tradicionales hasta la transición en auge de los deportes modernos, la región ha sido testigo de una importante evolución en su panorama deportivo. Oriente Medio se ha convertido en un centro neurálgico de acontecimientos deportivos internacionales, atrayendo así a atletas prometedores y excepcionales de todo el mundo. Paralelamente a esta transformación, el marco jurídico que rige el deporte ha adquirido una importancia progresiva. Este artículo ofrece una visión general del derecho deportivo en Oriente Medio y examina los aspectos clave y las tendencias que configuran el panorama jurídico.

The Middle East boasts a diverse range of sporting activities. In the State of Qatar, falconry, horse racing and camel racing have been part of the country's tradition and history for centuries. These traditional sports have risen to high-profile international events. It has been said that the presence of Sports in the Middle East involves nurturing home-grown talents, conceptualizing and constructing world-class top-notch facilities and fostering an environment conducive for development of both national and international talent.

Sport not only surpasses cultural variances but also helps unite society . Sport, especially football, has always been more than just a game in the Gulf Cooperation Council (GCC) countries but it has been one of the most noteworthy contributors that formed national individualities. Additionally, it plays a huge part in promoting unity and esteem. In fact, football has been frequently regarded as a means of state unity and an edifying bond within the alliance. For example, the formation of the Arabian Gulf Cup in 1970, governed by the Arab Gulf Cup Football Federation, established how sports are viewed as an instrument of unison. It can be said that over the last few decades, the GCC countries have openhandedly maintained the development of football, as well as other sports including more recently tennis, golf and padel.

Each sport is regulated by its respective governing body often affiliated with international organizations. For instance, the recent successful World Cup 2022 that made a historic mark in the field of sports of Qatar has the Qatar Olympic Committee overseeing the nation's sports affairs. According to the Bahrain Sports Committee, there are 27 sports federations in the country. Kuwait has mentioned that their country has 15 sports federations, Oman has 15 sports federations according to the Oman Olympic Committee, the Kingdom of Saudi Arabia has 26 sports federations, the State of Qatar has 24 sports federations and the United Arab Emirates have a total of 24 sports federations. These GCC countries have each contributed to and been involved in world sporting events i.e. Summer Olympics, winning olympic medals, Winter Olympics, Asian Games again winning medals, Football World Cup, Asian Cup, Arabian Gulf and the West Asian Football Federation Championship .

It can be clearly seen that in line with the socioeconomic popularity and contribution of Sports in the GCC countries with its reflective prominence on sports involvement, the construction of world class facilities has clearly impressed both spectators from around the world and its residents. The journey of the largest football stadiums in the Middle East has evolved into becoming a national pride for each country, its nationals and has turned out to be one of the key media focus attentions. Indeed, the all-encompassing

admiration that sports enjoy in the Middle East meant that countries required football stadiums that well-represented them and encouraged their forward-thinking image.

With the increasing popularity and commercialization of sports in the Middle East, legal frameworks governing sponsorship, player agreements, employment contracts, advertising, etc., have become essential and often involve complex negotiations covering aspects such as wage, benefits and image rights. Generally, the legal framework for each country ensures the protection of both athletes and clubs, addressing issues like contract breaches, transfers and dispute resolution mechanisms however the conciliation and enforcement of sponsorship agreements have become an elaborate legal process with an importance on compliance with local rules and guidelines.

The State of Qatar's Sports Law is governed by the Qatar Olympic Committee and the Qatar Sports Law and Regulations ensuring that the athletes and the sports organizations are protected by the law in general, thus, sealing all involved parties under a just and safe sporting environment. The State of Qatar has rigid anti-doping laws in place to protect the integrity of sports competition. The Qatar Anti-Doping Committee is accountable for implementing these laws and regulations and works in cooperation with the World Anti-Doping Agency (WADA) to ensure that all athletes and sports organizations in Qatar conform with the rules. The Qatar Sports Arbitration Foundation (QSAF) was formed as an independent organization with the sole purpose of resolving sports-related disputes as an outcome of the cooperation of four associations in Qatar namely Qatar Olympic Committee, Qatar Football Association, Qatar Stars League and Qatar Players Association. QSAF's working mechanism is said to follow the model implementation of the Court of Arbitration for Sport (CAS) to serve as an independent specialized organization in resolving any sports related dispute.

The Sultanate of Oman established in 1982 the Oman Olympic Committee to govern and regulate in accordance with the country's sports regulations and laws. It has a legal personality and in exercising its functions administrative and financial independence.

The United Arab Emirates recently established the regulatory framework for sports and sports infrastructure in the UAE under Federal Law n° 4 of 2023 "Concerning Sports, Sports Law", unifying and aligning the objectives for the development of the sports sector at both the federal and local levels. This law specified three segments which includes Community Sports Players, Competitive Sports Players and People of Determination.

The Kingdom of Saudi Arabia sports boasts the Saudi Sports Arbitration Centre (SSAC) as the highest exclusive organization for arbitrating sports and sports-related disputes through Arbitration and Mediation. SSAC is an independent and impartial body having financial and administrative independence.

Kuwait has established the National Sport Arbitration Tribunal (NSAT) under Chapter 9 of the Law No. 87 of 2017 of Sport. The NSAT established in Kuwaiti law reflects the necessity of an independent national organization responsible for the resolution of related sports disputes within the State of Kuwait through a system reflecting global standards in the field of sports.

Bahrain The Bahrain Chamber for Dispute Resolution (BCDR) was created by Legislative Decree n° (30) of 2009 (as amended by Legislative Decree n° (64) of 2014 and Legislative Decree n° (26) of 2021) in association with the Bahrain Chamber for the Resolution of Economic, Investment and Financial Disputes. On 12 March 2022, the Rules of Sports Arbitration of the Bahrain Chamber for Dispute Resolution were implemented.

The rise of women in sports in the Middle East has opened cultural barriers and notable women have joined the elite sporting scene not only in the GCC countries but globally as well. The increasing interest in female athleticism in the Middle East has paved way to the achievements of well-known female athletes. In terms of gender parity, sports have allowed women in the Middle East with opportunities by the increasing number of participants in the sports field. In addition, women's involvement in the administration of sport has increased as they take senior leadership positions with each country having female representations on the boards of sports administrators and organisations.

In line with the global efforts to maintain the integrity of sports, countries in the Middle East have implemented stringent anti-doping regulations. Compliance with WADA standards is a priority for all nations, reflecting a commitment to fair play and the health of athletes. Sports law in the Middle East includes provisions for doping control, sanctions for violations, and the establishment of national anti-doping agencies.

Hosting major sporting events has become a common practice in the Middle East, contributing to the region's global recognition. Legal frameworks address various aspects, including bidding processes, event organization, and infrastructure development. Governments and private entities collaborate to ensure the successful execution of these events, with a focus on adhering to international standards and promoting tourism.

As the sports industry continues to evolve globally, the Middle East faces new challenges and opportunities. Issues such as sports gambling, sports regulation, and the protection of intellectual property rights in sports branding are gaining prominence. Sports law practitioners in the region are adapting to these emerging trends, contributing to the development of a comprehensive legal framework.

The Middle East's sports law landscape is dynamic, reflecting the region's pledge to encourage sports at local, regional and international levels. As the sports industry rises, legal frameworks will continue to progress,

addressing emerging challenges and ensuring the sustainable development of sports in the Middle East. Understanding and navigating these legal intricacies is essential for all stakeholders involved in the vibrant world of Middle Eastern sports.

In conclusion, the GCC countries have been seen to effectively utilize sports to bring about a positive change at diverse levels not just domestically and regionally but also on a global level. It is worth noting that at the same time, sports has redefined the GCC countries in a unique and interesting way using varied techniques. Indeed, it can be concluded that the relationships between GCC countries and including that of the West are leaning more on effective strategies such as hosting global and regional mega-sporting events currently and in the future.

The Middle East states will continue hosting such events and continue to devote in developing the sports sector as a means to improve their country's quality of life locally and standing internationally. The region will continue to see sports as a means to diversify their economy, build social cohesion within the GCC countries and as a soft power in foreign policies. ■

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Comparative Cross-Sectional Analysis of Counterfeiting

PART II[1]

United Kingdom and Germany

Editor-in-Chief Comment
Both Steven Sidkin and Christoph Oertel have agreed to answer a variety of questions regarding counterfeit sales from the perspective of English and German law. Mr. Sidkin's analysis is first and focuses on the basics of civil litigation and criminal prosecutions, while also looking at border strategies.

Note de la Rédactrice en chef
Steven Sidkin et Christoph Oertel ont accepté de répondre à diverses questions concernant les ventes de contrefaçons du point de vue du droit anglais et du droit allemand. L'analyse de M. Sidkin est la première et se concentre sur les bases des litiges civils et des poursuites pénales, tout en examinant les stratégies frontalières.

Nota de la Redactora jefa
Tanto Steven Sidkin como Christoph Oertel han accedido a responder a una serie de preguntas relativas a las ventas de productos falsificados desde la perspectiva de la legislación inglesa y alemana. El análisis del Sr. Sidkin es el primero y se centra en los aspectos básicos de los litigios civiles y las acciones penales, al tiempo que examina las estrategias fronterizas.

Dans cet article en deux parties, des avocats anglais et allemands expliquent l'anatomie des procédures pénales et civiles, la saisie des marchandises et le problème des produits de contrefaçon, tout en examinant les erreurs qui peuvent être commises et le sujet des secrets d'affaires. Des conseils pratiques sont également proposés.

En este artículo en dos partes, abogados ingleses y alemanes explican la anatomía de los litigios penales y civiles, el embargo de mercancías y el problema de las mercancías falsificadas, al tiempo que consideran los errores que pueden cometerse y el tema de los secretos comerciales. También se ofrecen consejos prácticos.

1. Part I of this article was published in *Juriste 2023-1*.

The Point of View of English Law

Charlotte KONG

Stephen SIDKIN

1. What are the Main Steps of the Counterfeit Seizure Procedure in your Country?

1.1. Civil Litigation

Rights holders can bring civil claims against counterfeiters for the infringement of intellectual property rights in the High Court (Chancery Division) and in the Intellectual Property Enterprise Court (IPEC) in England and Wales.

The remedies available to a successful claimant include an injunction, an order for delivery, destruction of counterfeit goods, damages, and reimbursement of most legal costs. There are also several interim remedies available while a claim is pending.

1.2. Criminal Prosecutions

In certain circumstances, criminal prosecutions can also be instigated against counterfeiters in matters of trademark infringement, copyright infringement, and infringement of registered design rights, but not unregistered design rights, patents, or claims for passing off a counterfeit item as genuine. In addition, action can be taken against counterfeiters for breach of the Consumer Protection for Unfair Trading Regulations of 2008 (which prohibits traders from engaging in misleading advertising practices), offences under the Fraud Act of 2006, and for various money laundering offences and the offence of conspiracy to defraud.

If a prosecuted party is found guilty of any criminal offence, separate proceedings may also be brought under the Proceeds of Crime Act of 2002 to detect and confiscate any assets that can be attributed to criminal activity, usually over the previous six years.

Criminal proceedings are brought in England and Wales by the Criminal Prosecution Service (CPS), which has a designated Intellectual Property Crime Unit (PIPCU), and Trading Standards authorities. Alternatively, rights owners can elect to commence private criminal prosecutions through a private prosecutor. Such actions will involve significant time and expense, but they may be attractive to a prospective claimant who wishes to maintain control over proceedings, or if other law enforcement bodies cannot act against a counterfeiter due to other competing priorities and limited public funds. However, private criminal prosecutions are rare.

A successful criminal prosecution may result in a counterfeiter being imprisoned or fined. Law enforcement figures such as the police and Trading Standards officers can also make test purchases, enter premises, and seize counterfeit goods pending the outcome of criminal prosecutions. This can be an impactful way to remove counterfeits from the market and deter other infringers, although it will only apply to premises accessible by the public, including trade shows or places where counterfeits are available for sale.

According to the UK Government's latest Trading Standards Survey of 2022-2023,[1] the top-ranking counterfeit products investigated by Trading Standards over this period were tobacco, clothing, electronic vaping products, footwear, electrical goods, watches and jewellery, alcohol, perfume, cosmetics, and fake labels or packaging.

1.3. Seizure of Goods at the Border

HM Revenue and Customs (HMRC) is responsible for policies governing the enforcement of intellectual property rights at the UK border. Border Force officers are stationed at points of entry and will detain goods imported into the UK if they suspect them to be counterfeits.

These measures originate from *Council Regulation (EU) 608/2013,* which is now enshrined in UK domestic law by virtue of section 3 of the *European Union (Withdrawal) Act 2018,* amended by the *Customs (Enforcement of IP Rights) (Amendment) (EU Exit) Regulations 2019*, with the result that the UK operates a system at its borders which largely mirrors that within the EU.

Rights holders can file an Application for Action (AFA) with HMRC to request that Customs officers search for and detain suspicious goods that arrive at the UK border. An AFA may be based on several different intellectual property rights, including copyright, trademarks, trade names, designs,

1. https://www.gov.uk/government/publications/trading-standards-ip-crime-survey-and-successes-2022-to-2023/trading-standards-survey-2022-2023.

and patents, provided they are all protected under UK law. Certain goods will not be detained, including parallel imports, goods manufactured more than the quantities agreed with the rights holder, and non-commercial goods.

From 1 January 2021, EU AFAs ceased to provide protection at the UK border, and vice versa. In addition, following the creation of comparable UK and EU rights following Brexit, it is no longer possible to rely upon EU rights (or international rights designating the EU) in a UK AFA. It is also no longer possible to rely upon UK rights (or international rights designating the UK) in an EU AFA. For these reasons, rights holders must now file a separate AFA with the UK and one member state of the EU if they wish to maintain brand protection at the UK and EU border.

Applicants for UK AFAs also need to specify which parts of the UK the AFA should cover (Great Britain, Northern Ireland, or both). However, the UK system does not govern the movement of goods between Northern Ireland and the Republic of Ireland (where there are no customs controls because of the Northern Ireland Protocol, as amended). Further, there are no customs checks between the EU and Northern Ireland, which also remains within the EU single market and the EU Customs Code.

When Border Force detains a suspicious consignment of goods, it will notify the rights holder, disclose certain information to them (including size of the shipment, identity of the carrier, exporter, importer, and the country of origin), and ask them to confirm whether the goods are counterfeits. A communication will also be sent to the importer inviting them to either abandon the goods or object to their destruction (usually within a ten-day deadline). Border Force will release the goods after this deadline unless:

(a) the importer consents to the destruction of the goods; or

(b) the importer does not respond to the notification from Border Force and the rights holder has confirmed that the goods are counterfeits; or

(c) the rights holder commences legal proceedings against the counterfeiter.

The cost of storing and destroying the goods is borne by the rights holder. The rights holder must also assume liability for compensation and costs for any loss suffered by the owner of seized goods if the goods are subsequently found not to infringe.

2. What are the Pitfalls to Avoid in Conducting this Type of Procedure?

2.1. Civil Litigation

The main drawbacks of civil litigation are cost, time (a typical claim may take around 18 months from start to trial, depending on the Court timetable), and potential costs liability if the rights holder loses the claim. However, litigation can also be used as a tool to exert pressure on counterfeiters to cease their infringing activities. In this regard, it is worth noting that most infringement cases will settle in England and Wales before trial.

Prior to commencing litigation, it is important for the prospective claimant to carefully consider the most appropriate Court in which to bring the action. The High Court generally deals with complex and high value intellectual property litigation (where damages are expected to exceed GBP 500,000), whereas the Intellectual Property Enterprise Court (IPEC) offers a more streamlined (and often, cheaper) approach with shorter trials and specialist judges. The general rule with litigation is that the losing party pays most of the winning party's legal costs. In the High Court, the costs awarded at the conclusion of a case are uncapped, while in the IPEC, the losing party's total costs liability is usually capped at a maximum of GBP 60,000 (save for in exceptional circumstances).

In counterfeiting matters, a prospective claimant should also consider the viability of making an interim application or opting for the Shorter Trial Scheme (STS). The STS may be preferable to obtain a speedy trial, but it is not suitable for IPEC claims, claims that are particularly complex, or where extensive disclosure or witness evidence is involved.

2.2. Criminal Prosecutions

The evidential bar is higher in matters of criminal prosecution than in civil litigation. The burden of proof will require the prosecutor to prove infringement "beyond reasonable doubt" rather than on the "balance of probabilities."

Coupled with this, public bodies, such as the CPS and Trading Standards, have limited and finite resources. Therefore, they only usually involve themselves in large scale matters substantiated by clear evidence implicating the guilty party and may not always be able to bring prosecutions. Even if a prosecution is brought, the rights holder will not have any control over the proceedings unless they initiate a private action.

A successful criminal prosecution is likely to result in a custodial sentence or fine. The same remedies as in civil litigation (for example, including an injunction to cease any infringing activity or damages payable to the rights holder) are not available. When deciding which "route" to take in tackling infringement, a rights holder will need to consider carefully what their objectives are, and what is likely to be the best deterrent to the counterfeiter in question. For example, criminal proceedings may be effective if there is a particular individual who is deeply involved in a counterfeiting operation. However, the best course of action will be heavily dependent on the circumstances.

2.3. Seizure of Goods at the Border

Where counterfeit goods are being imported or exported, effective enforcement of intellectual property rights at the border (for example, through use of an AFA) is a vital weapon to have in a brand's artillery against counterfeiters. However, simply destroying counterfeit goods at the

border is not a long-term solution to counterfeiting issues and should not be a tactic employed in isolation.

It may only be possible to shut down counterfeiting operations at the source through litigation. The information supplied by Border Force, including the identity of the importer and exporter, will be useful in this regard. In addition, if an importer opposes the destruction of goods, a rights holder must commence legal proceedings against the counterfeiter, or the goods will be released.

Rights holders must also ensure that they complete their AFA with as much detailed information as possible to enable Border Force authorities to identify suspicious consignments of goods. Not doing so may result in counterfeits going undetected or in the detainment of genuine goods, which can slow down a brand's own business operations.

Helpful information may include details of authentic goods, together with any distinctive features or barcodes, pricing lists, territories in which genuine goods are produced, authorised importers, suppliers, manufacturers, carriers, consignees or exporters, typical features of counterfeit goods, and any suspected traders or channels of distribution. All information provided to Border Force should be kept up to date (for example, when new product lines are introduced.) Rights holders may also consider alternative and creative ways to engage Border Force to encourage more effective enforcement, such as involvement in brand awareness events.

