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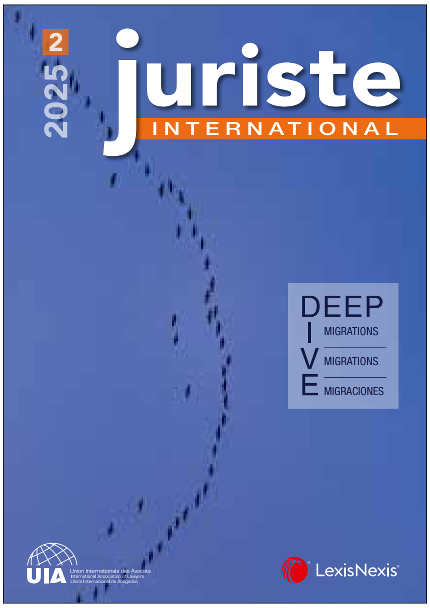

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Carlo **Mastellone**

PRESIDENT'S MESSAGE

I must congratulate the Chief Editor and the Editorial Team of the *Juriste* for dedicating this issue to the topic of migrations. I am proud that the Executive Committee and the Governing Board of the UIA have approved the *Basic Principles on the Treatment and Status of Migrants* (an augmented version of the *Basic Principles on the Status of Refugees*), carefully drafted by the leaders of the UIA Immigration Commission (Clayton Cartwright, Hervé N. Linder and Matthew Wills) and their team.

The *Basic Principles* (together with the *Dispute Prevention and Resolution* document) will be submitted to the General Assembly in Guadalajara and deal not only with the rights of asylum seekers and refugees, but all migrants regardless of their status. The Principles call for human rights-based migration governance at global and national levels, affirm migrants' rights in compliance with international law and the rule of law, outline the need for tailored provisions and support to be provided for women and girls and address the obligations of States and responsibility of lawyers in protecting and defending the rights of migrants at risk of discrimination, exploitation and marginalisation.

LE MOT DU PRÉSIDENT

Je tiens à féliciter la Rédactrice en chef ainsi que l'équipe éditoriale du *Juriste* pour avoir consacré ce numéro au thème des migrations. Je suis fier que le Comité de Direction et le Conseil de Présidence de l'UIA aient approuvé les Principes fondamentaux relatifs au traitement et au statut des migrants (version enrichie des Principes fondamentaux sur le statut des réfugiés), soigneusement rédigés par les responsables de la commission Droit de l'Immigration de l'UIA (Clayton Cartwright, Hervé N. Linder et Matthew Wills) et leur équipe.

Les Principes fondamentaux (accompagnés du document sur la prévention et la résolution des litiges) seront présentés à l'Assemblée générale de Guadalajara. Ils traitent, non seulement des droits des demandeurs d'asile et des réfugiés, mais également de ceux de tous les migrants, quel que soit leur statut. Ces Principes appellent à une gouvernance des migrations fondée sur les droits humains aux niveaux mondial et national, affirment les droits des migrants en conformité avec le droit international et l'état de droit, soulignent la nécessité de dispositions spécifiques et de soutiens adaptés pour les femmes et les filles, et abordent les obligations des États ainsi que la responsabilité des avocats dans la protection et la défense des droits des migrants exposés à la discrimination, à l'exploitation et à la marginalisation.

MENSAJE DEL PRESIDENTE

Quiero felicitar a la Redactora Jefa y al equipo editorial de*l Juriste* por haber dedicado este número al tema de las migraciones. Me enorgullece que el Comité de Dirección y el Consejo de Presidencia de la UIA hayan aprobado los Principios Básicos sobre el Trato y el Estatus de los Migrantes (una versión ampliada de los Principios Básicos sobre el Estatus de los Refugiados), cuidadosamente redactados por los líderes de la Comisión de Inmigración de la UIA (Clayton Cartwright, Hervé N. Linder y Matthew Wills) y su equipo.

Los Principios Básicos (junto con el documento sobre Prevención y Resolución de Conflictos) serán presentados ante la Asamblea General en Guadalajara y abordan no solo los derechos de los solicitantes de asilo y los refugiados, sino de todos los migrantes, independientemente de su estatus. Los Principios hacen un llamado a una gobernanza migratoria basada en los derechos humanos a nivel mundial y nacional, afirman los derechos de los migrantes conforme al derecho internacional y al Estado de derecho, subrayan la necesidad de disposiciones y apoyos específicos para mujeres y niñas, y abordan las obligaciones de los Estados y la responsabilidad de los abogados en la protección y defensa de los derechos de los migrantes en situación de riesgo de discriminación, explotación y marginación.

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Barbara **Gislason**

EDITORIAL

Human beings value the rule of law for the stability and certainty it provides, protecting how we live and earn a living. Many core legal principles originated in ancient religious texts and codes emphasizing human primacy over other life, a tradition continued through Imperial Legal Codes, Roman Law, and the Napoleonic Code.

The rule of law's quality developed, influenced by lawmakers' experience, knowledge, wisdom, honesty, and judicial officers' impartiality. Legal systems differed on protecting the weak, promoting equality, or benefiting the rich. However, when political shifts sacrifice the rule of law to powerful self-interests, its legitimacy and effectiveness are undermined, causing widespread instability and uncertainty.

Literature has grappled with the rule of law, like in the Sherlock Holmes series where justice often precedes strict legal application. Other significant works exploring justice and rule of law themes include Victor Hugo's *Les Misérables*, Alan Moore's *Batman: The Killing Joke*, Stieg Larson's *The Girl with the Dragon Tattoo*, Colson Whitehead's *The Underground Railroad*, and Raju Mukherjee's *Flesh and Blood*.

Justice, in its varied forms, including environmental, animal, social, economic, and global justice, highlights the interconnectedness of human and animal rights and interests. These universal concepts are shaped by morality, ethics, dignity, and science, as research reveals our shared traits: genetic commonality, emotional/cognitive capacity, problem-solving, communication skills, and social structures.

But as the wheel of time turns and climate change and more advanced technology is upon us, is it possible that other lifeforms could benefit us in unexpected ways? Consider how bees cooperate and adapt, or octopi problem solve with both a centralized brain and eight "mini brains" in their arms. Ancient trees stand as a timeless testament to ecological resilience.

Are humans too envious of other life's complexity to acknowledge that non-humans are not merely resources, but essential partners in our shared survival? This perspective challenges us to extend the principles of the rule of law and advanced justice to non-human life, recognizing their intrinsic value and right to exist within a balanced ecosystem.

As we stand on the brink of learning to truly communicate with other species – an achievement that would surely make Hugh Lofting, the creator of Dr. Dolittle, proud – we will also begin to uncover the limitations of our current legal frameworks and take vital steps toward a more inclusive and universal vision of justice.

L'ÉDITO

Les êtres humains accordent de la valeur à l'État de droit pour la stabilité et la certitude qu'il procure, protégeant ainsi notre mode de vie et nos moyens de subsistance. De nombreux principes juridiques fondamentaux trouvent leur origine dans d'anciens textes religieux et codes soulignant la primauté de l'humain sur les autres formes de vie, une tradition perpétuée à travers les Codes impériaux, le Droit romain et le Code napoléonien.

La qualité de l'État de droit s'est développée sous l'influence de l'expérience, des connaissances, de la sagesse et de l'honnêteté des législateurs, ainsi que de l'impartialité des magistrats. Les systèmes juridiques ont divergé quant à leur volonté de protéger les faibles, de promouvoir l'égalité ou de favoriser les riches. Cependant, lorsque des bouleversements politiques sacrifient l'État de droit au profit d'intérêts puissants et égoïstes, sa légitimité et son efficacité sont sapées, provoquant une instabilité et une incertitude généralisées.

La littérature s'est penchée sur la question de l'État de droit, comme dans la série des *Sherlock Holmes*, où la justice précède souvent l'application stricte du droit. D'autres œuvres majeures explorant les thèmes de la justice et de l'État de droit incluent *Les Misérables* de Victor Hugo, *Batman : The Killing Joke* d'Alan Moore, *Millénium : Les hommes qui n'aimaient pas les femmes* de Stieg Larsson, *Underground Railroad* de Colson Whitehead et *Flesh and Blood* de Raju Mukherjee.

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"As we stand on the brink of learning to truly communicate with other species, we will also begin to uncover the limitations of our current legal frameworks and take vital steps toward a more inclusive and universal vision of justice."

La justice, sous ses nombreuses formes – environnementale, animale, sociale, économique et mondiale – met en lumière l'interconnexion entre les droits et intérêts humains et non humains. Ces concepts universels sont façonnés par la morale, l'éthique, la dignité et la science, car la recherche révèle nos traits communs : similarité génétique, capacités émotionnelles et cognitives, aptitude à résoudre des problèmes, compétences en communication et structures sociales.

Mais alors que tourne la roue du temps, que les changements climatiques s'intensifient et que les technologies progressent, est-il possible que d'autres formes de vie puissent nous être utiles de manière inattendue ? Pensons à la coopération et à l'adaptabilité des abeilles, ou encore à la capacité des pieuvres à résoudre des problèmes grâce à un cerveau central et huit « mini-cerveaux » dans leurs tentacules. Les arbres millénaires restent un témoignage intemporel de résilience écologique.

Les humains sont-ils trop envieux de la complexité du vivant pour reconnaître que les non-humains ne sont pas de simples ressources, mais des partenaires essentiels à notre survie commune ? Cette perspective nous pousse à élargir les principes de l'État de droit et d'une justice évoluée à la vie non humaine, en reconnaissant sa valeur intrinsèque et son droit à exister dans un écosystème équilibré.

Alors que nous nous apprêtons à réellement apprendre à communiquer avec d'autres espèces – une réalisation qui rendrait sans doute fier Hugh Lofting, le créateur du *Docteur Dolittle* – nous commencerons aussi à percevoir les limites de nos cadres juridiques actuels et à franchir des étapes cruciales vers une vision de la justice plus inclusive et universelle.

➘ EDITORIAL

Los seres humanos valoran el estado de derecho por la estabilidad y certeza que proporciona, protegiendo la manera en que vivimos y ganamos nuestro sustento. Muchos de los principios jurídicos fundamentales se originaron en antiguos textos y códigos religiosos que enfatizaban la primacía humana sobre otras formas de vida, una tradición continuada a través de los Códigos Legales Imperiales, el Derecho Romano y el Código Napoleónico.

La calidad del estado de derecho se desarrolló influenciada por la experiencia, el conocimiento, la sabiduría, la honestidad de los legisladores y la imparcialidad de los jueces. Los sistemas legales variaban en cuanto a la protección de los débiles, la promoción de la igualdad o el beneficio de los ricos. Sin embargo, cuando los cambios políticos sacrifican el estado de derecho en favor de poderosos intereses personales, su legitimidad y eficacia se ven socavadas, provocando una gran inestabilidad e incertidumbre.

La literatura ha abordado el tema del estado de derecho, como en la serie de Sherlock Holmes, donde la justicia a menudo precede a la estricta aplicación legal. Otras obras importantes que exploran temas de justicia y estado de derecho incluyen *Los Miserables* de Victor Hugo, *Batman: La broma asesina* de Alan Moore, *Los hombres que no amaban a las mujeres* de Stieg Larsson, *El ferrocarril subterráneo* de Colson Whitehead y *Flesh and Blood* de Raju Mukherjee.

La justicia, en sus variadas formas – incluyendo la justicia ambiental, animal, social, económica y global – resalta la interconexión entre los derechos e intereses humanos y animales. Estos conceptos universales están moldeados por la moralidad, la ética, la dignidad y la ciencia, ya que la investigación revela nuestros rasgos compartidos: la similitud genética, la capacidad emocional y cognitiva, la resolución de problemas, las habilidades comunicativas y las estructuras sociales.

Pero, a medida que gira la rueda del tiempo y nos enfrentamos al cambio climático y tecnologías más avanzadas, ¿es posible que otras formas de vida puedan beneficiarnos de maneras inesperadas? Consideremos cómo cooperan y se adaptan las abejas, o cómo los pulpos resuelven problemas con un cerebro centralizado y ocho "mini cerebros" en sus brazos. Los árboles milenarios son un testimonio atemporal de la resiliencia ecológica.

¿Somos los humanos demasiado envidiosos de la complejidad de otras formas de vida como para reconocer que los no humanos no son simplemente recursos, sino socios esenciales en nuestra supervivencia compartida? Esta perspectiva nos desafía a extender los principios del estado de derecho y la justicia avanzada a la vida no humana, reconociendo su valor intrínseco y su derecho a existir dentro de un ecosistema equilibrado.

Al estar al borde de aprender a comunicarnos verdaderamente con otras especies – un logro que, sin duda, enorgullecería a Hugh Lofting, el creador del Dr. Dolittle – también comenzaremos a descubrir las limitaciones de nuestros marcos legales actuales y a dar pasos fundamentales hacia una visión de justicia más inclusiva y universal.

Regards croisés : **avocat et juge face au contentieux de l'asile**

AGATHE BLANC

FANNIE BRUNEAU

Interviews with a magistrate and a lawyer shed light on the role of the CNDA, France's asylum court. The court ruled on over 61,000 appeals in 2024, granting protection in 21.3% of cases. Faced with complex human situations, judges, lawyers and auxiliaries strive to ensure fair treatment, despite short deadlines and vulnerability of applicants. Doubts are omnipresent, requiring rigor and empathy. While the CNDA remains legally independent, the geopolitical context inevitably influences its interpretation of the law. The human element, at the heart of this litigation, guides the actions of all those involved.

Entrevistas con un magistrado y un abogado ponen de relieve el papel de la CNDA, el tribunal de asilo francés. El tribunal resolvió más de 61.000 recursos en 2024, concediendo protección en el 21,3% de los casos. Enfrentados a situaciones humanas complejas, jueces, abogados y personal de apoyo se esfuerzan por garantizar que las solicitudes de asilo se tramiten con equidad, a pesar de la brevedad de los plazos y la vulnerabilidad de los solicitantes. Las dudas son omnipresentes y exigen rigor y empatía. Aunque la CNDA sigue siendo jurídicamente independiente, el contexto geopolítico influye inevitablemente en su interpretación de la ley. El elemento humano, en el centro de este litigio, guía la actuación de todos los implicados.

En 2024, la Cour nationale du droit d'asile (CNDA) a rendu 61 593 décisions. La Cour a accordé une protection dans 21,3 % des recours sur lesquels elle s'est prononcée.

Parmi les pays qui bénéficient des taux de protection les plus élevés figurent Haïti, le Soudan, l'Ethiopie, la Syrie, l'Iran, la Somalie, Djibouti, l'Ukraine, la Centrafrique et le Burkina Faso.

La Cour nationale du droit d'asile a la lourde charge d'appréhender d'un point de vue juridique des situations humaines complexes tout en faisant face à une grande vulnérabilité. Adaptant constamment sa position à la réalité géopolitique, cette juridiction mobilise des équipes pour faire face aux défis mondiaux. Pour cela un monde judiciaire se met au service des requérants : des juges professionnels, des juges assesseurs, non professionnels, des interprètes, des rapporteurs, non juges, qui instruisent les dossiers, des greffiers, du personnel assurant la sécurité et l'accueil, et aussi les avocats.

Tous ces acteurs participent à une œuvre de justice, offrant aux requérants un espace pour exposer les raisons de leur exil et partager leurs craintes en cas de retour dans leur pays d'origine.

Pour mieux comprendre les spécificités de ce contentieux, nous avons interrogé Monsieur Thurian Jouno, président de formation de jugement à la Cour nationale du droit d'asile, qui s'exprime à titre strictement personnel, et Madame Justine Mallet, avocate aux barreaux de Paris et de Montpellier.

1. Pourquoi avoir choisi ce contentieux ?

Magistrat : En 2020, j'étais magistrat en cour administrative d'appel. Je traitais de contentieux techniques (marchés publics, fiscalité, notamment). J'ai ressenti le besoin de réintroduire une dimension humaine dans ma pratique, mais aussi de me confronter à des questions plus géopolitiques. C'est ce qui m'a conduit à la CNDA, où j'ai d'abord exercé les fonctions de président de chambre.

Alors qu'un juge rapporteur en cour administrative d'appel prépare ses dossiers, dans une large mesure, de manière solitaire, la CNDA fonctionne de manière beaucoup plus collective, avec des équipes diversifiées : des juges professionnels, mais aussi des juges non professionnels issus de profils variés (universitaires, anciens membre de la haute administration, membres d'ONG), des rapporteurs, les équipes de services centraux de la Cour, etc. L'interaction avec les auxiliaires de justice est aussi une dimension humaine essentielle.

Avocat : Je n'ai pas vraiment choisi le droit d'asile directement. Venant du contentieux du séjour, je croyais à tort qu'il fallait être experte en géopolitique pour pratiquer l'asile. Cependant, j'ai compris qu'il s'agissait surtout d'être une bonne enquêtrice. Structurer un récit et permettre au requérant de s'exprimer au mieux sont au cœur de cette spécialité.

Aujourd'hui, je consacre environ 60 % de mon temps au droit d'asile et 40 % au contentieux du séjour. Le bouche-à-oreille fonctionne très bien dans les centres d'accueil pour les demandeurs d'asile (CADA) : quand ton nom circule positivement, on te recommande. Financièrement, cela peut être complexe, l'aide juridictionnelle (AJ) et les forfaits de représentation (FIR) rendent cette pratique viable.

Au départ, je choisissais des dossiers que je considérais comme «plus simples», comme les mariages forcés. Je n'osais pas prendre des dossiers afghans ou soudanais. Ironiquement, ce sont souvent les plus documentés, donc parfois plus faciles à plaider, surtout si la personne est bien intégrée ou occidentalisée. À l'inverse, les situations les plus complexes sont souvent celles où tout repose sur la parole : des récits de femmes mariées très jeunes, traumatisées, avec peu ou pas de preuves. Il faut d'abord réussir à les faire parler, ce qui peut être un vrai défi.

2. Quelles sont les principales difficultés de ce contentieux ?

Magistrat : Les défis principaux tiennent à ses aspects humains et à l'incertitude, qui est une dimension essentielle du contentieux de l'asile. Globalement, ce contentieux demande de s'appuyer sur la crédibilité plutôt que sur des éléments parfaitement établis, ce qui peut être déstabilisant. Mais, la spécialisation géographique des formations de jugement permet à celles-ci d'avoir une véritable expertise thématique, ce qui est un élément déterminant pour apprécier la crédibilité des récits d'asile.

Avocat : La première difficulté, c'est de trouver le bon équilibre émotionnel afin de ne pas être submergée par la détresse du client, tout en restant attentive.

La deuxième difficulté, ce sont les délais très courts : après un rejet de l'Office Français de Protection des Réfugiés et Apatrides (OFPRA), il faut saisir la CNDA dans un délai d'un mois, dont seulement 15 jours pour l'AJ. On ne connaît pas toujours à l'avance la date de l'audience, ce qui ajoute du stress.

Alors qu'un juge rapporteur en cour administrative d'appel prépare ses dossiers, dans une large mesure, de manière solitaire, la CNDA fonctionne de manière beaucoup plus collective […].

Dans ce laps de temps, il faut créer une relation de confiance, obtenir des pièces, organiser des rendez-vous avec médecins ou psychologues, ce qui est d'autant plus compliqué en région. À Montpellier, par exemple, il faut attendre neuf mois pour un rendez-vous en médecine légale. Et les renvois sont difficiles à obtenir.

3. Comment vous préparez-vous juridiquement et géopolitiquement ?

Magistrat : À la CNDA, comme je l'ai dit, chaque chambre est spécialisée géographiquement. Certains pays nécessitent une chambre dédiée. Ce fut le cas de l'Afghanistan, notamment avant l'arrivée des talibans. C'est le cas à ce jour, par exemple, de l'Éthiopie, de la Colombie, ou bien encore de l'Irak et de tant d'autres pays.

La préparation repose sur plusieurs éléments :

- L'étude minutieuse des pièces versées par l'OFPRA et par le requérant.
- L'analyse des comptes rendus d'entretien réalisés par l'OFPRA.
- Un travail collectif avec le rapporteur chargé de l'instruction.
- Une formation interne de haut niveau, assurée par les magistrats permanents et/ou par le centre de recherche interne à la Cour (le CEREDOC), qui produit des analyses pays et répond aussi à des questions ciblées des rapporteurs.
- Le recours à des bases de données juridiques.

Avocat : Je commence toujours par rechercher la jurisprudence rendue sur le pays concerné. Par exemple, pour une cliente ivoirienne, je vais chercher s'il existe un groupe social reconnu. La CNDA publie des décisions très bien motivées et documentées.

Je travaille systématiquement en présentiel, dans un cabinet chaleureux, très «cosy», que j'ai conçu pour mettre les clients à l'aise.

Ensuite, je consulte le site de la CNDA et les bases de données géopolitiques. Je fais aussi partie de réseaux d'avocats où l'on échange la jurisprudence. Si je n'ai rien, je n'hésite pas à utiliser des outils d'IA – pour des sujets comme la sorcellerie, par exemple – tout en demandant systématiquement les sources citées.

4. Comment appréhendez-vous la vulnérabilité des requérants ?

Magistrat : La vulnérabilité est un enjeu essentiel. On essaie de l'évaluer, avant audience, sur la base des documents versés au dossier, et notamment des pièces, notamment médicales, produites par le requérant, et aussi au vu des réponses qu'il ou elle a apportées devant l'autorité administrative, l'OFPRA, durant l'entretien dont il/elle a bénéficié. Mais parfois c'est quelque chose qui apparaît à l'audience, dans le cours du questionnement. Il faut alors faire en sorte de créer les conditions propices à l'obtention des réponses nécessaires au jugement de l'affaire, ce qui est parfois rendu délicat par la barrière de la langue. Mais sur ce point nous avons la chance d'être assistés d'interprètes très souvent remarquables.

> **Les pièces médicales ont une valeur majeure, notamment en cas de brûlures, cicatrices, violences.**

Avocat : Je travaille systématiquement en présentiel, dans un cabinet chaleureux, très «cosy», que j'ai conçu pour mettre les clients à l'aise. Je suis douce, rassurante, et je commence toujours par me rappeler le secret professionnel. Je peux faire sortir un éducateur si nécessaire, et je leur explique qu'ils peuvent répondre par écrit s'ils ne souhaitent pas parler.

Je cadre énormément l'entretien, surtout pour les femmes. Je reçois beaucoup de clientes accompagnées par les CADA, où elles bénéficient déjà d'un accompagnement social. Mes entretiens de préparation durent une à deux heures, souvent en après-midi, car je sais que ces récits peuvent être éprouvants.

> **L'asile est une matière sensible qui touche à des questions profondes, qui peuvent être clivantes au sein de la société.**

À l'audience, je me sens parfois démunie, surtout lorsqu'il y a des crises de panique ou des pleurs incontrôlables. Heureusement, la CNDA fait souvent preuve de compréhension : pause dans l'audience, verre d'eau, mouchoirs. Mais c'est toujours un moment très délicat à gérer.

5. Quelle est votre position face au doute ?

Magistrat : En matière d'asile, le doute est omniprésent : sur la nationalité, l'âge, la véracité du récit. Contrairement au droit pénal, ici le doute ne profite pas nécessairement au requérant. C'est le cas lorsqu'il existe des raisons sérieuses de penser que le requérant a commis un acte qui le rend, en quelque sorte, « indigne » de protection (ce qui conduit l'autorité chargée de l'asile à l'exclure du bénéfice de la protection internationale).

Le raisonnement se fait en deux temps devant les autorités chargées de l'asile (administratives et juridictionnelles) :

1. La personne court-elle un risque de persécution ou d'atteinte grave dans son pays ?
2. Si oui, est-elle « digne » de protection (n'a-t-elle pas commis de crimes, ne représente-t-elle pas une menace grave pour l'ordre public, etc.) ?

Au stade de la première étape du raisonnement, le doute bénéficie plutôt, si l'on schématise, au demandeur d'asile. Mais quand on arrive à la seconde étape, le doute joue en sa défaveur.

Avocat : Le doute est toujours présent : sur les documents, les récits, l'identité… Quand j'ai un doute, je lis le dossier en me mettant dans la position du juge. Si les documents me paraissent incohérents, je préfère en parler franchement avec mes clients. Je reste transparente, mais je ne les accuse jamais. Je confronte les requérants aux incohérences, toujours à l'écoute.

Je m'appuie beaucoup sur les éducateurs avec qui j'ai l'habitude de travailler : ils font un énorme travail en amont, facilitent la communication et préparent mieux les requérants. Les femmes et les mineurs que je représente sont souvent mieux accompagnés, donc mieux préparés.

6. Quelle est la valeur des pièces apportées par les demandeurs ?

Magistrat : Les pièces sont analysées du point de vue de leur crédibilité. Lorsqu'il est documenté que l'obtention de certaines pièces est particulièrement délicate, la formation de jugement s'interrogera sur la présence de telles pièces au dossier, sur leur mode d'obtention, etc. C'est le récit, et sa précision de même que sa cohérence, tant interne qu'externe (c'est-à-dire par rapport aux données générales largement documentées), qui reste au cœur de l'évaluation. Mais, bien entendu, il y a des pièces qui ont toujours une importance déterminante. Je pense en particulier aux certificats médicaux circonstanciés dont l'authenticité est établie.

Avocat : Les pièces médicales ont une valeur majeure, notamment en cas de brûlures, cicatrices, violences. Ce sont souvent les seuls éléments objectifs dans des dossiers très subjectifs.

7. Quels sont les délais moyens de traitement ?

Magistrat : Le délai effectif moyen est d'environ 5 mois. Néanmoins les recours rejetés par voie d'ordonnance sont, à ma connaissance, traités dans des délais plus rapides, globalement. Cela concerne environ 30 % des dossiers. A l'inverse, un dossier complexe porté en audience sera traité dans des délais potentiellement bien plus longs, ce qui est nécessaire à sa parfaite analyse.

Il faut savoir qu'un triple filtre est mis en place pour orienter les dossiers soit vers un rejet par ordonnance soit vers un examen au cours d'une audience. Et ce système de filtre fait intervenir les présidents de section de la Cour, les présidents de chambre et les rapporteurs chargés de l'instruction.

Avocat : C'est très variable. Depuis la réforme de la territorialisation du mois de janvier 2024, les audiences ne sont plus centralisées à Paris. Cela a permis de désengorger la juridiction : auparavant cinq avocats représentaient 60 % du contentieux.

Depuis janvier 2025, des pôles se sont ouverts à Toulouse, Nancy, Bordeaux, Lyon, Nantes, Marseille… À Toulouse, par exemple, entre le rejet de l'OFPRA et le délibéré, le délai est d'environ cinq mois.

8. Quelles sont les prérogatives de la CNDA pour enquêter ?

Magistrat : La CNDA peut ordonner des mesures d'instruction telles que des demandes de pièces adressées à des services administratifs, voire au juge pénal. En théorie, elle peut aussi ordonner des expertises.

Mais ces dernières sont rares. Quant aux demandes de pièces ou de compléments d'information adressées notamment à l'administration, il s'agit d'actes d'instruction parfois déterminants, notamment dans des cas où l'on se demande si un requérant présente une menace grave pour l'ordre public. Dans des cas, heureusement très peu fréquents au plan statistique, les services de renseignement peuvent aussi spontanément informer la Cour d'une situation particulière, par la communication de « notes blanches ».

Avocat : La Cour peut ordonner toutes mesures d'instruction utiles, mais cela reste rare. Elle peut, par exemple, demander une expertise ou une recherche géopolitique dans des cas très spécifiques.

Dans les dossiers de réseaux de prostitution, la Cour peut demander de prouver que la requérante s'en est extraite : emploi du temps, grossesse, hébergement, suivi de cours de français…

9. La CNDA, une juridiction politique ?

Magistrat : Non. Cela me choque qu'on puisse dire cela et même tout simplement le penser. La CNDA est une juridiction administrative, qui est, comme telle, absolument indépendante. Notre seul guide, c'est la convention de Genève et l'ensemble des textes qui régissent le droit d'asile, de même que la jurisprudence française et européenne. Autrement dit, c'est le droit.

Mais c'est une évidence : l'asile est une matière sensible qui touche à des questions profondes, qui peuvent être clivantes au sein de la société.

Avocat : En théorie, non. C'est une juridiction indépendante, régie par le droit européen et par les conventions internationales comme celle du Haut-Commissariat aux Réfugiés.

Mais dans les faits, elle ne peut ignorer les réalités diplomatiques et géopolitiques. Ainsi la politique des pays d'origine des requérants doit être prise en compte. Par exemple les questions d'asile liés aux genres et à l'homosexualité, sont purement politiques et en lien avec le pays d'origine. ■

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La directive 2024/1799 et la création d'un « *droit à la réparation* », entre protection du consommateur et risques accrus pour les vendeurs

MARIE-ALIX CHABOISSON

Directive 2024/1799 introduces a right to repair for European consumers, who, in addition to the legal warranty of conformity, under which they could already obtain repair or replacement of their defective product, will now be able to compel the seller to repair the product, where possible, free of charge or for a reasonable price. Consumers still have the "legal warranty of conformity," which enables them to repair or replace a defective product. With this new right, they can further look to the seller for repairs and replacements. This harmonization benefits the French seller, who was already subject to a comparable regime under Article L.217-13 of the French Consumer Code.

La Directiva 2024/1799 introduce un derecho a reparación para los consumidores europeos, que, además de la garantía legal de conformidad, en virtud de la cual ya podían obtener la reparación o sustitución de su producto defectuoso, podrán ahora obligar al vendedor a reparar el producto, cuando ello sea posible, gratuitamente o por un precio razonable. Si bien los consumidores tienen la "garantía legal de conformidad" que les permite reparar o reemplazar un producto defectuoso. Con este nuevo derecho, pueden recurrir además al vendedor para reparaciones y reemplazos. Esta armonización es beneficiosa para los vendedores franceses, que ya estaban sujetos a un régimen comparable en virtud del artículo L.217-13 del Código de Consumo francés.

La création d'un droit à réparation

La directive 2024/1799 du 13 juin 2024 « *établissant des règles communes visant à promouvoir la réparation des biens* » se donne pour objectif d'instaurer une consommation durable au sein de l'Union européenne, et devra être transposée par les États membres avant le 31 juillet 2026.

Ce nouveau dispositif vise principalement les produits blancs, bruns et gris, à savoir l'électroménager, les produits de l'image et du son, et ceux liés à la téléphonie ainsi qu'à l'informatique.

De nouvelles règles harmonisées pèsent désormais sur les vendeurs de ces produits, afin de « *réduire l'élimination prématurée de biens viables achetés par les consommateurs et d'encourager ces derniers à utiliser leurs biens plus longtemps* ».

Partant du constat que 35 millions de tonnes de déchets sont produites par l'élimination prématurée de biens réparables, l'Union européenne a mis en place de nouvelles mesures pour prolonger le cycle de vie des produits et créer un système qui favorise la réparation d'un produit, plutôt qu'en l'achat d'un nouveau.

Le consommateur européen est ainsi encouragé à faire réparer les produits défectueux.

Un droit à réparation, corollaire de la garantie légale de conformité

Ce nouveau régime vient s'ajouter à celui déjà existant au titre de la garantie légale de conformité, et est d'ores et déjà intégrée au sein des droits nationaux.

En effet, le consommateur peut, dès maintenant, demander la réparation ou le remplacement du bien défectueux dans les 24 mois qui suivent son achat.

Aussi, en pratique, le consommateur européen peut désormais demander la réparation ou le remplacement du produit défectueux dans les 24 mois qui suivent son achat ; et s'il choisit la réparation du produit, alors sa garantie légale sera prolongée de 12 mois supplémentaires.

Cette obligation de réparation s'impose également aux vendeurs hors Union européenne, puisqu'ils sont tenus de désigner un mandataire européen pour procéder auxdites réparations.

L'information du consommateur

En tout état de cause, le consommateur doit être informé de son droit à réparation et cette information doit être disponible, accessible et gratuite, pendant toute la durée de l'obligation incombant au vendeur.

Plus précisément, le vendeur (en ce compris les notions de fabricant, mandataire, importateur ou distributeur) doit informer gratuitement le consommateur européen de son droit à réparation, et la directive précise que « *les informations* *devraient être disponibles au moins pendant toute la durée de l'obligation de réparation, qui pourrait être comprise comme commençant au moment de la mise sur le marché et se terminant à l'expiration des exigences de réparation* ».

Aussi, le vendeur doit transmettre, au consommateur, les informations relatives au réparateur qui lui est le plus proche - ses coordonnées et moyens de communication.

S'agissant des réparations, la directive impose aux vendeurs qu'elles soient effectuées « *gratuitement ou moyennant un prix raisonnable* », « *dans un délai raisonnable* » et « *le fabricant peut accorder au consommateur le prêt d'un bien de remplacement, gratuitement ou moyennant un coût raisonnable pendant la durée de la réparation* ».

La directive prévoit, également, la mise en place d'une plateforme européenne pour permettre aux consommateurs européens de trouver un réparateur approprié, un vendeur de produits reconditionnés, voire des initiatives de réparations participatives dans chaque Etat membre.

Les vendeurs devront donc s'adapter à cette nouvelle obligation, et offrir des options de réparation plus accessibles.

Une harmonisation favorable aux vendeurs français

Cela étant, l'harmonisation est favorable aux vendeurs français, qui se voyaient déjà imposer un régime similaire en application de l'article L.217-13 du Code de la consommation, lequel prolonge, en cas de réparation, la garantie légale de six mois et qui pénalise le vendeur lorsqu'il impose un remplacement à un consommateur qui avait fait le choix d'une réparation, en faisant repartir la garantie légale pour un nouveau délai de 24 mois.

