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À la recherche du taux perdu : Réflexions sur le taux de change dans le paiement des dettes monétaires libellées en devises / In quest of the lost rate: Reflections on the exchange rate in the payment of monetary debts fixed in foreign currencies

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Abstract

Monetary debts fixed in foreign currencies are paid, in Lebanon, in Lebanese Liras (legal tender). The debtor will multiply the sum by the exchange rate, to calculate the quantity of Liras to be paid. But the actual situation in Lebanon poses a specific problem: the exchange rate adopted by the courts of law is the average exchange rate published by the Central bank. This rate, unchanged since 1997, no longer corresponds to the realistic exchange rates by which Lebanese are actually able to buy dollars.

Courts of law justify their stance by reminding that it is the legislator that fixes the value of the national currency, and it is not up to the judges to fill the shoes of the legislator. Another argument is the instability of any other exchange rate besides the official rate of the Banque du Liban (central bank).

The purpose of this article will be to examine thoroughly the notions of "*legal rate*" and "*official rate*".

Lebanese laws keep the principle that the value of the national currency must be legally determined in gold or in dollar, according to the initial Bretton-Woods monetary system, yet this legal value was never actually determined. We will try to demonstrate that the notion of "*legal value*" or "*legal parity*" no longer corresponds to the actual international monetary system; subsidiarily, if such a legal value must exist, its scope of application does not concern private payments.

As for the official rate set by the Central Bank, we will try to demonstrate that even though judicial decisions constantly refer to it, nothing in law obliges them to do so: this rate is also not mandatory in private payments. At the contrary, it has become necessary to depart from this rate, because it no longer coincides with reality. Furthermore, when parties to a contract determine their debt in dollars, their intention is to protect themselves from inflation, yet, in Lebanon's current financial situation, applying the overvalued official rate neutralizes the intention of the parties. Finally, for money to assume its functions properly, any creditor must be assured that he will get paid by his debtor with money that has the same value as the money he will need to pay his own creditors.

> « *Vaine est certes la croyance qu'une valeur artificielle peut être maintenue par la vertu d'un texte, quelles que soient les mesures répressives dont il est armé*[1] ». Jacques OUGHOURLIAN

L'hypothèse que nous envisageons dans cet article est l'hypothèse d'une dette monétaire libellée en monnaie étrangère qu'il s'agit de payer en monnaie nationale. La monnaie étrangère joue ici le rôle d'une monnaie de compte, alors que la monnaie nationale est la monnaie de paiement dotée du cours légal[2] et que le créancier ne peut refuser[3]. Pratiquement donc, pour pouvoir payer cette obligation, la somme stipulée en monnaie étrangère doit être convertie en monnaie locale, selon un taux de change déterminé. Ce taux va commander la fixation du *quantum* de la somme en monnaie locale que le débiteur doit payer.

Le taux de change est le « *prix d'une monnaie en termes d'une autre monnaie*[4] », le « *rapport d'échange entre deux devises*[5] », ou encore le « *cours*[6] », la « *valeur* » d'une monnaie par rapport à une autre ou la « *parité* » entre

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1 J. OUGHOURLIAN, *Une monnaie, Un État, histoire de la monnaie libanaise*, éd. érès, 1981, p. 23.

2 Le cours légal est « *l'obligation imposée par la loi à un créancier de recevoir un instrument monétaire déterminé en paiement d'une quantité déterminée d'unités monétaires. Il y a donc à l'origine du cours légal, une injonction de l'État* ». J. CARBONNIER, *Droit civil, Les biens – Les obligations*, PUF, coll. Quadrige, 2004, vol. 2, p. 1561. Le cours légal est assuré en droit libanais par l'article 192 du Code de la monnaie et du crédit (CMC) du 1 août 1963 ; en droit français, V. l'art. R 162-2 du Code pénal français.

3 En droit libanais, l'art. 301 COC interdit les clauses de paiement en monnaie étrangère ou en or, mais n'empêche pas le débiteur de payer en devises de son propre gré. Pour plus d'informations, V. notre article : « Le paiement des obligations monétaires en monnaie étrangère en droit libanais : Une relecture de l'alinéa 2 de l'article 301 COC », *Revue juridique de l'USEK* 2020, n° 20, p. 7-41, <https://www.usek.edu.lb/Content/Assets/20201228BecharaKaram.pdf>.

4 B. GUILLOCHON *et al.*, *Économie internationale – Cours et exercices corrigés*, Dunod, 2016, p. 325, <https://www-cairn-info.ezproxy.usek.edu.lb/economie-internationale--9782100739363-page-325.htm#s2n7> ; le « *prix d'une monnaie étrangère* », selon le *Lexique juridique*, Dalloz, 23e éd., 2015-2016, V° « Taux » ; ou encore : "*the price of a country's money in relation to another country's money*", selon *Britannica*, V° « Exchange rates (finance) », <https://www.britannica.com/topic/exchange-rate>. Liens consultés le 30 juin 2021.