3. How Can one Reconcile the Protection of Business Secrecy and the Seizure of Counterfeit Goods?

Unlike the position under, for example, French, Spanish, and Italian law, where a preventive measure such as a seizure may infringe business secrecy, English law has no such inhibition. In brief, business secrecy will not result in a preventive measure being ordered by the Courts.

4. Can Provisional Measures be Obtained in an Adversarial Manner Before a Judge?

It is possible to obtain provisional or interim measures in an adversarial manner before a Judge. The Courts in England and Wales are equipped with special measures where action needs to be taken on an urgent basis, including pertaining to serious issues of infringement or counterfeiting.

4.1. Summary Judgment

In straightforward or obvious matters of infringement, a rights holder may issue a claim and subsequently apply for "summary judgment" against a counterfeiter. Under the Civil Procedure Rules, the High Court and the IPEC have the power to determine a claim without a trial if they consider that the defendant has no real prospect of successfully defending the claim, and there is no other compelling reason why the case should be disposed of at trial.

If granted, summary judgment is a quicker and less expensive way to obtain a final judgment and remedies against a counterfeiter. Even if it is unsuccessful, it may have a tactical advantage as the prospective defendant will be forced to set out its position and evidence at an early stage.

However, summary judgment will not be suitable for all cases, including where there are complex issues to be decided, substantial evidence to be reviewed, or the need for expert witnesses. There are also adverse costs risks when making an unsuccessful application.

4.2. Injunctions

Pending the outcome of proceedings, a prospective claimant can apply to the Court for various types of interim injunction. If there are concerns about inadvertently "tipping off" the subject of the injunction application, the injunction may be applied for without notice.

(a) Prohibitory Injunction (Interim or Final)

This type of injunction will prevent a party from doing specified acts, such as selling or importing counterfeit goods. However, it is worth noting that there are significant costs liabilities associated with obtaining such an order. If goods are found not to infringe, the claimant will be ordered to pay damages to the defendant for any loss suffered.

(b) Freezing (Mareva) Order

A freezing order preserves the defendant's assets until a claim is decided. Such orders can be applied for to have effect in the UK or worldwide, although they will not be enforceable overseas, unless they are recognised by a local court in the relevant jurisdiction.

(c) Search and Seizure (Anton Piller) Order

A search and seizure order enables a representative for the claimant to enter the premises of a defendant without notice, and in the presence of a Supervising Solicitor, to search for and remove evidence relevant to the anticipated proceedings. However, making an application for an order of this type is expensive and should only be considered if the claimant knows there is material evidence under a defendant's control which may be destroyed if proceedings are initiated. Any evidence seized can only be used for the purpose of the claim, and not for any collateral purpose.

(d) Third Party Disclosure (Norwich Pharmacal) Order

A so-called Norwich Pharmacal order forces a third party (which is not a subject of the proceedings) to disclose documents or evidence relevant to a claim. It will only be granted if it is necessary in the interests of justice.

(e) Intermediary Injunctions

An intermediary injunction requires an "intermediary" to prevent an infringer from using its services to infringe and particularly applies to the issue of online sales of counterfeit goods. This type of injunction is only available in the High Court.

Applications for this type of injunction in the past have included:

- "blocking" injunctions to force internet service providers to block access to websites advertising and selling the counterfeit goods (*Cartier International AG and others v British Sky Broadcasting Ltd and others [2014] EWHC 3354 (Ch), 17 October 2014*); and
- an injunction to prevent a tenant of a market hall to sub-let marketplaces for use by traders known to be selling counterfeit goods (*Tommy Hilfiger Licensing LLC and others v Delta Center a.s., Case C 494/15, 7 July 2016)* (retained EU law).

However, the usual rule is that the rights holder will be required to reimburse the intermediary for their reasonable costs of implementing the injunction.

4.3. Online Counterfeits

It is notoriously difficult to monitor and police the sale of counterfeit products online. However, many website registrars, hosting providers, social media platforms (such as Facebook and Instagram), and operators of e-commerce websites (such as Amazon and eBay), have procedures in place whereby rights holders can report infringement of their intellectual property rights and request that such content is removed, or access to it is disabled.

In fact, under the Electronic Commerce (EC Directive) Regulations of 2002 (which is not identified for repeal in the Retained EU Law Revocation and Reform Act of 2023 either in terms of or as a result of the effect of section 2 of that Act), because the 2002 Regulations were part of the Assimilated Law under section 2 of the European Union (Withdrawal) Act of 2018 (as later amended), an information society service provider is required to act in taking down items when receiving a report of infringement from a rights holder.

However, it is worth noting that the 2002 Regulations did not implement Article 15(1) of the EU Directive, which prohibited a general monitoring requirement. As such, there is no general obligation on information society service providers, when providing the services, to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.

However, it is difficult to force such parties to take the required action. Takedown requests have a varying level of success across different platforms and are much less likely to be successful where a platform's business model depends upon the continued availability of goods at low prices. On the other hand, many platforms will have more

of a vested interest in preventing the sale of counterfeit goods than, for example, preventing the sale of parallel imports.

5. From a Practical Point of View, do You Think that Seizure Procedures are Effective or too Complex, and is There an Alternative Way to Prove Infringement?

The answer to this question depends on the identity of the party for whom the lawyer is acting. It also depends on the social objective of the legislation. If, for example, the objective is to protect the creative industries, then it would be preferable to find ways to make seizure procedures less complex, less expensive, or both. In the interim, because of Brexit, operating a seizure programme across Europe involving the UK and EU is more expensive, and this is a disadvantage for the creators of intellectual property.

In contrast, the issue of whether or not there is an alternative way to prove infringement would probably involve changes to both civil and criminal law, which could have knock-on effects in other areas of civil and criminal law and, as such, is likely undesirable. ■

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The Point of View of German Law

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1. What Are the Main Steps of the Infringement Seizure Procedure in Germany?

Both German law and the law of the European Union protect IP rights in Germany, including in trademark law, design law, competition law, patent law, copyright law, and trade secret law. The protection, and remedies for infringement, include claims for injunctive relief, acquisition of information, damages, recall, and destruction of goods. In particular, recall and destruction claims are secured when there is a seizure of IP infringing goods resulting from preliminary injunction proceedings.

The seizure, as an interim measure, must be applied for separately and must be submitted in Germany to the competent district court at the place of the IP right infringement. In the case of infringements in internet commerce, the infringed party may submit its application throughout Germany.

The infringed party can simultaneously request the seizure against any infringer in question, e.g. the manufacturer, importer, warehouse keeper, distributor, or even retailer. This may exert significant pressure on the manufacturer.

The application is usually directed towards surrender of the infringing goods to the competent bailiff and storage with a custodian (sequestration). It is sufficient to establish the facts on which the claim is based by means of an affidavit. The application must be filed within a short time limit.

The court decision ordering the seizure shall be served by the applicant to the defendant within one month. The physical seizure shall be carried out by the bailiff within one week.

If there is an application for appeal against the seizure order, an oral hearing is then usually held within three months before the court which issued the order. An application for the temporary suspension of execution usually has little chance of success in the preliminary injunction proceedings.

After the oral hearing, a verdict is issued, which may be appealed to the next higher court. In such cases, it takes about six months to reach a decision in the second instance.

As the seizure proceedings are only interim injunctions, the infringed party must, in principle, pursue main court proceedings in order to reach a final court decision on the infringement matter. However, in order to avoid lengthy and time consuming court proceedings, the defendant may as well submit a letter to the infringed party, in which the infringer acknowledges the provisions of the preliminary injunction proceedings as final and legally binding.

Further, it is possible to seize infringing goods at the border during customs clearance. Border seizure is admissible, if the infringing goods can be stopped when entering the European Union and/or the Federal Republic of Germany. This procedure might be more accessible for the applicant because border seizure by the customs authorities requires only a suspicion of an infringement of property rights. It is not necessary at a border cross to prove that an infringement of property rights actually exists, and costs are relatively low.

The standardised application for seizure must be submitted to the Directorate General of Customs and may be supplemented by an application for removal of the infringing item. If the customs authority orders the seizure, it shall immediately inform the person entitled to dispose of the goods and the applicant (most of the time, the alleged infringer). The applicant shall be informed *ex*

officio about the origin, quantity, and place of storage of the goods as well as the name and address of the person entitled to dispose thereof. The person entitled to dispose of the goods is entitled to file an objection within two weeks, which obliges the applicant to take legal action.

It is very useful to have direct contact to the competent customs authorities in the big harbours and airports through which infringing goods are shipped.

2. What Are the Pitfalls to be Avoided in Conducting this Type of Procedure?

In preliminary injunction proceedings, the time limits are short for urgency reasons, starting from the time when the infringement and the infringer have been discovered. The length of the time limit varies from court to court. Some courts allow the applicant only four weeks, others accept time limits of eight weeks between knowledge of infringement and submission of the application. If a person hesitates to mandate and retain a lawyer after gaining knowledge of an infringement, this time limit can be very short. As the deadlines are so short, giving advice in these cases need a lot of immediate attention from the involved lawyers. In particular, foreign colleagues need to act quickly for a referral in order not to endanger their clients' rights.

The seizure order is only served to the applicant and must then be served to the opponent within the party business. If the opponent is domiciled in a non-EU country and has not appointed a legal representative in Germany, service is governed by international procedural law. This can be difficult to determine. In principle, service must be effected within one month after receipt of the seizure order. For service to other EU countries, it is sufficient if the applicant requests foreign service from the court within the one-month time limit and the actual service is effected "soon," i.e. without delays for which the applicant is responsible. If this deadline is missed, the seizure may be set aside.

The applicant is generally liable for the costs of the requested measures taken by the courts and cooperating public officials. The applicant only has a claim for reimbursement against the defendant. For example, if the claim for reimbursement cannot be realised abroad, the costs of the seizure are borne by the applicant.

In most cases involving foreign countries, the opponent must be served not only with the original court order, but also with a certified translation. If this is not done, the opponent can refuse such service. This may have negative consequences for the urgency time limit.

3. How Can one Reconcile the Protection of Business Secrets and the Seizure of Counterfeit Goods?

In principle, the balance between the protection of business secrets and seizures in preliminary injunction proceedings is met in such a way that the application for seizure can also be accompanied by an application for the provision of information regarding the origin, distribution channels, quantity, and sales channels of the seized goods. These rights to information are expressly regulated in various parts of the law. However, if the opponent refuses to provide the information, the applicant must pursue the opponent's claims for information in court and, if necessary, also enforce them.

4. Can One Obtain Provisional Measures in a Contradictory or Non-Adversarial Manner Before a Judge?

In particularly urgent cases, provisional measures can be applied for without a prior hearing of the opponent and oral proceedings. This procedure is common in seizure situations to prevent thwarting of the seizure.

However, the opponent retains its right to be heard. It can lodge an objection against the order after it has been served and thus initiate a contentious procedure.

V. From a Practical Point of View, do you Consider the Procedures of Infringement Seizure to be Efficient or too Complex, and is There an Alternative to Prove the Infringement of Rights?

Seizure in preliminary injunction proceedings is a demanding procedural method. Because of the urgency, the right holder has only a short period of time to execute it. It should only be carried out by experienced attorneys. It must be considered that the applicant is liable to compensate for the damage caused by the seizure if the seizure proves to be unjustified from the beginning and the applicant has not immediately released the goods in response to the objection of the opponent. In particular, if the seizure fails in the end, demurrage costs for containers seized in ports, for example, can be a high and, eventually, exceed the value of the seized goods.

Filing for border seizure should also be conducted by qualified lawyers or experienced staff. Any seizure incurs the risk of damages if goods are stopped without reason. Having trust and relationships with customs authorities is beneficial.

An effective means to stop infringement on marketplaces, such as Amazon and eBay, is to file a complaint through Amazon brand registry and eBay VeRi. In case of infringement of registered rights, the offers by opponents are usually stopped immediately. ■

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Regards croisés : le contre interrogatoire en droit pénal et arbitrage

Fannie BRUNEAU

Agathe BLANC

Cross-examination has come to dominate criminal law and arbitration. Although the importance of this technique has been questioned in arbitration, as a witness's recollection is not always reliable, cross-examination remains central to the process. In criminal law, while pleadings remains the essential part of the trial, cross-examination is widely used at the hearing. We interviewed respected practitioners, judges, and lawyers about tools and techniques. What they have to say may be useful in your own practice!

El contrainterrogatorio ha llegado a dominar el arbitraje y el derecho penal. Se ha cuestionado la importancia concedida a esta técnica en el arbitraje, ya que el recuerdo de un testigo no siempre es fiable. Sin embargo, el contrainterrogatorio sigue siendo fundamental. En derecho penal, mientras que el debate oral sigue siendo la parte esencial del juicio, el contrainterrogatorio se utiliza mucho en la vista. Los profesionales utilizan esta herramienta, y sus técnicas pueden diferir. Para tener una visión de conjunto, hemos entrevistado a profesionales: jueces y abogados. Lo que tienen que decir podría ser útil en su propia práctica.

I. Des objectifs assez distincts

1. L'origine

Les premières manifestations du contre-interrogatoire dateraient de 399 av. JC. Afin d'assurer sa défense, Socrate interroge Mélétos, l'un de ses principaux accusateurs. Si ce contre-interrogatoire n'a pas permis à Socrate d'échapper à une condamnation, il était l'outil indispensable pour faire face à la rumeur de la foule, Socrate déplorant devoir « [se] *battre contre des sortes d'ombres en prononçant* [sa] *défense, et réfuter l'adversaire sans que personne ne* [lui] *réponde* »[1].

Au fil du temps les méthodes d'interrogatoire ont évolué pour le bien de tous. Pendant la période de l'Inquisition, le contre-interrogatoire était souvent synonyme de tortures, le plus gros risque étant que le témoin meure des suites de l'interrogatoire.

Selon le professeur Langbein[2], l'institutionnalisation du contre-interrogatoire en Angleterre daterait des années 1730, en raison du recours habituel aux avocats, de la multiplication des témoignages frauduleux, et du système de la Couronne[3].

Dans le contentieux civil et commercial français, le contre-interrogatoire n'a pas encore trouvé sa place [...].

La pratique du contre-interrogatoire s'est imposée dans la tradition de *Common Law*. Il est devenu un outil si important qu'il a été consacré en matière criminelle en 1791, dans le sixième amendement à la Constitution des États-Unis : « *in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witness against him* ». Le contre-interrogatoire a ensuite conquis la matière civile. Comme nous l'indique John

1. F J Church, *The Trial and Death of Socrates*, A L Burt, 1908.

2. John H Langbein, The Origins of the Adversary Criminal Trial (Oxford University Press, 2003) 168- 70.

3. Quand un accusé devenait témoin à charge dans une affaire pénale et qu'il était encore susceptible d'être condamné pour une infraction visée dans ladite procédure, la Couronne était tenue d'abandonner les poursuites à son égard.

Nathanson, avocat à New York, chaque témoin qui dépose est soumis à un contre-interrogatoire.

Dans le contentieux civil et commercial français, le contre-interrogatoire n'a pas encore trouvé sa place, sauf à la chambre internationale de la Cour d'appel de Paris créée en 2018.

L'arbitrage international a essentiellement repris la technique du contre-interrogatoire telle que développée en Common Law.

En France, la place de la question s'apprécie au stade de l'audience pénale, et devient de plus en plus présente. Le contre-interrogatoire est quasiment inexistant au stade de l'enquête – les parties n'ayant pas accès au dossier et n'ayant pas l'occasion de questionner la partie adverse sauf en confrontation – et est très peu utilisé pendant l'instruction pénale. Ainsi que le rappelle M. le Bâtonnier Jean-Yves Le Borgne, en droit français, le contre-interrogatoire s'effectue sur la base d'une enquête dont les retranscriptions sont à la disposition des magistrats et des avocats. L'approche est donc différente.

Le contre-interrogatoire n'est pas forcément l'outil permettant la manifestation de la vérité.

Afin d'appréhender au mieux l'emploi de cet outil dans ces deux matières, nous avons interrogé des spécialistes, tant conseils que juge et arbitre.

2. Le but

Quel est l'objectif du contre-interrogatoire de nos jours ? Est-il le même en arbitrage et en matière pénale, tel qu'il est pratiqué en France ?

Selon notre Confrère John Nathanson, le contre-interrogatoire est important dans le procès de Common Law pour la manifestation de la vérité, consistant souvent à démontrer que le témoin atteste d'une vision biaisée de la réalité.

En matière d'arbitrage, l'objectif est similaire. Mais conseils et arbitres ne sont pas toujours sur la même longueur d'onde.

Selon notre Confrère José-Manuel García Represa, avocat spécialiste de l'arbitrage, l'objectif du contre-interrogatoire pour les conseils évolue en fonction du dossier et des premières réponses du témoin ou expert. L'objectif peut être de démontrer que le témoin n'est pas indépendant ou qu'il n'était pas présent sur le site de l'incident au moment clé, ou que l'expert a adopté les instructions de son client, sans réaliser d'analyses indépendantes. Le conseil cherche donc souvent à décrédibiliser le témoin.

Ce n'est pas le but recherché par les arbitres. Selon notre Consœur Carine Dupeyron, avocate spécialiste de l'arbitrage, pour l'arbitre, l'intérêt est d'échanger avec les protagonistes et personnifier une affaire.

Elle nous confie qu'un contre-interrogatoire bien mené peut inciter un arbitre à changer son point de vue sur un dossier. Arrivée à l'audience convaincue par l'étude des

écritures et pièces de l'orientation que devait prendre sa décision, Carine Dupeyron a changé d'avis après l'audience. Le contre-interrogatoire peut donc renverser la vapeur !

Quid de la procédure pénale française ? Selon M. le Bâtonnier Jean-Yves Le Borgne, un interrogatoire n'a pas toujours de but. Il faut parfois se lancer et « *ramasser dans son filet ce qu'il y avait comme poissons dans la mer ce jour-là* ».

Le contre-interrogatoire n'est pas forcément l'outil permettant la manifestation de la vérité. Il peut être utile lorsque les dires du témoin sont catastrophiques pour le dossier. On tente alors de le décrédibiliser, de démontrer qu'il dit n'importe quoi. A l'inverse, si le témoin est favorable, selon M. le Bâtonnier Jean-Yves Le Borgne, il est inutile de l'interroger. Parce qu'il pourrait finir par se contredire. Mais aussi parce qu'il faut parfois savoir éviter la contamination psychologique qui mènerait le juge à croire que le témoin ne vous est favorable que grâce à la tournure de la question posée.

