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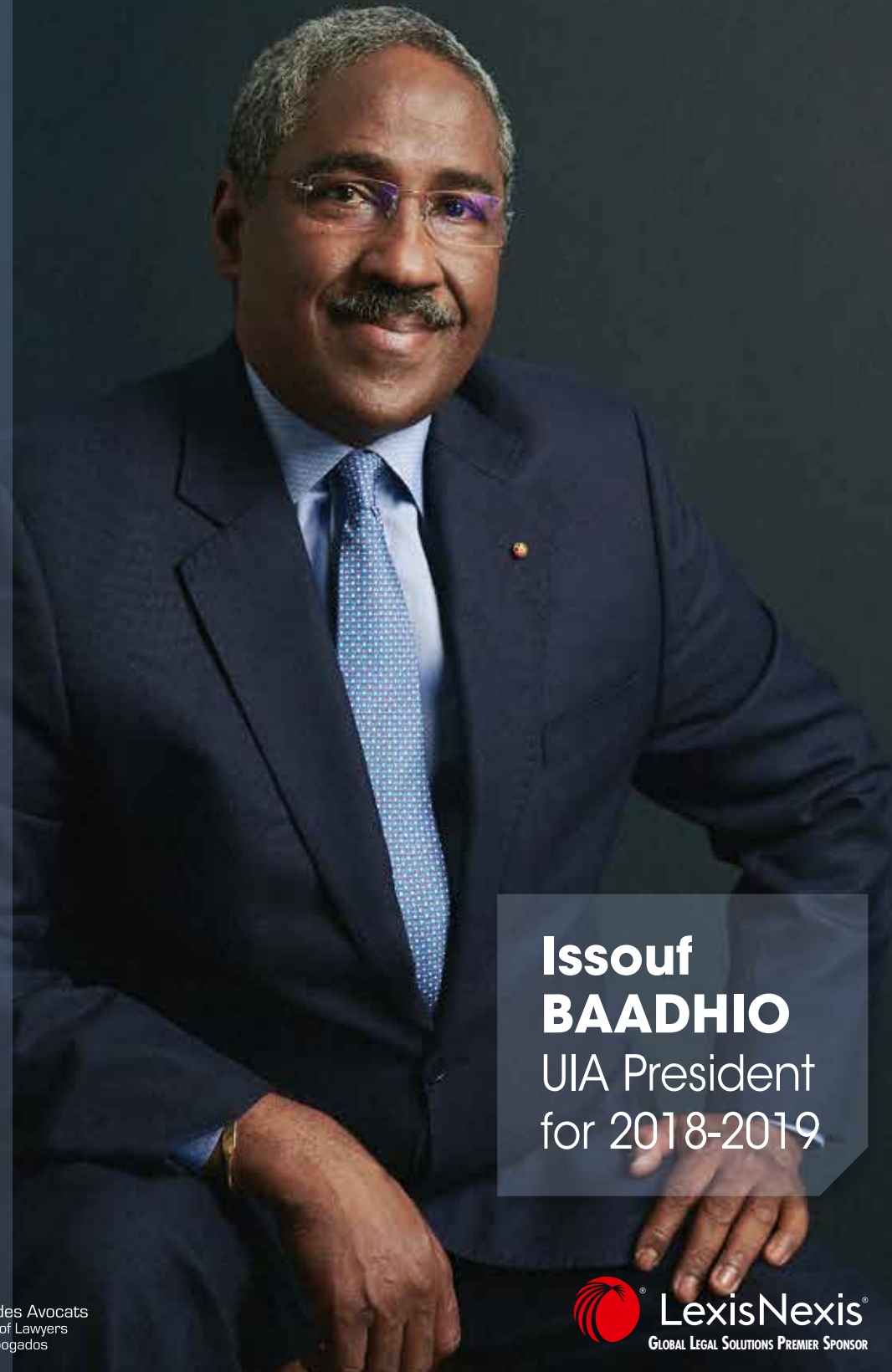
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*A group of UIA members from Africa at the Porto Congress*



# Editorial

*UIA General Assembly at the Porto Congress*





# President's Editorial

I Issouf BAADHIO

Dear Colleagues,

It is with pride and emotion that I took the lead at UIA at the end of the Porto Congress, on November 2, 2018, as the first President from Sub-Saharan Africa since the creation of the institution 92 years ago. That was certainly symbolic, but not just that. This movement illustrates our organisation's commitment to multiculturalism and the representativeness of its members, which is finally being reflected in its governing bodies, although still somewhat insufficiently.

Africa is widely represented in UIA: 26% of our individual members are African and new members from Africa accounted for 45.5% of the total new memberships in 2017. The presence of African lawyers in governing bodies is much lower – only 10%. I will therefore strive to change this aspect of our association by giving our African colleagues the opportunity to evolve within the association, without being limited to the roles they are expected to play, such as the presidency of the commission devoted to OHADA law (Organisation for the Harmonization of Business Law in Africa). In fact, in my inaugural speech, I also drew a parallel with the days when the only women in government dealt with the Ministry of Women's Affairs or Family Welfare.

This is a parallel which also leads me to note that the situation of our organisation's women members is also the same. They account for 27% of our members, but about 20% end up with official functions in the Governing Board. It is essential for UIA to evolve towards gender parity, especially considering that, in many of the countries that make up our association, the proportion of women entering the profession is higher than the number of men. That is why we had included the gender issue in our statutes in 2012. We now need to strengthen the application of this provision. It seems to me very noteworthy that this issue of the *Juriste* has devoted an entire section to the subject of women and law, with an approach that

deals both with the place of women in the profession and recent movements freeing women's voices and expression, which will eventually imply further developments in law.

I would like to highlight the excellent initiative taken by Christina Blacklaws, President of the Law Society of England and Wales, who – following a series of round tables and analyses undertaken with several thousand women – developed a "toolkit" to fight against unconscious biases that, when not identified, pollute our judgment and to encourage the implementation of regulatory, technological and educational measures that will allow women to break down structural and cultural barriers. The role of our bar associations in this evolution is of paramount importance.

During my presidency, I would also like to highlight the link between international law and human rights by having UIA draft a charter on these issues to bring them into focus for decision-makers. Indeed, has international law – which was forged at the end of the Second World War with a view to reorganising states – evolved sufficiently to take human rights and fundamental individual freedoms into account? These issues are particularly relevant for developing countries, including African countries.

Another avenue of work will be the consolidation of the conditions under which our profession is practiced. Last year, I had participated in the work of the UIA Sub-Committee on the core principles of the profession, headed by Bar President Dal from Belgium. You will also find the fruit of our labour in this issue: an important text bringing together the 8 main principles that govern our profession, which are the common denominators of our work, whatever our country of origin. UIA is a reference institution and a bulwark against the recurring challenges and threats lawyers face around the world. UIA must continue to be the voice promoting independence, freedom and justice.

I invite you to take ownership of this major text in an environment where the complexity of the rules of our profession is auguring a new, highly demanding era of special requirements, both in terms of the governance of our own ethics, and because of compliance-related rules that are more and more consubstantial with our professional lives.

But the UIA I am talking about is not a kind of distant entity with vague contours. UIA is the sum of its members and their individual initiatives. UIA is you, in reality! That is why I would encourage all of you to invest your efforts in the life and activities of our association, to promote its actions, such as this text on the core principles of the profession, or its seminars and annual congress – which will be held on November 6-10 in Luxembourg this year.

And I would of course especially encourage my African sisters and brothers to get involved in UIA, its technical commissions and different bodies, and to assert their truly dedicated expertise in all fields, because our bars harbour excellent skills, so that all may take full advantage of these multicultural professional exchanges, which are the true wealth of our organisation.

Happy reading to all!

Bâtonnier Issouf BAADHIO  
President of UIA  
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# Editorial du Président

## I Issouf BAADHIO

Chers Confrères, Chères Consœurs,

C'est avec fierté et émotion que j'ai pris la tête de l'UIA à l'issue du congrès de Porto, le 2 novembre dernier, en tant que premier Président d'Afrique sub-saharienne depuis la création de l'institution il y a 92 ans. C'est certes un symbole, mais pas uniquement. Ce mouvement illustre l'attachement de notre organisation au multiculturalisme et à la représentativité de ses membres, qui se reflète enfin dans ses instances dirigeantes, même si de manière insuffisante pour l'instant.

L'Afrique est largement représentée à l'UIA : 26% de nos membres individuels sont africains et les adhésions en provenance d'Afrique ont représenté 45,5% des adhésions totale en 2017. La présence d'avocats africains dans les instances dirigeantes est beaucoup plus faible, seulement 10%. Je vais donc m'attacher à faire évoluer cet aspect de notre association en donnant à nos confrères africains la possibilité d'évoluer au sein de l'association, sans être cantonnés aux rôles où ils sont attendus, comme la présidence de la commission consacrée au droit OHADA. Lors de mon discours d'investiture, j'avais d'ailleurs fait le parallèle avec l'époque où les seules femmes que l'on trouvait dans les gouvernements s'occupaient du ministère de la condition féminine, ou de la famille.

Parallèle qui m'amène à constater que la situation est identique pour les femmes membres de notre organisation. Elles représentent 27% de nos adhérents, mais environ 20% se retrouvent avec des fonctions officielles au sein du Conseil de Présidence. Il est indispensable que l'UIA évolue vers la parité hommes-femmes, surtout si l'on considère que, dans bon nombre de pays qui composent notre association, la proportion de femmes accédant à la profession est supérieure au nombre d'hommes. C'est pour cette raison que nous avons fait inscrire la question de la parité dans nos statuts en 2012. Il faut maintenant en renforcer son application.

Il me semble donc très important que ce numéro du Juriste dédie une section entière à la question des femmes et du droit, avec une approche qui traite à la fois de la place de la femme au sein de la profession, mais également des mouvements récents qui libèrent la parole des femmes et vont impliquer à terme une évolution du droit.

Je souligne ici l'excellente initiative de Christina Blacklaws, Présidente de la Law Society of England and Wales – qui, à la suite d'une série de tables rondes et d'analyses effectuées avec plusieurs milliers de femmes, a élaboré un « toolkit » (boîte à outils) destiné à lutter contre les préjugés inconscients qui, lorsqu'ils ne sont pas identifiés, polluent notre jugement, et à encourager la mise en place de mesures réglementaires, technologiques et éducatives qui permettront aux femmes de faire tomber les barrières structurelles et culturelles. Le rôle de nos organisations de barreaux dans cette évolution est primordial.

Je souhaite également, au cours de ma présidence, mettre l'accent sur l'articulation entre le droit international et les droits humains en amenant l'UIA à rédiger une charte sur ces questions pour en faire le centre des préoccupations des décideurs. En effet, ce droit international, mis en place à la sortie de la seconde guerre mondiale dans un objectif de réorganisation des Etats, a-t-il suffisamment évolué pour prendre en considération les droits humains et les libertés individuelles essentielles ? Ces questions sont particulièrement pertinentes pour les pays en voie de développement, dont les pays africains.

Un autre axe de travail sera la consolidation des conditions d'exercice de notre profession. J'ai participé l'an dernier aux travaux du Sous-Comité de l'UIA en charge des principes essentiels de la profession, dirigé par le Bâtonnier Dal de Belgique. Vous trouverez également dans ce numéro le fruit de nos travaux : un texte important qui rassemble les 8 grands principes qui

régissent notre profession et qui sont le dénominateur commun de notre activité, quel que soit notre pays d'origine. L'UIA se veut une référence et un rempart face aux challenges et menaces récurrents qui pèsent sur les avocats à travers le monde. L'UIA doit continuer à être cette voix en faveur de l'indépendance, la liberté et de la justice. Je vous invite à vous approprier ce texte majeur dans un environnement où la complexification des règles de notre métier augure d'une nouvelle ère d'exigence particulière, tant au regard de la gouvernance de notre propre éthique, qu'en raison des règles de conformité (compliance) de plus en plus consubstantielles à nos vies professionnelles.

Mais l'UIA dont je parle n'est pas une sorte d'entité lointaine aux contours imprécis. L'UIA est la somme de ses membres et de leurs initiatives individuelles. L'UIA, c'est vous en réalité ! C'est la raison pour laquelle je vous encourage à vous investir dans la vie et les activités de notre association, à promouvoir ses actions, comme ce texte des principes essentiels de la profession, ou encore ses séminaires et ou son congrès annuel – qui se tiendra cette année à Luxembourg du 6 au 10 novembre 2019.

Et évidemment j'encourage tout particulièrement mes consœurs et confrères africains à s'engager dans l'UIA, ses commissions techniques, ses organes et à faire valoir leur expertise dédiée dans tous les domaines car nos barreaux recèlent d'excellentes compétences, et afin que tous profitent pleinement de ces échanges professionnels multiculturels, qui font la richesse de notre organisation.

Bonne lecture à tous !

Bâtonnier Issouf BAADHIO  
Président de l'UIA  
[president@uianet.org](mailto:president@uianet.org)

# Editorial del Presidente

## I Issouf BAADHIO

Estimados compañeros, estimadas compañeras:

Me enorgullece y emociona haber asumido el mando de la UIA al final del congreso de Oporto, el 2 de noviembre pasado, como primer Presidente de África Subsahariana desde la creación de la institución hace 92 años. Es indudablemente un símbolo, pero no solo eso. Este movimiento ilustra el interés de nuestra organización por la multiculturalidad y la representatividad de sus miembros, que en última instancia se refleja en sus órganos de gobierno, aunque de momento sea insuficiente.

África está ampliamente representada en la UIA: el 26% de nuestros miembros individuales son africanos y las adhesiones procedentes de África representaron el 45,5% de todas las adhesiones en 2017. La presencia de abogados africanos en los órganos de gobierno es mucho menor, tan solo un 10%. Así que voy a dedicarme a tratar de avanzar en este aspecto de nuestra asociación dando a nuestros compañeros africanos la posibilidad de evolucionar en la asociación, sin quedar limitados a las funciones que se espera que ocupen, como la presidencia de la comisión dedicada al derecho OHADA. En mi discurso de investidura, hice el paralelismo con la época en la que las únicas mujeres que encontrábamos en los gobiernos se ocupaban del ministerio de asuntos de la mujer o de familia.

Paralelismo que me lleva a constatar que la situación es idéntica para las mujeres miembros de nuestra organización. Representan el 27% de nuestros miembros, pero aproximadamente el 20% ocupa cargos en el Consejo de Presidencia. Es indispensable que la UIA evolucione hacia la paridad entre hombres y mujeres, sobre todo si tenemos en cuenta que, en muchos países que componen nuestra asociación, la proporción de mujeres que acceden a la profesión es superior a la de hombres. Por este motivo, introdujimos la cuestión de la paridad en nuestros estatutos en 2017. Ahora hay que reforzar su aplicación. Así

pues, me parece muy importante que este número del Juriste dedique una sección entera a la cuestión de las mujeres y el derecho, con un enfoque que trate a la vez el lugar de la mujer en la profesión, pero también los recientes movimientos que liberan la palabra de las mujeres e implicarán al final una evolución del derecho.

Aquí destaco la excelente iniciativa de Christina Blacklaws, Presidenta de la Law Society of England and Wales, que, tras una serie de mesas redondas y análisis realizados con varios miles de mujeres, elaboró un «toolkit» (caja de herramientas) destinado a luchar contra los prejuicios inconscientes que, cuando no se identifican, contaminan nuestro juicio, y promover la implementación de medidas reglamentarias, tecnológicas y educativas que permitan a las mujeres derribar las barreras estructurales y culturales. El papel de nuestras organizaciones de representación de los abogados para esta evolución es primordial.

Durante mi presidencia deseo poner también el acento en la articulación entre el derecho internacional y los derechos humanos llevando a la UIA a redactar una carta sobre estas cuestiones para convertirlas en el centro de las preocupaciones de los encargados de la toma de decisiones. De hecho, este derecho internacional, creado al término de la Segunda Guerra Mundial con un objetivo de reorganización de los Estados, ¿ha evolucionado lo suficiente como para tener en cuenta los derechos humanos y las libertades individuales esenciales? Estas cuestiones son especialmente pertinentes para los países en vías de desarrollo, entre los que se encuentran los países africanos.

Otro eje de trabajo será la consolidación de las condiciones de ejercicio de nuestra profesión. El año pasado participé en los trabajos del Subcomité de la UIA encargado de los principios básicos de la profesión, dirigido por el Decano Dal de Bélgica. En este número encontrarán también el fruto de nuestros trabajos: un texto importante que reúne los 8 grandes

principios que rigen nuestra profesión y que son el denominador común de nuestra actividad, con independencia de nuestro país de origen. La UIA pretende ser una referencia y un bastión ante los retos y amenazas recurrentes que pesan sobre los abogados en el mundo. La UIA debe seguir por esta vía a favor de la independencia, la libertad y la justicia. Les invito a apropiarse de este importante texto en un entorno donde la creciente complejidad de las reglas de nuestra actividad augura una nueva era de exigencia particular, tanto por la gobernanza de nuestra propia ética como por las reglas de conformidad (compliance) cada vez más consustanciales a nuestras vidas profesionales.

Pero la UIA de la que hablo no es una especie de entidad lejana de contornos imprecisos. La UIA es la suma de sus miembros y sus iniciativas individuales. ¡La UIA en realidad son ustedes! Es el motivo por el que les animo a implicarse en la vida y las actividades de nuestra asociación, promover sus acciones, como este texto de los principios básicos de la profesión, o incluso sus seminarios y/o su congreso anual, que se celebrará este año en Luxemburgo del 6 al 10 de noviembre de 2019.

Y evidentemente, animo en particular a mis compañeras y compañeros africanos a implicarse en la UIA, sus comisiones técnicas, sus órganos y hacer valer sus conocimientos y experiencia específicos en todos los ámbitos, ya que nuestros colegios de abogados tienen excelentes competencias, y para que todos se beneficien plenamente de estos intercambios profesionales multiculturales, que constituyen la riqueza de nuestra organización.

Feliz lectura a todos.

Bâtonnier Issouf BAADHIO  
Presidente de la UIA  
president@uianet.org

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## Message from the Editor-in-Chief

I **Nicole VAN CROMBRUGHE**

Several of the articles in this issue are devoted to the condition of women in the world – in the world of law in particular. It seemed to us that, particularly as highlighted by recent events, this subject deserved our attention.

Several articles remind us that courageous and persevering women opened the doors to our profession for their female colleagues. This is particularly the case with the article by Pauline Wright, which reviews “*The First 100 Years of Women in the Law in NSW Australia*”, but also the article by Emmanuel Pierrat. Of course, a detour via the #Me Too movement and others of the same nature could not be overlooked either. Our colleagues, Deborah A. Nilson, Stephanie Messas and Caitlin Delaney, have echoed this, tracing the origins of the movement by shedding light on the consequences of this groundswell in terms of the evolution of legislation in the United States. However, the wave of outrage that cast the spotlight on the “casting couch” and generally on assaults of all kinds to which women may be subjected cannot obscure some of the even more dramatic aspects of the feminine condition. Such as the discrimination women suffer in certain jurisdictions in which the death penalty endures, highlighted by Delphine Lourtau and Sharon Pia Hockey in the article they have devoted to the project launched on this issue by the Cornell Center on Death Penalty Worldwide or the trafficking of women that still takes place today despite all the efforts made to counter it, which has been highlighted by Romina Canessa’s article.

As Christina Blacklaws reminds us, the future is in our hands, those of women and men of goodwill. The indispensable contribution of men in the recognition of the asset the participation of women represents in building society is very fortunately illustrated and already quoted by three other colleagues, besides Emmanuel Pierrat: Peter Reyes Jr., Christopher B. Kende and Gustavo Salas Rodriguez. It is

indeed important for men’s voices to be heard.

That being so, we may ask ourselves whether this debate is not – not out of date, as evidenced by the articles we publish, but considered too narrowly. It is clear that discrimination and violence are far from perpetrated against just one of the traditional genders and that members of the LGBT community must also be protected. Since that is the case, one may well wonder whether the “undifferentiation” of genders that we are currently witnessing presents the risk of sliding into a neutralization of otherness. In this respect – although the amendment will probably not be retained in the end – the draft law “for Schooling-in-Confidence” in France may be quoted, in which the deputies adopted an amendment to replace references to a “father” or “mother” by “parent 1” and “parent 2” on school forms. Of course, the trap of homosociality must be avoided – i.e. mechanisms that guide people of the same gender to have non-sexual relationships, which usually come into play in kindergarten – but must one lose one’s identity for this?

This time, the section on “The Legal Profession” includes just two contributions. On the one hand, an article by Georges-Albert Dal devoted to an important subject, i.e. a resolution adopted by the UIA General Assembly reminding the world of the core principles of the legal profession. On the other is a captivating article by James C. Moore on the role we can play in supporting a cultural institution. However, we regret to note that only the rare articles are contributed for this section. We therefore warmly invite all those of you who wish to speak about our profession, its challenges and its issues not to hesitate to take up their pens or at least to share with us the topics they would like to see covered.

In the “Practice of Law” section, as dictated by tradition, we have published the Monique Raynaud-Contamine prize, for which the *Juriste’s* editorial board is all the more proud

this time as it has been awarded to one of its members, Barbara J. Gislason. We had to request Barbara to make it a less ambitious version given the length of her study on “*Gene Editing, Portable Toilets and World Security*”, but you will find the details of the Website on which you can consult the full version at the end of the article. The other contributions in this section leave nothing to be desired in terms of their interest.

*Last but not least*, the “UIA News” section will remind you of the warmth of the Porto Congress, the lively discussions held during the working sessions or over a drink, the new or bolstered friendships and all that is the strength of UIA. Tomorrow it will be Luxembourg – another city, other scenery, but always the pleasure of meeting and gaining new knowledge (“*connaissances*” – both in terms of information and new contacts), in terms of all the meanings of the word in French.

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# Message du rédacteur en chef

**I Nicole VAN CROMBRUGGHE**

Dans ce numéro, nous consacrons plusieurs articles à la situation des femmes dans le monde et dans le monde du droit en particulier. Il nous a semblé, en effet, que cette question particulièrement mise en exergue par des événements récents méritait que nous nous y arrêtions.

Plusieurs articles nous rappellent que des femmes courageuses et opiniâtres ont ouvert la voie de notre profession à leurs consœurs. C'est le cas notamment de l'article de Pauline Wright qui fait le point sur « *The First 100 Years of Women in the Law in NSW Australia* » mais aussi de celui d'Emmanuel Pierrat. Bien évidemment, nous ne pouvions éviter un détour par #Me Too et les autres mouvements de même nature. Nos consœurs Deborah A. Nilson, Stephanie Messas et Caitlin Delaney s'en font l'écho et nous retracent l'origine du mouvement en éclairant les conséquences de cette lame de fond sur l'évolution de la législation aux Etats-Unis. La vague d'indignation qu'a suscité le coup de projecteur ainsi donné à la 'promotion canapé' forcée et de manière générale aux agressions en tout genre auxquelles les femmes peuvent se voir soumises, ne peut toutefois faire oublier des aspects encore plus dramatiques de la condition féminine. Ainsi la discrimination dont souffrent les femmes dans certaines juridictions connaissant la peine de mort, soulignée par Delphine Lourtau et Sharon Pia Hockey dans l'article qu'elles consacrent au projet lancé sur cette question par le Cornell Center on the Death Penalty Worldwide ou encore le trafic sexuel toujours d'actualité en dépit des efforts consentis, ce que souligne l'article de Romina Canessa.

Comme le rappelle Christina Blacklaws, l'avenir est entre nos mains, celles des femmes et des hommes de bonne volonté. Cette contribution indispensable du masculin dans la reconnaissance de l'atout que constitue la participation des femmes à la construction de la société est très heureusement illustrée déjà cité par trois autres confrères, outre par Emmanuel Pierrat: Peter Reyes Jr, Christopher B.

Kende et Gustavo Salas Rodriguez. Il est effectivement capital que des voix masculines se fassent entendre.

Cela étant, nous pouvons nous demander si ce débat n'est pas, non pas dépassé comme en témoignent les articles que nous publions, mais envisagé de manière trop étroite. Il est, en effet, évident que la discrimination et la violence sont loin de ne concerner qu'un seul des sexes traditionnels et que les membres de la communauté LGBT aussi doivent s'en voir protégés. Cela étant, on peut se demander si l'indifférenciation entre les genres à laquelle nous assistons ne présente pas un risque de glissement vers une neutralisation de l'altérité. On peut citer à cet égard, même si cet amendement ne sera sans doute pas retenu *in fine*, le projet de loi «pour une école de la confiance» en France, dans le cadre duquel les députés ont adopté un amendement afin de remplacer les mentions «père» et «mère» par «parent 1» et «parent 2» dans les formulaires scolaires. Il faut bien sûr éviter le piège de l'homosocialité, c'est-à-dire ces mécanismes qui orientent les personnes du même genre à entretenir des relations non sexuelles, qui se mettent généralement en place dès la maternelle, mais faut-il pour cela perdre son identité ?

La rubrique « la profession d'avocat » ne comporte cette fois que deux contributions. D'une part, un article de Georges-Albert Dal consacré à un sujet majeur, à savoir résolution adoptée par l'assemblée générale de l'UIA et rappelant au monde les principes essentiels de la profession d'avocat. D'autre part, un article captivant de James C. Moore sur le rôle que nous pouvons jouer en matière de soutien d'une institution culturelle. Cela étant nous regrettons de devoir constater que les articles destinés à cette rubrique se font rares. Nous invitons donc chaleureusement tous ceux parmi vous qui souhaitent s'exprimer sur notre profession, ses défis, ses enjeux de ne pas hésiter à prendre la plume ou à tout le moins de nous faire part des sujets qu'ils souhaiteraient voir traités.

Dans la rubrique « pratique du droit », nous publions, comme le veut la tradition, le prix Monique Raynaud-Contamines dont cette fois le comité de rédaction du *Juriste* est d'autant plus fier qu'il a été décerné à l'un de ses membres, Barbara J. Gislason. Nous avons dû demander à Barbara d'en faire une version moins ambitieuse compte tenu de la longueur de son étude intitulée « *Gene Editing, Portable Toilets, and World Security* » mais vous trouverez à la fin de l'article les coordonnées du site sur lequel vous pourrez consulter la version intégrale. Les autres contributions de cette rubrique ne laissent rien à désirer en matière d'intérêt.

*Last but not least*, la rubrique 'Actualités de l'UIA' vous rappellera le chaleureux congrès de Porto, les discussions animées lors des séances de travail ou autour d'un verre, les amitiés nouvelles ou renforcées et tout ce qui fait la force de l'UIA. Demain, ce sera Luxembourg. Autre ville, autre décor, mais toujours le plaisir de se retrouver et d'acquérir de nouvelles connaissances, dans tous les sens que le français donne à ce terme.

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# Mensaje del Redactor Jefe

## I Nicole VAN CROMBRUGGHE

En este número dedicamos varios artículos a la situación de las mujeres en el mundo y, en particular, en el mundo del derecho. Nos ha parecido que esta cuestión, que los últimos acontecimientos han puesto especialmente de relieve, merecía nuestra atención.

Varios artículos nos recuerdan que algunas mujeres valientes y tenaces abrieron la vía de nuestra profesión a sus compañeras. Es el caso del artículo de Pauline Wright, que hace un repaso a «*The First 100 Years of Women in the Law in NSW Australia*», así como el de Emmanuel Pierrat. Naturalmente, no podíamos evitar dedicar una parte a #Me Too y otros movimientos del mismo tipo. Nuestras compañeras Deborah A. Nilson, Stephanie Messas y Caitlin Delaney se hacen eco de ello y repasan el origen del movimiento explicando las consecuencias de este mar de fondo en la evolución de la legislación en Estados Unidos. La oleada de indignación que han suscitado los escándalos de acoso sexual en el ámbito laboral y, de manera general, las agresiones de todo tipo a las que pueden verse sometidas las mujeres, no puede hacernos olvidar aspectos aún más dramáticos de la condición femenina. Es el caso de la discriminación que sufren las mujeres en algunas jurisdicciones que conocen la pena de muerte, denunciada por Delphine Lourtou y Sharon Pia Hockey en el artículo que dedican al proyecto lanzado al respecto por el Cornell Center on the Death Penalty Worldwide, o incluso el tráfico sexual que sigue dándose a pesar de los esfuerzos realizados, lo que subraya el artículo de Romina Canessa.

Tal como recuerda Christina Blacklaws, el futuro está en nuestras manos, las de las mujeres y los hombres de buena voluntad. Esta contribución indispensable del sexo masculino al reconocimiento de la ventaja que constituye la participación de las mujeres en la construcción de la sociedad la ilustran muy atinadamente otros tres compañeros, además de Emmanuel Pierrat: Peter Reyes Jr, Christopher B. Kende y

Gustavo Salas Rodríguez. Efectivamente, era fundamental que se manifestaran voces masculinas.

Así pues, podemos preguntarnos si este debate no está, ya no superado como demuestran los artículos que publicamos, sino planteado de una forma demasiado somera. De hecho, es evidente que la discriminación y la violencia no afectan ni mucho menos a uno solo de los sexos tradicionales, y que también hay que proteger a los miembros de la comunidad LGBT. Cabe preguntarse, pues, si la no diferenciación entre géneros a la que asistimos no presenta el riesgo de virar hacia una neutralización de la alteridad. En este sentido, podemos citar – aunque seguramente esta enmienda no se tendrá en cuenta al final – el proyecto de ley «por una escuela de confianza» en Francia, para el cual los diputados han adoptado una modificación destinada a sustituir los términos «padre» y «madre» por «progenitor 1» y «progenitor 2» en los formularios escolares. Naturalmente, hay que evitar la trampa de la homosocialidad, es decir, esos mecanismos que llevan a las personas del mismo género a mantener relaciones no sexuales, que generalmente se crean ya en la primera infancia, pero ¿acaso hay que perder la propia identidad?

La sección «abogacía» tan solo cuenta esta vez con dos contribuciones. Por una parte, un artículo de Georges-Albert Dal dedicado a un tema importante, la resolución aprobada por la Asamblea General de la UIA, que recuerda al mundo los principios básicos de la abogacía. Por otra parte, un artículo fascinante de James C. Moore sobre el papel que podemos desempeñar en apoyo a una institución cultural. No obstante, lamentamos tener que señalar que los artículos destinados a esta sección están siendo escasos. Invitamos a todos aquellos de ustedes que deseen expresarse sobre nuestra profesión, sus retos o sus problemáticas, a tomar la pluma o, al menos, a comunicarnos los temas que les gustaría que se trataran.

En la sección «ejercicio del derecho» publicamos, como viene siendo tradicional, el premio Monique Raynaud-Contamine, del que esta vez el comité de redacción del *Juriste* está especialmente orgulloso, puesto que ha sido otorgado a una de sus miembros, Barbara J. Gislason. Hemos querido pedirle a Barbara que redactara una versión menos ambiciosa, dada la longitud de su análisis titulado «*Gene Editing, Portable Toilets, and World Security*» pero al final del artículo encontrarán la dirección de la página web en la que podrán consultar la versión íntegra. Las demás contribuciones de esta sección son también muy interesantes.

*Last but not least*, la sección «Actualidad de la UIA» les recordará el cálido congreso de Oporto, los animados debates que se mantuvieron en las sesiones de trabajo o en conversaciones informales, las amistades nuevas o afianzadas y todo aquello que engrandece la UIA. Mañana será Luxemburgo. Otra ciudad, otro escenario, pero siempre el mismo placer de reunirnos, aprender y conocer a otros compañeros.

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UIA News  
Actualités de l'UIA  
Novedades de la UIA





October 30 - November 3, 2018  
UIA 62<sup>nd</sup> Congress in Porto



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





*His Excellency the President of the Portuguese Republic, Marcelo Rebelo de Sousa*

## General Assembly and Opening Ceremony

The UIA (International Association of Lawyers) had the honor of welcoming his Excellency the President of the Portuguese Republic, Marcelo Rebelo de Sousa at its 62<sup>nd</sup> Congress General Assembly on October 30, 2018. He made an interesting opening speech for which he received a standing ovation.

Two resolutions were adopted: "Resolution on fight against all Forms of Slavery" and "Core Principles of the Legal Profession".



*Pedro Pais de Almeida, President of UIA*



*Jorge Sampaio, former President of the Republic of Portugal*

The President of the Porto Municipal Assembly, Miguel Pereira Leite, gave a vibrant speech at the UIA Congress opening ceremony. The UIA had also the honor to welcome the President of the Ordem dos Advogados Portugueses, Guilherme Figueiredo, the former President of the Republic of Portugal, Jorge Sampaio, the Vice-President of the European Parliament, Paulo Rangel and the Secretary of State for Justice, Anabela Pedroso.



*Guilherme Figueiredo, President of the Ordem dos Advogados Portugueses & Claudio Lamachia, President of the Ordem dos Advogados do Brasil*

A concert Fado and a cocktail followed this opening ceremony at the *Casa da Musica*.



## Acknowledgements

The UIA expresses its sincere thanks to Pedro Rebelo de Sousa President of the Congress, for his commitment to the success of the 62<sup>nd</sup> congress and to Marcelo Rebelo de Sousa, His Excellency the President of the Portuguese Republic, for his speech at the opening ceremony. The UIA would like to also thank the entire local committee for their support.



Pedro Rebelo de Sousa



Khadija Al-Salami

## Réseau Femmes de l'UIA

Cette année, le Réseau Femmes de l'UIA a eu le plaisir de vous convier les congressistes à la projection du film « Moi Noojom, 10 ans, divorcée » en présence de la réalisatrice yéménite Khadija Al-Salami.

## Publications UIA – LexisNexis

Lors du congrès, Carlo Mastellone, Directeur des Publications de l'UIA, a lancé en présence de Nigel Roberts, Vice-Président Global Associations – LexisNexis, le quatrième ouvrage de la collection de publications UIA - LexisNexis : Natural Resources Exploitation - Business and Human Rights [ed. Xavier Favre-Bulle]

*From left to right : Jérémy Bensoussan, César Coronel Jones, Carlo Mastellone, Paolo Lombardi, Jean-François Henrotte, Monika König, Sylvain Savolainen, Nigel Roberts, Guillaume Deroubaix.*



## Activités jeunes avocats

Les jeunes avocats de l'UIA ont été mis à l'honneur du congrès cette année. Deux sessions spéciales leur étaient dédié : « dilemmes éthiques et pièges récurrents pour les jeunes avocats » et l'impact de la blockchain sur la profession » durant lesquels ils ont pu rencontrer d'autres jeunes confrères et consœurs. Une soirée à la Casa do Livro leur a également été consacrée après le cocktail de bienvenue !

## Main Theme 1: Legal Challenge of Modern Day Slavery

This Main Theme panel examined legal challenges of modern day slavery in every corner of the world. Nowadays slavery is not about literal ownership of people but more about exploitation and systemic cases of coercion on a large scale. In the first session, the panelists examined the various forms of severe exploitation affecting vulnerable workers and discussed engagement of organisations in the fight to stop modern slavery in Australia. The second session addressed remedies to eradicate labor slavery from supply chains, a corrupt and usually hidden criminal activity.



## Tema Principal 2: La Práctica jurídica en la era digital



El primer panel se intituló « El impacto de la tecnología en la práctica del derecho » y ofreció una introducción general al tema, abordando los retos generales para los abogados tales como la ciberseguridad, la inteligencia artificial, la deontología y muchos otros.

El segundo panel trató el tema de la E-Justicia y la justicia predictiva poniendo acento en la situación actual de nuestro mundo, de los retos, de la robotización de la justicia. Se concluyó el debate con una nueva herramienta para la innovación en la práctica del derecho que se llama LegalTech.



*Milagros Poal-Manresa Cantarell*

## Premier concours photo à L'UIA

Les commissions Droit de l'Art et Droit Alimentaire ont organisé un concours photo sur le thème de « l'art culinaire ». Les 10 meilleures photos ont été exposées au Centre de congrès. Le premier prix a été remis lors du dîner de gala à **Milagros Poal-Manresa Cantarell** (Centell-Foch Abogados Asociados, Barcelone, Espagne).