5 *Encyclopædia Universalis*, V° « taux de change », <https://www.universalis.fr/encyclopedie/taux-de-change/>, consulté le 30 juin 2021.

6 « *Le cours, c'est-à-dire le prix, de cette devise par rapport à une autre devise* », selon *La finance pour tous*, <https://www.lafinancepourtous.com/decryptages/marches-financiers/fonctionnement-du-marche/taux-de-change/>, consulté le 30 juin 2021. Le terme « *parité* », quant à lui, est souvent employé dans le sens de parité légale ou officielle entre devises.

elles[7]. On distingue entre taux de change nominal, et taux de change réel – à ne pas confondre avec le taux du marché – qui consiste à prendre en compte les indices de prix et leurs évolutions[8].

Au Liban, actuellement, nous observons une multitude de taux de change nominaux différents caractérisés par un grand écart entre eux[9]. Le taux publié par la Banque du Liban, considéré comme le taux « *officiel* », demeure inchangé depuis 1997[10], mais dès la fin de 2019, il est impossible au libanais d'acheter des dollars selon cette parité officielle. Les banques restituent les dollars de leurs dépositaires en livres libanaises selon un autre taux spécifique défini par la Banque du Liban[11]. Devant les bureaux de change, le dollar s'échange bien au-delà du taux officiel. Il reste qu'actuellement, le moyen principal d'acheter des dollars est le marché « *parallèle* [12]» ou

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7 Les textes libanais utilisent le terme « *quima* » قيمة (littéralement : valeur) quand il s'agit d'exprimer la teneur de la livre en or (art. 1er de la loi de 1949 sur l'unité monétaire ; art. 2 du Code de la monnaie et du crédit – CMC – de 1963) ; et le terme « *se'r* » سعر quand il s'agit d'exprimer la valeur de la livre en autres devises (art. 2, 3 et 5 du décret d'application n° 15105/k du 27 mai 1949 ; art. 229 du CMC). Le terme « *se'r* » est donc utilisé dans le sens de taux de change, cours de change ou parité. À noter que ce dernier terme, parité, est utilisé spécialement pour désigner la parité légale entre deux monnaies (par ex., la parité légale transitionnelle de l'art. 229 CMC, V. *infra* note n° 32). Littéralement, « *se'r* » est défini comme le prix ثمن – *Munjid al Tullab*, 23e éd., 1986, V° « سعر » ; *Al Ra'id*, V° « سعر », www.maajim.com ; ou défini comme le coût تكلفة ou la base du prix ما يقوم عيه الثمن, dans un sens conventionnel – *Lisan al Arab*, V° « سعر » et *Al Kamous al Muhit*, V° « سعر », www.almaany.com).

8 Le taux de change nominal représente « *la valeur d'une monnaie exprimée dans une autre. On le définit communément comme le prix d'une monnaie étrangère dans un pays donné* » ; alors que le taux de change réel entre deux monnaies « *est calculé en multipliant le taux de change nominal (le coût d'achat d'un euro en dollars par exemple) par le ratio des prix entre les deux pays* ». L. A. V. CATÃO, « À quoi sert le taux de change réel ? », <*https://www.imf.org/external/pubs/ft/fandd/fre/2007/09/pdf/basics.pdf*>, consulté le 30 juin 2021. V. aussi le site de l'*insee.fr*; <https://www.insee.fr/fr/metadonnees/definition/c1438>.

9 Pour un exposé méthodique des différents taux : M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma », *The MENA Business Law Review* 2021, Lexis Nexis, n° 2, p. 73-79. Notons que l'existence d'une multitude de taux n'est pas en soi une situation anormale. V. note n° 78 *in fine*.

10 V. *infra* note n° 78.

11 Selon les circulaires de base de la BDL n° 151 du 21 avril 2020 ; et plus récemment, n° 158 du 8 juillet 2021 qui préconise la restitution de billets de dollars aux déposants (donc le dollar comme monnaie de paiement).

12 Ce terme vise l'existence d'un taux pratiqué en dehors des instances régulières (bureaux de change réguliers et les banques). Ex. d'un usage officiel du terme : les motifs de l'arrêté commun des ministres de l'Agriculture et de l'Économie et Commerce

« *noir*[13] » ou « *libre*[14] », c'est-à-dire les opérations de change manuel assurées par des changeurs irréguliers[15], à un taux plus que 10 fois supérieur au taux « *officiel* ».

Supposons une personne, créancière d'un loyer fixé en dollars – 100 dollars. Son locataire lui paie en livres libanaises selon le taux officiel de 1507.5, c'est-à-dire 150,750 livres[16]. Si elle veut utiliser cette même somme pour acquérir des dollars *via* le marché parallèle selon un taux de 15000 ou plus, c'est à peine qu'elle obtiendra 10 dollars...