L'uniformisation des règles et des conditions de concurrence était, d'ailleurs, un des objectifs poursuivis par la directive, qui constatait que « *des règles nationales impératives divergentes dans ce domaine constituent des obstacles réels ou potentiels au fonctionnement du marché intérieur, qui portent atteinte aux transactions transfrontières des opérateurs économiques agissant sur ce marché.* »

La transposition, en droit français, de la directive 2024/1799 n'aura donc, probablement, pas le même retentissement que dans certains États membres.

Nous pouvons, toutefois, nous féliciter de ces nouvelles exigences, qui encourageront les fabricants à concevoir des produits durables et les consommateurs à changer leurs habitudes de consommation.

L'exécution forcée du droit à réparation et la mise en cause de la responsabilité des vendeurs européens

La directive prend le soin d'imposer aux États membres, l'instauration de sanctions en cas d'infraction aux dispositions nationales adoptées par transposition.

Aucune précision n'est apportée quant à la nature de la sanction, qui pourrait être envisagée par les États membres.

L'on s'interroge même sur la nécessité d'une sanction spécifique, dès lors que la nouvelle obligation de réparation, corollaire de la garantie légale de conformité, peut faire l'objet d'une action en exécution forcée, assortie d'une demande de dommages et intérêts.

En effet, le consommateur peut, dès maintenant, demander la réparation ou le remplacement du bien défectueux dans les 24 mois qui suivent son achat.

Gardons également à l'esprit que la protection du consommateur européen est au cœur des préoccupations de l'Union.

Il est ainsi impossible de ne pas mentionner le risque le plus évident au regard des différents mécanismes mis à la disposition du consommateur européen lésé : les actions de groupe.

En effet, la direction 2020/1828 du 25 novembre 2020 dite « *Action représentative* », instaure un cadre permettant aux consommateurs d'intenter, collectivement, des actions contre des entreprises en infraction avec le droit de l'Union.

Cette directive vise à rendre les actions de groupe plus efficaces, en harmonisant les différents régimes juridiques ; et ainsi permettre une protection et des actions transfrontalières.

Le délai de transposition accordé aux États membres arrivait à son terme le 25 décembre 2022.

Si le législateur français est en retard sur le délai qui lui était imparti pour transposer cette directive, il n'en reste pas moins que la proposition de loi a été adoptée en première lecture par l'Assemblée nationale le 8 mars 2023, et qu'elle prévoit notamment :

- L'extension des entités et groupes habilités à intenter une action de groupe ;
- Une sanction civile en cas de faute intentionnelle ayant causé des dommages sériels.

Or, en matière de distribution de produits blancs, bruns et gris, soit les produits cibles de la directive « *réparation* », le dommage sériel est l'écueil le plus évident.

A cet égard, relevons que la première action de groupe fondée sur la directive 2020/1828 a été intentée à l'encontre du champion européen Philips, au titre de la défaillance et du caractère dangereux de ses appareils respiratoires.

Les entreprises qui seraient réticentes à se mettre en conformité avec le droit de l'Union, sont donc, désormais, exposées à un risque de procédures d'envergure. ■

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The Forgotten Stories of Balkan Women Lawyers

TANJA ARSIĆ

La vie et le travail des femmes juristes dans les Balkans n'ont jamais fait l'objet d'une étude systématique. Toutes les données sur les pionnières de la profession juridique ont jusqu'à présent été trouvées soit dans de grands registres, soit dans des dossiers contenant des documents, déjà jaunis par l'âge, témoignant de leur carrière. Certains des noms des premières avocates de l'entre-deux-guerres verront le jour pour la première fois dans cet article. Cette recherche vise à mettre en lumière leurs contributions et leurs défis, afin d'offrir une compréhension globale de leur impact sur le domaine juridique.

La vida y el trabajo de las mujeres abogadas en los Balcanes nunca se han estudiado de forma sistemática. Todos los datos sobre las pioneras de la abogacía se han encontrado hasta ahora en grandes libros-registro o en archivos que contienen documentos, ya amarillentos por el paso del tiempo, que dan testimonio de sus carreras. Algunos de los nombres de las primeras mujeres abogadas del periodo de entreguerras verán la luz por primera vez en este artículo. Esta investigación pretende arrojar luz sobre sus contribuciones y desafíos, proporcionando una comprensión global de su impacto en el ámbito jurídico.

Introduction

Women in the Balkans were some of the world's earliest lawyers, but their names, the fields they specialized in, and the extent of their contribution to the legal profession are not recorded anywhere in the systematic and comprehensive manner that they and their endeavors certainly deserve. Below is a short summary of the lives and contributions of several of those early pioneers, all but one of whom lived and worked in the same country: the Kingdom of Serbs, Croats, and Slovenes, which became the Kingdom of Yugoslavia in 1929.

Beginning in the 19th Century

Marija Milutinović Punktatorka, born in 1810 into the Popović family from Buda, Hungary, is credited as the first woman lawyer in the Balkans. She completed her elementary and grammar school education in Buda and, as was typical of women at the beginning of the 19th century, took up dressmaking, sewing, and crafts. At that time, there were no law faculties in Serbia, and everyone who was educated had to attend law faculties in Budapest, Vienna, or Paris.

Beginning in 1831, Marija Milutinović began corresponding with Vuk Stefanović Karadžić, the great reformer of the Serbian language. Marija assisted Vuk Karadžić in his work by collecting folk proverbs and songs. She traveled and was able to read in Serbian, German, Hungarian, and French. Her love of literature certainly helped her romantic life, as she married writer Sima Milutinović Sarajlija in 1838. After marrying, they moved to Belgrade. Marija helped her husband by adding punctuation to his texts, which earned her the nickname "Punktatorka."

Following her husband's death in 1847, Marija attended and graduated from the Faculty of Law in Buda, Hungary. She was the first known woman to graduate from the Faculty of Law, and, upon graduation, commenced her legal career. At the time, the legal profession was not regulated, and her practice was informal; she was not registered with the bar. Nevertheless, she represented the poor before the courts and devoted herself exclusively to *pro bono* work while having a *pro bono* legal practice. Marija supported herself by teaching at the Girls School in Belgrade, a rather prestigious job at that time. Marija died in 1875.

Legal Pioneers

During the reign of King Aleksandar I Karađorđević, known as "The Unifier," who ruled over the Kingdom of Serbs, Croats, and Slovenes (later the Kingdom of Yugoslavia) from 1921 to 1934, women lawyers benefitted from their King and his queen, both of whom advocated, in their own ways, for the rights of women. Although King Karađorđević did not publicly advocate for women's rights in the modern sense, he showed respect for women through his relationship with his wife, Queen Maria, whom he valued as the backbone of the family and the state.

Queen Maria, who was a Romanian princess by birth (daughter of King Ferdinand and Queen Maria of Romania), was highly appreciated by the people for her modesty, kindness, and humanitarian work. Maria advocated for the education of women and to increase their role in society, but in a way that corresponded to the social mores of the time. She established courses for women, including those that provided training in trades and housekeeping, to help them gain independence and to financially contribute to the family. Queen Maria was a role model for many women in Yugoslavia. She inspired women to be active in social and humanitarian life but remained within the bounds of the traditional values of her time.

During the same period, the role of lawyers, generally, was limited. Lawyers or advocates, known as *pravozastupništvo*,[1] were appointed by the Minister of Justice, and there was no Bar Association. Advocates could only act before the court that appointed them; they did not have the right to represent their clients before other judicial or state bodies. For women lawyers, however, appointment as an advocate was more complicated. According to the written materials available in the archives of the Bar Association of Serbia and the language of the decree of appointment, the ministerial appointment alone was not enough for married female colleagues to practice law; the decree also had to include the approval of their husbands.

It was not until after World War I that women lawyers began to appear more commonly. Jelena Đorić Mihajlović was one of those early women lawyers. She enrolled in the Faculty of Law before World War I but interrupted her studies to volunteer at a military hospital, where she worked until 1917.

After the liberation, she completed her law degree in 1922, and upon graduation, she was appointed president of the Second Housing Court. On 11 May 1923, Jelena Đorić Mihajlović entered private law practice after being appointed as an advocate by the Minister of Justice.

That same year, on 7 November 1923, Ruža Vinterštajn Jovanović, who was born on 3 December 1892 in Pest, Hungary, was also appointed as an advocate by a decree of the Minister of Justice. Ruža established a law practice in Belgrade but left the country in 1932. It is unclear whether, where, or to what extent Ruža continued to practice law after 1932.

Women Lawyers in the Era of Modern-Day Bar Associations

Dr. Mara Ilić

In 1929, in Croatia, the first woman registered in the lawyer's directory was Dr. Mara Ilić, whose practice was in Zagreb. Unfortunately, no further information about her life and work is available.

1. A term that was used in the 19th century instead of "lawyer."

Katarina Lengold Marinković

Katarina Lengold Marinković

That same year, in the Kingdom of Serbs, Croats, and Slovenes, with the adoption of the Legal Profession Act (Zakon o advokaturi), women were finally allowed to register for the bar. The first woman registered in the Directory of Lawyers of the Vojvodina Bar Association was Katarina Lengold Marinković. Her registration is still noted today in the records maintained by the Vojvodina Bar Association.

Like all women practicing law, Katarina was a rarity in society, eschewing the more traditional roles expected of women in her time. Katarina was married to a judge, but the marriage did not last long and ended in divorce. Divorcing was a courageous step at the time, as not only was she a woman lawyer working in private practice and fighting for women's rights at a time when women lawyers were few and far between, but she was also a divorcee, which was particularly scandalous in her society.

> **Women in the Balkans were some of the world's earliest lawyers, but their names, the fields they specialized in, and the extent of their contribution to the legal profession are not recorded anywhere in the systematic and comprehensive manner that they and their endeavors certainly deserve.**

From 1933, the year she was registered in the Directory of Lawyers, until 1949, Katarina represented clients and fought for their rights, even though, as a woman, she did not have the right to vote. Her most notable achievement involved being appointed guardian of the Vojvodina Bar Association during the occupation of Novi Sad by Hungary, an ally of Germany. She held this position on the day the occupying forces, during their withdrawal at the end of World War II, were burning the records of many institutions. Because she courageously refused to hand over the archives of the Vojvodina Bar Association, the historical records of the Vojvodina Bar Association's archive were preserved for future generations. Despite her bravery and commitment to the Bar Association, though, little was done to preserve her memory or her accomplishments. Since 2019, however, her name has been back in the limelight as her work has found a place in the writings and speeches of Serbian lawyers, as well as in prizes awarded by the Vojvodina Bar Association.

Olga M. Bandić

Another lawyer admitted to the bar before World War II was Olga M. Bandić. She spent her entire legal training

Жена и живот

У Југославији има дванаест жена адвоката од којих су пет у Београду

Савети домаћицама

ЛЕТЊИ КОСТИМИ

Најпрактичнији ансамбл

ЧИСТОЋА ИЗНАД СВЕГА

Уметнички пар

у Београду

Једна тридесетогодишњица

Београдски матуранти 1910 године

Најмодернија универзитетска зграда у Београду

Од јесени студенти Правног факултета слушаће предавања у новој згради

in private practice, working for Stojan Nešić, a lawyer in Belgrade. She was a legal trainee from 1935 until 1938, when she completed additional legal training in the District Court of Belgrade. She extended her legal training until her admission to the bar in 1940. At that time, Olga, like every other lawyer before World War II, took an oath of allegiance. The wording of the oath read: *"As I become part of the legal profession, I pledge on my honor and in the presence of God Almighty to remain loyal to the reigning King of the Kingdom of Yugoslavia and commit to upholding the law conscientiously and advocating for justice with equal dedication and enthusiasm in performing my duties. So help me God."* During World War II, however, bar membership was temporarily suspended for inactive lawyers, which included Olga. Olga renewed her registration with the bar in 1945 and actively practiced law until 1 July 1961.

It was not until after World War I that women lawyers began to appear more commonly.

Darinka Đ. Golović

Among the women lawyers who joined the bar after completing legal training in private law practices was Darinka Đ. Golović, who started her legal apprenticeship in 1936 and became a practicing lawyer in 1941. The records of the bar show that Darinka mainly handled petty civil claims before the Municipal and District courts. During the war, Darinka was a military investigator at the Military Court of the Command of the City of Belgrade. She also was an active member of the City Committee of the Women's Antifascist Front.

Nadežda Vukadinović

A particularly inspiring life story is that of another woman lawyer, Nadežda Vukadinović, who earned both an economic degree and a law degree. She registered as a legal trainee with the bar in Belgrade in 1932 and subsequently was admitted to the bar in 1937. A pre-war weekly newspaper, *Vreme*,[2] published an article about Nadežda, one of a few women lawyers at that time, with a title that attracted the interest of the newspaper's readers: *"There are Twelve Women Lawyers in Yugoslavia, Five of Them Practice in Belgrade."* In addition to the five women in Belgrade, the article mentions lawyers in Zagreb, Novi Sad, Ljubljana, and Bjelovar. Interestingly, in the article, Nadežda was the only one of the twelve women lawyers who was brave enough to note the rampant prejudice and mistrust towards women, something she herself experienced and against which she fought throughout her entire career.

Nadežda's road to success as a practicing lawyer was not a smooth one. At the beginning of Nadežda's career, she shared an office with her husband, who also was a lawyer. Initially, Nadežda worked as her husband's assistant, handling only simple tasks. One day, however, she surprised him by announcing that she was no longer his assistant, as she had been admitted to the bar as a lawyer. As the article notes, she did not wait for her husband's approval to be admitted. As her career progressed and clients began seeking her legal advice, her husband grew resentful and started overwhelming her with secretarial work to prevent her from having direct contact with clients. Of course, this did not sit well with Nadežda, and, inevitably, their marriage ended in divorce.

Nadežda was the only one of the five female lawyers in Belgrade to have her own office without any male colleagues. Although many clients trusted her and retained her, many of her fellow lawyers resented her because she was a woman. Some colleagues badgered her clients, trying to make them feel ashamed to be represented by a woman. In addition, the wife of Nadežda's client in a divorce proceeding filed an unfounded disciplinary complaint, using Nadežda's gender as the basis and falsely alleging that Nadežda and her client were engaged in an affair that was the cause of the couple's divorce. The complaint was dismissed as unfounded. Such complaints and actions only strengthened Nadežda's resolve to continue in her profession, and she remained in practice for almost 30 years, until 1965.

2. Digitalna Narodna biblioteka Srbije, https://digitalna.nb.rs.

Queen Maria's portrait: Queen Mary in the portrait of Paja Jovanović. Photo: promo/gallery Matica Srpska

Ljuba Prener (Anamalija)

The story of the first female lawyer in Slovenia is especially remarkable, both personally and professionally. Most notable, however, is the fact that she lived her life as a man. Anamalija Marija Prener was born on 19 June 1906, but she later changed her name to Ljuba Prener and, throughout her life, referred to herself exclusively using masculine gender pronouns and dressed accordingly.

Ljuba finished his studies in Law at the University of King Alexander I in Ljubljana. Due to his family's frequent relocations and lack of financial resources to fund his education, he resorted to tutoring students and writing short stories and novellas. Ljuba is the author of Slovenia's first published detective novel.[3]

When Ljuba earned his doctorate in 1941, he opened a law practice and primarily focused on defending politically persecuted individuals. Ljuba often introduced himself, stating: *"I am Dr. Ljuba Prener, neither man nor woman."* This self-presentation and the fact that Ljuba wore a suit and was, in many ways, ahead of his time, led to his expulsion from the Slovenian Writers' Association.[4] He was also imprisoned for a time but was allowed to resume practicing law in 1954. In 1968, he gave a speech at the Slovenian Lawyers' Day Celebration. At that time, it was unheard of for a man trapped in a woman's body to deliver a speech, considering the societal norms at the time. Ljuba's commitment to the legal profession, despite all the hardships he faced, is inspirational, and in 2024, his life and contributions were finally recognized by the City Museum of Ljubljana.[5]

Where Do We Stand Today?

Women lawyers today – in the Balkans and across the globe – owe much to these pioneering women lawyers of the 20th century. Their courage, strength, commitment, and perseverance in a profession that not only did not welcome them, but actively sought to marginalize or remove them, is truly impressive. Although women and women lawyers have come a long way, there is still much to be done to achieve true equality. May the examples set by these trailblazing role models inspire women everywhere, as women continue to strive for their equal and rightful place in society and the legal profession. ■

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3. Prostor Slovenske literarne kulture https://pslk.zrc-sazu.si.

4. He was finally allowed to resume publishing his writings shortly before his death.

5. An interactive exhibition was opened in 2024 at the City Museum in Ljubljana that includes a photograph of Ljuba Prener, among other notable historical figures from Ljubljana. Visitors are asked to identify the individuals, and by rotating the image, they can access and read the biography. What is particularly interesting is that the title of Ljuba Prener's biography is *The Female Attorney in Trousers*, Koroški pokrajinski muzej, www.kpm.si.

Le règlement *Markets in Crypto-Assets* et le rôle des autorités de surveillance et de régulation

SILVESTRE TANDEAU DE MARSAC

WILLIAM AMSELLEM

Crypto-Assets regulation represents a crucial step in regulating the development of Crypto-Assets in Europe. It confers extensive powers on the supervisory authorities and prevents abuse while supporting innovation. However, the complexity of its application could pose serious challenges for industry players.

Los criptoactivos representan un paso crucial en la regulación del desarrollo de los criptoactivos en Europa. Confiere amplios poderes a las autoridades de supervisión y previene los abusos al tiempo que apoya la innovación. Sin embargo, la complejidad de su aplicación podría plantear serios problemas a los agentes del sector.

Les plateformes d'investissements en cryptomonnaies font l'objet d'un contentieux important à l'échelle internationale, notamment aux Etats-Unis où la chute de la plateforme d'échange FTX a attiré l'attention de la *U.S. Securities and Exchange Commission* (SEC) qui n'hésite plus à contrôler et, au besoin, sanctionner ces acteurs.

L'une des plus importantes plateformes du secteur, Binance, était ainsi contrainte de payer en novembre 2023 deux amendes de respectivement 3,4 milliards et 968 millions de dollars à deux agences du Trésor américain pour mettre un terme à l'enquête menée par la SEC.

Le bras de fer s'est poursuivi, tandis que Binance et d'autres acteurs majeurs tels que Coinbase et Ripple ont fait l'objet de nouvelles enquêtes. Ces difficultés sont le reflet d'une règlementation inadaptée, voire inapplicable à ces nouvelles technologies financières. Le régulateur semble néanmoins céder du terrain, Ripple ayant finalement été condamné à une amende de 125 millions de dollars, quand la SEC réclamait près de 2 milliards de dollars de pénalités.

Face à l'acharnement du régulateur, Coinbase s'est jointe à sa concurrente, en interjetant appel devant la même cour que celle amenée à juger l'appel de la SEC dans l'affaire Ripple. Parallèlement, le futur président américain montre un engouement nouveau pour l'écosystème crypto. Ce contexte semble avoir mené à quelques modérations de la SEC qui ne demande plus dans l'affaire Binance à voir qualifier de « *securities* » les actifs litigieux. Cette notion demeurait pourtant au cœur de la quasi-totalité des litiges initiés par la SEC.

Pour sa part, l'Union européenne (UE) souhaite prévenir ces difficultés et accompagner le développement du secteur crypto. Ainsi, l'UE s'est dotée du règlement *Markets in Crypto-Assets* (MiCA ou le Règlement) qui vise à encadrer les cryptoactifs qui ne relèvent pas des règlementations existantes en matière d'instruments et de produits financiers. Entré en vigueur en juin 2023, ce texte est définitivement applicable depuis le 30 décembre 2024.

Le législateur européen souhaite *« établir des règles particulières interdisant certains comportements susceptibles de saper la confiance des utilisateurs dans les marchés de cryptoactifs et l'intégrité de ces marchés, y compris les opérations d'initiés, la divulgation illicite d'informations* *privilégiées et les manipulations de marché liées aux cryptoactifs »*[1].

Cette réglementation pourrait s'avérer d'autant plus précieuse que, très récemment, la Russie faisait adopter un projet de loi visant à contourner les sanctions occidentales en exploitant les possibilités offertes par la blockchain pour les paiement internationaux.

Cette règlementation remplace les cadres nationaux, notamment le régime français issu de la loi PACTE de 2019 relatif aux offres au public de jetons et aux prestataires de services sur actifs numériques (PSAN).

I. Le rôle et les pouvoirs des autorités nationales compétentes

Sous réserve du respect de certaines exigences (B), le règlement MiCA confère aux autorités nationales compétentes (ANC) un ensemble de pouvoirs élargis pour réguler et superviser le secteur des cryptoactifs (A). En France, ces prérogatives sont réparties entre l'Autorité des marchés financiers (AMF) et l'Autorité de contrôle prudentiel et de résolution (ACPR).

A) Les prérogatives renforcées des autorités nationales compétentes.

1. Exiger

Les ANC sont habilitées à requérir des différents acteurs cryptos la transmission d'informations et de documents « *susceptibles d'être utiles à l'exercice de leurs missions* »[2] permettant de garantir la transparence ou l'intégrité des opérations. Elles peuvent notamment exiger d'un prestataire de service sur cryptoactifs qu'il « *divulgue toutes les informations importantes susceptibles d'influer sur la fourniture des services sur cryptoactifs concernés* ».[3]

Il leur est également possible de requérir le départ d'une personne physique de l'organe de direction d'un émetteur ou d'un prestataire, ou de prendre certaines mesures pour réduire une position ou une exposition aux cryptoactifs.

2. Intervenir

Les ANC peuvent également transférer les contrats existants entre prestataires pour maintenir la continuité des services lorsque certains ajustements des acteurs s'avèrent nécessaires.

Elles ont aussi la possibilité d'intervenir dans les communications commerciales, dont elles peuvent demander la modification, la suspension voire l'arrêt.

Lorsqu'elles estiment qu'un cryptoactif pose un problème de protection ou constitue une menace qui ne peut être résolue par les dispositions réglementaires applicables, elles peuvent intervenir sur ce produit, sous réserve que la mesure prononcée ne soit ni disproportionnée, ni discriminatoire.

3. Suspendre

En cas de nécessité, les ANC sont également compétentes pour suspendre certaines activités.

La prestation de services sur cryptoactifs par un prestataire peut notamment être interrompue pour une période maximale de 30 jours consécutifs.

La négociation de cryptoactifs par un prestataire exploitant une plateforme de négociation peut également être suspendue.

Les ANC [autorités nationales compétentes] sont habilitées à requérir des différents acteurs cryptos la transmission d'informations et de documents [...].

La même sanction peut être prononcée en cas de soupçons raisonnables d'infraction pour l'offre au public ou l'admission à la négociation de cryptoactifs et les communications commerciales connexes.

4. Interdire

Lorsqu'est constatée une infraction avérée ou qu'il existe des soupçons fondés sur sa réalisation imminente, une ANC est habilitée à interdire la fourniture de services sur cryptoactifs, leur offre au public ou admission à la négociation sur une plateforme dédiée.

Les ANC sont également titulaires d'une option discrétionnaire en matière d'enquête et de surveillance, d'interdire temporairement l'exercice de l'activité ainsi que les communications commerciales pour simple soupçon d'infraction.

5. Divulguer

Elles peuvent rendre publiques certaines informations pour protéger les intérêts des détenteurs de cryptoactifs, assurer le bon fonctionnement du marché, ou à titre de sanction.

De plus, les ANC sont habilitées à intervenir sur le contenu en ligne, à rendre publics les manquements aux obligations des prestataires de services sur cryptoactifs (PSCA), voire à rectifier les informations fausses ou trompeuses diffusées au public, les auteurs de telles publications pouvant être contraints de publier un correctif.

6. Enquêter

Les ANC disposent des prérogatives nécessaires pour appliquer pleinement les dispositions du Règlement grâce aux pouvoirs de surveillance et d'enquête précédemment mentionnés. Elles disposent également des compétences supplémentaires que leur accorde leur droit national.

Elles ont ainsi la capacité d'effectuer des investigations sur place ou des enquêtes dans des lieux autres que les rési-

1. Règlement MiCA, *cons.* 95.
2. Article 94, 1., du règlement MiCA.
3. Ibid.

dences privées, accéder à des locaux, saisir des documents et autres données si une suspicion raisonnable d'opération d'initié ou de manipulation de marché existe, ou encore demander le gel ou la mise sous séquestre d'actifs. Certaines situations les autorisent également à demander la remise des enregistrements existants, ainsi que les données détenues par un opérateur de télécommunications.

B) L'exercice de leurs prérogatives par les autorités compétentes

Selon le règlement MiCA, lorsque le droit national l'exige, une ANC doit solliciter la juridiction compétente pour statuer sur l'exercice de ses prérogatives en matière d'enquête et de surveillance. Ces compétences peuvent être mises en œuvre directement ou en collaboration avec d'autres autorités, déléguées à ces dernières, voire encore en saisissant les autorités judiciaires compétentes.

Les ANC sont également tenues de répondre aux demandes d'informations ou de coopération, sauf exceptions, tandis que les informations échangées entre elles sont confidentielles et couvertes par le secret professionnel. Par ailleurs, toute personne fournissant des informations à une ANC n'encourt aucune responsabilité à cet égard.

Elles [les ANC] peuvent rendre publiques certaines informations pour protéger les intérêts des détenteurs de cryptoactifs, assurer le bon fonctionnement du marché, ou à titre de sanction.

En cas d'infraction au Règlement, l'ANC peut prononcer différentes sanctions et mesures administratives proportionnelles à la nature et à la gravité de l'infraction constatée.

Ces sanctions peuvent notamment revêtir la forme d'amendes dont le montant maximal varie selon la nature et la gravité de l'infraction, ainsi que les circonstances dans lesquelles elle a été commise. L'ANC peut également prendre des mesures administratives telles qu'une interdiction provisoire ou définitive, une déclaration publique, le retrait ou la suspension provisoire ou définitive, totale ou partielle, d'un agrément, ou encore une injonction.

Le Règlement énumère les divers éléments à prendre en compte par l'ANC lors de la détermination de la nature et du niveau des sanctions, notamment la gravité et la durée de l'infraction, son impact sur les détenteurs de cryptoactifs, le degré de coopération de l'auteur présumé de l'infraction, ainsi que les profits réalisés.

Les décisions des ANC doivent être publiées sur leurs sites internet et être accompagnées de motivations claires. Ces décisions sont susceptibles de recours devant les juridictions compétentes.[4] Les organismes publics, leurs représentants, les organisations de consommateurs et les organisations professionnelles pourront, sous certaines conditions, agir devant les juridictions ou organes administratifs compétents pour contrôler ces décisions.

II. Le rôle et les pouvoirs des autorités européennes

Le règlement confère aux différentes autorités européennes, plus précisément l'Autorité européenne des marchés financiers (ESMA) et de l'Autorité bancaire européenne (ABE), des compétences à la fois communes et spécifiques. Ces compétences comprennent des pouvoirs temporaires d'intervention (A), ainsi que des missions de surveillance et d'enquête accompagnées de pouvoirs significatifs en matière de contrôle et sanction (B).

A) Les pouvoirs temporaires d'intervention des autorités européennes

La mise en œuvre des pouvoirs temporaires d'intervention de l'ESMA et de l'ABE est conditionnée à la survenance d'une situation critique nécessitant une intervention rapide, notamment lorsqu'une menace pour la protection des investisseurs ou une instabilité du marché est identifiée.

Conformément aux articles 103 et 104 du Règlement, l'ESMA et l'ABE peuvent décider d'interdire ou de restreindre la commercialisation, la distribution et la vente de certains cryptoactifs ou activités spécifiques, en l'absence de mesure adéquate prise par une ANC, ou si ces mesures sont jugées insuffisantes. Ces interventions ne concernent cependant pas les jetons se référant à un ou des actifs (ART) ou les jetons de monnaie électronique (EMT).

Les mesures adoptées par les autorités européennes doivent respecter un principe de proportionnalité. Elles ne doivent pas créer de risques disproportionnés de contournement du Règlement. Par ailleurs, elles doivent être réexaminées régulièrement : tous les six mois, puis annuellement après deux renouvellements successifs.

B) Les missions de surveillance et d'enquête

Les missions de surveillance et d'enquête sont au cœur des compétences permanentes de l'ABE et de l'ESMA, chacune ayant des attributions spécifiques.

L'ESMA joue un rôle crucial dans la surveillance des marchés financiers, notamment en ce qui concerne les cryptoactifs. Elle est chargée de veiller au bon fonctionnement des marchés et à la protection des investisseurs. En cas de manquements graves, elle peut imposer des sanctions et prendre des mesures correctives.

Elle a d'ores et déjà lancé trois paquets de consultations publiques, en juillet et octobre 2023, puis en janvier 2024, concernant certaines lignes directrices du règlement MiCA et devrait être amenée à mettre à jour ses normes techniques ainsi que sa doctrine.

L'ABE est spécifiquement chargée de surveiller les émetteurs de jetons ART et EMT d'importance significative. Sa mission de surveillance est renforcée par la création d'un

4. En France, ces recours sont généralement portés devant le Conseil d'État ou la cour d'appel de Paris.

comité des cryptoactifs et de collèges d'autorités de surveillance pour chaque émetteur.

Ces collèges, composés d'ANC, formulent des avis et recommandations à l'attention de l'autorité européenne. Bien que non contraignants, ces avis doivent être pris en compte, sauf justification en cas de divergence importante.

L'ABE dispose en outre de pouvoir étendus pour exiger la communication d'informations et mener des enquêtes, y compris des inspections sur place. Ses agents peuvent entrer dans des locaux professionnels, mais pas dans des résidences privées. Elle peut déléguer certaines de ses compétences à des ANC pour mener des inspections ou recueillir des informations à sa place.

Elle peut également imposer des amendes, proportionnelles aux revenus ou bénéfices tirés des infractions, et accompagner ses décisions d'astreintes journalières. Ces sanctions doivent, là encore, être proportionnelles à la gravité des infractions constatées.

III. Adoption des premiers actes délégués et travaux de mise en œuvre du règlement

Le cadre réglementaire introduit par le règlement MiCA a été complété et précisé par quatre règlements délégués adoptés par la Commission européenne le 22 février 2024.

Ces actes délégués sont les premiers de leur série et s'inscrivent dans le vaste chantier du législateur européen qui, en adoptant le même jour deux actes délégués au titre du règlement DORA sur la résiliation opérationnelle, cherche à aménager et à faciliter la mise œuvre des nouvelles règles européennes en matière de cryptoactifs et de cybersécurité pour le secteur financier.

Le 15 octobre 2024, le législateur français a adopté deux ordonnances. La première (n° 2024-936) vise à harmoniser le droit français avec le règlement MiCA en précisant les compétences de l'AMF et de l'ACPR concernant les PSCA, tout en adaptant le régime applicable aux actifs numériques et aux PSAN, avec une mise en œuvre progressive jusqu'en 2026.

La seconde (n° 2024-937) renforce les obligations de lutte contre le blanchiment de capitaux et le financement du terrorisme en matière de transfert de cryptoactifs.

Encore plus récemment, en vue de de l'entrée en application du règlement MiCA, la Commission européenne a publié un règlement d'exécution n° 2024/2984 du 29 novembre 2024, définissant par des normes techniques les formulaires, formats et modèles des livres blancs dont le Règlement impose la publication.

L'ESMA [Autorité européenne des marchés financiers] joue un rôle crucial dans la surveillance des marchés financiers, notamment en ce qui concerne les cryptoactifs.

Le règlement MiCA marque une avancée majeure dans la régulation des cryptoactifs en Europe, en conférant des pouvoirs élargis aux autorités nationales et européennes. En dotant l'ESMA et l'ABE de prérogatives significatives, tant temporaires que permanentes, le législateur européen vise à instaurer une surveillance renforcée des acteurs du marché et à protéger les investisseurs tout en préservant l'intégrité des marchés financiers. Toutefois, la complexité des interactions entre les différentes autorités et l'ampleur de leurs pouvoirs soulèvent des interrogations quant à la mise en œuvre pratique de cette régulation. Il conviendra d'observer l'impact du règlement à long terme pour évaluer son efficacité dans un secteur en constante évolution. ■

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The Rome Call for AI Ethics: An Inspiration for the Legal Regulation of AI

MOHAMED HASSANEIN

L'intelligence artificielle (IA) est au cœur de la plupart des discours prononcés aujourd'hui par différents spécialistes aux points de vue variés. Les professionnels du droit s'interrogent sur la manière dont l'IA peut être réglementée tout en respectant l'éthique et la vie privée des communautés. Dans cet article, l'Appel de Rome pour l'éthique en l'IA est décrit comme une source d'inspiration pour la réglementation juridique de l'IA, mais il convient avant d'aborder la question de l'éthique de manière plus générale.

La Inteligencia Artificial (IA) es la comidilla de la mayoría de los discursos actuales entre distintos especialistas de perspectivas variadas. Los profesionales del Derecho abordan cómo puede regularse la IA de forma que permita respetar la ética y la privacidad de las comunidades. En este artículo, se describe el *Rome Call for AI Ethics* como inspiración para la regulación jurídica de la IA, pero antes de abordar el Llamamiento de Roma a la Ética de la IA, se investiga la cuestión de la ética

What are ethics? This has been a very controversial question throughout history. Plato used to define ethics as controlling one's desires, focusing on spirit rather than the body and anti-illiteracy. Aristotle defined ethics as actions coming out of a mindful thinking to achieve happiness, while Russo defined them as natural feelings that make us capable of differentiating between good and evil, and therefore capable of doing what is good for ourselves and our communities. It seems that philosophers relied a lot on the inner thinking or feeling as a method of defining ethics.

The Rome Call for AI Ethics is a profound effort to gather technology makers and religious scholars to find a common ground on today's AI ethics.