## Networking Day

The **UIA Networking Day** was the occasion to meet other lawyers with the same regional and language affinities in a friendly atmosphere. The participants had the opportunity to attend six different forum sessions. Thanks to the networking lunch, participants exchanged with their colleagues from around the world.



## UIA Congress Awards

### Monique Raynaud -Contamine Award

The **Monique Raynaud-Contamine Award** for the best report was awarded to Barbara Gislason (Minnesota, USA). The title of the report is "What do the Applications of Gene Editing, Artificial Intelligence and Big Data Brings To The Fields of Life Science, Medical Supply, Food Supply and Environmental Impact?"

Her report is published in the Juriste Magazine on page 61 and on our website [www.uanet.org](http://www.uanet.org)



Barbara Gislason and Corrado de Martini.

### Comité nacional del año

El **premio del comité nacional del año** fue entregado al comité nacional portugués presidido por José Luís Moreira da Silva. Este premio recompensa los esfuerzos del comité nacional para contribuir al desarrollo de la UIA en su país.

De la izquierda a la derecha: 1a fila : Etori Botteselli, Susana Reis, Jose Luis Moreira da Silva, Tiago Marreiros Moreira, Pedro Rebelo de Sousa.

2a fila : Fernando Tonim, Paulo Saragoça da Matta, Pedro Melo, Gonçalo Ribeiro da Costa , Acácio Negrão.

### Commission de l'année



Matthias Stecher, Elisabeth Zakharia Sioufi, Sebastiaan Moolenaar.

Le **prix de la commission de l'année** a été attribué à la commission droits de l'homme présidée par Elisabeth Zakharia Sioufi (Jdeidet El Metn, Liban). Ce prix récompense le travail scientifique de la commission tout au long de l'année 2018.



Portuguese National Committee.

## Informal Evening

The **informal evening** took place at Quinta dos Barões, a famous Port wine cellar. Participants had the chance to taste typical Portuguese food while enjoying various artistic activities.



## Partido de fútbol

Se organizó, con el patrocinio de Mundiavocat el tradicional partido amistoso de fútbol que reunió a congresistas de todas partes del mundo. Fue un gran momento de ocio.



## General Excursion in Guimarães



The last day of the congress, participants discovered the Minho region. The programme of this cultural day included:



- A guided tour of Guimarães, especially its historic centre which is actually a UNESCO world Heritage,
- The visit of the sanctuary of *Bom Jesus do Monte*
- A lunch at Pousada Mosteiro de Guimarães



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## Dîner de gala

Le dîner de gala s'est déroulé au *Palácio da Bolsa*. Les convives ont pu admirer l'architecture mauresque de ce lieu emblématique de Porto avant de prendre place dans l'élégante cour intérieure du palais pour y découvrir la *morna* - genre musical originaire du Cap-Vert - grâce à la belle prestation de musiciens capverdiens.



@UIA-www.uianet.org



## Issouf Baadhio, nouveau Président

Lors de la cérémonie de clôture du congrès, Pedro Pais de Almeida a officiellement passé la présidence de l'UIA à Issouf Baadhio, ancien bâtonnier du Burkina Faso. C'est pour l'UIA son premier Président d'Afrique sub-saharienne.

Le Président Baadhio a indiqué que son mandat s'articulerait autour de trois thèmes : le droit international et les droits de l'homme, les mutations de la profession d'avocat dues à l'intelligence artificielle et la consolidation d'exercice de la profession d'avocat.

« Il est indispensable que notre association réponde à sa vocation internationale en accueillant la diversité au sein des organes dirigeants de l'UIA, et pas seulement dans ses organes de base. Je citerais l'exemple de l'Afrique » a déclaré le nouveau Président.



## Témoignages / Remerciements

- "The UIA presents the highest-level standards of education and networking among lawyers around the world. I am very satisfied with collaboration both with the lawyers I met within UIA and with the staff of UIA. I am very satisfied with the Management of Law Firms Committee and the way they organised the panels." – **UIA member**
- "Excellent organisation, contents, panels! As a first timer I was very pleased to be able to participate in the event." – **Joana Whyte (Portugal)**
- "Les congrès sont des occasions exceptionnelles d'échanges et de partage d'expériences en toute confraternité." – **UIA member**
- "De todos que participé en más de 30 años de UIA, fué unos de los mejores." – **Paulo Lins e Silva (Brasil)**
- "UIA is an extraordinary organisation. UIA staff is fantastic. With regard to the Congress, thank you very much to have organised the Women's network with the film 10 ans divorcée." – **Barbara Bandiera (Italy)**
- "J'aime le congrès parce c'est le meilleur moment pour retrouver mes confrères et en même temps découvrir les autres coins du monde." – **Serge Mutombo Cibangu (RDC)**



Save the date

**63<sup>rd</sup>**  
**CONGRESS**  
**LUXEMBOURG**  
**November 6 to 10**  
**2019**

Main themes:

- ▶ Innovation and the Law: Where Passion Meets Reason
- ▶ Doing Business in Respect of Human Rights



**#UIALUXEMBOURG**



## Discours d'investiture du Président Issouf Baadhio

I **Bâtonnier Issouf BAADHIO**



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

Monsieur le Président de l'UIA et cher ami  
Monsieur le président du congrès de Porto  
Mesdames messieurs les bâtonniers  
Mesdames, messieurs les Présidents  
de fédérations de barreaux et de bar  
associations

Chers confrères, chères consœurs,  
Dear colleagues, estimados compañeros  
Messieurs, mesdames, chers amis,

Dear friends, estimados amigos,

L'émotion qui m'étreint ce soir, alors que je me tiens devant vous, est un étrange mélange de fierté exaltée et de sage gravité. Car ce qui peut ressembler à un accomplissement ou à l'aboutissement d'un parcours, n'est en réalité que le commencement d'une épreuve du feu, où la chance est donnée aux rêves intérieurs de s'incarner et aux discours de se muer en actes concrets. Ce soir m'est accordée la lourde responsabilité d'influer par mes actions et mes décisions, non plus sur mon seul destin, mais également sur celui de tous ceux qui ont investi en moi leur confiance et parfois leurs espérances.

Certains sont présents ici, et je leur adresse toute ma reconnaissance pour leur indéfectible soutien. Mais je voudrais aussi m'adresser aux autres, beaucoup plus nombreux, que sont ces millions d'anonymes qui gardent la foi en une justice humaine au service de la vérité et de la liberté. Une justice capable de porter la voix du prisonnier abandonné, de libérer celle du journaliste muselé, de faire retentir le cri de la femme violée, de restituer la dignité ontologique de ceux qui subissent l'Histoire dans le silence.

Cette immense ambition, je ne peux la réaliser seul. Elle nécessite une volonté irréductible et surtout une union solide de tous les acteurs de la Justice, les Juges

et bien sûr les avocats. C'est l'essence de cette Solidarité et de cette Coopération qu'incarne l'UIA, et c'est l'expression de cette Volonté et de cette Résistance que symbolise le lieu du Congrès dans la ville de Porto ; « Porto, la cité invincible » !

Car il faut être ensemble et être invincibles pour résister aux pressions, aux intimidations, aux menaces et malheureusement parfois aux crimes dont sont victimes les voix justes, les voix libres !

de faire face au cynisme de la réalité de ce monde. C'est ainsi que j'ai décidé de faire de mon idéal, mon métier.

*Sensitivity and attention to the concerns of others, they are certainly engrained in my genes or my character, but no doubt they are also the result of the way in which I was lucky enough to be raised by my family. Parents who were always open-minded and who aspired in all ways both to progress and to the respect of tradition and culture.<sup>1</sup>*

C'est à travers une longue réflexion et un plan de travail que j'ai élaboré selon plusieurs axes principaux, que j'espère pouvoir atteindre les objectifs de mon mandat.

Je suis aujourd'hui à la tête de cette noble institution, mais permettez-moi de remonter un peu dans ma mémoire à l'heure où j'ai choisi le métier d'avocat. Et le verbe choisir n'est pas anodin, parce qu'il renvoie à l'époque bénie de ma jeunesse, où, au sortir de la colonisation, nos États avaient mesuré la valeur de leur émancipation et cru en la compétence et en la créativité de leurs peuples. C'est ainsi que, grâce à une politique égalitaire de l'éducation publique, dont je suis un pur produit, j'ai pu saisir et orienter mon destin selon mes désirs profonds.

Ces désirs correspondaient à un besoin ancré en moi d'agir. Agir pour tenter d'arrêter l'intolérable, de contester l'absurde, de dénoncer l'oppression, de me mettre du côté du plus faible, de le défendre.

Ces idéaux qui m'animaient, comme souvent ils animent les jeunes au sortir de l'enfance, ont trouvé dans le métier d'avocat un moyen noble et efficace de rester vivants et

La paix, conçue comme une harmonie totale, résulte de l'équilibre délicat entre les aspirations individuelles et collectives, entre la liberté et la Loi. C'est pourquoi il ne peut y avoir de paix sans justice et qu'une paix durable est conditionnée par une justice qui soit humaine et intègre.

Ces questionnements philosophiques et existentiels qui agitaient mes années de jeunesse ont trouvé des réponses dans mes lectures, dans l'amour des livres que mon père m'avait transmis et qu'il a patiemment nourri. La confrontation des idées et des idéologies, la diversité des convictions et des perspectives que j'y ai trouvées m'ont appris la prudence, la tolérance, l'altérité. Comment l'on peut être « autre » et le même à la fois, dans les grandes intersections de l'histoire et aussi de la géographie.

Je voudrais à l'occasion de cet honneur qui m'est fait, rendre hommage à mes parents et à ma famille qui m'ont soutenu et encouragé tout au long de mon parcours.

Une pensée spéciale dédiée à mon père qui n'est plus de ce monde mais qui, assurément de l'endroit où il se trouve, acquiesce d'un petit geste de la tête, de me trouver debout à cette honorable tribune.

Je me dois aussi de rendre hommage et d'exprimer toute ma gratitude à mes professeurs que j'ai côtoyés tant à la faculté de Montpellier qu'à Paris, des maîtres, et qui m'ont inculqué la rigueur intellectuelle, indispensable en droit. J'aimerais exprimer une reconnaissance particulière à mon mentor, le Bâtonnier André Damien, dont j'ai eu le grand privilège d'être l'élève, qui m'a initié à la beauté de notre métier sous toutes ses facettes, et dont les principes ont guidé toute ma vie professionnelle. C'est grâce à eux, c'est grâce à lui, que vous m'avez estimé digne d'assumer cette noble charge.

Comment, à partir de là, puis-je être à la hauteur de vos attentes ?

C'est à travers une longue réflexion et un plan de travail que j'ai élaboré selon plusieurs axes principaux, que j'espère pouvoir atteindre les objectifs de mon mandat.

Pour commencer, je mesure la portée de l'émergence pour la première fois d'un africain sub-saharien à la tête de l'UIA. Ce choix exprime, après 90 ans d'existence de l'organisation, l'attachement de l'UIA à la diversité et au multiculturalisme qui définissent ses membres. Il dénote aussi d'une compréhension fine des mutations et de l'extension des zones d'influence et de décision à des régions jeunes et dynamiques, en cours d'expansion économique et sociale. Ce choix place le pari existentiel de l'UIA sur le futur globalisé du monde du droit en général, et de la profession d'Avocat en particulier.

Je tâcherai d'amplifier cette dynamique en donnant à l'UIA **un objectif de diversification** et une politique de **recrutement de nouveaux membres dans les régions** où nous disposons d'un énorme vivier de potentialités, mais où notre présence est encore peu significative.

Il est par ailleurs indispensable que notre association réponde à sa vocation internationale en **accueillant la diversité** au sein des organes dirigeants de l'UIA,

et pas seulement dans ses organes de base. Je citerai l'exemple de l'Afrique qui doit impérativement retrouver une représentativité au sein des commissions du conseil de présidence et du comité de direction, en phase avec l'envergure de sa présence au sein de l'UIA. Cette évolution à laquelle adhèrent pleinement mes prédécesseurs et j'espère mes successeurs, se fera non pas sur la base d'une « discrimination positive » mais sur des critères de mérite.

Dans ce sens, et dès la fin de ce congrès, **un collègue Africain sera nommé au comité de direction à un poste de responsabilité, et deux ou trois autres seront nommés pour occuper des postes d'adjoints au comité de direction.**

Nos ambitions sont grandes mais pleinement justifiées par la noblesse de nos intentions et par l'état alarmant de notre monde.

En complément, nous demanderons aux présidents de commissions **d'identifier très rapidement les profils potentiellement éligibles**, à moyen terme, que ce soit à la tête des directions de l'UIA ou de ses différentes commissions, au regard de nos règles internes d'élection des présidents de commissions.

Il ne serait pas en effet souhaitable de limiter dorénavant les candidatures africaines à des sphères spécifiques, à l'instar de notre ami Cheick Diop qui est d'une part le seul africain à diriger une commission, qui de surcroît est consacrée au droit OHADA, (comme à une certaine époque où les femmes dans les gouvernements n'étaient détentrices que du ministère de la promotion de la femme ou de la condition féminine).

*El éxito de esta misión es fundamental para revitalizar nuestra asociación y conducirla hacia la modernidad en el pluralismo. Cuento con vuestra ayuda y apoyo para lograrlo.<sup>2</sup>*

Dans le même sens, je souhaite interroger **le sens de notre appartenance à l'UIA**. Qu'est-ce qu'être avocat au sein de l'UIA dans un monde globalisé et comment définir un socle commun, une sorte de charte commune à laquelle pourraient adhérer les avocats du monde, indépendamment de leur mode d'exercice professionnel, de leur

domaine de spécialisation ou de la nature de leurs compétences. Afin que nous puissions ensemble promouvoir et porter avec fierté les idéaux de l'UIA à travers nos barreaux et organisations professionnelles respectives.

Ce monde globalisé exige de notre part une adaptation et surtout une profonde évolution. Je souhaite pour cela engager un grand chantier autour de la **mutation de la profession d'avocat de palais classique, à l'aune du développement de l'intelligence artificielle**. L'on nous prédit d'ici 20 ans la disparition de la moitié des métiers que nous connaissons aujourd'hui. Le nôtre en fait partie. Il nous faut pour cela anticiper la généralisation de l'Intelligence artificielle et l'adapter à nos besoins, au lieu de craindre qu'elle ne nous remplace.

Car l'intelligence artificielle ne pourra jamais, à mon avis, remplacer ou intégrer les paramètres humains dans la prise d'une décision ou la rédaction d'une sentence.

Dans mon introduction je vous ai parlé d'une justice humaine. C'est-à-dire d'une justice qui s'adresse non seulement au collectif mais aussi à l'individuel. Chaque homme, chaque femme a le droit d'être considéré dans son individualité. C'est pourquoi je souhaite engager une réflexion autour d'une problématique qui est au centre des préoccupations des États et des avocats et qui est la suivante :

**Droit international et droits humains, antagonisme ou complémentarité ?**

L'UIA doit clairement prendre position sur cette question essentielle et existentielle. Est-ce que le droit international, forgé au sortir de la seconde guerre mondiale et dont le but était de réorganiser les États après le chaos de la guerre et le déplacement des frontières, prend-il effectivement en compte les hommes et leurs droits et libertés individuelles essentielles ? Cette question se pose plus spécifiquement pour l'Afrique et les pays du tiers monde.

Est-il normal qu'aujourd'hui nombre de pays qui siègent dans les organisations

internationales bafouent allègrement les droits primordiaux de leurs citoyens, tels que définis dans la charte des droits de l'Homme ?

Ceci concerne autant le droit à l'eau, à la santé, à l'éducation, au partage des richesses, qu'aux libertés individuelles, comme la liberté de culte, d'expression ou d'orientation sexuelle.

Peut-on encore accepter qu'aujourd'hui, à l'ère de l'intelligence artificielle, que dans de nombreux pays des enfants naissent encore sans état civil et deviennent des apatrides dans leur propre pays sans existence civile, sans présent et sans avenir?

Peut-on tolérer la cruelle légèreté de certains pays vis-à-vis de leurs propres citoyens alors qu'ils siègent par ailleurs dans les organisations internationales?

Peut-on se résigner à ce que les missions de Paix des Nations Unies ou les interventions armées de l'ONU se résument dans bien des cas à des échecs patents, victimes de la corruption ou de la réalpolitik ?

Ces questions soulèvent **la pertinence et la nécessité du droit d'ingérence**, de son efficacité et de ses limites objectives.

C'est pourquoi, **j'engagerai notre grande organisation à rédiger une charte sur cette question**, pour peser de tout notre poids afin que ces questions soient au centre des préoccupations des décideurs. C'est alors que nous permettrons **l'émergence d'un droit international "humain"**.

Je souhaite faire cela en partenariat avec les autres grandes organisations d'avocats et organisations internationales, en profitant au maximum de notre statut consultatif auprès de l'ONU pour la diffuser et sensibiliser les États à leurs devoirs élémentaires vis-à-vis de leurs citoyens.

Nos ambitions sont grandes mais pleinement justifiées par la noblesse de nos intentions et par l'état alarmant de notre monde. C'est pour cela que chacun de nous sera combattu par les parasites du système et qu'il faudra tout faire pour assurer un cadre protecteur à nos collègues et soutiens.

Pour cela, je souhaite également réfléchir avec vous sur **la consolidation des conditions**



**d'exercice de notre profession**, afin que l'UIA soit une référence et un rempart face aux menaces récurrentes qui pèsent sur les avocats à travers le monde, tant sur le plan professionnel, que malheureusement sur leur intégrité physique. Il faut que l'UIA constitue un recours inébranlable et intransigeant lorsque la liberté et la justice sont en péril.

Enfin, je ne saurais terminer cette allocution sans une mention particulière pour mon épouse, sans qui ce parcours n'aurait pas été. Je salue son accompagnement constant dans la discrétion depuis plus de 3 décennies. J'adresse une pensée affectueuse à mes enfants, leurs conjoints et mes petits-enfants, à qui ce métier a largement empiété sur le temps de vie familiale.

Pour conclure, je vous dirai que les idées et les projets que je soulève ne sont pas des illuminations ou des révélations qui m'ont été miraculeusement insufflées. Ces idées et ces projets répondent à des problèmes que nous rencontrons tous dans l'exercice de notre métier et dans notre vie quotidienne, qui font souvent la « une » des médias internationaux et des réseaux sociaux, sans qu'une réponse ne leur soit apportée.

Ma différence réside dans ma farouche volonté **d'agir**, de ne pas me résigner, de

ne pas accepter que dans chaque report, un destin soit compromis, une vie soit menacée, **qu'un collègue meure d'avoir été seul !**

C'est cette même volonté d'agir qui fut, souvenez-vous, à l'origine de cette profession d'avocat que je ne considère pas comme un métier, mais comme une profession de foi !

Je vous remercie.  
Muchas gracias.  
Thank you.

Bâtonnier Issouf BAADHIO  
Président de l'UIA  
[president@uianet.org](mailto:president@uianet.org)

1 La sensibilité et l'attention portée à autrui, je les ai certainement inscrites quelque part dans mes gènes ou dans ma personnalité, mais elles sont assurément le résultat d'une éducation que j'ai eu la chance d'avoir dans ma famille. Des parents ouverts sur les autres et qui alliaient à merveille l'aspiration au progrès et le respect de la tradition et de la culture. C'est en effet, dans le respect des différences et des richesses de l'Autre que le progrès peut advenir, car il ne peut germer que dans des terres de paix.

2 La réussite de cette mission est essentielle pour redynamiser notre association et l'emmener sur la voie de la modernité dans le pluralisme ; et je compte sur votre collaboration et votre soutien pour y arriver.



# The UIA in Copenhagen

9<sup>th</sup> Business Law Forum

I Aleksander STAWICKI

The 9<sup>th</sup> edition of the highly successful Business Law Forum of the UIA was organised in the form of a two-day seminar taking place in Copenhagen, Denmark on September 20-21, in cooperation with the renowned Danish law firm - Gorrissen Federspiel on the topic of New Trends in Liability of Senior Managers – Overview of the Most Important Developments in Key Jurisdictions around the World New Trends in Liability of Senior Managers. In-house and external counsels, leading academics & representatives of public administration joined us to consider the legal and practical challenges faced as a result of enforcement agencies' increased focus on holding senior officers accountable, as well as considering the competing interests of corporates and their employees, the gradual erosion of client-attorney privilege, and whether compliance is the answer.

The forum focused on the most important developments in key jurisdictions around the world, with the agenda including the following sessions:

- *Competition Law – Is Further Criminalization the Next Step?*

This panel focused on new trends in competition law enforcement, with a focus on the increased willingness of the authorities to go not only after the companies, but also after individuals involved in the anticompetitive behavior.

- *Radical Changes to Data Protection Legislation – First Experiences, Lessons Learned*

This panel explored how companies balance ever increasing obligations for data protection with the need to operate in a high tech environment. It also focused on first practical experiences with application of GDPR following its entry into force.

- *Employment Law – Risks, Internal Investigations and Disciplinary Measures*

This panel explored the legal requirements to be observed when practicing internal investigations: in accordance to the rights of the employees, no matter if they are witnesses, suspects or whistle-blowers.

- *Banking/Anti-Corruption*

This panel sought to highlight the most recent trends in the complex banking and financial sector. Whether in the wake of calls for an anti-money laundering crackdown following allegations of wrongdoing by a number of European banks or whether due to increasing levels of regulation and “red tape”, the banking and financial sectors and its senior management are increasingly coming under fire in relation to compliance.

- *Civil Law – Damages Claims*

This panel focused on contractual and tortious liability of managers for violation of various regulations (not only a liability towards to company but also a new trend to sue managers for damages resulting from illegal behavior, with claims being brought by victims of breaches of law).

- *Corporate Liability. Directors v. other Senior Managers*

The panel provided an overview of the most significant changes in this area, including imposing criminal liability for businesses as well as holding senior management to account, with consideration of the potential financial consequences, and some recent examples.

- *Compliance – A Universal Answer to All Types of Risks?*

During this workshop leading competition lawyers from firms around the world discussed what is required for compliance efforts to be truly successful and effective.

- *Attorney Client Privilege – Key Considerations for In-House Counsel*

This panel considered whether attorney client privilege can be relied upon when wrongdoing is identified and in what circumstances corporations are being required to waive privilege over such material, and, for certain jurisdictions, in what circumstances this material would no longer be considered to be covered by privilege.

- *Self-Reporting and Leniency*

This panel considered whether voluntary self-reporting is the new key to mitigating

corporate liability. The US Yates Memorandum emphasized the US' renewed focus on individual corporate wrongdoing, and the need for companies to hand over evidence of individual culpability.

## What are the main take outs?

At the opening of the panel devoted to corporate liability of directors & senior managers, Raphael Monty made a very interesting comparison between artificial intelligence and corporate law. He started by saying that he often thinks about AI nowadays and how it develops and whether we – humans – are still able to control it. And that when people invented limited liability corporations they were probably not able to imagine how they would develop to become multimillion, international giants which are often more powerful than nations or states. Giants we do not seem to be able to control anymore... So if this is the fate of a relatively simple legal structure what will happen with something that is much more complex?

When I look back at all the varied discussions we had during this seminar, I tend to think that we have quite a similar problem with the legal system (or legal systems). Enormous amounts of legislation – old and new, adopted at multinational & national level, are like a multi-headed Hydra that we brought to life but seem not to be able to control anymore. And as we know – unless you are Hercules – a meeting with Hydra can have far reaching (and lethal) consequences.

Our discussions prove that the current situation is – in the first place – a big challenge for legislators and state authorities. Risks (including legal & regulatory risks) are never good for business. Therefore, we need much more focused and coherent enforcement, based on clearly defined priorities. Whether this is achievable is an open question, but this need definitely has to be voiced over and over again by both businesses and their lawyers.



And how can companies respond to this threat? The majority of us would think about compliance in the first place. But during the seminar we made a step (or a few steps) back – something that was truly refreshing and enlightening for me. The answer seems to lie in a coherent set of values that we need to have – as nations, corporations & human beings. Compliance will work at its best only if it is rooted in values. If it is not, scandals will hit the headlines exactly the same way they did on the morning when we met in Copenhagen and learnt that Danske Bank was involved in a giant money laundering scheme...

Over the years, we have learnt as lawyers that we need to understand our Clients' businesses very well – we are all “sector-oriented”, “pragmatic and focused” and have “in-depth knowledge of the industry”. Maybe it is time to focus equally on values which the businesses of our Clients grow on? Ask not only “how” they do it, but also “why” they do it?

We will definitely come back to this question when we meet in Vienna next year for the 10<sup>th</sup> Business Forum!

Aleksander STAWICKI  
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## 26<sup>e</sup> Forum Mondial UIA des Centres de Médiation

**I Fabienne  
VAN DER VLEUGEL**

8-9 Mars, 2019



L'anniversaire du 25<sup>e</sup> Forum Mondial UIA des Centres de Médiation organisé en France, sur le territoire du Val d'Europe les 22 et 23 juin 2018, restera ancré dans les mémoires.

Le fait que de très nombreux partenaires aient manifesté leur adhésion au Forum démontre à quel point la médiation devient un mode de résolution des conflits de plus en plus apprécié, compris et mis en œuvre.

Les pays qui adhèrent au processus de médiation en vantent ses mérites et s'organisent au mieux pour permettre d'initier, en amont, une première rencontre entre les justiciables et les médiateurs : les premiers doivent comprendre la médiation, y adhérer de façon volontaire et informée, et pouvoir choisir de façon posée un médiateur. Cette première démarche, créatrice d'un premier lien, est essentielle, non seulement pour donner une visibilité aux médiateurs et une information aux justiciables, mais aussi pour forger un socle initial de confiance et de crédibilité au processus de médiation lui-même. Les juridictions de l'ordre judiciaire jouent, ici, un rôle primordial, ainsi que les associations et/ou centres de médiation. Si ce premier socle est bien solide, il facilitera sans aucun doute les premières démarches du médiateur visant à, sinon reconstruire, ou moins rétablir cette relation et communication perdue entre les justiciables eux-mêmes.

C'est, en réalité, toute une hiérarchie qui se construit lentement, et sûrement, de manière diversifiée suivant les territoires concernés, les cultures, les textes.

La mise en œuvre efficace du processus de médiation participe réellement à la reconstruction des méthodes de gestion des conflits et ce, de façon bien plus générale et approfondie qu'on pourrait le croire.

Le processus de médiation lui-même, se peaufine. Le Forum a permis à de nombreux médiateurs – jeunes et moins expérimentés – avocats, entreprises, étudiants et

professeurs, d'affiner leurs connaissances, d'améliorer leurs pratiques et de mieux comprendre les caractéristiques du processus de médiation pour en assurer une mise en œuvre pratique, correcte et adéquate. La médiation reste assurément, pour les parties en conflit, un moyen d'aboutir à des solutions pragmatiques, adaptées, rationnelles, négociées dépassant parfois les attentes et les espérances des parties elles-mêmes. Tous les 9 mois, les participants du Forum se remettent en question, enrichissent leurs réseaux, évaluent les avancées de leurs pays respectifs : une richesse d'information continuellement mise à jour et communiquée d'une façon professionnelle, efficace, dans des environnements qui cumulent professionnalisme et convivialité.

Le prochain Forum, pour sa 26<sup>e</sup> édition, sera organisé les 8 et 9 mars 2019 à Zurich, en Suisse, et promet d'être particulièrement intéressant, avec des interventions et conférenciers de haut niveau. Dr. Regine Sauter, notamment, nous fera l'honneur de sa présence à l'ouverture du Forum.

La première session, intitulée « The Swiss Dispute Resolution Landscape », permettra à l'ensemble des participants de comprendre la manière avec laquelle les médiations judiciaires, institutionnelles et conventionnelles, sont actuellement organisées sur le territoire suisse. Les participants au Forum écouteront avec intérêt Petra Schmäh et Jean-Christophe Barth (CSMC), Andrea Staubli (SDM-FSM), Urs Weber Stecher (Cour d'Arbitrage de la SCAI), et Roman Manser (SAV-FSA).

La session qui suivra, organisée par Birgit Sambeth Glasner (Altenburger), exposera de façon détaillée le système encore trop méconnu ARB-MED-ARB pour mettre en lumière ses avantages, ses caractéristiques, et la manière avec laquelle il peut être efficacement utilisé dans les litiges de nature commerciale ou autre. Danielle Hutchinson (Australie), Anne-Karin Grill (Autriche, ICC International Court of Justice) et Prof. Dr. Alexander von Ziegler

(Schellenberg Wittmer Ltd) apporteront leur éclairage professionnel respectif.

La matinée se terminera avec l'intervention interactive très attendue de Ross Stoddard (USA), qui n'hésite jamais à partager en toute simplicité sa grande expérience en matière de médiation, et dont les enseignements, à chaque Forum auquel il intervient, restent particulièrement enrichissants.

En début d'après-midi, Peter Philipps (USA), Katarzyna Przyłuska-Ciszewska (Pologne) et Stefano Pavletic (Italie) nous expliciteront la convention de Singapour : ce que l'on doit espérer, comprendre, déduire : « The Singapore Convention : opportunity or threat for commercial mediation ? »

Caroline Ming (SCAI) et Kirstin Dodge (Homburger) présenteront ensuite d'une façon pragmatique et dynamique les détails du nouveau règlement 2019 de la SCAI.

La première journée du Forum se terminera avec les interventions de Stefano Pavletic (Italie), Monique van der Griendt (Pays-Bas) et Diana Paraguacuto (France) qui, ensemble, animeront une session intitulée « Dispute prevention in the spotlight » : comment, où, pourquoi la médiation se développe-t-elle ? Pourquoi les techniques de médiation sont-elles intéressantes pour les litiges complexes et difficiles ?

Jeff S. Abrams (USA) animera la session sur un thème qui lui tient fort à cœur : la médiation est-elle ou devrait-elle être obligatoire ? Catherine Leclercs nous exposera la situation en France, tandis que Pasquale Orrico, Katarzyna Przyłuska-Ciszewska et Julia Jung nous détailleront la situation dans leurs pays respectifs soit l'Italie, la Pologne et la Suisse. Nul doute que cette session déclenchera des réactions et le souhait, pour les participants, d'exposer l'évolution de la situation dans leur pays respectifs.

Cezary Rogula (Pologne) et Jennifer Lygren (Suisse) développeront ensemble plusieurs points d'actualité et notamment, pour la Suisse, le nouvel organisme de médiation visé par les textes dans le domaine financier.

En fin de matinée, Laurent Hirsch (avocat, Genève), Bruno P. Gomart (MAREEX Consulting), Issaka Zampaligre (avocat, Paris),

et la présidente du Forum s'interrogeront de façon générale sur les divers liens entre l'expertise et la médiation, et notamment les expertises judiciaires et la médiation judiciaire et/ou conventionnelle et la manière avec laquelle ces deux instruments devraient être utilisés à l'avantage de la fixation d'une solution raisonnable, pérenne et adaptée aux circonstances spécifiques de dossier parfois relativement complexes.

Gérard Kuiper (bMediation, Belgique), David Lutran (avocat, Lutran & Associés) et Thiruvengadam BC (Inde) partageront leurs réflexions communes sur un sujet qui mérite réflexions : « Economical and marketing concepts applied to mediation ».

C'est avec grand intérêt que les participants écouteront ensuite les entreprises qui ont souhaité nous faire part de leurs expériences de médiation et/ou de leur position sur le sujet, notamment Torsten Bartsch (Caterpillar).

Le Forum se terminera avec une session consacrée au développement de la médiation en Chine et organisée par Clarisse Von Wunschheim (Altenburger) et Wang Fang (CCPIT, Chine).

Nul doute : le 26<sup>e</sup> Forum Mondial UIA des Centres de Médiation promet à nouveau d'être très riche en information. Le Forum vous attend, les participants seront heureux de s'y rencontrer. Il suffit pour vous de fixer votre agenda et de nous retrouver à Zurich.

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# The UIA in Cape Town, South Africa

Combating Counterfeiting and other IP Rights Infringements

I Gavin LLEWELYN



The Internet age has created many opportunities for businesses and digital technology confers many benefits on their customers, including the ability to shop without having to leave home. However, for intellectual property (IP) rights-holders such as owners of brands, audio or visual content and product designs, the Internet has created an extra layer of complexity and risk to be navigated in doing business in the 21<sup>st</sup> century.

That risk lies in the ease with which brands can be promoted, with which content and data can be shared and with which goods and services can be traded across the digital plane. The digital plane is a shop doorway through which the world can enter which makes IP rights an easy target for infringers and hackers. It seems that valuable IP rights and trade secrets are under constant threat.

Business depends for survival not just on the quality or exclusivity of its goods or services and the speed with which it responds to changing trends or, indeed, sets them, but also on the quality of its on-line security and how well it protects its IP assets against infringement.

Pharmaceutical companies rely upon valuable patent rights to provide the exclusivity which they need to generate funding for future research and development.

Luxury brands depend upon IP rights in their names and in their product designs to maintain an aura of exclusivity. Their

customers are not interested in the commonplace.

The sports and entertainment industries too are looking to maximise the value of their IP assets. Global revenues from ticket sales and broadcasting and sponsorship deals, together with the value of sales of merchandise, sporting goods, clothing and equipment, mean that the global sports industry generates around \$700 billion annually, which is about 1 per cent of global GDP. It is easy to see why counterfeiters and pirates are seeking a share of the action.

This seminar will look at how counterfeiting, infringement and on-line piracy pose a constant threat to business and at how organisations in different industry sectors approach this issue. We shall consider the interests of and challenges faced by the various stakeholders in the pharmaceuticals, sports and entertainment and fashion industries and look at where the tensions lie. How are IP rights used to control the distribution of music, films and television broadcasts through the policing of on-line intermediaries? How have fashion houses dealt with the rise of the Internet, e-commerce and social media? Are IP rights abused by rights-holders in the pharmaceuticals sector artificially to inflate the price of drugs and medical devices and effectively deny access in certain countries? Our panel sessions move from the needs of industry, through legal and regulatory frameworks, to the commoditisation

and protection of IP rights and on to licensing and distribution agreements. We shall also be considering whether IP rights are too powerful and whether they are being abused by industry so as to create monopolies or carve up markets artificially. This will lead us on conveniently to consider whether piracy can provide a template for a successful business model and at whether alternative dispute resolution mechanisms can provide a better solution for dealing with infringements than litigation.

In the final part of the seminar, we shall compare the evidential requirements, available remedies and the duration and cost of available procedures for IP infringements in different jurisdictions around the world. We hope that this will help us to answer the question, what improvements could be made to give our clients better protection? By the end of the seminar, participants should certainly have a better understanding of what their clients need to know to operate in this ever-changing landscape.

This seminar is sponsored by the Intellectual Property, Fashion Law and Criminal Law Commissions with the assistance of Werksmans Attorneys, Stellenbosch, South Africa.

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Human Rights and Protection of Lawyers  
Droits de l'Homme et de la Défense  
Derechos Humanos y de la Defensa





# Soutien aux avocats turcs pour la 9<sup>e</sup> Journée de l'avocat en danger

24  
JANVIER  
2019



La Journée de l'avocat en danger, une initiative lancée par l'Association des avocats européens démocrates et suivie par de plus en plus d'organisations d'avocats dans le monde vise à mobiliser l'opinion publique chaque 24 janvier autour de la situation de confrères harcelés, menacés, persécutés pour la simple raison qu'ils exercent leur profession et remplissent leur devoir professionnel. En 2019, le pays cible de la Journée des avocats en danger est, pour la deuxième fois, la Turquie.

Victimes d'arrestations de masse, comme en 2011 ou en 2013, dans le cadre des opérations anti-terroristes, ou suspectés d'avoir des liens avec l'organisation Gülen, que le Président Erdoğan accuse d'être derrière la tentative de coup d'État manqué de 2016, les avocats turcs sont depuis de nombreuses années la cible d'attaques récurrentes du seul fait de l'exercice de leur profession. Et ils sont trop souvent assimilés aux clients qu'ils défendent.