Le problème est donc assez particulier : en général, la détermination du taux de change est considérée comme une question banale, à peine effleurée par la doctrine[17], tant la chose semble aller de soi. La particularité actuelle de la question au Liban provient de ce que le taux officiel est devenu détaché

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n° 1/5/م أت du 6 oct. 2020 relatif à la fixation du prix de certains produits (poulets, œufs, viandes, lait). "بناء على ارتفاع سعر الصرف في السوق الموازي" Ex. d'un usage médiatique : « Le dollar à 15.000 livres libanaises sur le marché parallèle », *L'Orient-Le Jour*, 11 juin 2021, <https://www-lorientlejour-com.ezproxy.usek.edu.lb/article/1264860/le-dollar-a-15000-livres-libanaises-sur-le-marche-parallele.html>.

13 V. à titre d'exemple : F. KHOURY HELOU, « Au Liban, à quoi sert le marché noir ? », *Le Commerce du Levant*, 10 mars 2021, <https://www.lecommercedulevant.com/article/30269-au-liban-a-quoi-sert-le-marche-noir->. Cette appellation suggère l'illicéité des opérations de change assurées par des changeurs irréguliers. V. *infra* parag. 2, B, 2.

14 Le terme est ambigu, libre par rapport à quoi ? Les trois termes (parallèle, noir, libre) sont utilisés indifféremment par les médias. V. ce qu'en dit la décision du Juge d'exécution de Jdeidé, 28 juin 2021, inédit.

15 V. *infra* parag. 2, B, 2 sur les opérations de change.

16 Mal lui en prend s'il refuse le paiement, car son débiteur aura inévitablement recours à l'offre réelle et consignation- avec toutes les chances de succès, grâce à une jurisprudence constante.

17 Le décalage entre le taux officiel et le taux du marché est une question tellement particulière, d'un côté ; d'un autre côté, la détermination du taux de change « *constitue un élément de fait* », Cass. com., 25 mars 1997, n° 94-21.466, V. surtout D. CARREAU et C. KLEINER, *Rép. Droit Intern. Dalloz*, V° « Monnaie », juin 2017, n° 129. Ceci explique le manque d'intérêt dont lui témoignent les ouvrages de droit des obligations, qui nous enseignent que le paiement s'effectue « *au cours du jour du paiement effectif* », sans aucune précision quant à ce cours. V. par ex., Ph. MALAURIE, L. AYNÈS et Ph. STOFFEL-MUNCK, *Droit des obligations*, LGDJ, coll. Droit civil, 9e éd., 2017, p. 642 ; A. BÉNABENT, *Droit des obligations*, LGDJ, précis Domat, 16e éd., 2017, p. 137 n° 165 ; de même pour les thèses spécialisées que nous avons consultées : R. LIBCHABER, *Recherches sur la monnaie en droit privé*, LGDJ, coll. Bibl. de Droit privé, 1992, t. 225 ; Th. LE GUEUT, *Le paiement de l'obligation monétaire en droit privé*

de la réalité, et de ce qu'il existe une multitude de taux alternatifs. Comment donc, dans ces conditions, déterminer le taux de change selon lequel se fait le paiement d'une dette monétaire libellée en monnaie étrangère ?

Les quelques décisions récentes accessibles sur le sujet[18] – presque toutes de 1er degré – semblent en majorité retenir le taux déclaré par la Banque du Liban de 1507.5 livres libanaises pour un dollar, et ceci pour des motifs

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interne, LGDJ, coll. Bibl. de Droit privé, 2016, t. 572, même s'ils s'intéressent aux opérations de change et à la monnaie étrangère.

Les ouvrages libanais de droit des obligations ne sont pas plus informatifs sur la question. Par ex., M. AWAGI s'intéresse au moment du calcul du taux de change, mais non à sa détermination ; Z. YAKON dans son commentaire sur l'art. 301 COC, s'intéresse plus aux clauses or et valeur-or qu'à la monnaie étrangère. Ch. FABIA et P. SAFA, quant à eux, dans leur *Précis de Code de commerce annoté*, éd. du Béryl, 2e éd. annotée, 2005, t. 1, p. 624, sous l'article 356 du Code de commerce relatif à la monnaie de paiement de la lettre de change, donnent quelques précisions. Pour les références arabes :

م. **العوجي**، الموجبات المدنية، منشورات الحلبي الحقوقية، ٢٠١٨، ص ٣٥٠-٣٥١؛ ز. **يكن**، شرح قانون الموجبات والعقود، دار العلم والنور، [د. ت.]، ج ٦، ص ١٦٤؛ ج. **سيوفي**، النظرية العامة للموجبات والعقود، الموجبات، ط ٢ (أعدّها م. سيوفي)، ١٩٩٤، ج ٢، ٢٣١ وما يليها؛ وفي القانون المصري: ع. **السنهوري**، الوسيط في شرح القانون المدني الجديد، ج ١، م ١، ص ٣٨٩ رقم ٢٢٤ وما يليها خاصّة الحاشية رقم ٢ ص ٣٩١ حيث يذكر أن المشروع التمهيدي للقانون المدني المصري احتوى على مادة (١٨٧) تتيح الإتفاق على الإيفاء بالعملات الأجنبية حسب سعر القطع لكنها حذفت.

