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EDITORIAL

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I begin my final editorial on a slightly different note to my previous offerings. I would like to say that it has been my privilege and pleasure to take the helm of this journal for the last eighteen months. It is an exciting time for academic publishing (indeed, as I opined in my first editorial, an exciting time for academia generally). Although my stay has been brief, it has been both challenging and enjoyable and I think represents the dynamic nature of the EJLS. Much has changed since the journal's ambitious launch five years ago, and despite the necessary process of fine-tuning its internal structure to cope with the pressures of online publishing, I believe it has maintained its core values of excellence in writing and training. It is only right that my stay should be fairly brief, given the focus which the EJLS places on providing opportunities to the next generation of academics to learn valuable reviewing and publishing skills, and I look forward with interest with watching its further development from the wings as I step down and leave the stage to Tiago Andreotti e Silva, who will take over from the next issue onwards.

Law as Strategic Choice

A time of great change is afoot in many areas of law, despite the stubborn insistence of a few that the classic structures of law remain unaffected by globalization. Anthony Kronman wrote in 1993 that there was a crisis of identity in the legal profession, left by the collapse of what he called the 'lawyer-statesman' idea and the increasing commercialisation and division of labour amongst lawyers themselves.[1] Interestingly, he rubbished the distinction between those who practice law for money and those who seek to use the law to 'do good', suggesting that both parties view the law in the same way: in strictly instrumental terms.[2]

With the growth of large one-side-only bars, and the adoption of commercial tactics by many, if not all firms, it is worth asking what remains to legal practice beyond another battleground upon which various actors can seek furtherance of their goals and frustrate the goals of their opponents or competitors. Indeed, many in legal practice today would be surprised – perhaps even shocked – by the suggestion that it is anything else. Let me then explain why the question is worth asking. I begin with an example: that of the well-known phenomenon of the 'Italian torpedo' in international civil litigation. This derives from the fact that Italian courts are often slow-moving. In the *Trasporti Castelletti v Hugo Trumpy* case,[3] bills of lading were delivered

* European University Institute (Italy). Any errors or omissions are entirely my own. I am grateful to Andrea Talarico for her feedback.

1 Anthony T. Kronman, *The Lost Lawyer*, (1995, Cambridge, Massachusetts: Belknap Harvard)

2 *Ibid*, at 366

3 Case C-159/97, [1999] ECR I-1597 (ECJ).

which contained a choice-of-court clause in favour of England. However, the receiver of the cargo brought proceedings in Italy where the court took a full ten years (or eight years if the two years in the ECJ are discounted) to decide that it had no jurisdiction. What this enables is a 'torpedo' action by a bad-faith party to sue first and write letters later, in the full knowledge that it may take many years (and expense) for its opponent to obtain satisfaction, in the hope of forcing the latter to accept an unfavourable settlement.

This may seem pretty benign when the parties are both significant commercial players with well-resourced legal advisors. However, what about where one party is a wrongdoing multinational and on the other side are stacked its numerous victims? In the infamous *Bhopal* disaster, Union Carbide used their best efforts (successfully) to send the litigation back to India, where they settled the case for a sum that was manifestly inadequate, and nearly 30 years after the original explosion many victims remain unpaid.

Such examples are endemic in a culture which sees the law as a mere tool for litigating or contracting parties, and lawyers who see themselves as no more than mouthpieces of their clients' agendas. However, I would argue, it is the law itself that is cheapened by being instrumentalised in this fashion. It has not always been so, if Kronman's history of the lawyer-statesman is to be believed. And occasional examples bear witness to exceptions. In his autobiography, Gandhi relates the story of a certain case where he successfully represented the defendant in a commercial arbitration, but realized it would be impossible for the plaintiff to pay without declaring bankruptcy. He therefore persuaded his client to accept payment in instalments spread out over a 'very long period'. 'My joy was boundless', he wrote, 'I realized that the true function of a lawyer was to unite parties riven asunder'.[4]

When we sent out the original call for papers for this issue I received an interesting email from a Professor who was shocked that we had adopted the term 'lawfare' at all. To conceive of law in this way was an affront, in his mind. Perhaps he is right: in an age of ruthless competition in various fields, it could be argued that the last thing that is needed is the reduction of law to an all-purpose battering ram. If, as Kronman feared and globalization has proved, law is seen increasingly as a mere tool and those who practise it as technicians, perhaps the time has come for a new identity for lawyers which reifies the ideal of seeing beyond the parties to a dispute to wider societal needs for a global age, be that in crafting new constitutional approaches, human rights or justice regimes, or simply updating professional ethics to take account of the tendency to instrumentalise. Perhaps the word which law should be married to is not war, but welfare.

In this issue

This issue has a very balanced feel. Cambien and Moorhead provide two very different perspectives on EU law, Cambien by revisiting the concept of EU citizenship and its effect on the immigration law of member states, and Moorhead by challenging the generally accepted view of EU law as *sui generis*, arguing that it is an international legal based on the same underlying rationales as general international law. Meanwhile, Marín García offers a classic comparative examination of penalty clauses, updated for the transnational age, suggesting we

4 M. K. Gandhi, *The Story of My Experiments with Truth: An Autobiography*, (2007, London: Penguin), Part II, Ch. 14 esp. pp.132-133

need clear transnational rules to manage the friction between the civil and common law traditional approaches.

In international law, Zivkovic, Pervou and Perez de la Fuente offer general articles covering the recognition of contracts as international investments, the Convention on Enforced Disappearance, and culturally motivated crimes, respectively. Pervou's article in particular provides a topical contribution to the debates surrounding the regulation of terrorism, arguing that many practices being adopted in the war on terror constitute enforced disappearance according to the convention. Last but not least, de Hoon gives us our lawfare article, arguing that law is ultimately not up to the task of regulating warfare at all, but creates a false presumption that law can resolve 'fundamental disagreements'.