Le Bureau du Haut-Commissariat des Nations Unies aux droits de l'homme a indiqué qu'entre janvier et décembre 2017, environ 570 avocats ont été arrêtés, 1480 ont fait face à des poursuites et 79 ont été condamnés à de longues peines de prison.

Il est fondamental que les barreaux et associations professionnelles d'avocats à travers le monde puissent travailler ensemble afin de partager l'information et joindre leurs forces pour défendre les confrères qui en ont le plus besoin.

## Parmi les avocats turcs menacés:

**Tahir Elçi**, Bâtonnier du Barreau de Diyarbakir et figure militante des droits de l'homme, assassiné le 28 novembre 2015 en pleine rue, peu après une conférence de presse du Barreau de Diyarbakir.

**Muharrem Erbey**, ancien vice-président de İnsan Hakları Derneği – IHD – et ancien Président de la Section Diyarbakir de l'IHD, écrivain et lauréat du Prix International des



Mobilisation d'avocats à Paris, le 24 janvier 2019

droits de l'homme Ludovic-Trarieux en 2012, condamné le 28 mars 2017 à six ans et trois mois de prison pour « appartenance à une organisation terroriste ».

**Taner Kiliç**, Président d'Amnesty International Turquie, arrêté à Izmir le 6 juin 2017 à l'occasion des opérations entreprises contre l'organisation Gülen par le Président Erdoğan, en compagnie de 22 autres avocats. Il est resté 14 mois en détention.

**Özlem Gümüştaş et Sezin Uçar**, membres du « Cabinet d'avocats des opprimés » (EHB), arrêtées le 18 octobre 2017, avant le procès du massacre de Suruç qu'elles observaient. Accusées « d'appartenance à une organisation illégale » et de « propagande en faveur d'une organisation interdite », elles ont été libérées sous contrôle judiciaire, le 5 octobre 2018.

**Selçuk Kosağaçlı**, défenseur des droits humains et Secrétaire général de l'Association des avocats progressistes (ÇHD), arrêté le 8 novembre 2017 à Istanbul et placé en détention pour être prétendument membre d'une organisation terroriste. 19 autres confrères sont poursuivis dans le même procès judiciaire.

**Ramazan Demir**, secrétaire général de l'Association des avocats pour la liberté (ÖHD), connu notamment pour ses interventions dans des affaires concernant les violences policières, arrêté le 16 mars 2016 avec 11 autres avocats qui représentaient les 46 autres avocats turcs arrêtés en 2012. Libéré le 7 septembre 2016, il a été condamné à 11 mois et 20 jours de prison pour insultes au président Erdoğan le 12 janvier 2018.

## UIA Statement: Turkish Authorities Must Immediately Cease Persecution Against Lawyers

Upon the occasion of the Executive Committee meeting of the Union Internationale des Avocats convened in Bilbao, Spain, on January 26, 2019 and in solidarity with the 9<sup>th</sup> Day of the Endangered Lawyer, a statement was released to express UIA serious concern about the recurrent persecution, prosecution, interrogation, detention and torture of our Turkish lawyers simply in the course of the exercise of their profession.

[www.uianet.org/en/news/turkish-authorities-must-immediately-cessate-persecution-against-lawyers?backlist](http://www.uianet.org/en/news/turkish-authorities-must-immediately-cessate-persecution-against-lawyers?backlist)

# 30 Videos 30 Articles 1 Goal

#Standup4HumanRights!

In 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (UDHR) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. The UDHR has been translated into **504 languages**.

To commemorate the 70<sup>th</sup> Anniversary of the UDHR, the UN Office of the High Commissioner for Human Rights, launched in 2017 the campaign "Standup4HumanRights".

In 2018, the UIA, with the support of LexisNexis, joined the campaign in a very particular way! The 30 articles of the UDHR have been read by participants of the UIA 62<sup>nd</sup> Congress in Porto, which gathered over a thousand lawyers from around the world.

One by one the videos were posted on the UIA's social networks - Facebook, Twitter, LinkedIn - and on the UIA YouTube channel until the anniversary date of the UDHR on December 10, 2018.

Los artículos de la DUDH fueron leídos en los tres idiomas de trabajo de la UIA – inglés, francés y español – pero también en árabe, bambara, búlgaro, chino, danés, hebreo, húngaro, lingala, polaco, wólof... idiomas todos que reflejan la diversidad y el multiculturalismo que caracterizan a la UIA desde hace más de 90 años.

« Partout dans le monde LexisNexis s'est engagé pour promouvoir la primauté du droit et pour rendre le droit plus accessible au plus grand nombre, notamment les droits fondamentaux humains. À ce titre, nous sommes particulièrement fiers de soutenir cette initiative de l'Union Internationale des Avocats. »

Guillaume Deroubaix, MENA Managing Director, LexisNexis France



« A l'UIA, nous nous devons plus que jamais d'agir et de faire en sorte que cette Déclaration Universelle des Droits de l'Homme retrouve son lustre et soit partie prenante de toutes nos préoccupations, chaque jour, chaque année et autant de décennies qu'il sera nécessaire. »

Issouf Baadhio, Président UIA



"Human rights are as relevant to humans as air, food, water and shelter. Without our rights, our humanity is lost. Each day, in every way, we must work together to uphold our own rights and those of others. As lawyers representing more than an hundred countries and two dozens languages, we, at the UIA, appreciate the importance and relevance, even seventy years later of the Universal Declaration of Human Rights, as the UIA stands up for human rights."

Jacqueline Scott, UIA-IROL General Director



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Agradecimentos - Terima kasih - Merci - Thank you - Jërëjëf

Agradecemos a los miembros de la UIA y congresistas que participaron en los videos (en orden de aparición): Vanessa Liveth Irías López, Brahim Ebety, Abouba Aly Maiga, Valia Gigova, Thomas Hansen, Luc Adjé, Stanley Gaston, Elisabeth Thole, Polyxeni Tsitsoni, Daniela Horvitz Lennon, Burghard Piltz, Benjamin Strauss, Amal Kumar Ganguli, Veronica Dindo, Judit Budai, Hongmin Ji, Motoyasu Hirose, Magdalena Selwa, Elena

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**SPANISH**

Article 1, in Spanish by Vanessa Liveth Irias Lopez, Honduras



**GREEK**

Article 9, in Greek by Polyxeni Tsitsoni, Greece



**ARABIC**

Article 2, in Arabic by Brahim Ebety, Mauritania



**CHINESE**

Article 16, in Chinese by Hongmin Ji, China



**BULGARIAN**

Article 4, in Bulgarian by Valia Gigova, Bulgaria



**SWAHILI**

Article 21, in Swahili by Elodie Nsimire Muzirgiwa, Democratic Republic of the Congo



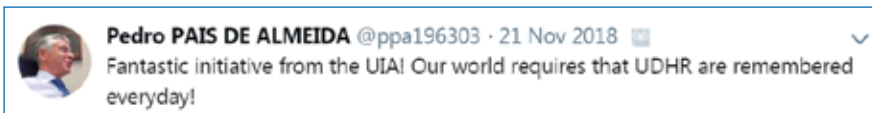
**BAOULÉ**

Article 6, in Baoulé by Luc Adjé, Côte d'Ivoire



**ENGLISH**

Article 23, in English by Elizabeth Espinosa, Australia





"BE STRONG"

Women and the Law Special Issue  
Section spéciale - Les femmes et le droit  
Sección especial - Las mujeres y el derecho







# Women in Leadership in Law

■ Christina BLACKLAWS

## Time for action

As the centenary of the Sex Disqualification Removal Act 1919 approaches, the Law Society of England and Wales is leading on a project to 'move the needle' and promote gender equality in the profession.

The Women in Leadership in Law project aims to bring about true equality, to understand the barriers that persist, and to provide meaningful action-orientated solutions for our members.

Since 2017, women have made up over 50% of solicitors in England and Wales (50.2% today), and with a mandate to represent, promote and support the profession it is appropriate that we give due consideration to the current position of women. As the 174<sup>th</sup> president of the Law Society, and only the fifth woman to hold this office, I am deeply committed to driving this project to promote diversity and gender balance.

## Evidence-based

At first glance, the statistics look positive. Since 1990, women have represented more than 60% of new entrants into the legal profession and women make up 63.6% of new trainees. The number of women partners is on the rise and the number of practising solicitors from minority ethnic groups is at its highest to date at over 19,000.

But if we dig a little deeper, despite the progress which is being made, the data shows that inequalities persist, with women comprising 28% of partners in private practice in comparison to 72% of partners being men – a statistic which is even lower for business owners at equity level.

*“Our firm is led by a female CEO and heads of department include women, but there is still a perception that women need to work hard to achieve.”*

Women's roundtable attendee

In early 2018 we concluded our survey on Women in Law which was supported by the International Bar Association's Women's Interest Group and LexisNexis. With almost 8,000 respondents the survey is the largest on the topic to date. The results identified three key perceived barriers to women achieving positions of leadership:

1. The impact of unconscious bias was considered to be the main barrier to progression (52%)
2. Unacceptable work life balance is required to reach senior levels (49%)
3. Traditional networks/routes to promotion are male orientated (46%)

Interestingly, although half of the respondents felt that there had been progress on gender equality over the last five years, there was a large difference in perception by gender, as 74% of men reported progress in gender equality compared to 48% of women.

Some of the key themes which have emerged from the domestic UK roundtables include:

**Ambition** – time and again participants said there is no lack of drive or ambition, but many women reported that presumptions made about them as women have damaged their careers – this was particularly perceived by women with disabilities.

**Attributes** – characteristics which are considered commendable or acceptable can vary depending on whether they are demonstrated by men or women; comments such as “aggressive” or “pushy” can be used in a gender specific way and have negative connotations in these contexts.

**Balancing act** – juggling work and caring responsibilities for young and elderly relatives falls predominantly, and often entirely, to women whilst they juggle demanding careers. They are required to do ‘two jobs’, often without recognition and without overlap.

The purpose of the roundtables is to identify best practice solutions and to empower women to become change makers and leaders in their organisations.

## Shared experiences

Based on the survey results we have conducted a series of roundtables, domestically and internationally, to learn more about women's lived experiences of unconscious bias, flexible working and the gender pay gap. From Chicago to Kigali, to Singapore and beyond, women have contributed to our research through hosting and joining roundtables in their jurisdictions and sharing the issues which are pertinent to them.

*“There is this push for women at the top but there isn't really any push for ethnic minorities. In our firm, there are so many ethnic minorities, but as you go higher and higher, the colour seems to fade.”*

Women's roundtable attendee

**Credit** – when taking on heavy lifting or work that is seen as undesirable, appreciation or acknowledgement can be overlooked.

**Ethnicity** – examples of the worst barriers, challenges and obstacles faced were received from members of the Black, Asian, and minority ethnic (BAME) community who face multiple challenges related to intersectionality.

**Flexibility** – everyone has personal matters that attend to, and these should not be overlooked, or individuals made to feel awkward for not being in the office; greater flexibility and understanding from business leaders can prevent presenteeism, engender loyalty and contribute to wellbeing.

**‘Masculine’ leadership** – senior women reported that they felt required to adopt

typically male characteristics to progress their careers, but this is alienating to women who aspire to leadership without having to compromise their identity.

**Networking** – gender neutral and inclusive activities for networking are preferred and particular activities such as rugby, football and golf, were perceived as alienating for many women.

**Presumption** – there were reports of a perception that people who adopted flexible/agile working when returning from parental leave etc. were less motivated. People said this could be devastating to careers and especially career progression.

**Proof** – individuals with protected characteristics such as race, ethnicity, religion, disability, sexuality or age face a double burden to prove themselves compared to their peers because of the stereotypes which they face.

**Role models** – there is a strong desire to see women 'like me' in senior leadership - women who can be related to and are transparent about whether it is possible to reach leadership roles and have fulfilling personal lives.

**Solitude** – women who have made it to the top reference their lone voice as women in the top echelons of senior leadership, and the consequent struggle to be heard or understood.

**Support** – commitment from senior leadership is required to ensure that diversity and inclusion is a business priority.

Of course, the challenges faced by women across international jurisdictions vary considerably. By gathering data on what is being experienced, we believe that we can create target solutions to overcome unnecessary barriers to progression.

## Actionable solutions

The purpose of the roundtables is to identify best practice solutions and to empower women to become change makers and leaders in their organisations. Our bespoke toolkits include calls to actions for individuals, firms and organisations of all sizes to address gender imbalances and accelerate change.

200 roundtables took place in the second half of 2018 with approximately 3,000 women from every stage of their legal career coming together to share their experiences, discuss best practice and measures of success.

*"It is helpful if we are able to be flexible, even when it is a regular arrangement. Being able to stop and restart flexible working according to personal and business need is important"*

*Women's roundtable attendee*

Having led over 30 roundtables myself, I have been moved by some of the experiences which have been shared, particularly accounts from BAME women, women with disabilities and young women at the start of their careers. However, the openness of the discussions and the shared experiences have led to the creation of a powerful network of women from all walks

implementing tangible actions to accelerate change in their firms and organisations.

*"There was a recent application for flexible working by a male colleague. The line manager was surprised as he had an unconscious bias of expecting women to request flexible working"*

*Women's roundtable attendee*

The methodology for these discussions is slightly different to the women's roundtables as there is a greater focus on the role than men can play in their efforts to achieve gender balance. A separate but complimentary toolkit has been created to assist in these discussions. So far, sessions have only taken place in the UK, but we would like them to be held in other jurisdictions as well.

The next step will be to bring women and men together to discuss initiatives and interventions to accelerate change.

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of life and real momentum to take action to achieve gender equality in the profession.

Feedback we have received from women who have hosted roundtables in their own firms paints a similar picture. Women in senior roles who thought that much of what they experienced whilst rising through the ranks had changed have been startled to hear that the issues persist, and they are consequently re-energised and inspired to be part of the solution, often offering to be mentors or sponsors to junior colleagues.

## Male champions for change

Achieving true gender balance is not just an issue for 50% but for 100% of us. Solving the challenges women face would also result in a more inclusive experience for men as well as promoting a more diverse and inclusive culture more widely. This makes sound business sense. So it is important that men are also involved in our research. Our 'male champions for change' roundtables have been attended by senior male leaders in the profession who are committed to

## Academic perspective

As part of the Women in Leadership project, academics from the University of Westminster and the University of Birmingham have conducted a review of studies about women in the legal profession to answer the research questions: to what extent have women solicitors reached a position of equality in the profession, and to the extent to which they have not, why not and what can be done to remedy the inequality.

The review outlines the structural and cultural barriers to women progressing from an academic perspective and explores theoretical approaches which are used to explain and tackle these. The report provides insight in a range of areas, from the impact of parenthood on careers to unconscious bias and its role in the recruitment; career development and promotion of lawyers. It also explores the changing nature of legal practice – how regulatory, educational and technological changes may have a differential impact on male and female lawyers now and in the future.



The Law Society



## WOMEN IN LEADERSHIP IN LAW: TOOLKIT

[www.lawsociety.org.uk](http://www.lawsociety.org.uk)

hope to pass the baton to the international community so that best practice can be identified and shared worldwide for the benefit of the entire global profession.

We hope that this will be a momentous occasion and further catalyst for change.

### Gender balance for the future

I believe that this is the time to achieve real transformation and a profession which is more inclusive, diverse and truly representative. There is certainly some way to go before we reach a satisfactory level of impact, but my ultimate goal and dear wish is that the transformative impact and outcomes of the 'Women in leadership in Law' project will be felt by the legal community, its clients and other professions long after my presidency, and that the next generation continue and build upon the progress that is made in the immediate future. I see no limit to the positive impact of this work and international lawyers are a central part of it.

My presidency will conclude in July 2019, but my successor Simon Davis will continue this important work.

If you would like to be involved in the project, please do feel free to reach out to me at [President@LawSociety.org.uk](mailto:President@LawSociety.org.uk). More information can also be found on the Law Society webpage where PDF versions of our toolkit resources can be downloaded.

Christina BLACKLAWS  
*President, The Law Society of England and  
Wales  
London, United Kingdom  
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### Celebrations

On International Women's Day 2019, we will publish a report with analysis of the issues and solutions for individuals, firms and organisations. These findings will also be presented in New York to coincide with the 63<sup>rd</sup> session of the United Nations Commission on the Status of Women.

To mark the centenary of the Sex Disqualification Removal Act 1919, the historic legislation which recognised women

as 'persons' and first those in England and Wales to practice as solicitors, we are hosting a two-day celebratory International Conference in London on 20 - 21 June 2019.

The conference will explore in more detail the key findings of our research. We will also launch our final set of toolkits which will bring together all that we have learned from the research about what works and how to achieve it. Recognising the applicability to other jurisdictions and industries, we also



# The First 100 Years of Women in the Law in NSW Australia

I Pauline WRIGHT

In 2018, the State of New South Wales (NSW), the largest in population and the first settled by Europeans in Australia, celebrated 100 years since women became entitled to practise law. This came with the passage of the *Women's Legal Status Act 1918* (NSW), which finally recognised women as 'persons' able to practise law and sit in parliament.

An initiative called The First 100 Years, taking its cue from similar common law jurisdictions such as the United Kingdom, was developed by a dedicated group of female solicitors together with The Law Society of New South Wales (NSW) and the Women Lawyers Association of NSW<sup>1</sup> to mark the achievements of the past as well as celebrate the bright future ahead for women lawyers in NSW. The initiative is billed, very deliberately, as the First 100 Years, because we are only just beginning!

In 1918, after decades of lobbying, women won the long overdue legal right to be formally recognised as 'persons' enabling them to become lawyers and be elected to the NSW Legislative Assembly. Although there was no law specifically disqualifying women from becoming lawyers, the common law did not regard a woman as a 'person', which prevented them from admission to practise, since only 'persons' could practise law or sit in parliament.

The passage of the *Women's Legal Status Act* was a profound milestone. It is hard to imagine in the 21<sup>st</sup> century a time that such things were considered controversial; they represent a recognition that women are qualified to represent and advise others about their legal rights, and qualified to represent their community as members of parliament.

Joan O'Brien articulated well the plight of women in the nineteenth and early twentieth century in her Masters Thesis, *A History of Women in the Legal Profession in NSW*:

*"Under the common law a woman's status merged, on marriage, with that of her*

*husband; she had little control over her own property and she was not the legal guardian of her own children.*

*Because the English courts had interpreted the common law to mean that a woman was not entitled to hold any public office, women's activities were confined to those associated with the home. A married woman, with the exception of royalty, was at law incapable of exercising any public function."*

Women bring this sort of human empathy to the practice of law in strong measure – made possible by highly developed communication, listening and problem-solving skills. That is not to say that men don't have such traits, indeed many men who practice in our profession have enormous empathy, but perhaps these are still encouraged, from a cultural perspective, in women and girls more so than in men and boys.

Although it is easy to feel that these are battles "long-won", the "firsts" for women in the law in NSW, are in relative historical terms very recent.

It is significant to reflect on the fact that although we commemorate 100 years since women were admitted as solicitors in NSW, the first woman to be appointed to full judicial office in NSW remains Patron of the Women Lawyers Association of NSW – the Honourable Acting Justice Jane Mathews AO, and still actively campaigns for inclusion and diversity in our profession.

Although it is easy to feel that these are battles "long-won", the "firsts" for women in the law in NSW, are in relative historical terms very recent. The newness of these milestones should make us ever more determined to uphold them and take them to new chapters in our future history.

Even when I began as a solicitor in 1985, there were not many women in the profession in NSW. Women made up just 15 % of the 8,300 solicitors then practising – just 1,245 in NSW. Now we make up just over half of about 33,000 members of the solicitors' branch of the profession and about 23% of the barristers' branch.

As lawyers, people of all kinds from all walks of life come to us for help. A lawyer has to be able to anticipate what is important to people and what might happen in their lives. We have to be perceptive in order to understand a given situation from another person's perspective.

There have been many female trailblazers in the practise of law in Australia, but Marie Byles serves as a standard-bearer for the attitudes which ought to guide any modern law firm. Although not the first woman in the profession, having been admitted as a solicitor in 1924, she was the first woman to practise law in NSW after the passage of the *Women's Legal Status Act 1918*.

Although she obtained her law degree in 1924, she had trouble getting a job until the Dean of Law at Sydney University, Sir John Peden, persuaded Henry Davis & Co to offer her a position. Byles had to pay double the usual £100 to her master solicitor for her clerkship, but she succeeded and went on to establish her own firm.

Marie Byles is upheld as an example of lawyer as advocate for justice, for the rule of law, and a fair go for all. She actively sought to employ women in her law firm and introduced flexible working hours for her employees.

Many women lawyers in Australia have drawn interest and inspiration in equal measure from this trailblazing, mountaineering, bushwalking, mould-breaking heroine of the law in Australia. I feel a particular connection to her – she went to school at Pymble Ladies' College, my *alma mater*, and she established the precious Boudi

National Park on the Central Coast of NSW, near my home at Avoca Beach.

As well as Byles, we look to exemplars like Ada Evans, the first woman to graduate in law in Australia, who took on the Supreme Court in her fight to be admitted as a solicitor-at-law after she graduated from Sydney University NSW in 1902. She was rebuffed and was not admitted to practise until 1921, but ignited a spark which would not stop burning until all women in Australia would be allowed to practise law.

Evans was the first woman to graduate with a Bachelor of Laws in this Country at a time when she was unable to be admitted to the practice of the law. When the Dean of the Sydney Law School discovered, upon his return from overseas, that the Law School had somehow admitted a woman into its ranks (!), he summoned Ada Evans into his office and told her that her frame was “too light for law” and that she would likely find medicine more suitable.

In an interview with *The Evening News* following her graduation in 1902, Evans explained that she had “*tried to get admittance to practise in some form. The Chief Justice, when I wanted to be admitted some time ago, pointed out that women were not admitted in London and so could not be here. I didn't like that, for I don't think we should slavishly follow London.*”<sup>2</sup>

So it was not until 1918 that Ada Evans was legally entitled in her home State of NSW to be a lawyer. In fact she did not become admitted to the bar until 1921, 19 years after her graduation. She never actually practised law, however, citing family commitments.

The first woman to be admitted to legal practice in Australia, her graduation prompting the *Women's Disabilities Removal Act 1903* in Victoria, Flos Greig was at the vanguard of “the graceful incoming of a revolution” as described by then Chief Justice Sir John Madden, as he presided over the ceremony granting her admission to the Victorian bar in August 1905.

Thanks to these early trailblazers, Australia had Julia Gillard as its first female Prime Minister from 2010 to 2013, a solicitor prior to her political career, and we now have for the first time as the head of the High Court, Susan Kiefel AC, Chief Justice of Australia.

In 2011, the Law Society of NSW initiated its Advancement of Women project in recognition of the fact that although in terms of numbers women were at that time approaching equality with men, they were still facing barriers in two key areas: pay inequality and career progression and retention. The Advancement of Women Project's latest initiative has been a Charter for the Advancement of Women in the Legal Profession<sup>3</sup>, which has had sign-on by many law firms as well as government agencies and in-house corporate practices.

The charter is a culture-shifting document designed to promote and support strategies to retain women in the profession over the course of their careers and encourage and promote their career progression into senior executive and management positions. And of course we would like to see more women appointed to the judiciary, whether from the solicitors' branch of the profession or from the bar.

In concluding it is helpful to consider the First 100 Years Mission Statement:

*“We stand for History: It is only with a substantial comprehension of its history can one truly understand women and their place in the world. We don't just laud the heroes, but share their stories, successes and failures.*

*We stand for Recognition: Without the trailblazers we celebrate, women simply would not be where they are today as regards work. We aim to give credit where credit's due.*

*Finally, we stand for Justice: we are dedicated but not limited to women's rights; we believe that incidences of birth such as sex, religion or race should never impact anyone's role in the workplace.”*

No matter in what part of the world we practise our profession, we should all strive to be a part of that mission.

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<sup>1</sup> The First 100 Years Project of NSW was founded by Rachael Scanlon and Champions of the Project include First 100 Years Patron Chief Justice Susan Kiefel AC, Immediate Past President of the Law Society of NSW Pauline Wright, President of Women Lawyers NSW Holly Lam, Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at UTS Larissa Behrendt, Head of Diversity & Inclusion for Australia & Asia of Herbert Smith Freehills Danielle Kelly, and Claire Bibby Non-Executive Director, Keynote Speaker, Lawyer & Mediator. The Steering Committee are Rachael Scanlon, Catherine James, Amber Cerny, Ilana Orlievsky and Lucinda Bradshaw.

<sup>2</sup> See the First 100 Years website <https://first100years.com.au/>

<sup>3</sup> See webpage <https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/charter>





# Men Advocating for Women: It is Time for Men to Speak Up

■ Peter REYES Jr.

## Introduction

Issues affecting women are not just important to women; they are important to all of us. Women face challenges in all aspects of life, including careers in the legal profession. Accordingly, men not only need to be more aware of the challenges women face in society and in the legal profession, but also what can be done to address these issues and overcome these obstacles. This article explores issues facing women in the legal profession and provides recommendations of what men can do to advocate for, and be allies of, women in order to have a more equal, fair, and just legal profession.

## The (Sobering) Statistics<sup>1</sup>

The gender disparity in the legal profession in terms of wages, representation, and opportunities is well-known and well-documented. For example, the gender wage gap in the United States continues to exist, with women making only 83.3% of their male counterparts in 2017 (the median weekly salary for women attorneys in the U.S. was \$1,753 compared to \$2,105 for men). This wage gap actually grew from 2015, when it was 89.7%. Another survey found that male partners earn 44% more than female partners in large U.S. and international law firms.

As to representation, women now make up slightly over half of U.S. law school graduates and almost half of law-firm associates, but only 19.8% are equity partners. The percentage of women in the position of general counsel in Fortune 500 companies is slightly better at 26.4%.

These disparities are even greater for women of color in the U.S. Only 2.5% of equity partners are women of color yet comprise 13.4% of law-firm associates. As to general counsel at Fortune 500 companies, only 4.8% of women of color serve in that role. The only area where women of color lead all other demographic

groups is perhaps the most troubling; they are more likely to leave a law firm than any other group.

The numbers in Europe are only slightly better. Like in the U.S., women in the European Union member states comprise more than half of law school graduates, but they still lag behind in advanced positions in the legal profession. In the United Kingdom, while women comprise 48% of law-firm attorneys, only 33% have become law-firm partners. While that percentage of partners is higher than in the U.S., it drops to 29% at the largest law firms in the U.K. and to 18% at the U.K.'s top ten law firms.

experienced harassment to as high as 67% of those surveyed.<sup>3</sup> However, there is no question that it is an issue that needs to be addressed.

## Why We All Must Address the Disparities in the Legal Profession

There are several reasons why addressing these disparities is important for men as well as women. First and foremost, as members of the legal profession, it is our duty to promote justice, fairness, and equality in the community at-large. It is therefore imperative that we take steps to uphold these

Look for women law students and attorneys at all levels to mentor, support, and champion.

The judiciary shares similar issues. It is noteworthy that, while women make up half of the attorneys and judges in France, a French woman has never served as a permanent female judge on the International Court of Justice, the International Criminal Court, or the European Court of Justice. In the U.S., women comprise only 33% of all state-court judges, where 90% of all cases in the U.S. are tried.<sup>2</sup> If we as members of the legal profession want a more just society, fairness in the courts, and adherence to the rule of law, it is imperative that we take steps to change these sobering numbers.

Finally, women historically have faced sexual harassment in the male-dominated legal profession and continue to report sexual harassment as an issue. This additional challenge women face can lead to decreased job satisfaction, withdrawal from work, job changes, retaliation, lost career opportunities, or even departure from the profession. Surveys and studies throughout the U.S. vary as to how widespread the problem is, ranging from 14% of women stating that they have

tenets within our own community as well. Additionally, it is worth considering what effects the optics of a male-dominated legal profession have on female litigants. Does it inspire confidence in them that their interests will be fairly considered and represented? The short answer is, most likely not.

It is important for men to take a more active role in advocating on issues affecting women in the legal profession not only because it serves the cause of justice, but there is also a strong business case of promoting economic growth. The Harvard Business Review states that "A study by McKinsey projects that in a 'full potential' scenario in which women participate in the economy identically to men, \$28 trillion dollars (26%) would be added to the annual global GDP when compared to the current business-as-usual scenario."<sup>4</sup> Advocating for women to occupy a more equal role with their male counterparts in the practice of law leads to capitalizing on currently under-utilized resources of women's knowledge, experience, and skills, which can lead to more effective services to clients.

In addition to the legal and business case, it is not difficult to find evidence of the real-world benefits of men taking an active part in addressing these disparities. Gender-inclusion programs at law firms and in-house legal departments are becoming more common now and can serve an important function of allowing women to have a place where they can share their experiences and challenges, find support, and develop ideas on how to improve the legal profession. But interestingly, studies show that engagement by men can significantly increase the likelihood of progress by gender-inclusion programs. Evidence reveals that an incredible 96% of the organizations with a gender-inclusion program see progress being made when men are engaged in the programs in contrast to 30% of the organizations that see progress when men are not actively engaged.

## What Men Can Do

So what can be done to increase the stature of women in the legal profession? And more particularly, what can men do to help women advance and have equal representation? Here are a few suggestions.

**Engage in active listening with women.** Active listening requires a person to attentively listen and focus solely on the speaker, talking only to clarify or paraphrase what has been said. The goal is to understand the speaker's statement without criticizing, advising, or passing judgment. This approach avoids the tendency to be dismissive, critical, or non-accepting of the speaker. It can also lead to a greater understanding of a women's experience and perspective, which can be profoundly different than what men in the legal profession experience. In practice, this would include acknowledgement by the male listener that the challenges and injustices experienced by the female speaker are heard, understood, and taken seriously.

**Continuously challenge your own assumptions, perceptions, and actions.** It is easy to assume that we treat everyone fairly and equally. The reality is that none of us do. In order to overcome this, we need to engage in the mindset of continuous improvement, including in our relationships, and how we interact with and treat others. I have noticed on numerous occasions that male litigants will often focus on me

when I am on the bench with two female judges (we have three-judge panels on our court of appeals). I need to ask myself whether I engage in similar behaviors in other situations. When introduced to male and female attorneys, do I address the male attorney first? Do I focus on the male attorney? Do I engage in meaningful conversation with the female attorney? We also need to seek feedback from others, particularly women, about how our words and actions are perceived. We all have biases, regardless of our background, gender, ethnicity, socio-economic status, and any other factors, and we need to be aware of them and correct them.

**Look for opportunities to promote, support, and advance women.** We all have been the beneficiaries of others who have been mentors and champions for us. We need to make sure we reach back and do the same for others. When hiring, make sure that you have a truly diverse pool of candidates. Look for women law students and attorneys at all levels to mentor, support, and champion. Lead by example, which will allow you to encourage others to do the same. For my part, 67% of my clerks have been female, and 39% have been people of color. The diversity of perspectives and experiences from this group of outstanding law clerks has challenged me and ultimately provided a better work product.

**Get involved.** Look for opportunities to get involved in programs that will advance women. These can be in your place of employment, such as gender-inclusion programs, in bar associations, or other similar groups. If a gender-inclusion program does not exist at your place of employment, why not create one? Support activities and programs that will advance women in the profession. As mentioned above, engagement by men in such programs can substantially increase progress.

**If you see an injustice, speak up!** This can be a challenging but important action to take. Situations calling for action may range from blatantly inappropriate comments or acts by others to observing micro-inequities to simply seeing someone being ignored. I recall a time on the bench when a male attorney accused my fellow female judge of being ignorant and not knowing the law. I immediately told the attorney that

he was out of line, that his comments were completely inappropriate, and that my colleague was one of the finest attorneys and judges I have ever met. Responses can vary depending on the situation, ranging from direct confrontation (as in the example above), to taking the person to the side to discuss privately (e.g., if a male colleague is unknowingly and unintentionally engaging in a micro-inequity such as by talking over a female colleague); to using humor to de-escalate a situation (e.g., "I am sure you made that comment in jest."). While every situation is different, any time is a good time to speak up when an injustice occurs. As Dr. Martin Luther King Jr. so eloquently stated, "For evil to succeed, all it needs is for good men to do nothing."

## Conclusion

As a person of color raised by a single mother along with my two younger sisters, I have been fortunate enough to be the very grateful beneficiary of support from allies of all backgrounds. I simply would not be in the position I am in now but for their generous support. I have the same obligation to advocate for and support others. The practice of law has long been a male-dominated profession. We in the majority have an obligation to advocate for, support, and champion women in the profession. Only when our profession reflects the communities we serve can we truly be one that furthers the goals of fairness, equality, and justice for all.

Peter REYES Jr.  
Judge

Minnesota Court of Appeal  
St Paul, MN, United States

1 The statistics in this section, except where indicated otherwise, are taken from the Catalyst, Quick Take: Women in Law (October 2, 2018).

2 The American Bench 2018, Forster-Long, LLC.

3 ABA Resolution 302 on Women in the Legal Profession, adopted by the ABA House of Delegates on Feb. 5, 2018

4 Harvard Business Review, How Men Can Become Better Allies to Women, October 2018.



## À chacun sa robe

I Emmanuel PIERRAT

Les avocats et les juges sont aujourd'hui, dans une très grande majorité, des femmes. Si les places les plus en vue sont toujours occupées par une poignée d'hommes qui portent la robe, plusieurs « femmes de loi » ont déjà marqué l'histoire de leur empreinte.

Il en est ainsi des premières avocates de France qui ont su se battre pour obtenir, à l'instar de Jeanne Chauvin, au tout début du XX<sup>e</sup> siècle, de prêter serment ; et ce bien avant de pouvoir voter et donc de siéger au sein du jury populaire d'une cour d'assises, composé... de citoyens inscrits sur les listes électorales.

En 1916, soit seize ans après les prestations de serment de Sophie Balachowsky-Petit et de Jeanne Chauvin, le barreau de Paris ne comptait encore que 27 femmes contre 2342 hommes. Ces débuts pénibles s'expliquaient notamment par la difficulté, pour les premières avocates, de recruter une clientèle. Par ailleurs, le coût des études de droit limitait l'accès de la profession aux couches les plus aisées de la population. Le mouvement s'amplifia après la guerre : les pionnières, par leur persévérance, s'étaient conquis une légitimité.

Quand, le 22 décembre 1922, huit avocats décident, à Paris, de créer l'Union des Jeunes Avocats (UJA), une association à vocation syndicale destinée à favoriser l'insertion des jeunes diplômés dans la profession, une femme, Madeleine Taupain, est du nombre des fondateurs – elle-même n'ayant prêté serment que onze mois plus tôt.

En 1929, deux avocates françaises, Agathe Dyvrande-Thevenin et Marcelle Kraemer-Bach, participent à la création de la Fédération internationale des femmes des carrières juridiques (FIFCJ). C'est également dans les années 1920 que Suzanne Grinberg, qui avait prêté serment en 1901, à tout juste vingt ans, créa la première Association des femmes juristes, laquelle sera resuscitée, au début des années 2000, par Dominique de La Garanderie.

Mais c'est après la Libération que les femmes commenceront vraiment de peser dans les métiers de la justice et du droit. En 1950, Lucile Tynaire-Grenaudier est la première avocate élue au Conseil de l'ordre du barreau de Paris. Ce qui constitue, à l'époque, un événement, deviendra de plus en plus fréquent. 1977 fut même la dernière année où le Conseil de l'ordre ne compta aucune femme dans ses rangs.

En 2016, le Conseil de l'Ordre devient paritaire pour la première fois de son histoire – et le restera désormais. En mars 2016, le Barreau de Paris recensait un peu plus de 27 000 avocats inscrits dont 14 654 femmes.

le 1<sup>er</sup> janvier 2018, le 220<sup>e</sup> bâtonnier de Paris.