Pour M. le Premier Président Jean-Michel Hayat, ancien président de cours d'assises, la place de l'interrogatoire est essentielle, les jurés ne connaissant pas le dossier. Il s'agit de permettre aux jurés de comprendre les faits reprochés à l'accusé et de juger, en conscience, de son éventuelle responsabilité. Néanmoins, cette pratique doit être réservée en priorité au magistrat, dès lors qu'il lui revient de conduire les débats.

Si les opinions de nos Confrères diffèrent sur l'utilité du contre-interrogatoire, tous s'accordent à dire qu'il reste un élément parmi d'autres et que la preuve écrite est plus fiable.

3. La cible

Si vous êtes soumis à un contre-interrogatoire, soit vous êtes tiers à la procédure - témoin ou expert - soit vous êtes partie à la procédure, en qualité de mis en cause ou plaignant dans le procès pénal.

En arbitrage, pour les conseils, le contre-interrogatoire des témoins permet de présenter un narrateur au tribunal arbitral, afin de situer un document dans un contexte par exemple.

Notre Consœur Carine Dupeyron nous indique que les arbitres ont souvent des attentes importantes quant aux témoins, qui donnent un peu de couleurs à un dossier. Lors de l'étude du dossier, Carine Dupeyron identifie les témoins qu'elle a envie d'entendre. Et il arrive qu'un témoin qui parait anodin à la lecture du dossier, se révèle important au cours du contre-interrogatoire.

Notre Confrère José-Manuel García Represa nous confie qu'il existe une certaine défiance envers les témoins de faits, parce que leur mémoire pourrait être défaillante, et parce qu'ils peuvent se retrouver à témoigner dans une affaire impliquant l'entreprise dans laquelle ils travaillent encore. Ils sont ainsi dans une situation de conflit de loyauté, ou à tout le moins dans une position qui permet de douter de leurs dires. Imaginez-vous une salle d'audience, face à trois inconnus et entourés des parties et de leurs conseils, , passé au grill sous les yeux de votre patron… ambiance tendue, peu propice à la manifestation de la vérité.

Les experts ne sont pas soumis à cette pression. Ils ont un rôle pédagogique, celui d'éclairer le tribunal sur des questions techniques. Notre Confrère José-Manuel García Represa nous dépeint une course aux experts à chaque dossier, ceux-ci étant peu nombreux. Il est donc commun pour les praticiens de retrouver les mêmes experts au fil des dossiers qu'ils traitent. Notre Confrère nous confie avoir interrogé onze fois le même expert. A ce stade, difficile de ne pas connaître par cœur les questions et réactions de l'autre.

En matière pénale, le contre-interrogatoire se focalise sur les protagonistes du dossier : l'accusé, la partie civile et les témoins. Les experts participent à la manifestation de la vérité sur la base du rapport qu'ils ont rédigé au cours de l'enquête et/ou de l'information judiciaire. Leur présence à l'audience, et la possibilité de les entendre, dépend soit de la nature des faits, soit de la formation de jugement. Dans les affaires techniques, comme en droit pénal de l'environnement ou de la santé, les experts jouent un rôle majeur. Néanmoins en pratique, interroger les experts reste un exercice rare.

Les experts sont présents devant la Cour d'assises en raison de la particularité de l'audience. L'existence de jurés, citoyens tirés au sort, impose que la totalité du dossier soit présentée à l'audience, afin de leur permettre de se forger une conviction sur les faits dont ils ont à juger.

II. Des pratiques diamétralement opposées

1. L'organisation de l'audience

Dans le procès pénal, il revient au Président de mener les débats, en ce qu'il détient la police de l'audience.

M. Jean-Michel Hayat compare l'audience de Cour d'assises à une tragédie grecque dans laquelle chaque acteur entre en scène : au fur et à mesure l'accusé est confronté aux faits. Un puzzle se reconstitue alors sous les yeux de la Cour et des jurés.

Le Premier Président débute l'audience d'assises par l'interrogatoire de personnalité de l'accusé, avant un premier interrogatoire au fond qui repose sur une question : « *racontez-nous votre version des faits* ». Cet interrogatoire doit permettre aux jurés de comprendre la position de l'accusé sur les faits pour lesquels il comparait. Il permet également à l'accusé de s'expliquer, sans que sa parole ne soit contredite. Viennent ensuite les autres interrogatoires et contre-interrogatoires dont l'organisation peut varier mais pour lesquels une règle demeure : la défense doit avoir la parole en dernier.

En matière pénale, le contre-interrogatoire se focalise sur les protagonistes du dossier […].

En matière d'arbitrage, l'organisation est plus souple en ce qu'elle repose souvent sur un accord des parties qui décident du temps dédié à chaque phase de l'audience. Aux membres du tribunal arbitral de se faire ensuite les maîtres du temps afin d'assurer l'égalité entre les parties.

Il existe tout de même un schéma type. L'audience commence par un « opening statement », dans lequel chaque partie expose les faits et sa position. Puis viennent les interrogatoires et contre-interrogatoires des témoins et experts. Enfin, le « closing statement », consiste en une sorte de conclusion générale et de rappel des demandes des parties.

2. La préparation des interrogés

Le point clivant des deux mondes réside dans la préparation des personnes soumises au contre-interrogatoire. Préparation admise en arbitrage, avec ses limites, et absente dans le procès pénal.

En matière d'arbitrage, s'il est communément admis que les témoins et experts cités vont être préparés par les conseils, ils ne peuvent pas être « *coachés* ». La préparation consiste en une présentation du déroulement de l'audience, suivie de séances d'exercices de simulation. Cet exercice ne doit pas se transformer en véritable *boot-camp* à l'occasion duquel le témoin apprendrait par cœur des réponses toutes faites. L'objectif de la préparation est de faire comprendre au témoin le contexte et le type de questions qui pourraient lui être posées.

Dans le procès pénal, la question de la préparation ne se pose pas dans les mêmes termes. Elle est limitée à la seule partie dont l'avocat assure la défense : la partie civile ou le mis en cause. Il est inimaginable de préparer un témoin, ou un expert. Cette différence tient à la nature même de l'audience pénale : les témoins sont cités par le tribunal ou la Cour d'assises, le Ministère public, et rarement, par les parties. Avant de commencer la déposition, le témoin prête serment de « *parler sans haine et sans crainte, de dire toute la vérité, rien que la vérité* »[4] devant la Cour d'assises, et de « *dire toute la vérité, rien que la vérité* » devant le tribunal correctionnel[5]. Seuls les membres de la famille du mis en cause et les mineurs de 16 ans ne prêtent pas serment.

Les équipes d'arbitrage préparent de véritables dialogues, essayant de prévoir toutes les versions possibles du film.

La différence entre les deux procédures est majeure mais il ressort de nos échanges avec nos Confrères que la préparation des témoins et experts, si elle est autorisée en matière arbitrale, ne doit pas biaiser le fond du discours de la personne interrogée. Une préparation trop importante finirait par se révéler, tant le témoignage pourrait sonner faux ou mécanique. Tout l'intérêt du contre-interrogatoire disparaitrait.

3. La pratique des interrogateurs

Notre Consœur Carine Dupeyron et M. Jean-Michel Hayat divergent sur l'intérêt du contre-interrogatoire pour celui qui préside l'audience.

M. Jean-Michel Hayat rappelle que si la procédure d'instruction est inquisitoire et secrète, le procès pénal est public et contradictoire, laissant la possibilité aux parties de mener des interrogatoires et contre-interrogatoires pouvant modifier sensiblement la lecture du dossier. Il ajoute :« *certains diront que c'est bien cela, la magie de l'audience* ». C'est dans le feu roulant des questions que la vérité peut émerger, la culpabilité se dessiner ou tout au contraire le doute se profiler. Ce sont bien ces « cross examinations » qui occupent désormais une place centrale à l'audience pénale, concurrençant l'importance de la plaidoirie. Il en découle une « nouvelle donne » puisque toutes les personnes qui défilent à la barre sont soumises à ces questionnements croisés.

La possibilité pour les parties de poser directement des questions aux personnes citées est relativement récente. Le Code de procédure pénale prévoyait initialement que les avocats devaient passer par l'intermédiaire du Président pour poser leurs questions.

En matière d'arbitrage, la prise de parole du témoin à l'audience arbitrale se divise en trois phases principales : (1) la phase du « *direct* », l'avocat présente le témoin au tribunal arbitral, (2) la phase de « *cross-examination* », effectuée par la partie adverse, (3) la phase du « *re-direct* » l'avocat repose les questions à son témoin.

Si notre Consœur Carine Dupeyron, regrette parfois le style très mécanique du contre-interrogatoire, pour les conseils, il s'agit d'un exercice préparé dans le moindre détail. Notre Confrère José-Manuel García Represa nous confie qu'avec son équipe, il rédige un véritable script détaillant toute éventualité. Pour chaque question posée, toutes les réponses sont envisagées puis toutes les questions suivant chaque réponse envisagée sont anticipées. Les équipes d'arbitrage préparent de véritables dialogues, essayant de prévoir toutes les versions possibles du film. Un travail d'orfèvre qui n'efface cependant pas une part d'improvisation, tant il est impossible d'anticiper toutes les réactions d'une personne. Le contre-interrogatoire, s'il se prépare, reste un art oratoire.

Si les techniques diffèrent, tous semblent s'accorder sur une chose : ne pas poser une question dont on ne connait pas la réponse. Sauf si le cas est extrême et que, peu importe la réponse, cela ne peut pas affecter la situation. Il est en général préférable de se limiter à des questions fermées, ne donnant pas la possibilité à la personne interrogée de se perdre dans les méandres d'une histoire qu'elle veut raconter et qui vous dessert.

Par ailleurs, si les juges et arbitres tendent à laisser une certaine liberté aux conseils qui interrogent et à ne pas les interrompre, ils arrêtent le processus quand le témoin perd pied, ou que la question n'est pas justifiée et insultante.

En conclusion, pour mener un bon contre-interrogatoire, il faut être fin stratège, subtile dans ses questions, ne pas poser la question de trop… Le contre-interrogatoire est un véritable art qui ne se maîtrise que par la force du travail. ■

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4. Article 331 du Code de procédure pénale.
5. Article 446 du Code de procédure pénale.

El Derecho Penal en Argentina y en América Latina hoy: demanda de solución de problemas versus los nuevos desafíos

Dr. Mariano CÚNEO LIBARONA

The author approaches Criminal Law in two different aspects:

1) the current state of criminal dogma, its problems, and the discussions that arise around it; and

2) the complex situation that Criminal Law is going through in Latin America and, especially, in the Argentine Republic. Solutions are demanded to the problems posed by the new challenges of these times.

L'auteur aborde la question de l'état actuel du droit pénal sous deux aspects différents :

1) l'état actuel de la dogmatique pénale, ses problèmes et les discussions qui l'entourent ; et

2) la situation complexe du droit pénal en général en Amérique latine et, en particulier, dans notre pays, la République d'Argentine, ainsi que la demande de solutions aux problèmes posés par les nouveaux défis de l'époque.

En el trabajo publicado por la Unión Internacional de Abogados en octubre del año pasado[1], expuse sobre las controversias del derecho penal. Allí señalé que entre los diferentes dilemas me interesó resaltar la marcada diferencia entre los postulados de la doctrina y los legisladores, los jueces y los fiscales. Asimismo, me dispuse a indagar dónde se encuentra el derecho penal, en qué lugar de la evolución de la civilización y del hombre, hacia dónde se dirige, si brinda respuestas socialmente adecuadas y, en especial, en la relación -muchas veces tensa, en otras traumáticas-, entre: a) el Estado, sus agencias u operadores y el derecho penal y b) entre el poder y el hombre.

1. Véase, Mariano Cúneo Libarona, *Las controversias del Derecho Penal*, publicado con motivo del 67° Congreso de la Unión Internacional de Abogados en Roma del 25 al 29 de octubre de 2023. https://www.uianet.org/es/biblioteca

También mencioné que sin duda existe un nuevo derecho penal que modificó el que existía, con acuerdo de todos, hace 50 años y, en consecuencia, se generan controversias, dilemas y discusiones en torno a opiniones contrarias que inciden en la teoría y en la práctica judicial sobre los justiciables (víctimas, imputados y la sociedad en su conjunto).

En función de lo dicho enfoqué el abordaje del tema sometido a estudio desde dos aspectos diferentes: 1) el estado actual en que se encuentra la dogmática penal, la teoría del delito, sus problemas y las discusiones que se presentan; y 2) la compleja situación que atraviesa el derecho penal en general, tanto en el mundo como en Latinoamérica y, especialmente, en nuestro país la República Argentina-, con un modelo de control social que tutele bienes jurídicos o expectativas atinentes a la vigencia de la norma.

Somos un país económica, moral y socialmente en crisis en el que impera un clima de desorientación y desilusión general.

Ya que el texto fue publicado en toda su extensión por la UIA haré una breve mención del análisis de la dogmática penal realizado en dicha oportunidad, y me centraré en este artículo en la segunda de las situaciones planteadas, a saber, cómo se encuentra el derecho penal en la Argentina y en América Latina hoy, y en su demanda de solución de problemas versus los nuevos desafíos.

Con respecto a la dogmática, hice especial mención sobre su finalidad que consiste en la contribución a la seguridad jurídica mediante los límites que se imponen al poder punitivo, y destaqué su función de ciencia práctica para servir a la realización racional de una determinada actividad del Estado, teniendo como guía el principio constitucional de la separación de poderes.

En cuanto a la teoría del delito, brevemente cabe mencionar que es un instrumento dogmático conceptual que tiene el propósito de: a) asegurar la vigencia de las garantías y principios fundamentales, y b) permitir una

aplicación racional de la ley a los casos concretos. Por medio de ella se establece un orden para el planteamiento y la resolución del proceso que implica la aplicación de la ley penal a través de un método analítico.

[…] El derecho penal no brinda todas las respuestas a las expectativas comunitarias […].

Consecuentemente, la teoría del delito es parte de la Constitución Nacional, sirve de respaldo al Código Penal, representa los derechos humanos esenciales y los principios más trascendentes que constituyen un límite, un valladar, una barrera contra todas las arbitrariedades. Asimismo, es una guía de procedimiento y actuación para los legisladores, jueces, fiscales y abogados.

Luego me adentré en el análisis de las grandes transformaciones que evidenció la dogmática penal en orden a los conceptos, al contenido y a la forma en que se interpretó con el correr del tiempo.

En la publicación a la que me remito expuse sobre la teoría de la imputación objetiva, las controversias en torno a los conceptos de culpa y dolo, la inexistencia de un límite preciso entre el peligroso dolo eventual y la culpa consciente o con representación y, particularmente indagué sobre los delitos de comisión por omisión y las discusiones y manifestaciones que las diferentes corrientes doctrinarias aportaron al tema, en especial la alemana.

Asimismo en relación a la antijuridicidad, la conducta típica contraria a derecho y sus causas de justificación (permisos o autorizaciones para realizar la acción prevista en la ley) que, en otros tiempos, parecía un tema incontrovertible que no planteaba discusiones, y que en la actualidad no es tan así, en especial por los debates suscitados sobre su alcance, límites y prueba (por ejemplo, la presencia cierta de la necesidad, el marco preciso del legítimo ejercicio de un derecho) y la disputa que se acrecienta en casos de exceso y su real configuración, y con ello los problemas en la legítima defensa (CP, art. 34 inc. 6).

El tipo de culpabilidad (que comprende, por el contrario, aquellos factores que caracterizan la actitud subjetiva o interna frente al derecho), además el derecho penal de autor, las teorías peligrositas, la legitimidad de los delitos de comisión por omisión, y la discusión en torno a la extensión de la responsabilidad aplicando la posición de garante, así como la comparación de la aplicación de la figura en nuestro país y en otros.

También me referí al análisis del concepto funcional de la pena fundado en la necesidad preventiva de sanción, y la discusión en torno a los elementos de los que depende su merecimiento (la necesidad preventiva de punición de Roxin y Jakobs) y la distinción entre el tipo del injusto (que abarca aquellos elementos de la figura delictiva en los que se expresa el sentido de la prohibición de la correspondiente norma jurídica).

Finalmente, el análisis de la capacidad del sistema penal para cumplir con sus objetivos básicos y más elementales y la demanda de solución de problemas versus el mantenimiento de los principios constitucionales.

Dicho esto, me adentraré sucintamente en la situación actual que atraviesa el derecho penal en mi país y en América Latina.

En la Argentina y en muchos países de América Latina, en los últimos años, la ola de inseguridad, marcada por un significativo aumento en la comisión de delitos, algunos con amplia repercusión pública, ha monopolizado la atención de la sociedad y ocupa uno de los primeros lugares entre los temas que movilizan la demanda social.

Es indudable que hoy existe una situación de transculturación, con cambios sustanciales en la forma de vida, así como una mutación en nuestras pautas de valoración general y, particularmente, variaciones en nuestras normas de procedimiento comunitario con una manifiesta tendencia transgresora. Pienso que no exageramos si sostenemos que existe un culto a la transgresión. La palabra y la confianza no son ni valen lo que eran en otros tiempos. La moral no es la misma. El incumplimiento y la infracción a las normas están a la orden del día. Hay poco respeto, educación y diálogo.

La pérdida de valores es una característica de nuestros tiempos. La familia y el colegio o la escuela no son lo que eran en otra época. La calle ya no es la misma. Hoy existen muchos peligros (violencia, narcotráfico, etc.).

La cuestión ha llegado a un punto en que, en ocasiones, la costumbre y el hábito llevan a no advertir que, con una determinada acción u omisión, se está vulnerando la ley. Somos un país económica, moral y socialmente en crisis en el que impera un clima de desorientación y desilusión general.

Lamentablemente, nadie puede dudar que nos encontramos un Estado ineficiente, que no cumple sus funciones esenciales, que no brinda trabajo, educación, cultura, salud, vivienda y seguridad, en la medida en que la población lo requiere. No se fomenta la inversión. No se ataca la corrupción con el enorme daño que provoca. Por ello, es nuestro deber impulsar un plan serio orientado a suministrar igualdad de oportunidades resguardando el marco de la seguridad jurídica. Y al respecto sostenemos con énfasis que el mejor remedio contra la delincuencia son el empleo y la educación. Hasta ahora sólo se atendió el presente sin pensar en el futuro. Es momento de prestar atención a las víctimas y a los vulnerables. Debemos fomentar una cultura ética, a través de la honestidad y del ejemplo.

Lamentablemente los jóvenes no tienen el esfuerzo, la responsabilidad ni el nivel cultural que se presentaba hace años. La pobreza alarma (pasamos de un 4% de la población (1980) a un 50% en 2020, en solo unas décadas). El desempleo es evidente. La distribución de la riqueza es injusta. Resulta muy difícil progresar. Enfrentamos numerosos problemas sociales y culturales, odios y resentimientos. Las instituciones tradicionales (gobierno, iglesia, justicia y otras) han sufrido en los últimos años un enorme desprestigio.