Par contre, la crise monétaire des années 1990 et la crise actuelle ont donné lieu à des études juridiques sensibles à la question du taux de change, comme par ex. un article de M. SIOUFI dans la revue *Al-Adl*, 1993 ; ou plus récemment, M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma », p. 73-79 qui explique la diversité des taux de change en présence et recommande le taux le plus proche du taux du marché; G. ZOUEIN, qui met à profit la notion d'ancrage à la valeur de Rémy Libchaber pour préconiser l'application du taux réel minimum.

ج. **زوين**، "الإيفاء بالعملة الوطنية لدين محرّر بالعملة الأجنبية في ضوء عدم قابلية الليرة اللبنانية للتحويل بسعر صرفها الرسمي"، العدل ٢٠٢٠، ع ٢، ص ٥٢٧-٥٣٥؛ **سيوفي** م.، "التعاقد بالعملة الأجنبي"، العدل ١٩٩٣، ع ٢، ص ٢٥-٢٨.

L'Argentine, abondamment citée comme précédent dans les médias, a connu une crise caractérisée par le maintien d'un taux de change surévalué de la monnaie locale qui ne correspondait plus à la réalité. M. FELDSTEIN, "Argentina's Fall: Lessons from the Latest Financial Crisis", *Foreign Affairs*, mars - avr. 2002, vol. 81, n° 2 p. 8-14, lien : <https://www.jstor.org/stable/20033080>, consulté le 28 juin 2021. D'un point de vue comparatif, il serait intéressant de connaitre les solutions envisagées dans les paiements internes. Malheureusement, nous n'avons pas pu trouver des sources en anglais ou français qui traitent spécifiquement du taux de change.

18 Nous remercions messieurs les magistrats Gaby Chahine et Teddy Salameh qui ont partagé avec nous des décisions rendues encore inédites, ainsi que d'autres documents.

divers, qui mettent en relief le caractère officiel de ce taux, et le considèrent comme substitut au prix « *légal* » de la livre, tel que l'exige la loi[19].

À la question posée, nous ne donnerons qu'une réponse partielle, car nous nous intéresserons particulièrement à deux notions : la « *valeur légale* » de la monnaie nationale, et le taux « *officiel* » de la Banque du Liban. Comme indiqué plus haut, nous raisonnerons principalement sur le paiement des dettes monétaires, celles dont l'objet *in obligatione* comme *in solutione* est une somme de monnaie[20]. Il est à noter que le juriste étudie les effets du taux de change sur les obligations et relations juridiques en aval, et qu'il a besoin de l'économiste pour lui expliquer les mécanismes et politiques monétaires qui affectent le taux en amont.

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19 JU Beyrouth, n° 279/2020, 3 déc. 2020, *idrel.com* : application du prix de change officiel défini par la Banque du Liban dans ses relations avec les banques (1507.5) surtout que l'article 70 du Code de la monnaie et du crédit confie à la BDL la mission de préserver la stabilité de la monnaie ; dans le même sens, JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com* : à défaut d'un taux légal, application du taux officiel de la Banque du Liban ; TGI Beyrouth, 6e ch. civ., n° 289, 1 déc. 2020, *idrel.com* : selon les art. 2 et 229 du Code de la monnaie et du crédit, la livre doit avoir un prix légal, puis – presque sans transition – la décision applique le taux officiel publié par la BDL (1507.5-1515) car le juge ne saurait empiéter sur les compétences du législateur ; Juge d'exécution, Jdeidé, 28 juin 2021, inédit : la décision reconnait l'absence d'un taux légal, exclut le taux du marché libre et autre taux, et finit par appliquer le taux officiel, considéré comme taux légal du fait de sa mention dans une loi budgétaire. Comp. avec Appel Beyrouth, 1re ch. civ., n° 315, 17 juin 2021, inédit : cet arrêt reconnait l'absence d'un taux légal, mais n'en tire pas la même conséquence, au contraire, il ajoute que le préambule de la Constitution libanaise consacre le système économique libéral, et par conséquent - renvoie les parties au juge compétent pour décider du taux à appliquer. Comp. surtout avec l'opinion dissidente dans les deux décisions de TGI Beyrouth, 3e ch., n° 56, 24 juin 2021 et n° 63, 1 juill. 2021, inédits, opinion qui conteste l'idée d'un prix légal ainsi que l'application du taux de la Banque du Liban.