Paule Pignet fut la toute première femme élue à la fonction de bâtonnier. C'était... en 1933, à La Roche-sur-Yon, en Vendée. Née en 1889, Paule Pignet était entrée au barreau de La Roche-sur-Yon à vingt ans, en 1919. Habituee des prétoires, elle plaquait régulièrement en correctionnelle et aux assises, écumant ainsi les tribunaux de la région. Elle fut élue à quarante-quatre ans à la charge de bâtonnier, alors qu'elle était veuve d'un professeur du lycée de la ville et mère d'un jeune étudiant en médecine.

Quel est le féminin de « ténor du barreau » ? « Diva du barreau » ? Mieux vaut renoncer à trouver l'équivalent féminin d'une expression consacrée, même si le métier d'avocat est désormais largement choisi par les femmes.

Quel est le féminin de « ténor du barreau » ? « Diva du barreau » ? Mieux vaut renoncer à trouver l'équivalent féminin d'une expression consacrée, même si le métier d'avocat est désormais largement choisi par les femmes. En 2009, la proportion de femmes avocates dépassait pour la première fois celle des hommes. Elles représentent aujourd'hui plus de 55 % des effectifs. Et encore ce ratio s'entend-il toutes générations confondues. Chez les moins de quarante ans, le chiffre est bien supérieur.

Certaines avocates ont défendu des causes retentissantes, telle Gisèle Halimi (plaidant pour les femmes ayant avorté clandestinement), Isabelle Coutant-Peyre (avocate des groupes terroristes comme de la République d'Iran, qui a épousé le terroriste Carlos en prison), la pénaliste Françoise Cotta, Frédérique Pons (qui a codéfendu Guy Georges), etc.

D'autres sont même devenues bâtonnières dès les années 1990 : Dominique de La Garanderie, Christiane Féral-Schuhl ou encore Marie-Aimée Peyron qui est devenue,

Paule Pignet, décédée en 1970, resta longtemps une exception puisque ce n'est que vingt-six ans plus tard, en 1959, qu'une seconde femme, Ginette Synave, accéda au bâtonnat, celui de Versailles. Cependant, ce n'est qu'après l'événement constitué par l'élection de Dominique de La Garanderie à la tête du barreau de Paris, que les verrous ont progressivement sauté dans les autres barreaux de France.

Les « petits » barreaux basculent plus facilement. Celui d'Albi a déjà connu cinq bâtonnières femmes, celui d'Alençon quatre et celui de Blois, trois. Et les grandes villes capitulent peu à peu. Lille est tombée en 2013 grâce à Hélène Fontaine. Marseille en novembre 2015, avec l'élection de Geneviève Maillet. Ce mouvement, irréversible, ne va pas sans quelques grincements de dents qu'on qualifiera d'anachroniques.

Les femmes avocates, ce sont aussi, en France et à l'étranger, de grandes figures, telles Hillary Clinton, Michèle Obama, Cherie Blair, Corinne Lepage, Christine Lagarde ou encore Shirin Ebadi, avocate



iranienne qui a reçu le prix Nobel de la Paix.

Les femmes de loi sont également des juges, de Simone Rozès, qui a siégé comme plus haute magistrate de France, à Eva Joly, longtemps juge d'instruction. Il convient, à ce titre, de rappeler que la mixité de la magistrature n'a été autorisée, par la loi, qu'en 1946. Treize ans plus tard, en 1959, les femmes n'étaient encore que 6 % à être juges. En l'an 2000, elles représentaient déjà la moitié des effectifs.

Ce sont encore trois femmes Gardes des Sceaux, au parcours marquant : Élisabeth Guigou, Rachida Dati et Christiane Taubira.

Le genre féminin enfin, depuis bien longtemps cette fois, du... box des accusées : Marie-Antoinette en a appelé à la barre à « toutes les mères de France », Thérèse Humbert est considérée comme l'auteur d'une des plus incroyables escroqueries, sans oublier les sœurs Papin, Violette Nozières, Simone Weber, Marie Besnard, Florence Rey, ainsi qu'Henriette Caillaux, qui a été acquittée après avoir abattu le directeur du Figaro.

On l'aura compris, dans une salle d'audience, il n'y a pas de sexe faible, mais des femmes qui sont passées du rôle d'accusées à celui d'acteurs majeurs de la justice. Elles occupent depuis des décennies un lieu de pouvoir et de courage conçu par et pour les hommes. Elles le dominent presque déjà. Les femmes du monde de la justice sont donc avant tout des femmes de courage, qui souvent combattent pour la démocratie et la paix, en acceptant les risques de leurs actions là où règnent arbitraire et affrontements.

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## #MeToo, TIME'S UP, and the Evolution of the Law

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Stories of sexual harassment, assault, and other types of coercion in the workplace are nothing new. Unfortunately, many of us in the United States know someone who has been assaulted by a stranger or, more often, by someone familiar, such as in the home or in a professional setting. However, in the past two years, the reaction in the U.S. to allegations of sexual harassment and violence, particularly towards men in positions of power, has shifted dramatically from a cultural, social, and legal perspective. There have been several movements aimed at empowering those who have been historically marginalized in the workplace, the most notorious ones being the #MeToo and TIME'S UP movements. Those two movements brought sexual violence and inequity in the workplace to the forefront of national media, including digital platforms and traditional media sources. Because of the movements' widespread coverage, conversations surrounding sexual violence and harassment have found their way to kitchen tables and cocktail hours across America, highlighting the rise of a global consciousness about sexual assault and women's issues at work.

It is important to differentiate the #MeToo movement from TIME'S UP, though they

are certainly intertwined. #MeToo is a movement against sexual violence of any kind against both women and men and gained traction through individuals revealing personal experiences of assault to the public, particularly via social media. TIME'S UP is centered on promoting workplace equality and supporting women to overcome professional obstacles. The two movements do overlap, as #MeToo's message encompasses exposing and combatting sexual violence in the workplace, and TIME'S UP focuses on obstacles women face in the workplace, including sexual harassment. Both movements went "viral" in part because of celebrities recounting their own experiences with sexual violence and inequality in the workplace and using their platform to raise awareness.

#MeToo first began in 2006 when, Tarana Burke, a survivor of sexual assault herself, founded the non-profit Just Be, Inc., an organization that supports victims of sexual misconduct, with a focus on young girls of color. She coined the phrase "Me Too." Over ten years later, on October 5, 2017, *The New York Times* published an article that included accounts from numerous women, including actress Ashley Judd, citing that they

had been subjected to sexual misconduct by media mogul Harvey Weinstein. A few days later, actress Alyssa Milano tweeted “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” With 66,000 replies, her tweet launched an emotional, political, and legally charged discussion about sexual abuse. A plethora of allegations then surfaced against high profile individuals from business executives, Roy Price (former president of Amazon.com’s media development division), Les Moonves (CEO of CBS) to Larry Nassar (USA Gymnastics team doctor) and from Kevin Spacey, Morgan Freedman (prominent actors) to political figures. Most recently, the Supreme Court nominee Brett Kavanaugh has been accused of sexual assault by several individuals, which made his nomination very controversial.

TIME’S UP began at the beginning of 2018, as a sister movement to #MeToo and aimed at changing the landscape for women in the workplace, in part, by establishing the TIME’S UP Legal Defense Fund. The movement was started by a group of over 300 women in Hollywood, including, actress Reese Witherspoon, and Natalie Portman (actresses) and Shonda Rimes (television producer, screenwriter, and author of shows like Grey’s Anatomy and Scandal). The TIME’S UP Legal Defense Fund’s purpose is to raise money to fund legal and public relation costs in cases of women facing sexual harassment, abuse, or related retaliation in the workplace or while trying to advance their careers. Along with the fund, these women behind the movement have been using their platform to advocate for workplace changes from basic safety to equal work conditions.

The reactions to these movements manifested in several ways in 2017 and 2018. On December 18, 2017, Time magazine named “the Silence Breakers” its Person of the Year for 2017, referring to men and women who had spoken up about experiences of sexual assault in their professions. More than one million people in the United States came out to support these movements and women’s rights generally at the second annual Women’s March in March 2018. With the growth of two national movements in the public sphere, many ethical and legal debates have followed regarding the fairness of “outing” alleged sexual harassers without a fair trial.

No matter the stance, these movements have highlighted a global issue and, in the United States, sparked some legislatures to reassess current laws.

## I. The Effects of #MeToo and TIME’S UP on US Law

While the #MeToo and TIME’S UP movements have brought sexual harassment and inequality in the workplace to the forefront, it is notable that laws, on a federal and state level, were in place before the movements began. However, the movements, combined with new developing social and cultural norms surrounding sexual violence, have revealed that existing laws can be

incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

- The harasser can be the victim’s supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

States also have laws designed to prevent sexual harassment at work. For instance, New York Human Rights Law § 296.1 prohibits sex discrimination which comprises sexual harassment.

While some states have imposed stringent legal obligations on their employers, others have devised “recommended practices” rather than mandatory workplace requirements.

inadequate or insufficient to protect women. Prior to the #MeToo and TIME’S UP movements, national laws were established to protect employees at work against sexual harassment. In fact, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 (the “Act”). Title VII applies to employers with 15 or more employees, including federal, state and local governments. It also applies to employment agencies and to labor organizations. According to the U.S. Equal Employment Opportunity Commission, which oversees the enforcement of the Act:

- It is unlawful to harass a person (an applicant or employee) because of that person’s sex. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general.
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
- Although the law doesn’t prohibit simple teasing, offhand comments, or isolated

Unfortunately, federal and state laws have failed to take into account the unique social and professional implications of alleging workplace sexual harassment, a setting which has historically been unequal, not only between sexes but also for employees in other “protected classes.” In most states, these “protected classes” include employees of a certain race, religion, color, or national origin, people over 40, and people with physical or mental disabilities. While legislative changes throughout the country are still developing, there has been a concerted effort to enact laws which affect the professional structures and procedures at work and strengthen existing law. In the past, companies may have been ill equipped to deal with sexual harassment due to a lack of consistent and established sexual harassment policies and procedures, lack of guidelines regarding what types of behaviors constitute as sexual harassment and lack of training for all employees. In the wake of #MeToo and TIME’S UP, many states have pushed for legislation obligating employers to take steps aimed at fostering a positive workplace culture and providing them with the necessary tools.

While there is much room for legislative improvement, as of now, there has been no federal legislative overhaul of the Act. However, across the nation, states have

passed laws prompting employers to revisit Human Resources policies and seek legal counsel to advise on best practices for handling sexual harassment claims going forward.

## II. Some State Specific Legal Requirements in the Workplace

While some states have imposed stringent legal obligations on their employers, others have devised “recommended practices” rather than mandatory workplace requirements. For instance, in California and Connecticut, employers with fifty or more employees must provide two hours of mandatory sexual harassment training to supervisors within six months of becoming a supervisor, and at least once every two years. Sexual harassment training is also required by all public employers regardless of the number of employees. California even adds abusive conduct, or bullying, to be addressed in the same training. In Illinois, in a similar vein, every state executive department, agency, board, commission, and instrumentality must develop a written sexual harassment policy and post it in a prominent and accessible location and distribute it to employees in a manner to assure that all employees see it. They must all provide sexual harassment training as part of all ongoing or new employee training programs.

In Michigan, the law mandates that in its state governmental body, the Department of Civil Rights, education and training programs be offered to all employers, labor organizations, and employment agencies. The goal is to help them understand the existing law regarding sexual harassment in the workplace.

In New York, robust measures aimed at diminishing sexual harassment in the workplace were signed into law by Governor Andrew Cuomo this past April. By October 9, 2018, all New York employers must adopt and implement a written sexual harassment prevention policy and a sexual harassment prevention training program which meets the state’s minimum standards. These standards must be provided to all employees by January 1, 2019, and thereafter on an annual basis. Both the policy and training program have guidelines which must be strictly followed by employers and include, for example, that the training have an interactive component.



It is important that New York has also banned mandatory arbitration agreements arising from sexual harassment claims, as well as confidential settlement agreements among sexual harassment complaints without the complainant’s consent.

On the other hand, states like Colorado, Vermont, and Hawaii, do not have any requirements but encourage all employers to take necessary steps to prevent sexual harassment, including sensitizing employees to be aware of sexual harassment behaviors. In Massachusetts, while there are no legal obligations imposed on employers or governmental bodies, employers are encouraged to provide sexual harassment training to new employees within one year of employment with additional training for managers and supervisors.

In other states, including Alabama, Delaware, Georgia, and Indiana, no new laws have been put into effect as to sexual harassment following the MeToo and TimesUP movements.

### Conclusion

Regardless of whether one uses the hashtag #MeToo, it has been remarkable and empowering, particularly for many of us women, to witness the profound effect of public consciousness on the evolution of the law thanks to the #MeToo and TIME’S UP movements. It has also been a powerful reminder that legal shortcomings

can be changed by a collective voice which will inevitably benefit employees but also employers, who will have employees working in safer and more productive workplaces.

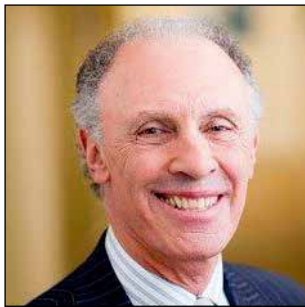
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# Flying the Unfriendly Skies: Sexual Harassment and the Montreal Convention

■ Christopher B. KENDE

Passenger on passenger assaults on international flights are, unfortunately, on the increase, due in large part to cramped seating, the stress of flying, fear of terrorism and the generally decreasing quality of service on board. Commercial airline liability for injury or death of passengers on international flights, which necessarily would include sexual assaults or unwelcome sexual advances, is governed by a unique Conventional scheme commonly known as the “Montreal Convention.”<sup>1</sup>

This Convention, which came into force in the U.S. in 2004 and has been ratified by most countries in the world and almost every European Nation, essentially replaced an earlier international convention governing liability for injury or death to passengers known as the Warsaw Convention.<sup>2</sup> Although the Montreal Convention both replaced and superseded the Warsaw Convention, many of the concepts set forth in the Warsaw Convention were carried forward, including a number of definitions which will be further described below. In this article, we will first provide an overview of pertinent provisions of the Montreal Convention, then address how the Convention pertains to sexual harassment claims.

In essence, with respect to international air carrier liability for the personal injury or death of passengers, the Montreal Convention sets forth a strict liability scheme requiring only that the passenger be injured or killed by an “accident,” in the process of embarking, while on board the aircraft or disembarking. (Montreal Convention, Article 17.1)<sup>3</sup>

The Montreal Convention provides for a limit of liability of approximately \$165,000 (or approximately 113,000 special drawing rights (SDRs)) but the limitation only applies if the carrier is able to prove a lack of negligence with respect to its conduct in causing the accident.<sup>4</sup> This of course is a heavy burden and it is quite unusual that the limitation in the Montreal Convention will be applied except in extraordinary circumstances, and only if the air carrier is able to prove the negative of no negligence.

Thus, there are essentially three requirements for strict liability. They are: 1) an accident, 2) causing injury or death, and 3) the accident occurring during the operation of the aircraft or the embarking or disembarking by the passenger. The air carrier can assert a defense of contributory negligence which will either diminish recovery or preclude recovery entirely if the passenger was completely responsible for the injury.<sup>5</sup>

The airline may also attempt to limit liability by proving that the accident was caused entirely by a third party.<sup>6</sup> However again, this is generally a fairly unusual outcome, since courts tend to be very likely to impose strict liability absent extraordinary circumstances.

passenger must prove an unusual or abnormal event external to the passenger which causes injury or death.

So what has all this to do with sexual harassment? Well, quite a bit, since the harassment of a passenger by another passenger must be shown to be an “accident” for there to be any liability on the part of the air carrier.

The leading case in this area, decided under the Warsaw Convention but completely applicable to any incident which might occur under the Montreal Convention, is the 2<sup>nd</sup> Circuit Court of Appeals case of *Wallace v. Korean Air*, 214 F.3<sup>rd</sup> 293 (2<sup>nd</sup> Cir. 2000).

There is one very important aspect to the liability scheme under the Montreal Convention: it requires that there be actual physical injury.

There is one very important aspect to the liability scheme under the Montreal Convention: it requires that there be actual physical injury. In other words, pure emotional distress in the absence of physical injury is not recoverable under the Montreal Convention. See, *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991).

In the landmark Supreme Court case of *Air France v. Saks*, 470 U.S. 392 (1985), the U.S. Supreme Court distinguished between an “event” resulting in injury and an “accident” as defined in the Montreal Convention. The court held that a passenger’s injury could only be considered an accident if the injury resulted from “an unexpected or unusual event that was external to the passenger.”<sup>7</sup>

In *Saks*, a passenger lost hearing in one ear due to the pressurization of the aircraft. However, it was shown that the pressurization functioned normally and that the loss of hearing was an unusual or abnormal reaction of the passenger to a normal condition of air travel. Thus, to recover under the Montreal Convention strict liability scheme, the

The facts in the *Wallace* case were as follows.

The plaintiff, Brandi Wallace, was a passenger on a Korean Air flight from Seoul, South Korea to Los Angeles, CA on the evening of August 17, 1997. It was the middle of summer, so Ms. Wallace wore a t-shirt and jean shorts with a belt. Initially the flight passed uneventfully, while Ms. Wallace was seated next to a window in economy class. She fell asleep shortly after finishing her in-flight meal. Two male passengers sat between Ms. Wallace’s window seat and the aisle. Seated close to Ms. Wallace was one Kwang-Young Park. Prior to falling asleep, Ms. Wallace had never spoken to or given the slightest indication of familiarity with Mr. Park. However, three hours into the flight, Ms. Wallace awoke in the darkened plane to find that Mr. Park had unbuckled her belt, unzipped and unbuttoned her shorts and had placed his hands into her underwear to fondle her. Ms. Wallace awoke with a start and immediately turned her body to the window, causing Mr. Park to withdraw his hands. However, Mr. Park resumed his unwelcomed advances and when Ms. Wallace

recovered from her shock, she hit him hard, then climbed out of her chair and jumped over the sleeping man in the aisle to make an escape. At the back of the plane, Ms. Wallace found a flight attendant and made a complaint about the assault. She was reassigned to another seat and when the plane arrived in Los Angeles, Ms. Wallace told airport police about the incident. They arrested Mr. Park and he subsequently pled guilty to the crime of engaging in unwelcome sexual conduct with another person in violation of Federal Statute 18 U.S.C. § 2244(b).

In February 1998, Wallace brought an action against Korean Air in the U.S. District Court for the Southern District of New York, claiming liability for Park's sexual advances under what was then the Warsaw Convention and which, of course, now is the Montreal Convention. Following discovery, Wallace moved for summary judgment on her Warsaw Convention claim, but the motion was denied by the District Court under the theory that a sexual assault was not "a risk characteristic of air travel." Therefore, the assault did not constitute an "accident" under the Warsaw Convention as defined by the *Saks* case.

Wallace appealed to the 2<sup>nd</sup> Circuit. The Court unanimously reversed, finding that the assault constituted an "accident" under Article 17 of the Warsaw Convention, as a general matter, ducking the issue of whether the term "accident" excludes risks which are not characteristic of air travel. Although the court recognized that the characteristics of air travel "increased Ms. Wallace's vulnerability to Mr. Park's assault," the Court reasoned that the attack may well have been due to lack of supervision by flight attendants during the flight. As the Court noted, "while Ms. Wallace lay sleeping, Mr. Park, 1) unbuckled her belt; 2) unbuttoned her shorts; 3) unzipped her shorts and 4) squeezed his hand into her underpants. These could not have been 5 second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous. Yet, it is undisputed that for the entire duration of Mr. Park's attack, not a single flight attendant noticed a problem and it is not without significance that when Ms. Wallace woke up, she could not get away immediately, but had to endure another of Mr. Park's advances before clamoring out to the isle."

Under this rationale and what appears to be a concern about lack of supervision or

oversight by the flight crew, the court found that this incident constituted an accident because it was an "unexpected or unusual event or happening that was external to the passenger," citing the language of the *Saks* case.

Interestingly, the concurring opinion took issue with the court's ducking of the question of whether the term "accident" is limited to risks characteristic of air travel, or whether the term should be construed more broadly to include any type of incident whether or not related to air travel, which is unexpected and external to the passenger. It is submitted that given the expansion of the term "accident" since the decision in *Wallace* and the general politicized nature of sexual harassment as an offensive and unacceptable form of behavior, a court today faced with the same issue would have no hesitation in finding sexual assault to be an accident regardless of the issue of whether it is part of the inherent risk of air travel.

Thus, although the Court of Appeals reversed on the issue of accident, it expressed no view as to whether the plaintiff could recover in the absence of actual manifestation of a physical injury. The traditional rule of no recovery for pure emotional distress under the Warsaw Convention would have probably resulted in no award to Ms. Wallace had the case gone forward.

Happily for plaintiffs in air carrier cases, there has been some erosion of the notion of limiting recovery to physical injury in a recent case, *Doe v. Etihad Airways*, 870 F.3d 406 (6<sup>th</sup> Cir. 2017). In that case, the plaintiff pricked her finger on a used syringe which had been left in the magazine holder in front of her seat. The airline contended that her only ability to recover was for the actual physical injury of the pricking of her finger, since clearly the presence of the used syringe in the seatback pocket was an unexpected and unusual event external to the passenger, thus an "accident," as well as any possible claim for direct medical attention required for the injury. The plaintiff contended that, because of the injury and the lack of any knowledge as to the source of the syringe, she suffered severe emotional distress. She was so apprehensive of the possible contracting of numerous diseases, including hepatitis or AIDS, that she refrained from sexual relations with her husband for many months because of fear of contagion (the suit included a claim

for loss of consortium by the husband). She also refused to eat at the same table with her daughter, again because of the fear of having contracted a serious illness.

While it was later learned that the syringe contained insulin, the plaintiff had already undergone numerous tests and examinations to ensure that she had not contracted a serious disease.

The Court of Appeals in *Etihad Airways* allowed the plaintiffs associated emotional distress claims, even though substantially removed from the actual physical injury, to go forward. The court essentially held that as long as the emotional distress was traceable to the *accident*, it could be asserted even if unrelated to the bodily *injury*. Thus, it is possible that in a future sexual harassment claim similar to the one brought by Ms. Wallace, even the slightest scratch or bruise as a result of an unwanted or aggressive sexual advance by another passenger could allow for a claim for significant emotional injury as well. Time will tell if the courts allow the expansion of emotional distress claims resulting from sexual harassment in Montreal Convention cases.<sup>8</sup>

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1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, reprinted in S. Treaty DOC. No. 106-45, 2242 U.N.T.S. 309.

2. Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934).

3. Article 17.1 provides as follows: "The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

4. Montreal Convention, Article 21.2(a).

5. Montreal Convention, Article 20.

6. Montreal Convention, Article 21.2(b).

7. *Saks*, *supra*, 470 U.S. at 405.

8. Most courts have held that the Convention preempts state law and constitutes the exclusive remedy for injury or death of a passenger on board an international flight. See, *El Al Israel Airlines, Ltd., v. Tseng*, 525 U.S. 155 (1999).



# Trafficking for Sexual Exploitation and the Commercial Sex Trade

*Why an Equality Approach is Necessary to Combat Sex Trafficking*

■ Romina CANESSA

La trata con fines de explotación sexual es basada en la desigualdad sistemática, la gran mayoría de sus víctimas son mujeres. Este problema está intrínsecamente relacionado con la prostitución. El *Equality Model* trata de corregir estas desigualdades promoviendo el derecho de las mujeres a la seguridad, la salud y la no discriminación, y cuestionando el derecho de los hombres a comprar los cuerpos de las mujeres para el sexo. Hasta que esto no se reconozca en la ley, la política y la práctica, no habrá una solución para terminar con el tráfico sexual y la explotación sexual.

It is an extraordinary time for women. Movements such as #MeToo, #TimesUp, and #NiUnaMenos have emphasized the voices of survivors and brought a renewed sense of urgency to address sexual harassment and assault. The same awareness, empathy, and dignity of these movements must also be brought to the issues of sex trafficking and sexual exploitation of women and girls. This includes efforts and processes to change and implement trafficking laws and policies around the world.

Trafficking for sexual exploitation happens every day, in every region across the world, it is not an isolated problem. Although trafficking manifests differently across all regions, some regions see more trafficking for forced labor or for other purposes - including forced marriage, selling of children, or forced begging, one thing that is certain is that it is a highly gendered trade. According to the United Nations Office of Drugs and Crime 2016 Global Report on Trafficking in Persons, 71% of trafficking victims are women and girls. Preliminary data for the upcoming 2018 report indicates that the majority of women (82%) and girls (71%) are trafficked for purposes of sexual exploitation.

There is no question that trafficking for sexual exploitation is a gendered problem, the vast majority of its victims are female, 96% according to the UNODC Report, and

equally the vast majority of perpetrators are male. Women and girls end up being trafficked for sexual exploitation in many different ways such as: sold into prostitution because of poverty, deceived into signing contracts for jobs and ending up in prostitution, trafficked into temporary marriages for sex, abducted as sex slaves in times of conflict, advertised and sold on the internet, and many other ways. Regardless of the method used to traffic a woman or girl into sexual exploitation, gender inequality is a constant. While anybody can become a victim of trafficking for sexual exploitation, most victims come from marginalized and vulnerable groups. Women and girls are more vulnerable to exploitation purely as a result of their gender, while other social and economic

a sex trade there would not be as high an incidence of trafficking. Human trafficking, and in particular trafficking for sexual exploitation is a business and is ultimately about the exploitation of individuals for profit. Sex trafficking accounts for nearly \$99 billion in profit every year, according to the International Labor Organization. Women and girls trafficked into sexual exploitation can be sold over and over again generating immense profits for their exploiters. As long as there is an industry for women and girls to be trafficked into, in this case, the commercial sex trade, and people willing to buy and exploit them, there will continue to be trafficking for sexual exploitation. If there were no profit to be made by traffickers and pimps, there would be no market to traffic women and

International law recognizes the link between prostitution and human trafficking, as well as the gender inequality and discrimination inherent in sexual exploitation.

inequalities also contribute. Women and girls are discriminated against and face violation in all aspects of life, all around the world. Girls are often discriminated against in their right to education, are more often subject to harmful practices such as child marriage and experience higher incidences of sexual abuse and violence. Gender discrimination, both in law and in practice, facilitates the path many women and girls take into sexual exploitation. Furthermore, girls are sexualized at increasingly younger ages, creating the perception that a girl's worth is solely based on her sexuality or sexiness. This type of cultural attitude only serves to foment the demand for sexual exploitation of increasingly younger girls. This results in acceptance that sexual exploitation is a "normal" part of life for girls and for women, resulting in increased sex trafficking and sexual exploitation.<sup>1</sup>

Trafficking for sexual exploitation is intrinsically linked to prostitution, without

girls into. So why is not more being done to eliminate the link between the two or the demand that drives this "business"?

*"To me the whole point of the sex trade is to have as many prostitutes as possible out there and therefore they make the market. Using white middle class girls is one way to make it invisible because people don't believe it happens to people like themselves. To disconnect prostitution from trafficking is a really good way of letting men think, well what I'm doing is okay."* (Rebecca, The Lion Within, Equality Now)<sup>2</sup>

International law recognizes the link between prostitution and human trafficking, as well as the gender inequality and discrimination inherent in sexual exploitation. There are three critical international treaties addressing the issues of trafficking and prostitution.

- **The UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the**

**Prostitution of Others** states that “prostitution and trafficking for sexual exploitation are incompatible with the dignity and worth of the human person”.

- Article 9 of the **Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol)** stipulates that parties to the Protocol must adopt or strengthen legislative measures to “discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”. Article 3 also specifies that consent of a victim of trafficking is irrelevant.
- **The Convention of the Elimination of All Forms of Discrimination against Women (CEDAW)** in Article 6 requires State Parties to take “all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

It is clear in international law that prostitution is seen not only as exploitation but inherently linked to human trafficking. Taking this into account, it is also clear that the majority of governments need to examine their laws and their approach to prostitution.

Currently, there are four main ways that governments regulate prostitution: legalization, decriminalization, full criminalization, and partial decriminalization or the Equality Model. Countries such as the Netherlands and Germany have chosen regulation through legalization of the commercial sex trade. The legalization of prostitution legalizes the buying and selling of sex, however, it also legalizes the activities involved in and surrounding prostitution, such as pimping and brothel keeping, and imposes specific regulations for the sex industry. These regulations can often create a two-tiered sex industry, those operating within the regulations and those operating outside of its bounds. The reasoning behind a legalization approach is often premised on the fact that prostitution is unsafe only because it is illegal and unregulated. New Zealand and portions of Australia have chosen the approach of full decriminalization of the sex trade. This approach decriminalizes all aspects of the sex trade and presupposes that prostitution is a transaction between equal and willing parties and requires no state involvement. Both of these approaches make legal various aspects of the commercial sex trade that profits off



the bodies of others. When governments take these approaches, a larger reported incidence of human trafficking inflows occur in that country as a result.<sup>3</sup> This is a result of the expansion of the industry and the ability to increase profits; as the market increases the supply must also increase, thus human trafficking by necessity increases to meet this new demand.

Former UN Trafficking Rapporteur Sigma Huda stated that: “state parties with legalized prostitution industries have a heavy responsibility to ensure that ... [they] are not simply perpetuating widespread and systematic trafficking. As current conditions throughout the world attest, State parties that maintain legalized prostitution are far from satisfying this obligation.”<sup>4</sup>

Full criminalization of the industry is the approach taken by countries such as the United States (with the exception of Nevada) and South Africa. This approach criminalizes everyone involved in the commercial sex trade, including those who sell or are sold for sex (excepting those under 18). Criminalizing those in prostitution further punishes individuals who are often already discriminated against, are already vulnerable, and have already suffered numerous abuses, including trafficking and rape. This also makes it harder for those coerced into selling sex to try and leave for fear that they will be punished or have a criminal record. General Recommendation 35 of CEDAW recognizes that being in prostitution is a position of vulnerability that can lead to discrimination

and calls for the decriminalization of women in prostitution.

As international law recognizes, addressing the demand for paid sex is a key component to preventing sex trafficking and sexual exploitation. Sweden was one of the first countries to acknowledge this link and in 1999, the Swedish government passed the Act Prohibiting the Purchase of Sexual Services. Since that act came into force there has been a dramatic drop in the number of women in street prostitution, in the number of men who buy sexual services, and in the recruitment of women into prostitution.<sup>5</sup> Moreover, traffickers have been deterred from operating in Sweden; traffickers have had problems finding men to buy sex from the trafficked women and, as a result, their profits have been smaller than they expected. The traffickers seemingly have moved on to more lucrative markets. This model is called the Equality Model or Nordic Model for its acknowledgment of the gender inequalities inherent in the commercial sex trade. The Equality Model advocates for criminalizing those who exploit people for profit - buyers, pimps, brothel-keepers, traffickers - and decriminalizes those in prostitution, in line with international law.

Over the last 20 years countries including Sweden, Iceland, Norway, Canada, Northern Ireland, France and Ireland have all adopted the Equality Model. This has been largely in response to the efforts of sex trade survivors, supported by national and international women’s groups.

Exploitation in the commercial sex industry is both a cause and consequence of gender and other inequalities. It entails various human rights violations, including the right to equality and non-discrimination, dignity, health and to be free from violence, torture, inhuman and degrading treatment. It perpetuates the idea that it is acceptable to buy women's and girls' bodies to satisfy male sexual desires. The Equality Model challenges this construct and tries to redress these inequalities by promoting women's and girls' right to safety, health and non-discrimination, and by challenging men's perceived right to buy women's bodies for sex. Until this is acknowledged in law, policy and practice there will not be a solution to ending sex trafficking and sexual exploitation. Strong laws that will promote gender equality and human dignity and eliminate discrimination in all aspects of women and girls' lives must be implemented. Only then will #Metoo include all survivors of sexual exploitation and abuse.

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1 For further discussion on how discrimination and gender inequality facilitate sex trafficking in women and girls see: Hunt, Jacqui et al. How lifelong discrimination and legal inequality facilitates sex trafficking in women and girls, in *The Palgrave International Handbook of Human Trafficking* (Winterdyk, John, Jones, Jackie eds., forthcoming June 2019).

2 Equality Now, *The Lion Within*, (2017), at [https://www.equalitynow.org/the\\_lion\\_within?locale=en](https://www.equalitynow.org/the_lion_within?locale=en)

3 Cho, Seo-Young et al. Does legalized prostitution increase human trafficking?, *41 World Development*, 67 - 82 (2012).

4 United Nations, *Integration of the Human Rights of Women and Gender Perspective*, Report of the Special Rapporteur on the human rights aspects of victims of trafficking in persons, especially women and children, Sigma Huda, E/CN.4/2006/62 (2006), available at [https://digitallibrary.un.org/record/569065/files/E\\_CN-4\\_2006\\_62-EN.pdf](https://digitallibrary.un.org/record/569065/files/E_CN-4_2006_62-EN.pdf)

5 Swedish Institute, *Selected extracts of the Swedish government report SOU 2010:49: The Ban against the Purchase of Sexual Services. An evaluation 1999 -2008* (2010), available at [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the\\_ban\\_against\\_the\\_purchase\\_of\\_sexual\\_services\\_an\\_evaluation\\_1999-2008\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services_an_evaluation_1999-2008_1.pdf)



# Judged for More than Her Crime

*Discrimination Against Women Facing the Death Penalty*

**I Delphine LOURTAU  
 & Sharon Pia HICKEY**

Le Cornell Center on the Death Penalty Worldwide (Centre Cornell sur la peine de mort dans le monde), en collaboration avec la Coalition mondiale contre la peine de mort, a récemment publié une étude novatrice sur les femmes passibles de la peine de mort, un condamné à mort longtemps négligé. Le rapport a révélé que la discrimination fondée sur le sexe imprègne toutes les étapes des procès pour condamnation des femmes et met en lumière le fait que la protection des femmes est centrée sur leur rôle de mère et leur carrière, ce qui entraîne des préjugés désastreux à l'encontre des femmes, violant ainsi les normes de comportement liées au genre.

was finally appointed a lawyer at her trial, she retracted the confession. Still a child, she should have been spared any threat of capital punishment under international human rights law. The court nevertheless sentenced her to death.

Stories like Zeinab Sekaanvand's, marked by the blindness of criminal justice systems to domestic abuse, child marriage, and other gender-specific experiences that should play a part in sentencing decisions, are not exceptions. Death row conjures images of men in shackles, but there are hundreds of women under sentence of death around the world, some of them teenage girls, and some detained with young children. Because of the widespread

Poverty and experiences of violence are nearly ubiquitous for women who come in contact with the criminal justice system.

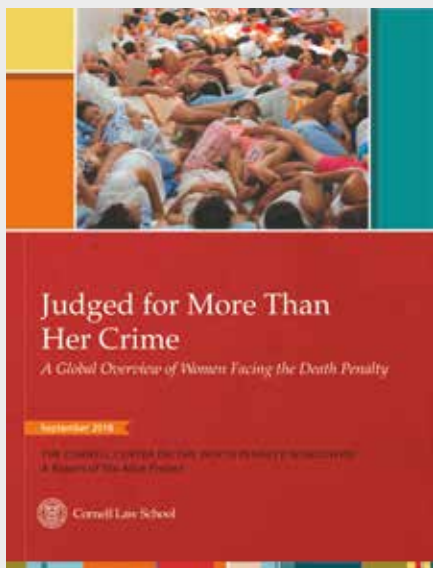
## Introduction

Last October, Iran executed a 24-year-old woman, Zeinab Sekaanvand, after a grossly unfair trial. Born into a poor and conservative family, Zeinab was married at the age of 15 to an older man who soon turned abusive and violent. She appealed to her family and to local authorities to protect her from her husband and her brother-in-law, who raped her, but her pleas went unheard. When her husband was found dead, she was arrested, at the age of 17. Under police torture, she confessed to the crime. When she

assumption that the death penalty is a male phenomenon, few scholars and advocates have examined the patterns of gender bias and intersectional discrimination that affect capital prosecutions of women. As a result, women facing capital punishment have to date remained a largely invisible death row population.