On the other side, religious scholars may not differentiate between religion and ethics, particularly when religion is the source of ethics. Religion is the source of all good to the individual and community, either in this life or the hereafter.

But the question of ethics in the context of religion remains. Before having religion, peoples, tribes, and nations used to have ethics that allowed them to choose what is good and to feel ashamed of what is bad.

In this context, speaking about AI ethics requires an algorethics aimed at understanding the meaning of intelligence, consciousness, emotionality, affective intentionality, and autonomy of moral action. By this, the topic of AI ethics can be expanded.

The Rome Call for AI Ethics is a profound effort to gather technology makers and religious scholars to find a common ground on today's AI ethics. On 28 February 2020, the Rome Call for AI Ethics was signed by the Pontifical Academy for Life, Microsoft, IBM, FAO and the Ministry of Innovation, a part of the Italian Government in Rome, to promote an ethical approach to AI.[1] Later, the Abu Dhabi Forum for Peace, the Archbishop of Canterbury, the Chair and CEO of Cisco, and the Chief Rabbinate of Israel's Commission for Interfaith Relations joined the call as signatories.

The Rome Call for AI Ethics focused on three impact areas: ethics, education, and rights, and it included seven principles: transparency, inclusion, accountability, impartiality, reliability, security, and privacy. Considering such principles, legal professionals may design legal frames that are well confirmed with ethics.

In most cases, lawmakers are behind in understanding developing technology, and their legal regulation comes as a response to the needs of either the technology makers or the consumers. The Rome Call on AI Ethics can be considered as a start for legalists to regulate AI ethics in a manner recognized and agreed upon by the most prestigious technology manufacturers and religious scholars. ■

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Gender Equality
& the Legal Profession in Turkey

DOĞAN GÖZDE ÖZGÖDEK

Cet article met en lumière les réalités vécues par les avocats en général, et par les avocates en particulier, au sein du système juridique de la République de Turquie, un pays aux traditions et valeurs profondément enracinées. La profession juridique et le contexte dans lequel elle est exercée sont brièvement abordés, avant de présenter les points de vue des femmes avocates en Turquie, dans le but de mieux comprendre l'égalité des sexes dans la profession juridique turque.

Este artículo distingue las realidades que experimentan los abogados en general, y las abogadas en particular, dentro del sistema jurídico de la República de Turquía, un país con tradiciones y valores profundamente arraigados. Se aborda brevemente la profesión jurídica y el entorno en el que se ejerce, seguido de las perspectivas de las mujeres abogadas en Turquía, con el objetivo de conocer mejor la igualdad de género en la profesión legal en Turquía.

Being a lawyer and a defender of rights is a profession that brings with it very special meaning and a philosophical dimension. It is also a part of a lawyer's profession to benefit from different disciplines while carrying out the current professional work. Being a lawyer also carries artistic features: the arts of writing, oratory, and rhetoric are production tools of the legal profession. Personal characteristics of the lawyer and their years of practice gradually become elements that nourish each other.

However, the legal profession does not only have a personal nature. The physical environment, technological elements, and of course, the characteristics of the national or supranational public authority to which judicial power is exercised directly affect the professional perception and performance of the lawyer. In principle, whether a lawyer's gender is male or female should not create a distinction or a difference in terms of the practice of the profession, considering the work they do, the education they receive, and the philosophical underpinnings of law.

This should also be the case regarding legal rules. But let's face it, social perspectives, educational characteristics, and traditional and modern prejudices affect us. Although it varies from country to country, there may be similar problems for male and female lawyers in the practice of the legal profession, or gender-specific problems, or to put this another way, what "should be" and "what actually happens." Without social and/or cultural equality between men and women, it is not possible to achieve the elements of gender equality in the profession of law.

We begin with the legal steps taken by the Republic of Turkey in furtherance of gender equality. There is generally no direct proportion between the written text and the practices and experiences of the individuals that the written text or rules seek to benefit. Sometimes, law enforcement officers may ignore the relevant legal rule or law. However, although it is not a sufficient condition for the rule of law to acknowledge equality and address it specifically, the acknowledgement of equality as a precept of law *is* a necessary condition.

Women have actively taken part in every stage of Turkish history. Turkish women were present in working life as midwives as early as 1843, and women practicing midwifery were followed by female workers in other roles in 1897. In 1913, women were granted the right to become civil servants. Thereafter, they began to take part in the social and economic life of Turkey as tradespeople and merchants.

In 1923, the Republic of Turkey was founded under the leadership of Mustafa Kemal Atatürk, with the goal of a secular and modern administration fighting against negative social realities that accumulated over centuries and created economic, social, religious, regional, and gender discrimination. Legislation enacted one after another included the principle of full equality of women with men in every profession, as well as laws pertaining to professional actions. Such early and quick legislative actions meant that women citizens of the Republic of Turkey gained the right to vote in local elections in 1930, and the right to vote in general elections in 1934.

Turkey signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1985 and took a series of steps to comply with international commitments and norms on ensuring gender equality. In 2004, Turkey brought a constitutional guarantee to gender equality by amending Article 10 of the Turkish Constitution to state that "Women and men have equal rights. The State is obliged to ensure that this equality is realized." CEDAW was given priority over national legislation in international agreements.

In 2009, the Commission on Equal Opportunities for Women and Men was established in the Turkish Grand National Assembly (TBMM), and in 2010, Article 10 of the Constitution was further updated with the sentence "measures to be taken for this purpose cannot be interepreted as contrary to the principle of equality."

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In 2012, Law n° 6284 on the Protection of the Family and Prevention of Violence Against Women was adopted by Turkish Parliamentary. In the same year, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention, was approved. The preamble of this Convention states that preventing all kinds of discrimination against women and ensuring their equality with men is only possible by eliminating domestic violence.

Turkey has put these important and detailed legal norms into effect over the recent decades, but currently, gender equality in daily life and professional practice does not have a bright image. While legal protections and rules were adopted, the negative reality targeted by these regulations remained much the same. The Republic of Turkey suddenly withdrew from the Istanbul Convention by only signing a Presidential Decree rather than a separate law. This action has halted Turkey's progression for many years. No satisfactory reason was put forward as to why Turkey withdrew from this international agreement.

Next, we will discuss equality between men and women in Turkey's legal profession and the roles played by bar associations, which are also constitutional establishments in the Republic of Turkey, and by lawyers of all genders and sexual orientations who are members of these bars. Consider the number of lawyers in Turkey and the gender distribution of these numbers. The Union of Turkish Bar Associations' 2022 data on lawyers shows that while the number of female lawyers lags behind that of male lawyers, the gap is closing every year. In the last three years, the number of female lawyers has been approaching the number of male lawyers.

In 2020, the difference between the number of male and female lawyers was 12,264, and in 2021, the difference was 11,575, further decreasing to 10,059 by the end of 2022.[1] Proportionally, the number of female lawyers remains at about half that of male lawyers. However, according to the records of the Union of Turkish Bar Associations, only 14 of the Turkey's 79 bar associations have presidents who are female.[2]

Turkish bar associations are working to fix this gender equality issue, including through the Ankara Bar Association's Gender Equality Policy Declaration.[3] The main goal of the Ankara Bar Association is to provide suitable conditions for the practice of the legal profession on the basis of freedom and equality. In accordance with the universal principles on which the legal profession is based, people are obliged to perform the profession equally, regardless of any differences, such as age, sexual orientation, gender identity/expression, gender characteristics, language, religion, race, ideology, sect, economic income, and professional seniority.

The principles on which the legal profession is based require providing working conditions that enable the practice of the profession without any discrimination or privilege. Bar associations serve institutionally to ensure and maintain a free, democratic working environment worthy of the rule of law and human dignity, regardless of time and place, where there is no discrimination that causes hierarchical relations, contrary to the principles of the legal profession.

At this stage, although the concepts of sex equality and gender equality have overlapping aspects, they also have important differences. Defining gender as biological sex does not give accurate results. Lawyer Kübra Ekmen, a female member of the Ankara Bar Association, expressed in an interview that "A colleague's personal and professional qualities, not their biological gender, should be at the forefront, and biological gender should not be a reason for discrimination."[4]

She also said, "Unfortunately, when it comes to being a female lawyer in Turkey, it brings to mind that women start their business life from a disadvantaged point, just like in all other fields of work. Gender-based professional discrimination experienced by women in Turkey also applies to lawyers. Even if a law practice in which the same or even more effort is spent by male lawyers of the same age range and experience level is carried out by female lawyers, it is often not possible to achieve the same economic standards and reputation. The way male lawyers relate to their clients, courthouse staff, and people in other judicial bodies is not possible for female lawyers. Reaching clients and client networks becomes more difficult from the very beginning."

The Kocaeli Bar Association conducted a survey called the "Study Conducted Among Female Lawyers Registered in Kocaeli Bar Association." Results of this research, shared

1. https://www.turkiyehukuk.org/sayilarla-barolarda-kadinin-varligi/

2. Türkiye Barolar Birliği web sayfası, https://www.barobirlik.org.tr/Haberler/baro-baskanlari-5423

3. Ankara Bar Association web page, https://www.ankarabarosu.org.tr/upload/Belgeler/POLITIKABELGESI.pdf

4. Ekmen Kübra, Attorney at Law, Ankara Bar Association, Interview, 5 April 5 2021, https://www.indyturk.com/

by Mr. Metehan Uluman, a member of the Koaceli Bar Association and Kocaeli Bar Association Women's Rights Center, include:

> *"The survey that forms the basis of our research was conducted with the participation of female lawyers operating in Kocaeli. The data we analyze in this article comes from a two-wave survey study. While publishing the data we obtained, we tried to simplify it and present it to you in the most understandable form. I would like to take this opportunity to thank everyone who participated in our survey and contributed to the compilation and preparation of our article, the essence of which was written as an article.*
>
> *The first thing that catches our eye is that the reason why interns and lawyers with 1-5 years of seniority (equivalent to 60% of the survey participants) choose the legal profession is to defend human rights. As seniority increases, this situation gives way to the opportunity to work independently. It should also be underlined that the fact that the increasing awareness of human rights has an inverse relationship with seniority may be a manifestation of the fact that our survey was conducted among the valuable members of the women's rights center.*
>
> *It is observed that female lawyers mostly practice in courthouse or law office settings. Less female lawyers are seen in places like police stations, removal centers, immigration, or places involving administrative affairs or the seizure of a business. It also seems that women lawyers lack opportunities to be involved in big transactions and are sidelined. There are reports by female lawyers that they experience psychological violence, which impacts where they work and what kind of work they do, or violence from their clients, in some cases.*
>
> *As is the nature of every profession, it should be expected that the legal profession imposes certain obligations on those who benefit from this service. Naturally, the most well-known of these is the fee for legal services. 62.5% do not think they ever get the salary they deserve while practicing law. 37.5% stated that they had no hope for the future of the profession.*
>
> *Although at first it was thought that this situation was a result of not meeting financial expectations, according to the information we obtained from individual interviews, it is understood that the main issue that triggered this situation was the uncontrolled increase in law faculties and their quotas.*
>
> *Despite being exposed to so much psychological or physical violence, not being able to get the necessary feedback from the relevant authorities, not having hope for the future of the profession, and not being paid the wages they deserve; 32.5% stated that they were spiritually satisfied while practicing their profession, and 57.5% stated that they loved their profession. This situation is undoubtedly a result of the wisdom and indomitable character of Turkish women today, as in the past."*[5]

The marital status of female lawyers may bring different consequences when performing their profession. In research conducted on female lawyer members of the Sakarya Bar Association, in the Master's thesis titled, "Career Problems of Female Lawyers According to their Marital Status: Sakarya Bar Association Example," prepared by Ms. Begüm Gencer Aytaç at Sakarya University, the conclusions below were reached.[6]

Turkish bar associations are working to fix this gender equality issue, including through the Ankara Bar Association's Gender Equality Policy Declaration.

Using a semi-structured interview technique with 28 female lawyers belonging to the Sakarya Bar Association, the study focused on the career status of female lawyers and the relationships between their career status as married, single, and with or without children. According to the results of the study, the majority of the participants are of the opinion that the legal profession is suitable for women, and they stated that suitability for any profession should be evaluated apart from being a woman or a man.

Participants aim to perform their profession in the best way possible as their career goal. There are serious differences in the career goals of female lawyers depending on whether they are single or married. While many single female lawyers aim only to practice their profession properly, some do not have a clear career goal. Married female lawyers, on the other hand, stated that in addition to aiming to practice their profession properly, they aim to specialize by attending training and seminars related to their profession and also want to get a master's degree in their field. Most of the participants stated that having children had a negative impact on their professional life.

The marital status of female lawyers may bring different consequences when performing their profession.

There is also important numerical data in the thesis. Looking at women in the field of law in Turkey, they are less involved than men, as in some other fields.[7] According to the historical records of December 31, 2017, out of a total of 106,496 people registered with the Union of Turkish

5. Uluman Metehan, Attorney at Law, member of Kocaeli Bar Association, Women Rights Center, Survey.

6. Aytaç, Begüm Gencer, 2019, "Medeni durumlarına göre kadın avukatların kariyer sorunları", Sakarya Barosu örneği (Yayınlanmamış Yüksek Lisans Tezi), Sakarya Üniversitesi Sosyal Bilimler Enstitüsü; Sakarya.

7. Berk, 2013:85.

Bar Associations, 46,136 are female and 60,360 are male lawyers.[8]

As in other professions, some of women's choices in legal careers appear to be shaped by their social roles. An example of this is that they prefer to work freelance or in public institutions rather than in private companies, due to more favorable conditions while fulfilling their responsibilities of being a housewife and mother.[9] It is a common phenomenon among lawyers to have family members or husband and wife lawyers and husband and wife judges and prosecutors. The fact that female lawyers generally share their lives with men who earn at least as much as they do, and often even more than them, is another important indicator that the dominant gender roles continue in the domestic relations of women in the legal profession.[10]

Some common indicators emerge both in individual opinions and in professional or academic research, including:

- The problems that women lawyers experience while performing their profession are multifaceted. While these may be due to legislation, they are mainly due to the physical and social environment in which the profession is performed.
- The difficulties faced by female lawyers may increase depending on their marital status or if they are parents.
- Female lawyers mainly work in offices and courthouses.
- Although it has decreased in recent years, there are still serious wage and social rights imbalances between male and female lawyers.
- The rate of dedication to the profession of female lawyers is high despite all negative conditions.
- There is a numerical inequality between men and women, which is less prevalent in bar association memberships but more prevalent at the Bar Association Presidency level.

Conclusion

The legal profession is a multidimensional profession that has philosophical and artistic aspects. Since it is a profession that deals with people and the problems created by people, it has an aspect that arouses negative emotions for the professional. In general, the feeling of satisfaction that this difficult profession and perhaps professional art gives people outweighs the negative emotions within the profession for it deals with people and the problems created by people. It is an undeniable fact that this profession has problems independent of gender, and that it also has problems that female lawyers experience specifically. Despite these problems, we will persevere. ■

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8. Union of Turkish Bar Associations, 2017.
9. Seron, 1997: 37.
10. Berk, 2013:87.

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40 Years of the Cartagena Declaration: Shaping the Future of Refugee Rights

Cintia SOUSA DE FREITAS

La Déclaration de Cartagena de 1984 a marqué un tournant dans la protection des réfugiés en Amérique latine et dans les Caraïbes, en élargissant la Convention de 1951 relative au statut des réfugiés et son Protocole de 1967 pour inclure ceux fuyant la violence, les abus des droits de l'homme et les conflits. Ses principes ont façonné les cadres juridiques nationaux, y compris celui du Brésil, ont influencé le Pacte mondial sur les réfugiés de 2018 et restent un modèle pour d'autres régions. À l'occasion de son 40e anniversaire, la Déclaration et le Plan d'action de Santiago (2024-2034) réaffirment son importance régionale tout en abordant de nouveaux défis humanitaires et en faisant avancer des solutions durables.

La Declaración de Cartagena de 1984 fue un hito en la protección de los refugiados en América Latina y el Caribe, ampliando la Convención de 1951 sobre el Estatuto de los Refugiados y su Protocolo de 1967 para incluir a aquellos que huyen de la violencia, los abusos de derechos humanos y los conflictos. Sus principios han moldeado los marcos legales nacionales, incluido el de Brasil, han influido en el Pacto Mundial sobre los Refugiados de 2018 y siguen siendo un modelo para otras regiones. Al conmemorar su 40º aniversario, la Declaración y el Plan de Acción de Chile (2024-2034) reafirman su importancia regional, abordando nuevos desafíos humanitarios y promoviendo soluciones sostenibles.

1. Cartagena Declaration on Refugees (1984)

The Cartagena Declaration on Refugees (commonly known as the Cartagena Declaration), adopted in 1984, fundamentally reshaped the understanding of who qualifies as a refugee in Latin America. Beyond the traditional categories outlined by the 1951 Convention Relating to the Status of Refugees (also known as the 1951 Refugee Convention) and its 1967 Protocol Relating to the Status of Refugees (also referred to as the 1967 Protocol), the Cartagena Declaration included those fleeing from generalized violence, internal armed conflict, and severe human rights abuses. This broader approach was a direct response to the realities of displacement in the region, where conflict and instability frequently forced large numbers of people to flee their homes.

This expanded definition created a more inclusive protection framework, ensuring that displaced individuals who did not strictly meet the criteria for political persecution could still be refugees. It marked a significant advancement in international refugee law, offering a more nuanced and comprehensive understanding of the diverse causes of forced migration in the Americas.

The expanded definition adopted by the Cartagena Declaration aligns with the broader approach found in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. This convention broadened the scope of who could be considered a refugee to include individuals fleeing internal armed conflict, massive human rights violations, and situations that severely disrupt the legal order of countries. In particular, the Cartagena Declaration adopted this expanded legal criterion, addressing the unique realities of displacement in Latin America and the Caribbean. In the following years, the principles of the Cartagena Declaration were incorporated into national legal frameworks, such as Brazil's, and played a significant role in shaping the 2018 Global Compact on Refugees.

2. San Jose Declaration on Refugees and Displaced People (1994)

In 1994, the San Jose Declaration on Refugees and Displaced People was adopted, registering an important expansion in the region's approach to displacement. Building on the principles of the 1984 Cartagena Declaration, this declaration expanded refugee protection to include internally displaced persons (IDPs). Colombia is a key example, having experienced long internal conflict that has displaced large numbers of people within its borders. The San Jose Declaration demonstrated that internal displacement must also be discussed within the broader framework of forced migration and human rights, reflecting an evolving understanding of displacement in Latin America. By recognizing IDPs, this action indicated that forced displacement is not only a cross-border issue but also an ongoing concern within national territories.

3. Mexico's Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (2004-2014)

In 2004, the Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (2004-2014) was adopted as part of the continuing efforts to reinforce the regional refugee protection framework. The Declaration was particularly focused on addressing the challenges posed by the Colombian conflict, which had resulted in many displaced persons both internally and across borders. Colombia's displacement crisis led to a humanitarian response that involved neighboring countries, especially in providing refugee protection to Colombian nationals. Mexico's declaration recognized the growing need for a comprehensive regional approach to support countries like Colombia, emphasizing the importance of solidarity, shared responsibility, and the need for concrete protection measures for refugees and displaced persons in the region.

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The Mexico Action Plan reaffirmed the importance of international cooperation based on the principle of shared responsibility. It introduced innovative measures to strengthen solidarity with displaced persons, such as the "solidarity cities," "borders of solidarity," and "solidarity resettlement" programs. These initiatives aimed to offer displaced individuals opportunities to resettle in safer environments, facilitating their integration and ensuring protection under international refugee law. While resettlement had not been widely utilized as a solution in Latin America, the Mexico Plan represented a significant shift toward incorporating it into the region's refugee protection strategies. These solidarity initiatives paved the way for more comprehensive regional responses to forced migration, improving the region's ability to manage displacement crises in a coordinated and collaborative manner.

4. Brazil Declaration and Plan of Action - Cartagena +30 (2014-2024)

In 2014, Brazil led the creation of the Brazil Declaration and Plan of Action (Cartagena+30), marking a significant milestone in regional cooperation for the protection of refugees, displaced persons, and stateless individuals in Latin America and the Caribbean. The process behind the

Brazil Declaration involved thorough sub-regional consultations, which were crucial in highlighting and addressing the unique challenges faced by different areas, particularly Central America. One of the most important results was its recognition of the Caribbean's role in the Cartagena process for the first time, marking a significant step towards greater regional solidarity and cooperation.

The 2014 Brazil Declaration introduced a ten-year action plan that emphasized the principles of solidarity, cooperation, and shared responsibility.

The 2014 Brazil Declaration introduced a ten-year action plan that emphasized the principles of solidarity, cooperation, and shared responsibility. It expanded the scope of protection to include statelessness and introduced sustainable solutions and strategies for both the Caribbean and Central America. These initiatives also played a key role in shaping the 2018 Global Compact on Refugees, further strengthening the international framework for refugee protection.

5. Chile Declaration and Plan of Action - Cartagena +40 (2024-2034)

As the Cartagena Declaration marks its 40th anniversary, the region confronts new challenges, including displacement driven by natural disasters and the effects of climate change. The Chile Declaration and Plan of Action, adopted at the end of 2024 and extending through 2034, offers a proactive approach to addressing these emerging issues. The consultations highlighted key themes, including the protection of individuals in situations of human mobility, promoting inclusion and integration through sustainable solutions, and ensuring protection in the context of disasters.

Brazil, for example, has successfully integrated the principles of the Cartagena Declaration into its national law […].

The Chile Declaration and Plan of Action resulted from concrete action recommendations drawn from participatory consultations held throughout 2024 with governments, organizations led by refugees and displaced persons, local authorities, civil society, national human rights promotion and protection bodies, academia, international organizations, the private sector, and international development and finance actors, as part of the Cartagena+40 process.

As a tool to advance the 2018 Global Compact on Refugees in the region, the Chile Declaration and Plan of Action urged the international community to support the efforts of host countries and other stakeholders in implementing the proposed programs and recommendations, thereby reinforcing regional leadership in safeguarding and finding sustainable solutions for refugees, displaced persons, and stateless populations.[1]

6. The Impact of the Cartagena Declaration on Domestic Law: The Case of Venezuelan Refugees in Brazil

Although it is a non-binding document, many countries in Latin America and the Caribbean have adopted the Cartagena Declaration, embracing its expanded definition of refugees. Brazil, for example, has successfully integrated the principles of the Cartagena Declaration into its national law, demonstrating a strong regional commitment to refugee protection.

The Brazilian Refugee Law (Law n° 9,474/1997), formally incorporated the broader definition of refugees provided in the Cartagena Declaration in its Article 1, item III, extending protection to individuals fleeing from grave and generalized violations of human rights, aligning with the expanded criteria established by the Declaration. This legal framework allows for a more inclusive and comprehensive refugee protection system, which reflects the realities of forced migration in the region. Similarly, Mexico's Refugee Law ("Ley sobre Refugiados, Protección Complementaria y Asilo Político"), from 2011, extends the expanded refugee definition to ensure greater protection for displaced persons from a variety of contexts. Article 13 of this law explicitly includes individuals fleeing internal armed conflict and widespread violence, reflecting the principles of solidarity and cooperation emphasized in the Cartagena Declaration.

Brazil has emerged as one of the leading countries in providing refuge to Venezuelans, especially after the 2019 recognition of severe and generalized human rights violations in Venezuela, as outlined in Technical Note n° 03/2019[2] from the National Committee for Refugees (CONARE). Although Brazil's 1997 Refugee Law, which followed the expanded concept outlined in the Cartagena Declaration, had already established a framework for refugee protection, it was only in 2019 that the situation in Venezuela was officially recognized. This recognition facilitated the application of the *prima facie*[3] recognition procedure for Venezuelan nationals, streamlining the

1. UNHCR, *Cartagena+40: Chile Declaration and Plan of Action consolidate regional leadership [Cartagena+40: Declaração e Plano de Ação do Chile consolidam a liderança regional]*, 2024, https://www.acnur.org/br/noticias/notas-informativas/cartagena-40-declaracao-e-plano-de-acao-do-chile-consolidam-lideranca

2. Brazil. (2019). *Conare Technical Note n° 03, 2019*, https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/o-que-e-refugio/anexos/sei_mj8757617estudodepaisdeorigemvenezuela.pdf

3. Brazil (n.d.). Ministry of Justice and Public Security. *Refuge in Brazil [Refúgio no Brasil]*. https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/o-que-e-refugio/refugio-no-brasil: https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/o-que-e-refugio/refugio-no-brasil

process of granting refugee status to accelerate their integration into Brazilian society.

According to the 9th edition of Refugees in Numbers ("Refúgio em Números"),[4] a Brazilian report on refugees, released in June 2024 by the Observatory of International Migrations (OBMigra), 58,628 people applied for asylum in Brazil in 2023, with 29,467 (50.3%) of them being of Venezuelan nationality.

This sharp rise underscores the critical nature of the ongoing crisis in Venezuela, as millions continue to flee the country in search of safety and stability. The application of the *prima facie* recognition system has been crucial in accelerating the recognition of Venezuelan refugees, aligning with the principles established in the Cartagena Declaration and providing a more inclusive and efficient protection framework for those displaced by conflict and human rights abuses.

In addition to Venezuela, Brazil has also recognized Syria, Afghanistan, Iraq, Mali, and Burkina Faso as countries experiencing severe and widespread human rights violations, as outlined in Article 1, item III, of the Refugee Law (Law n° 9,474/1997), which aligns with the principles of the 1984 Cartagena Declaration. These recognitions were formalized through technical notes[5] issued by CONARE, enabling simplified procedures for a defined period, which facilitated a more efficient and expedited process for granting refugee status to nationals from these countries.

The broadening of the refugee definition in Brazil and other countries in the region demonstrates the growing recognition of the diverse causes of forced migration. It highlights Latin American and Caribbean countries' strong commitment to protecting refugees and implementing regional solutions in line with the principles of the Cartagena Declaration, which has become a cornerstone of refugee protection in the Americas.

Conclusion

The Cartagena Declaration on Refugees has played a valuable role in shaping the future of refugee protection in Latin America and the Caribbean. In the last 40 years, it has expanded the scope of refugee definitions, integrated solutions for internally displaced persons (IDPs), and provided a model for regional cooperation in response to forced migration. Brazil and other Latin American countries have incorporated the Declaration's principles through national legislation that protects refugee rights.

It is worth mentioning that the 1984 Cartagena Declaration remains a guiding tool for ensuring the protection and dignity of forced displaced persons in the Americas. The Chile Declaration and Plan of Action (2024-2034) represents an important aspect for the next decade, consolidating the legacy of the Cartagena Declaration and offering new ways for collaboration and protection in the face of global displacement crises. Moreover, it serves as a potential model for other regions and countries, encouraging them to adopt a similarly expansive approach to refugee protection, which could significantly enhance global efforts to address forced migration challenges. ■

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4. G. Junger da Silva, L. Cavalcanti, S. Lemos Silva, & A. T. R. de Oliveira, (2024). Observatório das Migrações Internacionais. *Refúgio em Números*. pp. 10-11. https://www.obmigra.gov.br

5. Brazil (n.d.). Ministry of Justice and Public Security. *Refuge in Brazil [Refúgio no Brasil]*. https://www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/o-que-e-refugio/refugio-no-brasil

Birth Rights for Children



Armando CECATIELLO

Svetlana GARCIA

Mohamed HASSANEIN

On a dit un jour : *« Nous aimons nos enfants non seulement parce qu'ils sont une partie intime de nous-mêmes, mais aussi parce qu'ils nous offrent une nouvelle vie et qu'ils prolongent notre vie actuelle »*. Avoir des enfants est une énorme responsabilité pour les parents. Cet article traite des droits de l'enfant découlant de sa naissance dans trois juridictions différentes : l'Italie, la Russie et l'Égypte.

Se dijo una vez: *«Amamos a nuestros hijos no sólo porque son una parte íntima de nosotros, sino porque nos brindan una nueva vida y prolongan nuestra existencia en ésta»*. En este artículo se analizan los derechos del niño derivados de su nacimiento en tres jurisdicciones diferentes: Italia, Rusia y Egipto.

ITALY

Under Italian law, every child has the right to a name, which is registered in the civil registry upon birth. The mother can declare the child's birth, and if the father acknowledges paternity, his name is included as well. However, if the father refuses to recognize the child, Italian law allows the mother or the child (upon reaching legal age) to initiate legal proceedings to establish paternity.

Recognition is crucial because it determines parental responsibilities, inheritance rights, and the child's ability to obtain nationality from both parents. However, a father's refusal to acknowledge paternity does not automatically strip the child of their right to be recognized. The Italian legal system provides judicial procedures to confirm paternity through DNA testing and other evidence.

The Right to Nationality

Italian nationality law is primarily based on *ius sanguinis*, or right of blood, meaning a child acquires nationality if one of the parents is an Italian citizen. This right is independent from the father's acknowledgment of paternity. If the mother is Italian, the child automatically inherits her nationality.

However, if the mother is a foreign citizen and the father is an Italian citizen but refuses to recognize the child, the situation becomes more complex. In such cases, nationality is not immediately granted, and the child may be left stateless unless: (1) Judicial Recognition of Paternity: A court ruling can establish paternity, granting the child Italian nationality retroactively, (2) Administrative Procedures: If paternity is later recognized, even voluntarily, nationality can be granted through a simplified procedure, or (3) Special Protections for Stateless Children: Italian law and international treaties, such as the 1961 Convention on the Reduction of Statelessness, provide mechanisms to prevent statelessness, allowing a child born in Italy to apply for nationality under specific conditions.

Impact of Paternal Denial on Nationality

While an unrecognized child does not automatically inherit the father's nationality, Italian law aims to prevent children from being left stateless. Even in cases of paternal denial, nationality can be secured through legal action as an immediate visa until the end of the procedure. Additionally, Italian courts often prioritize the child's best interests, ensuring that nationality is not unfairly denied due to parental disputes.

Adoption and Alternative Protections

If a child is abandoned or left without recognition, adoption may provide an alternative legal framework for protection. In Italy, national and international adoption procedures ensure that children without parental recognition still have access to legal identity, family care, and nationality.

As stated above, a father's denial of paternity does not automatically deprive a child of nationality in Italy. Legal mechanisms exist to establish paternity and ensure nationality rights, safeguarding the child's fundamental protections. While complications may arise, especially in cases where the mother is a foreign citizen, Italian law generally prioritizes preventing statelessness and upholding children's rights at birth.

RUSSIA

Under Article 38 of the Constitution of the Russian Federation, maternity, childhood, and families in general are protected by the state. Children have such basic rights, including the right to life, healthcare, development, domicile, and safety.

Every child has a right to know his or her parents. If a child is born in a registered marriage or no later than 300 days from the divorce, his or her mother's husband, or ex-husband, is automatically indicated on the birth certificate as the child's father pursuant to Article 48 of the Family Code of the Russian Federation of 1995 n° 223-FZ.

Meanwhile, if the child's parents were never married or the child was born when the period of 300 days from the divorce expired, both parents must appear together at the registry office and file a common application for filiation and determination of fatherhood. If the father is not willing to appear before the registry office, only the mother's name will be indicated on the birth certificate. The mother has a right to file a fatherhood claim with the court. In case of refusal of recognition of the child by the biological father, fatherhood will be determined on the grounds of genetic testing results. If the father does not attend the forensic experts agency, it will be interpreted in favor of his fatherhood.

One of the most important rights is a right to have a name pursuant to Article 58 of the Family Code of the Russian Federation. In Russia, every name consists of three parts: a first name, a patronymic name which is derived from the father's first name and never from the mother's, and a last name. It is rather common that a woman obtains her husband's last name when she gets married, although many women prefer to keep their last name. If both parents have a common last name, their child will get this last name as well. In case of different last names, parents can choose which last name will be given to their child, or they may give the child both last names.

These rules are applied to situations when both parents are indicated on the birth certificate. If the child's mother is the only registered parent, the mother chooses the first name of the child without the father's consent. The child's last name is indicated as the mother's last name, and the above-mentioned patronymic name is to be chosen by the mother at her discretion, and independently of the biological father's name.

Italian nationality law is primarily based on *ius sanguinis*, or right of blood, meaning a child acquires nationality if one of the parents is an Italian citizen.

Pursuant to Article 13 of the Federal Law of 2023 n° 138-FZ, "On the citizenship of the Russian Federation," a minor child obtains the Russian nationality (citizenship) automatically if at least one parent already had Russian nationality as of the child's date of birth. Normally, there are no obstacles in obtaining the Russian nationality for a minor child, especially if the child has not been granted any other nationality.

Most medical services, which are not limited to first aid, are provided to minor children free of charge. Voluntary written consent to medical care, signed by one of the parents, is obligatory for healthcare facilities, except in emergency situations when there is a serious direct threat to the child's life or health.

Children also have the right to education. The legislation of the Russian Federation stipulates that an educational institution is to be chosen by agreement of both parents. However, the parent residing with the child is usually the one who makes such decisions.

According to Article 61 of the Family Code of the Russian Federation, both parents have equal rights and obligations. At the same time, every child has the right to communicate with both parents, as well as with other relatives, and the right to regular and sufficient financial support. Thus, even if a father denies participating in his child's life, he will be obliged at least to maintain the child. It would be impossible to make the father communicate with the child and participate in the child's life financially. Nevertheless, non-fulfillment or improper fulfillment of parental responsibilities can lead to deprivation of parental rights. In the situation of deprivation of parental rights, the child conserves all his or her rights, including rights to financial support and succession.