Desde hace décadas las políticas de economía, salud, educación, seguridad, de atención a la pobreza, no han podido detener la decadencia en la que nos encontramos. Y en este contexto llegó el coronavirus. La evolución de la pandemia provocó estragos en la salud pública y en la economía mundial. La falta de vacunas o remedios nos llevó a recurrir al confinamiento obligatorio como único mecanismo eficaz para evitar la enfermedad. Y ello, indudablemente, provocó la imposibilidad de intercambiar bienes y servicios, la paralización absoluta o parcial de numerosos sectores, la consecuente pérdida de ingresos, desempleo, mayor pobreza y hambre y un significativo aumento del delito.

Frente a este fenómeno social, cultural y económico, lógica y naturalmente, la sociedad exige al Estado que establezca seguridad y concluya con la impunidad.

Pero existe un problema para satisfacer aquellos reclamos, el derecho penal no brinda todas las respuestas a las expectativas comunitarias (los reclamos sociales y las demandas del ciudadano común) y se evidencia, especialmente, en América Latina, como un sistema desigual, selectivo y simplemente simbólico.

A esto se suma que en nuestros días, con la tercera revolución industrial y los avances tecnológicos, se impuso la sociedad de riesgo[2] y, consecuentemente, se estableció un "Derecho Penal del riesgo" o "de la puesta en peligro" con nuevos objetivos, novedosas conductas punibles y reglas de atribución de la responsabilidad diferentes de las tradicionales.

Se presentan entonces estas características:

1) La creación legislativa de delitos de peligro, en especial abstractos, sin esperar la producción del resultado, con un consecuente adelantamiento de la barrera de protección penal y normas cada vez más abstractas en términos de peligro presunto (armas, drogas, medio ambiente, economía, etc.);
2) la aparición de bienes jurídicos colectivos, supraindividuales, de contenido difuso, reunidos en torno a la idea de seguridad (la protección de la hacienda pública, la preservación del medio ambiente, la valorización del producto y del mercado de capitales, la seguridad en el tráfico, la seguridad en el trabajo, etc.);
3) la reducción a las exigencias para la reprochabilidad, que se evidencian en el cambio de paradigma que va de la hostilidad hacia el bien jurídico a su peligrosidad con un fuerte componente de responsabilidad objetiva y con delitos sancionados por el solo resultado;
4) leyes con un fuerte contenido preventivo general negativo (leyes penal tributarias y de orden económico y financiero, etc.);
5) la modernización de los presupuestos materiales y subjetivos de la responsabilidad, es decir, la imputación objetiva con reglas sobre el riesgo permitido y un mayor desarrollo dogmático jurídico de la responsabilidad por el delito imprudente, de acción y omisión y de comisión por omisión;
6) el relajamiento de las bases de la imputación subjetiva y confusión entre autoría y participación y entre conductas preparatorias, intentadas o consumadas del delito;
7) el recorte de las exigencias de prueba o la omisión de tratar sus dificultades;

2. Ulrich Beck, *La sociedad de riesgo*, Ed. Paidós, Barcelona, 1998 con previsiones catastróficas, más políticas que sociológicas. Con sentido sociológico preciso puede consultarse Niklas Luhmann, *Sociología y riesgo*, 1986 y 1991, Heft 229, p. 18 y siguientes.

8) la responsabilidad penal de las personas jurídicas (leyes de lavado de dinero, de orden económico y financiero y muchas otras conductas);

9) nuevas medidas y penas y restricción de derechos (decomiso, congelamiento de activos, prohibición de contacto, etc.).

Asimismo se debe homogeneizar la flexibilización y desformalización del derecho material y procesal con los principios básicos de esta materia y las garantías constitucionales.

El derecho penal no es ya la reacción ético-jurídica a una lesión culpable a bienes jurídicos o intereses ajenos. Hoy se dirige a la gestión, organización y administración de contextos sociales de riesgo y conductas de peligro.

En este marco nadie puede ignorar que existe además una nueva criminalidad, nuevos delitos que traspasan las fronteras (narcotráfico, trata de personas, lavado de dinero, organización criminal, delitos informáticos, etc.) y que se presenta una nueva criminalidad, en muchos casos económica (los casos internacionales como el de Chernobyl de la ex Unión Soviética, Sandoz en Suiza, Contergan, Lederspray y Holzmittel en Alemania, Colza, Doñan; en otros en forma de catástrofe medioambiental, como el desastre del *Prestige* en España; Parmalat y Volare en Italia; o como nuevas formas de corrupción financiera, véase Enron, Arthur Andersen y Madoff en los Estados Unidos, Odebrecht en Brasil, entre otros muchos, o en nuestro ámbito vernáculo con caídas de banco y entidades financieras, como novedosas maniobras de corrupción pública y privada, etc.) y graves casos de terrorismo internacional.

El derecho penal del nuevo milenio debe hacer frente a las nuevas formas de criminalidad organizada [...].

Tampoco se puede desconocer que en las sociedades democráticas post industrializadas en que vivimos, el fenómeno del delito está determinado por el papel que juegan los intereses, la opinión pública, los medios de comunicación, los colectivos organizados y una serie de factores sociales como el desencanto social, la falta de referentes ideológicos, morales y religiosos.

No debe perderse de vista que el Estado se encuentra al servicio de los ciudadanos y está sometido al derecho que está sobre el poder y en donde la autoridad debe someterse al orden normativo.

El derecho es soberanía, voluntad y expresión popular y la ley es todo, por lo que, necesariamente, se debe limitar el poder y el alcance del castigo aplicándolo en su justa medida.

El derecho penal del nuevo milenio debe hacer frente a las nuevas formas de criminalidad organizada y a los riesgos, sin contrariar los principios y garantías del Estado de derecho. En ese sentido, debe tenerse en cuenta que la función de los jueces no puede limitarse a ratificar lo actuado por otros poderes, sino que su deber consiste en controlar la razonabilidad de esos actos.

En lineamiento con lo dicho, es imperiosa la introducción de algunas modificaciones que tornen más eficiente su aplicación, fomenten su celeridad y lo adecuen a los tiempos actuales, sin perder de vista quienes son sus actores y hacia quiénes van dirigidas.

En este sentido, lo manifesté recientemente ante el Honorable Congreso de la Nación cuando expuse las modificaciones que se impulsarán en esta gestión y que aportarán herramientas necesarias, rápidas y acordes a la crisis que está transitando nuestro país.

A título ilustrativo y debido a la brevedad de esta exposición, solo mencionaré algunas de las reformas propuestas desde mi cartera, que sin duda contribuirán a mejorar el sistema de justicia actual. Entre las medidas están:

La tarea de desregular y facilitar los trámites ante la Justicia mediante procedimientos informatizados; la suplencia de vacantes existentes en la justicia federal y en los tribunales ordinarios; la implementación en todo el país del Código Procesal Penal Federal; la implementación del sistema acusatorio en los juicios penales; la reforma del Código Penal; la implementación del juicio por jurados; el ordenamiento de la ley de víctimas y del rol de la víctima y su tratamiento; la modificación de algunas funciones de la UIF y de la Oficina Anticorrupción; la creación de un nuevo Régimen Penal Juvenil junto con la baja de la edad de imputabilidad penal que ponga el objetivo principal en la educación y resocialización del niño infractor, entre muchas otras a las que por razones de espacio no podré hacer mención.

A modo de cierre de esta breve exposición solo me resta resaltar que no tengo dudas de que los valores fundamentales en un Estado de derecho y en un país libre son libertad, responsabilidad y justicia. En consecuencia, el lema que debe adoptarse es libertad para todos, responsabilidad de todos y justicia para todos. ■

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The Conflicting Change in Japan: Exploration Theory, Spiritual Sales, and Tax Exemption

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À la suite de l'exécution de l'ancien Premier ministre japonais Shinzo Abe, on a beaucoup appris sur les ventes spirituelles et les victimes, en particulier en ce qui concerne l'Église de l'Unification (EU), ainsi que sur la manière dont cette exploration affecte la religion de la deuxième génération et l'intersection de la religion et de la politique. Cet article explique pourquoi le ministère japonais de l'éducation, de la culture, des sports, de la science et de la technologie (MEXT) étudie une demande de dissolution de l'Église de l'Unification.

Tras la ejecución del ex primer ministro japonés Shinzo Abe, se ha aprendido mucho sobre las ventas espirituales y las víctimas, en particular en relación con la Iglesia de la Unificación (IC), así como la forma en que esta exploración afecta a la religión de segunda generación, y la intersección de la religión y la política. Este artículo ayuda a explicar por qué el Ministerio japonés de Educación, Cultura, Deporte, Ciencia y Tecnología (MEXT) está estudiando una orden de disolución de la UC.

Introduction

On 8 July 2022, former Prime Minister Shinzo Abe was shot and killed during a campaign speech to support the Liberal Democratic Party for the Upper House election scheduled two days later in Nara Prefecture (the Incident). The suspect was Tetsuya Yamagami, whose mother was a believer in the Unification Church (UC). Japanese media reported that the suspect held a grudge against the UC for 20 years since his mother went bankrupt due to making huge donations to the UC, and his family was ruined. In 2021, the former Prime Minister sent a video message to an affiliated group of the UC, which caused the suspect to believe that he had a connection with the UC. The suspect shot and killed the former Prime Minister with a handmade gun.

In January 2023, the suspect was accused of murder and a violation of the firearms law and is under trial before the Nara District Court. This Incident brought attention to various issues in Japan, including

(i) spiritual sales and victims,

(ii) religion second generation, and

(iii) religion and politics.

The Unification Church

The UC is a religious organization established in Seoul in 1954. The UC came to Japan in 1959 and was certified as a religious corporation in 1964 under the Religious Corporations Act. As a religious corporation that is a legal entity, the UC enjoys tax benefits.

Since the 1980s, aggressive solicitation and so-called "spiritual sales" by the UC came to be recognized as a serious social issue in Japan. To support the victims, the National Network of Lawyers Against the Spiritual Sales (NNLASS) was organized in 1987, with approximately 200 lawyers to support the victims. The Japan Federation of Bar Associations (JFBA) also recognizes spiritual sales by the UC as a social issue.

Spiritual Sales and Recovery of the Financial Damage

I. Before the Incident

Spiritual sales, though not specifically defined in laws, is known as sales tactics used to sell items such as seal

stamps, beads, pagodas, and jars at an exorbitant price or to cause citizens to pay offerings by making them believe that those items or offerings have the power to remove serious disadvantages that would occur to them due to its karma or the fateful destiny of ancestors, etc. Since the 1980s, spiritual sales have been recognized as a fraudulent business practice, and the NNLASS and the JFBA started to tackle the issue with the recognition of the existence of the UC behind the scenes of spiritual sales.

Since the 1980s, spiritual sales have been recognized as a fraudulent business practice […].

In the 1980s and 1990s, the JFBA issued opinions in which it pointed out specific spiritual sales tactics and how to deal with them, and produced guidelines in which it provided determinants of human rights violations and customer damage regarding religious activities useful for lawyers tackling these issues. The guidelines provided information regarding (i) the way of solicitation for a donation, (ii) the way of solicitation to potential believers, (iii) the treatment of believers, and (iv) special care for minors.

II. After the Incident

One of the issues dealt with in the immediate aftermath of Abe's assassination was the recovery of the financial losses for the victims of spiritual sales. On 10 December 2022, the Consumer Contract Law was amended, and the Act on Prohibition of Unjust Solicitation of Donation by Legal Entity was enacted. The former expands the scope of the right to rescind the contract, such as purchase agreements and donation agreements, and extends the duration of the right to rescind to reinforce the protection of the consumers.

According to Japanese media, the ties between politics and the UC go back to the era of former prime minister Nobusuke Kishi, Abe's grandfather.

The latter is newly enacted to cover a situation where a donation was made by a unilateral juridical act, not by a contract where the Consumer Contract Law does not apply. It also allows the individual who was solicited unjustly the right to rescind.

Both legislations allow the children and spouse of the spiritual sales victim to exercise the right to rescind and claim a refund under the acts (right of subrogation) when they have claims to the victim related to duty of support, including living expenses of married life and child support.

It was respected that the above legislation was passed swiftly after the Incident. The scope of the legislation, however, is still not enough to protect victims because among others,

(i) mind-control or brainwashing is not specified in the laws and regulations yet, which is one of the central concepts of the issue, and

(ii) regulations regarding the way of solicitation are basically limited to the "duty of care," the breach of which will not be subject to penalty.

An Issue of Religion Second Generation

The UC related issue is not limited to the financial damages of the victims. The Incident has shed light on the anguish of the second generation of the UC believers. The second generation is suffering from poverty and neglect because their parents donated as much money as possible and were preoccupied with religious activities.

At the JFBA consultation desk, they confessed the hardship that they experienced, saying that they were financially and mentally exploited since they were young, were forced to follow the doctrine, and were struggling to adjust to social life after leaving the UC. Assistance for the second generation not only to escape from the UC, but also to live their lives after leaving the UC, was clearly required. In doing so, it was important to organize experts for mental counseling, child abuse, and poverty, especially for second generation adults, and also required employment support.

There are two types of people classed as second generation:

(i) a blessed second generation (a child of God) (*shukufuku-nisei*), who was born to parents who got married in a joint wedding ceremony held by the UC, and

(ii) a second-generation believer, who was born before their parents became believers (*shinkou-nisei*). Blessed second generations could easily be brainwashed by being forced to join the ceremony and taught the doctrine since birth. In either case, however, the second generation is clearly suffering and needs assistance.

Ties Between Politics and Religion

It is reported that the suspect's motive in the Incident was the video sent by Abe to a UC-related group in 2019, which caused him to believe that Abe had a relationship with the UC. Upon the video message being issued, the NNLASS sent a warning letter to Abe explaining that politicians sending messages to the UC, or its related groups, gives a message to society that the activities of the UC are socially acceptable and are used by the UC for their activities.

The NNLASS also asked Abe to think carefully about his message being used for the exploitation of citizens by the UC. Regrettably, this was not broadcast by the media or recognized broadly in society at that time. In the wake of the Incident, however, the issue of ties between politics and religion gained attention, and an inspection was conducted. Among 379 politicians in the Liberal Democratic Party (LDP), 179 politicians were found to have some involvement with the UC. The depth of involvement varied but included organizational support for election (vote gathering) and provided greetings to the ceremony of the UC or UC-related groups. After these facts were revealed, many cabinet members were removed.

According to Japanese media, the ties between politics and the UC go back to the era of former prime minister Nobusuke Kishi, Abe's grandfather. Kishi and the UC were closely connected to each other under the united target of "victory over communism," and he played a vital role in securing the position of the UC in Japan. The close relations between Kishi and the UC have since been inherited by Kishi's LDP faction, which was the Abe faction. This was also part of the suspect's motive in murdering Abe.

Qualification as Religious Corporations

Under Japanese law, religious corporations enjoy tax benefits. After the Incident, society began questioning whether the UC was qualified as a religious corporation under the Religious Corporation Act considering the issues of that Act.

Under Japanese law, the court may order the dissolution of a religious corporation at the request of a competent authority, including the Ministry of Education, Culture, Sports, Science and Technology (MEXT), when the court finds that the religious corporation commits an act that is clearly found to harm public welfare, is substantially in violation of laws and regulations, or commits an act which deviates substantially from the purpose of the religious organization (item (1) (2), article 81 of the Religious Corporation Act).

Conclusion and Afterword

Presently, the MEXT is considering asking the court to issue a dissolution order for the UC. For that purpose, it has exercised the right to question the UC three times since November 2022 (article 78-2 of the Religious Corporation Act). The Religious Corporation Act was amended in 1995 to give an authority the right to question the religious corporation when Aum Shinrikyo, a Japanese cult, carried out the Tokyo subway sarin gas attacks. The right to question was never exercised since then until this time. After nearly 30 years of silence, politicians are finally investigating the UC.

Note

Even after finishing the article in early 2023, the situation regarding the UC kept moving in 2023. For example, in October, after exercising the right to question the UC seven times, the MEXT filed a petition for a dissolution order against the UC to the Tokyo District Court. In December, the act for prompt and smooth relief was enacted. However, preserving the UC's assets remains a challenge for victims. In July, Lawyers from Across Japan for the Victims of the UC filed a civil conciliation to the Tokyo District Court. ■

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L'autoréglementation peut-elle rendre la finance suisse durable ?

Tali PASCHOUD

Clara BRAMBILLA

Switzerland ratified the Paris Agreement in 2017. However, its application remains incomplete and therefore ineffective in many areas, such as finance. Switzerland has spent a considerable amount of time and effort claiming to be a leader in sustainable finance but developing various strategies to avoid regulation in this area. In this paper, we compare the advantages and disadvantages of the legislative process versus self-regulation. Our conclusion is that binding regulation is needed to ensure that financial flows contribute to finding a way of reducing greenhouse gases, developing climate resilience and taking sustainability aspects into account in investment and financing decisions.

Suiza ratificó el Acuerdo de París en 2017. Sin embargo, su aplicación sigue siendo incompleta y, por tanto, ineficaz en muchos ámbitos, como las finanzas. Suiza ha invertido una cantidad considerable de tiempo y esfuerzo afirmando ser líder en finanzas sostenibles, pero desarrollando diversas estrategias para evitar la regulación en este ámbito. En este documento comparamos las ventajas y desventajas del proceso legislativo frente a la autorregulación. Nuestra conclusión es que se necesita una regulación vinculante para garantizar que los flujos financieros contribuyan a encontrar la manera de reducir los gases de efecto invernadero, desarrollar la resiliencia climática y tener en cuenta los aspectos de sostenibilidad en las decisiones de inversión y financiación.

La Suisse a ratifié l'Accord de Paris le 6 octobre 2017. En entérinant ce texte, la Suisse s'est engagée à légiférer afin d'apporter une contribution « just and fair » dans la mise en œuvre des objectifs de cet Accord. Le Conseil fédéral, organe exécutif suisse, a souligné que : « *siège de nombreuses entreprises internationales, la Suisse assume une grande responsabilité en matière de respect des droits de l'homme et de protection de l'environnement* »[1]. La Suisse a donc un rôle primordial à jouer dans la lutte contre le réchauffement climatique. Cependant six ans plus tard, sa mise en œuvre, en Suisse, reste lacunaire. Les lois helvétiques demeurent à ce jour inefficaces face à la puissance de nos modes de production et à l'organisation économique de notre société.