The Cornell Center on the Death Penalty Worldwide<sup>1</sup> sought to remedy this omission through a three-year research project focusing on women facing the death penalty worldwide, with a particular focus on India, Indonesia, Jordan, Malawi, Pakistan and the





United States. In September, we published the results of our research in *Judged for More than Her Crime: A Global Overview of Women Facing the Death Penalty*.<sup>2</sup> The report illuminates, for the first time, the intersectional discrimination that women experience before coming into contact with the law, and the consequences of gender bias and inequality at trial and while in prison. Despite international law's requirements to prevent and respond to gender-based violence, women on death row disproportionately suffer from histories of violence and trauma, circumstances which courts often fail to consider when handing down a death sentence. Poverty also plays a significant role in women's offending, particularly in the cases of women convicted of non-violent drug offenses, who heavily populate women's death rows in some countries.

Despite our research efforts, many critical pieces of information about women on death row still remain unknown. No one knows, for instance, exactly how many women are under sentence of death globally. We recently raised our cautious estimate of 500 women after revelations that there were almost 150 women under sentence of death in Malaysia alone. We are also hearing troubling reports that a significant number of women are being sentenced to death in Iraq, merely for being married to a member of ISIS. Even within the abolitionist community, research rarely recognizes women on death row as a distinct category of rights holders facing unique challenges

in the criminal justice system. Instead, the experience of female capital defendants has been subsumed into the default male framework, further marginalizing their needs and ignoring the rights violations they suffer. This lack of attention has led to a dearth of information on women under sentence of death, precluding monitoring for human rights abuses and advocacy for their redress.

The situation of women on death row is emblematic of systemic failings in the application of capital punishment. When we analyzed the profile of death-sentenced women, we found striking patterns reflecting the realities of gender inequality. Women are most often sentenced to death for the crime of murder, frequently in relation to the killing of a family member and in a context of gender-based violence. In Jordan, for example, all but one of the sixteen women on death row was convicted of killing a husband, a father, or a mother-in-law: close family members who wield potentially abusive authority. Other women

the prosecution paraded her underwear in front of the jury during her trial, allegedly to show that she was not behaving as a grieving widow. As an appellate judge noted, Brenda was put on trial not only for murder but for being 'a bad wife, a bad mother, and a bad woman'. In other words, female capital defendants are judged for more than their crimes: they are judged for whether or not they are good women.

By comparing the life circumstances of women facing the death penalty, *Judged for More than Her Crime* exposes forms of marginalization that increase the risk that a girl or woman will face capital punishment. Poverty and experiences of violence are nearly ubiquitous for women who come in contact with the criminal justice system. Further risk factors include youth, forced and/or child marriage, mental illness or intellectual disability, migrant worker status, and minority race and ethnicity. When women fall into several of these categories, their vulnerability before, during, and after trial is compounded. These circumstances

Even if evidence of domestic violence is presented at trial, women face substantial barriers in convincing a court that they acted within the strict legal definition of self-defense.

receive death sentences for non-violent drug offences, for which international law prohibits capital punishment. In Thailand, most women on death row, who represent a staggering 18 per cent of the country's death row, received convictions for drug offences. Many female drug offenders engage in drug smuggling to counteract their poverty and provide for their families. The death penalty exacerbates the consequences of pre-existing gender inequality.

We also found that when determining whether a woman deserves a death sentence, courts often judge the defendant's behavior through a gendered lens, meting out the most severe punishment to women who transgress gender norms. Prosecutors and courts have cast women as 'femme fatales' or 'morally impure' to justify capital sentences. In the case of Brenda Andrews, sentenced to death in the United States, the jury heard details of her alleged extramarital affairs from years before the offence, and

sometimes culminate in the offense for which they are charged. And while quality legal representation is a key component in avoiding a capital sentence, women, like most capital defendants, are often too poor to afford their own lawyer. Overburdened state-appointed lawyers often meet them shortly before trial and don't have the resources or skills to conduct mitigation investigation or respond to the needs of clients who have experienced trauma and violence. Added to this, women confront intersecting forms of discrimination based on "gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence," which, according to the U.N. Office of the High Commissioner for Human Rights, have 'an adverse impact on the ability of women to gain access to justice on an equal basis with men.'<sup>3</sup>

Overlapping discrimination against women is especially pernicious in cases of girls and women facing capital prosecution



for killing their abusers. We know that gender-based violence produces serious physical harm and mental trauma. Even if evidence of domestic violence is presented at trial, women face substantial barriers in convincing a court that they acted within the strict legal definition of self-defense. Additionally, courts rarely view gender-based violence as mitigation, despite the near universality of these concerns across cultures and legal systems. In countries with a mandatory death penalty, there is simply no mechanism that would allow the courts to consider such evidence.

Despite the fact that one of the most widely accepted tenets of international law prohibits the imposition of death sentences on children under the age of 18 at the time of the offense, we found several cases of death-sentenced girls. Virtually every case involved gender-based violence, child marriage, poverty, and/or sexual abuse. Instead of protecting girls who committed crimes stemming from forced marriage,

courts instead sometimes treat girls under the age of 18 as criminally responsible adults because of their married status.

The case of Zarbibi, sentenced to death in Iran, tragically illustrates these points. Zarbibi was 15 years old when she was forced to marry a 27-year-old man to escape her family's poverty. In a diary she wrote from her prison cell, she described how her husband physically and sexually abused her, separated her from her family, and forced her to leave school. At the age of 16, while four months pregnant, she killed her husband with a kitchen knife. The court sentenced her to death, and she gave birth to her daughter while imprisoned on death row. Zarbibi's late husband's family pardoned her, thus lifting her death sentence under Shariah law, on the condition that she marry his brother. She agreed and was released from death row. According to her lawyer, however, her freedom remains highly restricted. Furthermore, her daughter is not allowed

to go to school, continuing the cycle of poverty and gender-based discrimination.

## Conclusion

The release of *Judged for More Than Her Crime* marks the launch of the Alice Project at the Cornell Center on the Death Penalty Worldwide. Named after Alice Nungu, a former death row inmate in Malawi who was sentenced to death without the court ever hearing that she had suffered from years of abuse or that she had acted in self-defense, the Alice Project honors the women and girls who have suffered under legal systems blind to the discrimination and violence that have marked their lives. By telling the long-neglected stories of women on death row, the Alice Project will shed light on how gender-based discrimination plays out in countries that apply the death penalty, develop human rights strategies around the application of capital punishment to women, and invite international law to look to its own biases. It is our hope that the Alice Project marks the beginning of a new era of visibility and action on the plight of women on death row.

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1. See the Cornell Center on the Death Penalty Worldwide's research and publications at [www.deathpenaltyworldwide.org](http://www.deathpenaltyworldwide.org).

2. Read *Judged for More than Her Crime: A Global Overview of Women Facing the Death Penalty* at [bit.ly/MoreThanHerCrime](http://bit.ly/MoreThanHerCrime).

3. U.N. Office of the High Commissioner for Human Rights, Death penalty disproportionately affects the poor, U.N. rights experts warn, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E>, Oct. 10, 2017. *Research and Advocacy Director*



# Autonomía de la voluntad, mujer y bioética

I Gustavo SALAS RODRIGUEZ

Unir el tema de la **autonomía de la voluntad** con la **mujer** se antoja, *prima facie*, sexista; sin embargo, bajo el velo constitucional que establece la igualdad entre la mujer y el hombre se mantienen regulaciones que atentan contra dicha autonomía, al tiempo que se dejan de implementar políticas que combatan estas desigualdades.

En México y, en general, Latinoamérica – al menos – se continúa con arcaicos modelos sociales y legales que inhiben la autodeterminación de la mujer.

Una mujer a la que, ya lo apuntaba desde entonces Virginia Wolf, se le niega social y legalmente plena autodeterminación: la mujer no puede tomar decisiones sobre sí misma en caso de quedar embarazada; la mujer vale en tanto sea hija de, mujer de, madre de o viuda de – difícil inclusión tendrán las que queden en soltería por divorcio o peor aún, las madres solteras.

*“Hay otro factor que da frecuentemente al hombre un semblante hostil y torna el acto sexual en un grave peligro: la amenaza del hijo. En la mayoría de las civilizaciones, un hijo ilegítimo supone tal inconveniente social y económico para la mujer no casada, que sabido es el caso de muchachas que se suicidan cuando comprueban que están encintas, y de las madres solteras que degüellan al recién nacido; semejante riesgo constituye un freno sexual lo bastante poderoso para que multitud de muchachas observen la castidad prenupcial exigida por las costumbres. Cuando este freno es insuficiente, la muchacha, mientras cede al amante, se siente espantada ante el terrible peligro que este oculta en sus flancos.*

*En el mismo matrimonio, a menudo la mujer no desea tener hijos, ora porque su salud sea deficiente, ora porque eso representaría para el joven matrimonio una carga demasiado pesada. Amante o marido, si ella no tiene en su compañero una confianza absoluta, su erotismo quedará paralizado por la prudencia. O bien observará con inquietud*

*la conducta del hombre, o bien, apenas terminado el coito, tendrá que correr hasta el cuarto de aseo para expulsar de su vientre el germen vivo depositado en ella muy a su pesar; esa operación higiénica contradice brutalmente la magia sensual de las caricias, efectúa una absoluta separación de los cuerpos a los cuales confundía un mismo gozo; entonces es cuando el semen masculino aparece como un germen nocivo, una mancula; la mujer se limpia como quien limpia un vaso sucio, mientras el hombre reposa en el lecho, en toda su soberbia integridad.”* (Beauvoir, 1949).

*“El coito es sobre todo asunto del hombre; el embarazo, en cambio, solo de la mujer.”*  
Schopenhauer

Para Rosario Castellanos la sociedad plantea una especie de falta de capacidad de la mujer para establecer reglas de conducta para sí y en sus relaciones con los demás – i. e., autonomía de la voluntad – y, lejos de ello, la mujer genera principalmente vínculos de dependencia:

*“Animal enfermo, diagnostica san Pablo. Varón mutilado, decreta santo Tomás. La mujer es concebida como un receptáculo de humores que la tornan impura durante fechas determinadas del mes, fechas en las cuales está prohibido tener acceso a ella porque contagia su impureza a lo que toca: alimentos, ropa, personas. Escenario en el que va a cumplirse un proceso fascinante y asqueroso: el del embarazo. Durante esa larga época la mujer está como poseída de espíritus malignos que enmohecen los metales, que malogran las cosechas, que hacen mal de ojo a las bestias de carga, que pudren las conservas, que manchan lo que contemplan. Es por eso, más que por temor a un aborto, por lo que hay que mantener resguardada a la mujer que está gestando un hijo. Y cuando sobrevenga el parto será como el rayo del castigo divino y se entablará una lucha entre el hijo y la madre en la que la sabiduría de la naturaleza dictará el desenlace.*

*Pero cuando el desenlace no se produce de manera oportuna y ortodoxa y están en*

*juego las dos vidas, la ley manda salvar la vida del niño y sacrificar la otra.*

*Y ¿por qué había de darse preferencia a un simple vehículo para la perpetuación de la especie y no a lo que tiene más valor: una persona? Por que es esto, personalidad, lo que aún no ha alcanzado la mujer.”*  
(Castellanos, 1973).

Sobre esto último Habermas argumenta que: *“No podemos, desde la premisa del pluralismo, otorgarle al embrión ‘desde el principio’ la protección absoluta de la vida que disfrutaban las personas que son sujetos que poseen derechos básicos.”* (Habermas, 2012).

Esta supeditación que hace la sociedad a la autonomía de la voluntad en la mujer se traduce en leyes que inhiben la autodeterminación de la mujer sobre su cuerpo en caso de quedar embarazada, mediante la criminalización del aborto.

Ferrajoli apunta lo siguiente sobre la autodeterminación en materia de maternidad (y consecuentemente, de aborto) de las mujeres:

*“Se trata de un derecho que es al mismo tiempo fundamental y exclusivo de las mujeres por múltiples y fundadas razones: porque forma un todo con la libertad personal, que no puede dejar de comportar la autodeterminación de la mujer en orden a la opción de convertirse en madre; porque expresa lo que John Stuart Mill llamaba la ‘soberanía’ de cada uno sobre la propia mente y el propio cuerpo; porque cualquier decisión heterónoma, justificada por intereses extraños a los de la mujer, equivale a una lesión del segundo imperativo kantiano según el cual ninguna persona puede ser tratada como medio o instrumento –aunque sea de procreación– para fines no propios, sino sólo como fin en sí misma; porque, en fin, a diferencia de cualquier otra prohibición penal, la prohibición del aborto equivale a una obligación – la de convertirse en madre, soportar un embarazo, parir, criar un hijo – en contraste con todos los principios*

liberales del derecho penal. En efecto, se trata de una fundamental libertad negativa (de no convertirse en madre y, por tanto, de abortar), sino de una inmunidad de construcciones y de servidumbres personales que es complementaria de una fundamental libertad positiva: el derecho-poder de generar, traer personas al mundo, que es un poder por así decir constituyente, de tipo pre- o meta-jurídico, puesto que es el reflejo de una potencia natural inherente de manera exclusiva a la diferencia femenina. No se trata sólo de un derecho de libertad, sino también de un derecho-pretensión al que deben corresponder obligaciones públicas, concretamente exigibles, de asistencia y de cuidado, tanto en el momento de la maternidad como en el del aborto.” (Ferrajoli, 2004).

Siguiendo estos argumentos de Ferrajoli, cualquier intromisión del Estado (o incluso de la sociedad) a esta “autodeterminación en materia de maternidad” entrañaría, indubitadamente, una intrusión a la libertad misma de cualquier mujer y, sobretodo, a su proyecto de vida; por el contrario, y más aún, obligar a la mujer a la procreación en contra de la autodeterminación de lo que quiere para su vida, vuelve al Estado injusto, pues aleja a dicha mujer del bien común, considerando el principio aristotélico en que “el bien de una persona está determinado por el proyecto racional de vida que elegiría con la racionalidad deliberativa, entre la clase de proyectos del máximo valor.” (Rawls, 2002).

En efecto, un Estado es injusto cuando atenta contra lo que Rawls establece como el proyecto racional de vida, según se define enseguida:

“el proyecto de vida de una persona es racional, cuando – y sólo cuando – 1) es uno de los proyectos congruentes con los principios de elección racional, cuando estos se aplican a todas las características importantes de su situación, y 2) es ese proyecto entre los que satisfacen esta condición, el que sería elegido por él con plena racionalidad deliberativa, esto es, con plena conciencia de los hechos importantes y tras una cuidadosa reflexión acerca de las consecuencias.”

“...con ciertas salvedades, podemos pensar que una persona es feliz cuando está en vías de una realización afortunada (más o menos) de un proyecto racional de vida trazado en unas condiciones (más o menos) favorables, y si esa persona confía razonablemente en que

su proyecto puede llevarse a cabo. Alguien es feliz cuando sus proyectos se desarrollan bien, cuando sus más importantes aspiraciones se van realizando, y cuando se siente seguro de que su buena fortuna será duradera.” (Rawls, 2002).

Así, será injusto el Estado que interfiera en este proyecto racional de vida, que incluye desde luego a la autonomía de la voluntad, puesto que “en una sociedad justa, las libertades básicas se dan por sentadas, y los derechos, asegurados por la justicia, no están sujetos al regateo político ni al cálculo de intereses sociales (Alexy, 2001); incluso en tratándose del proyecto racional de vida familiar – los vínculos que se conforman a partir de la autonomía de la voluntad – esto es, el proyecto en el que una mujer se autodetermina como madre, soltera o no, y válidamente decide el tipo de familia que va a conformar o no.

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The Legal Profession  
La profession d'avocat  
La Abogacía





# Core Principles of the Legal Profession

I **Georges-Albert DAL**

Le mardi 30 novembre 2018, premier jour de son dernier congrès annuel qui s'est tenu à Porto, l'Union Internationale des Avocats a adopté en Assemblée générale une résolution rappelant au monde les principes essentiels de la profession d'avocat. 8 principes se référant aux valeurs de base de la profession ont été retenus : « Ils sont simplement l'expression d'une base commune idéale à l'ensemble des barreaux, qui constitue à la fois une synthèse des principales règles nationales et internationales qui régissent la profession d'avocat, mais aussi un but à atteindre dans un État de droit idéal. » (Extrait du préambule du mémorandum). L'UIA, dans le souci constant de renforcer l'information de ses membres sur l'actualité juridique, de favoriser le développement professionnel, et de bâtir un réseau mondial pour défendre l'État de droit, l'indépendance et la liberté des avocats, a également rédigé et rendu public un mémorandum dans l'objectif d'expliquer et d'illustrer ces principes, et d'aider avocats et barreaux dans leur application au plan mondial. Le texte de la résolution a été proposé par le sous-comité de l'UIA consacré à ces principes essentiels composé de M<sup>es</sup> Issouf Baadhio (Burkina Faso), Stephen L. Dreyfuss (USA), Jean-Jacques Uettwiller (France), Luis Delgado de Molina (Espagne), Urquiola de Palacio (Espagne), Francis Gervais (Canada), Andras Szecskay (Hongrie), sous la présidence de M<sup>e</sup> Georges-Albert Dal (Belgique).

Les principes essentiels et le mémorandum explicatif ont été rédigés dans les trois langues de l'UIA : l'anglais, l'espagnol et le français, les trois versions faisant également foi. Vu l'ampleur de ces textes, il n'a pas été possible de les reproduire tous dans le présent numéro. Le lecteur prendra connaissance du texte anglais reproduit ci-après. Les versions espagnole et française peuvent être aisément consultées sur le site de l'UIA\*.

On Tuesday, November 30, 2018, the first day of its latest annual congress held in Porto, UIA adopted at its General Assembly a resolution reminding the world of the core principles of the legal profession. 8 principles referring to the basic values of the profession were retained: "They are merely the expression of an ideal foundation common to all Bars, which constitutes both a summary of the principal national and international rules that govern the legal profession, and a goal to be achieved in an ideal state that respects the rule of law." (From the preamble of the memorandum). UIA, with the constant objective to reinforce the information towards its members on legal news, to promote their professional development, and to build a worldwide network to defend the rule of law, the independence and the freedom of the lawyers, has also drafted and made public a memorandum to explain and illustrate these principles, and to assist lawyers and law societies in their application at the global level. The text of the resolution was proposed by the UIA Subcommittee on these core principles, composed of Mr. Issouf Baadhio (Burkina Faso), Mr. Stephen L. Dreyfuss (United States), Mr. Jean-Jacques Uettwiller (France) and Mr. Luis Delgad. de Molina (Spain), Urquiola de Palacio (Spain), Francis Gervais (Canada), Andras Szecskay (Hungary), under the chairmanship of Mr. Georges-Albert Dal (Belgium).

The essential principles and the explanatory memorandum were written in the three UIA languages: English, French and Spanish, all three versions being equally authentic. Given the breadth of these texts, it has not been possible to reproduce them all in this issue. The reader will take note of the English text reproduced below. The Spanish and French versions can be easily consulted on the UIA Website.\*

El martes 30 de noviembre de 2018, el primer día de su último congreso anual celebrado en Oporto, la UIA adoptó en su Asamblea General una resolución que recuerda al mundo los principios esenciales de la profesión de abogado. Se mantuvieron 8 principios que se refieren a los valores básicos de la profesión: "Son únicamente de la expresión de una base común de ideas del conjunto de los Colegios, que constituye a la vez una síntesis de las principales reglas nacionales e internacionales que rigen la profesión del abogado, al tiempo también se trata de una meta a alcanzar en un Estado de derecho ideal." (Del preámbulo del memorándum). La UIA, con la constante preocupación por reforzar la información de sus miembros sobre las noticias legales, promover el desarrollo profesional y construir una red mundial para defender el Estado de derecho, la independencia y la libertad de los abogados. También ha redactado y hecho público un memorando para explicar e ilustrar estos principios, y para ayudar a los abogados y las sociedades de abogados en su aplicación a nivel global. El texto de la resolución fue propuesto por el Subcomité de la UIA sobre estos principios esenciales, compuesto por el Sr. Issouf Baadhio (Burkina Faso), el Sr. Stephen L. Dreyfuss (Estados Unidos), el Sr. Jean-Jacques Uettwiller (Francia) y el Sr. Luis Delgado de Molina (España), Urquiola de Palacio (España), Francis Gervais (Canadá), Andras Szecskay (Hungria), bajo la presidencia del Sr. Georges-Albert Dal (Bélgica).

Los principios esenciales y el memorando explicativo se escribieron en los tres idiomas de la UIA: inglés, francés y español, siendo las tres versiones igualmente auténticas. Dada la amplitud de estos textos, no ha sido posible reproducirlos todos en este número. El lector tomará nota del texto en inglés reproducido a continuación. Las versiones en español y francés pueden ser consultadas fácilmente en el sitio web de la UIA\*.

Georges-Albert DAL

# Core Principles of the Legal Profession

## Preamble

*The lawyer's role is to counsel, conciliate, represent and defend.*

In a society founded on respect for the law and for justice, the lawyer advises the client on legal matters, examines the possibility and the appropriateness of finding amicable solutions or of choosing an alternative dispute resolution method, assists the client and represents the client in legal proceedings.

The lawyer fulfils the lawyer's engagement in the interest of the client while respecting the rights of the parties and the rules of the profession, and within the boundaries of the law.

Over the years, each bar association has adopted its own rules of conduct, which take into account national or local traditions, procedures and laws. The lawyer should respect these rules, which, notwithstanding their details, are based on the same basic values set forth below.

## 1. Independence of the lawyer and of the Bar

In order to fulfil fully the lawyer's role as the counsel and representative of the client, the lawyer must be independent and preserve his lawyer's professional and intellectual independence with regard to the courts, public authorities, economic powers, professional colleagues and the client, as well as regarding the lawyer's own interests.

The lawyer's independence is guaranteed by both the courts and the Bar, according to domestic or international rules.

Except for instances where the law requires otherwise to ensure due process or to ensure the defense of persons of limited means, the client is free to choose the client's lawyer and the lawyer is free to choose whether to accept a case.

## 2. Legal professional privilege and confidentiality

Legal professional privilege is traditionally understood to be the lawyer's duty not to disclose confidential information that is learned in the practice of the profession. This obligation has a moral and contractual foundation (not betraying the trust owed to a person who has confided in a lawyer, and the lawyer's commitment, even if tacit, to the client), an ethical foundation (it flows from the nature of the legal profession and is the profession's very essence) and a varying basis in law. In some countries, the protection of legal professional privilege is a constitutional norm. In other countries, which make it a principle of public policy, breaching legal professional privilege carries criminal penalties. In yet other countries, it is merely an essential ethical obligation for lawyers.

Depending on the country, clients may or may not waive legal professional privilege.

Even in countries that make legal professional privilege a fundamental matter of public interest, there are exceptions, which, depending on the case, obligate or authorize the lawyer to disclose information that is protected by legal professional privilege, in particular in the event of an imminent threat of death or serious injury to a person or a group of persons. In any event, a lawyer who is in this situation is urged, if possible, to consult the relevant regulatory authority (chair of the bar council, union, senior member or chair of his or her bar association, or ethics committee).

## 3. Prohibition of conflicts of interest

In order to uphold legal professional privilege and the principles of independence and loyalty, the lawyer must avoid conflicts of interest. He or she therefore cannot represent two or more clients in the same case if there is a conflict or risk of a conflict between them. Likewise, the lawyer must avoid acting for a client if that client has confidential information obtained from another former or current client of the lawyer. Similarly, the lawyer may not use information in one case that was obtained confidentially in another case.

In any event, the lawyer cannot represent a client whose interests may be in conflict or intermingled with the lawyer's own interests.

If a conflict of interest arises during an engagement, the lawyer must stop all work on the case.

The existence of a conflict of interest is determined with regard to the lawyer, and also all the lawyers with whom the lawyer works as part of an association, grouping or network.

The conditions under which this general principle applies are detailed in the national or local laws or regulations that govern the profession. In the event of a discrepancy between them concerning a cross-border dispute or case, the more restrictive law or regulation governs.



## 4. Competence

The lawyer can only practice his or her profession properly with appropriate professional training, which the lawyer must obtain, maintain and pursue throughout his or her career.

The lawyer may agree to provide services only in fields with which the lawyer is competent, or in any other legal or other fields with the assistance of professional colleagues or experts, after so informing the client.

## 5. Dignity, probity, loyalty and diligence

The lawyer must prove worthy of the trust placed in him or her by upholding the principles of dignity, probity, loyalty and diligence. The lawyer must not do anything that damages the lawyer's reputation, or that of the profession as a whole or the public's trust in the profession.

The lawyer must not under any circumstances facilitate the commission by a client or a third party of an illegal act punishable as a criminal offence, or an act that constitutes tax fraud.

## 6. Respect towards professional colleagues

In the interest of the proper administration of justice, the lawyer must comply with the rules of the profession by maintaining a spirit of trust, fairness and cooperation with the lawyer's professional colleagues, bearing in mind that the lawyer must always defend the interests of the client to the best of the lawyer's ability.

Depending on the jurisdiction, correspondence between lawyers is official, with some exceptions, or confidential, with some exceptions. The lawyer must adhere to the rules applicable in the lawyer's jurisdiction. When the lawyer corresponds with lawyer in another jurisdiction, the correspondence is presumptively official. If the lawyer wishes that the correspondence remain confidential, the lawyer must first ensure that the other lawyer is permitted to maintain this confidentiality and must obtain the other lawyer's express agreement to that effect.

## 7. Contribution to the proper administration of justice and respect for the rule of law

While acting respectfully and in good faith towards the courts, the lawyer must defend his or her client with complete freedom in compliance with applicable procedural rules and customary practices before the relevant court. The lawyer must never knowingly give the courts – or anyone – false or misleading information.

## 8. Right to fair remuneration

The lawyer is entitled to legal fees and to the reimbursement of the expenses incurred in providing the exercise of the profession. These fees and expenses are determined by agreement with the client, in accordance with the law and the ethical rules by which the lawyer is bound.

At the outset of the representation, the lawyer should inform the client if the client is eligible for legal aid.

In general, the lawyer should counsel the client on how to manage the case in light of the cost of the matter, and in particular by attempting to reach a possible amicable resolution or by suggesting that recourse to a method of alternate dispute resolution.

‣ **Version française :** <http://bit.ly/UIA-PRINCIPES>

‣ **English Version:** <http://bit.ly/UIA-PRINCIPLES>

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## Explanatory Memorandum

This memorandum is the work of the sub-committee tasked with drafting the core principles of the legal profession in order to explain and illustrate these principles, which have been drafted succinctly, and to help lawyers and Bars apply them, without being binding in any way.

### Preamble

These core principles have not been designed as a code of ethics. They are not intended to constitute binding rules. They are merely the expression of an ideal foundation common to all Bars, which constitutes both a summary of the principal national and international rules that govern the legal profession, and a goal to be achieved in an ideal state that respects the rule of law.

The lawyer assists and represents the client.

Before accepting an engagement, it is the lawyer's responsibility to identify the client, being particularly careful when the contact has not been made directly by that client, as when assisting legal entities or groupings whose legal representatives and in certain cases whose beneficial owners the lawyer must identify.

The lawyer then must obtain all information necessary to ensure that the lawyer is able to provide the client with all legal assistance that the client requests, in compliance with the law.

Conciliation should be sought as part of defending the client's interests. Conciliation attempts sometimes required the lawyer to seek - even unilaterally - interim or preservative measures, or that proceedings be initiated immediately. Even in these cases and at all times over the course of proceedings, the lawyer must consider whether an amicable solution can achieve a result that is in the interest of the client.

Clients are represented in judicial proceedings, but also in all alternative dispute resolution methods, such as mediation or arbitration for example.

### 1. Independence of the lawyer and of the Bar

The situation varies considerably around the world. Some countries prohibit lawyers from being employees of law firms, while others authorize this. Many make no distinction between the practice of law as an independent professional and as an employee. In some countries, in-house counsel are members of the Bar, while in others they are excluded from bar admission. Some countries allow third parties to invest in law firms, others prohibit this. In all cases, the intellectual independence of the lawyer is a key aspect of the practice of the profession.

This independence is guaranteed in two ways: either by the courts, in countries where professional conduct disputes fall under the jurisdiction of independent judges, or by the regulatory authorities, i.e., the Bars, which have specific jurisdiction over matters of conduct and discipline. These two systems are incidentally not mutually exclusive.

The principle of the free choice of lawyer is closely linked with the principle of independence, since although the client is free in theory to choose his or her lawyer, the lawyer normally is never obliged to accept a case. There are two types of exceptions to this principle: the various legal aid systems may assign a lawyer to a client who cannot afford one, and most legal systems provide for lawyers to be assigned by the courts or the Bar authorities. In these cases, unless the lawyer invokes a conscience clause, he or she must take the case but is free to structure the client's defense as the lawyer sees fit.

### 2. Legal professional privilege and confidentiality

Legal professional privilege is a crucial and delicate topic. Already, at the national level, the abundance of legal scholarship and

case law are a testament to the difficulty of analyzing a principle that all agree to be fundamental. This difficulty only increases when borders are crossed and reaches its peak when the "continental" (Romano-German) traditions are confronted with those of the common law. The words themselves are problematic and deceptive cognates infect translations.

The UIA respects all existing legal systems. Its role is not to standardize them; neither does it have the power to do so. Its members nevertheless share the conviction that over and above differences – whether apparent or real – in concepts and terminologies, there is a common base that is summarized in the second principle above.

Going forward, the desire is to create a permanent unit that would take responsibility for compiling a database of regularly-updated information containing the principal statutes, case law and legal scholarship on international conventions and courts.

### 3. Prohibition of conflicts of interest

The lawyer should prevent and resolve all conflicts of interest, and in general all situations that could affect the lawyer's professional judgment, independence or loyalty because of interests that diverge from those of the client.

The lawyer cannot represent a client if, due to the lawyer's relationship with a current or former client:

- legal professional privilege would be violated or would be at serious risk of violation;
- the lawyer would have to use information that belongs to that current or former client,
- unless that information is in the public domain;
- the lawyer reasonably believes that the existence of this relationship affects his or her independence of judgment or loyalty to any of the clients concerned;

- the law or the rules of the profession prohibit this.

The lawyer should have internal procedures adapted to the size of the lawyer's firm, designed to identify, when starting a relationship with a new client, the potential existence of a conflict of interest with a current or former client. The lawyer should assess the risk of conflict of interest at all times.

The lawyer cannot advise several clients if there is a conflict among the interests of these clients or a serious risk of such a conflict. Therefore, when drafting a contract, the lawyer must clearly state who the client is, especially when the other parties are not represented by counsel. If all the parties ask the lawyer to draft the contract, he or she may do so in the absence of a foreseeable conflict of interest; in such a case, the lawyer must remain neutral and provide the clients with objective, comprehensive observations on the scope of what the lawyer is drafting for them.

The lawyer must stop handling the cases of clients when a conflict of interest arises between them.

Lawyers who practice together or whose public communications show that they practice together are bound by the same conflict of interest and ineligibility rules as lawyers who practice individually.

## 4. Competence

The lawyer's role can only be fulfilled effectively if the lawyer has received suitable professional training. The academic degree required to practice the profession is a minimum legal requirement in this regard.

The increasing complexity of the law, the ever-increasing proliferation of rules of all kinds and the increase in the frequency of changes in the law require continuing legal education. This constitutes a professional obligation for lawyers, which is often provided by the regulatory authorities but for which lawyers are ultimately responsible.

In any event, it is no longer possible for a lawyer to be proficient in all fields of law. The lawyer therefore may not accept a

case without the competence to handle it or, after informing the client, without obtaining the assistance of other lawyers or experts.

## 5. Dignity, probity, loyalty and diligence

Each of these principles constitutes a rule of good conduct.

Lawyers must be trustworthy, and must not do anything that could harm the lawyer's reputation, or that of the profession as a whole, such as the public's trust in the profession.

Inappropriate conduct may lead to sanctions, including, in the most serious cases, disbarment.

## 6. Respect of professional colleagues

Respect of professional colleagues goes beyond the requisite courtesy that is essential to maintain, especially in hard-fought litigation between clients. Mutual respect between professional colleagues ultimately serves the interests of the clients, in that it facilitates the proper administration of justice and can help to resolve disputes.

Relations between lawyers must not interfere with the disputes between their clients.

A number of jurisdictions have made discussions and correspondence between lawyers confidential as a matter of principle, in order to promote the handling or settlement of disputes. Elsewhere, all correspondence between lawyers is presumptively official.

Lawyers should comply with the principle that is applicable in their jurisdiction. They must be particularly attentive to this in their cross-border relations. According to the Council of Bars and Law Societies of Europe (CCBE), Article 5.3 of the Code of Conduct for European Lawyers should apply: correspondence is official as a rule, unless there is an agreement for confidentiality. For non-CCBE members, there are no normative rules. The UIA suggests applying the conflict of laws rule adopted by the CCBE.

## 7. Contribution to the proper administration of justice and respect for the rule of law

The stated principle is clear: the lawyer must never knowingly provide the court – or anyone else – with false or misleading information.

Above and beyond this principle, the lawyer's obligations to the courts vary according to the nature of the proceeding – adversarial or inquisitorial – that is applicable in the jurisdiction. In some countries, the lawyer must inform the courts of all precedents that are favorable or unfavorable to the client; in other countries, there is no such requirement.

In all these proceedings, divergences between the interests of the client and those of justice can raise delicate issues for the lawyer, which the lawyer must resolve, bearing in mind that a lawyer can only represent a client successfully if the lawyer can be trusted to act to promote the proper administration of justice.

## 8. Right to fair remuneration

Fees should be set according to three basic principles:

- the lawyer must inform the client of the manner in which the proposed fees will be calculated, so that the client can give informed consent,
- the amount of the fees must be equitable and well-supported,
- the fees must be set in compliance with the law and the rules of ethics.

In some jurisdictions, this third rule bans agreements for contingent or any form of success fees, and sometimes allows the courts or the regulatory authority to reduce the agreed fees. Otherwise, the parties are bound by the agreement reached freely between them.

The local rule should be applied, while keeping in mind these three principles which constitute rules of good conduct.



## Law Firms from Many Countries Generously Support Cultural Institutions

James C. MOORE

The Hermitage Museum, St Petersburg, Russia



Cultural institutions such as museums, symphonies, libraries and theaters have historically depended on financial support from local and state governments as well as endowments and memberships. However, a combination of expanded cultural events and facilities requiring greater capital resources to operate, and reduced support from governments, has left those entities with no alternative to that of seeking support from private resources. As a result, corporations, small businesses and private individuals have responded by providing some of the needed funds.

To their great credit, law firms have also responded by providing support both in cash and in *pro bono* services for events such as art exhibitions, a symphony's entire season, and for the production of a new play's premiere. The remarkable aspect of these acts of generosity is that they enhance the community in which the firm exists without the expectation that the firm will receive a *quid pro quo* for its gifts. It is also notable that law firms from many countries have similarly responded to these needs.

Examples of law firms voluntarily supporting the arts abound:

- For many years the Philadelphia law firm of Pepper Hamilton LLP has provided generous financial support for the Philadelphia Museum of Art and the Barnes Museum's extraordinary

collection of paintings by Pierre Auguste Renoir.

- The London based law firm of Simmons & Simmons for more than 30 years has provided funds to collect and then display in its gallery the works of young, emerging artists who live in London.
- The Minneapolis law firm of Dorsey & Whitney created a foundation solely for the purpose of matching gifts made by the firm's employees to not-for-profit programs. As a result, the firm has made gifts to the Minneapolis Institute of Art, the State Historical Society and to National History Day.
- For several years, the Luxembourg based international law firm of Bonn & Schmitt has provided financial support for an association which establishes schools for displaced children in war ravaged countries.
- And recently in a remarkable contribution to the world of great art, the law firm of Baker McKenzie provided the financial resources to allow the Hermitage Museum in St. Petersburg to restore the only Caravaggio painting in Russia, *The Lute Player*. The extraordinary history of that painting and its restoration bears retelling.