EGYPT

Article 2 of the Egyptian Constitution (2014) states that *"Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation."*

Article 3 of issuance of law n° 1/2000 on family law procedures states that *"Court orders shall be issued according to the valid family and Waqf laws, and in case there is no explicit statement of the law, the most prevailing opinion of the Hanafi Islamic school of jurisdiction shall be applicable."*

Children birth rights in Egypt are driven mainly from Islamic "Sharia Law." Sharia Law recognizes the right of a child towards his or her father in choosing a good mother so that the child cannot be discriminated against or bullied because of the child's mother. A child also has the right to life as abortion is prohibited by both Sharia Law and the Egyptian Law.

One of the most important rights is a right to have a name pursuant to Article 58 of the Family Code of the Russian Federation.

A child must have a good name, which means that the child cannot have a bad name. It was narrated that Prophet Muhamad said: *"You will be called by the names of you and your fathers at the day of judgement, so choose good names."* When a man went to Prophet Muhamad complaining of his son, the Prophet heard his claims and then asked the son, "Why do you disobey your father? The man said, my father named me at birth as 'A bug.' The prophet said to the father, you have abused your son before he disobeys you."*

A child has the right to belong to his or her father and the family of his or her father. The Qur'an says: *"Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you."* 33:5.

Children birth rights in Egypt are driven mainly from Islamic "Sharia Law."

According to Article 20 of the Egyptian Civil Status Law, persons who could note the event of birth are: (1) the father of the child, if he was present, (2) the mother of the child on the condition that she proves marriage, and (3) hospital chiefs, prison chiefs, and other places where birth events could happen.

If a father denies paternity, the mother has the right to start a case on the matter. If there had been a sound marriage, the child is considered as the husband's child. If there was not a marriage relationship, the court, under its discretion, could oblige the father to submit himself to a DNA test.

A child has the right to equality with his or her brothers and sisters. Prophet Muhamad blamed a man for granting one of his sons a farm without giving his other sons an equal thing.

Children also have the right to education, to maintenance, and to housing. Article 18 II of law n° 100/1985 on family law states that if a child has no money, his father shall bear all his or her expenses. The maintenance of children shall continue by the father until a daughter gets married and a son becomes 15 under the condition that he can afford his living expenses. If the son becomes 15 but is unable to afford his living expenses due to bodily or mental illness or due to the continuity of his education that is suitable to his peers or due to a shortage in paying these expenses, the father shall bear his son's expenses. A father shall bear all his children's expenses and provide suitable housing equal to their peers.

Article 18 III stipulates that the father shall provide an independent and suitable house for his children and the mother, and if he does not do so, they will continue to stay at the house of marriage without him. If the house of marriage is not rented, the divorcing husband could take it solely, if he provided an alternative independent suitable house for the children and the mother. The judge shall give the custodian mother the right to choose between staying at a house provided by the ex-husband (the father) or getting a rental instead. When the custody terminates, the divorcing husband has the right to retrieve his house and live with his children.

A child also has the right of inheritance to his or her parents and relatives according to the rules stipulated by both Sharia Law and Egyptian Law so long as the child is recognized as a relative of the deceased.

Conclusion

Children's rights at birth are fundamental in establishing their legal identity, personal status, and connection to their biological family. These rights include the right to a name, recognition or adoption, and nationality. ■

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Citizenship by Descent: The Increasingly Travelled Highway of Global Migration



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Les politiques migratoires restrictives sont de plus en plus nombreuses dans les pays à économie avancée. Par conséquent, les visas de travail semblant être un atout de plus en plus rare, la capacité d'un individu à revendiquer la citoyenneté par ascendance est un outil de plus en plus utilisé dans le cadre de la migration mondiale. Le pouvoir de cet outil est amplifié par la perspective d'une citoyenneté par filiation dans un pays de l'Union européenne (UE), avec la libre circulation qui en découle dans l'UE. Cet article résume les dispositions légales relatives à la citoyenneté par filiation dans trois pays européens : la France, les Pays-Bas et la Suisse. Les dispositions légales énoncent les principes de base de la citoyenneté par filiation et les exceptions uniques permettant de revendiquer la citoyenneté par filiation en raison de l'abrogation de lois obsolètes, tout en avertissant que la citoyenneté par filiation s'accompagne souvent d'exigences en matière de conservation.

Las políticas migratorias restrictivas van en aumento en los países con economías avanzadas. Por lo tanto, dado que los visados de trabajo parecen ser un activo cada vez más escaso, la posibilidad de que una persona reclame la ciudadanía por ascendencia es una herramienta cada vez más utilizada en la migración mundial. El poder de esa herramienta se amplifica con la perspectiva de la ciudadanía por ascendencia en un país de la Unión Europea (UE), con la consiguiente libre circulación en la UE. Este artículo resume las disposiciones legales sobre ciudadanía por ascendencia de tres países europeos: Francia, Países Bajos y Suiza. Las disposiciones legales establecen la ciudadanía por ascendencia básica y excepciones únicas para reclamar la ciudadanía por ascendencia debido a la derogación de leyes anticuadas, pero al mismo tiempo, advierte que a menudo la ciudadanía por ascendencia viene acompañada de requisitos de retención.

France

France has maintained citizenship practices based on a mixture of territorial ("jus soli") and descent ("jus sanguinis") ties. French citizenship by descent is a very complex procedure and the processing time for obtaining a French citizenship certificate can reach up to three years.

A child born by a French parent (father or mother) automatically acquires French citizenship. This applies to both biological and adopted children if the adoptive parent is French. This rule applies to children born both in France and abroad, as long as one parent is French at the time of the child's birth. If the child is born abroad, the French parent should register the child's birth with the French consulate or embassy to officially recognize the child's French citizenship. This step is essential for a child born outside France. Thus, a child of a French parent born abroad maintains the right to French citizenship, preserving the connection to French citizenship even without living in France. Additionally, a child born in France where at least one of the parents was also born in France (regardless of citizenship), is French starting from the moment of the birth ("double jus soli").

> [...] Clients usually are advised that *"Dutch citizenship by ancestry does not exist."*

The attribution of French citizenship by descent may be interrupted and subsequently lost when a French citizen is absent from France for a protracted period and does not maintain ties with the country. Indeed, Article n° 30-3 of the Civil Code states:

"When an individual lives or usually lived abroad, where his/her ascendants who could have transmitted their French citizenship remained established during more than half a century, this individual will not be allowed to obtain the French citizenship by lineage if himself or his/her father and mother could have transmitted their French citizenship but were not in the state of possession d'état."

The persons born abroad to a French parent may lose their French citizenship if they fail to maintain ties to France, such as by not registering their birth or taking any active steps to demonstrate their connection to France.

The Netherlands

In the Netherlands, citizenship is passed down from Dutch parents to their children. One therefore would think that Dutch citizenship by ancestry is common. However, clients usually are advised that "Dutch citizenship by ancestry does not exist." This statement means that if one of an individual's grandparents was Dutch, in most situations, that individual will not be able to claim Dutch citizenship. This is because in Dutch citizenship law, there are many grounds that makes one lose Dutch citizenship. Accordingly, over the years, the Dutch citizenship of the grandparents and/or parents is lost, with the result that an individual, who queries about their Dutch citizenship by descent, receives the disappointing news that they were not born to a Dutch parent.

> It took the Netherlands a very long time to amend its citizenship law to give Dutch mothers equal rights as Dutch fathers [...].

On a positive note, there are two exceptions to this general rule where an individual only can derive Dutch citizenship if one of their parents is Dutch. The two exceptions are the "grandparent article" and the "latent Dutch citizen option."

Grandparent Article

The grandparent article states the following:

Children are Dutch when they are born to a father or mother who had their main residency in the Netherlands, Aruba, Curacao, or Saint Maarten when the child was born and who themselves is born to a father or mother who at the time of their birth had main residency in the Netherlands, Aruba, Curacao, or Saint Maarten while the child has their main residency in the Netherlands, Aruba, Curacao, or Saint Maarten.

Before 2003, the grandparent article was called the grandmother article as Dutch citizenship by ancestry through this article went only through the grandmother of the child. Based on the grandparent article, a child can be born with Dutch citizenship without having Dutch parents or Dutch grandparents. In this situation, the Dutch child can file an application for a Dutch passport and is automatically also an EU citizen.

Moving beyond the grandparent article, there also is the rare situation concerning individuals who originate from Aruba, Curacao, or Saint Maarten (former colonies and now special municipalities of the Kingdom of the Netherlands). In this rare situation, they, or their children, could be Dutch citizens through descent even if their parents and grandparents never had Dutch citizenship.

Latent Dutch Citizenship

Before 1985, Dutch citizenship by birth could only pass from a legal Dutch father to child. A Dutch mother could

not give Dutch citizenship to her children at birth. Slowly, Dutch citizenship acts were amended to give men and women equal rights concerning their and their children's citizenship positions. For example, it also used to be common that a woman lost her original citizenship when marrying a man who had a different citizenship. In Dutch citizenship law, there was a time that such a marriage could result in loss of Dutch citizenship for the wife, and therefore, statelessness in the situation where a Dutch woman would marry a man who was stateless. Fortunately, this is no longer the case.

It took the Netherlands a very long time to amend its citizenship law to give Dutch mothers equal rights as Dutch fathers in being able to transfer their Dutch citizenship to their children at birth. From 1 January 1985, the Dutch Citizenship Act stated that a child is born Dutch when their father or mother is Dutch. This Act did not have retroactive effect though, and therefore, the view was that the discrimination of Dutch mothers in Dutch citizenship law was not fully resolved.

It was not until 1 October 2010 that the Dutch Citizenship Act contained a special option right to claim Dutch citizenship for children born before 1985 to a Dutch mother and non-Dutch legal father. Also, the children of these so-called "latent Dutch citizens" can claim Dutch citizenship through a similar option process to the Dutch grandparent exception. This means that based on ancestry through a Dutch grandmother, two generations of children can become Dutch. Whatever grounds for loss of Dutch citizenship over the years of the grandmother and mother would occur in a regular Dutch citizenship process do not apply when the descendent is a "latent Dutch citizen." Additionally, the descendent will receive their Dutch passport and EU citizenship on top of any other citizenships, whereas in most other citizenship situations, the Netherlands make you choose one citizenship or lose your original one(s).

Switzerland

While Switzerland is famous for its tourism, it is also known for its strict immigration rules. Citizenship, including naturalization, is no exception.

When an individual becomes Swiss, they have a canton and commune of origin. Switzerland has 26 cantons, and each of these cantons has its own rules for citizenship. Each of the communes may have its own specific rules on whether an individual can have more than one commune of origin. Birthright citizenship does not exist, except in the situation where children are found in Switzerland without any proof of affiliation, in which case they are granted Swiss citizenship.

When an individual becomes Swiss, they have a canton and commune of origin. Switzerland has 26 cantons, and each of these cantons has its own rules for citizenship.

Citizenship of Children Born to Swiss Parents Domiciled in Switzerland or Abroad

Obviously, children born to Swiss parents living in Switzerland acquire Swiss citizenship. The canton of origin and the commune of origin of a child depend on the canton and commune of origin of the parent from which the child has the last name, as per provision of Article 271 of the Swiss Civil Code. Swiss law does not allow a child to have both their mother's and father's last names.

The Role of Naturalization with Citizenship by Descent

Swiss citizenship used to distinguish between the Swiss citizenship of a mother according to whether she acquired her citizenship by descent (affiliation) or naturalization. This is fortunately no longer the case. Moreover, before 1985, a child born from a Swiss mother, who obtained her naturalization before giving birth, had to prove that they were "successfully integrated in Switzerland," for the child to attain Swiss citizenship by naturalization. This was not the case for a child born to a Swiss father.

Switzerland has two types of naturalization procedures: ordinary and simplified. The differences between the two types of procedures are that (1) the simplified procedure has a shorter requirement of years of residence in

Switzerland and (2) the simplified procedure has a faster processing time because the procedure only is handled by the Federal authorities. Both types of naturalization procedures require successful integration, *i.e.*, no debts, no criminal record, respect for the Federal constitution, and sufficient language skills of at least written A2 level and oral B1 level.

Children born abroad, with another citizenship and who have at least one parent who is a Swiss citizen, must declare, before their 25th birthday, their intention to retain Swiss citizenship. Otherwise, they will lose Swiss citizenship, pursuant to Article 7, paragraph 1, of the Swiss Citizenship Act (SCA). This deadline can be extended in exceptional circumstances, per Article 7, paragraph 4, of the SCA. If a child was not naturalized at the time their parents were naturalized as Swiss citizens (after the child's birth), the child can be eligible for simplified naturalization, under Article 24, paragraph 1, of the SCA.

Citizenship from Partnerships and Same-Sex Marriages

If a child is born to a mother who is a citizen of another country and who is married to a Swiss woman, then the child acquires the citizenship of the Swiss parent depending on when the marriage took place, since same-sex marriages were authorized only since 1 July 2022 in Switzerland. If the parents were in a partnership at the time the child was born, then the partner could adopt their partner's child, provided the couple has lived together for at least three years, pursuant to Article 264c(1) of the Swiss Civil Code.

Citizenship from Swiss Grandparents

Before 2018, foreign children could apply for Swiss citizenship from their grandparents through the simplified naturalization procedure only if they were minors at the time that their parents were naturalized, per Article 31a of the prior SCA.

Since 15 February 2018, foreign citizens whose grandparents emigrated to Switzerland can apply for simplified naturalization before their 25th birthday, subject to the following conditions under Article 24a of the SCA:

1. At least one of their grandparents was born in Switzerland and can be proven to have acquired a right of residence in Switzerland.
2. At least one parent (has) acquired a permanent residence permit, (has) lived for at least ten years in Switzerland, and attended compulsory schooling in Switzerland for at least five years.
3. They were born in Switzerland and hold a permanent residence permit.
4. They have attended compulsory schooling for at least five years in Switzerland.
5. They are successfully integrated into Switzerland.
6. They submit their application before their 25th birthday.

Conclusion

Citizenship by descent, as illustrated by the above sampling of laws from France, the Netherlands, and Switzerland, is more than the declarative statements of "I am French," "I am Dutch," or "I am Swiss."

Indeed, as an area of global migration law, it has evolved into complex means for an individual to achieve greater global mobility. Despite this complexity, the rewards of a successive claim of citizenship by descent are rich – freedom from work visa applications and free movement being shining crown jewels amongst these rewards. ■

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Ciudadanía italiana *ius sanguinis*: Un derecho en extinción

Katherine MUÑOZ TUFRO

Italy has been historically a country of emigrants. From the end of the 19th century to the middle of the 20th century, millions of Italians left the peninsula in search of better opportunities, leaving a legacy that has endured over time. Today, with no generational limit, the principle of ius sanguinis - enshrined in Law n° 91/1992 - makes it possible for more than 80 million people worldwide to claim Italian citizenship. However, various reforms and legislative proposals threaten to restrict this historic right.

L'Italie est historiquement un pays d'émigrants. De la fin du XIXe au milieu du XXe siècle, des millions d'Italiens ont quitté la péninsule à la recherche de meilleures opportunités, laissant un héritage qui a perduré dans le temps. Aujourd'hui, sans limite générationnelle, le principe du droit du sang - consacré par la loi n° 91/1992 - permet à plus de 80 millions de personnes dans le monde de revendiquer la citoyenneté italienne. Cependant, plusieurs réformes et propositions législatives menacent de restreindre ce droit historique.

Fundamentos del *Ius Sanguinis*

El principio de *ius sanguinis* constituye el eje normativo del sistema de nacionalidad italiano, sustentado en el artículo 1 de la Ley n° 91/1992. Según esta norma, la ciudadanía se transmite «de *iure*» por línea de sangre, sin imponer límites temporales o geográficos. Este enfoque garantiza que los descendientes de ciudadanos italianos adquieran la nacionalidad automáticamente, permitiendo a generaciones de italianos en el exterior – especialmente en América Latina, Estados Unidos y Europa – mantener un vínculo identitario con Italia.

La razonabilidad de este principio radica en que garantiza el acceso a la ciudadanía como un derecho inherente al vínculo sanguíneo, sin que factores externos – como la residencia, el idioma o el arraigo cultural – condicionen su ejercicio. Esta interpretación se alinea con el artículo 3 de la Constitución Italiana, que consagra el principio de igualdad ante la ley, y se ve reforzada por instrumentos internacionales, como el Convenio Europeo sobre la Nacionalidad (1997).

Restricciones legislativas y propuestas controversiales

En el contexto legislativo actual, han surgido propuestas que pretenden limitar el alcance del *ius sanguinis*:

- **Ley de Presupuesto 2025 (Legge di Bilancio 2025):** La reforma introdujo un incremento en las tasas consulares, elevándolas de 300 a 600 euros por solicitante (Art. 7 bis del Decreto Legislativo n° 71/2011), lo que supone un obstáculo económico adicional para las familias con múltiples descendientes italianos.
- **Proyecto de Ley Menia:** Esta propuesta, actualmente en debate, exige que todos los solicitantes – incluidos los bisnietos – demuestren conocimiento del idioma italiano. La redacción actual presenta lagunas y ambigüedades que requieren revisión por la Comisión Constitucional. En mi opinión, esta exigencia resulta inconstitucional, ya que vulnera el artículo 3 de la Constitución Italiana y atenta contra el derecho a la nacionalidad, consagrado también en el Art. 15 de la Declaración Universal de Derechos Humanos.
- **Proyecto de Ley Tajani (*Ius Scholae*):** La propuesta de limitar el acceso a la ciudadanía únicamente a los bisnietos de ciudadanos italianos, exigiendo además una conexión cultural o lingüística comprobable, amenaza con desvirtuar el *ius sanguinis* y excluir a millones de descendientes legítimos nacidos en el extranjero.

Cabe destacar que, en el caso concreto del Tribunale di Bologna, el Giudice Marco Gattuso ha presentado una solicitud de pronunciamiento a la Corte Costituzionale sobre la razonabilidad de la normativa vigente. La Corte Costituzionale ha dado lugar a dicha solicitud y ha fijado audiencia pública para discutir la cuestión el próximo 25 de junio. Este pronunciamiento tiene como finalidad clarificar la compatibilidad de la ausencia de límites generacionales con el principio de proporcionalidad y el derecho a la igualdad (Art. 3) de la Constitución Italiana.

La racionalidad del *Ius Sanguinis* y el principio de proporzionalità

El *ius sanguinis* se fundamenta en la transmisión *de iure* de la ciudadanía, lo que permite que el vínculo de sangre sea el único criterio para acceder a la nacionalidad. Limitar este derecho mediante restricciones generacionales o exigiendo un conocimiento del idioma introduce condiciones que, en ausencia de justificación objetiva, pueden resultar discriminatorias.

Ante la saturación del sistema consular, la vía judicial se ha consolidado como la opción más eficaz para obtener la ciudadanía italiana.

La razonabilidad de cualquier restricción debe evaluarse según el principio de proporcionalidad, que exige que las medidas adoptadas sean idóneas, necesarias y proporcionate in senso stretto. La jurisprudencia constitucional italiana, en casos como la sentencia n° 203/1989 y otros precedentes, ha subrayado que las restricciones al derecho a la ciudadanía deben estar fundamentadas en criterios objetivos y no generar un trato desigual sin justificación.

El proceso judicial como vía de acceso

Ante la saturación del sistema consular, la vía judicial se ha consolidado como la opción más eficaz para obtener la ciudadanía italiana. Durante el último año se han presentado más de 70.000 acciones judiciales mediante procesos simplificados, beneficiando a más de medio millón de personas. Aunque las tarifas judiciales han aumentado, su coste es comparable al de las nuevas tasas consulares, haciendo de la vía judicial una alternativa viable para quienes enfrentan largas demoras en el sistema administrativo.

La vía judicial ofrece certidumbre jurídica, ya que los tribunales competentes emiten resoluciones definitivas y vinculantes. Con la adecuada representación legal, los solicitantes pueden superar deficiencias documentales mediante la admisión de pruebas alternativas, garantizando el reconocimiento de su derecho a la ciudadanía.

Conclusión: preservar un derecho histórico y universal

El derecho a la ciudadanía italiana, basado en el *ius sanguinis*, constituye un patrimonio histórico y cultural que debe seguir siendo accesible para todos los descendientes de italianos, sin restricciones arbitrarias. Las propuestas recientes, como el Proyecto de Ley Menia y el *Ius Scholae*, representan una amenaza a este derecho al imponer barreras económicas, culturales y generacionales que vulneran el principio de igualdad consagrado en el Art. 3 de la Constitución Italiana.

Es fundamental que Italia mantenga el acceso a la ciudadanía sin comprometer los principios de razonabilidad y proporcionalidad. La solicitud de pronunciamiento presentada por el Giudice Marco Gattuso ante la Corte Costituzionale – con audiencia pública fijada para el 25 de junio – subraya la necesidad de revisar y, en su caso, reformular la normativa vigente para garantizar que el derecho a la ciudadanía se ejerza de manera equitativa y conforme a los principios constitucionales.

Como abogada especializada en derecho constitucional italiano, reafirmo mi compromiso de defender este derecho inalienable y de trabajar para que la ciudadanía italiana siga siendo accesible, justa y equitativa para todos aquellos que, por vínculo de sangre, tienen derecho a ella. ■

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L'immigration clandestine face à la problématique de l'identification : Défis juridiques et humanitaires d'une crise mondiale

Fayçal DRIOUÈCHE

Illegal immigration complicates migration and humanitarian policies, notably by destroying documents to avoid deportation. It calls for urgent reforms to reconcile human rights, identification of migrants, and the fight against abuse in order to preserve the justice and efficiency of the systems. Lawyers must advocate fair reforms.

La inmigración ilegal complica las políticas migratorias y humanitarias, en particular al destruir documentos para evitar la deportación. Cuando se documenta, exige reformas urgentes para conciliar los derechos humanos, la identificación de migrantes y la lucha contra los abusos, a fin de preservar la justicia y la eficiencia de los sistemas. Los abogados deben promover reformas justas.

Introduction

L'immigration clandestine est une réalité complexe et multiforme qui bouleverse les politiques d'immigration, les droits humains et la sécurité nationale des pays récepteurs. Dans le contexte actuel, où les mouvements migratoires sont amplifiés par les guerres, les crises économiques, et les violations des droits humains, certains migrants cherchent à contourner les systèmes d'identification en détruisant volontairement leurs documents d'identité. Ce geste stratégique leur permet d'éviter l'expulsion immédiate, de se déclarer comme ressortissants de pays en conflit, et parfois même de bénéficier de protections internationales, telles que le statut de réfugié.

Cette pratique, qui s'inscrit dans une logique de survie pour certains et d'opportunisme pour d'autres, soulève d'importantes questions juridiques et humanitaires. Les États se retrouvent face à un dilemme difficile : comment gérer ces migrants sans papiers tout en respectant les obligations internationales de protection des droits de l'homme ? La destruction des documents d'identité complique non seulement l'expulsion des migrants en situation irrégulière, mais surcharge également les systèmes d'asile, créant une pression supplémentaire sur des structures déjà fragilisées.

De plus, les pays d'accueil doivent jongler entre le respect des conventions internationales, telles que la Convention de Genève de 1951 sur les réfugiés, et la nécessité de protéger leurs frontières et leur sécurité intérieure. La non-discrimination entre les réfugiés légitimes et ceux qui abusent du système devient un enjeu majeur, nécessitant des réformes en profondeur.

Les migrants clandestins détruisent souvent leurs papiers pour éviter une expulsion immédiate.

I. Les motivations derrière la destruction des documents d'identité

L'un des aspects les plus intrigants de l'immigration clandestine est la décision, souvent concertée, de détruire les documents d'identité une fois arrivés sur le territoire du pays de destination. Ce geste, qui peut sembler radical, s'inscrit généralement dans une stratégie visant à compliquer les procédures de renvoi ou d'expulsion. Les motivations derrière cette pratique peuvent être multiples, allant de la recherche d'une protection légale au contournement des systèmes de contrôle migratoire.

I.1. Éviter les procédures d'expulsion

Les migrants clandestins détruisent souvent leurs papiers pour éviter une expulsion immédiate. Sans documents prouvant leur nationalité ou pays d'origine, les autorités des pays d'accueil font face à une impasse juridique, car expulser une personne vers un pays indéterminé pourrait violer le principe de non-refoulement. Ce principe, établi par la Convention de Genève de 1951, interdit de renvoyer une personne vers un territoire où sa vie ou sa liberté serait en danger.

Cette incertitude juridique donne aux migrants un temps précieux pour préparer une demande d'asile ou trouver d'autres moyens de régulariser leur situation. Certains États, faute de preuves tangibles, se voient contraints de relâcher ces individus dans l'attente d'une décision judiciaire, leur permettant ainsi de rester sur le territoire bien au-delà des délais initiaux.

I.2. Simulation de nationalité : le choix des pays en crise

Un autre motif fréquent est la possibilité de se réclamer d'un pays en guerre ou d'une région en crise humanitaire. De nombreux migrants se présentent aux autorités sous une fausse nationalité, en affirmant être originaires de pays où la situation est particulièrement difficile, comme la Syrie, le Yémen ou l'Afghanistan... En se réclamant d'un État dévasté par les conflits, ces migrants espèrent bénéficier du statut de réfugié ou de protections humanitaires spéciales, souvent accordées en raison des risques graves auxquels ils sont exposés.

Cette pratique repose sur la connaissance des législations d'accueil et des mécanismes d'asile des pays récepteurs. Les migrants, conscients des politiques d'accueil favorables aux demandeurs venant de zones de conflit, exploitent ces mécanismes.

I.3. L'utilisation du principe de non-refoulement

Certains détruisent leurs documents pour éviter leur renvoi vers leur pays d'origine, même si ce dernier est sûr. Le principe de non-refoulement, consacré à l'article 33 de la Convention de Genève, empêche les États de renvoyer une personne vers un pays où elle risquerait d'être persécutée. En se présentant comme ressortissants de pays où ce risque existe, les migrants cherchent à tirer parti de cette disposition juridique.

Les failles des systèmes d'asile compliquent l'identification des migrants, permettant à certains d'obtenir un statut malgré des doutes sur leur légitimité.

Sans documents, Les migrants cherchent souvent à exploiter les failles des systèmes juridiques des pays d'accueil, en s'appuyant sur des conventions et accords internationaux. Comme la Convention de Genève de 1951, notamment à travers son article 33 sur le principe de non-refoulement, qui protège ceux qui risquent d'être persécutés s'ils sont renvoyés dans leur pays d'origine.

I.4. Revendiquer une identité persécutée : orientation sexuelle et diversité de genre

Un autre phénomène observé dans certaines demandes d'asile repose non plus sur la destruction des documents d'identité, mais sur la revendication d'une identité sexuelle ou de genre persécutée dans le pays d'origine. Ce recours à des motifs liés à la diversité sexuelle est utilisé par certains migrants pour obtenir le statut de réfugié, en particulier lorsque l'orientation sexuelle ou l'identité de genre est réprimée par la législation de leur pays.

Cette protection, est parfois exploitée par des migrants qui simulent une identité LGBTQ+ pour contourner les lois d'immigration et obtenir l'asile. En effet, des pays d'accueil, comme ceux de l'Union européenne, accordent un statut de réfugié aux individus persécutés en raison de leur orientation sexuelle, conformément à des textes tels que la Directive européenne 2011/95/UE, qui reconnaît l'orientation sexuelle et l'identité de genre comme motifs valables de persécution.

II. Les défis juridiques et administratifs pour les pays de destination

La destruction des documents crée des défis juridiques et administratifs pour les pays d'accueil. Ces systèmes, conçus pour traiter des demandes avec des preuves tangibles, telles que des passeports ou d'autres documents officiels, peinent à gérer efficacement les flux migratoires et à garantir la protection des réfugiés légitimes en l'absence de ces documents.

II.1. Les mécanismes d'identification des migrants sans papiers

Les pays d'accueil utilisent souvent différents mécanismes pour tenter d'identifier les migrants sans papiers, notamment les bases de données biométriques et la coopération avec les pays d'origine. Cependant, l'expulsion devient complexe si la nationalité reste indéterminée, car un retour forcé sans un accord préalable avec le pays

d'origine est souvent impossible et risquant de violer des accords internationaux.

II.2. Les failles dans le système d'asile

Les failles des systèmes d'asile compliquent l'identification des migrants, permettant à certains d'obtenir un statut malgré des doutes sur leur légitimité. Cette situation surcharge les systèmes, limitant les ressources pour examiner chaque cas et retardant les expulsions, même en cas de rejet. Les migrants exploitent ces lenteurs pour prolonger leur séjour, rendant difficile la distinction entre véritables réfugiés et demandeurs abusifs, ce qui conduit à un encombrement des systèmes d'asile, qui doivent alors traiter un nombre croissant de demandes tout en manquant de ressources pour investiguer chaque cas en profondeur.

II.3. Le coût pour les administrations

La gestion des migrants sans papiers engendre des coûts élevés pour les pays d'accueil, qui doivent mobiliser des ressources pour vérifier les identités, fournir un hébergement temporaire et couvrir des dépenses sociales, médicales et juridiques. Les pays du sud de l'Europe, comme l'Italie, la Grèce et l'Espagne, subissent une forte pression sur leurs systèmes d'asile, tandis que les longues procédures d'expulsion aggravent encore la charge financière et administrative.

II.4. L'impact sur les familles et les relations diplomatiques

La manipulation d'identité par les migrants ne crée pas seulement des complications pour les autorités des pays d'accueil, mais elle a également un impact dévastateur sur les familles des migrants, notamment lorsque ceux-ci disparaissent sans laisser de traces ou sont incarcérés sous une fausse identité. Dans de nombreux cas, les parents de migrants, souvent inquiets de ne plus avoir de nouvelles de leurs enfants, entament des recherches auprès des autorités de leur pays d'origine et des pays de destination. Toutefois, lorsqu'un migrant est emprisonné sous une fausse identité, il devient extrêmement difficile, voire impossible, pour sa famille de le retrouver.

Cette situation peut aussi donner lieu à des tensions diplomatiques. Dans certains cas, des familles ou des gouvernements affirment qu'un individu est détenu dans un pays étranger, alors que ce dernier dément toute connaissance de la personne en question en raison de l'identité falsifiée. Ce manque de coordination et de transparence complique non seulement les relations bilatérales mais alimente également la frustration des familles qui se trouvent dans l'incapacité de savoir où se trouvent leurs proches, particulièrement en cas d'arrestation.

III. Propositions pour une amélioration du système

La gestion des migrants sans papiers et la problématique de l'identification exigent des réformes profondes et une coopération internationale accrue. Dans cette section, nous proposons quelques pistes pour améliorer les systèmes actuels, en tenant compte des défis identifiés précédemment.

III.1. Renforcement de la coopération internationale

L'une des principales faiblesses des systèmes actuels réside dans la coopération insuffisante entre les pays d'origine, de transit et de destination des migrants. Pour améliorer la gestion des flux migratoires, il est essentiel de renforcer les accords bilatéraux et multilatéraux de réadmission, afin que les pays d'origine soient plus impliqués dans la gestion de leurs ressortissants.

Il serait opportun de créer des structures spécifiques au sein des organisations internationales pour traiter les cas où les identités des migrants restent incertaines.

Cela implique la signature d'accords plus contraignants, avec des mécanismes clairs pour identifier les migrants et faciliter leur retour lorsqu'ils ne remplissent pas les critères pour rester dans les pays d'accueil. L'Organisation internationale pour les migrations (OIM) et d'autres instances internationales pourraient jouer un rôle central dans la facilitation de ces accords et dans la mise en place de programmes de retour volontaires, en garantissant le respect des droits humains.

III.2. Amélioration des mécanismes d'identification

Pour lutter contre la manipulation des identités, il est important de renforcer les outils d'identification. Le recours systématique aux bases de données biométriques pourrait permettre une identification plus rapide et plus fiable des individus, réduisant ainsi les possibilités de fraude. L'élargissement des bases de données partagées entre les pays et les organisations internationales, tout en respectant les normes de protection des données, pourrait également contribuer à une meilleure gestion des dossiers migratoires.

De plus, il serait opportun de créer des structures spécifiques au sein des organisations internationales pour traiter les cas où les identités des migrants restent incertaines. Ces structures pourraient regrouper des experts juridiques, des spécialistes des droits humains et des autorités locales pour évaluer, avec plus de précision, les informations fournies par les migrants et ainsi éviter les abus.

III.3. Proposition de nouvelles législations

Afin de remédier aux lacunes des législations actuelles, il est nécessaire d'envisager l'adoption de nouvelles lois adaptées aux défis contemporains. Ces législations pourraient prévoir des sanctions pour les migrants qui détruisent volontairement leurs documents d'identité dans le but de tromper les autorités. Parallèlement, elles pourraient renforcer les procédures de vérification des demandes d'asile, afin de garantir que seules les personnes éligibles bénéficient des protections offertes par les conventions internationales.

Des efforts doivent également être faits pour uniformiser les lois entre les pays de l'Union européenne et au niveau international, afin d'assurer une approche cohérente et équitable face aux défis posés par l'immigration clandestine et les manipulations identitaires.

III.4. Revalorisation du rôle des organisations non gouvernementales (ONG)

Les ONG jouent un rôle vital dans la protection des droits des migrants et des réfugiés. En renforçant leur collaboration avec les gouvernements et les organisations internationales, elles peuvent contribuer à améliorer la prise en charge des migrants et à surveiller les éventuelles violations des droits humains dans les centres de détention et d'accueil. Les ONG devraient être encouragées à participer activement aux discussions sur les politiques migratoires et à proposer des solutions humanitaires pour les migrants les plus vulnérables.

Les avocats peuvent jouer un rôle clé en fournissant une assistance juridique gratuite ou à faible coût aux migrants, en particulier ceux en situation irrégulière.

III.5. Sensibilisation et lutte contre les causes profondes de la migration

Au-delà des solutions administratives et légales, il est essentiel d'aborder les causes profondes de la migration clandestine. Les conflits armés, les crises économiques, et les violations des droits humains qui poussent les individus à fuir leur pays doivent être traités à la source. Les États et les organisations internationales doivent intensifier leurs efforts pour promouvoir la paix, le développement durable, et les droits humains dans les pays d'origine, afin de réduire la nécessité pour leurs populations de chercher refuge à l'étranger.