Prenons l'exemple des flux financiers. L'Accord de Paris prévoit trois moyens d'atteindre l'objectif de réduction d'émissions de gaz à effet de serre, parmi lesquels, celui de rendre les flux financiers compatibles avec un profil d'évolution vers un développement à faible émission de gaz à effet de serre et résilient aux changements climatiques.

La loi climat, soit la loi suisse de mise en œuvre de l'Accord de Paris, reprend l'objectif d'alignement des flux financiers à son art. 9 et invite le Conseil fédéral à conclure des conventions avec les acteurs du domaine financier. Cette méthode de soft law est-elle suffisante ? Est-ce que l'adoption de lois contraignantes permet de lutter efficacement contre le dérèglement climatique ? Nous commencerons par analyser les spécificités et les défis des lois contraignantes en matière de lutte contre le dérèglement climatique dans le domaine de la finance puis ceux de la soft law et nous finirons par une comparaison de ces deux modes de régulation.

1. Cf. « Rapport de droit comparé : Mécanisme de diligence en matière de droits de l'hommes et d'environnement en rapport avec les activités d'entreprises suisses à l'étranger », 2 mai 2014, (https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2014/2014-05-28.html) (consulté le 6 août 2023), p.2 ; Canapa, Schmid, Cima : « "Entreprises responsables" : limitations et perspectives », p.557).

Les défis des méthodes contraignantes

Les lois se distinguent de la *soft law* sur deux aspects principaux. Premièrement, elles sont adoptées par le pouvoir législatif, lequel représente une assez large partie de la population, contrairement à l'autoréglementation qui relève de la compétence d'acteurs économiques privés spécialisés dans un domaine. Deuxièmement, les lois, mises en œuvre par le pouvoir exécutif, élu par le peuple ou ses représentants sont contraignantes ; leur non-respect est sanctionnés par un pouvoir judiciaire devant répondre aux exigences d'indépendance et d'impartialité, ce qui n'est pas le cas de l'autoréglementation dont la surveillance et la sanction, si elle existe, est assurée traditionnellement par les acteurs de la branche eux-mêmes.

Ces particularités en font un instrument davantage démocratique que la *soft law*. Mais cela a aussi pour conséquence, d'en faire une réglementation plus générale car adoptée par des élus issus de milieux très divers. Parfois, pour cette raison, elles peuvent être moins acceptées par les milieux concernés qui ont le sentiment que leurs intérêts ne sont pas assez pris en compte. En Suisse, certaines associations de branche ont la possibilité d'être entendues lors du processus d'adoption d'une loi par la participation à une consultation, procédure dont les contours sont définis par la loi fédérale sur la procédure de consultation en tant que milieux concernés.

Malheureusement, la règlementation suisse générale manque d'effectivité en raison de la difficulté à identifier les responsables des atteintes à l'environnement, du manque de connaissance du dérèglement climatique des autorités en charge de la mise en œuvre de ces lois et de leur manque de dynamisme. Par ailleurs, les critères stricts entourant la responsabilité pénale des personnes morales constituent un frein à une réelle répression des atteintes à l'environnement causées par celles-ci.

Un des défis que pose le réchauffement climatique est sans aucun doute l'interdisciplinarité qui est exigée lors du processus législatif ainsi que lors de l'application de ces lois par les autorités et les tribunaux. Le droit pénal suisse offre de nombreuses possibilités de collaboration entre les autorités pénales et les autorités de protection de l'environnement ; elles demeurent toutefois peu utilisées notamment s'agissant de la marge de manœuvre législative laissée par le droit fédéral aux cantons suisses, par exemple le droit de dénonciation des offices cantonaux de protection de l'environnement auprès des autorités de poursuite pénale. Nous pensons que les rares échanges entre ces autorités expliquent notamment la faible effectivité de ce domaine du droit. Il est essentiel que des spécialistes de la protection de l'environnement soient impliqués lors de l'adoption de ces règles et de leur mise en œuvre, ce qui apparaît plus probable dans le cadre du processus législatif traditionnel d'une loi contraignante plutôt que dans le contexte de la *soft law* où seul le secteur financier est usuellement représenté dans toutes les phases d'existence de cette réglementation.

Le processus législatif suisse est souvent vu comme lent et peu dynamique. Cependant, la Constitution suisse connaît divers instruments permettant d'édicter des lois ou des ordonnances en cas d'urgence. Ces instruments ont été très efficaces lors de la crise du coronavirus. Dès lors, la lenteur ne peut être un argument valable pour mettre en doute l'usage de la loi. Soit le temps est nécessaire pour adopter une loi, soit la situation est si urgente que ces instruments dédiés aux situations d'urgence doivent être utilisés.

Dans le domaine du droit pénal de l'environnement, deux approches sont généralement adoptées ; d'une part l'instauration d'une loi protégeant un élément spécifique de l'environnement, par exemple les forêts, soit d'autre part l'établissement d'une loi encadrant une pratique susceptible de nuire à l'environnement, comme l'agriculture. Il est difficile de comprendre pourquoi la loi encadrant la pratique de l'agriculture réprime les atteintes à l'environnement spécifiquement réalisées dans l'exercice de cette activité, tandis que la règlementation financière n'instaure aucune infraction en lien avec les atteintes à l'environnement générées, par exemple, par le soutien financier aux entreprises actives dans l'expansion fossile.

Les critères stricts entourant la responsabilité pénale des personnes morales constituent un frein à une réelle répression des atteintes à l'environnement causées par celles-ci.

Pour conclure, le droit suisse semble manifestement incapable, à ce jour, à rendre la finance durable. Selon nous, des lois contraignantes doivent être adoptées par notre pouvoir législatif afin de mettre en œuvre de façon efficace les engagements pris par la Suisse.

Les défis de la *soft law*

On parle d'autoréglementation lorsque les acteurs économiques privés, d'une branche ou d'une industrie, conviennent de leurs propres règles du jeu, afin de tenir compte d'une demande du marché ou du public. Les acteurs privés veillent ensuite à l'application de ces règles, soit par la mise en œuvre d'un contrôle réciproque ou par celui d'un tiers[2].

D'un point de vue juridique la terminologie varie, l'autoréglementation prend la forme de chartes, de codes de bonne conduite ou encore de directives. Les normes adoptées peuvent être des normes d'organisation, de procédure ou de comportement (interne ou vis à vis de tiers).

Les objectifs de l'autorégulation peuvent être variés : interpréter ou compléter des dispositions légales, prépa-

2. Werner Schiesser, « L'autoréglementation au banc d'essai », in *L'expert-comptable suisse*, 2014, ECS 5/14 p. 377 ss, 377.

rer le terrain pour une réforme législative ou, au contraire, prévenir l'adoption de dispositions légales. En effet, cette réglementation souple repose sur une vision libérale de la société où l'intervention de l'État, par le biais de la réglementation, ne doit s'immiscer qu'en cas de besoin réel.

Le recours à l'autoréglementation est courant dans le secteur financier suisse. Les avantages régulièrement cités concernent la technicité des questions traitées pouvant être mieux appréhendées par les acteurs privés, la rapidité et la flexibilité du processus d'adoption des normes, une meilleure prise en compte de l'évolution rapide du secteur, ou encore la présence de nombreuses organisations de branches.

Le recours à l'autoréglementation est courant dans le secteur financier suisse.

En revanche, alors que l'État est censé édicter des normes justes et équitables, il ne va pas de soi que le secteur économique prenne en compte l'intérêt public de façon appropriée. Une association professionnelle risque par exemple de ne pas adopter des normes imposant à ses membres des frais supplémentaires ou leur faisant perdre un avantage compétitif.

En Suisse, il existe plusieurs types d'autoréglementation : l'autoréglementation libre (strictement privée, sans aucune intervention étatique), l'autoréglementation dirigée et l'autoréglementation obligatoire, laquelle repose sur un mandat spécifique du législateur. L'autoréglementation dite dirigée se développe dans le cadre qui lui est réservée par une autorité, par exemple par une autorité de surveillance telle que, en Suisse, l'Autorité fédérale de surveillance des marchés financiers (la FINMA). Dans ce cadre, si l'autoréglementation apparaît suffisante et appliquée avec rigueur, le secteur privé peut espérer que l'État renonce à imposer ses propres règles[3].

Force est de constater que l'autoréglementation seule ne parviendra pas à ce que la Suisse respecte les engagements internationaux pris.

La Suisse a consacré beaucoup de temps et d'efforts à affirmer être un leader en matière de finance durable et à développer diverses stratégies pour ne pas règlementer ce domaine.

A ce jour, la règlementation financière suisse ne met aucunement en œuvre l'obligation d'alignement des flux financiers avec les objectifs de l'Accord de Paris ; l'art. 9 de la loi climat constitue un pas dans la bonne direction mais manque de concrétisation.

Par le prisme de la lutte contre le *greenwashing* – dont le but relève plus de la protection de l'investisseur que de

3. Carlo Lombardini, « La protection de l'investisseur sur le marché financier », 2012, p. 193, 197 et 200.

l'habitabilité de notre planète – la FINMA a tout de même, dans la limite de son mandat, émis des directives visant à plus de transparence des grandes banques dans leurs rapports annuels.

En 2022, deux normes d'autoréglementation en matière de finance durable ont vu le jour. Si la directive de l'Asset Management Association Switzerland (« AMAS ») a le mérite d'essayer de définir ce qu'est un investissement durable, l'Association suisse des banquiers (« ASB ») se contente d'imposer à ses membres un devoir de questionner sa clientèle sur ses préférences Environnementales, Sociales et de Gouvernance (« ESG ») sans pour autant en définir les contours. Il s'agit de très petits pas dans la bonne direction. Toutefois, la règlementation est sommaire et peu précise ; la définition même d'un investissement durable semble distincte d'une directive à l'autre.

Entre 2017 et 2022, trois tests de compatibilité climatique PACTA (Paris Agreement Capital Transition Assessment) lancés par l'Office fédéral de l'environnement et le Secrétariat d'État aux questions financières internationales ont permis aux banques, assurances et caisses de pension suisses, sur une base volontaire, d'évaluer l'orientation globale de leurs portefeuilles. Les résultats de 2022 sont sans appel, la place financière investit encore drastiquement dans la production d'énergies fossiles. Force est de constater que l'autoréglementation seule ne parviendra pas à ce que la Suisse respecte les engagements internationaux pris.

En décembre 2022, le Conseil fédéral, constatant qu'aucune obligation de transparence ou de conformité avec certains critères spécifiques au développement durable n'existe au niveau législatif ou réglementaire pour les services financiers, a fait part de sa volonté de lutter contre l'écoblanchiment dans le secteur financier. Dans cette perspective, il a chargé le Département fédéral des finances (DFF) de déterminer, avec un groupe de travail regroupant des acteurs privés, des associations et des organisations de branches, la meilleure façon de mettre en œuvre cet objectif.

Avec soulagement, en octobre 2023, le DFF a annoncé l'élaboration d'un projet de réglementation étatique d'ici à fin août 2024. Néanmoins, le communiqué du DFF ter-

mine ainsi : « *Toutefois, si le secteur financier présente une autorégulation mettant en œuvre efficacement la position du Conseil fédéral, le DFF renoncera à des travaux réglementaires.* ».

Après quelques mois de suspens, le Conseil fédéral a annoncé le 19 juin dernier être conquis par l'autorégulation – présente et à venir – de ASB, de l'AMAS et de l'Association Suisse des Assurances (ASA). Toute idée d'une réglementation étatique dans ce domaine est à ce jour malheureusement abandonnée.

Nous sommes d'avis que faire confiance aux acteurs privés de la place financière suisse, pour définir leurs propres règles du jeu, témoigne d'un manque de courage et de prise de conscience de l'urgence de la part de notre gouvernement.

Conclusion

Le monde financier prend conscience du fait que la question climatique constitue une préoccupation importante de la population et que les pratiques doivent changer. Cependant, nous remarquons un usage très accru du *greenwashing* et pensons que l'autoréglementation existante laisse trop de place à l'usage de méthodes trompeuses.

Un défi que rencontrent les lois comme la *soft law* réside dans la difficulté de provoquer un réel effet dissuasif. Les sanctions prévues par ces deux modes de réglementation sont souvent bien inférieures aux bénéfices réalisés grâce aux investissements écocidaires effectués et l'atteinte à l'image provoqué par une sanction symbolique ou contraignante, demeure trop éphémère. La possibilité offerte en droit suisse de la confiscation pénale des bénéfices doit selon nous être davantage utilisée. Cette mesure doit être examiné d'office par les autorités en pénale en cas de condamnation.

Les autorités administratives spécialisées dans le domaine de la protection de l'environnement doivent jouer leur rôle d'expert dans le processus d'élaboration des lois. Nous sommes d'avis que le changement de paradigme nécessaire au respect des engagements pris par notre gouvernement nécessite une meilleure appréhension des causes et des solutions nécessaires.

A ce jour, la place financière suisse doit se doter d'une règlementation claire et contraignante dans le domaine de la finance durable. La lutte contre le *greenwashing*, bien qu'essentielle, ne saurait faire oublier à la Suisse que le respect de l'Accord de Paris devra également passer par une règlementation entourant les financements octroyés aux entreprises dont les activités impactent l'habitabilité de notre planète. ■

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Cuestiones políticas no judiciables y corrupción pública en la República Argentina

In this article, three high profile cases in the Republic of Argentina are analyzed where the so called political questions doctrine was not applied allowing for judgement and sanction in public corruption trials, while not allowing judges to interfere with government action, thus assuring control of public office abuses related to corruption to which the Argentine state is compromised by its National Constitution and international instruments on the matter.

Cet article analyse trois affaires très médiatisées en République d'Argentine dans lesquelles la doctrine dite des questions politiques n'a pas été appliquée, ce qui a permis de juger et de sanctionner des procès pour corruption publique, tout en n'autorisant pas les juges à interférer avec l'action du gouvernement, assurant ainsi le contrôle des abus de fonctions publiques liés à la corruption pour laquelle l'État argentin est compromis par sa Constitution nationale et les instruments internationaux en la matière.

Introducción

Estas líneas tienen por objeto analizar la aplicación de la doctrina de las cuestiones políticas no judiciables en la República Argentina (similar a las political questions de los Estados Unidos de América o los actos de gobierno en Francia) en algunos casos recientes de corrupción pública y como los jueces integrantes del Poder Judicial han rechazado su aplicación, sin por ello inmiscuirse en el gobierno democrático.

I. Las constituciones y la tensión democrática

Desde la organización de los llamados Estados nacionales se han establecido constituciones políticas que regulan la relación entre la autoridad y la sociedad, fijándose un marco – generalmente escrito y con recaudos que lo diferencian de la legislación ordinaria – mediante el cual se interrelaciona la sociedad con el poder estatal. Las constituciones establecen prerrogativas de los ciudadanos y poderes limitados de los gobiernos mediante cartas de derechos de los habitantes y la división de poderes del estado que difieren en cada sociedad, considerando su historia e idiosincrasia.

En lo que respecta a la división de los poderes, puede señalarse que se establece una autoridad legislativa, de carácter representativo, que dicta leyes estableciendo las líneas generales de gobierno, los alcances de los derechos de los individuos y los grados de intervención estatal; una autoridad ejecutiva – también elegida democráticamente – que las aplica y gestiona los intereses del conjunto para el bien común y una autoridad judicial cuyos miembros resuelven los conflictos que se suscitan entre los particulares y en los diferendos entre el gobierno y los individuos. En el caso de este último poder, éste se encuentra conformado por jueces, no elegidos democráticamente, aunque con legitimidad democrática mediata o indirecta, ya que son seleccionados por las otras ramas de gobierno que sí lo son.

Como el poder democrático también puede incurrir en abusos de poder es que se han establecido diversas formas de control de ese gobierno, ya sea mediante mecanismo exógenos a la estructura estatal (elecciones, consultas populares, prensa independiente) o endógenos donde esos poderes en que se organiza el propio Estado van a tener incentivos para controlar el ejercicio que hacen los otros – los denominados *checks and balances* – evitando así la tiranía de unos y resguardando la libertad de todos.

Estos controles pueden incluir el juicio y eventual sanción criminal por abusos en la función ante los tribunales de justicia que, como se señaló, está a cargo de funcionarios que no han sido seleccionados democráticamente, aunque limitando su grado de intervención en el gobierno, impidiendo que asuman o ejerzan un poder propio de las autoridades democráticas, como es la fijación del rumbo político o la gestión de gobierno. Su intervención se circunscribe a casos puntuales abarcados por algún delito. Para ello, el marco de intervención de estas autoridades se encuentra fijado previamente por las constituciones y las leyes, tales como los códigos penales, las normas de organización de la justicia y los códigos de procedimiento.

Quienes definen e implementan las políticas públicas y aquellos que los deben controlar pueden entrar en conflicto y es lo que se ha definido como la tensión entre los poderes mayoritarios y aquellos poderes contra mayoritarios ya

que los primero son elegidos democráticamente y sus controlantes no. Así, aquellos elegidos democráticamente pueden señalar que sus decisiones están exentas de un control por ese motivo. Paradójicamente, quienes buscan controlarlos reconocen pleno valor a esa afirmación y persiguen hacer valer las decisiones democráticas previas, fijadas en las constituciones y las leyes que establecen límites y sancionan su violación, incluso a través de penas luego de un juicio respetuoso del debido proceso.

II. La corrupción pública

La corrupción estatal, cuyos efectos deletéreos socavan la confianza en el gobierno colectivo, supone un abuso de la función pública para beneficio propio o de terceros. Si bien dicho abuso ha sido una constante en la historia, a través de una confusión entre lo que es de todos y lo que es particular o privado, desviando bienes públicos fuera de los mecanismos o resguardos legales, éste flagelo ha adquirido una dimensión tal que la comunidad internacional ha aunado esfuerzos para su prevención, control, enjuiciamiento y sanción (ver Convención Interamericana contra la Corrupción; Convención de las Naciones Unidas contra la Corrupción; Convención para combatir el Cohecho de Servidores Públicos en Transacciones Comerciales Internacionales, entre otras). Los hechos de corrupción no tienen una víctima determinada sino que, al detraerse fondos públicos por este medio se compromete la asignación de recursos públicos, sobre todo para la atención de derechos sociales, económicos y culturales[1].

La Constitución Nacional de la República Argentina (CN argentina) se hizo cargo de esta desviación en el ejercicio del gobierno y equiparó como un atentado al sistema democrático a quien incurra en grave delito doloso contra el Estado que conlleve enriquecimiento (art. 36 CN argentina). Esos delitos, generalmente aquellos que afectan a la Administración Pública – están sancionados desde la primera redacción del Código Penal argentino en 1921 (ley 11.179), e incluyen fraudes contra el Estado, cohecho, exacciones ilegales, abuso de autoridad, entre otros (art. 174, inc. 5 y arts. 248, 256, 258, 266, 268, del CP argentino).