Caravaggio, whose art continues to have broad appeal, was a late Renaissance and early Baroque artist from the Lombard region of Italy. Michelangelo da Merisi was

born in 1570 in or near the small town of Caravaggio and, in time, simply became known as Caravaggio.

In about 1592, Caravaggio moved to Rome either because he was fleeing from criminal prosecution, as one of his later biographers suggested, or because Rome was where most struggling artists in 16<sup>th</sup> century Italy congregated. As the center of the Roman Catholic Church, Rome was a perfect setting for those young artists who hoped to create paintings to decorate churches, chapels, and clergy homes.

Within two or three years of his arrival in Rome, Caravaggio began to create paintings. Two of those, *The Gypsy Fortune Teller* (1594) and *The Card Sharps* (1594), were well received by the public and came to the attention of Cardinal Francesco Maria del Monte, a well-known and well-connected member of the Roman Catholic clergy. Del Monte kept a majestic home in Rome known as the Palazzo Madama which is presently the home of the Italian Senate. There he invited artists, musicians, poets, and alchemists to reside and continue to work. In that manner, Caravaggio came to live and paint in del Monte's home.

In 1595, del Monte's friend, Marquis Vincenzo Guistiniani, a wealthy Roman banker and art collector, asked Caravaggio to create a painting for his home. The resulting work came to be known as *The Lute Player*. It has been reported by a biographer that Caravaggio regarded it as his "best painting".

The painting portrays a young boy (some have suggested it was really a young woman) who is plucking at a lute and appears to be singing. The lute was a stringed instrument with a large round body which was played by fingers. Before the boy on a marble table is a remarkably detailed musical score, the notes and words of which can be clearly read ("You know I love you...I am yours"). A cluster of fruits and vegetables also sits on the table as does a vase with several flowers. Reflections of light can be seen on the glass vase. As a whole, the components of the painting can

*The Lute Player – Caravaggio (1596)*



be seen to reflect the five senses.

The painting demonstrated the hallmarks of Caravaggio's art which would soon earn him many admirers and followers: his dramatic use of dark backgrounds and offstage lighting which had the effect of focusing the viewer's attention on the central figure, the naturalism or realism of all of the articles in the painting, and the almost photographic detail of every object.

Caravaggio's *Lute Player* was so well received that he was soon asked by del Monte and another collector to create two additional copies of the original. It is, however, well known that the Hermitage's *Lute Player* is the original which the artist created for Guistiniani. Caravaggio's painting remained in the Guistiniani family's possession until it was sold at a Paris auction in 1808 to Czar Alexander I of Russia. Shortly thereafter the painting entered the Hermitage's collection of Old Masters art. Caravaggio continued to create incredibly detailed and dramatic art for another 14 years in Rome, Naples, Malta, and in Sicily. Then in 1610, at the age of 39, he died under mysterious circumstances as he was returning to Rome. From the time of his arrival in Rome in 1592 until his death, he created as many as 100 paintings (many of which have since been lost or destroyed), of which 64 remain and which most experts agree are by his hand.

Fortunately, the Hermitage's *Lute Player* remained safe in the care of the museum's staff for the next 213 years. During that

time, it was periodically cleaned, loaned to other museums, and to the best of the staff's ability, protected from the elements in the form of light, smoke, dust, and other forms of debris. During those years, museum conservators would periodically coat the painting (and others) with a varnish solution composed of egg white and tree resin. The varnish protected the painting surface and enhanced its colors. However, in time, natural varnishes tend to darken and obscure a painting. As a result, it was necessary to periodically remove older layers of varnish. Further, during the cleaning process, chips of the artist's original paint would accidentally fall from the painting. Museum conservators would then attempt to restore the damaged areas by painting over the area.

A further and more deadly risk to the condition of the painting occurred during 1941-44 (a period of 876 days) when German and Finnish forces surrounded St. Petersburg (then Leningrad). In the summer of 1941, as the Germans advanced and bombarded the city, the museum's staff decided to remove its vast collection of art before it fell into enemy hands. Within the space of two months, more than 7,000 masterpieces, including *The Lute Player*, were cut from their frames, rolled into metal tubes, packed in wooden boxes, and then loaded onto two railroad cars. The paintings were then shipped to the town of Sverdlovsk Oblast in the Ural

Mountains where they were hidden in caves. The paintings were safely returned to the museum after the war ended.

However, by the early 2000s it was apparent that Caravaggio's masterpiece was in need of extensive cleaning and restoration. At that point, the Baker McKenzie law firm, which had an existing largely *pro bono* professional relationship with the museum, offered to provide financial assistance for the restoration.

As a result, in May of 2015, the painting was moved to the State Hermitage's Laboratory for the Scientific Restoration of Easel Paintings. There, under the guidance of Viktor Anatolyevich Korobov, the director of the laboratory, it was determined that the painting was covered by multiple layers of yellowed and darkened varnish and overpainting which appeared to have distorted Caravaggio's original work. Also, earlier attempts at restoration had darkened and hidden some of the artist's original colors. Over the next two years, several layers of varnish and remnants of overpainting were removed by using a mixture of alcohol and turpentine and a soft synthetic brush. Restoring the images of the strings on the lute proved to be an especially difficult task for the artisans because by that time the painting's overlayers had all but obscured the strings. The process of restoration was time consuming. UV lighting and x-ray technology were employed to discern the artist's original design and color selection. Ultimately, when the painting was returned to the museum for public viewing, it was apparent that Caravaggio's portrayal of the youthful musician and the original color scheme had been restored to previously unseen glory.

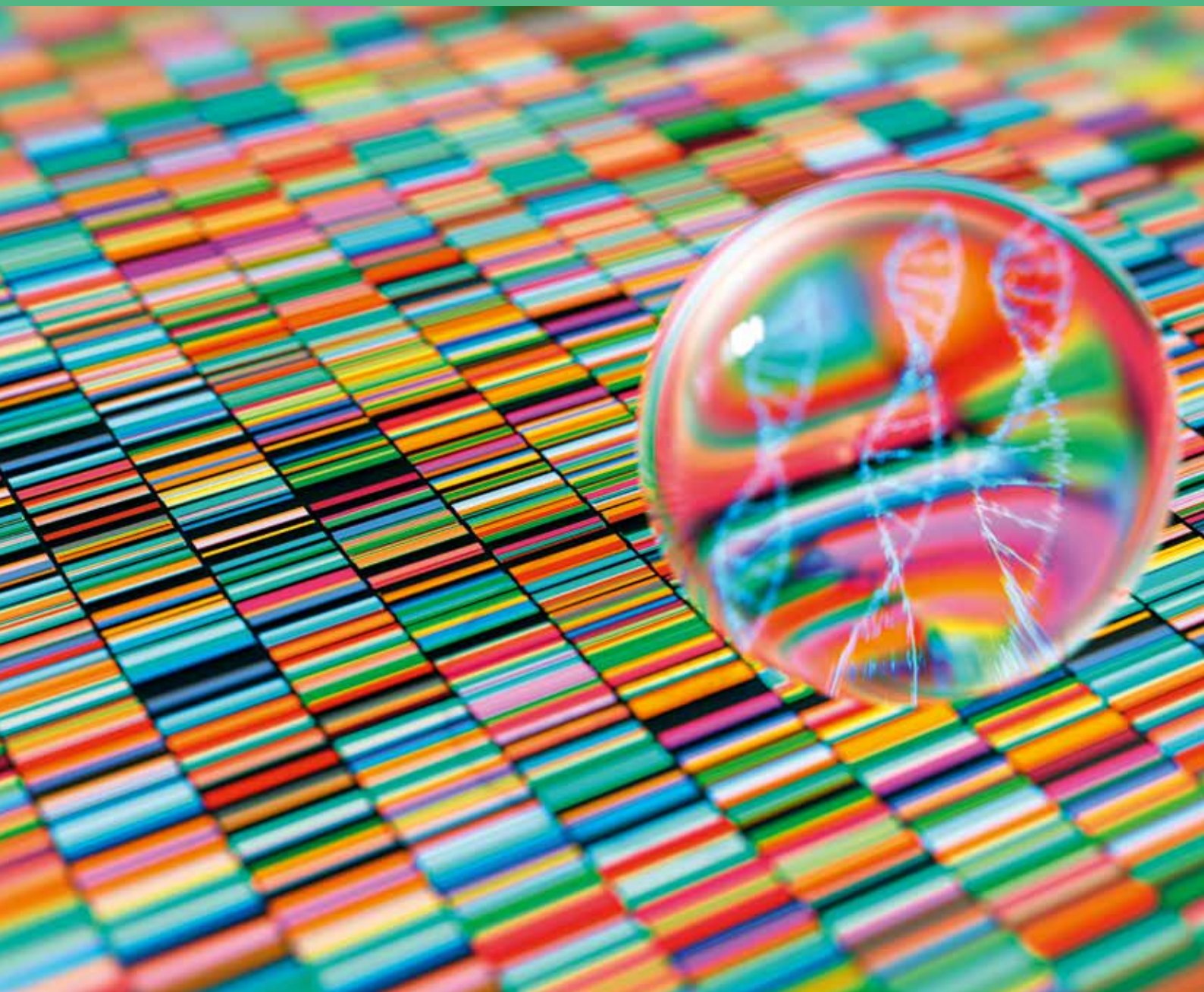
Caravaggio's beautifully restored *Lute Player* can now be seen at the Hermitage Museum.

Although Baker McKenzie's funding of the restoration of Caravaggio's *Lute Player* was significant because of the importance of the painting and the artist, its actions were not unique. Indeed, as the examples noted in this article illustrate, many law firms whose members are active in the UIA recognize their commitment to the communities in which they practice by regularly providing support to local culture.

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Legal Practice  
Pratique du Droit  
Ejercicio de la Abogacía





# Gene Editing, Portable Toilets, and World Security: Target and Off-Target Consequences<sup>1</sup>

I Barbara J. GILSON

2019  
Monique Raynaud  
Contamine  
Award

## Introduction

In this paper, I hope to challenge lawyers to learn about the relationship between genetic advances and biosecurity and biosafety risks in order to not only protect the rule of law, but also the dreamers of the dreams from which legal ideals grew. Implicit in this discussion is consideration of emerging ideas about individual safety protocols, as reflected in the behavior of a world leader who travels with portable toilets.

Understanding the threats upon us will draw our attention to the need for collaborative security efforts across the arts and sciences and across national and international boundaries. We must reconceptualize the rule of law to enable appropriate and meaningful responses to emerging biosafety and biosecurity threats.

## Bill Gates Warns of Disease Pandemics

Bill Gates, the richest man in the world who made his first fortune at Microsoft Corporation, said a disease pandemic is one of the deadliest threats facing the world. Instead of being proactive, he warned, "Because the population is naïve, there are no real preparations." He observed that it does not "take much biology expertise nowadays to assemble a smallpox virus."<sup>2</sup>

As it would be relatively easy to engineer a new flu strain by combining qualities from varieties that could spread like wildfire with deadly affect, Gates emphasized that fighting a global pandemic should be taken seriously, together with the subjects of nuclear deterrence and a climate catastrophe. Accordingly, efforts must be made to develop the vaccines, drugs, and diagnostic techniques necessary to fight a disease outbreak. Pandemic concerns are one aspect of a broader investigation of the dark side of gene editing. We will explore the intentional weaponization of biological organisms, as well as the

potentially catastrophic unintentional or careless consequences of these behaviors.

## Biological Weapons Agents

Now that the human genome has been largely sequenced, the mechanics of creating a bioweapon are becoming more rudimentary if the creator is able to obtain live cells from the target. In order to create a personalized bioweapon, one method is to grow and weaponize selected cells.

A report from the Harvard Kennedy School well articulated concerns that North Korea has a large biologically-based pesticide program with dual use capacity. It is presumed that North Korea has 13 biological weapons agents, including *Bacillus anthracis* (Anthrax), *Clostridium botulinum* (Botulism), and *Vibrio cholerae* (Cholera).

Pyongyang Bio-Technical Institute in North Korea is famous for making biological pesticides and would be a likely facility for the advancement of biological weaponry. As the military application of this bioweapon technology is refined, delivery methods may include missiles, drones, airplanes, and sprayers.

North Korea is not the only country described in the Harvard report. North Korea asked the United Nations (UN) Security Council to investigate the United States after live anthrax was delivered to South Korea. The Soviet Union's Progress Scientific and Production Association, and Iraq's Al Hakam Factory, both bio-pesticide operations, have been described as likely "covers" for bioweapons production.

The Harvard report advocates for a "dual-response program." The elements of this program would include: a quality threat assessment by military and intelligence communities, a strong public health detection and response system, a well-coordinated crisis stakeholder communication strategy, informed public compliance, and strategy for disseminating information.

## The Atlantic Magazine and Live Cells

At the time of the murder of Kim Jong Nam in Malaysia in 2017, the *Atlantic* had already published a well-researched and groundbreaking article entitled *Hacking the President's DNA*. Even though written in 2012, this article withstands the test of time and reveals how scientific discoveries that benefit us may be weaponized in large and small ways.

"Large ways" refers to how bioweapons can kill or cause great bodily harm and "small ways" refers to how these bioweapons could cause persistent health challenges to the individual target, ranging from causing hallucinations to paranoia to even a change in sexual preference. These bioweapons can be "personalized," just like personalized treatment methods in cancer treatment. An individual impacted by these weapons may be unable to detect them or know the origin of the causative agent. The bioweapons can act like a time bomb. The reason this *Atlantic* article is signaled out for attention is because it so clearly lays out risk factors, in plain language, and to that extent, this article serves as a clarion call to world leaders to take preventative measures for their individual biosecurity.

## The Genetic Alphabet

All information-based technologies are impacted by exponential growth. The four letters of the genetic alphabet, adenine (A), cytosine (C), guanine (G), and thymine (T), can be transformed to a quaternary code, where genetic information may be electronically manipulated. These four natural nucleotides enable DNA and RNA to work together and perform vital functions. Essentially, this is accomplished through the manufacturing of proteins. Instead of DNA being composed only of the natural letters A, C, G, and T, synthetic biologists have created two synthetic bases. This discovery will influence the developments of many

new amino acids, which will in turn change and affect life as we know it.

## New Breeding Techniques (NBTs)

The genetic alphabet, as well as gene-editing technologies, are enabling New Breeding Techniques (NBTs).<sup>3</sup> Although there is no settled NBT definition, there is industry resistance to NBTs being given Genetically Modified Organisms (GMOs), Living Modified Organisms, (LMOs), and transgenic labels. NBTs use molecular biological traits. Each NBT has a different safety assessment, novel traits, and production method. There is an effort to differentiate NBTs from GMOs for regulatory reasons. The Cartagena Protocol on Biosafety (CPB) already pertains to GMOs and may inform developing gene-editing protocols.

## Human Genome Project (HGP)

Humans have 23 pairs of chromosomes in each cell's nucleus. The Human Genome Project (HGP) in the U.S. promoted the compilation of information from the chromosomes necessary to effectively gain a genomic portrait. Both mapping an individual gene in an individual chromosome and looking at the order of four chemical bases in a DNA molecule enables scientists to have a better understanding of what genes can be turned on, turned off, or gene-edited by deletion, addition, or the alteration of alleles.

John Sotos is the Intel Chief Medical Officer. When speaking at a DEF CON Hacking Conference, he emphasized that the HGP maps all the genes in human DNA. It is possible that cancer may arise from DNA mutations, either inherited or acquired. The U.S. Cancer Moonshot Program seeks to create a cancer vaccine. Success might mean that researchers could target and put flags on frequently mutated genes and then utilize genetic signals to create a virus that attacks signature cells. This positive attribute may also have a blowback bioweapons potential.

James Clapper, the former U.S. Director of National Intelligence, said Weapons of Mass Destruction (WMD) can be created through gene-editing. He observed that a virus is an ideal vehicle for gene delivery because it could

be used to cause flu-like symptoms to a non-target while triggering a neuro-destructive disease in the target. Those developing WMDs could be terrorists, criminals, governments, corporations, or amateurs.

## Synthetic Biology

When applying engineering principles to biology in an interdisciplinary way, the method may be called synthetic biology or "syn bio." There are perils posed by syn bio, including: recreating known pathogenic viruses, recreating known pathogenic bacteria, making biochemicals via "in situ" synthesis, making existing bacteria more dangerous, manufacturing chemicals or biochemicals by exploiting natural metabolic pathways, modifying the human microbiome,

development of therapeutic applications, facilitate crop improvement, and enable the control of disease-transmitting insects. Even so, by affecting gene drive, it could also cause the demise of the *Aedes aegypti* mosquito, thereby impacting the insect's ecosystem, as well as our own.

Genome editing technologies dramatically change every few years. Currently, technologies at the forefront include: Meganucleases (MNs), Zinc Finger Nucleases (ZFNs), Transcription Activator-Like Effector Nucleases (TALENs), and Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR/Cas9). All of these new technologies are able to target and edit specific stretches of genetic code. It is important to know that complex traits may be impacted by more than one gene.

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modifying the human immune system, modifying the human genome using human gene drives, and creating new pathogens.

## CRISPR/Cas9

CRISPR/Cas9 is conceptualized as a "molecular scissors" whereby a pair of enzymes can be used to remove a DNA strand and replace it with new genes. This process may leave no trace, so its GMO nature may be unknown. The CRISPR/Cas9 error rate is currently estimated to be 1%. Given the trillions of cells in a human body, this 1% error rate is significant. Even so, we should understand that CRISPR technology is in its nascency.

The Cas9 enzyme can be used to engineer pathological organisms as the enzyme can cut specific strands of DNA so that other DNA strands can be added or removed. A piece of RNA called "guide RNA" (gRNA) binds to DNA through pre-designed sequences that guide the Cas9 enzyme to the desired DNA portion. Through CRISPR technology, new WMDs are possible.

Positive attributes to CRISPR/Cas9 include that it is a simple and efficient gene-editing technology. It may revolutionize research and development, promote the

CRISPR technology may be applied in ways we do not expect. For example, CRISPR is being used to change clonal raider ant colonies in a way that negatively impacts their social behavior, as natural ants are observed to cooperate. Through CRISPR gene-editing, these ants, who have 350 odorant receptors on their antennae, were changed. This affected their receptors' ability to detect pheromones. When CRISPR disrupted the antennae cells' odorant receptors, the ants became unable to follow old social norms. They laid fewer eggs and the eggs they did lay died faster. If changing DNA can affect the social behavior of ants, can gene-editing affect the social behavior of other life forms, even human?

## Toxic Substances Control Act (TSCA)

With advances in neuro-nanotechnology (NNT), a whole new conversation must unfold about how the regulation of the Toxic Substances Control Act (TSCA) should pertain to the nanoworld. The distinction between chemistry and medical devices becomes difficult there. Reasons for this distinction are complex, but include that at nanoscale, there is lack of consensus



about what size qualifies as a nanoparticle and vocabulary and definitions influence what regulatory scheme applies. There are economic advantages as to whether the “art,” a term used in intellectual property, is viewed as a chemical or medical device. Regulatory challenges represented by new discoveries and whether the invention is a chemical or mechanical device, or perhaps another yet to be defined category, are likely to expand.

## UN Security Resolution 1540

The UN Security Resolution 1540 relates to the Biological Weapons Convention (BWC), effective in 1975, and the Chemical Weapons Convention (CWC), effective in 1997. Under this Resolution, unanimously adopted by the UN Security Council in 2004, member states must adopt related laws and regulations and no delivery is permitted of these weapons to non-state actors. As there is now a necessary convergence of biology and biomedicine with chemistry, engineering, mathematics, computer science, and information theory, all under the general heading of information technologies, it is appropriate to revisit these old conventions and resolutions and bring them up to date.

## Responsible Research, Gene-Editing, and Public Opinion

Responsible research should not effectively exploit Low-and-Middle-Income Countries (LMICs). This problem arises in a variety of ways. Active and passive business practices may exploit the weaknesses and loopholes in a foreign country’s governance system, including its enforcement capability, making research possible that would be illegal or unethical elsewhere. This has been a subject of interest to the European Commission.

Many in the U.S. believe that gene-editing technology could lead to widespread negative consequences for society. Approximately 73% say that this technology “would likely be used before the health effects are fully understood, and seven-in-ten say inequality would be prone to increase because gene editing would only be available for the wealthy.”<sup>4</sup>

The Pew Research Center investigated public opinion related to gene-editing

technologies and the benefits and risks they present. For many, there is hesitancy to alter God’s plan, or go against nature. There is great concern that the entire species genome, not just the genome of one individual, could be impacted. There is more support for gene-editing when it is used to combat or reduce the risk of a serious disease, and less support when the technology is used for the enhancement of intellect, appearance, or athleticism. There is concern that those who are not enhanced will be disadvantaged and even controlled by the more powerful enhanced individuals.

As a corollary to the concern of the misuse of certain countries for experimental research, when the country lacks the infrastructures to pass or implement protection laws, there remains of course the concerns that both across and within borders there will be wealth concentration, economic inequality, law of increasing poverty, law of concentration of capital, and the emergence of what is called the Matthew effect.

Many in the U.S. believe that gene-editing technology could lead to widespread negative consequences for society.

## Gene-Editing Technology Regulatory Positions

When it comes to imports and exports, many countries are cautious about importing GMOs. Accordingly, there is a dispute about whether gene-edited products are GMOs. Argentina, Chile, and Japan are addressing these types of imports on a case-by-case basis. It is expected that Argentina, a country widely regarded as able to well-craft NBT resolutions rooted in the Cartagena Protocol, will be influential in establishing new protocols. Although the European Union is still developing its gene-edited policy pursuant to a recent decision handed down by the Court of Justice of the European Union (ECJ), gene-edited crops are subject to the same regulations as GMOs.

The European Union passed the General Data Protection Regulation (GDPR) in April 2016. The GDPR applies to anyone while in the European Union, not just European Union residents. U.S. clinical trials may be

affected by the GDPR even if the trial is conducted outside of the European Union. All personal data collected and transferred to the U.S. while a participant is in the European Union is subject to the GDPR. However, the GDPR generally will not apply to European Union citizens enrolling in a U.S. clinical trial while located in the U.S.

## U.S. Regulatory Quandaries

There is confusion about commitment in the United States to changing and updating its regulatory processes. The White House has an Office of Science and Technology Policy. The director of that office is referred to as the President’s Science Advisor. No director has served since Donald Trump was elected President.

In April 2017, the U.S. President did issue an executive order establishing an Interagency Task Force on Agriculture and Rural Prosperity to address regulations

affecting agriculture and rural commerce under the auspices of the U.S. Department of Agriculture. Although this group has developed five action items, the subject of biosecurity threats is not listed.

The USDA’s Animal and Plant Health Inspection Service (APHIS) regulates genetically engineered plants only if they are deemed to present a plant pest risk. When Oxitec wanted to release a mosquito with a self-limiting gene, wherein its offspring would have short term survival, it was determined that instead of the Food and Drug Administration (FDA) regulating this gene-editing technology, it would instead be regulated by the Environmental Protection Agency (EPA). The EPA is an independent federal agency.

On March 9, 2018, the EPA published in the United States Federal Register a notice of receipt of an application for an Experimental Use Permit (EUP) for the release of Oxitec’s OX513<sup>A</sup> Friendly™ Mosquitoes in Monroe County, Florida, as

the first step in considering the company's permit regulation.

There are a variety of U.S. national policies and governance frameworks that pertain to some aspect of biosecurity. It is concerning that they seem disjointed. In the U.S., the National Institutes of Health (NIH) released "Guidelines for Recombinant DNA Research" in 1976 and the "Coordinated Framework for Regulation of Biotechnology" in 1986 (updated in 2017).

The U.S. Department of Health and Human Services had released guidance in 2010 for DNA suppliers called *Screening Framework Guidance for Providers of Synthetic Double-Stranded DNA*, requiring the supplier to identify potential misuses of synthetic DNA obtained through commercial providers. Under the Obama Administration, the White House formulated the *Potential Pandemic Pathogen Care and Oversight (P3CO) Policy* to ensure consistent oversight of federally funded research efforts.

The U.S. National Academies of Sciences, Engineering, and Medicine has also developed a vague framework for assessing potential risks posed by synthetic biological technologies and national biodefense capabilities for mitigating risks. The Intelligence Advanced Research Projects Activity (IARPA) plans to develop tools and methods to detect gene-editing in biological organisms and to identify genome editing signatures.

## Clinical Trials for Genome Editing of Human Germline

According to the National Academy of Sciences, Engineering and Medicine in the United States, heritable germline editing is not currently permissible in the U.S. The FDA is prohibited from using federal funds to review "research in which a human embryo is intentionally created or modified to include a heritable genetic modification."<sup>5</sup>

The report recommends that overarching principles apply to any nation involved in human genome editing research or its applications. They include the promotion of well-being, transparency, due care, responsible science, respect for persons, fairness, and transnational cooperation. Although these ideas make sense, the application of these principles lack the rigor

and depth that is needed given the biosafety and biosecurity perils involved.

## Monsanto Acquired by Bayer

Breeding plants through genome editing has been connected to "several important international policy and regulatory issues," including sustainability in food production, food security, and food safety, as well as environmental and socio-economic impacts.

Monsanto has been an agribusiness well-known for obtaining seed patents, genetic engineering, and for producing the pesticides DDT, dioxin, and agent orange; polychlorinated crops, biophenyls (PCBs), the Bovine Growth Hormone (rBGH), and the herbicide Roundup. Monsanto's products have harmed biosystems and caused health risks to humans. In Monsanto's 2016 Annual Report, its mission statement ends with the following claim: "Today and in the future, those who act as good stewards of our resources can discover the infinite possibilities within them."<sup>6</sup>

Hugh Grant, the company's CEO, heralded Monsanto's pending merger with Bayer by saying that the acquisition of Monsanto by Bayer, based in New Jersey, USA, meant two complementary businesses could accelerate innovation, provide enhanced solutions to seeds and traits, create digital agriculture, and promote crop protection, while maintaining the company's commitment to safety, sustainability, and collaboration.

Even so, the claims about Monsanto being a good steward should be scrutinized in the context of the company's past concerning behaviors. Keep the track record of Monsanto, and now Bayer, in your mind when you think of which businesses may have irreversible influence over the future of life forms, as NBTs expand.

Of the 13 people serving on Monsanto's Board of Directors in 2016, one of them was Robert J. Stevens, the retired Chairman of the Board at the world's largest defense contractor, Lockheed Martin Corporation. Stevens served on the Monsanto Board since 2002.

It is important to ask what contributions Robert J. Stevens made while serving on the Board of Monsanto for all these years

and to learn whether he, or those like him, will now serve on the Board of Bayer now that the businesses have merged. It is easy to confirm that many of the prominent people in Monsanto have been laced into upper management positions at Bayer. Given Lockheed Martin Corporation's reputation in defense, security, and advanced technology, and this defense contractor's close relationship with the U.S. military, it would not be surprising if because of Stevens' influence, Monsanto had been involved in pesticide activities, the type that are concerning to U.S. citizens about North Korea. It seems likely that Bayer has acquired a company wherein NBTs have dual use.

The Monsanto report stated, "Competition for the discovery of new traits based on biotechnology or genomics is likely to come from major global agrichemical companies, smaller biotechnology research companies and institutions, state-funded programs and academic institutions. Enabling technologies to enhance biotechnology trait development may also come from academic researchers and biotechnology research companies. Competitors using our technology outside of license terms and farmers who save seed from one year to the next also affect competitive conditions." Although nothing is explicitly stated about the company's role in dual-use biotechnology and involvement with national defense, you can see the possibilities.

## CRISPR, Biosafety, and Biosecurity

A genome is a complete set of genes in a cell, and effectively, the blueprint for the entire organism. Through gene-editing technologies, now called NBTs, including CRISPR, a gene is modified at a specific location in the genome, and the change made may be indistinguishable from a natural mutation. Specific genes can be spread through gene drive genetic engineering.

Gene drive technology is meant to override natural selection and cause a selected trait introduced by genetic engineering to efficiently spread. Gene drives are believed to have the potential to genetically alter an entire species, or cause its demise, rather than the targeted invasive species within a locale. When you change one species, you affect a biosystem.

The U.S. military's involvement in gene drive technology has drawn attention from Kevin Esvelt, an evolutionary engineer at the Massachusetts Institute of Technology. He won DARPA funding to limit the spread of gene drives and said, "Every powerful technology is a national security issue," and "Bio-error is what I'm worried about."<sup>7</sup>

## Safety vs. Security

In a European Commission funded ethics study, concerns about the safety and security risks of CRISPR/Cas9 included: risks in the therapeutic application of gene editing; risks to the environment following the genomic editing of animals, plants, and microbes; security risks posed by the creation of harmful agents in a bioweapon context; and human enhancement in the military and how this will impact international security.

Strong concern was expressed not only for the lack of international standards related to safety and security, but also for the practical aspects of oversight in countries with less capability.

An example of a presenting security risk from this new genome editing technology involves a technique that can result in a new class of infectious pathogenic organisms, including the creation of a virus that can be used to cause cancer. A cancerous mutation was introduced into mice through genome editing using viral vectors. Pancreatic cancer, too, can be caused by using viral vectors. While this research may be instrumental in the understanding of the mechanisms that sustain tumor growth, from a risk assessment standpoint, there may be the unintended consequence of metastatic spread and drug resistance. This is an example of a novel safety risk.

At the conclusion of this ethics study, the European Commission made the following pithy and well-articulated recommendations:

### I. Technical Level:

- Reduce off-target effects, mosaicism, and epigenetic effects through further research that is higher fidelity and improves understanding of genome editing technologies.
- Use safe virus systems or alternative less risky vector systems to transfer genome editing tools.

- Develop reversal gene drives in parallel that can undo the effects of gene drives.
- Provide technological assistance (e.g. detection capacities for modified organisms) in implementing international obligations such as the Cartagena Protocol.

### 2. Containment Level:

- Ensure adequate biosafety risk classification and implementation of adequate containment measures in biosafety-sensitive genome editing experiments.
- Develop "molecular containment" approaches when working with genome-edited high-risk pathogens.

reliability governing significant differences between species.

Even if the same gene-editing technology risks apply between species, there is still the problem that editing a diseased gene that has hereditary traits may affect the normal functioning of other genes. These could cause genetic mutations and other safety problems. If, by using the CRISPR genetic "magic scissors" the cell death of pluripotent stem cells occurred, the cells might sustain a loss of necessary function, resulting in malignancy. Transplanted cells may cause cancer, too. Unexpected gene

The Intelligence Advanced Research Projects Activity (IARPA) plans to develop tools and methods to detect gene-editing in biological organisms and to identify genome editing signatures.

### 3. Governance and Oversight Level:

- Provide international guidance or amend existing guidance documents on biosafety and biosecurity to cover risks from genome editing.
- Map the status of existing biosafety and biosecurity legislation as well as its practical implementation in countries carrying out genome editing experiments.
- Include stakeholders (e.g. funding institutions, research institutions, researchers) in the responsible governance of research involving genome editing.

### 4. International Standardization:

- In case of gaps in legal oversight, develop international codes and guidelines for safe and secure work in genome editing.

modification might cause off-target effects at the genomic level.

The bioethicists also opined that genetic modification may increase the desirable attributes to those with wealth and privilege, including a greater IQ and enhanced health and beauty. They foresaw that the stratification between the haves and the have nots would increase, and with it, social inequality, social contradictions, and conflicts that impact the principles of justice. Those gaining enhancements through gene-editing technology might have advantages over other people, including controlling them through government dictators. Decisions about gene-editing have ethical and moral dimensions.

The Chinese also warn of another risk pertaining to the importance of genetic diversity to the promotion of ecological stability. Without more diverse human genetics, humans would be more at risk in the event of an attack, especially if our genes had not adapted to the environment.

These bioethicists suggest that a supervising body of gene-editing ethics should be created at national and international levels and that the ethicists should assist in formulating laws and regulations regarding the responsible development of this gene-editing technology. This ethical supervising body should be comprised of a wide

## Bioethics

An article well-describing the perils of gene-editing appeared in the 2018.3 issue of the UIA's *Juriste* entitled *Thinking About the Ethical Issues of Gene-Editing Technology*. The Chinese bioethicists who wrote the article described that even with the use of CRISPR and new versions of what is commonly referred to as CRISPR/Cas9, there are very concerning off-target effects of this technology. They state that the animal model used to predict humans in a genetic modification context lacks scientific

variety of stakeholders, including ethicists, sociologists, and the public.

## Neuroscience Bioweapon Potential

The U.S. military is invested in the subject of brain-computer interfaces (BCIs). The Defense Advanced Research Projects Agency (DARPA), an agency of the U.S. Department of Defense (DOD), has well-funded U.S. BCI efforts. After all, what is learned about the human brain will not only affect health but will also have military applications. Be cognizant that neuroscience military applications may be weaponized and therefore impact biosafety and security.

Aware of the vast array of advances in science and technology, the U.S. military is developing brain gyms to promote short term memory increases and prevent cognitive overload. The military, in its effort to treat Post-Traumatic Stress Disorder (PTSD), is learning how to delete and encode memories, as well as how an individual's nervous system interfaces with other biological processes. Future conflicts may involve neuroweapons as a type of bioweapon rather than the more muscular kinesthetic weapons of the past. Gene-editing will not only provide opportunities for cognitive imbalance, but for direr neuro-based weaponization, too.

## Cognitive Enhancements

In addition to concerns about pandemics, Mr. Gates, together with Stephen Hawking and Elon Musk, jointly accentuated the importance of being concerned with artificial intelligence (AI) as it could evolve and become independent from its creator. Robots are gaining internet compatibility, mobility, perceptual abilities, a digital nervous system, and a digital brain function learning about their own maintenance needs. Because of these emerging technologies, robot brains can be expected to process or think differently than humans.

We used to believe that our brains had special protection, as reflected in our belief that the blood brain barrier protected us. Now, nanobots and other nanoscale devices can cross this barrier for a variety of purposes. They could also cause toxicity. Many risks associated with

neuro-nanotechnology (NNT) and other technology are not well-understood; yet endeavors to improve and expand the role of NNT in all areas, including health care, continue at a rapid pace.

Using NNT as a building block, complex artificial structures can be assembled using DNA. These DNA-based superstructures can affect cells as a function of their design. Biochemists and molecular biologists are already utilizing DNA computing instead of silicon-based computer technologies.

Keep the track record of Monsanto, and now Bayer, in your mind when you think of which businesses may have irreversible influence over the future of life forms, as NBTs expand.

The promise and possible benefits of NNT and other cognitive enhancement technology is appealing to many. Those already inseparable from their cell phones may welcome a brain nanobot implant with AI capability. They may be indifferent to their own loss of privacy and vulnerability to external monitoring or control. This attitude might be reflected by a shrug of the shoulders and the statement "I've got nothing to hide."

Beware that an individual could be manipulated if a nanobot, even one the person chose to ingest, could affect the pleasure and pain they experience. If the human animal is, as behavior modification pioneer B.F. Skinner described, susceptible to operant conditioning through positive and negative reinforcement, then we could be controlled and used for a sinister purpose. These changes could come to pass unnoticed.

## The Future of the Mind

Isaac Asimov, a biochemist and author, said, "The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom."<sup>8</sup> As the mind of the future becomes subject to so many influences, there may be little left of personal autonomy, free will, or even legal intention. Mind privacy may vanish, too, as our brains become more bionic and even more vulnerable to surveillance, not unlike the shadowing of electronic communications on the internet.