III.6. Renforcement de l'assistance juridique pour les migrants

Les avocats peuvent jouer un rôle clé en fournissant une assistance juridique gratuite ou à faible coût aux migrants, en particulier ceux en situation irrégulière. Ils les aident à connaitre leurs droits, à naviguer dans des systèmes administratifs complexes, et à déposer des demandes d'asile conformes aux lois et fournissent un soutien juridique et veillent également à la protection des migrants détenus contre les abus et violations de leurs droits.

La création de réseaux de volontaires parmi les avocats, comme, permet de fournir une assistance directe et rapide à différents points d'entrée ou lors de procédures de

détention, garantissant ainsi que les droits fondamentaux soient respectés.

Conclusion

La problématique de l'identification des migrants sans papiers, et plus largement de l'immigration clandestine, met en lumière les limites des systèmes juridiques et administratifs des pays d'accueil. La destruction des documents d'identité, la manipulation des statuts de réfugiés, et l'exploitation des failles des législations en matière d'asile créent des défis sans précédent pour les États et les institutions internationales.

En tant qu'avocat, je constate que nous avons un rôle crucial à jouer dans cette crise. Notre profession n'est pas seulement un acteur clé de la défense des droits humains, mais aussi un pont entre les systèmes légaux et les personnes vulnérables. Que ce soit en fournissant une assistance juridique aux migrants ou en plaidant pour des réformes législatives qui allient protection des réfugiés et gestion efficace des flux migratoires, les avocats peuvent aider à rétablir un équilibre entre humanité et sécurité juridique.

Il est désormais crucial de trouver des solutions équilibrées, qui permettent de protéger les véritables réfugiés tout en préservant l'intégrité des systèmes d'immigration. À travers une coopération internationale renforcée, des technologies avancées d'identification, et une réforme des législations, nous, en tant qu'avocats, pouvons contribuer à répondre de manière plus efficace à cette crise mondiale tout en respectant les droits humains.

Notre engagement et notre expertise peuvent transformer ce défi en une opportunité de renforcer la justice et de garantir que personne, qu'il soit migrant ou réfugié, ne soit privé de ses droits fondamentaux. ■

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Residencies in Egypt

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Cet article présente une vue d'ensemble des lois égyptiennes sur la résidence, en retraçant leur évolution historique et leur cadre actuel. Depuis sa semi-indépendance de l'Empire ottoman en 1840, l'Égypte a progressivement réglementé la résidence. Les changements récents reflètent une tendance à encourager les investissements étrangers et à relever les défis économiques en offrant des résidences par le biais de la propriété immobilière ou de dépôts bancaires. Enfin, cet article conclut sur une vision de politiques de résidence plus flexibles pour attirer les devises étrangères et soutenir la croissance économique.

Este artículo ofrece una visión general de las leyes de residencia de Egipto, trazando su desarrollo histórico y su marco actual. Desde que obtuvo la semi-independencia del Imperio Otomano en 1840, Egipto ha regulado progresivamente la residencia. Los cambios recientes reflejan un giro hacia el fomento de la inversión extranjera y la solución de los problemas económicos, ofreciendo residencias mediante la propiedad de bienes inmuebles o depósitos bancarios. Por último, este artículo concluye con una visión de políticas de residencia más flexibles para atraer divisas y apoyar el crecimiento económico.

Introduction

Egypt has historically been a welcoming land for guests, a fact likely attributed to its strategic location as a crucial passage between the East and West, often referred to as the "Old World." Moreover, Egypt has served as a vital hub along the Mediterranean coast, facilitating trade and migration between Africa and Europe.

In 1840, Egypt gained a measure of semi-independence from the Ottoman Empire, prompting the beginning of formal regulations regarding Egyptian nationality. Following the 1952 revolution and amid various political and security challenges, Egyptian authorities began implementing laws and regulations on residency, particularly through Law n° 89 of 1960.

Residencies

Under this law, Egypt offers various types of residencies based on the purpose and duration of stay, each with specific requirements. For instance, Article 18 allows for long-term residency of up to ten years, contingent upon either the foreigner being born in Egypt before 1952 with continuous residency or having resided in Egypt for 20 uninterrupted years before the law's enactment.

Additionally, the law provides for a renewable five-year residency for foreigners who have lived in Egypt for 15 continuous years prior to the law's issuance. Short-term residencies, valid for one year and renewable for up to five years, are also available for tourism, medical treatment, family visits, and other purposes. Moreover, a study residency is granted to students and their families, renewed annually, but does not permit employment.

> **In response to the recent foreign currency crisis, the Egyptian Minister of Interior Affairs issued Decision n° 977 of 2023, introducing special residency options […].**

Asylum residency is available for those recognized as refugees under the 1951 Geneva Convention. Another residency category, established by Law n°. 12 of 2003, pertains to employment and business, allowing for residencies ranging from one to five years, provided that the foreigner presents a certified employment contract and a valid work license from an Egyptian or foreign entity operating in Egypt.

Historically, the Egyptian legislator was cautious regarding residency regulations, partly due to the ongoing challenge of accommodating over nine million refugees and the volatile political environment in the region. However, recent legislative changes have marked a shift towards a more open approach. The Egyptian parliament's Law n° 71 of 2017 encourages foreign investments by allowing investment residencies that last from one year to the project's completion. To qualify, an investor must be a partner, stakeholder, or owner of an Egyptian company operating in specified sectors such as renewable energy, heavy manufacturing, technology, healthcare, tourism, infrastructure, oil and gas, free zones, and agriculture. The capital investment must be no less than 250,000 EGP, with additional stipulations pertaining to workforce composition.

In response to the recent foreign currency crisis, the Egyptian Minister of Interior Affairs issued Decision n° 977 of 2023, introducing special residency options, which include:

a) Residency through Property Ownership

- A five-year renewable residency for foreigners owning property valued at over $200,000.
- A three-year renewable residency for property valued at over $100,000.
- A one-year renewable residency for property valued at over $50,000.

b) Residency through Bank Deposit

- A three-year renewable residency for a deposit of $100,000 in an Egyptian bank for three years.
- A one-year renewable residency for a deposit of $50,000 in an Egyptian bank for one year.

Egypt also grants all visitors a one-month tourism residency upon arrival at the airport, encouraging them to enjoy the country's warm climate and rich 7,000-year history, from the Pharaohs to modern Egypt, and from deserts to the inviting shores of the Red and Mediterranean Seas.

Conclusion

In the future, the Egyptian legislator could adopt a more flexible residency policy, permitting visitors to obtain residency upon arrival at the airport or via the internet. This change could positively foster the growth of start-ups and businesses, providing a valuable influx of foreign currency to help the country overcome its economic challenges. ■

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La Visa de Inversionista: mitos y realidades

Elizabeth REED

The E-2 visa is a temporary immigration status granted to individuals who invest a substantial amount in a goods or service business in the United States. It requires a treaty between the countries, a significant investment, and active management of the business. It does not lead to permanent residency. It benefits the spouse (who receives a work permit) and children under 21 (who can attend public or private school, but cannot work or obtain a Social Security number). It can be obtained through a change of status within the U.S. or via consular processing, proving a lawful source of the investment funds is a key requirement.

La visa E-2 est un statut migratoire temporaire accordé aux personnes qui investissent une somme substantielle dans une entreprise de biens ou de services aux États-Unis. Elle requiert un traité entre les pays, un investissement significatif et une implication active dans la gestion de l'entreprise. Elle ne mène pas à la résidence permanente. Elle bénéficie au conjoint (qui obtient un permis de travail) et aux enfants de moins de 21 ans (qui peuvent fréquenter l'école publique ou privée, mais ne peuvent ni travailler ni obtenir de numéro de sécurité sociale). Elle peut être obtenue par un changement de statut depuis les États-Unis ou par une procédure consulaire. Il est essentiel de prouver l'origine légale des fonds investis.

La visa de inversionista – E-2 – es un status migratorio no-inmigrante (status temporal) que se le otorga a aquella persona que ha invertido o está en el proceso de invertir una cantidad "substancial" en una empresa establecida en Estados Unidos de América que ofrece bienes o servicios.

Los requisitos para calificar para la Visa E-2 son:

1. Contar con un tratado internacional entre el país de la nacionalidad del inversionista con Estados Unidos. No todos los países califican para la visa E-2.[1]

2. El 50% de las acciones estén en manos de individuos con la nacionalidad del inversionista.[2]
3. Se ha invertido o se encuentra en el proceso de invertir una cantidad 'substancial.'[3]
4. El inversionista viene a dirigir y/o desarrollar el negocio establecido.
5. Se pueden solicitar 'empleados' del inversionista, aunque el inversionista Mexicano no cuente con visa E-2.

1. Ver: https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html

2. Por ejemplo: en caso de ser Mexicanos, si la persona moral establecida en EE.UU. cuenta con 5 accionistas y cada uno de ellos cuenta con un porcentaje del 20%, se cumple con el requisito del 50% Mexicano, ya que el 100% de la empresa es considerada Mexicana.

3. El Reglamento Federal de los EE.UU. no define lo que es una "cantidad substancial", cada abogado o despacho de abogados en materia de derecho migratorio recomendará distintas cantidades. Nuestro despacho recomienda como minimo entre USD 00,000 a USD 150,000. A sabiendas que, entre más alta la inversión, se incrementan las posibilidades de éxito de la visa.

La pregunta más común que recibo en consultas para visas de inversionista es *¿qué tipo de negocio establecer*, es decir, cuál giro? ¿Cuál giro es el que 'mejor' funciona? La verdad es que no existe un giro que sea mejor a otro. Recomiendo dedicarse a lo que a uno le interese, lo que ya ha establecido en su país (en caso de contar con empresa establecida en Mexico, por ejemplo). Algunos ejemplos comunes son: transporte, restaurantes, logística, entre otros.

La visa de inversionista (E-2) se confunde comúnmente con la 'categoría inmigrante' de EB-5 (ésta es una categoría conducente a una residencia permanente). La categoría de EB-5 se subdivide en tres categorías, una de ellas requiere inversión de $1 050 000 USD (en empresa propia), inversión en zona rural mínimo de $800 000 USD, o inversión por medio de centro regional.[4]

¿Con esta visa no puedo obtener residencia permanente? ¿Después de cuántos años de renovar la visa E-2 puedo obtener la residencia permanente?

Éstas son, entre otras, las preguntas más comunes que recibo. La Visa E-2 y la Residencia Permanente son dos caminos distintos, caminos paralelos y como tal nunca se cruzan.

Para optar por la residencia permanente se tiene que explorar alguna de las categorías inmigrantes. Existen cinco categorías inmigrantes: EB-1, EB-2, EB-3, EB-4 y EB-5.[5] Cada una de estas categorías contiene subcategorías, por ejemplo; EB-1A, EB-1B y EB-1C, y así sucesivamente.

La residencia permanente no se obtiene por antigüedad, sólo se puede obtener mediante alguna de las categorías anteriormente mencionadas.

Entre los beneficios que otorga la Visa de Inversionista (E-2) destacan poder vivir y trabajar en Estados Unidos, país en el que se ha invertido. El dependiente del Principal (Cónyuge) tiene derecho a trabajar donde guste. El Principal y Cónyuge (Dependiente) obtienen un número de seguro social, el cual les permite trabajar legalmente en EE.UU.; les permite obtener una licencia de manejo y tener acceso a créditos personales. La Visa E-2 también se extiende a los hijos siempre y cuando sean menores de 21 años. Éstos tienen derecho a acceder a escuela pública o privada, pero no pueden trabajar ni obtienen número de seguro social. Una vez que los hijos lleguen a su mayoría de edad (21 años) tendrían que optar por su propia visa, si es que desean permanecer en EE.UU., esto se logra usualmente con una visa de estudiante (F1).

Entre los beneficios que otorga la Visa de Inversionista (E-2) destacan poder vivir y trabajar en Estados Unidos, país en el que se ha invertido.

Existen dos vías para lograr el Status de Inversionsita E-2:

- *Cambio de Status* – Status
- *Proceso Consular* – Visa

El *Cambio de Status* se realiza dentro de Estados Unidos. El inversionista ingresa a EE.UU. con una visa que le permita la entrada (usualmente la visa de turista, B1/B2).[6] Una vez dentro, se envía la solicitud por correo convencional a USCIS (migración, por sus siglas en inglés). Durante este tiempo el inversionista y su familia no podrá salir de EE.UU. hasta que se apruebe la solicitud. En esta opción, no hay entrevista con un oficial de migración. No se otorga una "Visa," se emite un "Status Migratorio." El status se aprueba por 2 años y se puede renovar de manera indefinida. El status migratorio presenta limitaciones o restricciones en cuanto a viajes fuera de EE.UU. (una vez aprobado).

El *Proceso Consular* se realiza en uno de los consulados aprobados para recibir solicitudes de visa de inversionista (E-2), que son la Ciudad de México y Ciudad Juárez. En esta opción, el inversionista y su familia acuden a una entrevista con un oficial de migración en alguno de los consulados mencionados. Al aprobarse la solicitud se emite una "Visa". Ésta se puede emitir por 4 años y se puede renovar de manera indefinida. La visa no presenta restricciones de viajes.

Uno de los errores más comunes que apreciamos en los extranjeros que ingresan a EE.UU.. es la inscripción de sus hijos en escuelas públicas o privadas sin contar con una visa de estudiante (F1). Esto es una violación migratoria grave que perjudica la estrategia migratoria.

Entre los retos más importantes que exige esta visa, se encuentra la necesidad de demostrar el origen limpio del dinero. El inversionista debe demostrar que el dinero proviene de origen lícito, esto incluye que se hayan presentado declaraciones por ingresos percibidos en su país de origen. Negocios informales (donde no se declaran impuestos) o lavado de dinero precluyen la posibilidad de obtener esta visa.

Lo más importante es consultar con un abogado de migración antes de emprender con una visa de inversionista (E-2). Cada caso es distinto, y requiere atención personalizada para poder planear una estrategia migratoria completa. ■

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4. https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program

5. Ver: https://www.uscis.gov/working-in-the-united-states/permanent-workers

6. Ciertos extranjeros ingresan a EE.UU bajo el programa de "Visa Waiver Program," entre otros, personas con pasaportes Europeos. Estas personas no tienen derecho a realizar Cambio de Status.

New-Style Migration to Japan

Yoshihisa HAYAKAWA

L'image traditionnelle de la « migration » est que les habitants de pays relativement pauvres se rendent dans des pays relativement riches pour y trouver de meilleures perspectives d'emploi et améliorer leur situation économique. Après la pandémie de COVID, un autre type de migration vers le Japon, principalement en provenance de Chine, est apparu parmi les étrangers relativement riches qui peuvent facilement acheter des biens immobiliers au Japon. Ces nouveaux immigrants cherchent à vivre dans les quartiers relativement aisés de Tokyo, où se trouvent des écoles primaires et secondaires réputées. Pourquoi tentent-ils de s'installer au Japon et/ou d'encourager leurs enfants à s'y installer ?

Una imagen tradicional de la «migración» es la de personas de países relativamente empobrecidos que se trasladan a países relativamente ricos en busca de mejores perspectivas laborales y con el fin de mejorar su situación económica. Tras la pandemia del COVID, ha surgido otro tipo de migración a Japón, principalmente desde China, entre personas extranjeras relativamente ricas que pueden adquirir fácilmente propiedades inmobiliarias en Japón. Los nuevos inmigrantes buscan vivir en las zonas relativamente acomodadas de Tokio, donde se encuentran escuelas primarias y secundarias de buena reputación. ¿Por qué intentan trasladarse a Japón y/o animar a sus hijos a hacerlo?

I. Introduction

A traditional image of "migration" is that people in relatively impoverished countries move to relatively wealthy countries to find better job prospects and improve their economic situations. Of course, the same applies to Japan. Before the COVID pandemic, according to statistics provided by the Immigration Services Agency of Japan,[1] the number of foreign nationals registered at the local government of Japan increased by 40% from 2014 to 2019, and 84% of the registered foreign nationals came from other countries in Asia. According to a statistic provided by the Ministry of Health, Labor and Welfare of Japan in 2020,[2] approximately 35% of the foreign-national employees in Japan worked in the construction or manufacturing industry, and approximately 25% of them worked in the wholesale/retail or service industry.

After the COVID pandemics, however, another type of migration to Japan, mainly from China, surfaced. The purpose of this migration was not to find better job prospects in Japan as the immigrants were already rich people in their home countries. Why, then, did they attempt to migrate to Japan?

II. A Significant Amendment of the Japanese Immigration Law

Before exploring their aim, as a premise, the Immigration Law of Japan should be explained. Japan is a country relatively closed for foreign immigrants. It was incredibly difficult for foreign nationals to immigrate to Japan, especially when their purpose was to find better job prospects in Japan. It was considered that such a limitation was absolutely necessary to avoid a situation where job opportunities for Japanese nationals were replenished by the foreign immigrants.

According to a statistic provided by the Ministry of Health, Labor and Welfare of Japan in 2020,[3] the population of Japan is decreasing, and the ratio of elderly people is largely expanding. Furthermore, the number of Japanese-national employees is rapidly decreasing, while many Japanese employers are suffering from labor shortages.

1. https://www.moj.go.jp/isa/policies/statistics/toukei_ichiran_touroku.html
2. https://www.mhlw.go.jp/content/11655000/000729116.pdf
3. https://www.mhlw.go.jp/stf/newpage_21481.html

To cope with the worsening labor shortages, two categories of special status of residence of "Specified Skilled Worker (i)" and a special status of residence of "Specified Skilled Worker (ii)" were newly introduced in 2019 to accept work-ready foreign nationals who have a certain degree of expertise and skills in the industries where it is still difficult to secure Japanese human resources. The "Specified Skilled Worker (i)" is a status of residence for foreign nationals engaging in work requiring skills which need a considerable degree of knowledge or experience belonging to a specific industry.

The "Specified Skilled Worker (ii)" is a status of residence for foreign nationals engaging in work requiring proficient skills belonging to a specified field. The number of foreign nationals in the category (i) was approximately 250,000 and the number of foreign nationals in the category (ii) was approximately 150,000 as of the end of June 2024.[4]

Although Japan is yet not widely receptive to immigration from foreign countries, there has been a drastic change in Japan's immigration policy. Many foreign nationals, especially from other Asian countries, try to use this status introduced by the new amendment of the Japanese immigration law.

III. New-Style Migration to Japan

At the time of the amendment of the Japanese immigration law, it was expected that relatively impoverished foreign people would try to use the new status. But another type of foreign people began to move to Japan. They are relatively rich foreign people who can easily purchase real estate in Japan. They seek to live in the relatively affluent areas of Tokyo, where elementary and junior high schools with good reputations are located.

According to statistics provided by Japan's Ministry of Land, Infrastructure, Transport and Tourism, the proportion of real-estate-investments in Japan held by foreigners accounted for 34% of the total amount of real-estate-investments in Japan in 2020.[5] Many are for pure investment purposes, but the number for residential purposes is also increasing. Bunkyo District, one of the affluent areas of Tokyo, is a very popular place for such residential investments. The number of foreign pupils, mainly from China, attending elementary schools in the Bunkyo District have doubled in the last five years.

These immigrants also try to engage in highly specialized occupations and/or seek high-paying jobs in Japan. For instance, the number of applications for the registration as "Registered Foreign Lawyer" have drastically increased, mainly by Chinese lawyers, where a foreign lawyer is allowed to provide certain types of legal services in Japan.

At the same time, the applications of foreign students, mainly Chinese students, for undergraduate/graduate courses of Japanese universities have rapidly increased. As a consequence, approximately one-half of the overseas students in Rikkyo University, which is one of the six eminent and reputed universities located in Tokyo, are occupied by Chinese students as of October 2024.[6] The expenses for studying in Japan are never cheap for these overseas students, but the parents, including the Chinese parents, are usually rich enough to afford these expenses.

Apparently, these new-style immigrants are different from the immigrants of traditional type. But why they are trying to move to Japan, and/or to encourage their children to move to Japan although they are rich enough in their home countries, remains a pressing question.

IV. Backgrounds for the New Phenomenon

Nowadays, a common word in the Chinese language is "Rùn." This word expresses a desire to escape from his or her current country of residence. In addition to the original meaning of this Chinese word "Rùn," another meaning was added to the word "Rùn" since its romanization resembled the English word "run." It has been secretly used due to China's strictly severe lockdown at the period of the COVID-19 pandemic, which prompted many Chinese people to consider emigrating from China.

Even after the COVID-19 pandemic, the tendency has continued. It is probably because they experienced worsening economic prospects and diminishing political freedoms in their home country, and one of the preferred emergency exits could be the migration to Japan, which is a safe and convenient country with freedom and is located not far away from their home. Even at this moment, whilst this article goes for publication, the new-style migration to Japan continues to grow. ■

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4. https://www.moj.go.jp/isa/content/930004452.pdf

5. https://www.mlit.go.jp/totikensangyo/content/001444771.pdf

6. https://www.rikkyo.ac.jp/about/disclosure/qo9edr00000081k^{h}-att/ryugaku.pdf

2025, año de un – *posible* – cambio en la política migratoria mexicana

Adrián OJEDA-CUEVAS

While, historically, corporate migration in Mexico has represented an example of simplicity and flexibility worldwide for the past 12 years, US immigration policies and expected regulations may have a profound effect. This is even more true if US President Donald Trump implements what he promised during his political campaign.

Historiquement, la migration d'entreprise au Mexique a représenté un exemple de simplicité et de flexibilité à l'échelle mondiale au cours des douze dernières années. Toutefois, les politiques migratoires américaines et les réglementations attendues pourraient avoir un impact profond. Cela est d'autant plus vrai si le Président Donald Trump met en œuvre ce qu'il a promis durant sa campagne électorale.

Durante más de 12 años México ha sido ejemplo a nivel mundial por la flexibilidad y simplicidad de su sistema migratorio. Desde la entrada en vigor de la Ley de Migración en el año 2012, las reglas esenciales de la migración por razón de empleo, también conocida como "Migración Corporativa", pueden resumirse en 3 preguntas básicas:

1. ¿La persona de nacionalidad extranjera recibirá alguna remuneración en México?
   Si la respuesta es afirmativa, el extranjero requerirá un permiso migratorio de trabajo, de lo contrario, no es necesario un permiso del Instituto Nacional de Migración (INM), sin importar las actividades que realice en México.
2. ¿El extranjero permanecerá en territorio nacional más de 180 días *consecutivos*?
   En caso afirmativo, necesita obtener la condición migratoria de residente temporal. Si la respuesta es negativa, puede ingresar válidamente como visitante.
3. Finalmente, ¿el visitante extranjero es nacional de algún país que requiere visa mexicana para viajar a México?
   Si la respuesta es afirmativa, requerirá obtener previamente una visa de visitante ante alguno de los consulados de México en el extranjero, *salvo que* el visitante cuente con una visa válida de los Estados Unidos de América, Canadá, Reino Unido, Japón o cualquiera de los países del espacio Schengen o sea residente permanente de estos países o de Chile, Colombia o Perú.

Durante la administración del Presidente López Obrador la política migratoria mantuvo el principio de plena movilidad y fronteras abiertas para la Migración Corporativa, aun durante la pandemia ocasionada por el virus SARS-COV-2 y no obstante la amenaza del Presidente Donald Trump en 2019 de imponer aranceles a los productos fabricados en México y exportados a los Estados Unidos de América si el gobierno mexicano no frenaba las caravanas de migrantes irregulares en tránsito por el país.

Si bien existieron algunos obstáculos para la Migración Corporativa durante el sexenio 2018-2024, como la falta de citas para las entrevistas en algunos de los consulados de México en el extranjero para obtener visas para viajar

a México o los frecuentes rechazos de entrada al país en los aeropuertos internacionales, principalmente en la Ciudad de México y Cancún, para algunas nacionalidades como Venezuela, Brasil, India, o China, la realidad es que los procesos migratorios mantuvieron su simplicidad y celeridad en los tiempos de resolución.

Esta política migratoria que tanto ha favorecido la movilidad de empleados y ejecutivos extranjeros de empresas mexicanas y multinacionales, pudiera tener que cambiar bajo la nueva administración de la Presidenta Claudia Sheinbaum, no por decisión propia, sino por el cambio radical que experimentará la política migratoria de los Estados Unidos de América, y posiblemente su regulación migratoria, durante los cuatro años del segundo periodo presidencial de Donald Trump en los años 2025 al 2029.

A diferencia de la campaña presidencial en México, en la que poco, muy poco (casi nada) se habló del tema migratorio, éste fue uno de los 5 temas más importantes para los votantes en los Estados Unidos de América y de ahí que el en ese entonces el candidato por el Partido Republicano, Donald Trump, tomara como eje de su campaña un discurso anti-migrante que ahora se ha convertido en una *amenaza directa para nuestro país.*

[...] Hemos sido testigos de las primeras deportaciones masivas que tanto pregonó el candidato Trump en su campaña.

Aun quitando las exageraciones de los discursos de campaña del candidato Trump, en los primeros días de su mandato, hemos confirmado que ha endurecido las políticas migratorias en los Estados Unidos de América y ello está limitando y continuará restringiendo el ingreso irregular (sin permiso migratorio) de los miles de migrantes que siguen entrando a México en tránsito para llegar a Estados Unidos en búsqueda del "*American Dream*".

También hemos sido testigos de las primeras deportaciones masivas que tanto pregonó el candidato Trump en su campaña.

Es previsible que la suma de ambas políticas migratorias en los Estados Unidos de América tendrá un impacto directo en México por el número de migrantes extranjeros que permanecerán en territorio nacional, ya sea por no poder ingresar a los Estados Unidos de América, o por ser devueltos a México durante los procesos de deportaciones – masivas o no – que se implementen en nuestro vecino del Norte.

Ante estos importantes cambios en el flujo y dinámica migratoria en los Estados Unidos de América, es altamente probable que la política migratoria en nuestro país tenga que cambiar para adaptarse al nuevo fenómeno migratorio y el cambio de la vocación migratoria de México: de país de tránsito a país de destino de migrantes no mexicanos.

Una de las muchas preguntas que surgen ante este posible cambio de la política migratoria mexicana motivada por la migración irregular es si estos cambios impactarán negativamente a la Migración Corporativa y las 3 reglas básicas – y sencillas – expuestas al inicio de este artículo.

Aunque es difícil y arriesgado aventurar una respuesta, comparto mi opinión: SI.

Si, si es probable que la Migración Corporativa se vea afectada por la dinámica migratoria entre México y los Estados Unidos de América durante los cuatro años del mandato del presidente Donald Trump ya que posiblemente México se vea forzado a endurecer los procesos migratorios *regulares (corporativos)* como muestra de los esfuerzos para frenar la migración irregular frente a su vecino del Norte.

Me explico: frenar el movimiento irregular de personas que viajan a través de México es sumamente complicado y costoso, en términos económicos y políticos, mientras que endurecer los criterios y procesos para obtener visas e ingresar al país por los puertos de tránsito internacional de personas (aeropuertos, fronteras terrestres, puertos marítimos) es más fácil, rápido y económico de implementar y con ello la Administración Federal podría tratar de evidenciar los esfuerzos adoptados por México para frenar la migración (en general) y evitar así las amenazas del Presidente Trump.

En un escenario a más largo plazo, también podría requerirse un cambio en la política migratoria mexicana para el otorgamiento de permisos de residencia temporal y permisos de trabajo si el número de migrantes a quienes el Presidente Donald Trump no permite entrar o deporta a México crece exponencialmente y éstos deciden permanecer en México de manera temporal o indefinida.

Desgraciadamente, ninguno de los cambios en las políticas migratorias en México o Estados Unidos de América que hemos comentado en este artículo resolverán los retos de ambos países frente el fenómeno de la migración, el cual es intrínseco a la naturaleza humana y continuará aún con todas las restricciones y deportaciones que Donald Trump a comenzado a implementar.

En su lugar, deberían abrirse conversaciones serias y realistas para atender el fenómeno migratorio binacional de una manera ordenada y en respeto pleno de los derechos fundamentales de los migrantes y de la soberanía de ambos Estados. Si bien hoy parece algo imposible por el interlocutor por el que votó el electorado de nuestro vecino del Norte, la administración de la Presidenta Claudia Sheinbaum no debe dejar de intentarlo y volver a intentarlo las veces que sea necesario, ya que es la única vía en que se lograrán resultados viables y sostenibles en el tiempo. ■

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El control migratorio estadounidense, una constante en la relación bilateral con México

Alejandro CELORIO ALCÁNTARA

Immigration control measures are not a new issue in the United States, nor has it been a new issue for Mexico to confront the reality of irregular migration flows to the North. The difference this time is the increasingly public nationalist mood in the United States and the implementation of several measures restricting migration at the same time. And in the face of this reality, there is a debate between a supposed right to migrate and the right of the States to control entry to their territories. This article proposes that in the face of President Trump's migration policies, migration flows should be managed to respect the sovereign decisions of each country while observing international law and the human rights of migrants.

Les mesures de contrôle d'immigration ne sont pas un sujet nouveau aux États-Unis, pas plus qu'il n'est nouveau pour le Mexique d'être confronté à une réalité dans laquelle les flux migratoires irréguliers en transit vers le nord convergent avec les personnes expulsées. Cette fois-ci, la différence réside dans l'humeur nationaliste de plus en plus répandue aux États-Unis et dans la mise en œuvre simultanée de plusieurs mesures restrictives en matière d'immigration. Face à cette réalité, il existe un débat entre le droit supposé de migrer et le droit des États à contrôler l'entrée sur leur territoire. Cet article propose que, face à la politique migratoire du président Trump, les flux migratoires soient gérés de manière à respecter les décisions souveraines de chaque pays tout en observant le droit international et les droits humains des migrants.

Al asumir el presidente Trump el poder en 2017, se hizo famosa una imagen de su estratega en jefe Steve Bannon en su oficina en la Casa Blanca, frente a un pizarrón con decenas de medidas sobre migración. Entre ellas, una de las primeras acciones de esa Administración fue imponer una prohibición al ingreso de nacionales de ciertos países musulmanes (Orden Ejecutiva 13769) e implementar lo dispuesto en la sección 235(b)(2)(c) de su Ley de Inmigración y Nacionalidad, para devolver a territorio mexicano a solicitantes de asilo, el programa conocido como "Quédate en México". Durante su periodo presidencial, el presidente Trump, animado por Bannon y Stephen Miller, implementó diversas medidas para desincentivar la migración irregular. Muchas de estas acciones fueron detenidas en las cortes federales estadounidenses, otras fueron canceladas por su sucesor, el presidente Joe Biden.

La inmigración a los Estados Unidos fue y vuelve a ser una de las prioridades del presidente Trump. Algunos consideran que el nacionalismo blanco inspira la posición trumpista de restringir el ingreso de migrantes de manera legal, por ejemplo, con la reducción del número de refugiados que anualmente acepta el gobierno estadounidense, así como evitar la inmigración irregular al desincentivar los flujos, ya sea restringiendo el acceso al asilo o negando la nacionalidad por nacimiento.

> **La inmigración a los Estados Unidos fue y vuelve a ser una de las prioridades del presidente Trump.**

La posición del presidente Trump no es muy diferente a lo que se ha visto en otras latitudes. Los flujos migratorios irregulares, incluidos aquellos de personas que buscan asilo en países desarrollados, han dominado los espacios noticiosos en la última década. No es que antes no existieran, siendo la migración una constante humana, lo diferente quizás es la atención que ha recibido y el rechazo de algunos sectores nacionalistas en los países de destino.

Los flujos de nacionales sirios hacia Europa y las medidas para administrar su ingreso a la Unión Europea vía Grecia y Turquía, así como la migración subsahariana a través de las aguas del Mediterráneo, nos recuerdan dramáticas imágenes de personas, incluidos niños, que han perdido la vida en el intento de lograr una mejor vida en otras regiones.

En América, los flujos migratorios irregulares han enfrentado situaciones precarias similares en su tránsito hacia Estados Unidos. Las instancias más recientes son la crisis de los menores no acompañados en 2014, las caravanas de nacionales centroamericanos cruzando territorio mexicano entre 2018 y 2019, el tránsito de nacionales haitianos desde su isla a Brasil, Chile y hacia Estados Unidos en esas fechas también, junto con los denominados extracontinentales mezclándose con cubanos, nicaragüenses y venezolanos escapando situaciones políticas complejas.

Las dinámicas migratorias en Norteamérica han cambiado. Ya no son sólo mexicanos los que desean ingresar de manera irregular a Estados Unidos, ahora la mayoría son nacionales de otros países de la región. La forma de ingresar también se ha modificado, mientras en el pasado las personas mexicanas trataban de ingresar a Estados Unidos sin ser descubiertos, en los últimos años, la norma es que el extranjero ingresa a ese país por la vía terrestre y se entrega a las autoridades de control migratorio (*US Customs and Border Protection*) para solicitar asilo. De ser un país de origen únicamente, México se ha convertido en un país de tránsito, retorno y destino.

México se ha convertido en un país de tránsito, retorno y destino.

La migración es un tema complejo en el que se enfrentan posturas diversas. Hay quienes consideran que migrar es un derecho y que los países están obligados a recibir y ofrecer asilo a cuantas personas extranjeras lo requieran. Otros ven a la migración como un delito, como una "invasión" que debe detenerse ante la amenaza de que la llegada de extranjeros borrará las características nacionales de un país. Son pocos quienes ven a la migración como una oportunidad para que sus países se enriquezcan culturalmente y para que las personas migrantes puedan contribuir a la economía y a la fuerza laboral de países que se encuentran en plena disminución poblacional. En este debate sobre la migración como un derecho, vale destacar que la Declaración Universal de los Derechos Humanos establece en su artículo 13 fracción 2, que toda persona tiene derecho a dejar cualquier país, incluido el propio, y a regresar a su país. Y que en diversos marcos normativos nacionales se reconoce un derecho al movimiento de las personas.