20 Cette définition exclut les dettes de valeur, qui ont pour objet *in obligatione* une valeur et *in solutione* une somme d'argent. Dans ce sens, J. CARBONNIER, *Droit civil*, *Les biens - Les obligations*, p. 1931 n° 927 ; *contra* Th. LE GUEUT, *Le paiement de l'obligation monétaire en droit privé interne*, p. 379 n° 570, selon qui l'objet de toute obligation monétaire est le transfert de propriété d'unités monétaires, y inclus les dettes de valeurs. La définition de la dette monétaire est une affaire délicate. Concernant un livret d'épargne en dollars, une décision récente a qualifié l'obligation de la banque dépositaire comme une dette de restitution et non une dette monétaire, et par conséquent, la banque ne peut se libérer en payant la contrevaleur en livres mais doit restituer des dollars. Juge d'exécution, Beyrouth, n° 2/2021, 15 févr. 2021, *Al-Adl* 2020, 1, p. 359 et s. ; *idrel.com*. Or, il s'agit d'un dépôt irrégulier qui porte sur des choses fongibles, et le dépositaire n'est plus tenu à une restitution en nature, V. : Ph. MALAURIE, L. AYNÈS et P.-Y. GAUTIER, *Les contrats spéciaux*, Defrénois-Delta, 4e éd., 2009, p. 515 - 516 n° 886 et 887 ; P. PUIG, *Contrats spéciaux*, Dalloz, Hypercours, 2e éd., 2007, p. 554-555 n° 1003 -1006.

Dans un premier temps, nous explorerons la notion de « *valeur légale* » de la monnaie, pour démontrer qu'il s'agit d'une notion au pire dépassée et au mieux inopérante (paragraphe 1) et dans un second temps, nous examinerons la notion de « *taux officiel* » pour démontrer qu'un tel taux ne s'impose pas quant il ne traduit plus la réalité (paragraphe 2).

Paragraphe 1. L'incongruité de la notion d'une valeur légale de la monnaie

L'argument que le taux de change doit être déterminé par la loi est récurrent en jurisprudence[21]. Les décisions qui invoquent cet argument reconnaissent qu'actuellement un tel taux légal n'existe pas, mais la conséquence qu'ils en tirent est l'application subsidiaire du taux officiel de la Banque du Liban, même si les voies empruntées pour justifier le résultat ne sont pas toujours les mêmes. Ce que nous voulons démontrer dans ce paragraphe est que la notion même d'une détermination légale de la valeur de la monnaie est devenue une notion obsolète, et que, subsidiairement, si une telle valeur existe, elle ne s'impose point aux relations privées internes. Ainsi, nous discuterons, dans un premier temps, de l'opportunité d'une détermination légale du prix de la monnaie nationale (A) et dans un second temps, subsidiairement, du domaine d'application d'un tel prix légal, à supposer qu'il existe (B).

A. La « *valeur légale* » de la monnaie, atavisme impraticable

Nous exposerons brièvement l'histoire de la notion de la « *valeur légale* » de la monnaie libanaise (1) avant d'en tirer quelques enseignements (2).

1. Bref historique de la notion de valeur légale de la livre libanaise

L'histoire de la « *valeur légale* » de la livre libanaise ne peut être comprise isolément de l'histoire du système monétaire international. Nous distinguerons trois périodes.

Première période : de 1920 à la fin des années 40

La première période s'étend de 1920 – quand la Banque de Syrie (devenue en 1924 Banque de la Syrie et du Liban) obtint le privilège d'émettre la livre

21 V. *supra* note n° 19.

syrienne (devenue en 1924, la livre libano-syrienne)[22] – à 1949, date de la loi monétaire qui a établi la livre libanaise comme unité monétaire de la République libanaise. Cette période correspond au système international de l'étalon-or, ou « *gold standard* », qui prit fin avec l'accord Bretton Woods de 1944. Les dernières décennies du 19e siècle furent marquées par l'adoption du « *gold standard* » par la plupart des grandes puissances, au lieu du bimétallisme[23] qui y avait cours. Selon ce système, chaque unité monétaire correspond à un grammage d'or, et est convertible en or – du moins, en temps normal[24] ; par exemple, le franc Pointcaré[25]. La livre libano-syrienne, quant à elle, n'était pas évaluée directement en or mais en francs français, selon une parité légale stable (une livre = 20 francs), réévalué en 1944[26].

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22 L'arrêté n° 129 du 31 mars 1920 du Haut-Commissaire français a investi la Banque de Syrie, société anonyme, du privilège de l'émission de la livre syrienne, unité monétaire du Liban et la Syrie. Selon l'art. 3 de l'arrêté, les billets sont « *remboursables au porteur et à vue en chèque sur Paris à raison de vingt centimes par piastre syrienne* » ; après la Convention du 23 janvier 1924, le nom de la banque devient Banque de Syrie et du Grand-Liban ; la livre syrienne devient la livre libano-syrienne, la parité avec le franc demeure la même : une livre équivaut à 20 francs ; les billets sont remboursables en chèques sur Paris ou Marseille au choix du porteur ; la Convention du 29 mai 1937 entre le Liban et la Banque de la Syrie et du Liban, entrée en vigueur au début de 1940, maintint la même unité monétaire et la même parité. V. : J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 25-26, p. 71 et s. et p. 77 et s.