Las decisiones públicas deben ser democráticamente adoptadas, ya sea por el voto de los representantes o bien por mecanismos deliberativos, cuando ello sea posible. Su finalidad debe contemplar únicamente el interés general y no desviarse de él, ya sea por medio del dinero o del uso faccioso del poder estatal.

La intromisión de la esfera del dinero en las decisiones públicas ha sido motivo de preocupación por parte de nuestra tradición política y cultural, asumiendo que hay ciertas cosas que deben mantenerse fuera del comercio no pudiéndose comprar o vender. La línea divisoria entre lo público y lo privado es la que lleva a reprimir el cohecho – la entrega de dinero a cambio de una decisión pública – como arquetipo de la corrupción. Esta prohibición reconoce su origen en la república ateniense, al involucrarse los ciudadanos en el gobierno del conjunto y también se puede remontar al cristianismo, al condenar como pecado la simonía, que es la prohibición de la adquisición de bienes y dones espirituales por dinero[2]. Por esta división entre lo público y lo privado es que surgen las instituciones públicas, que habrán de ocuparse de las interrelaciones entre el ciudadano y el Estado. Por ello, la existencia de arreglos corruptos supone que esas instituciones no se usan para promover los valores públicos, sino para el enriquecimiento personal y para la provisión de beneficios a los corruptos[3].

III. Las cuestiones políticas no judiciales

Aquí donde entra a jugar la doctrina de las llamadas cuestiones políticas no judiciables, es decir, la intervención de la judicatura en la revisión o control de aquellas decisiones de la rama legislativa o ejecutiva que estarían exentas del control de los jueces, por implicar entrometerse en las decisiones propias de aquellos funcionarios cuyo control sería de tipo político o democrático, no judicial.

Los jueces deben abstenerse de intervenir en estos casos ya que son atribuciones propias y exclusivas de esos poderes, no pudiendo ser revisadas en cuanto a la forma de su ejercicio. Una típica cuestión política sería la asignación presupuestaria: ¿cuántos fondos corresponde asignar por ejemplo a la seguridad comparados con aquellos que corresponde otorgar a la salud de la población? La mayoría de las constituciones reserva estas decisiones a los órganos legislativos, representantes de la voluntad popular, cuyos miembros ponderan y examinan la necesidad y razón para asignar dichos fondos. Otros casos involucran, por ejemplo, la autonomía de los estados en una federación y su intervención por la autoridad central, el enjuiciamiento y remoción de magistrados en el marco de juicios políticos, el control del ingreso o exclusión de representantes elegidos al Congreso, la declaración del estado de excepción frente a crisis internas o externas, los procedimientos de sanción de las leyes, el manejo de las relaciones exteriores y los poderes de guerra, todos ello con sus particularidades según los modos de control judicial, generalmente a cargo de jueces y sus máximos tribunales. En estos casos, se asume que, si las constituciones han otorgado una atribución

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1. Ver Informe de la Comisión Interamericana de Derechos Humanos sobre Venezuela en : http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf).

2. Ver Micheal Walzer, Las Esferas de la Justicia, Fondo de Cultura Económica (1983), Méjico, trad. Heriberto Rubio, 2001, p. 108, y 111; *Hechos de los Apostoles* 8 9:26 (en *El Libro de la Nueva Alianza*, Fundación Palabra de Vida, 18ª Ed, 1980, p. 271-2).

3. Ver Susan Rose-Ackerman y Bonnie J. Palifka, *Corrupción y Gobierno- Causas, Consecuencias y Reformas*, Marcial Pons, 2da. Ed., trad. Francisca Pou Giménez, Madrid, 2019, p. 85.

a determinado poder, la judicatura no puede atribuirse su ejercicio a riesgo de violentar la división de poderes. Asimismo, en línea con el derecho norteamericano, se ha definido a las cuestiones políticas como aquellas cuestiones cuya resolución definitiva no ha sido encomendada por la Constitución a los tribunales judiciales sino a otros organismos de gobierno, descartándose la intervención del Poder Judicial por no existir criterios apropiados para resolver el caso que sean susceptibles de descubrimiento y aplicación judicial[4].

Sin embargo, debe recordarse que son las propias constituciones las que han querido y mandado a los poderes constituidos, en este caso, al Poder Judicial, para que intervengan en esos casos abarcados por el catálogo de normas penales que dicta el Congreso mediante las condiciones fijadas de antemano por las leyes. En este sentido, cuando el art. 116 de la CN argentina establece que los jueces de la Nación deben intervenir en "todas las causas que versen sobre puntos regidos por la Constitución, y por las leyes de la Nación", – lo que incluye al Código Penal – está marcando una línea de actuación que debe ser respetada y aplicada con esos límites, no por la materia "política" sino circunscripto a las "causas", esto es, a los casos sometidos a su conocimiento y decisión, cuando involucren la comisión de delitos. El no juzgamiento de estos casos, alegando la existencia de una cuestión política, implicaría declinar el ejercicio de la función de administrar justicia, avalando implícitamente el abuso de la función pública.

Sin embargo, debe recordarse que son las propias constituciones las que han querido y mandado a los poderes constituidos […].

IV. Casos recientes que involucraron supuestas cuestiones políticas no judiciables

En un caso de corrupción pública que involucró a la ex presidenta de la República Argentina, la Dra. Cristina Fernández de Kirchner, un ministro, secretarios de estado otros funcionarios nacionales y provinciales como así también un ex contratista de obras viales, lo referido a la existencia de una cuestión política no judiciable fue uno de los puntos que tuvo que ser tratado en la sentencia dictada que, en lo que se refiere a la ex presidenta de la Nación, culminó con su condena a seis años de prisión por haber incurrido en un fraude en perjuicio del Estado (art. 174, inc. 5 del CP argentino).

En los Fundamentos de la sentencia en la causa CFP 5048/2016, dictada el pasado 9 de marzo de 2023 (no firme) el Tribunal Oral Federal nro. 2 de la Ciudad de Buenos Aires sostuvo que era una decisión discrecional, no pasible de ser cuestionada judicialmente, la de asignar obras viales a una provincia en desmedro de otras con, por ejemplo mayor población o siniestralidad, por implicar dicho juicio adentrarse en una decisión propia de otros poderes (ver Fundamentos, p. 197 y 211 a 213). No obstante se aclaró que nada impide que, so pretexto de una política vial se lleven adelante delitos (Fundamentos, p. 201) en los modos de implementación de esa política y los desvíos normativos que se adviertan (Fundamentos, p. 206, 214 y 214).

Con cita de antecedentes de la Corte Suprema de Justicia de la Nación (Fallos 343:195), el Tribunal señaló que las excepciones al control judicial tienen como fin asegurar que ninguno de los poderes del Estado actúe por fuera de las atribuciones que la Constitución les confiere y evitar que, al ejercer las facultades asignadas de forma exclusiva, los poderes políticos se desvíen del modo en que se los autoriza a ponerlos en la práctica, equilibrando la tensión entre el valor republicano y el valor de supremacía de la Constitución Nacional. Se argumentó que la Corte Suprema no definió en forma concluyente cuál sería la línea precisa que divide las cuestiones judiciables de las políticas por lo que frente a ciertos casos persiste la duda: ¿han de prevalecer los actos de gobierno en virtud de la legitimidad democrática de los órganos que los dictan, representativos de la voluntad popular o por el contrario, son susceptibles de escrutinio por parte del Poder Judicial de la Nación en su rol de resguardo del ordenamiento jurídico – por mandato del art. 116 de la Constitución Nacional? (Fundamentos, p. 210). Para el Tribunal, la política pública – en este caso vial – no era revisable judicialmente, pero sí lo es su implementación y el apartamiento de la legalidad, en la determinación de los incumplimientos normativos que, valorados con los hechos de la causa y las pruebas incorporadas al juicio, permitieron tener por probada una maniobra fraudulenta. No es otra cosa más que la aplicación del Código Penal – ley de la Nación – en un caso sometido al conocimiento y decisión de los jueces (art. 116 CN argentina).

En otra causa de trascendencia política e internacional, la existencia de una cuestión política no judiciable adquirió suma relevancia. Se trata de una causa iniciada para establecer si hubo un plan criminal orientado a favorecer la impunidad de ciudadanos iraníes sospechados de haber participado en el atentado terrorista a la sede de la Asociación de Mutuales Israelitas Argentinas ocurrido en Buenos Aires en el año1994. La denuncia se hizo a fin de establecer si la existencia de un arreglo diplomático mediante un canal formal – el memorándum de entendimiento con la República Islámica de Irán – incluía otro informal, a través de negociaciones no oficiales, que buscaba sustraer de la acción de la justicia a esas personas señaladas como sus autores y cómplices (causa CFP 14305/2015, resolución de la Sala Ia. de la Cámara Federal de Casación Penal del 18-9-23).

Acá estaríamos ante lo que sería una típica cuestión política: el manejo de las relaciones internacionales. No obstante, al mandarse a celebrar el juicio correspondiente, no se descartó que la cuestión sea finalmente insusceptible de cuestionamiento judicial, por involucrar aspectos que hacen al manejo de las relaciones exteriores. Pero para ello

4. Ver Héctor A. Mairal, *Control Judicial de la Administración Pública*, ed. La Ley, Buenos Aires, Buenos Aires, 2021, p. 553 y 555.

se promovió que se haga en el marco de un juicio para un mejor conocimiento de los hechos. Así, incluso en un caso típico de lo que sería una cuestión política no judiciable, la existencia de datos o informaciones de posible incidencia criminal inclinaron la balanza hacia su judiciabilidad en el marco del conocimiento pleno que supone el juicio penal.

En otro caso, pero ya vinculado a la posible existencia de maniobras de lavado de dinero cuyo origen posible sería la existencia de hechos de corrupción, el Tribunal encargado de su juzgamiento señaló: "*Esos fondos públicos, por haber sido obtenidos a causa de la actividad financiera lícita del Estado Nacional, no se presumen contaminados en su origen. Pero la alteración fraudulenta del destino de esos fondos es ciertamente la causa que ipso facto los contamina de ilicitud […] La actividad financiera del Estado Nacional es la causa lícita que permite dotar de legitimidad a esos fondos presupuestados. Pero los fraudes, cierto es, novaron esa causa lícita primigenia, en otra indudablemente ilícita*" (causa CFP 3017/2013, Tribunal Oral Federal n° 4 de la Ciudad de Buenos Aires, Fundamentos del 26-4-21, p. 1899/1900, confirmada por el tribunal de alzada).

Acá lo que el Tribunal señala es que la actividad financiera del Estado no puede ser delictiva originariamente ya que la asignación de fondos es una decisión política para atender necesidades públicas pero, al incluir maniobras fraudulentas en su desvío, esa actividad ulterior la torna delictiva, habilitando la intervención de los jueces.

Estos casos son tan sólo una muestra de lo actual de la discusión en la materia, que ha trascendido el típico marco de consideración de las llamadas cuestiones políticas – generalmente por medio de acciones expeditas de amparo judicial frente a actos administrativos – para adentrarse en su consideración en el marco de procesos criminales.

V. Conclusión

Cualquier hecho de corrupción pública conlleva un abuso funcional que puede establecerse a partir de las competencias y su ejercicio concreto que configuran una extralimitación orientada a que el funcionario y su grupo afín se enriquezcan; o una afirmación de lo falso o disimulación de lo verdadero, en el marco de maquinaciones que revelan un engaño o ardid orientado a perjudicar al Estado. Lo propio puede establecerse a partir de un acuerdo espurio con el fin de que un funcionario haga o se abstenga de hacer algo a cambio de ventajas económicas o dinero, todo ello vinculado y relacionado con operaciones – de aparente licitud – no lo serían en ese contexto. Todo esto es susceptible de determinación judicial mediante el análisis de prueba incorporada al proceso penal. Esta información es analizada con intervención de las partes, tanto en la etapa de investigación como en el juicio propiamente dicho. Esto es algo propio del oficio de los tribunales en el marco del "conocimiento" del caso (como reza el art. 116 CN argentina), ponderando prueba, desechando unas y dándole preeminencia a otras, para luego escuchar argumentos y su respuesta, analizando las leyes aplicables al caso concreto para finalmente adoptar una decisión final, de condena o absolución.

Lo que suele suceder es que lo delictivo se enmascara en lo político buscando sustraerlo de todo control para garantizar su impunidad. Pero el oficio de los jueces criminales es desentrañar lo marginal y espurio entre papeles y documentos para confirmar o descartar las hipótesis que les someten los fiscales en los procesos que tramitan ante los tribunales de justicia. La corrupción suele ser clandestina y la labor de los tribunales está orientada a echar luz sobre los acuerdos corruptos.

En estos casos hay pautas susceptibles de apreciación judicial, posibilidad de conocimiento de los hechos y no hay imposibilidad de juzgamiento por alguna suerte de privilegio constitucional que impediría su persecución, como la inmunidad de expresión de los legisladores en el ejercicio de su labor (art. 68 CN argentina) o bien la existencia de una cuestión prejudicial, como sería la necesidad de invalidación de actos administrativos en órganos o tribunales especializados, que no existe en el derecho argentino.

Todo lo contrario, hay un mandato de aplicación de las leyes fijado por la propia Constitución argentina, como son las normas penales sancionadas por el Congreso argentino en el marco del caso concreto (arts. 75, inc. 12 y 116 CN argentina). Esto último, reafirmado en el art. 36 CN argentina, en cuanto reconoce que pueden existir graves delitos dolosos contra el Estado y diversos instrumentos internacionales que ordenan tipificar, enjuiciar y sancionar los hechos de corrupción que se cometan en el ejercicio de la función pública.

En otra causa de trascendencia política e internacional, la existencia de una cuestión política no judiciable adquirió suma relevancia.

¿De qué serviría contar con un Poder Judicial independiente si en aquellos casos donde más se demanda su acción enérgica y decidida, su intervención se vea limitada mediante construcciones jurisprudenciales que enerven su actuación? Esto sucedería si se pretende aplicar la doctrina de las cuestiones políticas no judiciables para impedir el juzgamiento de hechos de corrupción pública. Esta doctrina puede incluso funcionar de una manera más perversamente eficaz que el hostigamiento de jueces y fiscales mediante procedimientos disciplinarios o de remoción infundados.

En este sentido, los pronunciamientos judiciales reseñados son auspiciosos y revelan una voluntad de ejercicio pleno de una magistratura independiente y comprometida en el enjuiciamiento y sanción de abusos del poder estatal que, si bien no se encuentran concluidos, van en la senda correcta que supone la rendición de cuentas por delitos incurridos en el ejercicio de la función pública.

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Represión del terrorismo: dilemas para el orden institucional en la Argentina globalizada

This article delves into the journey of criminalizing terrorism in Argentina's national Criminal Code within the context of international technical standardization programs. Addressing criminal conduct without a genuine domestic terrorist threat presents a challenge in complying with global standards.

Cet article examine l'évolution de la criminalisation du terrorisme dans le code pénal national Argentin dans le contexte des programmes internationaux de normalisation technique. Mettre l'accent sur un comportement criminel en l'absence d'une véritable menace terroriste nationale constitue un défi pour se conformer aux normes mondiales.

La cuestión concerniente al modo con el que un país decide criminalizar el delito de terrorismo constituye un laboratorio privilegiado para examinar las tensiones que se producen entre las normas jurídicas, las decisiones políticas y la configuración ética que constituyen un orden institucional concreto. Ello se debe al hecho de que el terrorismo no solo es la expresión más intensa de negación del Otro, de mi libertad, de mi identidad, sino también, la negación del derecho como tal. Por tanto, la determinación con la que el Estado se prepara y reacciona para sancionar los actos terroristas muestra a cielo abierto el tenor de las expectativas que una sociedad mantiene sobre la vigencia de la ley, aun cuando la misma sea puesta en crisis por la existencia de una amenaza grave.

La Argentina es un caso interesante para considerar ya que, en la región de América Latina, presenta enormes dificultades para tomar posición respecto al sentido y alcance que debe tener un sistema de represalias al terrorismo en sus diferentes formas de manifestación. Un punto de partida reiterado —que no puede ser obviado sino a fuerza de olvidar la historia reciente— es que la sociedad argentina fue víctima en la década de los noventa de dos graves ataques terroristas perpetrados bajo el concierto de la Republica Islámica de Irán y la organización terrorista chiita Hezbollah. Estos atentados, el primero contra la Embajada de Israel en Buenos Aires (1992) y el segundo contra la Asociación Mutual Israelita Argentina / AMIA (1994), se proyectan irremediablemente hasta nuestros días ya que al enorme saldo de muertes y destrucción material y simbólica que dejaron se suma el lastre ominoso de la impunidad que benefició a los autores mediatos y inmediatos. En el caso del segundo ataque, después de una larga investigación que mostró los vicios y las incapacidades del sistema de justicia penal argentino para enfrentar desafíos tan profundos como el que representa el terrorismo, se llegó a la sorprendente conclusión de que la única condena que podía imponerse debía recaer sobre las autoridades, jueces y fiscales que actuaron en el esclarecimiento del caso. Conclusión: el extremismo islamista fue exitoso al imponer una legalidad aparente que, reivindicando el odio como guía de acción, desmerece como válido todo proyecto social basado en el reconocimiento de ciudadanos libres.

Los atentados y la impunidad subsiguiente pusieron en evidencia la necesidad de configurar una *cuestión terrorista*, genuina y consistente, que operase como el *topos* concreto para edificar la estructura legal para la represión del terrorismo y, a su vez, dotar de legitimidad a la intervención punitiva estatal haciendo que se recree la expectativa de la efectividad del ejercicio del derecho en ese campo. Sin embargo, con el paso del tiempo fue posible comprobar que el orden institucional argentino padecía diversas acechanzas (ideológicas y materiales) que dificultaban una reacción que estuviese a la altura de las circunstancias de un país que, al fin de cuentas, se integraba como podía a la globalización en curso. En el año 2000, seis años después del último atentado, el Congreso de la Nación sancionó la escueta Ley nº 25.241 que autorizaba a reducir la pena a los imputados que colaboren en una investigación en hechos de terrorismo. Estos fueron definidos como "*acciones delictivas cometidas por integrantes de asociaciones ilícitas u organizaciones constituidas con el fin de causar alarma o temor, y que se realicen empleando sustancias explosivas, inflamables, armas o en general elementos de elevado poder ofensivo, siempre que sean idóneos para poner en peligro la vida o integridad de un número indeterminado de personas*". La norma produjo escasos resultados prácticos.