Estamos viendo que, el presidente Trump retoma a la migración irregular como una de las mayores amenazas a la seguridad de los estadounidenses.

En México, el artículo 11 constitucional establece el derecho de tránsito por el territorio nacional, así como el derecho de buscar y recibir asilo, estando subordinado a las limitaciones que las leyes impongan. En muchas ocasiones, el debate se ha centrado en la cuestión respecto a si el derecho al movimiento, tránsito y a solicitar asilo está por encima del derecho soberano de los Estados a establecer ciertas restricciones para el ingreso a su territorio y para normar la forma en la que las personas pueden solicitar asilo y en su caso, recibirlo. Lo anterior, observando el principio de *non refoulement* establecido en el Derecho Internacional y que prohíbe la devolución de una persona al país en donde podría sufrir persecución.

Y en cuanto a restricciones, Estados Unidos, si bien un país creado por migrantes, se ha caracterizado por limitar cada vez más el ingreso de extranjeros a su territorio. Una buena ilustración de su posición restrictiva es el caso *Chae Chan Ping v. United States* (*The Chinese Exclusion Case 1889*) en el que la Suprema Corte determinó que el gobierno tenía la autoridad de excluir a extranjeros que no se asimilarán y que representan un peligro a la paz y la seguridad del país.

Estamos viendo que, el presidente Trump retoma a la migración irregular como una de las mayores amenazas a la seguridad de los estadounidenses. Denominándola una "invasión", decretó una emergencia nacional en la frontera sur con México, por la cual se destinarán recursos extraordinarios para detener el flujo irregular de inmigrantes y posiblemente, se justificarán acciones severas de control migratorio para remover a personas inmigrantes y disuadir a flujos futuros.

Las acciones de control migratorio del presidente Trump no son únicamente animadas por el nacionalismo de una minoría estadounidense que pretende evitar a toda costa la llegada de migrantes no blancos, son una expresión de la añeja tradición estadounidense de restringir a conveniencia el ingreso de personas migrantes y de tratar de externalizar sus fronteras. Basta recordar acciones durante la administración Obama, como *Secure Communities* o los acuerdos 287g, los cuales ampliaron la capacidad de detención de personas indocumentadas con la colaboración de autoridades policiacas estatales y municipales, o la suscripción del Acuerdo de Tercer País Seguro entre Estados Unidos y Canadá en 2002.

Sin duda, el gobierno estadounidense tiene un amplio catálogo de acciones legales -aunque se pudiera cuestionar su moralidad- para remover del interior de su territorio a personas en condición migratoria irregular o para rechazar en sus fronteras a quienes intentan ingresar a su territorio sin documentos.

Algunos ejemplos: asociación de agencias de control migratorio con policías locales y estatales para conocer si una persona detenida por infracciones administrativas o por sospecha de cometer un delito, puede ser removida (*Secure Communities*); remoción de aquellas personas cuyos casos ante un juez migratorio (muchas solicitudes de asilo abandonadas) fueron resueltos negativamente *in absentia*; terminación de programas que suspenden la remoción como el *Temporary Protected Status* (TPS) y *Deferred Action for Childhood Arrivals* (DACA); limitar el número de personas que pueden ingresar a solicitar asilo en los puertos de entrada fronterizos (*meetering*); devolver a extranjeros a territorio mexicano (*Migration*

Protection Protocols); expulsión inmediata de territorio estadounidense y sin necesidad de un proceso ante un juez migratorio (*expedited removal*); y el traslado de extranjeros a terceros países (*Asylum Cooperative Agreement*).

En la relación bilateral, México ha sabido navegar la imposición de medidas estrictas de control migratorio estadounidense. Desafortunadamente, se ha tratado de una dinámica en la que Estados Unidos no ha reformado su sistema migratorio de manera integral desde 1986, los casos de asilo se siguen apilando con un retraso de casi cuatro años para que sean resueltos y su industria, particularmente agrícola, de la construcción y de servicios, se siguen beneficiando de la mano de obra indocumentada. Por su parte, México ha asumido una posición reactiva en la que destina esfuerzos para tratar de controlar el flujo de personas que desean llegar al país del norte al tiempo que recibe a mexicanos y a no mexicanos que son devueltos desde Estados Unidos. El reto para ambos países durante la administración Trump será la implementación al mismo tiempo de todas las medidas de control migratorio disponibles en la ley estadounidense, sin que se atiendan las causas de raíz que generan los flujos migratorios irregulares.

Conclusiones

Migrar es inherente a los seres humanos. En la compleja realidad actual, la migración se ve cada vez más como un problema en lugar de como un factor positivo para las comunidades de recepción. En ese sentido, los marcos normativos parecerían listos para reformularse. No obstante, el surgimiento de nacionalismos y la creciente tendencia a la desinformación, anima a que los sistemas migratorios sean cada vez más restrictivos. La propuesta entonces sería reconocer que la migración es un fenómeno que debe gestionarse y no controlarse, y que como lo establece la meta 10.7 de los Objetivos de Desarrollo Sostenible (ODS) y el Pacto Global para la Migración, los Estados deberían concentrar sus esfuerzos en facilitar la movilidad humana de manera segura, ordenada y en la que se respete la soberanía nacional, el estado de derecho, así como sus obligaciones de derecho internacional y los derechos humanos de las personas migrantes. ■

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Individual Global Mobility: Preferential Tax Regimes, Golden Visas/Passports, and Global Minimum Tax

Claire WEEKS

La mobilité mondiale est souvent utilisée pour décrire le mouvement des individus qui choisissent de vivre, de travailler ou de prendre leur retraite à l'étranger. Dans cet article, je me concentre sur les régimes applicables aux personnes très fortunées (UHNW). Ces dernières années ont été marquées par d'importants changements dans les régimes nationaux applicables aux personnes fortunées qui s'installent dans une nouvelle juridiction, tant sur le plan fiscal que sur celui de l'immigration. Dans le même temps, le G20, l'OCDE et l'UE ont étudié des projets d'impôt minimum pour ces personnes. L'objectif de cet article est de fournir une vue d'ensemble des développements récents, en mettant l'accent sur les récentes réformes britanniques concernant la base d'imposition dite « non-dom ».

La movilidad global se utiliza a menudo para describir el movimiento de las personas que deciden vivir, trabajar o jubilarse en el extranjero. En este artículo, me centraré en los regímenes aplicables a las personas con patrimonios muy elevados. En los últimos años se han producido grandes cambios en los regímenes nacionales aplicables a los grandes patrimonios que se trasladan a una nueva jurisdicción, tanto en materia fiscal como de inmigración. Al mismo tiempo, hemos visto cómo el G20, la OCDE y la UE exploraban planes para establecer un impuesto mínimo sobre estas personas. El objetivo de este artículo es ofrecer una visión general de los últimos acontecimientos, con especial atención a las recientes reformas en el Reino Unido de la base imponible denominada "non-dom".

Global mobility is often used to describe the movement of individuals as they choose to live, work, or retire abroad. In this article, the author focuses on the regimes that are applicable to ultra-high net worth (UHNW) individuals.

Recent years have seen huge changes to domestic regimes for UHNW individuals moving to a new jurisdiction, in relation to both tax and immigration. At the same time, we have seen the G20, Organisation for Economic Co-operation and Development (OECD) and European Union (EU) explore plans for a minimum tax on such individuals.

The purpose of this article is to provide an overview of recent developments, with a particular focus on the recent UK reforms to the so-called "non-dom" basis of taxation.

Preferential Tax Regimes

Countries can compete to attract wealthy individuals by either reducing tax rates or offering preferential tax regimes. Whilst the UK has had some form of preferential tax regime since 1799 (see below for a brief history lesson), the last 15 years have seen many countries introduce new regimes to attract specific socio-economic groups perceived as particularly mobile.

These tend to take one of three forms:

(a) "Foreign-source income" regimes offer preferential taxation of worldwide income or of foreign income while applying standard taxation to domestic income. Countries that currently offer such a regime include Ireland, Italy, Switzerland, and the UK.

(b) "Domestic income" regimes offer reduced rates for specific economic activity in the host country. Examples include Austria, Belgium, Cyprus, and Denmark.

(c) "Pension" regimes offer lower taxation on foreign-source pension income for retirees. Examples again include Greece, Italy, Malta, and Portugal.

For each of these jurisdictions, this strategy can enhance tax collection and benefit the national economy. However, there tend to be two main criticisms:

(a) First, according to the EU Tax Observatory, globally these policies are negative sum: taxpayers attracted by one country reduce the tax base by the same amount in another, and global tax revenue collection falls.[1]

(b) The second criticism is whether it is fair to existing/long term residents: the UK reforms discussed below are a clear example of a policy decision based on "fairness."

1. EU Tax Observatory (2024), Global Tax Evasion Report.

Focus on the UK: The old rules…

Most UK tax residents are taxed on the "arising basis," which means they are fully liable to UK tax on their worldwide income and gains. However, under the rules that were in place before 6 April 2025, individuals who were non-UK domiciled (and not deemed domiciled) could choose to be taxed on the "remittance basis," such that their exposure to tax on foreign income and gains was restricted to those enjoyed in or brought ("remitted") to the UK.[2] The availability of the remittance basis was not dependent on the individual's immigration status, and it was perfectly possible to be non-domiciled whilst being a UK national. There were also additional benefits for trusts settled by such individuals.

(If readers can forgive a brief history lesson: A form of the "remittance basis" of taxation has been part of the UK tax code since 1799, when income tax was first introduced. Its current form can however be traced back to 1914, when the full benefits of the regime were restricted to "non-UK domiciliaries." This lasted until 1965, when the capital gains tax was first introduced. The subsequent history of the regime is then one of continued curtailment, culminating in its restriction to 15 years of residence in 2017 and its abolition with effect from 6 April 2025.)

A separate preferential regime also applied to individuals who were non-UK domiciled (and not deemed domiciled) for inheritance tax purposes: they were outside the scope of UK inheritance tax on non-UK situs assets (with further favourable rules for trusts settled by such individuals).

2. "Domicile" is an archaic common law concept that focuses on where a person intends to live permanently or indefinitely; "deemed domicile" is a tax concept that looks at whether an individual has been resident for 15 out of 20 tax years.

… and the new rules from 6 April 2025

With effect from 6 April 2025, the above regimes were abolished and domicile ceased to be the connecting factor for UK tax purposes. Instead:

- For income tax and capital gains tax, there is a new regime referred to as the "FIG Regime" which exempts all foreign income and gains "FIGs" from UK tax, regardless of whether they are remitted to the UK. The downside is that this regime is only available for the first four years of tax residence (and only following 10 consecutive years of non-residence) – thereafter, income tax and capital gains tax will apply on a worldwide basis.
- For inheritance tax, non-UK situs assets are outside the scope of tax, but only until the individual has been a UK tax resident for 10 out of 20 tax years. Thereafter (and for a continuing period after ceasing UK tax residence), an individual is referred to as a "long term resident" and subject to inheritance tax on a worldwide basis.

Immigration by Investment

The ability to take advantage of a preferential tax regime is limited by the right to reside in the relevant jurisdiction. Acquiring residence will usually confer the opportunity to live, work and purchase property in a jurisdiction.

Many countries offer residence by investment schemes ("golden visas") and/or citizenship by investment ("golden passports"), whereby applicants are required to make significant investments in return for residence rights and, sometimes, a route to citizenship. Examples of wealthy nations include the UK, the USA, Switzerland, and Monaco. At the other end of the spectrum are smaller Caribbean states like St. Kitts and Nevis.

Acquiring residence will usually confer the opportunity to live, work and purchase property in a jurisdiction.

However, both golden visa and golden passport regimes have been criticised on the basis that they can be used to facilitate money laundering, financial crime, and tax evasion. This is because such programmes enable individuals to create legal substance in one jurisdiction, sometimes cutting ties with another, raising concerns of inadequate due diligence.

Recent years have seen big changes. The UK position is discussed below, but Ireland, Portugal, the Netherlands, and Greece have also abolished or restricted their residence by investment schemes.

Focus on the UK

In the UK, the investor visa programme was closed with immediate effect on 17 February 2022. The government of the day cited concerns that the route "facilitated the presence of persons relying on funds that have been obtained illicitly or who represent wider security risks" and also questioned the scheme's overall benefit to the UK economy.

Prior to that date, it had been possible to obtain a visa with a minimum investment of £2 million in actively trading UK companies (with accelerated routes to permanent settlement available where the investment was £5 million or £10 million). No replacement has been proposed.

The visa options in the UK are therefore limited to (i) work, (ii) study, (iii) business creation, (iv) exceptional talent (under limited endorsement), or (v) relationship with a British or settled person.

Global Minimum Tax

It has already been mentioned the argument that countries competing to offer preferential tax regimes can affect government revenues on a global basis. Recent research has also shown that global billionaires have very low personal effective tax rates, of between 0% and 0.5% of their wealth.[3]

In June 2024, at the request of the Brazilian G20 presidency, Gabriel Zucman presented "A blueprint for a coordinated minimum effective taxation standard for Ultra-High-Net-Worth Individuals."[4] The proposal would create a minimum tax on around 3,000 billionaires, aiming to ensure they pay at least 2% of their wealth in taxes. It is suggested that this could be implemented through wealth tax, extended income tax, or a tax on deemed income.

The OECD has also contributed to the debate, with its 2024 report to the G20.[5] The report explores how tax systems can mitigate or exacerbate inequality with a focus on the distribution of income and wealth and identifies scope for potential reform, without providing any proposals for how this should be achieved.

Concluding Thoughts

In the UK, there has been significant upheaval in relation to both the preferential tax and immigration regimes. Whilst the old rules were not perfect, they certainly served a purpose – one that is recognised by many other jurisdictions competing with the UK to attract energetic entrepreneurial individuals to their shores. From a tax perspective, it will remain to be seen whether a global minimum tax could level the playing field. ■

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3. See footnotes to the report of the EU Tax Observatory, ibid.

4. Gabriel Zucman, *A blueprint for a coordinated minimum effective taxation standard for ultra-high-net-worth individuals*, 2024.

5. OECD, *Taxation and Inequality: OECD Report to G20 Finance Ministers and Central Bank Governors*, OECD Publishing, Paris, 2024.

Access to Justice in the Kafala System: Constraints and Violations

Ahmed ALAMMAR

Cet article examine l'accès à la justice pour les migrants dans le cadre du système de la « kafala », un cadre dans lequel un migrant est généralement parrainé par un employeur (kafeel) qui a des responsabilités, prévalant au Moyen-Orient et en Afrique du Nord. Conçu à l'origine comme un mécanisme de protection ancré dans les traditions islamiques, ce système a évolué vers une vulnérabilité structurelle : restriction des déplacements, confiscation des passeports, conditions de travail abusives et violences physiques. Les traités internationaux relatifs aux droits de l'homme soulignent que l'accès à la justice est fondamental pour la protection des droits de l'Homme, mais il existe des lacunes dans la mise en œuvre de ces normes dans le cadre de la kafala.

Este artículo examina el acceso a la justicia de los migrantes bajo el sistema de «kafala», un marco en el que un migrante suele ser patrocinado por un empleador (kafeel) que tiene responsabilidades, frecuente en Oriente Medio y el Norte de África. Aunque en un principio se concibió como un mecanismo de protección arraigado en las tradiciones islámicas, el sistema ha evolucionado hasta convertirse en uno que fomenta vulnerabilidades estructurales, como la restricción de movimientos, la confiscación de pasaportes, la explotación laboral y los abusos físicos. Los tratados internacionales de derechos humanos hacen hincapié en que el acceso a la justicia es fundamental para proteger los derechos humanos, pero existen lagunas en la aplicación de estas normas en la kafala.

Introduction

Throughout history, there has been international migration. The International Organization for Migration (IOM) defines "migrant" as: *"An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons."*

This definition includes diverse well-defined legal categories of people, such as "migrant worker," which the IOM defines as: *"A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."* Despite its prevalence throughout human history, migration has become a defining global issue in the twenty-first century, becoming a significant factor in domestic, regional, and international policy agendas. It is a topic that affects all states, whether they be host, sending, or transit states.

All over the world, migrant workers are considered a vulnerable group.[1] They may face human rights violations, discrimination, and other negative societal and structural dynamics. The vulnerability of migrant workers is particularly evident where the kafala system prevails: many nations of the Middle East and North Africa, particularly in the Arabian Peninsula. The kafala system is a sponsorship system in which employers act as sponsors (kafeel) to migrant workers, sponsoring their visa and ability to enter the country.[2] Initially, the purpose of the system was to guarantee the rights of both the employer and the migrant worker. Historians of the kafala system have explored its Islamic origin, its ties to the culture, and its shift from a well-meaning, protective system to its current form.

The vulnerability of migrant workers within the kafala system highlights a broader, critical issue in human rights: lack of access to justice. Access to justice, itself a fundamental human right, is crucial for the enforcement of other human rights, particularly in systems like kafala. A migrant worker must be able to seek redress in a fair process, to complain about human rights violations, and to seek assistance from authorities. In both respects, the kafala system has fallen short.

1. I. Bantekas & L. Oette, *International Human Rights Law and Practice*, at 612-616 (3rd ed. 2020).

2. H. Malaeb, *The "Kafala" System and Human Rights: Time for a Decision*, 29 Arab Law Quarterly 4 at 307-342 (2015).

International Protections for Access to Justice

The international legal framework is replete with treaties and conventions that enshrine the right to access to justice, underscoring its critical role in the protection and enforcement of human rights globally.

The vulnerability of migrant workers within the kafala system highlights a broader, critical issue in human rights: lack of access to justice.

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 and has been ratified by 174 states, including states that operate the kafala system. The ICCPR is a cornerstone international human rights treaty that enshrines fundamental civil and political rights, including the crucial rights to access justice and seek redress for violations. Article 2 of the ICCPR lays the foundation for implementing these rights by obligating each party state to respect and ensure the rights recognised by the ICCPR for all individuals within its jurisdiction.

Specifically, Article 2(3) mandates that states provide an effective remedy to individuals whose rights under the ICCPR have been violated, ensuring that competent judicial, administrative, or legislative authorities enforce these remedies. Article 2(3) affirms that access to justice is essential for the realization of every other right under the ICCPR, as it provides the necessary mechanisms for individuals to challenge and rectify violations. Article 2 thus underscores the principle that civil and political rights, without accessible and enforceable remedies, are ineffective.[3]

The International Covenant on Economic, Social and Cultural Rights (ICESCR), also adopted in 1966, is a fundamental treaty in international human rights law that aims to protect and fulfil economic, social, and cultural rights. The ICESCR recognises a broad range of rights, including the rights to work, to social security, to an adequate standard of living, to health, and to education. Central to implementing these rights is Article 2(1), which obligates each party state to take deliberate steps, "to the maximum of its available resources," to make the rights recognised in the ICESCR a reality.

To further clarify the obligations under Article 2(1), the ICESCR issued General Comment n° 9, which provides detailed guidance on the domestic application of the ICESCR. This General Comment emphasizes the necessity of judicial and other effective remedies to address violations of rights under the ICESCR. It emphasises that

3. B. Ramcharan, *The Fundamentals of International Human Rights Treaty Law* at 148, 2011.

states must ensure the availability of appropriate means of redress, including judicial remedies, and that the ICESCR should be fully integrated into domestic law to allow for direct applicability in national courts. The General Comment also elaborates on the broader obligations of states to respect, protect, and fulfil the rights enshrined in the ICESCR, reinforcing the critical role of effective remedies in realising these rights.

The Kafala System

Derived from the Arabic root word of k-f-l, the term "kafala" can take on multiple meanings, the most significant for the system being "legal guardian."[4] Kafala as a legal system has a modern and a traditional origin, both vital to understanding its current iteration. Traditionally, the system has origins in Sharia (Islamic law). Sharia is a legal system rooted in the Islamic religion; where it applies, it informs people's daily lives and is a vital part of the local legal philosophy. The "kafeel," or sponsor, and the "makful," or the sponsored party, are put in a legal guardianship where the kafeel is meant to provide legal protection and guarantees to the makful. This relationship was meant to be a mutually beneficial exchange of legal guarantees. Kafala is a matter of deep tradition in many countries, often preexisting the current legal system.[5]

Kafala in its modern form has been widely criticised for its inherent structural shortcomings that often lead to severe exploitation and abuse. Because the sponsor effectively has control over the worker's ability to earn a living in the host state, there is an inherent power imbalance between them. This imbalance is exacerbated by the fact that the vast majority[6] of migrant workers in kafala-system countries are low-income or low-skilled workers who are required to reimburse their sponsors for recruitment fees. Sponsors may exploit this imbalance to exert undue control over their workers. Documented abuses include restrictions on workers' freedom of movement, confiscation of passports, exploitative working conditions, inadequate living conditions, and physical abuse.

Access to Justice for Migrant Workers

As a result of the power imbalance discussed above, workers are understandably reluctant to seek a legal remedy. This is a critical failure of the kafala system. Kafala states have often failed to enact laws implementing international legal standards. In other cases, existing local laws are not enforced. For meaningful improvement of migrant workers' situation in kafala countries, there must be a concerted effort to strengthen laws and procedural access to justice. Judicial systems must be accessible, transparent, and capable of providing real protection and redress for migrant workers. Perhaps kafala and justice are incompatible with one another, as the kafala system puts too much control over the migrant worker's livelihood into the hands of the employer. ■

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4. O. AlShehabi, *Policing Labour in Empire: The Modern Origins of the Kafala Sponsorship System in the Gulf Arab States*, 48 British Journal of Middle Eastern Studies 2 at 291-310, 2019.

5. A. Longva, *Walls Built on Sand: Migration, Exclusion and Society in Kuwait*, 1997.

6. According to data from the United Nations Economic and Social Commission for Western Asia.

Unification of Business Law in Turkic States

Dr. Ilgar BABAYEV

Le processus d'unification du droit dans les États membres de l'Organisation des États turcs d'Azerbaïdjan, de Turquie, du Kazakhstan, du Kirghizistan et de l'Ouzbékistan (« OTS ») implique des mesures visant à harmoniser et à unifier les systèmes juridiques de ces pays. L'unification vise principalement à renforcer les relations économiques et commerciales, à faciliter la coopération transfrontalière et à éliminer les barrières juridiques. Cette approche permet non seulement d'assurer l'harmonie dans l'application du droit, mais aussi de soutenir l'intégration commerciale des pays. Cet article traite de l'importance de l'unification du droit, en particulier du droit des affaires dans les États membres de l'OTS, du renforcement de la coopération économique et juridique intergouvernementale et des avantages de l'alignement des normes juridiques.

El proceso de unificación del Derecho en los Estados miembros de la Organización de Estados Turcos de Azerbaiyán, Turquía, Kazajstán, Kirguistán y Uzbekistán («OET») implica pasos encaminados a armonizar y unificar los sistemas jurídicos de estos países. La unificación busca principalmente reforzar las relaciones económicas y comerciales, facilitar la cooperación transfronteriza y eliminar las barreras jurídicas. Este enfoque no sólo garantiza la armonía en la aplicación de la ley, sino que también apoya la integración comercial de los países. Este artículo analiza la importancia de unificar el derecho, especialmente el derecho mercantil en los Estados miembros de la OET, la mejora de la cooperación económica y jurídica intergubernamental y los beneficios de alinear las normas jurídicas.

Introduction

Unification of law is the process of aligning legal norms from different legal systems or countries and regulating them based on common rules and principles. The primary goal of this process is to eliminate legal differences between various countries and legal systems and ensure harmonization. Unification of law is particularly significant in areas such as international trade, business, contracts, and financial transactions. It plays a crucial role in boosting mutual trade and investment among states with diverse legal systems, removing legal obstacles, and strengthening intergovernmental legal cooperation.

The movement toward unification of law began in the early 20th century and continues today at both international and regional levels. Although not all steps taken in this field have been successful, the achievements to date hold great promise. Organizations like UNCITRAL (United Nations Commission on International Trade Law), UNIDROIT (International Institute for the Unification of Private Law), and the Hague Conference on Private International Law have played key roles at the international level. Meanwhile, organizations such as European Union, OHADA (Organization for the Harmonization of Business Law in Africa), OHADAC (Organization for the Harmonization of Business Law in the Caribbean) and the League of Arab States have contributed to the implementation of this activity at the regional level.

Considering the benefits of unification of law, especially business law, at the regional level, we believe it would be advantageous to evaluate this topic in the context of the Organization of Turkic States (OTS). Unification of law among the member states of OTS (Azerbaijan, Turkey, Kazakhstan, Kyrgyzstan, Uzbekistan) could hold strategic importance in strengthening intergovernmental cooperation, supporting economic development, and accelerating the resolution of legal disputes.

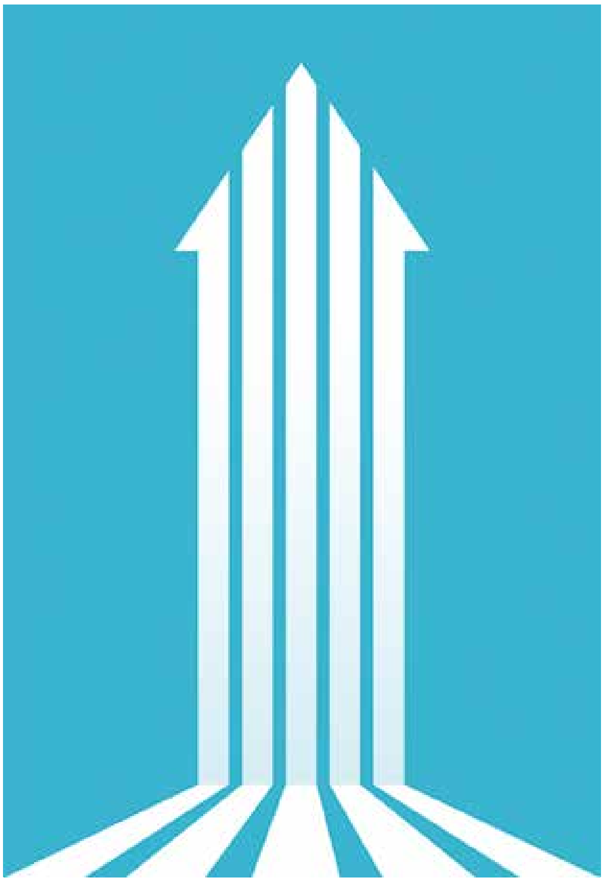
The member states of OTS predominantly comprise former Soviet Union republics. The legal systems of these countries were significantly shaped by the legal legacy of the USSR, resulting in certain similarities among them. The legal system applied during the Soviet era was primarily based on the socialist legal system, traces of which are still evident in the legal systems of post-Soviet states.

Turkey, however, stands out as a relatively different country in terms of its legal system among OTS member states.

Through legal reforms in the early 20th century, Turkey transitioned from the Ottoman legal system to the Roman-German legal family. During these reforms, Turkey adopted the Swiss Civil Code, the German Penal Code, and the Italian Enforcement Code, aligning its legal system more closely with Western countries. Nevertheless, other OTS member states also carried out legal reforms after regaining their independence, implementing measures consistent with the Roman-German legal family. This context provides a favorable foundation for the unification of law within the members of OTS.

The importance of unification of law is particularly evident in economic and business areas. Aligning business agreements and laws among states with different legal systems is crucial for international economic cooperation and increasing investments. Adopting unified business laws, investment protection agreements, and arbitration mechanisms within OTS can serve as key elements of the unification process. For instance, adopting model laws such as those proposed by UNCITRAL could simplify regional trade and provide a standardized approach to resolving legal disputes.

Ultimately, the unification of law among OTS states, located along the ancient Silk Road and the "Belt and Road Initiative," is both feasible and desirable. This process could significantly contribute to stronger economic cooperation, legal security, and the overall development and integration of the OTS.



The Benefits of Unification of Business Law in the OTS Countries

The unification of business law facilitates international trade and investment activities. This could increase trade potential among the Turkic States and contribute to economic development. However, the legal barriers created by diverse legal systems can complicate the enforcement of business contracts or lead to legal disputes. Legal unification plays a key role in addressing these problems.

For example, the positive effects of legal unification on trade among European Union (EU) countries are widely recognized. By reducing legal differences, the EU has created a common market and increased trade turnover. This has led to a reduction in customs restrictions and ensured legal certainty for business activities. Applying the same approach among the Turkic States would enable the more efficient implementation of trade agreements and the establishment of a common market. Legal unification would strengthen the economic relations of the Turkic States and provide legal stability for foreign investors.

The unification of business law facilitates international trade and investment activities.

One model of legal unification that is worth noting is the experience of OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires). OHADA was established to harmonize trade and business law among African countries. The uniform legal system adopted within this organization has facilitated trade and economic development among 17 African countries, minimizing legal obstacles. One of the main advantages of the OHADA model is the elimination of legal differences and the provision of legal stability through the application of uniform trade legislation. If a similar approach were applied among the Turkic States, the enforcement of trade contracts could be simplified and legal stability ensured.

The creation of a unified arbitration system among the Turkic States could also help resolve interstate business disputes more quickly and effectively.

Another example is the Arab Unified Commercial Law project carried out within the framework of the League of Arab States. This project was proposed to simplify trade processes and eliminate legal differences between Arab countries. Similarly, OTS could apply such an approach to reduce legal obstacles and enhance economic cooperation.

As seen, the application of legal unification has been implemented several times at the regional level and has had a positive impact on supporting trade and economic development of OTS, which aims to develop trade and

expand its economy among its members, which can benefit from these examples.

Legal unification among the Turkic States can ensure not only the expansion of economic relations and the efficient implementation of business contracts, but also the faster and more effective resolution of legal disputes. This process will facilitate the resolution of interstate disputes based on common legal norms and support the preservation of legal stability. The application of uniform legal approaches can speed up and make the resolution of business disputes through arbitration and judicial channels more transparent.

A notable example in this context is the OHADA experience in the field of legal harmonization among African states. The OHADA arbitration court offers a uniform and simplified procedure for the resolution of disputes, enabling the swift resolution of disputes between states and companies. One of the most important results achieved through the application of OHADA is the expanded possibility of resolving business disputes through arbitration outside of courts and ensuring legal stability. A similar approach among the Turkic States could provide more efficient and faster resolution of trade disputes.

The creation of a unified arbitration system among the Turkic States could also help resolve interstate business disputes more quickly and effectively. Such mechanisms would not only expedite dispute resolution, but also strengthen mutual legal trust between states. The unification of law and the establishment of uniform arbitration systems among the Turkic States could make a significant contribution to the expansion of trade and economic relations and the provision of legal stability.

The unification of business law in the Turkic States can also directly and indirectly impact the reduction of costs in the regional business. This is linked to several key factors that reduce costs in business operations.

First and foremost, legal unification leads to a reduction in regulatory and compliance costs in trade. Companies operating in different legal systems typically incur costs for legal advice, local court processes, and varying bureaucratic requirements to comply with each country's local laws. When a uniform legal framework is applied, these costs are significantly reduced. Companies operate under the same legal rules, which minimizes compliance costs and accelerates operations.

Secondly, uniform legal standards reduce uncertainty. When the requirements of different legal systems vary, legal disputes and uncertainties make operations riskier and more costly for companies. Legal unification removes these risks, builds trust among trade partners, and simplifies the enforcement of contracts. As a result, the costs and time losses related to judicial proceedings for the enforcement of international contracts are reduced.

In addition, legal unification simplifies customs procedures and foreign trade operations. When trade partners operating under the same legal rules follow the same procedures in customs and trade operations, operational costs are reduced. For example, the uniform customs regulations applied within the EU have facilitated trade among European countries and reduced costs. OHADA can also be cited as an example. Legal harmonization among OHADA member states has accelerated the resolution of trade disputes and the enforcement of contracts, reducing business costs.

Methods that Can be Used for the Unification of Law

Various methods are available for implementing the process of unification of law. These methods can also be used for the process of unifying law in OTS countries.

International conventions are one of the widely used tools in the process of law unification. The preparation and signing of international conventions in areas such as trade, taxation, customs, or investment among the Turkic States can create common legal norms. This can play a significant role, especially in resolving interstate legal disputes. The application of such conventions will help accelerate legal procedures and ensure the preservation of legal stability between states.

Model laws are also an effective tool for law unification. This method offers a single legal framework for countries with different legal systems. The adoption of model laws within OTS can be widely applied, particularly in economic and trade law. Each state can adapt and adopt these model laws to fit its national legal system, thereby speeding up interstate cooperation and integration.

Model contracts are another important tool in the process of law unification. Using these model contracts to achieve law unification within OTS can be very beneficial for harmonizing legal systems and increasing mutual relations between different countries. The preparation of model contracts in a standardized and regulated format facilitates the resolution of legal issues between states with different legal cultures and accelerates the establishment of mutual legal relations.

Soft law refers to legal instruments that are not legally binding but are used by states and organizations to create behavioral norms and obligations. Although these legal norms are not mandatory, they play a significant role in facilitating cooperation and integration processes between states and international organizations. The use of soft law in law unification within the Turkic States is particularly important because it promotes harmonization and integration between states without the need for formal legislation. The application of soft law between the Turkic States can create a flexible, fast, and adaptable legal base among states with different legal systems.

Legal guides can play an essential role in the unification of law within the Turkic States. These guides serve as advisory sources to bring national legislations closer and more harmonized. They function as both legal instructions and a roadmap for harmonization. The use of legal guides simplifies the process of law unification within the Turkic States and supports the creation of common legal frameworks among states.