23 Le bimétallisme est la circulation de pièces d'argent et d'or avec une parité officielle entre les deux. Dans l'empire ottoman, toutefois, aucune parité de la sorte n'existait entre les deux métaux. H. GERBER, « The monetary system of the ottoman empire », *Journal of the economic and social history of the Orient* 1982, vol. 25, n° 3, p. 308-324, <https://www-jstor-org.ezproxy.usek.edu.lb/stable/3632189?seq=2#metadata_info_tab_contents>, consulté le 30 juin 2020.

24 L'article 301 du COC (1932) définit la période normale conformément au système du « *gold standard* », comme la période où la convertibilité en or est possible - ce qui ne correspond plus au système monétaire international contemporain. V. notre article : « Le paiement des obligations monétaires en monnaie étrangère en droit libanais : Une relecture de l'alinéa 2 de l'article 301 COC », p. 11-16.

25 La loi française du 25 juin 1928, *JORF* du 25 juin 1928, a introduit le franc dit Pointcaré, du nom du Président du Conseil et ministre des Finances Raymond Pointcaré. Son 2e art. dispose : « *Le franc unité monétaire française est constitué par 65,5 milligrammes d'or au titre de 900 millièmes de fin* ». Le franc Pointcaré succède au franc Germinal (introduit par le consul Napoléon par la loi sur la fabrication et la vérification de la monnaie du 7 Germinal XI / 23 mars 1803). Source : *Bulletin des lois de la République française* 1803, Gallica.fr.

26 La parité livre/franc demeura stable (1 L. = 20 F.) jusqu'au protocole franco-anglo-libano-syrien du 25 janvier 1944, car suite à la dévaluation du franc en 1944, la parité fut revisitée : 1 livre = 22.65 francs. V. : J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 101.

Deuxième période : de 1949 à 1971-1973

Les accords internationaux de Bretton Woods de 1944 mirent fin au système déjà moribond[27] du « *gold standard* ». Ces accords sont à l'origine du Fonds monétaire international (FMI) et la Banque internationale pour la reconstruction et le développement (BIRD) (devenue la Banque Mondiale par la suite), et instaurèrent un nouveau système monétaire international dit système de l'étalon de change-or (« *gold exchange standard* »). Selon ce système, les monnaies – sauf le dollar américain – ne sont plus convertibles en or ; en d'autres termes, c'est la normalisation de l'inconvertibilité en or de la monnaie fiduciaire (cours forcé) ; les pays membres doivent fixer une parité de leurs monnaies soit en or, soit en dollar ; le dollar devient la monnaie de réserve, seule monnaie convertible en or[28], et base du système.

L'écho de ce nouveau système se retrouve dans la loi libanaise du 24 mai 1949 relative à l'unité monétaire, dont le premier article dispose, conformément à l'acte d'adhésion du Liban au FMI[29], que « *l'unité monétaire est la livre libanaise dont la valeur* [ou teneur en or] *équivaut à 405/512 milligramme d'or pur, ceci étant le taux déclaré au Fonds Monétaire International*[30] ». L'idée d'une valeur légale de la livre exprimée en or – composante du système de la FMI – va se perpétuer dans le Code de la monnaie et du crédit du 1er août 1963, quoique dans des termes différents, car si l'article 1er du Code en maintient le principe[31], l'article 229 dispose

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27 En 1931, le Royaume Uni et le Japon se désistèrent du *Gold Standard*, suivis d'autres pays. V. l'article « *Money* » dans l'encyclopédie Britannica, dont l'un des auteurs originaux est Milton FRIEDMAN, le célèbre économiste : A. H. MELTZER, *Britannica*, V° « Money », mis à jour 2021, <https://www.britannica.com/topic/money>, consulté le 30 juin 2021.

28 La convertibilité du dollar concernait les États entre eux. Sur les systèmes monétaires internationaux : M. LELART, *Le système monétaire international*, La Découverte, coll. Repères, 9e éd., 2017 ; A. RAY, *International Business Law : Text, Cases, and Readings*, Prentice Hall, 2004, chapitre "Money and banking", p. 304 et s. ; D. PLIHON, *La monnaie et ses mécanismes*, La découverte, coll. repères, 2017, p. 69-86, chapitre « La dimension internationale des monnaies », surtout le graphique p. 82.

29 La résolution n° 5 du Conseil des gouverneurs du FMI, dont le texte est reproduit par J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 148-149. Le Liban est devenu membre le 14 avril 1947.

٣٠ مادة ١: "ان الوحدة النقدية هي الليرة اللبنانية التي تساوي قيمتها ٤٠٥/٥١٢ مليغرام من الذهب الخاص، وهو المعدل المصرح به لصندوق النقد الدولي وتقسم الليرة اللبنانية الى مئة قرش".