## Emergence of Human Hybrids, Chimeras, and Other Life Forms

Safeguards are necessary to prevent our individual DNA, particularly from live cells, from being taken without our knowledge or consent. What could be more personal than the DNA that builds the tissue and neurons in human brains and constitutes the biological directions for the way we think? Nevertheless, a substantial number

of human gametes, cells, and tissues, all of which include the live cells that the North Korean President has been safeguarding, are currently kept in biobanks in many countries while most humans are not even aware of it. There is potential, given these kinds of banking systems, that valuable genetics, including the genetics of world leaders, could be harvested and sold for gene-editing purposes.

## Conventions

Conventions are still considered to be the cornerstone of international humanitarian law. There are many treaties or agreements, referred to as international conventions, between countries. They are difficult to summarize as a country may be a party to a convention but not necessarily a signatory. The country may not have ratified a convention they are a signatory to, either. Even so, conventions relevant to this topic include the Convention on Biological Diversity, the Chemical Weapons Convention, the Biological Weapons Convention, and the Universal Declaration of Human Rights.

In addition, the Geneva Conventions, which define the basic rights of wartime prisoners, as well as the rights and protections given to non-combatants during wartime, should be revisited. It is also worthwhile to revisit the Hague Conventions, which along with the Geneva Conventions, has focused on war laws and war crimes. The subjects

of biosafety and biosecurity should be a priority of the UIA and other world leading law-based institutions.

## Privacy, Big Data, and New Frontiers

Data gathering, data storage, data distribution, advanced analytics, and predictive analytics are becoming the new normal, both in standard business practices, including legal business practices, and in health care. Private spaces shrink due to the gathering, monitoring, and distribution of data inside and outside the body. While it used to be that we wanted to protect our homes from unreasonable search and seizure, in the future, it will not only be our brains, but our very genomes that are uniquely vulnerable. What is the role of lawyers in the context of big data?

The role of lawyers must change because science and innovation require it. Those who entered law school inspired to make a difference must not only step up their original ambition, but now rise to meet the needs of coming generations. It is not enough for lawyers to be complacent in their current practice of undertaking new narrow ethical responsibilities when lawyers see the edge of their ethical duty as being a duty to a client.

In order to stay up to date with developments in biotechnology, lawyers will need to not only build their vocabulary to include a variety of technological terms, but also challenge themselves to use their expanded vocabulary to better anticipate and regulate this rapidly changing legal work environment. We need to know about artificial intelligence, machine learning, data mining, big data analysis, bioinformatics, molecular biology, computational systems, discovery informatics, knowledge representation, the somatic web, and applied informatics. This is just the beginning of what we need to do to retool to become not only effective advocates, but the protectors of the world we depend on and cherish. We must learn what our brains can comprehend and beyond that, use emerging tools as safely as we can to help us protect biodiversity and promote biosafety and biosecurity.

## Conclusion

We assume that the discoveries developed by corporations and nations for offensive

and defensive military capabilities may be used in warfare contexts. However, it is foreseeable that power seeking individuals, entities, and nations will seek to develop and use information technologies and its bio-aspects to advance their own power-seeking agendas, even domestically.

The future is daunting. To keep up, we will not remain what we were, and law will not remain what it was. As we either robustly, or tepidly, utilize technological advances to enhance ourselves and prolong our lives, it can be presumed that we will sacrifice aspects of our individuality and our privacy.

## Decisions about gene-editing have ethical and moral dimensions.

It is less a question of will we change, but more how individuals, companies, and countries will manage the changes and how the rule of law will emerge. While in the past, we have focused on durable statutes and in some instances, time-tested precedents, current ideas about the rule of law are becoming obsolete. While we experience exponential growth in technological developments, there is no comparable exponential growth of laws and regulations to manage the new world order fraught with perils growing beyond our understanding. We need to be resolute that our information technologies, infused with AI, have important ethical and moral components in order to take rule of law principles to new heights.

It seems that as the biological aspects of ourselves become less and the synthetic aspects of ourselves become more, we gain insight into the dark side of human nature and must manage its transformation with grace. The UIA as an independent organization with a moral center, can be expected to play an important and pivotal role in promoting biosecurity and biosafety, and the quality of life for every living thing.

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*Editor's Note: If you want Barbara J. Gislason's full article, including 98 footnotes, email her at barbara@gislasonlaw.com.*

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# Research on the Legal Issues in the Construction of Clinical Trial Hospitals

**ZHANGZHI Ge & SONG Wei**

## I. Introduction

The criteria for differentiating regular patients from critically ill patients are the degree to which the disease is life-threatening and the degree to which the disease can be controlled. Compared with regular patients, the availability of the medical products and the applicability of the treatment options are both limited for critically ill patients. The construction of the clinical trial hospital is to deal with this problem. Through the construction of the one-stop platform, it can provide diversified path choices for critically ill patients and effectively solve the treatment dilemma. The proposal of the clinical trial hospital is an innovative conception. Its essence lies in the bidirectional and reasonable allocation of the limited clinical trial resources. There are still many problems to be solved in theory and practice.

The diversified treatment paths in clinical trial hospital can effectively solve the treatment demands of critically ill patients. However, there also exist many legal issues and risks: Is the clinical trial hospital itself, and its multiple treatment paths, legal? How has the clinical trial treatment method changed the original medical legal relationship? Will other policy measures provide more effective solutions for critically ill patients? Can clinical trial hospitals effectively balance the purpose of clinical trial review and the purpose of treatment? Should clinical trial hospitals be exempted from liability for clinical trial treatment? Is the price of medical products too high to exclude critically ill patients from participating in treatment? Overcoming these obstacles is

the key to successful development of clinical trial hospitals.

## 2. From Hospital Clinical Trials to Clinical Trial Hospitals

### 2.1 The Value Pursuit of Clinical Trial Institution

Derived from the relevant qualification identification of hospitals, medical research institutions, medical universities and other main bodies, clinical trial institutions are important carriers for clinical research on the safety and effectiveness of new medical products. Medical products for clinical trials were initially limited to drugs and later expanded to medical devices and medical technology.

of medical products, to promote industrial competitiveness and the protection of public health. Its specific value pursuit can be summed up to two points: 1) to provide an adequate basis for the security and effectiveness of the approval of new medical products so that the majority of patients could benefit from the relatively mature and innovative products (this can be called “*Innovation Universality Value*”) and 2) to provide new medical products that are still under research and are not yet on the market to respond to the demand of unconventional clinical treatment for critically ill patients (this can be called “*Urgent Treatment Value*”). Through investigating the history of clinical trials, we have learned that the treatment objective is continuously explored in the development

After all, the core of the appellation of “hospital” lies in the diagnosis and treatment.

After more than 30 years’ development, China has made considerable progress in the construction of clinical trial institutions. China has identified 625 clinical trial institutions for drugs and has recorded 190 clinical trial institutions for medical devices, of which 162 clinical trial institutions have two qualifications.<sup>1</sup> The ultimate goals of the construction of clinical trial institutions are to systematically examine the reliability of the new medical products and to provide support for the innovation

process from conventional clinical trials to expanded clinical trials, [1] in addition to meeting the purpose of medical product marketing research. What is ultimately a dual value pursuit has gradually become clearer and the basic target.

### 2.2 The Concept of Clinical Trial Hospitals

“*Innovation Universality Value*” requires clinical trial institutions to consider more of

the interests of an unspecified majority of patients, while the “Urgent Treatment Value” requires clinical trial institutions to consider more of the interests of an unspecified small number of critically ill patients. It is not necessary to discuss which of the two kinds of value pursuit is more important and/or should take priority.

The key to solving the problem is how to achieve the goal of “balanced protection,” which requires a reasonable allocation of limited clinical trial resources. The concept of “clinical trial hospital” is used to describe the clinical trial institution that is mainly based on the clinical trial treatment for critically ill patients and supplemented by the clinical test of new medical products. After all, the core of the appellation of “hospital” lies in the diagnosis and treatment. Therefore, the clinical trial hospital is not the abbreviation of the hospital with the qualification of clinical trial institution. It is also different from the conventional hospital, the research hospital and transformation hospital, which have become the focus of current academia.

Instead, it is not only an important platform for the integration of basic research, clinical trials and medical services, but also an important window for medical products to undergo small-scale and scientific testing from the laboratory to the market by taking a small proportion of critically ill patients as the treatment objects and supporting new drugs, new medical devices, new medical technologies, and so on to recruit a small number of patients to implement clinical trial treatment.

Based on this, the article defines the clinical trial hospital as follows: a new-type of clinical trial institution carrying out disease intervention through clinical trial treatment which is under strict and normative procedures to meet the special treatment demands of critically ill patients. For critically ill patients, the clinical trial hospital will rely on the existing clinical trial platform to reconstruct special treatment sites and treatment modes in order to change the current situation of seeking medical treatment in conventional medical institutions.

It is important to note that clinical trial treatment should comply with the relevant specifications on human trials of new medical products. They involve multi-disciplinary contents including sociology, ethics, biology, and law, which are beyond the scope of this paper. The related specifications could refer to the Declaration of Helsinki by World Medical Association, and the International Ethical Guidelines for Biomedical Research Involving Human Subjects by the Council for International Organizations of Medical Sciences, etc.

### 2.3 The Practical Embryonic Form of Clinical Trial Hospitals

There are no mature cases in the construction of clinical trial hospitals all over the world. Some medical institutions and clinics that have reference significance include: *National Institutes of Health*, *Mayo Clinic*, *Boao Super Hospital*, and *Anhui Provincial Hospital*, as shown in **Table I**. Although both the *National Institutes of Health* and *Mayo Clinic* in the United States have no appellation of clinical trial hospitals, they have long practiced treating

**Table I Comparison of the Characteristics of Four Medical Institutions**

Hospital Property	National Institutes of Health	Mayo Clinic	Boao Super Hospital in Hainan province, China	The First Affiliated Hospital of USTC
<b>Historical Accumulation</b>	A hospital specializing in clinical research; the largest clinical research hospital in USA.	One of the largest comprehensive hospitals in USA; global medical system brand	A comprehensive hospital with mixed ownership for less than one year	First put forward clearly the concept of clinical trial hospitals at the end of 2017
<b>Overall Layout</b>	Clinical Center in the headquarters and National Centre for Advancing Translational Research all over the country	Clinical practice, medical education, medical research	One sharing hospital and several clinical medical centers	Integrated development of the research hospital and the clinical medical research center
<b>Therapeutic Pattern</b>	Bench-Bedside mode: concentrating on the treatment and research of patients with five types of work: clinical research, clinical trials, medical history research, screening research, training research	Ensures the use of the most advanced and latest diagnostic and therapeutic techniques	Takes clinical applications as the guidance, takes medical structure as the main body and takes collaborative networks as the support	Clinical trial treatment of new medical products and new medical technologies
<b>Main Features</b>	<ul style="list-style-type: none"> <li>• Patients with the referral;</li> <li>• Free diagnosis and treatment;</li> <li>• Ensures the best experimental treatment and the best health care service</li> <li>• Emphasis on process convergence and collaboration among clinical researchers</li> </ul>	<ul style="list-style-type: none"> <li>• Nonprofit;</li> <li>• Experienced doctors in all fields;</li> <li>• Patients first;</li> <li>• One-stop medical service;</li> <li>• Focus on innovation and research;</li> <li>• Strong experience and influence</li> </ul>	<ul style="list-style-type: none"> <li>• Clinical research;</li> <li>• Collaborative innovation;</li> <li>• Academic exchange;</li> <li>• Personnel training;</li> <li>• Achievement transformation;</li> <li>• Popularization and application</li> </ul>	<ul style="list-style-type: none"> <li>• Promotes the development of new drugs, medical devices, high-end medical materials;</li> <li>• Innovates diagnosis and treatment methods;</li> <li>• Forms the chain of “basic research-application development-transfer &amp; transformation”</li> </ul>

critically ill patients by providing differentiated and high-quality medical services.

*Boao Super Hospital* is located in IMTPZ (International Medical Tourism Pioneer Zone<sup>2</sup> in Hainan Province, China) and enjoys the national special policy bonus, such as chartered medical services (giving medical technology, medical personnel, medical device and drug concessionary access), chartered research (developing frontier medical technology research projects such as stem cell clinical application), chartered operating (relaxing part of the authority of medical approval and allowing foreign capital to enter), and chartered international exchanges (allowing the introduction and creation of international organizations and undertaking international conferences). It has the ability to introduce and use foreign drugs, equipment, consumptive material, and new technologies to allow many patients with special needs for drugs or medical devices to be treated effectively in the hospitals located in IMTPZ instead of going abroad.

Anhui Provincial Hospital has put forward the concept of clinical trial hospitals for the first time and put its construction into the general development plan of the hospital. It aims to promote the innovation of new drugs, to innovate diagnosis and treatment methods and related technologies, to develop advanced clinical medical devices and medical materials with independent intellectual property rights, to lead the innovation of clinical medical engineering equipment, to meet the major demands of independent innovation of national high-end medical equipment, and to promote the upgrade of intelligent manufacturing and the medical equipment industry through taking the emphasis of the construction of clinical trial hospitals at the center. At present, it is still in the planning stages and needs the support of specific practice from top to bottom.

### 3. Legal Risk and Prevention for the Construction of Clinical Trial Hospitals

#### 3.1 Whether Clinical Trial Hospitals Can Effectively Balance the Purpose of Approval Review and the Purpose of Treatment

At present, there are more than 600 clinical trial institutions in China, and the vast

majority of them were already Class 3A hospitals before they were even qualified. These hospitals serve as high-quality clinical trial platforms as well as high-quality medical service bases. To a certain extent, it leads to the shortage of clinical trial resources. In the face of the innovative development of medical products and the growing needs of clinical trials, it is difficult for the existing clinical trial institutions to meet the increasing needs of the market. It is more difficult to use most of the resources of the clinical trial institutions to carry out the treatment for critically ill patients.

As in other countries or regions, the development of clinical research capacity in China also started from drug clinical trials initiated by the sponsor and expanded to other areas [...].

According to the *Regulations on the Conditions and Filing Management of Medical Device Clinical Trial Institutions* jointly issued by former CFDA and former National Health and Family Planning Commission on November 24, 2017 and the *Provisions on the Administration of Drug Clinical Trial Institutions (Exposure Draft)* issued by former General Office of CFDA in October 26, 2017, the original approval system changed into a registration system. Institutions other than Class 3A hospitals are easily able to meet the required conditions to become clinical trial institutions. The increase of the number of clinical trial institutions can ease the shortage of clinical trial resources to a certain extent. However, due to the strictness and high input of clinical trials, enterprises still prefer Class 3<sup>A</sup> hospitals with better software and hardware conditions to avoid mistakes, thus the external pressure of the clinical trial hospital has not been substantially reduced.

As in other countries or regions, the development of clinical research capacity in China also started from drug clinical trials initiated by the sponsor and expanded to other areas, so it has insufficient support for the clinical trials initiated by the researchers, not to mention the treatment purpose directed by the clinical trial institutions. While making significant progress, China's existing clinical trial institutions still have some unsolved problems, such as imperfect

management structure, untimely updating of relevant rules and regulations, unstandardized management of documents and qualifications, lack of software and hardware facilities, poor management of investigational drugs, weak internal quality control, lack of rigorous test data acquisition,<sup>3</sup> poor implementation of ethical review, and poor coordination with the sponsor or the third-party service provider.[3]

These problems not only affect institutions' testing ability for the purpose of product listing, but also affect institutions' exploratory treatment ability for critically ill patients.

Therefore, if the existing clinical trial institutions want to carry out clinical trial treatment successfully, it is necessary to work on two points. One is to select some prospective, high-end, and scarce medical products to carry out clinical trials in order to control the total number of the clinical trial projects and not to deviate from its therapeutic target because of external pressure and temptation. The result of the latter is the distortion of resources allocation such as manpower, equipment and time.

The other is liberation from tedious conventional medical services, which requires the coordination of family doctors and a hierarchical medical system. The *13<sup>th</sup> Five-Year Plan for Deepening the Reform of the Medical and Health System* issued by the State Council on December 27, 2016, set the goals to realize the wide coverage of the family doctor contract service system, to promote resource sharing between large hospitals and grassroots hospitals, to promote business cooperation between general practitioners and specialists, to promote the longitudinal flow of medical resources through information technology, to encourage the second Class or third Class hospitals to provide telemedicine services to the grassroots hospitals, and to bring the clinic service of traditional Chinese medicine hospitals into first diagnosis and treatment. They all need to be actively implemented.



### 3.2 Whether Clinical Trial Treatment Has Changed the Original Medical Legal Relationship

Clinical trial hospitals are a new type of organization, and clinical trial treatment is a new type of behavior. The important manifestation of this “new type” is that the original legal relationship becomes complicated without adding the new subject of legal relationship. In clinical trial treatments, hospitals and doctors are both subjects of treatment and scientific experiments, and patients are both objects of treatment and scientific experiments. The phenomenon of identity overlap is very prominent, and the balance of interests caused by dual identities always exists.

In reality, an ordinary doctor-patient relationship is mainly comprised of a doctor-patient contract relationship (treatment invitation sent by the hospital, patients applying for registration and the hospital accepting the registration), management of affairs without mandating a relationship (to avoid the damage to personal and property interests, voluntary party providing medical service), and doctor-patient factual contract relationship (patient did not register but medical party has begun to make treatment, e.g. diagnosis and treatment of the critically ill patient through the green channel).

However, in clinical trial treatments, the doctor-patient relationship is more of a doctor-patient contractual relationship, which is due to the fact that the expansion of the medical path for critically ill patients requires the real intention of the patient or his legal agent to achieve the treatment goal. Doctor-patient contract relationships are mainly manifested as: (1) whether the treatment decision is made by the patient (or its legal agent); (2) the treatment plan is formulated by the hospital and its doctors; (3) the patient is informed and agrees to receive treatment; and (4) there is real-time control of the treatment process.

Clinical trial hospitals give critically ill patients a greater degree of choice. They have freedom in changing, suspending or terminating the contract. The protection of patients' right to know is more proactive (e.g. in addition to general notification, urgent notification and real-time notification may be applied), and the protection of patients' right of privacy is more rigorous (e.g., disease research or teaching observation is subject to patient agreement).



Clinical trial hospitals are a new type of organization, and clinical trial treatment is a new type of behavior.

According to the statistics, 80% of the cost of drug R&D is spent in the phase of clinical trials. In order to save resources, many sponsors of drug R&D projects choose to outsource their projects to Contract Research Organizations (CRO). In conventional clinical trials, the sponsor and CRO initially belong to the transactional relationship. The outsourcing of clinical trials to CRO means the sponsor pays for the services, which may result in the transaction sequence determined by the price. When most CRO obtain preferential cooperation rights by lowering prices, it is easy to deviate from the ultimate purpose of clinical trials, resulting in the distortion of clinical trial results and even the burden of management.

The relationship between the sponsor and CRO tends to develop in the direction of risk sharing, knowledge resource sharing and even benefit sharing. In clinical trial treatment, a new type of cooperative treatment relationship centered on clinical trial hospitals is gradually established, which is mainly shown as follows: (1) clinical trial hospital takes the leading position, actively seeks the connection with pharmaceutical enterprises/device enterprises, and realizes the supply of medical products for trial;

(2) CRO is not necessary, clinical trial treatment can be completed without its participation; (3) clinical trial hospital is more focused on the function of its own ethics review committee, unless the clinical trial hospital does not have the ethical review conditions; and (4) the drug regulatory department makes necessary supervision before, during and after the clinical trial treatment according to its risk.

### 3.3 Whether Other Policies Provide More Effective Solutions for Critically Ill Patients

The contradiction between the supervision of drug review and the protection of public health reflects parallel development. When the regulation is loose, drug safety and effectiveness are likely to have high risks and the overwhelming majority of the demanders will be exposed to the risks and dangers of drug using, even though the availability of the medical products will be enhanced. When the supervision is strict, drug safety and effectiveness are well expected, but the harsh conditions and procedural fixity will exclude special demands of special groups, although this part of the group only accounts for a very small proportion of all patients.

**Table 3: A List of Some Chinese Relevant Policies**

Issue Time	Enacted by	Policy Name	Primary Coverage
January 25, 2018	Former China Food and Drug Administration, Ministry of Science and Technology	Guiding Opinions on Strengthening and Promoting (S&T) innovation of food and drugs	Relying on the relevant national scientific and technological plans (special projects, funds and so on), increase the support for the independent innovation of the key drugs, innovative drugs and advanced medical instruments that are urgently needed by the masses
March 21, 2018	General Office of the State Council	Opinions on Reform and Improvement of Supply and Use Policies of Generic Drugs	Promote the research and development (R&D) of generic pharmaceuticals, focus on solving the shortage of high-quality generic drugs, including regular formulation and publication of drug catalogues for encouraging imitation, strengthening of generic drug technology and improving the protection system of intellectual property rights of drugs
October 10, 2017	Former China Food and Drug Administration	Decision on Adjusting the Registration and Administration of Imported drugs	In order to encourage new drugs to be listed and meet clinical needs, adjust matters related to the registration and administration of imported drugs
April 24, 2018	State Drug Administration	Announcement on Matters Related to Customs Inspection of Imported Chemicals	Cancel the port inspection of the imported chemicals, which can be directly sent to the medical institutions and retail pharmacies after the port customs clearance, and the time of entry into the Chinese market has been shortened by 2-3 months
May 17, 2018	State Drug Administration, National Health Commission	Announcement on Optimizing the Review and Approval of Drug Registration	For the drugs that have been listed abroad and use for the prevention and treatment of immediately life-threatening diseases with no effective treatment and rare diseases and have been identified as no ethnic differences, the applicants do not need to declare clinical trials, but can directly declare for listing with overseas trial data. The time of drug listing will be accelerated by 1-2 years.
January 10, 2018	Former China Food and Drug Administration	Technical Guidelines for the Acceptance of Overseas Clinical Trials of Medical Devices	Provide technical guidance for applicants to apply for registration of overseas clinical trial data of medical devices and for the review of such clinical trial data by regulatory authorities, to avoid or reduce the repeated clinical trials and to speed up the process of medical devices listed in China
July 10, 2018	State Drug Administration	Technical Guidelines for the Acceptance of Data on Overseas Clinical Trials of Drugs	The adoption of overseas data of clinical trials directly saves the time and cost of global drug listing in China, and incorporates more advanced anti-cancer drugs into the treatment protocol of domestic cancer patients
November 8, 2016	The Leading Group of the State Council to Deepen the Reform of the Medical and Health System	Some Opinions on Further Promoting the Experience of Deepening the Reform of the Medical and Health system	All public hospitals abolish the addition of drug price, and gradually carry out the "two ticket system" (the production enterprise opens the invoice to the circulation enterprise once, the circulation enterprise opens the invoice to the medical institution) of drug purchasing in public medical institutions, reduces the intermediate link in the field of drug circulation and improves the concentration of the circulation enterprise
January 01, 2019	General Office of the State Council	Pilot program for centralized procurement and use of drugs organized by the state	Eleven cities in China were selected to carry out the pilot program of centralized procurement and use of drugs organized by the state. The goals include: cut down the drug price obviously and reduce patients' burden of drug cost; reduce enterprise transaction cost, purify circulation environment, improve industry ecology; guide medical institutions to standardize drug use and support the reform of public hospitals; explore ways to improve the centralized drug procurement mechanism and the market-oriented drug pricing mechanism.
April 23, 2018	Customs Tariff Commission of the State Council	Announcement on Reducing the Import Tariff of Drugs	Since May 1, 2018, the import tariff of all common drugs, including anti-cancer drugs, alkaloid drugs with anti-cancer effects and Chinese patent medicines with actual imports has been reduced to zero at a provisional rate
April 27, 2018	Ministry of Finance, General Administration of Customs, State Administration of Taxation, and State Drug Administration	Notice on the Value Added Tax Policy of Anti-Cancer Drugs	Since May 1, 2018, VAT general taxpayers who produce, sell, wholesale and retail anti-cancer drugs pay VAT at a 3% levy rate in accordance with the summary procedure; for imported anti-cancer drugs (including 103 kinds of anti-cancer drug preparations and 51 kinds of anti-cancer drug raw materials), and the value-added tax on imported links shall be levied at a reduced rate of 3%

Therefore, the basic judgment based on the protection of patients' rights is general drug review and supervision is indeed necessary, but exceptional rules need to be established, that is, to take into account the special needs of special groups, which is the important premise and basis for clinical trial treatment. From a more macro perspective, clinical trial treatment reflects the exploration of the effective use of scarce investigational medical products, which is also a compromise solution to the conflict between drug review supervision and public health protection. However, it only solves the problem of "flow." The more basic problem of "source" is to speed up the research and development of new drugs and generic drugs, to accelerate the review and approval procedures of new medical products, and to use imported drugs from overseas.

This is also true for China. Policies to encourage the research and development of new drugs, to accelerate the review and approval procedures, and to reform the approval process of imported drugs, as shown in **Table 3**, as well as the policy of prudently widening the treatment path for critically ill patients, can also provide an effective solution in terms of broadening the availability of medical products. This changes the dilemma of Chinese patients not able to use the latest medical products from overseas and alleviates the problem of the high price of imported medical products.

All of these embody the synergetic propulsion between the two kinds of

regulations of "source" and "flow." In practice since April 2018, the State Drug Administration has sped up the approval of 7 new drugs that are urgently needed by critically ill patients to control serious life-threatening diseases.[2] In addition, the relevant government departments are also considering tax incentive policies for pharmaceutical innovation enterprises to increase enterprises' reinvestment in innovation, and to encourage domestic innovation enterprises to go abroad to attain development.

#### 4. Conclusion

In order to meet the urgent demands of critically ill patients, special clinical trial treatment is needed in addition to the conventional clinical treatment. As the carrier of clinical trial treatment, clinical trial hospitals are special clinical trial institutions. They intensively embody the rational allocation of limited clinical trial resources and form a service framework which is based on clinical trial treatment and supplemented by clinical tests for new medical products. The clinical trial hospital can seek support in the existing regulatory framework, and it is not necessary to emphasize the licensing establishment of clinical trial hospitals.

This paper attempts to explore the ontological content of the construction of clinical trial hospitals and puts forward the corresponding legal issues and corresponding solutions. We will continue to discuss the actual operation of clinical trial hospitals

and whether they can seek corresponding support within the framework of existing laws and regulations.

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# Using United States Discovery Rules for Advantage for Non-U.S. Disputes

I John B. PINNEY

In the United States, the court rules allow litigants in civil proceedings not only to require opposing parties to produce evidence relevant to the issues being litigated but also to require third-parties, not involved in the litigation, to produce such evidence. Moreover, there is a law, 28 U.S.C. §1782<sup>1</sup>, that allows a United States district court to order any person or business entity (a corporation, bank or any other kind of company) to give evidence, including sworn oral deposition testimony, and produce relevant documents “for use in a proceeding in a foreign or international tribunal.” Importantly, such an order may be directed to the adverse party in the foreign proceedings, or it may be issued to an unrelated third-party that has possession of relevant evidence material to the outcome of the foreign case.

Section 1782 also pertains to the Hague Evidence Convention, but is broader in scope than the Convention.<sup>2</sup> However, the Hague Evidence Convention applies only for requests from a foreign “judicial authority” before which civil litigation is actually pending. In contrast, Section 1782 allows applications that are from “an interested person” (i.e., not necessarily by the foreign court), that are brought prior to commencement of proceedings and that are (most probably) requested by an international arbitration tribunal.<sup>3</sup>

While U.S. discovery rules are frequently criticized for being overly broad and may lead to excessive expense to litigants before U.S. courts, these rules can offer an avenue for non-U.S. litigants (and, in some cases, arbitration parties) to obtain critical evidence not otherwise obtainable before a foreign court or international arbitration tribunal. Under the law, the district court may in its discretion issue such an order either upon the request of the tribunal (the foreign court or other tribunal) or simply of a party to the foreign proceeding. Thus, the U.S. court may order production of the evidence from either the adverse party or the unrelated third-party with or without the consent of the foreign court or tribunal.

In civil law jurisdictions, the ability of litigants to obtain evidence from an opponent is generally limited such that a claimant must frequently prove its case entirely from documents and other evidence within the claimant’s own control. In addition, the ethical mandate in many jurisdictions proscribing a lawyer from disclosing evidence harmful to his or her own client’s case further restricts the ability of a claimant to obtain evidence not available from its own files or from witnesses under the claimant’s control or otherwise willing to cooperate voluntarily.

United States Supreme Court considered the scope of Section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). This is an important case in a number of respects. First, the case did not directly involve a pending court action or arbitration at the time the discovery application was made. Rather, the application for the discovery order was brought by Advanced Micro Devices,

the discovery application should be granted. These factors are: (1) whether the party against which the discovery order is sought is subject to the jurisdiction of the foreign or international tribunal; (2) the receptivity of the foreign tribunal to U.S. judicial assistance; (3) whether the application seeks to circumvent foreign evidence-gathering restrictions; and (4) whether the request is unduly intrusive or burdensome.

A claimant’s inability to require production of such evidence might well be the difference between winning and losing for lack of proof. For example, in a case where a non-U.S. distributor has been wrongly terminated, critical evidence of lost sales may be entirely in the possession of and controlled by the defendant or respondent. Or, as another example, a claimant that has won a judgment or arbitration award cannot locate assets which the debtor has concealed needed to satisfy the judgment. U.S. discovery procedures brought under Section 1782 could provide the answer, provided, of

[...] A claimant that has won a judgment or arbitration award cannot locate assets which the debtor has concealed needed to satisfy the judgment.

a world-wide competitor of Intel Corp., in order to obtain evidence directly from Intel to present to the European Union’s Competition Commissioner that would support the Commission’s anti-trust investigation being directed against Intel. The Supreme Court made clear that an application under Section 1782 could be brought *before* an underlying proceeding was filed provided that a legal action was “reasonably contemplated.” Second, the Supreme Court suggested in a footnote that an international arbitration tribunal would be considered to be an “international tribunal” within the meaning of the law. Third, the *Intel* court set out the factors that the district court must consider in exercising its wide discretion on whether

course, that the needed evidence is either contained in documents or is known by persons located in the United States. In other words, Section 1782, upon a proper showing by the applicant, empowers a U.S. court to issue an order requiring either an *opposing party* in the foreign proceeding or a totally *uninvolved third-party* (such as a bank) to produce relevant documents and, if needed, to give sworn oral testimony that is transcribed *verbatim* and can also be video recorded if desired.

As noted above, Section 1782 importantly does not limit judicial assistance to cases where proceedings are already underway but allows for the U.S. court to order discovery before the proceedings are

commenced as long as they are at the time simply “within reasonable contemplation.” *Intel Corp.*, *supra.* at 258-59. The fact that a party can seek and obtain critical evidence *before* having to commence its suit or international arbitration is highly significant because it both allows that party to gather and assess its evidence prior to filing the proceedings and possibly enabling the party to achieve an early settlement. This also can be highly valuable for plaintiffs in civil law jurisdictions because it will allow them to build their case and develop their needed evidence before the actually commence proceedings in the foreign court or before an international arbitral tribunal.

Consequently, litigants in cases either pending or being contemplated anywhere in the world should consider whether invoking the jurisdiction of U.S. courts could enable them to obtain critical evidence that is not otherwise directly obtainable through procedures available in their litigation or arbitration. It is also significant that Section 1782 allows “any interested party” to make application for the order, irrespective of whether the “foreign or international tribunal” has itself requested or even consented to the application to the U.S. court. While this does not mean that parties ought not take into account concerns about how the court or tribunal before which the underlying matter is pending (or will be brought) will view the application and the evidence obtained, the existence and probative value of the evidence, weighed against the costs of making application, should in most cases be the determining factor.

Although the author is of the view that Section 1782 may properly be used to obtain evidence for use in international commercial arbitrations, there currently is a split of authority in the United States on whether law may be used to obtain evidence for use in an international arbitration. Two early cases, *Nat'l. Broad. Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2<sup>nd</sup> Cir. 1998), *Repub. of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5<sup>th</sup> Cir. 1999), held that the phrase “foreign or international tribunal” in Section 1782 was not intended by Congress to include an international *arbitration* tribunal. However, subsequent to the decisions in the *NBC* and *Kazakhstan* cases, the U.S. Supreme Court in 2004 in the *Intel* case gave life to the

argument that the statute’s language should be interpreted to hold that an international arbitration tribunal was within the meaning of the phrase “international tribunal” in Section 1782. Since issuance of the *Intel* decision in 2004, there has been a split of authority in the lower federal courts on whether Section 1782 applies with respect to foreign or international arbitral tribunals, but the trend recent cases appears to be to find that international arbitration tribunals are included and may provide the predicate for making an application for discovery in a U.S. federal district court.<sup>4</sup>

Other than the Second and Fifth Circuits in decisions prior to *Intel*, neither the regional Courts of Appeals nor the U.S. Supreme Court has squarely decided the issue of whether a U.S. court may render judicial assistance under Section 1782 for a proceeding before an international arbitral tribunal.<sup>5</sup>

In accordance with Section 1782, the court receiving the application must be in the judicial district where the witness or documents are located. An example of the type of a case that might benefit from making an application under Section 1782 would be where a French franchisee claims its franchise was wrongfully terminated by an Ohio-based franchisor and seeks to recover from the American franchisor both an indemnity resulting from the termination and its actual lost profits from the franchisor in a litigation brought in a French court. In such a case, the claimant’s claim would likely benefit from evidence of electronic email communications that the franchisor had acted improperly in terminating the franchisee and also from evidence showing the sales made by the new franchisee as a means of proving lost profits. As noted above, Section 1782 would allow the terminated French franchisee to bring its application to “discover” such evidence prior to commencing the lawsuit as long as it could show that such a proceeding was “reasonably contemplated.”

To conclude, Section 1782 offers foreign litigants the ability to develop evidence that may not be available under the procedures ordinarily available in non-U.S. courts and international arbitration tribunals, especially with respect to electronically stored information and evidence held by unrelated

third-parties. Accordingly, where non-U.S. litigants expect difficulty in obtaining critical evidence needed to prove their case or locate assets for collecting on a judgment or arbitral award, they should consider enlisting the U.S. courts and Section 1782 to obtain the needed evidence or location of assets.

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<sup>1</sup> In pertinent part, the U.S. statute, 28 U.S.C. §1782, states:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. **The order may be made** pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or **upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.** \* \* \*

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(Emphasis added.)

<sup>2</sup> *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, done at The Hague March 18, 1970. This convention went into effect in the United States on October 7, 1972, and its U.S. citation is 23 U.S.T. 2555.

<sup>3</sup> There is a split of authority in the United States on whether Section 1782 may be used to obtain evidence for use in an international arbitration. The U.S. Second Circuit Court of Appeals held in *Nat'l. Broad. Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2<sup>nd</sup> Cir. 1998) that the statute’s phrase “foreign or international tribunal” did not include an international *arbitration* tribunal. To the same effect was a decision of the U.S. Fifth Circuit Court of Appeals in *Repub. of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5<sup>th</sup> Cir. 1999). However, subsequent to the decisions in the *NBC* and *Kazakhstan* cases, the U.S. Supreme Court in 2004 in the case of *Intel Corp. v. Advanced Micro Devices, Inc.* (discussed *infra*) indicated, but did not squarely hold, that an international arbitration tribunal would be considered to be an “international tribunal” as used in Section 1782. Since the Supreme Court’s



## ICOs in Switzerland – A New Way of Project and Venture Financing

I **Martin BERWEGER**

Intel decision in 2004, there has been a split of authority in the lower federal courts on whether Section 1782 applies to allow judicial assistance for proceedings before international arbitral tribunals.