The unified acceptance of legal terminology can also play an important role in the unification of law. Differences in legal terminology between the legal systems of various states can sometimes lead to misunderstandings. The application of common legal terminology will ensure a more accurate understanding of legal documents and contracts and prevent legal disputes.

The establishment of a regional court among the Turkic States could be an effective mechanism for law unification and resolving legal disputes. Models such as the European Union Court or the Mercosur court system in Latin America could serve as examples. Through such a regional court, interstate disputes can be resolved under a unified legal framework, and the burden on national judicial systems will be reduced. This would also ensure legal stability in interstate trade and investment operations. The creation of unified arbitration and mediation mechanisms for resolving trade and investment disputes among the Turkic States can also accelerate the process of law unification.

Law unification should not only take place at the legislative level, but also at the level of legal education and professional development. Cooperation between law faculties and legal education institutions among the Turkic States should be enhanced, and joint legal programs and certification systems should be implemented. This will ensure that future legal professionals are trained within the framework of unified legal norms.

Model contracts are another important tool in the process of law unification.

As seen, various methods are available for implementing the process of law unification in the Turkic States. Several of these methods, or the most appropriate ones, could be utilized. However, prior to all, it would be advisable to conduct necessary research and studies and prepare a relevant roadmap, including the establishment of an institute for comparative legal research and studies within OTS or the Turkic Academy.

Conclusion

In conclusion, the unification of business law is an important process for strengthening legal and economic relations within OTS. While the member countries of OTS have different legal systems, common economic interests and historical similarities facilitate this integration. Through legal unification, trade and investment activities between the countries can be carried out more efficiently and securely.

This approach will help transform the Turkic States into a stronger cooperation platform and lead to a more robust economic and political unity through the unification of their legal systems. The unification of law will be a crucial step for deepening interstate integration and ensuring long-term development.

Creating legal harmony within OTS will ensure more effective enforcement of business contracts, faster resolution of legal disputes, and a more stable environment for investors. This will bring numerous benefits, such as reduced trade costs, simplified customs procedures, and enhanced legal security. The creation and implementation of unified legal norms will be a strategic step for the future development of OTS and will contribute to strengthening interstate economic and legal cooperation. ■

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La evolución de la protección del medio ambiente en la Unión Europea

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This article analyzes the evolution of environmental regulation in the European Union over the last three decades, highlighting three main aspects: greater ambition, comprehensiveness, and complexity. It shows an increase in the number and scope of regulations, which now range from traditional areas, such as water, waste, hazardous substances, or environmental assessment, to new areas, such as climate change, environmental responsibility, and corporate sustainability. It also highlights the growing interrelationship between environmental protection and other areas of law, such as human rights and commercial law. Current legislation is more detailed and demanding, reflecting the EU's commitment to sustainable development and the fight against environmental degradation and climate change.

Cet article analyse l'évolution de la réglementation environnementale dans l'Union européenne au cours des trois dernières décennies, en soulignant trois aspects principaux : une plus grande ambition, une plus grande exhaustivité et une plus grande complexité. Le constat est une augmentation du nombre et de la portée des réglementations, qui vont désormais des domaines traditionnels (tels que l'eau, les déchets, les substances dangereuses ou l'évaluation environnementale) à de nouveaux domaines tels que le changement climatique, la responsabilité environnementale et le développement durable des entreprises. Elle met également en évidence l'interdépendance croissante entre la protection de l'environnement et d'autres domaines du droit, tels que les droits de l'homme et le droit commercial. La législation actuelle est plus détaillée et plus exigeante, reflétant l'engagement de l'UE en faveur du développement durable et de la lutte contre la dégradation de l'environnement et le changement climatique.

La Unión Europea (UE) lleva tiempo preocupándose por la protección ambiental. Pero la relevancia de esta protección ha evolucionado con el paso de los años hacia un enfoque más ambicioso, más amplio y más complejo:

- Más ambicioso: en las áreas "tradicionales" del medio ambiente (tales como la autorización ambiental integrada, evaluación de impacto ambiental, aguas, atmósfera, residuos, sustancias peligrosas, flora y fauna, o accidentes graves), incidiendo en su mayor y mejor protección, imponiendo más exigencias.
- Más amplio: además de esas áreas "tradicionales" se regulan también otras, destacando la referida al cambio climático.
- Y más complejo: la protección ambiental interactúa ahora de forma más clara con otras áreas del Derecho con las que parecía no tener relación, o no tanta: derechos humanos, derecho mercantil, derecho financiero y derecho Laboral.

La evolución normativa en el ámbito de la Unión Europea durante los últimos treinta años ha sido la siguiente:

1. Normativa ambiental en la Unión Europea hace treinta años

Hace tres Tratado de Ámsterdam firmado en 1997 (sirva de ejemplo, la redacción que daba a los artículos 2, 3 C, 100 A y 130 R del Tratado constitutivo de la Comunidad Europea), servía de base a normas ambientales tales como las siguientes[1]:

- *Sustancias peligrosas:* la Directiva 67/548 establecía quince categorías de peligro, y exigía a los proveedores que clasificaran, etiquetaran y embalaran las sustancias peligrosas de conformidad con unas normas armonizadas.

1. Solo incluyo en esta relación la norma básica en cada una de las materias que señalo, por orden cronológico. No incluyo las normas posteriores que modificaron las que aquí cito, ni normas referidas a otras materias en las que no hay una norma claramente principal (por ejemplo, sobre ruido o radiaciones) o en las que no se han dado variaciones esenciales relevantes en estas tres décadas (por ejemplo, hábitats).

- *Aguas:* la Directiva 75/440, complementada por otras Directivas (por ejemplo, Directivas 79/869 y 80/778), determinaba los requisitos a los que debía ajustarse la calidad de las aguas superficiales destinadas a la producción de agua potable en los Estados miembros.
- *Residuos:* la Directiva 75/442 imponía a los Estados miembros la obligación de adoptar las medidas adecuadas para promover la prevención, el reciclaje y la transformación de los residuos, la obtención a partir de éstos de materias primas y eventualmente energía, así como cualquier otro método que permitiera la reutilización de los residuos.
- *Evaluación ambiental:* la Directiva 85/337 se aplicaba a dos grupos de proyectos, según tuvieran que someterse a una evaluación en todo caso (proyectos recogidos bajo nueve epígrafes), o solo cuando los Estados miembros así lo consideraran preciso (proyectos recogidos bajo doce epígrafes).
- *Prevención de accidentes graves:* la Directiva 82/501 se destinaba a determinadas actividades industriales recogidas en siete epígrafes (anexos I y II).
- *Acceso a información ambiental:* la Directiva 90/313 tenía por objeto garantizar la libertad de acceso y la difusión de esa información que estuviera en poder de las autoridades públicas.
- *Etiqueta ecológica:* el Reglamento 880/92 establecía un sistema comunitario de concesión de una etiqueta ecológica para promover el diseño, la producción, la comercialización y la utilización de productos que tuvieran repercusiones reducidas en el medio ambiente durante todo su ciclo de vida, y proporcionar a los consumidores mejor información sobre las repercusiones ecológicas de los productos.
- *Gestión y auditoría ambiental:* el Reglamento 1836/93 establecía un sistema voluntario de ecogestión y ecoauditoría para las empresas que desarrollaran actividades industriales.
- *Prevención y control de la contaminación:* la Directiva 96/61 tenía como objeto prevenir y reducir de forma integrada la contaminación procedente de ciertas actividades, recogidas en seis epígrafes en su Anexo I.
- *Protección del ambiente atmosférico:* la Directiva 96/62 tenía como objetivo determinar los principios básicos de una estrategia común dirigida a definir y establecer objetivos de calidad del aire ambiente.

2. Normas ambientales en la UE en la actualidad

A día de hoy tenemos normas comunitarias sobre estas mismas materias, pero más exigentes:

- *Sustancias peligrosas:* el Reglamento 1272/2008 establece requisitos para la clasificación, etiquetado y envasado de sustancias químicas y mezclas de acuerdo con el Sistema Globalmente Armonizado (SGA) de las Naciones Unidas. Las sustancias y las mezclas se clasifican en categorías (nivel de peligro) y clases de peligro (tipo de peligro) concretas: peligros fisicoquímicos; peligros para la salud humana; y peligros para el medio ambiente.
- *Aguas:* la Directiva 2000/60 establece normas para detener el deterioro del estado de las masas de agua de la UE y conseguir un "buen estado" de los ríos, lagos y aguas subterráneas europeos. En particular, esto incluye la protección de todas las formas de agua (superficiales, subterráneas continentales y de transición); la regeneración de sus ecosistemas; la reducción de la contaminación en las masas de agua; y la garantía de un uso sostenible del agua.
- *Residuos:* la Directiva 2008/98 establece medidas para la prevención o la reducción de la generación de residuos y de los impactos negativos de su generación y gestión; la reducción del impacto del uso de los recursos; y la mejora de la eficiencia de dicho uso; todo ello con vistas a efectuar la transición a una economía circular y garantizar la competitividad de la UE a largo plazo.
- *Evaluación ambiental:* la Directiva 2011/92, de forma similar a lo que ocurría con la Directiva 85/337, se aplica a dos grupos de proyectos, en función de que deban ser objeto de evaluación en todo caso, o de que así lo determinen los Estados miembros. El primer grupo de proyectos se recoge en el anexo I (24 epígrafes, antes nueve), y el segundo en el anexo II (trece epígrafes, antes doce).
- *Accidentes graves:* la Directiva 2012/18 incide de forma especial en los derechos del público, a quien se facilita el acceso a la información sobre los riesgos en las instalaciones industriales, y sobre cómo reaccionar en caso de accidente.
- *Acceso a información ambiental:* la Directiva 2003/4 tiene como objetivos garantizar el derecho de acceso a la información medioambiental que obre en poder de las autoridades públicas o de otras entidades en su nombre, y garantizar que, de oficio, la información medioambiental se difunda y se ponga a disposición del público.

- *Etiqueta ecológica:* el Reglamento 66/2010 establece que los criterios de la etiqueta ecológica de la UE se determinarán científicamente teniendo en cuenta la totalidad del ciclo de vida de los productos, considerando extremos tales como los impactos ambientales más significativos; la sustitución de las sustancias peligrosas por otras más seguras; o, cuando proceda (sic), los aspectos éticos y sociales.
- *Gestión y auditoría ambiental:* el Reglamento 1221/2009 regula la participación voluntaria de organizaciones en un sistema comunitario de gestión y auditoría medioambientales. Se pretende promover mejoras continuas del comportamiento medioambiental de las organizaciones mediante, entre otras cosas, el establecimiento y la aplicación de sistemas de gestión medioambiental, la evaluación sistemática, objetiva y periódica del funcionamiento de tales sistemas, y la difusión de información sobre comportamiento medioambiental.
- *Prevención y control de la contaminación:* la Directiva 2010/75 tiene básicamente el mismo objeto que la Directiva 90/313, si bien ahora se aplica a actividades recogidas en diez epígrafes (recogidos los seis primeros en el anexo I, y los restantes en los capítulos III a VI de la Directiva, frente a los seis de la Directiva 96/61).
- *Protección del ambiente atmosférico:* la Directiva 2008/50 establece medidas destinadas, entre otras cosas, a definir y establecer objetivos de calidad del aire ambiente; obtener información sobre la calidad del aire ambiente para combatir la contaminación atmosférica y otros perjuicios; y asegurar que esa información sobre calidad del aire ambiente se halla a disposición de los ciudadanos.
- Junto con estas nuevas normas ambientales se han dictado otras referidas a materias a las que antes se prestaba poca o ninguna atención, como la responsabilidad medioambiental (Directiva 2004/35), la protección del medio ambiente mediante el Derecho penal (Directiva 2024/1203), o especialmente sobre el cambio climático, respecto del que hay normas y actos relevantes, tales como los siguientes:
- Directiva 2003/87, por la que se establece un régimen para el comercio de derechos de emisión de gases de efecto invernadero.
- Reglamento 2018/1999, sobre la gobernanza de la Unión de la Energía y de la Acción por el Clima.
- Reglamento 2021/1119, que establece el marco para lograr la neutralidad climática (conocido como "Legislación europea sobre el clima").
- Comunicación de la Comisión "Objetivo 55": cumplimiento del objetivo climático de la UE para 2030 en el camino hacia la neutralidad climática" (Bruselas, 14 de julio de 2021, COM(2021) 550 final).
- Comunicación de la Comisión "Forjar una Europa resiliente al cambio climático – La nueva estrategia de adaptación al cambio climático de la UE" (Bruselas, 24 de febrero de 2021, COM(2021) 82 final).
- Otras normas o actos no estrictamente ambientales pero que se relacionan de forma directa con el cambio climático, como son el Marco Financiero Plurianual 2021-2027, que destina al menos el 30% de sus recursos a la acción climática.

Y, para acabar, todo lo anterior se da dentro de un marco general también más ambicioso. Así, junto con los artículos 11 y 191 a 193 del Tratado de Funcionamiento de la Unión Europea y 37 de la Carta de los Derechos Fundamentales de la Unión Europea puede hacerse referencia al artículo 3.3 del Tratado de la UE[2] y el Pacto Verde Europeo (Comunicación de la Comisión, Bruselas, 11 de diciembre de 2019, COM(2019) 640 final), que concibe la respuesta a los desafíos del clima y el medio ambiente como *la tarea definitoria de esta generación* (p. 2).

3. Evolución de la normativa ambiental europea

En la evolución de la normativa ambiental europea se han dado tres cambios relevantes:

(i) Ahora hay más normas de protección ambiental. Junto a las que regulan las cuestiones "tradicionales", hay normas que regulan otras nuevas, tales como la responsabilidad ambiental, la penal referida al medio ambiente y, en especial, el cambio climático. Y todo ello dentro de un marco normativo general ambicioso, que determina cómo deben interpretarse y aplicarse estas normas.

(ii) Las normas son ahora más complejas. Centrándome en las normas que regulan las materias "tradicionales", la mayor complejidad puede apreciarse en dos aspectos: en el número de artículos de las normas, y en las materias que se tratan en esas normas.

Por lo que se refiere al número de artículos, las tablas que siguen resumen los datos de forma muy clara *(ver tablas opuestas).*

Como puede verse, la tendencia generalizada es el incremento, sustancial en muchos casos, del número de preceptos contenidos en las nuevas normas. Esto es de por sí significativo, pero se corresponde con una mayor complejidad cualitativa de las materias que se tratan ahora. Basta con constatar, por ejemplo, lo que ocurre con la normativa en materia de aguas, de residuos y de evaluación ambiental, tres áreas clave en la protección ambiental.

2. Este artículo establece, en línea con la Agenda 2030 para el Desarrollo Sostenible (Nueva York, 2015) y con el Acuerdo de París de 2015, que "*la Unión obrará en pro del desarrollo sostenible de Europa basado en un crecimiento económico equilibrado y en un nivel elevado de protección y mejora de la calidad del medio ambiente La Unión fomentará la solidaridad entre las generaciones. La Unión fomentará la cohesión económica, social y territorial y la solidaridad entre los Estados miembros.*"

	Sustancias peligrosas		Aguas		Residuos		Evaluación ambiental	
	Directiva 67/548	Reglamento 1272/2008	Directiva 75/440	Directiva 2000/60	Directiva 75/442	Directiva 2008/98	Directiva 85/337	Directiva 2011/92
Artículos	11	62	11	26	15	43	14	16
Anexos	1	8	2	11	-	7	3	7

	Accidentes graves		Acceso a ambiental información		Etiqueta ecológica		Gestión auditoría y ambiental	
	Directiva 82/501	Directiva 2012/18	Directiva 90/313	Directiva 2003/4	Reglamento 880/92	Reglamento 66/2010	Reglamento 1836/93	Reglamento 1221/2009
Artículos	21	34	10	13	18	20	21	52
Anexos	7	7	-	-	2	5	5	8

	Prevención integrados y control		Ambiente	atmosférico
	Directiva 96/61	Directiva 2010/75	Directiva 96/62	Directiva 2008/50
Artículos	23	84	15	35
Anexos	4	10	4	17

Así, la Directiva marco de aguas trata cuestiones habituales aunque con más detalle y ambición que antes. Por ejemplo, en lo que se refiere a valores aplicables de las aguas y metodología para su control, o la planificación. Pero junto con esto, se centra además en cuestiones que antes no se trataban, como las demarcaciones hidrográficas o la recuperación de costes. Y aún deben añadirse normas vinculadas a esta Directiva marco, como son las Directivas 2006/118 (aguas subterráneas) 2007/60 (riesgos de inundación), y 2008/105 (calidad ambiental en el ámbito de la política de aguas), que conforman un ordenamiento básico de Derecho de aguas complejo.

Lo mismo puede decirse de la Directiva marco de residuos: junto a cuestiones tradicionales, como la planificación, la gestión y la actividad de policía, tienen ahora un papel protagonista conceptos antes desconocidos, como la jerarquía de residuos, el subproducto, el fin de la condición de residuo, o la responsabilidad ampliada del productor del producto, que se regula ya de forma generalizada.

Por último, en materia de evaluación ambiental ya no solo se regula con mayor detalle y ambición la evaluación de proyectos, sino que existe un nuevo objeto de evaluación: los planes y programas, que son regulados por su propia norma, la Directiva 2001/42.

(iii) El tercer y último cambio relevante que se ha dado consiste en que hoy la protección ambiental se relaciona con otras áreas del Derecho con las que hace algunas décadas parecía no tener relación. Destacan el Derecho mercantil y la protección de los derechos humanos. En principio esto no debería sorprender, ya que el medio ambiente, junto con la economía y los aspectos sociales y de derechos humanos, conforman la base del desarrollo sostenible. Pero solo recientemente se ha dado en la UE un impulso normativo claro que pone en relación estas tres áreas. Me estoy refiriendo al concepto de sostenibilidad corporativa, que se concreta en la normativa sobre diligencia debida de las empresas en materia de sostenibilidad (Directiva 2024/1760); divulgación de información sobre sostenibilidad (regulada dentro de la Directiva 2013/34, sobre sobre los estados financieros anuales y consolidados); y taxonomía para facilitar inversiones sostenibles (Reglamento 2020/852). Sobre esto ya he escrito en un número anterior de *Juriste* al que me remito (*Juriste International* 2024-2 – Páginas 50 a 52).

4. Conclusión

La UE pretende ser la región del mundo que con mayor decisión encara los desafíos que plantea la degradación ambiental, incluyendo el cambio climático y el desarrollo sostenible. Esto, a su vez, abarca otros ámbitos, como el de los derechos humanos y la gobernanza. La normativa es más ambiciosa, más amplia y más compleja. Es una decisión que tiene sus riesgos, pero la dirección es la correcta. ■

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La incidencia de la declaración de concurso sobre la cláusula arbitral en la legislación española

This article presents an analysis of the complex and controversial impact of the declaration of bankruptcy on arbitration clauses in Spain, especially for arbitrations not yet initiated at the time of the bankruptcy declaration. A jurisprudential examination is conducted on the possibility of suspending an international arbitration due to potential harm to the bankruptcy proceedings. The key lies in the judicial interpretation of "harm to the bankruptcy proceedings," an unclear concept that has generated contradictory rulings. Judicial discretion creates great legal uncertainty.

Cet article présente une analyse de l'impact complexe et controversé de la déclaration de faillite sur les clauses d'arbitrage en Espagne, notamment pour les arbitrages non encore engagés au moment de la déclaration de faillite. Un examen jurisprudentiel est mené sur la possibilité de suspendre un arbitrage international en raison d'un préjudice potentiel à la procédure de faillite. La clé réside dans l'interprétation judiciaire de la notion de « préjudice à la procédure de faillite », une notion floue qui a donné lieu à des décisions contradictoires. Le pouvoir discrétionnaire du juge crée une grande incertitude juridique.

La incidencia de la declaración de concurso de acreedores sobre el arbitraje es enorme y, como tal, una cuestión muy controvertida en España teniendo en cuenta que su alcance lo es antes y después de haberse declarado el concurso de acreedores y su interpretación, además de doctrinal, lo ha sido, y muy divergente, por los Tribunales de Justicia.

En efecto, el arbitraje ya constituido antes de la declaración del concurso de acreedores tendrá el mismo recorrido que los litigios en trámite: hasta dictarse el laudo. Mientras, ¿qué ocurre con los arbitrajes no iniciados al tiempo de declararse el concurso? Esto será el objeto de mi reflexión en este artículo.

Para abordarlo aludiré a un caso que ha tenido repercusión pública en España por la *"fama"* de una de las partes: en concreto, la sentencia dictada por el Juzgado de lo Mercantil n°1 de Santander el 30 de septiembre de 2019, que admitió la demanda interpuesta por una Sociedad declarada en concurso para suspender los efectos del convenio arbitral firmado con el artista David Guetta, sometido a la legislación inglesa y al Tribunal Arbitral de Londres, cuando se le iba a demandar por incumplimiento del contrato al no haberse presentado el día de su actuación y haber devuelto sólo una parte de su remuneración.

La pretensión de la Sociedad española ante el Juzgado de Mercantil de Santander no fue otra que evitar la sumisión a arbitraje cuando se iba a demandar al artista solicitando del Juzgado, al fin y a la postre, evitar mayores perjuicios (al parecer, la declaración de concurso fue consecuencia directa de la cancelación de esa actuación) y poder hacerlo en España y conforme la ley española.

Sustentando su protección en la Ley Concursal española que, como después indicaré, establece que la declaración de concurso no afecta a los convenios arbitrales a menos que supongan un perjuicio para la tramitación del concurso, en cuyo caso se faculta al Juez *para "suspender sus efectos"*, cual acordó ese Juzgado.

La concursada argumentó en la demanda que un eventual procedimiento arbitral supondría un grave perjuicio para el concurso por dos motivos: la falta de concreción de la cláusula arbitral que, al no indicar árbitro ni normas rectoras del procedimiento, retrasaría la iniciación del arbitraje y, por otra parte, los gastos inasumibles para la concursada relativos al desplazamiento a Londres y a los honorarios de árbitros y Abogados[1].

Sobre esa base tan interesante desarrollaré mi trabajo, para lo que es ya necesario transcribir el artículo 140 del Texto Refundido de la Ley Concursal española en que se amparó dicha sentencia:

"Articulo 140. Pacto de mediación, convenio y procedimientos arbitrales:

1. Natalia Font Gorgorio: *"El efecto del concurso de acreedores en el convenio arbitral inerte"*, La ley 8753/2020.

1. *La declaración de concurso, por sí sola, no afectará a la vigencia de los pactos de mediación ni a los convenios arbitrales suscritos por el deudor.*
2. *Los procedimientos de mediación y los procedimientos arbitrales en tramitación a la fecha de la declaración de concurso continuarán hasta la tramitación de la mediación o hasta la firmeza del laudo arbitral. La representación y defensa del concursado en estos procedimientos se regirá para los juicios declarativos en el capítulo 1 de este título.*
3. *El juez del concurso, de oficio o a solicitud de concursado, en caso de intervención, o de la administración concursal, en caso de suspensión, podrá acordar, antes de que comience el procedimiento de mediación o de que se inicie el procedimiento arbitral, la suspensión de los efectos de esos pactos o de esos convenios, si entendiera que pudieran suponer un perjuicio para la tramitación del concurso. Queda a salvo lo establecido en los tratados internacionales.*

4. *En caso de fraude, el administrador concursal podrá impugnar ante el juez del concurso los pactos de mediación y los convenios y procedimientos arbitrales."*

Según la Ley Concursal, los convenios arbitrales suscritos por una Sociedad concursada no se ven, con carácter general, alterados por la declaración concursal, motivo por el que los mismos despliegan todos sus efectos, en particular, el efecto positivo de obligar a las partes a acudir al arbitraje como vía para solucionar sus controversias.

El perjuicio previsto en la Ley Concursal no se corresponde con el interés del concursado ni el de sus acreedores, sino con la ordenada tramitación del concurso de acreedores.

A la vista del citado artículo 140, claro que puede seguirse cualquier tipo de procedimiento arbitral contra una entidad concursada salvo que el juez, en las condiciones que indicaré, lo suspenda *"antes de que comience el procedimiento arbitral"*.

Conforme a ello, el juez del concurso puede excepcionalmente suspender los efectos de un convenio arbitral – o un arbitraje iniciado con posterioridad a la declaración de concurso de acreedores – si aprecia que el contrato puede suponer un perjuicio para la tramitación del concurso de acreedores.

Ahora bien, ¿qué se entiende -o se debe entender- por perjuicio para la tramitación del concurso? ¿Existe normativa internacional que lo regula o algún condicionante en la legislación española? ¿Y qué se debe entender, entonces, como prejuicio para la tramitación del concurso?

Sin embargo, se advierte un obstáculo de naturaleza procesal pues se refiere "para la tramitación" y no "para el concurso"; por otra parte, no se puede identificar con las costas de los Abogados o las consecuencias económicas propiamente dichas, cuestiones sobre las que nada dice el artículo 140 del Texto Refundido de la Ley Concursal que pretendía resolverlas. Podría entenderse, en principio, como cualquier obstáculo para el interés de la masa y de sus acreedores.

Siendo materia de interpretación del Juez del concurso, deberá reconocerse que no se le facilita la labor [...].

En efecto, el perjuicio previsto en la Ley Concursal no se corresponde con el interés del concursado ni el de sus acreedores, sino con la ordenada tramitación del concurso de acreedores. De esa forma parece que solo una eventual injerencia en la tramitación del proceso concursal derivada de la aplicación del convenio arbitral podría justificar la excepcional suspensión de efectos de un convenio arbitral.

Siendo materia de interpretación del Juez del concurso, deberá reconocerse que no se le facilita la labor porque si se tratara solo de una cuestión procesal parecería evidente que se pudiera controlar por él mismo, pero si se condiciona a la tramitación del concurso y no se aclara, pudiendo alcanzar a las costas, honorarios de Abogado, normativa de otros países..., la aplicación comienza a debilitarse.

Tal es así que, hasta la fecha en España, como sucedió en el caso de David Guetta, ha habido decisiones judiciales para todos los gustos:

1. *"la carencia o insuficiencia de medios económicos para afrontar el coste del procedimiento arbitral (...) no es una razón jurídica válida para establecer la ineficacia del convenio arbitral"*. (Auto de la Audiencia Provincial de Barcelona de 29 de Abril de 2009);
2. queda *"en manos del Juez del concurso el decidir si tal suspensión de efectos del pacto arbitral se produce o no, pero ese caso deberá atender a circunstancias procedimentales en aras a una ordenada, rápida y coordinada tramitación del concurso"* (Auto del Juzgado de lo Mercantil nº 6 de Madrid de 2 de Septiembre de 2014);
3. acordando la suspensión del arbitraje iniciado con posterioridad a la declaración del concurso sin necesidad de alcanzar ni conocer el prejuicio, porque este requisito solo es exigible para *"el convenio arbitral pero no al procedimiento arbitral propiamente dichos"* (Auto del Juzgado de lo Mercantil de Sevilla, de fecha 20 de febrero de 2018);
4. denegando la suspensión porque es posible iniciar el arbitraje tras la declaración del concurso, siempre y cuando el convenio arbitral y el procedimiento arbitral no ocasione un perjuicio para la tramitación del concurso (Auto del Juzgado de lo Mercantil de Bilbao de 30 de Julio de 2018);
5. *"queda claro que la voluntad del legislador es dar validez y eficacia plena a los convenios arbitrales iniciados por la concursada con terceros debiendo estar a lo pactado por las partes. El que la eventual reclamación derivada del arbitraje resulte más o menos costosa, proyecte más ventajas patrimoniales o de otra índole en el concurso no es indicativo ni determina la procedencia de dejar sin efecto el convenio arbitral"* (Auto del Juzgado de Mercantil nº 1 de Palma de Mallorca de 2 de septiembre de 2013);
6. *"lo que debe resultar perjudicado, según el tenor de la norma, es la tramitación del concurso"* (Auto del Juzgado Mercantil de Madrid de 21 de noviembre de 2016); y
7. decidiendo que el *"perjuicio para la tramitación del concurso no debería entenderse en un sentido meramente adjetivo, procesal abstracto"*, sino vinculado al *"sentido, finalidad, utilidad y eficacia del procedimiento concursal,"* pues la ley habla de *"perjuicios para la tramitación"* y no de *"perjuicios para el concurso"*, lo que supondría a su vez que *"este eventual perjuicio no podría identificarse con los costes de arbitraje o las consecuencias económicas para el concurso o los acreedores"* (Sentencia del Juzgado de lo Mercantil número 1 de Santander de 30 de septiembre de 2019).

Más reciente la sentencia de la Audiencia Provincial de Asturias, Sección 1ª, de 18 de Enero de 2023, autorizó la suspensión por entender que podía suponer un perjuicio para la tramitación del concurso al haberse prescindido del trámite de audiencia.

Suspensión que debe significarse que tiene carácter excepcional y restrictivo pues:

1. Implica modificar la autonomía de la voluntad de las partes (1255 cc).
2. El Reglamento Europeo Insolvencia establece la necesidad de respetar las competencias de otros órganos jurisdiccionales para las cuestiones que no guarden conexión/vinculación con el Arbitraje (materia extra-concusales).
3. Y porque deben mantenerse aquellas cuestiones que pudiendo afectar al concurso pueden plantearse con independencia al propio concurso.

Una cuestión a tener en cuenta para evitar esa aplicación de la norma española es el carácter del arbitraje pues si las partes tienen domicilios en Estados diferentes, el lugar del cumplimiento sustancial de las obligaciones o el lugar donde se genera la controversia o se someten a arbitraje está fuera de España será calificado como arbitraje internacional, y, en este caso, deberá tenerse en cuenta que el artículo 140 dispone que *"queda a salvo lo establecido en los tratados internacionales"*.

Si se puede acordar la suspensión *"antes de que se inicie el procedimiento arbitral"* debe aclararse cuándo se entiende iniciado: cuando se acude al Tribunal Arbitral y se insta el arbitraje, no cuando se notifica al demandado en el arbitraje el inicio del mismo, tal y como se colige del artículo 27 de la Ley Arbitral española y como ha resuelto la Jurisprudencia.

Concluyo diciendo que si el laudo se ha dictado, deberá constar en la lista de acreedores dándole el tratamiento concursal correspondiente, aunque no sea firme, pudiéndose impugnar ante el juez los convenios y procedimientos arbitrales en los que se entienda hubo fraude (140.4 Texto Refundido de la Ley Concursal).

En definitiva, es una materia dispositiva por el Juzgado del concurso que genera inseguridad jurídica para, por lo menos, una de las partes que, en cualquier caso, no parece la de mayor objeto de protección. ■

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The Extraterritorial Reach of the Defend Trade Secrets Act


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La Cour d'appel des États-Unis pour le septième circuit est devenue la première cour d'appel fédérale à conclure que la loi sur la défense des secrets d'affaires (Defend Trade Secrets Act, DTSA) s'applique à un comportement en dehors des États-Unis. La Cour d'appel du septième circuit a conclu que le DTSA pouvait s'appliquer à toutes les ventes mondiales d'un défendeur résultant d'une appropriation illicite, à condition que – selon les termes de l'article 18 U.S.C. § 1837(2) – « un acte permettant » l'appropriation illicite ait été commis aux États-Unis. Cette décision confirme que les portes des tribunaux fédéraux sont ouvertes aux plaignants en matière de secrets d'affaires, même lorsqu'une grande partie (ou même la plus grande partie) du comportement illicite a eu lieu en dehors des États-Unis - et que les plaignants en matière de secrets d'affaires peuvent obtenir des dommages-intérêts même sur les ventes de contrefaçon réalisées en dehors des États-Unis.

El Tribunal de Apelación del Séptimo Circuito de los Estados Unidos se ha convertido en el primer tribunal federal de apelación que concluye que la Ley de Defensa de los Secretos Comerciales (DTSA) se aplica a conductas realizadas fuera de los Estados Unidos. El Tribunal de Apelación del Séptimo Circuito concluyó que la DTSA puede aplicarse a todas las ventas mundiales de un demandado causadas por apropiación indebida, siempre que – en virtud de lo dispuesto en 18 U.S.C. § 1837(2) – se haya cometido en los Estados Unidos "un acto de promoción" de la apropiación indebida. Esta decisión confirma que las puertas de los tribunales federales están abiertas a los demandantes de secretos comerciales, incluso cuando gran parte (o incluso la mayor parte) de la conducta infractora haya tenido lugar fuera de los Estados Unidos, y que los demandantes de secretos comerciales pueden reclamar daños y perjuicios incluso por las ventas infractoras realizadas fuera de los Estados Unidos.

In the United States, trade secrets are protectable intellectual property. Trade secrets can be any form and type of financial, business, scientific, technical, economic, or engineering information so long as the trade secret owner takes reasonable efforts to protect the information and the information derives independent economic value from not being generally known and not readily ascertainable through proper means.[1] Trade secrets can be things like patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes.

For years, trade secret cases in the United States were mostly litigated under state law. But in 2016, the DTSA was enacted and added to the Economic Espionage Act of 1996. The enactment of the DTSA gave trade secret owners a federal, standardized claim for trade secret misappropriation that may be brought in federal court.

The DTSA's Application to Conduct Outside the United States

Until recently, it was an open question whether the DTSA applied to conduct occurring outside the United States. In general, there is a presumption against U.S. statutes applying outside the United States, and the U.S. Court of Appeals for the Seventh Circuit recently addressed

1. 18 U.S.C. § 1839(3).

whether that presumption applied to the DTSA in *Motorola Solutions, Inc. v. Hytera Communications Corp. Ltd.*, 108 F.4th 458 (7th Cir. 2024).