31 Art. 1 du CMC : « *La loi détermine la valeur* [ou teneur] *de la livre libanaise en or pur* ». "يحدد القانون قيمة الليرة اللبنانية بالذهب الخالص".

que provisoirement – et il n'y a que le provisoire qui dure au Liban – sera adopté une « *parité légale transitoire* » calculée à partir du dollar américain. L'article 229 substitue à la *valeur légale* en or, une *parité légale* avec le dollar américain :

> « *En attendant qu'une nouvelle parité exprimée en termes d'or soit déterminée en accord avec le Fonds monétaire international, et sanctionnée par une loi conformément au deuxième article, les mesures transitoires suivantes seront prises par le ministre des Finances et mises en vigueur, aux dates qui seront arrêtées par lui :*
>
> *Un cours de change réel, aussi voisin que possible du cours du marché libre sera adopté pour la livre libanaise, par référence au dollar U.S.A. défini par un poids d'or fin de gramme 0.888671. Ce cours sera la "parité légale transitoire" de la livre libanaise*[32] ».

Selon les accords de Bretton Woods, la parité dollar/or a été fixée à 35 dollars pour une once troy[33] d'or (ou 31.103 grammes). Une simple règle de trois permet d'obtenir le chiffre mentionné dans l'article 229 : un dollar correspond à 31.103/35 grammes d'or, ou 0.8886. Les États-Unis ont pu conserver cette parité jusqu'en 1970.

Troisième période : l'après Bretton Woods

1971 fut l'année du « *Nixon shock*[34] », une série de décisions du Président américain qui changea en profondeur le système monétaire international :

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32 Le texte français de l'art. 229 est empruntée à une traduction française publiée par la BDL en 1963 (« *traduction non officielle – Le texte arabe seul fait foi* » pouvons-nous lire dans la page du titre). Il est à remarquer, en comparaison avec le texte arabe original reproduit ci-dessous, que le terme « *se'r* » est traduit par cours quand il désigne les taux effectifs, et par parité quand il désigne la parité légale (par ex., « *parité légale transitoire* »).
وريثما يحدد بالذهب سعر جديد لليرة اللبنانية بالاتفاق مع صندوق النقد الدولي وريثما يثبت هذا السعر بموجب قانون وفقا للمادة الثانية، يتخذ وزير المالية الاجراءات الانتقالية التالية التي تدخل حيز التنفيذ بالتواريخ التي سيحددها:
١- يعتمد لليرة اللبنانية، بالنسبة للدولار الاميركي المحدد ب ٨٨٨٦٧١. غرام ذهب خالص سعر قطع حقيقي أقرب ما يكون من سعر السوق الحرة يكون هو "السعر الانتقالي القانوني" لليرة اللبنانية".

33 L'once troy diffère de l'once « *normale* » et est une mesure spécifique à l'or et autres métaux précieux. V. *Britannica*, V° « Ounce », <https://www.britannica.com/science/ounce>, consulté le 30 juin 2021.

34 Le texte de l'appel de Nixon du 15 août 1971 peut être lu sur ce lien : <https://www.presidency.ucsb.edu/documents/address-the-nation-outlining-new-economic-policy-the-challenge-peace>. V. deux points de vue divergents: B. DOMITROVIC, "August 15, 1971: A Date Which Has Lived In Infamy", *Forbes* 14 août 2011, August 15, 1971, <https://www.presidency.ucsb.edu/documents/address-the-nation-outlining-new-

Nixon déclara l'inconvertibilité du dollar en or – inconvertibilité « *temporaire* » mais qui fut finalement définitive – ; le prix du dollar n'était plus fixé à l'or, mettant ainsi fin au système du « *gold exchange standard* » ; et enfin, en 1973, conséquence presque inévitable – le dollar fut dévalué par rapport à l'or.

Les autres grandes puissances économiques n'apprécièrent pas ce désistement unilatéral des États-Unis mais durent finalement se soumettre[35], et passer eux-mêmes à un système de parités flottantes (au lieu des parités fixes).

La dévaluation du dollar signifie que le chiffre de l'article 229 CMC ne correspond plus à la réalité. La réaction du Gouvernement libanais[36] de l'époque fut deux projets de lois, l'un octroyant au ministère des Finances le pouvoir de prendre les mesures nécessaires, l'autre déléguant au Gouvernement le droit de déterminer le prix « *transitoire légal* » de la livre vis-à-vis du dollar, tenant compte de sa dévaluation. Les deux projets furent promulgués par décrets[37] selon la procédure de l'article 58 de la Constitution libanaise. Toutefois, le Gouvernement n'exerça pas cette prérogative[38].

2. Les enseignements de l'histoire

Cet exposé historique met en relief certaines constatations.

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economic-policy-the-challenge-peace>. qui accuse Nixon de vouloir imprimer plus de monnaie-papier en détachant le dollar de l'or ; et S. KOLLEN GHIZONI, <https://www.federalreservehistory.org/essays/gold-convertibility-ends>, qui donne une appréciation plus positive. Liens consultés le 30 juin 2021.