4 Compare, *In re Servotronics, Inc.*, 2018 U.S. Dist. LEXIS 189423, 2018 WL 5810109 (D. S.C.); *In re TJAC Waterloo, LLC*, 2016 U.S. Dist. LEXIS 56381, 2016 WL 1700001 (N.D. Ind. 2016); *In re Dubey*, 949 F. Supp. 2<sup>d</sup> 990, 993-94 (C.D. Cal. 2013); and *In re Arbitration between Norfolk S. Corp & Gen. Sec. Ins. Co.*, 626 F. Supp. 2<sup>d</sup> 882 (N.D. Ill. 2009) (holding that Section 1782 does not allow for judicial assistance for international arbitration tribunals), with *In re Pola Mar. Ltd.*, 2017 U.S. Dist. LEXIS 138926 (S.D. Ga., 2017); *Kleimar V.V. v. Benxi Iron & Steel Am., Ltd.*, 2017 U.S. Dist. LEXIS 124437, 2017 WL 3386115 (N.D. Ill. 2017); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2<sup>d</sup> 254 (D. Mass. 2010); *In re Application of Babcock Borsig AG*, 583 F. Supp. 2<sup>d</sup> 233 (D. Mass. 2008); *In re Hallmark Capital Corp.*, 534 F. Supp. 2<sup>d</sup> 951, 955 (D. Minn. 2007); and *In re Roz Trading Ltd.*, 469 F. Supp. 2<sup>d</sup> 1221, 1224 (N.D. Ga. 2006) (holding that Section 1782 allows judicial assistance for international arbitration tribunals).

5 Of note, however, are three decisions of the U.S. Courts of Appeals for the Sixth, Seventh and Eleventh Circuits. The first of these is the Sixth Circuit's recent order in *JSC MCC Eurochem v. Chauhan*, 2018 U.S. App. LEXIS 26226 (6<sup>th</sup> Cir.), in which the appeals court refused to stay, pending appeal, an order of a Tennessee district court granting discovery where there was both pending litigation and a related London arbitration. The Seventh Circuit's case, *GEA Group AG v. Flex-N-Gate Corp.*, 740 F. 3<sup>d</sup> 411, 419 (2014), implied in *dicta* that an international arbitration tribunal could be within the scope of Section 1782. Lastly, the Eleventh Circuit in *Consortio Ecuatoriano de Telecom. S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3<sup>d</sup> 1262, 1268 (11<sup>th</sup> Cir. 2014), affirmed the discovery order issued by the district court where there were both civil and criminal court proceedings contemplated (in addition to an international arbitration that was actually pending), noting that the district court had concluded that the arbitral tribunal was "likely within the purview of Section 1782." While none of these cases squarely holds that an international arbitral tribunal is an "international tribunal" within the meaning of Section 1782, the trend of recent decisions is that Section 1782 allows U.S. courts to provide judicial assistance in international arbitration cases. In addition, there also may be a distinction between private international commercial arbitration tribunals and investment arbitration tribunals, with investment cases being deemed closer to involving a government related tribunal and thus more likely to be viewed as an "international tribunal." See, S.I. Strong, *Discovery under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 Stan. J. Complex Litig. 295 (2013).

À ce jour, les ICO (Initial Coin Offering) sont l'application la plus pertinente de la technologie du grand livre distribué (blockchain) au niveau économique et elles sont devenues un moyen important de financement de projets et de capital-risque. Cet article vise à donner une introduction et une vue d'ensemble sur les ICOs en Suisse en mettant l'accent sur le Crypto Valley Zug. Il souligne la pertinence des ICOs, l'évolution du marché des ICOs ainsi que les caractéristiques de base et les enjeux des ICOs en droit suisse.

### The ICO Boom and the Current Crisis

One of the first ICOs was conducted in 2013 by Omni Layer. In order to finance a platform built on the bitcoin blockchain for creating and trading digital assets and currencies, Omni Layer raised bitcoins in exchange for newly created Mastercoins. About 500 investors participated in that ICO and transferred around 5,000 bitcoins (at that time at the equivalent of USD 500,000). In 2014, the Foundation Ethereum, domiciled in Zug, Switzerland, launched its ICO by issuing

Hence, for profit-oriented projects, corporations appear to be often the most suitable legal entity under Swiss law for conducting an ICO.

### ICOs, Smart Contracts and Tokens

ICO stands for «Initial Coin Offering» and is a form of crowdfunding. In an ICO, investors transfer funds to a certain organization. The funds commonly consist of popular cryptocurrencies or legal currencies. Those funds shall be used to realize a specific project or business case as described by the organization in their white paper<sup>1</sup>. As consideration for their funds, the investors receive tokens created by a self-executing application called smart contract on a pre-existing blockchain (often Ethereum) or on a blockchain specifically developed for that project. The rapidity and efficiency of raising large amounts of money without diluting the owner or giving up control to investors are the main reasons for the success of ICOs. At the beginning of the ICO boom, tokens often purely represented a means of payment, so-called coins. Nowadays, in order to be attractive for investors, tokens usually contain additional features, e.g. access to a certain service or an interest in an asset or a share in future profits of the organization.

Ether (ETH) tokens for the development and operation of Ethereum, currently the most important platform that runs smart contracts. Ether is today the cryptocurrency with the second largest market capitalization, after bitcoin. In the following years, ICOs experienced a boom: Worldwide, USD 256<sup>m</sup> were raised in 2016, USD 5<sup>bn</sup> in 2017 and even USD 17<sup>bn</sup> in 2018 (ICOs on average raised USD 6<sup>m</sup> in 2016, USD 16<sup>m</sup> in 2017 and USD 26<sup>m</sup> in 2018)<sup>2</sup>. ICOs have outperformed the traditional way of venture financing in this period. In 2018, though, the prices of cryptocurrencies collapsed dramatically, plunging the ICO market into a global crisis. The demand for new tokens declined sharply because investors lost a significant part of their crypto fortune, reducing their ability and willingness to invest in ICOs and to diversify their portfolio. In addition, the cryptocurrencies have not yet succeeded in reaching a broader public and shedding their ambivalent reputation. A majority of the crypto scene takes the current crisis calmly and is confident that the market correction will help to develop more sustainable projects. Stakeholders believe that launching high quality projects will increase demand again.

## The Crypto Valley Zug

A few years ago, Zug, Switzerland, has become one of the main locations for ICOs, since then also referred to as the Crypto Valley. How did that happen? Surely, the Foundation Ethereum raising USD 18<sup>m</sup> in 2014, the Tezos Foundation raising USD 232<sup>m</sup> in 2017 as well as other ICO projects launched in Zug have contributed to this success. Though, these are not the only reasons. Zug is a fertile ground for technology ventures. According to the Atomico report «The State of European Tech 2018», Zug is the fastest-growing tech hub in Europe. It has visionary entrepreneurs, offers deep pools of capital, low taxes and proximity to leading universities such as the ETH Zurich, the EPFL and the HSG.<sup>3</sup> Supportive circumstances are Switzerland's reliable and predictable legal framework, neutral and decentralized political system, a good infrastructure as well as a high quality of life. A further reason was the openness of Swiss authorities towards cryptocurrencies when they were introduced. As early as in June 2014, the report of the Federal Council on virtual currencies stated that «the mere use of bitcoins as a means of payment for goods and services is not regulated by the financial market legislation. This is true from the perspective both of the person paying for such services in bitcoins and of the person receiving payment in bitcoins». Since summer 2016, the City of Zug accepts bitcoin as a means of payment for governmental services up to a maximum of CHF 200. This peculiarity caused public awareness all over the world. Finally, a cluster of blockchain specialists and service providers contributed to a blockchain competence hub, supporting and developing the Crypto Valley Zug. Despite the many advantages Zug offers to entrepreneurs, ICO clients often struggle to open a bank account in Switzerland. Consequently, other places over the world were able to catch up, fostering an ongoing competition between those hubs. Currently, the main places for ICOs apart from Switzerland are the United States, Singapore, Hong Kong and the United Kingdom (the Cayman Islands, British Virgin Islands and Gibraltar).

## Regulatory Challenges

From a regulatory perspective, ICOs are subject to considerable uncertainty because

they are new, complex and global. In order to create clarity, at least in Switzerland, it is possible to request a no-action letter from the Swiss Financial Market Supervisory Authority (FINMA) in advance, in order to establish whether and how a specific ICO is regulated under Swiss financial market laws. In February 2018, FINMA published guidelines for enquiries regarding the regulatory framework of ICOs in Switzerland. FINMA was the first regulator to publish a comprehensive assessment of the regulatory treatment of ICOs in a jurisdiction. According to these guidelines, FINMA distinguishes between three categories of tokens based on the underlying economic function: Payment tokens, asset tokens and utility tokens. Each of these categories of tokens are subject to specific rules (it is also possible that a token qualifies as a hybrid token which falls into two or even all three categories as described below):

1. Payment tokens are tokens which might be used as means of payment for acquiring goods or services or as means of value transfer. Payment tokens do not give rise to a (repayment) claim against its issuer. The issuing of payment tokens as a means of payment constitutes a service for payment transactions and therefore falls within the scope of the Anti-Money Laundering Act (AMLA). The applicability of the AMLA requires the issuer of the tokens, among other things, to affiliate to a self-regulatory organization (SRO) and to identify the contracting party and the beneficial owner (KYC) of the paid-in funds. In many cases, the due diligence requirements are met by a professional service provider affiliated to an SRO (thus there is no more need for the issuer of the tokens to be affiliated to an SRO itself). FINMA considers most of the tokens, due to their transferability, as (potential) means of payment. As a result, the issuer must comply with the AMLA.
2. Asset (or security) tokens represent assets such as debt or equity claims against the issuer or physical assets to be traded on the blockchain. Asset tokens promise, for example, a share in future profits of the organization or an interest in a specific object. FINMA considers asset tokens generally as uncertificated securities since they are standardized and

suitable for mass trading. Under applicable Swiss law, the self-issuance of securities is essentially unregulated but requires the issuer to publish a prospectus. It must be noted, though, that the qualification as security has far-reaching consequences on the secondary trading, such as the authorization requirement of security dealers, stock exchanges, multilateral trading facilities (MTFs) as well as organized trading facilities (OTFs).

3. Utility tokens are tokens providing access to a blockchain-based application or service. Utility tokens are in general not regulated under the Swiss financial market laws, however, if a utility token has an investment purpose, FINMA will treat such token as security.

Apart from the AMLA and provisions on securities, the issuer of tokens should clarify whether banking law, provisions on collective investment schemes or other regulatory rules apply. In any case, it is highly recommended that legal experts assess the ICO and apply for a no-action letter from FINMA prior to the ICO. Without such "ruling", the risk that the FINMA enforcement division initiates investigations are considerable. The omission of obtaining a no-action letter might lead to significant expenses, uncertainty and time-consuming proceedings.

## Appropriate Legal Entity for an ICO

In addition to regulatory issues, further legal challenges arise, depending on the specific set up of the project. It is crucial to choose the appropriate legal structure to conduct an ICO. At the beginning of the ICO boom in Switzerland, many ICOs were conducted by Swiss foundations. Foundations were mainly chosen for tax reasons. Under Swiss law, non-profit foundations may be relieved from paying certain types of taxes if they pursue a public or charitable purpose – but almost all foundations conducting an ICO did not meet the necessary requirements. Nevertheless, they can still benefit from lower income tax rates compared to corporations. Apart from lower taxes, the absence of ownership resulting in increased trust in the legal entity is considered to be another advantage of foundations. This might be in particular the case for projects

that wish to set up an independent platform. Needless to mention that foundations also have major disadvantages, explaining their decreasing popularity. Firstly, the missing possibility of an exit due to the absence of ownership prevents the sale of the foundation and the distribution of profit to the founders. Secondly, foundations are supervised by an authority and require in general an auditor, making them more expensive in their operation than corporations. Thirdly, foundations feature an inflexible legal structure with a limited scope of action and the adaption of the foundation statute including its purpose is only possible to a very limited extent. This rigidity is unsuitable for many of the legal entities conducting an ICO as the distributed ledger technology and the environment are facing rapid changes. Therefore, corporations such as the company limited by shares (Ltd.) or the limited liability company (LLC) are nowadays more commonly used. Corporations allow their owners to realize an exit or to pay out dividends and to adapt the structure to a changing environment. Even though the Swiss corporations are less advantageous as foundations regarding the tax burden, profit and capital taxes are often lower in Switzerland compared to other jurisdictions. Finally, the association is an additional alternative to a foundation. The legal structure of a Swiss association is basically more adaptable than that of a Swiss foundation. Besides its more flexible legal structure, associations are not supervised by an authority, are less expensive in operation and do not need to be registered with the commercial register in most cases. Associations, however, are inappropriate for realizing an exit and cannot have a commercial purpose and run a business at the same time. Hence, for profit-oriented projects, corporations appear to be often the most suitable legal entity under Swiss law for conducting an ICO. However, careful considerations of the various advantages and disadvantages must be carried out in each case.

## Further Legal Challenges

For all forms of legal entities, taxes and particularly the taxation of the ICO profits are of relevance. In Switzerland, ICO proceeds are generally subject to income taxes. Initially, revenues from the ICO may be neutralized by forming a provision

in the amount of the ICO proceeds. Such provision may be recognized due to the obligation of the organization to realize the project, as described in the white paper. However, such provision must be released in the following years dependent on the progress of the project. Taxable income arises when a higher amount of the provision is or must be released than expenses incurred for the project in a tax period. The Swiss tax authorities usually require a release of the cost actually incurred plus 5%. Thus, for the entire period until the proceeds from the ICO are used up, the organization will generally be taxed on a profit of 5% of the revenues from the ICO. Comparable to the FINMA no-action letter, a tax ruling might be agreed in advance with the competent tax authorities, defining the tax consequences of an ICO. Such tax ruling is recommended and may avoid unwanted surprises. Other challenges arise from contract law, e.g. the formally valid transfer of tokens. Under Swiss law, a written assignment declaration is generally required to transfer rights. Another issue is data protection, such as the right of rectification or deletion of personal data, as a blockchain usually does not provide for the possibility to modify or delete transactions. The most challenging task, however, is to comply with foreign laws as a consequence of the global reach of ICOs. If a token, for example, is not a security according to Swiss law, it could still be considered as a security by the authorities of another country, requiring the issuer to comply with the security laws of these jurisdictions. In this respect a close cooperation with foreign lawyers, a careful instruction of clients, the disclosure of potential risks, the focus on relevant ICO markets, respectively the exclusion of investors from certain jurisdictions and a risk assessment is essential.

## Conclusion

ICOs, the most relevant application of the distributed ledger technology so far, have disrupted the traditional project and venture financing – other areas will follow. An ICO is a complex, expensive and elaborate undertaking providing the opportunity to raise millions for financing projects or business cases. From a legal point of view, an ICO is an interdisciplinary area requiring expertise in regulatory law, corporate law, tax law, compliance and

other disciplines. The fact that investors from all over the world might participate in an ICO requires compliance with rules from all over the world. For this reason, international cooperation among law firms is of great importance to successfully advise and accompany ICO clients in the age of blockchain.

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<sup>1</sup> The white paper is an information memorandum which usually describes the customer needs or problems and how the project shall satisfy respectively solve them, a market analysis, the organization and its team, the roadmap, conditions and technical aspects of the ICO, the number, use, functionality and distribution of the tokens and when they are issued, how the raised funds are going to be used as well as a disclaimer and compliance aspects.

<sup>2</sup> Figures according to <https://www.coindesk.com/ico-tracker>. Similar figures contained in Initial Coin Offerings. A strategic perspective. PwC in collaboration with Crypto Valley, June 2018 Edition, p. 2. Calculations based on currency exchange rates on end date of the ICOs.

<sup>3</sup> ETH Zurich is the Swiss Federal Institute of Technology in Zurich, EPFL the Swiss Federal Institute of Technology in Lausanne and HSG the University of St.Gallen in St.Gallen.





# Incorporating New Approach to Corporations

■ Robert L. BROWN

Across disciplines, the maxim has been corporations exist to increase profits and shareholder value.

The management wants to maximize its income; the stockholders want to maximize the value of the stock. (Roy Ruffin, Paul Gregory, *Principles of Economics*, 7<sup>th</sup> ed., p. 149).

Maximizing Shareholder Worth as the Primary Goal... The most widely accepted objective of the firm is to maximize the value of the firm for its owners, that is, to maximize shareholder wealth. (R. Charles Moyer, et. al., *Contemporary Financial Management*, 10<sup>th</sup> ed., p. 8).

This approach has been confirmed by the courts.

Stockholders are the only corporate constituency with power under our prevailing system of corporate governance. (Leo Strine, Corporate power is corporate purpose: Evidence from my hometown, *Oxford Review of Economic Policy*, 33(2), 176-87 (2017).

This emphasis on profits and value can be traced to Milton Friedman. "The social responsibility of business is to increase its profits" (*New York Times Magazine*, September 13, 1970), and "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game..." (*Capitalism and Freedom*, 1962).

Some writers have challenged this view from a public policy and societal viewpoint. Colin Mayer, former Dean of Saïd Business School at Oxford University poses a more comprehensive challenge to Friedman doctrine in his new book, *Prosperity* (2018).

The starting point is to recognize that the Friedman doctrine is not a law of nature, and in fact begs the question. Since successful corporations earn profits and increase value, to state that the

"purpose of a corporation is to make money or increase value" is to write that "its purpose is to fulfil its purpose of making money and increasing value" – its purpose is its purpose. (*Prosperity*, 6) Besides being circular in thinking, this is a bit tautological.

Even more, it is wrong. "This simply does not work... Profit is not a purpose any more than the pursuit of happiness is a purpose of mankind. Indeed profit maximization is as unlikely to create wealth as hedonism is to achieve happiness." (*Prosperity*, 9). A more accurate description of a corporation's purpose would be to produce products or services that solve customers' pain points (*Prosperity*, 118), and in the process to make money. The profits are per se not the purpose. (*Prosperity*, 109)

The Friedman doctrine is also out of date. Corporations have evolved significantly over the past 50 years since he first proposed his approach, but the Friedman perception of them has not. Consider these factors. The number of companies listed on major stock exchanges is falling (from more than 2,000 on the London Stock Exchange in 2000 to less than 1,000 in 2018). The number of public corporations in the US dropped by 38% from 1987 to 2012. (*Prosperity*, 101) The reason for this decline is that debt is a more important source of funding than equity markets. And, 85% of the market value of US corporations is intangibles. (*Prosperity*, 31, 190)

More importantly, the focus on shareholders was appropriate when they were providing the scarce resource. That is no longer the case. Equity is increasingly abundant.



In the new age of corporations, the scarce resource will be human, intellectual, natural and social capital. (*Prosperity*, 224). According to UNESCO, this is already happening. Only 32% of the world's capital is attributable to produced capital. Human capital is much more important at 55%, with 13% from natural capital. (*Inclusive Wealth Report*, 2014; *Prosperity*, 10) This will shift the control to the new group providing scarce materials – employees, entrepreneurs and society.

Some of this incorrect emphasis on profits and value is based on a misunderstanding of the corporation. It is not based on mere contracts, but on its nexus of relations and those relations are based on trust, which is in turn based on commitment. (*Prosperity*, 39) Additionally, corporations do not necessarily survive because they are the fittest and defeat competition. The most successful ones are based on cooperation, not elimination. Even in biology, the neo-Darwinist view has increasingly been challenged. (*Prosperity*, 47). Similarly, in negotiation studies have shown the integrative approach is more likely to produce greater returns than distributive approach. (*Expanding the Pie: Integrative versus Distributive Bargaining Negotiation Strategies*, Harvard Law School, Program on Negotiation).

In their present structure and approach, corporations find it difficult to create new (versus improve) products. Capital markets generally lack patience to allow new products to develop. Henry Ford may be the best example, since his first two attempts to create the Ford automobile failed due to shareholder impatience. He only succeeded on his third try because he retained control. Corporations have tried to support 'intrapreneurship', but have generally not been successful for this reason. Start-up companies controlled by founders, family firms, dual-class ownership (where founders retain control such as Google) and industrial foundations have been more successful in fostering new product creation.

Another problem facing present corporations is the emphasis on protecting minority rights. This has had the unintended consequence of undercutting the role of majority stockholders, who may be more inclined to take a long-term view. (*Prosperity*, 104)

Another failure of present corporations is their inability to internalize their externalities (*Prosperity*, 144). A corporation that only records revenues less expense does not record the effect on its sustainability or on

others. For instance, there is no indication if a company is depleting resources that it harvests at a rate in excess of their renewal. (*Prosperity*, 132) Similarly, since it does not bear costs imposed on others (such as pollution), its costs are lower and it produces more of the product/service and causes more harm. This causes the corporation to misallocate its resources to producing the wrong products/services. Under the new model, a corporation would have to measure and include the restoration cost (versus the decreased value, which would be a more difficult measure). (*Prosperity*, 138)

When *An Inquiry into the Nature and Causes of the Wealth of Nations* by Adam Smith was published in 1776, did readers realize they had just read a book that would transform the attitudes, approaches and perspectives of economics? Similarly, will readers of *Prosperity* by Colin Mayer realize they just read a book that will transform the attitudes and perspectives of corporations.

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# AI, Robots and Ethical Considerations for Lawyers

I Steven M. RICHMAN

## I. Introduction

Artificial intelligence (or “AI”) in the legal domain encompasses the simple to the complex, from advanced word search programming to quasi-adjudication and outcome prediction. Traditional legal work in the area of due diligence can be handled in meaningful ways by technology. For now, though, artificial intelligence remains at the service of lawyers, implicating traditional rules of professional responsibility. These include supervision, maintenance of client confidentiality, competence and diligence, among others.

From technology standpoint, AI covers a broad spectrum that does not lend itself to an easy definition. On one end of the spectrum, artificial intelligence covers what to many are simply straightforward computer programming, such as word searches in documents. A broad portion of the AI technological spectrum covers “simple” automation, such as word searches; self-teaching programs: correcting mistakes and improving; creative responsiveness: making connections, suggesting lines of research; programmed logic tree responses; and affirmative “deep learning” and initiation. This later range of the AI spectrum is arguably of most consequence to lawyers. At the other end of the spectrum are archetypical robots that are “programmed” to respond to questions and at the same time, demonstrate certain personality traits.

While AI’s technological scope remains evolving and elusive, the use of the term has been attributed to John McCarthy who coined the term in the mid 1950s, and its bedrock technological definition and principle. Essentially, artificial intelligence refers to application of software that mimics human intelligence to perform tasks normally performed by people. It is not just “rote” application. Examples of this range from reading natural language, predicting outcomes of various problems, recognizing images, and driving cars.

Reference to “machine learning,” a phrase attributed to Arthur Samuel in 1959, means that the machine can teach itself and learn without human programming intervention. As Calum McClelland explains in *The Difference Between Artificial Intelligence, Machine Learning, and Deep Learning* on medium.com, we speak of “deep learning” to delineate a type of machine learning that effectively mimics human brain activity, with algorithms functioning in the same way that neural networks of the brain function. While terminology such as “machine” or “robot” or “computer” or “software” is widely used in varying contexts, the fundamental notion remains the same: technology (i.e. non-human) mimicking human attributes, including self-teaching.

This article explores the professional ethics considerations of attorneys in dealing with artificial intelligence in its various components.

backgammon program, GNU Backgammon, which provides a challenging experience. Backgammon depends on the role of the dice but is also heavily dependent upon strategy and playing the odds. In tutorial mode, it will rank your proposed move based on the probability of what that move will achieve. Often it will suggest as the best move one that puts your piece at risk as opposed to a safer move, with the idea that that former move allows for better subsequent moves. If you make a different move, it will tell you the move is bad. At the end of the game, you may be ranked a superb player because you made the best moves based on probability, but still, have lost the game. On the contrary, you can rely on instinct, take a chance and win, or make a sound ethical judgment and not based on probabilities and still involving risk. If the risk materialized notwithstanding sound and professional legal judgment, one may still be relegated to the bottom of the professional

Will we see robots preparing deposition outlines and anticipated answers based on aggregation of documents?

## II. Capacities and Limitations of Artificial Intelligence

Perhaps one of the most intriguing examples of artificial intelligence employing deep learning is the AlphaZero chess program, that taught itself to play chess in four hours, and the Google program DeepMind that taught itself the game of Go; both were able to beat human champions. Essentially, AlphaZero made the game its own and came up with its own moves. However, there are physical limitations. It has been reported that hand-eye coordination can cause problems. Certain industrial robots lack sufficient sensitivity for control, such as the ability to pack a bento box.

There are also questions of instinct or “gut.” There is an excellent open source

ladder as a consequence. This represents one of the fundamental challenges of artificial intelligence: factoring in probability versus instinct. The new Google chess program that taught itself and beat a traditional chess program shows the impact of this.

Related to this is the increasing use and availability of predictive software. One that has achieved significant attention is that of Micolao Aletras, *et al*, titled *Predicting Judicial Decisions of the European Court of Human Rights: a Natural Language Processing Perspective*. This study, using 584 cases of the European Court of Justice relating to three separate articles of the Declaration of Human Rights Convention, achieved a 79% accuracy using “binary classification task where the input of our classifiers is the textual content extracted from a case and

the target output is the actual judgment as to whether there has been a violation of an article of the convention of human rights.” If the generally accepted statistic is that about a third of all current cases on appeal get reversed, does that mean that computer predictive software makes a better trial judge, with a record of 79% affirmance versus 67%?

Another example of a prediction study is Arditi and Pulket, Predicting the Outcome of Construction Litigation Using an Integrated Artificial Intelligence Model (2009): Using 132 Illinois circuit court cases between 1992 and 2000, it obtained 91.15% prediction rate with integrated prediction model (IPM), utilizing data consolidation, attribute selection, prediction using hybrid classifiers and assessment.

Will artificial intelligence develop to a point where “instinct” can be factored in and a non-probability assessment still have a place?

### III. Practical Uses of Artificial Intelligence

Artificial intelligence is being used in the practice of law in a variety of ways, including due diligence and discovery/document review, assessing privilege issues, aggregate existing opinions and case prediction. As such concerns have been raised as to whether there is a loss of attorney jobs or a liberation of attorneys from drudgery and permitting them to function at higher levels. Related to this is a concern about a loss of training for younger or new lawyers, particularly in the fundamentals of practice of law. Some have argued that artificial intelligence helps level the playing field, by affording smaller law firms the tools and resources of larger firms. On the other hand, the cost of state of the art artificial intelligence programming may have the opposite effect, and preclude certain advantages to firms that cannot afford it. Consider for example IBM’s Watson and its services geared to the legal industry – the so-called “lawtech” suite of services and enterprise solutions – initially afforded, and utilized primarily, by a certain so-called “big-law” firms. Regardless, a lawyer’s need for competence and diligence requires a rudimentary understanding of what is available and what it does.

Another practical aspect is to consider the impact on intangibles of practice, such as a need or desire for human interacting and “hand-holding” functions with clients. A robot sitting at a reception desk may be able to take in information, as credit card and airline companies do by phone, but it may be off-putting to clients. The so-called chat-bots dispensing legal advice or drawing up wills cannot fulfill that need. The same may be said for robots interacting as paralegals. On the other hand, robots may be useful as “explainers” and “navigators.” Should human lawyers still do tedious tasks to understand them?

Programs gaining in popularity include due diligence programs, such as eBrevia, Luminance and Kira Systems, and case predictive and analysis programs such as ROSS intelligence.

technology... ” While artificial intelligence can be useful, it might also be expensive, and the lawyer needs to discuss with the client, under ABA Model Rule 1.2 (allocation of authority) its use in achieving the client’s objectives. If the client mandates use of an artificial intelligence product that the lawyer finds suspect, the rules discuss the need of a lawyer and client to talk about the issue, but there are no definitive rules for resolution. Ultimately if the lawyer believes forced use of artificial intelligence product and reliance on its result impedes lawyer’s ability to represent a client, a lawyer may need to withdraw.

On the other hand, in ABA Model Rule 1.3, relating to diligence, the comments make clear that “[a] lawyer is not bound, however, to press for every advantage that might be realized for a client.” If the lawyer knows that use of a particular artificial intelligence

Confidentiality of Information [...]. This is particularly relevant to the extent that the use of AI implicates who is using, who sees raw data, results, who has access, what steps taken to protect information.

Will we see robot receptionists and paralegals handling client intake, like airline and credit card companies? Will we see robots preparing deposition outlines and anticipated answers based on aggregation of documents? Or robots that combine lie-detector technology to “read” witnesses and provide instant feedback?

### IV. Ethical v Malpractice Issues

The basic principles and rules of professional conduct remain the same. Lawyers remain ethically required under relevant rules of professional conduct to be competent, exercise diligence and reasonable supervision over other lawyers or non-lawyers to ensure compliance with ethical rules, communicate with their clients over the advantages and disadvantages of artificial intelligence. With certain AI involving shared usage, or cloud storage, the same type of care must be taken as with other off-site usage or storage to protect confidentiality, intellectual property rights and supervisions.

The ABA Model Rule 1.1, on competence, requires that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant

application can provide an advantage, such as more efficient document review or effective case prediction, the lawyer is not necessarily obligated to use it. Not every advantage needs to be used, but this must be read in conjunction with the obligation to communicate with a client (Rule 1.4).

The obligation of communication, set forth in ABA Model Rule 1.4: Communication, is critical, since the lawyer must inform the client of any decision or circumstance requiring the client’s informed consent, and consult with the client as to how to achieve the objectives. Cost of artificial intelligence and whether it is appropriate should be discussed, particularly if the client is to be charged for it. On the other hand, integration of artificial intelligence into the basic retinue of a lawyer’s toolkit, provided the lawyer knows how to use it and oversees it, does not necessarily do that level.

This raises the open question that relates to billing. Is the cost of licensing a program or otherwise acquiring hardware that embodies artificial intelligence considered overhead or something that can be passed on to the client? Under ABA Model Rule 1.5: Fees,

the reasonableness of fees are a function of time and labor required, among other things. Similarly, there is no hard and fast rule on the choice of vendors: client input versus lawyer decision. It may be closer to the considerations relating to outsourcing.

ABA Model Rule 1.5 addresses the fee issue and is a function of reasonableness and communication with client. But how do you charge for artificial intelligence? Or is it absorbed as overhead? According to ABA Formal Opinion 93-379 12.6.1993, lawyers are obliged to (1) disclose the basis for a fee at outset of engagement and (2) reasonably explain fees and costs in statements issued. There can be no false or misleading communications. Billing statements must adequately apprise clients as to how the basis of billing is applied. While most federal courts have held that computer research costs are overhead, some have allowed recovery of such charges as time savers. Artificial intelligence may well fit there. But to be sure, it remains paramount that the lawyer communicates with the client

Under ABA Model Rule 1.6: Confidentiality of Information, there must be "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to

the representation of a client." This is particularly relevant to the extent that the use of AI implicates who is using, who sees raw data, results, who has access, what steps are taken to protect information.

Above all, use of artificial intelligence requires the lawyer as supervisor under ABA Model Rules 5.1 and 5.3 (lawyer and nonlawyer assistance) to make sure that those supervising have requisite managerial authority to ensure reasonable efforts to comport with the rules of professional conduct; they have responsibility for breaches if such reasonable systems and enforcement mechanisms, and remedial measures, are not in place.

Another rule that has come up is ABA Model Rule 5.5, relating to unauthorized practice of law. It has also been suggested in some quarters that the use of software in can implicate issues regarding the unauthorized practice of law. For example, Texas by statute excludes from unauthorized practice, software creation and use as long as states clearly not substitute for advice of counsel. North Carolina has addressed the issue in connection with online form preparation.

## V. Smart Contracts

Smart contracts are not to be confused with forms or programs that generate

possible contracts for lawyers to review. The latter encompasses software that selects relevant clauses from a database, or possibly creates a clause, and presents the document for attorney review. The former is essentially like a vending machine, as explained by computer scientist Nick Szabo, which primarily depends upon literal satisfaction of terms that are coded, and effectuates a simultaneous implementation of the contract terms:

Essentially, as I've seen it explained, the bitcoin is like the quarter, the smart contract like the slot machine, and the blockchain like the casino. Blockchain: facilitates smart contracts, like an operating system for data.

Several issues arise. First, the principally touted advantage is to eliminate the uncertainty or margin of risk by having middle persons. On the other hand, there may be business reasons for not wanting automatic enforcement. Also, smart contracts cannot necessarily handle non-monetary issues of compliance, particularly where subjective elements are involved.

## VI. Impact on the legal profession

One view asserts that jobs will be lost. Another asserts that lawyers will be liberated. There is a question as to a lawyer's training; while tedious, a lawyer benefits from knowing how to do a large document review so the lawyer can evaluate the end product if done by artificial intelligence. Anecdotally, I've been told of law firms that have tested due diligence software against their attorneys, and the speed and accuracy rates of the former are compelling and often better. As with all technologies, there will be a need to adapt.

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## FEBRUARY - FÉVRIER - FEBRERO



L'importance de la Cour européenne des droits de l'homme dans le droit des affaires  
MONACO – PRINCIPAUTÉ DE MONACO (FR)



Digital Economy & The Law  
NEW DELHI – INDIA (EN)

## MARCH - MARS - MARZO



26<sup>th</sup> UIA World Forum of Mediation Centres  
ZURICH – SWITZERLAND (EN)



Combating Counterfeiting and other IP Rights Infringements  
CAPE TOWN – SOUTH AFRICA (EN)



Doing Business in and with the Emerging Markets – How to Hedge the Various Risks in Asia and other Regions  
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14<sup>th</sup> UIA Winter Seminar  
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Mediation as Instrument of Modern Justice  
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Répression des crimes transnationaux  
*Crackdown on Transnational Crimes*  
PORT-AU-PRINCE – HAÏTI (FR) (EN)



Drafting International Contracts – Traps and Traps  
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The Death of a Transaction  
LONDON – UNITED KINGDOM (EN)

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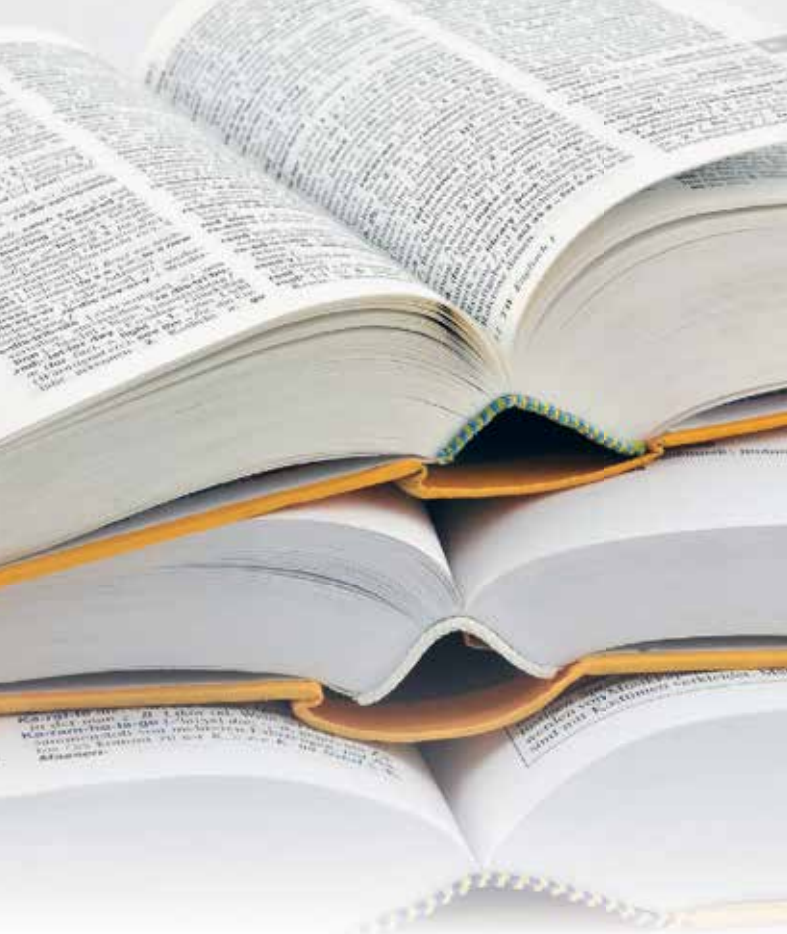


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