Por las razones que fuesen – y que no pueden analizarse aquí –, los atentados no generaron ninguna estructura legal consistente en materia de represión del terrorismo. Mientras tanto, la comunidad internacional organizada en las Naciones Unidas advertía a los países sobre la necesidad de tomar cartas en un nuevo asunto de la agenda global: la economía del nuevo terrorismo. La Asamblea General sancionaba en 1999 la Convención para la Represión del Terrorismo (RFT) y el Consejo de Seguridad a través de la Resolución 1267 (1999) reactivaba el mecanismo de sanciones financieras a los Talibanes seleccionados por un comité. Los atentados del 11 de septiembre, con el cambio de paradigma que representó, cimentó la idea de que la lucha contra la financiación del terrorismo debía tener un alcance legal. La Resolución 1373 (2001) del mismo Consejo de Seguridad fue distintiva al respecto al crear un nuevo comité de enlistamiento de los terroristas que significaban una amenaza para la paz y la seguridad de las naciones.

En 2000, la Argentina, junto con Brasil y México, ingresaba al Grupo de Acción Financiera / GAFI, hecho que la conduciría – aunque de manera lateral – a enfrentarse nuevamente con la problemática del terrorismo – que a esta altura estaba habitada por miles de fantasma – . En efecto, este mecanismo internacional, luego de los ataques en suelo americano, amplificó su mandato, solo reservado a la lucha contra el lavado de activos (AML), a este nuevo campo en formación: el *combate de la financiación del terrorismo* (CFT) impulsando a todos los países a definir una posición político-criminal sobre el tratamiento legal que debía darse a este asunto. Quedaba entonces planteado un problema de lógica elemental: los países que debían tipificar penalmente como un delito autónomo la recolección y provisión de fondos para el terrorismo debían necesariamente también definir normativamente justamente qué alcance tenía este último fenómeno. Así, un orden institucional como el argentino, que había sido esquivo a crear una legislación antiterrorista, se sometía ahora a las exigencias de una estandarización técnica, basada en el criterio de que todas las (diferentes) jurisdicciones debían converger a dar soluciones asimilables al desafío que planteaba *Al Qaeda* y sus afiliados, como nuevo enemigo global.

Durante la Administración Kirchner (2004-2007) llegó una primera de respuesta al programa de armonización que planteaba GAFI. En su segunda ronda de evaluaciones mutuas había advertido que, para cumplir con los estándares CFT, resultaba imprescindible, por un lado, la aprobación de la Convención RFT y, por otro, la tipificación autónoma del delito, no siendo suficiente la utilización de las reglas generales de autoría y participación que contenían los códigos penales, en especial, los de tradición continental. El Congreso de la Nación sancionó, en 2005, la Ley 26.024 que aprobó el mencionado instrumento de las Naciones Unidas y, en 2007, la Ley 26.268 modificó el Código Penal de la Nación, criminalizando las asociaciones ilícitas terroristas (articulo 213 *ter*) y la financiación del terrorismo (artículo 213 *quater*). De este modo, los hacedores de la norma encapsularon por primera vez el fenómeno del terrorismo sobre la base de una estructura objetiva: se exigía que el agrupamiento ilícito tuviera un plan de acción destinado a la propagación del odio étnico, religioso o político, se organizara en redes operativas internacionales y dispusiera de armas de guerra, explosivos, agentes químicos o bacteriológicos o cualquier otro medio idóneo para poner en peligro la vida o la integridad de un número indeterminado de personas. A ello se agregaba un especial requerimiento subjetivo: que la asociación tuviera como propósito aterrorizar a la población u obligar a un gobierno o a una organización internacional a realizar un acto o abstenerse de hacerlo. Con estas medidas, el orden institucional argentino terminaba por asimilar en su agenda un tema que le resultaba refractario, pero que le permitía superar de modo pragmático el test que le había realizado la comunidad global a través de GAFI.

Los atentados del 11 de septiembre, con el cambio de paradigma que representó, cimentó la idea de que la lucha contra la financiación del terrorismo debía tener un alcance legal.

Durante la Administración Fernández de Kirchner, con dos mandatos (2008-2015) tuvo lugar la tercera ronda de Evaluaciones de GAFI y, como consecuencia directa de ella, una reforma al Código Penal de la Nación, debido a la sanción de la Ley 26.734. Los evaluadores del mecanismo internacional habían observado que la figura de la asociación ilícita terrorista que había sido creada por la ya mencionada Ley 26.268 restringía la aplicación del delito

de financiación del terrorismo impidiendo la criminalización del apoyo material a los terroristas individuales. La crítica se realizó en el marco de una evaluación muy negativa para la Argentina: de las 49 recomendaciones evaluadas del llamado sistema ALA/CFT, el país solo cumplía completamente con 2. La reacción del gobierno fue tan expedita como sorprendente en lo que respecta al tratamiento legal que decidió darle a la cuestión terrorista: invocando las críticas de GAFI, por un lado, y la necesidad de no criminalizar la protesta social a través de herramientas antiterroristas, decidió eliminar la figura especial de las asociaciones ilícitas (213 *ter*) y no tipificar ningún delito más como acto de terrorismo en la Parte Especial del CNP. La solución político-criminal propuesta por el Poder Ejecutivo y aceptada por el Congreso fue introducir una nueva disposición en la Parte General que ordena agravar la pena en el doble del mínimo y el máximo cuando alguno de los delitos previstos en el Código Penal "*hubiere sido cometido con la finalidad de aterrorizar a la población u obligar a las autoridades públicas nacionales o gobiernos extranjeros o agentes de una organización internacional a realizar un acto o abstenerse de hacerlo*" (Artículo 41 *quinquies*). Con esta reforma, por completo anómala en la tradición comparada, cualquier delito devine acto de terrorismo si se comete con esta *ultraintencionalidad* del autor. Ahora el encapsulamiento legal del terrorismo se apoya en un especial elemento subjetivo del tipo distinto del dolo, prescindiendo de cualquier estructura subjetiva, como antes era una calificada asociación ilícita. En la propia lógica interna del ordenamiento penal nacional se produce un hecho paradojal: con esta nueva "agravante genérica" de la pena, se amplifica el poder de intervención penal cuando se había invocado que la asociación ilícita resultaba un factor no deseado de criminalización. Por eso, en el segundo párrafo del artículo el legislador decidió aclarar que "[l]*as agravantes previstas en este artículo no se aplicarán cuando el o los hechos de que se traten tuvieren lugar en ocasión del ejercicio de derechos humanos y/o sociales o de cualquier otro derecho constitucional*".

[…] Se amplifica el poder de intervención penal cuando se había invocado que la asociación ilícita resultaba un factor no deseado de criminalización.

Este breve itinerario que siguió la represión del terrorismo en Argentina permite extraer una serie de conclusiones sobre las relaciones que se producen entre el programa de estandarización global y el orden institucional nacional: (i) Lo más evidente es que la presión internacional de mecanismos como GAFI produce un impacto directo en la política criminal nacional con independencia de la ideología dominante en el país, que en el caso argentino en estos últimos veinte años abrevó en un progresismo garantista larvado conceptualmente, pero eficaz para dificultar la asimilación de temas de la agenda antiterrorista; (ii) Sin

embargo, habida cuenta de que en un ordenamiento concreto como el argentino la *cuestión terrorista* solo tenía un estatus fragmentario, que ni los atentados sufridos pudieron articular ni consolidar de modo genuino, la presión internacional solo logró imponer la exigencia de una criminalización formal, en cierta medida, exótica y con escasa legitimación material, lo que demuestra que la ideología hegemónica a nivel nacional es siempre más potente que los programas globales que, al basarse en estándares, se transforman rápidamente también en una ideología inconsistente y, de alguna manera, superficial; (iii) El derecho y, en particular, el derecho represivo, para ser efectivo no requiere solo mutaciones normativas, sino de decisiones políticas ancladas en una determinada configuración ética, esfera última donde las grandes preguntas sobre la paz y la seguridad por la que apuesta una sociedad adquieren su verdadero sentido.

Es muy probable que la próxima modificación legal en materia de represión al terrorismo en el país sea nuevamente la consecuencia de la renovada postulación internacional que GAFI hará conocer a las autoridades nacionales en el marco del próximo ejercicio evaluativo. Por lo tanto, seguirá siendo una tarea ardua pero apasionante de la sociedad civil y los especialistas advertir con realismo que para construir un sistema represivo contra el terrorismo lo primero es reconocerlo como una amanezca concreta, no tanto como enemigo global abstracto, sino como la negación de las voluntades libres que conforman una sociedad que no se resigna a perder los rasgos que, bien o mal, la distinguen. ■

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Maritza RODRÍGUEZ
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Attorney Well-Being: New Jersey State Bar's Work

Cet article met en lumière l'état de santé et les préoccupations croissantes pour le bien-être des avocats, avec des informations précieuses sur la santé mentale et l'abus de substances auxquelles sont confrontés les membres de la profession juridique ainsi que les étudiants des facultés de droit dans l'État du New Jersey. Il aborde les problèmes de santé mentale très sensibles et pourtant ignorés auxquels sont confrontés les avocats et qui pourraient affecter leur capacité à pratiquer le droit.

El artículo arroja luz sobre el estado de salud y la creciente preocupación por el bienestar de los abogados, con valiosas reflexiones sobre la salud mental y el abuso de sustancias a los que se enfrentan los miembros de la profesión jurídica, así como los estudiantes de las facultades de Derecho del Estado de Nueva Jersey. Profundiza en los problemas de salud mental, muy delicados pero ignorados, a los que se enfrentan los abogados y que podrían afectar a su capacidad para ejercer la abogacía.

Introduction

The quest to achieve and maintain well-being can be particularly challenging for members of the legal profession in the United States. In addition to the inherent challenges of the practice of law, attorneys over the past three years have confronted the stress of a global pandemic that affected everyone's personal and professional lives.

In November 2022, a New Jersey (NJ) State Bar Association's Attorney Health and Well-Being Work Group, under the leadership of then-State Bar President, Jeralyn Lawrence, created the taskforce "Putting Lawyers First. " It developed a detailed 90-question survey to which 1,643 New Jersey lawyers responded.

The NJ survey took place five years after a 2017 joint study was conducted and published by the American Bar Association's (ABA) Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation. This joint study included nearly 13,000 practicing lawyers across 19 states which investigated and addressed lawyer well-being issues. Of the lawyers studied, between 21 and 36 percent qualified as problem drinkers, and between 19 and 28 percent were struggling with some level of depression, anxiety, or stress.

New Jersey's Findings

NJ survey respondents reported burnout, depression, suicidal ideation, substance use disorders, anxiety, and expressed multiple thoughts of leaving the profession. While 51 percent of NJ lawyers felt enthusiastic about being a lawyer often, very often, or always, 68% reported feeling anxious in the past two weeks; 56% reported a high prevalence of alcohol misuse; 49% reported moderate to high levels of burnout; 49% reported feelings of isolation; 23% reported a high prevalence of depressive symptoms; 28% considered leaving the profession as a result of mental health, burnout, or stress; and 10% reported thoughts of suicidal ideation. These lawyers reported burnout at nearly two times the level of any other working populations[1], suicidal ideations at three times the rate[2], problem drinking at six times the rate[3], anxiety at five times the rate[4], and depression at three and a half times the rate reported for other working populations.

NJ is not the only state surveying its lawyers about the health and well-being of lawyers in their jurisdictions.

1. Tait D. Shanafelt et al., *Changes in Burnout and satisfaction with work-life integration in physicians and the general US working population between 2011 and 2020*, 97 Mayo Clinic Proceeding 491 (2022).
2. Beth Han et al., *Suicidal ideation, suicide attempt, and occupations among employed adults aged 18-64years in the United States*, 66 Comprehensive Psychiatry 176 (2016).
3. Donna M. Bush & Rachel N. Lipari, *Substance Use and Substance Use Disorder by Industry*, CBHSQ Report (15 April 2016), https://www.ncbi.nlm.nih.gov/books/NBK343542/pdf/Bookshelf_NBK343542.pdf.
4. *2021 National Health Interview Survey*, Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/nhis/2021nhis.htm (last visited 6 February 2023).

Other States' Research

NJ is not the only state surveying its lawyers about the health and well-being of lawyers in their jurisdictions. Some are implementing strategies and programs to promote attorney wellness[5]. In addition to state specific surveys, other legal organizations have conducted surveys as well. The American Lawyer's 2021 Mental Health and Substance Abuse Survey reported that 35% of respondents suffered from depression in 2021, a drop from the 37% who responded in 2020, but still a slight increase from the 31% who said they suffered from depression in 2019[6]. Anxiety levels followed a similar pattern, with 67% in 2021, down from the 70.7% reported in 2020, but above the 2019 level of 64%. Overall, the number of respondents who felt mental health and substance abuse in the legal industry were "at crisis levels" was up about three percentage points (445) compared to 2019 (41%) and 2020 (41.7%).

New Jersey's Wellness Committee

Shortly after the results of its survey were published, NJ's Supreme Court acted and formed the Supreme Court Committee on Wellness in the Law, chaired by Justice Lee A. Solomon Its representatives come from legal associations, Attorney General Offices, and the Office of the Public Defender, as well as key members of the court system. The Committee develops recommendations to support the mental health of attorneys, judges, and other members of the legal community, and this author serves on it.

After law school enrollment, statistics show a high prevalence of mental health issues and struggles amongst law students[7]. Students have been reluctant to seek treatment for mental health issues as they remain fearful that seeking treatment will affect their admission to the bar[8]. This fear often results in students not seeking needed treatment in order to avoid any diagnosis or formal labels and thereby meaning the students would have no duty to report this on law school applications[9]. Lack of treatment can lead some students (and thereafter, admitted attorneys) to "self-medicate" with alcohol or drugs[10].

New Jersey Bar Application Disclosure

The well-being of students has also become a priority for the NJ Bar. The Supreme Court announced on 19 September 2023, that the character and fitness aspect of the application that students fill out to be admitted to practice in the state will now limit what bar applicants must disclose about mental health conditions. The applicants do not have to disclose conduct related to a mental health diagnosis or addiction that has been treated professionally, or their participation in an established program.

Accordingly, the mental health questions clarify *"the limited nature of the inquiry and encourages candidates to seek support and treatment, when necessary."* Prior to this, students had to disclose any conditions — like substance and alcohol abuse or mental and emotional disorders — that could affect their ability to practice law and describe the treatment they received for those conditions.

Conclusion

As of 1 December 2023, twenty-two states have not yet taken into consideration a candidate's mental health status when evaluating fitness[11], which is a necessary step in towards supporting the well-being of lawyers. NJ is proud that curriculums now include Professionalism and Well-Being in NJ's law schools.

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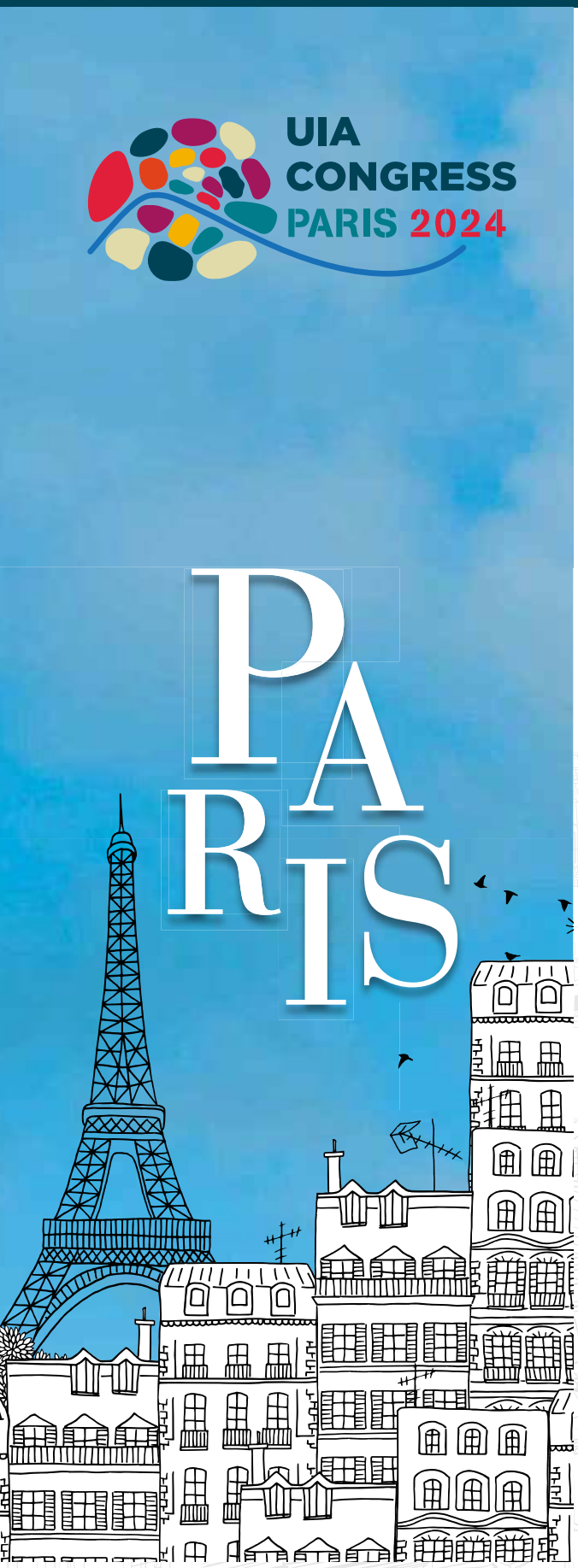
5. California, Colorado, Idaho, Kansas, Illinois, Massachusetts, Nebraska, New York, Virginia, Vermont, West Virginia, Wisconsin, Wyoming, and Utah.
6. Patrick Smith, *Legal Industry's Mental Health Struggles Persisting*, 265 Legal Intelligencer 1 (2022).
7. *See* Christine Charnosky, *Study: Law Schools That Ignore Students' Mental Health 'Shirk' Their Responsibilities*, Law.com (13 July 2022), https://www.law.com/2022/07/13/study-law-schools-that-ignore-students-mental-health-shirk-their-responsibilities/.
8. *See e.g. supra* note 6. *See also* Jerome M. Organ et al., *The 2021 Survey of Law Student Well-Being: More Progress Needed in Fostering Help-Seeking among Law Students*, 91 Bar Examiner 8 (2022), available at: https://thebarexaminer.ncbex.org/article/summer-2022/2021-survey-of-law-student-well-being/.
9. Organ, *supra* note 13.
10. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. of Legal Education 116, 127-136 (2016).