To answer the question, the Seventh Circuit followed well-established Supreme Court precedent that starts by looking at the language of the statute. It is pertinent to note that neither the private right of action in the DTSA nor the definition of misappropriation includes an express reference to extraterritorial conduct, while other parts of the chapter do. In particular, 18 U.S.C. § 1837 provides: *"This chapter [which includes the DTSA] also applies to conduct occurring outside the United States if an act in furtherance of the offense was committed in the United States."* The Seventh Circuit held that § 1837 expressly rebutted the presumption against extraterritoriality. This analysis, the Seventh Circuit agreed, is buttressed by Congress's purpose for the DTSA, which was intended to address misappropriation outside of the United States of trade secrets belonging to U.S. entities. Section 1837 therefore applies to a civil claim for misappropriation if the offender is a U.S. person or entity, or if there is a U.S.-based "act in furtherance" of the "offense."

Courts interpreting what constitutes an "act in furtherance" of the misappropriation have pulled from federal conspiracy law.

Courts interpreting what constitutes an "act in furtherance" of the misappropriation have pulled from federal conspiracy law. As a result, an act in furtherance does not need to be a complete act of domestic misappropriation or even an element of the claim. Instead, an act is considered to be taken in furtherance of the misappropriation when it "manifest[s] that the offense is at work and is not simply a project in the minds of the offenders or a fully completed operation."[2]

For example, courts have found the following to be sufficient "acts in furtherance:"

- A complete act of misappropriation in the United States.
- Obtaining trade secrets stored in the United States.
- Advertising, marketing, promoting, or selling in the United States products developed with the misappropriated trade secrets.
- Communications in the United States to further the plan to misappropriate the trade secrets.

In contrast, courts have found the following not sufficient as "acts in furtherance:"

- The defendant's travel to the United States unconnected to the misappropriation.
- A U.S. choice-of-law or forum-selection clause in the contract between the parties.

2. Motorola Sols., Inc. v. Hytera Comm's Corp. Ltd., 108 F.4th 458, 486 (7th Cir. 2024).

- Use of the trade secrets to sell or advertise products outside the United States to a foreign subsidiary of a U.S. parent.
- Damages suffered in the United States.

Once an act in furtherance of the misappropriation has been committed in the United States, the court can enjoin conduct outside the United States, and the plaintiff can recover damages incurred outside the United States caused by the misappropriation. Such damages may include, for example, the unjust enrichment from a defendant's worldwide sales. The plaintiff does not need to establish "specific causation between the qualifying domestic act and particular foreign sales for which damages are sought."[3] That is, "[s]o long as 'an act in furtherance of the offense was committed in the United States,' then all damages caused by the offense are recoverable under [Sections] 1836(b) and 1837(2), wherever in the world the rest of the underlying conduct occurred."[4]

Takeaway

Under *Motorola*, a trade secret owner can bring its claim against a foreign defendant in the United States even when most of the wrongful conduct occurs outside the United States, so long as there is some act in furtherance of the misappropriation that occurred in the United States. In such cases, the trade secret plaintiff can recover all of the defendant's unjust enrichment caused by the misappropriation, even when the benefit conferred on the defendant occurs outside the United States, such as sales made outside the United States.

As a result of the expansive reach of the DTSA, even in cases where the trade secret theft occurs mostly outside the United States, trade secret owners should consider whether they are still able to bring a claim in a U.S. court under the DTSA. ■

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3. Motorola Sols., Inc. v. Hytera Comm's Corp. Ltd., 108 F.4th 458, 486 (7th Cir. 2024).
4. Motorola Sols., Inc. v. Hytera Comm's Corp. Ltd., 108 F.4th 458, 487-88 (7th Cir. 2024).

Hungary on the Forefront of Adopting ESG DD Reporting Act for Global Competitiveness

Judit BUDAI

Anikó KELLER

Afin de permettre aux entreprises hongroises de rester compétitives sur les marchés internationaux et de pérenniser leurs activités en faisant preuve de responsabilité environnementale et sociale envers leurs partenaires commerciaux, la Hongrie a adopté en 2023 la loi ESG, qui fixe les obligations de diligence raisonnable et de *reporting* en matière de durabilité pour les entreprises, basées sur le total du bilan, le chiffre d'affaires annuel et le nombre d'employés. Cette loi vient d'être modifiée à la lumière des évolutions au niveau de l'UE, à savoir le paquet « Omnibus ». Le non-respect de cette loi peut entraîner une amende calculée sur la base des recettes, voire l'exclusion des subventions publiques ou des processus de passation de marchés.

Para que las empresas locales húngaras sigan siendo competitivas en los mercados internacionales y se mantengan en el mercado demostrando responsabilidad ambiental y social a sus socios comerciales, Hungría ya adoptó en 2023 la Ley ESG, que establece las obligaciones de diligencia debida y presentación de informes de sostenibilidad para las empresas, basadas en los balances, la facturación anual y el número de empleados. Esta ley acaba de ser modificada en vista de los avances a nivel de la UE, es decir, el llamado paquete "Ómnibus". El incumplimiento puede conllevar una multa fiscal o la exclusión de subvenciones estatales o procesos de contratación pública.

Introduction

Aware that the European Union (EU) Directive 2024/1760 on corporate sustainability due diligence just entered into force on 25 July 2024, the Hungarian legislator adopted Act CVIII of 2023 on corporate social responsibility, considering environmental, social, and societal aspects (known as the "ESG Act") already at the end of 2023. The latter promotes sustainable finance and unified corporate responsibility, following the corresponding German *Lieferkettensorgfaltspflichtengesetz* (LkSG), which is applicable as of 1 January 2023.

Why was Hungary on the forefront with this legislation? The response of the regulator was to follow the strong European business partner, Germany, by preparing Hungarian corporations on ESG due diligence of their supply chain as Hungary wanted not only to secure Hungarian large corporations gaining access to finance but are considered quality business partners for responsible businesses worldwide.

Although the ESG Act, in general, was applicable as of 1 January 2024, it is gradually entering into force for different players within three years. It is a frame regulation that also amended other relevant rules. Further decrees have been issued and are expected to be issued to clarify implementation. This article focuses on the application of the ESG Act.

Scope of ESG Supply Chain (DD) and Reporting Obligations

Large enterprises face new obligations to:

- Establish an effective sustainability risk management system of actual and potential sustainability risks,
- Develop an internal responsibility strategy and monitoring system,
- Carry out regular risk assessment analyses,

- Establish preventive measures for potential sustainability risks and take corrective measures for identified sustainability risks,
- Collect the declarations of direct suppliers in view of the risks involved, and
- Comply with ESG reporting obligations on the above system operations.

Company management is responsible for preparing and publishing an ESG report in compliance with EU and Hungarian rules […].

An effective sustainability risk management system must enable the identification and management of significant social and environmental risks with actual or potential adverse impacts. It also must be effective in the prevention, elimination, or minimization of harm or breaches of social or environmental obligations within the supply chain. Developing and operating an effective risk management system requires the following:

- Involve risk management tasks in all relevant business processes,
- Appoint an employee as an independent risk management officer,
- Conduct an annual full-scale risk assessment system to identify environmental and social risks in its own activity and in the activities of its direct suppliers,
- Perform specific risk assessment in case of major changes in supply chain, new projects, and new products,
- Prepare and publish a Corporate Social Responsibility (CSR) strategy,
- Develop preventive measures against potential environmental and social risks, as well as review the results annually, and
- Establish a whistleblowing system for ESG breaches and material risks.

The ESG Act created two sets of compliance obligations. First, the above-mentioned sustainability due diligence obligations and ESG reporting responsibilities are gradually applicable to public and private large enterprises and public small and medium enterprises (SMEs), and the regulation of accreditation. The second set entails the recording of ESG advisors, trainers, auditors, software developers, distributors, and certifiers to create a transparent domestic service provider framework. It should be noted that only the Information & Communication Technology (ICT) System of accredited suppliers that distribute and produce ESG software in Hungary, as defined in the ESG Act, may be used for supply chain due diligence, risk analysis, and ratings.

Who in Hungary is Obliged to Comply with the ESG Act?

The scope of the ESG Act covers the Hungarian resident and public companies who meet at least two of the following three criteria for 2024 and must present ESG reports for the 2025 business year: (1) balance sheet totals greater than Hungarian Forint (HUF) 10 billion, (2) annual net sales of over HUF 20 billion, and (3) more than 500 employees.

The original personal scope was amended due to policy changes at the EU level, the so-called Omnibus package, which is a set of proposed changes aimed at simplifying and streamlining sustainability reporting and due diligence requirements for companies, particularly within the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD). As a result, the number of affected companies will significantly decrease from the financial year starting in 2025.

Thus, the scope will extend only to those large undertakings whose principal activity, on the balance sheet date of the two financial years preceding the current business year, falls under the sectors defined in Annex 1 according to the Statistical Classification of Economic Activities (TEÁOR), and which exceed the following threshold values:

(ba) an annual net turnover of HUF 90 billion, and

(bb) an average number of employees of 500.

Furthermore, small and medium-sized enterprises (SMEs) that qualify as public-interest entities are excluded from the scope of the ESG Act, meaning that SMEs do not become directly subject to its obligations.

Reporting Framework

While the ESG Act was amended by the Hungarian Accounting Act to harmonize sustainability non-financial reporting obligations with the Corporate Sustainability Reporting Directive "(CSRD"), ESG reporting on the supply chain due diligence system is a new compliance and reporting obligation. Hungarian enterprises may prepare and submit their ESG reports free of charge to the Supervisory Authority for Regulated Activities (SARA) for publication through the publicly accessible ESG platform.

Company management is responsible for preparing and publishing an ESG report in compliance with EU and Hungarian rules within six months from the end of the financial year, which must be approved by a certified ESG auditor, prepared in a regulated format, and deliver the company's findings, measurements, and conclusions regarding sustainability issues.

The recent legislative amendment, however, introduced significant relief for affected companies regarding ESG reporting obligations for the financial years 2024–2026:

- In 2025, companies are not required to conduct an audit of their ESG report concerning the fulfilment of sustainability due diligence obligations for the 2024 financial year.
- For the financial years 2024–2026, affected companies are not required to submit their ESG reports and the related ESG certificates – prepared in respect of the 2024, 2025, and 2026 financial years – to the SARA.
- Affected companies are not obliged to make their ESG reports or their corporate social responsibility strategies public and freely accessible on their websites.

Sanctions for Non-Compliance with Supply Chain DD and Reporting Obligation

The complete list of possible sanctions in case of non-compliance is yet to be set out in government decrees under the ESG Act, but a revenue-based fine or exclusion from state subsidy or procurement processes may be expected.

Unified Supply Chain DD Questionnaire Under the ESG Act

In the already amended ESG Act, SARA was given the authority to establish the required content necessary for ESG reporting, including minimum standards of a questionnaire annexed to the report, and to assess claims to extend the minimum questionnaire. Any requests for further sustainability due diligence related information in excess of the standard ESG questionnaire must be pre-approved by SARA. If a company is requested to provide information covered by the ESG Act, the company will only be required to complete a single standard questionnaire for corporate sustainability due diligence.

Although setting up an ESG risk identification and monitoring system extending on the supply chain for large companies is a costly exercise, any standardization to ease the risk assessment and the response with such a standard base questionnaire is a great help. Otherwise, companies may find it difficult to collect and analyze ESG data considering the numerous questionnaires to assess sustainability risks, investments, access to finance, and supply chains.

Although the ESG Act in general, was applicable as of 1 January 2024, it is gradually entering into force for different players within three years.

The recent amendment, however, sets forth that micro and small enterprises cannot be required to provide ESG data reporting until 30 June 2027, nor can they undertake a written obligation to do so. As for medium-sized enterprises, ESG data reporting may be requested until 30 June 2027, but they may not undertake a written obligation to that effect.

Conclusion

To sum up, the dedication of Hungary to regulate at this early stage the sustainability due diligence obligation and ESG reporting aims to help local enterprises remain competitive in international markets where ESG reporting may be required for access to finance and be a condition to stay in business by showing environmental and social responsibility to business partners. ■

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Impuesto a la emisión de gases contaminantes a la atmósfera en la ciudad de México

On 1 January 2025, a tax on the emission of polluting gases into the atmosphere whose sum of emissions of carbon dioxide, methane and nitrous oxide, either as a unit or any combination of them, is equal to or greater than one ton of carbon dioxide equivalent (t CO2e) per month went into effect in Mexico City.

Le 1er janvier 2025, une taxe sur l'émission de gaz polluants dans l'atmosphère dont les émissions combinées de dioxyde de carbone, de méthane et d'oxyde nitreux, individuellement ou en combinaison, égalent ou dépassent une tonne d'équivalent dioxyde de carbone (t CO2e) par mois est entrée en vigueur dans la ville de Mexico.

El 1 de enero de 2025 entró en vigor en la Ciudad de México, un impuesto a la emisión de gases contaminantes a la atmósfera cuya suma de emisiones de dióxido de carbono, metano y óxido nitroso, ya sea de forma unitaria o de cualquier combinación de ellos, sea igual o mayor a una tonelada de dióxido de carbono equivalente (t CO2e) al mes.

El 27 de diciembre de 2024 se publicó en la Gaceta Oficial de la Ciudad de México el "*decreto por el que se reforman, adicionan y derogan diversas disposiciones del código fiscal de la ciudad de méxico …*" por el que se adicionó un "*Capítulo VII TER, Del Impuesto a la Emisión de Gases Contaminantes a la Atmósfera*" al Título Tercero del Libro Primero, el cual contienen los artículos 164 ter 1, 164 ter 2, 164 ter 3, 164 ter 4, 164 Ter 5 y 164 Ter 6, cuyo decreto entró en vigor el 1 de enero de 2025.

Para efectos de ese impuesto, se considera como emisión de gases contaminantes a la atmósfera, la descarga directa a la atmósfera de dióxido de carbono, metano y óxido nitroso, ya sea en forma unitaria o de cualquier combinación de ellos.

Están obligadas al pago de ese impuesto, las personas físicas y jurídicas, que cuenten con fuentes fijas,[1] dentro del territorio de la Ciudad de México, que emitan gases contaminantes a la atmósfera, cuya suma de emisiones de dióxido de carbono, metano y óxido nitroso, ya sea de forma unitaria o de cualquier combinación de ellos, sea igual o mayor a una tonelada de dióxido de carbono equivalente (t CO2e) al mes.

1. Se considera *fuente fija*, a toda instalación en un lugar determinado, en forma permanente, para desarrollar operaciones o procesos industriales, comerciales, de servicios y cualquiera otra actividad que genere emisiones contaminantes a la atmósfera. ARTÍCULO 164 TER 1, segundo párrafo, del Código Fiscal de la Ciudad de México.

Para la determinación de las toneladas o fracciones de toneladas descargadas a la atmósfera, se realizará la conversión a dióxido de carbono equivalente (CO_2e) de cualquiera de los gases referidos en el párrafo anterior, multiplicando cada tonelada del tipo de gas distinto de CO_2 emitido por la equivalencia correspondiente, de acuerdo con la siguiente tabla:

Nombre del Gas	Composición Molecular	Toneladas	Equivalencia
Dióxido de Carbono	CO_2	1	1
Metano	CH_4	1	28
Óxido Nitroso	N20	1	265

Para los efectos de este impuesto, las descargas contaminantes a la atmósfera se calcularán de acuerdo con la metodología para el llenado de la Licencia de Operación o funcionamiento, la Cédula de Operación Anual o Integral, según corresponda a su jurisdicción.

Este impuesto se causará en el momento que se realicen las descargas de los gases contaminantes a la atmósfera y se determinarán aplicando una cuota de $58.00 pesos por tonelada. El impuesto se pagará en las formas y medios que establezca la Secretaría de Finanzas.

Los contribuyentes obligados al pago de este impuesto, deberán:

(i) presentar el comprobante del registro respectivo ante la autoridad competente, según corresponda; y

(ii) llevar un Registro de Emisiones Contaminantes, para lo cual la Secretaría de Finanzas emitirá las reglas de carácter general correspondientes.

Quienes decidan impugnar este impuesto podrán hacerlo mediante Juicio de Amparo Indirecto, debiendo tomar en cuenta, para el desarrollo de los correspondientes conceptos de violación de la demanda, los diversos precedentes de la Suprema Corte de Justicia de la Nación, por los que se resolvieron amparos sobre diversos impuestos ecológicos similares, tales como los del Estado de Zacatecas, que sentaron precedentes sumamente negativos por la forma en que se plantearon los Amparos.

Tomando en cuenta lo anterior, será de gran importancia para mejorar las probabilidades de éxito de los posibles nuevos Juicios de Amparo, incluir en la argumentación de fondo aspectos jurídico-ambientales asociados a esas contribuciones, particularmente en lo relativo a la actualización del hecho imponible, que parece ser no se desarrollaron en los Amparos anteriores, sin dejar de atender los tradicionales argumentos de carácter fiscal a luz de los precedentes antes mencionados. ■

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México y Guadalajara ofrecen un escenario inigualable. Guadalajara, la segunda ciudad más grande de México, es un testimonio vivo de la mezcla de modernidad y tradición que caracteriza a nuestra nación. Guadalajara es el corazón de tradiciones emblemáticas de México. Aquí se originó el mariachi, símbolo musical de nuestro país y Patrimonio Cultural Inmaterial de la Humanidad por la UNESCO. Además, es la cuna del tequila y la charrería. Mucho de lo que asocian con México – mariachi, tequila, sombreros y el Jarabe Tapatío – se originó en Jalisco.

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En este congreso, participaremos en conferencias y talleres de alto nivel sobre los temas más relevantes del derecho internacional. Será una ocasión para aprender de expertos y compartir conocimientos. Guadalajara ofrece experiencias inolvidables. Nos vemos en México. ¡Guadalajara los espera!"

Arturo Pueblita Fernández
Presidente del 69° Congreso de la UIA

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- Plus de **deux millions de visiteurs, participants et congressistes** du monde entier
- **119 000 m²** de halls d'exposition

Main Theme 1

Present and Future of Foreign Investment Dispute Resolution

Thursday, October 30, 9.00 am – 12.30 pm

Join us in exploring the challenges and pitfalls of Foreign Investment dispute resolution! From the alternative ways presented (Investment Arbitration vs. Permanent Court; Dispute Boards or Mediation) to the coexistence of traditional forms of conflict with the eruption of new issues related to the times we live in (energy transition, sanctions, geopolitical tensions and financial uncertainty, and environmental and technological issues). Discover how different methods, backed by bilateral treaties and international agreements, shape the foreign investment environment, seeking to ensure stability and legal security for all parties involved. Don't miss this opportunity to broaden your understanding of this exciting topic and strengthen your skills in international practice!

Main Theme 2

Agrifood, Sustainability and International trade

Friday, 31 October 9.00 am – 12.30 pm

Part 1: *Agrifood and Sustainability*

Let's delve into agrifood and sustainability, emphasizing on health, environmental and sustainable development related topics such as water-food, land use, food wastes, climate change, carbon footprint, pesticides, fertilizers, and genetically modify organisms (seeds). Instead of intensive, dehumanized agriculture, how can we best protect local communities, cultures, and know-how?

Part 2: *Agrifood and International Trade*

We will explore the current state of agrifood and sustainability and the possible scenarios and trends in light of free trade agreements such as the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA); the proposal of a Transatlantic Free Trade Agreement covering Europe and North America (TAFTA); and the agreement between the United States, Mexico and Canada (USMCA) to be revised in 2025 before the agreed date of 2026.

More opportunities for social interaction!

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

■ **Regional Lawyers' Forum:** We encourage you to attend the "UIA Networking Day" on the opening day of the Congress, a place where law firms' representatives can make short presentations. Join us for engaging discussions and lively debates as we dive into the pressing challenges that lawyers face today! Choose by specific regions or by affinity of languages: Spanish-speaking lawyers' forum, Portuguese-speaking lawyers' forum, French- speaking lawyers' forum, forum of lawyers from Central and Eastern European countries, Latin-american lawyers' forum, Arabic-speaking lawyers' forum or the African lawyers' forum.

■ **Sesión de la comisión de las mujeres:** este panel, moderado por Elisabeth ZAKHARIA SIOUFI, Presidenta del Comité de Mujeres de la UIA, se centrará en el tema "**Mujeres y Desarrollo Sostenible**", examinando la responsabilidad social de las empresas y la eficacia de su compromiso en esta perspectiva, pero también la responsabilidad de los estados, principales actores en la realización de los objetivos del desarrollo sostenible, junto en la creación y aplicación de los mecanismos necesarios, a nivel nacional como internacional. La sesión tendrá lugar el **jueves 30 de octubre a las 9.00 horas**.

■ **UIAdvance:** UIA supports law-firm managers in their strategic, financial and human resources challenges. During the congress, a special session dedicated to UIAdvance members on the topic "Navigating Legal Frontiers: Current Challenges and Opportunities in an International Legal Network" will take place on **Friday, 31 October at 5.30 pm.**

■ **Sesión especial: Derechos Humanos y Emergencia Climática; Negocios y Derechos Humanos**

Los tribunales internacionales juegan un rol fundamental ante los desafíos actuales del Estado de Derecho y la vigencia de los Derechos Humanos. Son actores clave para asegurar la paz y el desarrollo sostenible. En el presente panel se discutirá el rol de los Tribunales Internacionales ante la crisis del Cambio Climático, la vigencia de los Derechos Humanos y el desarrollo sostenible.

La sesión tendrá lugar el **sábado 1 de noviembre a las 16:45.**

Welcome to our first-time participants!

Are you a new participant at the UIA Congress?

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

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

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

Activités sociales du Congrès

Cérémonie d'ouverture et cocktail de bienvenue

› ***Mercredi 29 octobre***

La cérémonie d'ouverture du congrès aura lieu dans l'un des théâtres les mieux conservés d'Amérique latine, le Teatro Degollado, icône du patrimoine culturel mexicain et lieu emblématique de l'excellence artistique.

Soirée informelle

› ***Jeudi 30 octobre***

Le Cortijo Los Fernández est un lieu unique pour les événements sociaux, touristiques et professionnels. Cette magnifique propriété accueille tous les types d'événements depuis plus de 25 ans, ce qui lui a valu la réputation d'un lieu qui promet des souvenirs inoubliables et des événements exceptionnels.

L'occasion de profiter votre soirée en passant un moment de détente conviviale !

Soirée de gala

› ***Vendredi 31 octobre***

L'Institut culturel Cabañas était l'un des plus anciens et des plus grands complexes d'orphelinats et d'hôpitaux des Amériques. Aujourd'hui transformé en musée, le hall principal abrite les fresques de l'opus magnum du peintre muraliste José Clemente Orozco. L'endroit a été classé au patrimoine mondial de l'UNESCO en 1997.

Cérémonie de clôture et cocktail

› ***Samedi 1 novembre***

La passation de la présidence de l'actuel Président Carlo Mastellone t au Président désigné Fernando Hernández Gómez sera un moment fort de la cérémonie de clôture. Cette dernière permettra également de faire la synthèse des travaux scientifiques du congrès.

Registration Fees

Do not miss the early-bird registration fees!

To benefit from the **preferential rate**, register in the Congress section at gdl.uianet.org **before 31 July!**

Online registration helps you save time.

Book your accommodation in advance!

Given the limited number of rooms and the fact that preferential rates cannot be guaranteed beyond the number of rooms booked for the UIA, we recommend that you make your hotel reservation as soon as possible with our partner Bnetwork.

You can book your accommodation online at: www.uia-guadalajara.bnetwork.com

Excursion générale

Dimanche 2 novembre
Journée complète

Visite de Tequila

Ne manquez pas l'occasion de **visiter la charmante ville de Tequila !**

La journée commencera par une visite des champs d'agaves bleus caractéristiques qui s'étendent sur les collines de toute la région.

Nous nous rendrons ensuite dans la ville pour visiter le Centre culturel et la distillerie de Mundo Cuervo, l'un des producteurs de téquila les plus réputés du monde.

La visite comprend le transfert privé aller-retour à partir de Guadalajara, une visite guidée en groupes de 40 personnes et le déjeuner dans le cadre enchanteur du Gran Salon, situé près de la distillerie.

Contributors to the Legal Spotlights in this issue are: Pierre-Gilles Bélanger, Christian Clapp, Mohamed Hassanein, and Camille Vuillemin-Loup.

Egypt – New Bill of Criminal Procedure Law

The Egyptian criminal procedural code n 150/1950 was always requested to be amended by several legal professionals in Egypt. One of the most criticised issues with this law relates to unlimited precautionary imprisonment that was considered a severe violation to human rights as it allowed imprisonment without any time limit. Additionally, one of the critiques to the old law is that it does not adopt any modern techniques like remote trials. Surprisingly the new bill is also criticised by both the lawyers' bar and journalists' bar for limiting the role of lawyers at the prosecution and investigations stage, as well as for laying certain limits on the media on transmitting trials and case news.

Egypt – New Law for Asylum

According to an official release, Egypt hosts more than 9 million refugees due to the situation in many neighbouring countries like the Sudan, Libya, Palestine, Iraq and Syria. This huge number of refugees represents a big burden to the Egyptian Government as the refugees are benefitting from the public support of goods and services. More importantly, this huge number of refugees is considered to be an escalating security challenge for Egypt. As a response to this growing challenge, the Egyptian President has issued law n. 164/2024, which regulates the legal position of refugees in Egypt. This law is considered the first law in Egypt that is focusing on refugees' regulation by defining who is considered a "refugee," and rights and duties of the refugees. It also envisages formation of a special committee for refugees.

Canada – Supreme Court of Canada Has Not a Monopoly of Knowledge and Wisdom

Created in 1875, the Supreme Court of Canada is Canada's final court of appeal and the only bilingual and bi-juridical court of last instance in the world. It decided to make a tour of the country this year to underline its 150th anniversary in order to demystify its work with the public. In front of an audience, questions and answers were tinged with both curiosity and concern about the strength of institutions and judgements. Interestingly, a question was asked to the Right Honourable Chief Justice Mr Richard Wagner: "Have you ever changed your mind?" to which the Chief Justice replied that there is no supreme court in the world that has a monopoly on knowledge and wisdom.

Germany – Birkenstock Sandals Are Not Works of Art

The German Federal Court of Justice recently ruled that Birkenstock sandals do not qualify as works of art, denying them copyright protection. This verdict concludes a legal battle started in May 2023, when Birkenstock sued German retailers Tchibo and shoe.com, and Danish company Bestseller, for selling similar products. Birkenstock sought their removal and destruction. After losing in the Cologne Court of Appeal in 2024, Birkenstock appealed to the Federal Court, which upheld the decision, noting the sandals' design is dictated by technical requirements and lacks the originality for copyright. The company continues legal actions in France, the Netherlands, Denmark, and Switzerland, awaiting a European Court of Justice ruling.

India – An Indian Lawyer Successfully Sued the Largest Cinema Chain in India

An Indian lawyer successfully sued PVR INOX, the country's largest cinema chain, for excessive advertising before a film, disrupting his work schedule. On 26 December 2023, he attended a screening which was delayed by 25 minutes of ads. He filed a complaint with the Bengaluru Urban District Consumer Disputes Redressal Commission claiming "unfair trade practice" and mental distress. PVR INOX defended its actions by citing legal obligations for public service announcements, but the court found that most ads were commercial. The court awarded him Indian Rupees 20,000 (USD 235) in damages, Indian Rupees 8,000 (USD 100) in costs, and Indian Rupees 100,000 (USD 1200) to the Consumer Welfare Fund. The ruling emphasised the value of time, criticising the cinema's prioritisation of ads over consumer experience. The case highlights the increasing importance of valuing consumer time in business practices.

Canada – Création d'une nouvelle commission indépendante d'examen des erreurs du système judiciaire

Le Canada se dote d'une commission indépendante pour les personnes condamnées à tort. Celle-ci fait suite à la création de commissions indépendantes semblables ailleurs dans le monde, comme en Angleterre, au pays de Galles et en Irlande du Nord, en Écosse et en Nouvelle-Zélande. Avant la création de commissions indépendantes dans ces pays a fait en sorte que beaucoup plus de demandes ont été présentées et que plus de condamnations injustifiées ont été découvertes et corrigées, comparativement à ce que l'on remarqua au Canada qui relevait de la discrétion du ministre de la Justice. Les demandeurs doivent d'abord épuiser leurs droits d'interjeter appel avant de demander un examen pour erreur judiciaire à la commission. Celle-ci ne déterminera pas si un demandeur est coupable ou innocent, mais devant une détermination qu'une erreur judiciaire a pu être commise et qu'il est dans l'intérêt de la justice de le faire, elle accordera une mesure de redressement, comme la tenue d'un nouveau procès ou d'un nouvel appel. Les tribunaux demeurent toujours les seuls de renverser une condamnation.

Monaco – Une décision de la CEDH entraine l'annulation d'un dossier de corruption

Le 27 février 2025, la justice monégasque a annulé l'essentiel du dossier de corruption impliquant le milliardaire russe Dmitri Rybolovlev et d'anciens hauts responsables monégasques, suite à une décision de la Cour européenne des droits de l'homme (CEDH) en juin 2024. La CEDH a jugé que l'expertise du téléphone de l'avocate de M. Rybolovlev, apparentée à la perquisition du bureau d'une avocate, était beaucoup trop large par rapport aux faits dont le juge d'instruction était saisi. La validité de l'expertise du téléphone, bien que reconnue par la justice monégasque, a ainsi été contestée par la CEDH, entraînant par la suite l'annulation de toutes les pièces du dossier liées à cette analyse, y compris l'ouverture de l'instruction et les inculpations.

Gaza Strip

Since the 1993 Oslo Accords, there has been an international consensus on solving the Palestinian-Israeli conflict on the basis of two neighboring states. This sounds very simple, but the reality is very hard. In the "Letters of Mutual Recognition," Israel was recognized as a state by the Palestine Liberation Organization (PLO) and reciprocally recognized the PLO as the representative of the Palestinian people. However, there were deep divisions on both sides about the way forward. Of course, the Palestinian people are physically divided between the Gaza Strip and the West Bank, which makes the establishment of a Palestinian state very complicated.

But there are also political divisions. On the Palestinian side, Gaza (but not the West Bank) is governed by Hamas; and the government in Israel, much more hawkish and right-wing than it was in 1993, faces much domestic opposition. Matters are further complicated by extremists on both sides, who believe that their religions entitle them to occupy the same land, even by violent means.

On October 7, 2023, Hamas attacked both military sites and civilian settlements in Israel, killing hundreds of non-combatants and taking hostages back to Gaza. Since then, Gaza has been under siege. Israel's military response has been overwhelming and controversial, and has resulted in the killing of tens of thousands and displacing most of the population within Gaza. In early 2025, a two-month ceasefire offered hope that displaced Gazans and Israeli hostages could return to their homes and Gaza could plan for reconstruction. Unfortunately, peace talks have broken down and combat has resumed. Innocents from both sides are suffering day by day; and the humanitarian disaster continues.

Royaume-Uni – La définition légale de «femme» repose sur le sexe biologique

Le 16 avril 2025, la Cour suprême britannique a statué que la définition légale de «femme» repose sur le sexe biologique, non le genre, selon la loi sur l'Égalité de 2010. Ce jugement, issu d'un litige entre le gouvernement écossais et l'association For Women Scotland, pourrait restreindre l'accès des femmes transgenres à certains espaces réservés aux femmes. Bien que la loi protège contre la discrimination liée au changement de genre, les implications juridiques sont vastes, affectant l'accès aux services publics et les droits en matière d'égalité. Ce verdict servira de référence pour les autorités locales et les services publics britanniques, notamment les services hospitaliers, les prisons, les refuges et les groupes de soutien, ainsi que sur les revendications en matière d'égalité salariale ou lors d'événements sportifs.

United States – Class Action Law in the U.S.

Class action law in the U.S. may change following the Supreme Court's decision to hear *Laboratory Corporation of America Holdings v. Davis*. The case involves blind patients who sued Labcorp for not complying with the Americans with Disabilities Act (ADA) and California state law regarding its self-service kiosks, which are essentially iPads used to check in for appointments. A California district court certified the class to allow it to proceed as a class action lawsuit, and the Ninth Circuit affirmed. The Supreme Court will determine whether a federal court can certify a damages class action when some members lack Article III injury under the U.S. Constitution.

This case highlights a divide among U.S. federal courts over the inclusion of uninjured class members in certified damages classes. In *TransUnion LLC v. Ramirez*, the Supreme Court stated that all class members must have Article III injury to recover damages, but it did not address this issue at the certification stage. A strict interpretation of *TransUnion* could complicate the certification process, making it harder and more expensive for plaintiffs, while a more lenient approach might lead to an increase in class action cases.

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• Law firm based in countries from HDI categories 3 & 4* : **3 265 €**

* The categories of countries are based on the Human Development Index from the United Nations Development Programme (UNDP).

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- **Participation in exclusive events** to develop and deepen relationships with other UIAdvance firms,
- **Full, complimentary UIA memberships** for 5 firm lawyers and 2 lawyers under the age of 35 with individual listings in the UIA Directory (additional members at preferential rates),
- **Free registration** for one firm lawyer at the UIA's Annual Congress
- **Unlimited registrations for firm lawyers** at the UIA's Annual Congress at preferential membership rates,
- **Free registration** for a firm lawyer at a UIA Seminar,
- **Unlimited registration** for firm lawyers at UIA Seminars at membership preferential rates,
- **Free law firm listing** on the UIA website and in the UIA Directory (with your firm's logo, contact, description and weblink, as well as an attorney photo),
- **50% discount** on advertising in the UIA Directory,
- **License to use the UIA logo** in your firm's marketing materials,
- **Recognition of your law firm** as a supporter of the UIA's Human Rights branch, the Institute for the Rule of Law (IROL),
- **10 copies** of the UIA Magazine, the Juriste International, and
- **10 copies** of the UIA Membership Directory.

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