11. These states do not consider a candidate's mental health status when evaluating fitness: Arizona, Arkansas, Hawaii, Illinois, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New York, North Dakota, Pennsylvania, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. American Bar Association, Mental Health Character & Fitness Questions for Bar Admission (1 December 2023), available at https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/.



Ne manquez pas le 68e Congrès annuel de l'UIA à Paris

du 30 octobre au 3 novembre 2024

Le Congrès UIA revient à Paris pour la première fois depuis 2007 !

Paris, ville mythique, est une véritable source d'inspiration à l'international pour beaucoup d'artistes, photographes, musiciens . Les monuments parisiens, par leur histoire et leur impressionnante architecture, font incontestablement partie du charme de la capitale française.

Si Paris se visite, Paris se vit aussi : Paris, c'est aussi la capitale de la gastronomie, de la mode et du shopping; un café en terrasse dans l'un des « bistrots parisiens », un repas sur le pouce dans une brasserie, un somptueux dîner dans un restaurant gastronomique... Attachée à la qualité de vie et au développement durable, la ville offre un cadre particulièrement agréable à ses habitants et à ses visiteurs.

Au nom du Comité d'organisation et en ma qualité de Président du 68e Congrès de notre association, je suis honoré de vous recevoir à Paris du 30 octobre au 3 novembre 2024, soit 17 ans après le congrès qui s'était tenu en 2007.

Paris, ville lumière, riche de sa culture et de son histoire, sera également en 2024 la capitale internationale du sport où se dérouleront les Jeux Olympiques du 26 juillet au 8 septembre, événement majeur après la Coupe du monde de rugby qui s'est tenue en 2023.

Paris accueillera la compétition la plus suivie de la planète et, au-delà « des clichés et des paillettes », la capitale souhaite donner l'exemple de Jeux Olympiques et Paralympiques sobres, écologiques, tournés vers les mobilités douces et donner aux générations futures un exemple d'une transition écologique apaisée.

Ce sera un immense défi.

C'est donc sans oublier ce qui a fait sa renommée et sa richesse passée que vous redécouvrirez Paris, peut-être même aurez-vous la chance de voir la rénovation de la Cathédrale Notre-Dame de Paris presque terminée, son ouverture étant programmée pour décembre 2024.

C'est de la même façon, pour célébrer à la fois le temps passé et l'avenir, que nos thèmes principaux concerneront la mode et les nouvelles technologies, notamment l'intelligence artificielle.

Il faut venir voir éclore le nouveau Paris en 2024 !

Y compris la rénovation du Grand Palais, et ne pas oublier de réserver un restaurant étoilé car, comme le dit la chanson « ça c'est Paris !».

J'espère que vous serez convaincus par cette invitation et viendrez partager ces moments de convivialité qui, j'en suis sûr, resteront gravés dans votre mémoire.

Hervé Chemouli
Président du 68e Congrès de l'UIA

Le Palais des Congrès en chiffres

Plus de **200 événements nationaux et internationaux** par an, rassemblant plus d'un million de participants du monde entier.

17 000 m² de halls d'exposition

4 amphithéâtres pouvant accueillir 370 à 3 700 personnes

22 salles de conférences de 100 à 380 places et 82 salles de réunion

Main Theme 1

Should and Can Artificial Intelligence be Regulated?

Thursday, October 31
9.00 am – 12.30 pm

Worldwide, the technological landscape is largely driven by an exponential development of Artificial Intelligence (AI) tools, based on powerful algorithms known as "systems." In this new landscape, new issues are beginning to emerge, including the fundamental question of regulation. Should AI systems be regulated, and if so, how? In this Main Theme morning session, three discussion panels will analyze the impact of AI systems from both generalist and specialist perspectives. First, a multidisciplinary panel of international experts will examine the philosophical and socio-economic underpinnings and impact of any regulation of AI - the most technologically advanced tool that mankind has ever used on a broad scale. This will lead to a second panel involving a discussion about regulatory objectives by representatives and experts of the world's leading economic blocs (United States of America, European Union, and China). Finally, a third panel will take a deep dive into how processes and procedures in judicial litigation and arbitration will change with the use of generative AI systems as virtual legal "assistants" by litigators: A new "eldorado" for litigators?

Main Theme 2

Fashion and Sustainable Development

Friday, November 1
9.00 am – 12.30 pm

The fashion and luxury sector is considered to be one of the sectors with the highest environmental impact, but also one with the greatest potential for development towards a circular economy. This is why the European Union and its Member States have decided to introduce new measures to accelerate change in the sector's production and consumption model and to raise consumer awareness of what companies are doing in terms of sustainability. EU and national regulations on duty of care, extra-financial communication, and extended producer responsibility to cover the entire product life cycle have a cascading effect on the entire production chain of Fashion and Luxury groups headquartered in the EU.

In a global market, the constraints imposed by the regulations of a continent whose regulatory authorities have chosen to act as a leader in environmental protection have international repercussions on the entire production chain of operators in the fashion and luxury sector, through the extra-territorial, worldwide application of measures or best practices that infuse, *volente o nolente*, their value chains.

The aim of the session is to take stock of the issue and look at the current state of regulations, practices, and issues for economic operators in the sector across continents.

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More opportunities for social interaction!

In parallel with the sessions of the UIA Commissions, many side events will take place in order to facilitate networking and meetings by affinity:

Regional Lawyers' Forum: On the opening day of the Congress (October 30), we encourage you to attend the "UIA Networking Day." Participants are invited to attend discussions and debates pertaining to issues lawyers face in specific regions or by affinity of languages: African lawyers' forum, Spanish-speaking lawyers' forum, Portuguese-speaking lawyers' forum, French-speaking lawyers' forum, Forum of Lawyers from Central and Eastern European countries, Latin-American lawyers' forum, and Arabic-speaking lawyers' forum. The UIA Networking session will also take place on this day. Law firm representatives will give a three-minute presentation on their law firms.

Women's Committee Session: This panel, moderated by Elisabeth Zakharia Sioufi, President of the UIA Women's Committee, will focus on Artificial Intelligence and Women's Rights, examining to what extent Artificial Intelligence can be a tool to contribute to or combat discrimination against women, stereotypes and biases in this respect, and promote and advance their rights. The session will take place on Friday, November 1 at 9.00 am.

UIAdvance: UIA supports law-firm managers in their strategic, financial, and human resources challenges. During the Congress, a special session dedicated to UIAdvance members will take place on Friday, November 1 at 5.30 pm.

10/20/30 years Members Cocktail: On October 30, as a token of appreciation for their unwavering support for the UIA, members of 10, 20, or 30 years will receive an award recognising their long involvement within the UIA on October 30.

Special Session: Innovation and Methodology in Humanitarian Action: The aim of this session is to present new forms of associative commitment, in terms of both methodology and innovation, through the lens of two themes: sexual violence in conflict zones and child protection worldwide. This session will take place on Wednesday, October 30 at 2.00 pm.

Welcome to our first-time participants!

Are you a new participant at the UIA Congress?

We always take care of first-timers at UIA congresses. The UIA organizers will welcome you during a Get-Together Breakfast on Thursday, October 31 from 8:00 am to 9:00 am.

This is an opportunity to meet other UIA members who are new participants and to network!

To make sure you receive special attention during this new experience, your accreditation badge will mention that you are a Congress first-timer.

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Actividades sociales del Congreso

Ceremonia Inaugural Y Cóctel De Bienvenida

Miércoles 30 de octubre

La ceremonia de apertura del congreso tendrá lugar en la Casa de la UNESCO, sede de la prestigiosa asociación con la que la UIA comparte sus valores de diálogo entre civilizaciones, culturas y pueblos, construcción de una cultura de paz y desarrollo sostenible.

Velada Informal

Jueves 31 de octubre

Desde hace 50 años, el Folies Gruss es un símbolo del espectáculo de calidad. Tendrá la oportunidad de asistir a un magnífico espectáculo original, tanto ecuestre como aéreo, presentado por 3 generaciones de la familia Alexis Gruss, seguido de cena y baile.

Es la ocasión perfecta para aprovechar al máximo la velada y disfrutar de un momento de distensión.

Cena de gala

Viernes 1 de noviembre

Un remanso de paz en un mundo agitado, l'Interallié, con sus salones históricos magníficamente restaurados, su espléndido jardín, su centro deportivo contemporáneo, su cocina de primera calidad y su rica historia centenaria, ayuda a mantener un arte de vivir a la francesa y, con ello, contribuye a la influencia de Francia.

Ceremonia De Clausura Y Cóctel

Sábado 2 de noviembre

El traspaso de la presidencia de la actual Presidenta, Jacqueline Scott, al Presidente designado, Carlo Mastellone, será uno de los momentos culminantes de la ceremonia de clausura. La ceremonia de clausura se celebrará en el Palais des Congrès y brindará también la oportunidad de resumir los trabajos científicos del congreso.

Book your accommodation in advance!

Due to high demand, Paris hotels are filling up very quickly. Considering the limited number of rooms and the fact that preferential rates cannot be guaranteed for more than the number of rooms reserved by the UIA, we recommend that you take care of your hotel reservation as early as possible!

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- Fragonard Workshop
- Visit to Fontainebleau Castle
- One-day tour in Champagne

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Suisse – La durée d'un viol comme atténuation de la culpabilité

Dans l'arrêt 7B_15/2021 et 7B_16/2021 du Tribunal fédéral suisse (TF) du 19 septembre 2023, les juges ont été amenés à s'interroger sur la durée d'un viol et ses conséquences sur la culpabilité de l'auteur. La conclusion de la Haute Cour fut qu'un viol d'environ onze minutes est « de courte durée », ce qui justifie une atténuation de la culpabilité. Pourtant, du point de vue de la victime, cette durée n'est pas anodine et peut au contraire paraître interminable. Si la question de la durée de l'acte peut se poser dans le cadre d'une séquestration, a-t-elle toutefois sa place en cas de viol ?

France – Inscription du droit à l'IVG dans la Constitution française

Le 24 juin 2022, la Cour suprême des Etats-Unis revenait sur la décision Roe vs. Wade qui protégeait depuis quasiment cinquante ans le droit des femmes à recourir à l'avortement dans tous les Etats du pays. Ce revirement de jurisprudence permet ainsi à chaque Etat américain d'autoriser ou non l'avortement. Face à cette remise en cause, des citoyens du monde entier sont descendus dans les rues pour protéger ce droit considéré comme fondamental.

En France, à cette fin, l'idée a émergé d'inscrire le droit à l'avortement dans la Constitution française. C'est chose faite depuis le 4 mars 2024. L'IVG, légalisée par la loi Veil du 17 janvier 1975 est désormais inscrite dans la Constitution française.

España – El Consejo de Ministros de España hace público un acuerdo ministerial de reconocimiento del Estado de Palestina

El Consejo de Ministros Español ha hecho público el día 28 de mayo de 2024 un Acuerdo Ministerial por el que se aprueba la Declaración de reconocimiento por España del Estado de Palestina. A diferencia de los recientes precedentes acaecidos en Irlanda, Noruega, este acuerdo no ha sido sometido a aprobación ante el Parlamento Español (Congreso de los Diputados y Senado). La decisión del Consejo de Ministros ya ha provocado las primeras reacciones de carácter diplomático de los países afectados en el conflicto, además de generar controversia en la población española, estando la opinión pública dividida en cuanto a este reconocimiento. En recientes fechas el Gobierno de Eslovenia, con la ratificación de su Parlamento, también ha reconocido al Estado Palestino.

United States – Gun manufacturer liability

Gun manufacturer accountability for transnational arms trafficking that facilitates gun violence in Mexico may be impacted by a landmark decision made on 23 January 2024. The US Court of Appeals determined that Mexico had the right to pursue liability against these gun manufacturers, thereby piercing what has come to be known as a legal shield. This matter was remanded back to the trial court.

India – Foreign Direct Investment Permitted in Space Sector

The Indian Government formulated the Indian Space Policy 2023 with a vision to permit private enterprises carry out end-to-end activities - ranging from launching satellites and rockets into space to operating Earth stations. In order to create an ecosystem for effective implementation of space applications amongst stakeholders and in line with the Space Policy 2023, India has further liberalised its Foreign Direct Policy ("FDI") on 4 March 2024. It permitted 100% FDI in the space sector thereby encouraging foreign participation in the Space activities. The various activities under which the FDI is permitted in the Space sector are either under a fully automatic route i.e. without any Government clearances or under the Government route which requires Government approvals.

The various FDI limits for investing in the Indian Space sector are detailed below:

SPACE SECTOR/ ACTIVITY	SECTORAL CAP	ENTRY ROUTE
• Satellites-Manufacturing & Operation • Satellite Data Products • Ground Segment & User Segment	100%	**Up to 74%:** Automatic route **Beyond 74%:** Government route
• Launch Vehicles and associated systems or subsystems • Creation of Spaceports for launching and receiving Spacecraft	100%	**Up to 49%:** Automatic route **Beyond 49%:** Government route
• Manufacturing of components and systems / sub-systems for satellites, ground segment and under segment	100%	**Up to 100%** Automatic

It is however pertinent to note that in spite of 100% FDI being permitted in the Space sector, the Investee entity shall be subject to sectoral guidelines as issued by the department of Space from time to time.

Egypt – Equality between Public and Private sectors in Egypt

To encourage foreign and local investments and in order to create a competitive environment, the Egyptian parliament has issued law n° 159/2023 that cancelled all privileges gifted to the public sector which included waivers from taxes, customs and governmental fees. On the same lines, the Egyptian prime minister has on 05/02/2024 issued a Decree bearing number n° 242/2024 that clarifies the aforementioned law. Decree n° 242/2024, mentions that cancellation of such privileges is for giving an opportunity and a level playing field that permits equality between both the public and private sector in the investment scheme. The Decree n° 242/2024 made an exception for waivers given to the public sector in areas related to defense and security as well as the public services which will be defined subsequently by another decree to be issued by the minister of finance.

Japan – New Arbitration Act and Governmental Project for International Arbitration in Japan

In 2024, the New Arbitration Act, based on UNCITRAL Model Law, came into force as the part of a governmental project. With a budget of approximately eight-million US$, it aimed to change situations where Japanese corporations did not have enough knowledges and strategies of international arbitration. Many educational seminars and training courses have been provided. Hearing Facilities with advanced IT were established in Tokyo and Osaka. After the project, according to the survey, the mind and knowledges of Japanese corporations has drastically improved. Another hearing facility was established by a private sector with the skills gathered during the project (https://tokyofacilities.com/). Japan is now ready for becoming another driving-force in Asia for international arbitration.

United Kingdom – Post Office in the UK

The State-owned postal service, The Post Office, its executives and lawyers are embroiled in a huge legal scandal. Sub-postmasters run local Post Office branches and often sit at the heart of the local community. The Post Office introduced in the late 1990's an accounting system developed by Fujitsu called Horizon. The new system suggested that many postmasters were stealing money. The Post Office brought criminal prosecutions based upon that evidence. Many went to prison; others lost their businesses. It has become clear recently that Horizon was flawed. Fujitsu had the ability to alter results.

Parliament, in a unique measure, has, by statute, recently reversed all the criminal findings. Revelations in a Public Inquiry suggest the Post Office knew of the problem in the Horizon system as it was prosecuting postmasters. The Inquiry is also looking at the conduct of lawyers and some are calling for the lawyers' regulators to investigate that conduct.

United States – Upheld law on abortion in Arizona

On 9 April 2024, Arizona's Supreme Court upheld an 1864 law that was passed before Arizona achieved statehood and banned all abortions, except those necessary to save a woman's life, a standard not well defined. This law does not make any exception for rape or incest. Arizona's Attorney General described this ruling as "unconscionable and an affront to freedom," and she promised to mount a legal effort to fight off implementation, which she can do, as the Governor of the state of Arizona delegated to her the authority to enforce (or effectively, not enforce) the law. If criminal actions were pursued, convicted doctors could face fines and prison terms of two to five years.

Suisse - La neutralité climatique dans la publicité déloyale

On peut tout dire mais pas avec n'importe qui. La Commission suisse pour la loyauté a conclu que les qualificatifs de « neutre en CO2 », « climatiquement neutre » ou « positif pour le climat » sont fallacieux lorsque les entreprises qui les utilisent dans leurs communications ne peuvent démontrer la véracité de leurs propos. La Commission a ainsi épinglé une entreprise de mazout qui affirmait que son produit était climatiquement neutre, ainsi qu'un fabricant d'aliments pour bébés utilisant le slogan « nos petits pots sont positifs pour le climat ». Bien que non-contraignante, cette décision rejoint les différents mouvements visant à combattre le *greenwashing* en Suisse.

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México – México Vs. Ecuador

El 5 de abril de 2024, la Embajada de México en Quito fue objeto de un hecho extraordinario cuando fuerzas oficiales de Ecuador irrumpieron para evitar la huida del ex vicepresidente de dicho país condenado por hechos de corrupción que ocurrieron entre 2013 y 2017. Desde el 17 de diciembre pasado Glas se refugió en la Embajada pidiendo asilo diplomático que le fue concedido por México. En el momento de los hechos el asilado se encontraba en proceso de obtener un salvoconducto para marcharse del país. Por su parte del gobierno de dicho país manifestó que la actuación de Ecuador vulnera el derecho internacional y el derecho de asilo. Así mismo, Ecuador responde que impedirá la huida de condenados por corrupción de su país. Se espera el anuncio de medidas provisionales solicitadas por México en el sentido de que Ecuador adopte los mecanismos apropiados en el caso y permita que los canales y asuntos diplomáticos sean respetados en la Sede de la Embajada Diplomática en dicho país.

France – Dissolution de l'Assemblée Nationale

Le 9 juin 2024, le Président de la République française Emmanuel Macron a annoncé la dissolution de l'Assemblée nationale.

La dissolution est une prérogative du Président, prévue par l'article 12 de la Constitution. Il existe deux conditions temporelles : les élections ont lieu 20 jours au moins et 40 jours au plus après la dissolution, en outre il ne peut y avoir une nouvelle dissolution dans l'année qui suit. Le Président est également tenu de consulter le premier ministre et les présidents des assemblées.

Cette dissolution a ceci d'exceptionnel qu'elle a été annoncée au regard des résultats des élections européenne, qui amènent à se questionner sur l'adéquation entre la majorité présidentielle et les citoyens français.

La dernière dissolution de cette nature remonte à 1968.

Contributed editors to these legal spotlights are:
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