35 L'accord du Smithonian (du nom de l'institution où eurent lieu les réunions) fut un effort éphémère visant à sauver les accords de Bretton Woods. <https://www.federalreservehistory.org/essays/smithsonian-agreement>, consulté le 30 juin 2021.

36 Le Gouvernement exprima la nécessité d'adopter un nouveau prix de l'or vis à vis du dollar américain et la nécessité d'adopter des taux réalistes pour les monnaies étrangères relativement à la livre libanaise, et ceci dans le but de la perception des impôts et taxes sur les sommes libellées en monnaies étrangères et dans le but de comptabiliser les monnaies étrangères encaissées par l'État. V. le procès-verbal de la séance du 21 mars 1973 du Conseil des ministres (texte en arabe):
<http://legiliban.ul.edu.lb/Law.aspx?lawId=256156>, consulté le 30 juin 2021.

37 Lois promulguées par les décrets 6104 et 6105, du 5 oct. 1973.

38 Comité de législation et de consultation du ministère de la Justice, consultation n° 881/1985, 9 oct. 1985.

L'absence d'une détermination légale de la valeur de la livre ?

Pratiquement, le législateur ou le gouvernement délégué par lui, n'ont jamais fixé un prix légal de la livre libanaise. La jurisprudence, même celle qui s'attache à l'idée d'une détermination légale de la livre, reconnait ce fait[39].

À l'époque, la détermination d'une valeur légale de la monnaie nationale était rendue obligatoire par l'adhésion du Liban au FMI, et c'est pourquoi l'article 2 du CMC maintient cette idée d'une détermination légale de la valeur la livre libanaise ; pourtant, l'article 229 semble esquiver le problème en ayant recours à une parité transitoire. C'est sans doute la leçon tirée de l'expérience de la loi monétaire précédente de 1949, car même avant le désistement des États-Unis du système de Bretton Woods, la parité légale de la loi 1949 était devenue impraticable et l'État achetait l'or et les devises étrangères pour assurer la couverture de la monnaie selon les taux du marché libre des changes. Selon un témoin privilégié de l'évolution de la livre libanaise : « *La parité légale actuelle de la livre libanaise n'a jamais correspondu à sa valeur réelle sur le marché libre […] quoique la part des opérations au cours légal […] soit modique par rapport à la masse des transactions faites aux cours du marché libre*[40] ».

Notons que des lois récentes déterminent une parité légale entre livre et dollar, mais à des fins spécifiques : la loi appelée loi du « *dollar estudiantin*[41] » dont la finalité est de permettre aux libanais étudiant à l'étranger ou à leurs parents d'effectuer des virements en dollars selon le taux de 1515 livres libanaises pour un dollar ; la loi budgétaire de 2020[42] qui, dans son article

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39 Par ex., Appel Beyrouth, 1re ch. civ., n° 315, 17 juin 2021, inédit ; juge d'exécution de Jdeidé, 28 juin 2021, inédits ; JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com*. V. aussi note précédente.

40 J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 162, 167 et 225. V. aussi : Comité de législation et de consultation du ministère de la Justice, consultation n° 881/1985, 9 oct. 1985, qui retrace d'une manière synthétique l'histoire du cours légal et du cours réel de la livre libanaise.

41 Loi n° 193/2020 du 16 oct. 2020 visant à obliger les banques à payer une somme de dix milles dollar, selon le cours officiel, pour l'an académique 2020-2021 aux étudiants universitaires libanais étudiant à l'étranger avant l'an 2020-2021. Cette loi a une finalité bien précise, et ne doit pas être retenue comme la valeur légale de l'article 2 du CMC. Dans ce sens : M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma » ; juge d'exécution de Jdeidé, 28 juin 2021, inédit.

42 Loi budgétaire n° 6 du 5 mars 2020. L'art. 35 a pour intitulé « *perception des impôts et taxes en livre libanaise* », et par conséquent, son domaine est limité.

35, fait référence au prix officiel de la Banque du Liban, et dont la finalité est la collecte des impôts et taxes. Ces deux textes sont-ils la détermination tant attendue du prix légal de la livre, transitoire ou non ? Nous ne le pensons pas, du fait de la spécificité de leurs finalités.

Incompatibilité avec le système monétaire contemporain

Une simple recherche sur Reuters ou Bloomberg permet de constater que le prix d'une once troy d'or n'est plus 35$, mais aux alentours de 1800 dollars[43]. Depuis le « *Nixon shock* », le dollar n'est plus fixé (« *pegged* ») à l'or, et sa valeur est devenue flottante. Conséquemment, le chiffre de l'article 229 CMC est devenu un chiffre dépassé et inutile.

L'idée même d'une détermination d'une valeur légale fixe en or n'est plus faisable, à moins que le législateur – ou le gouvernement délégué – ne procèdent à des actualisations régulières de cette valeur de la livre en or (ou en dollars).

Durant le système de Bretton Woods, le dollar a été la devise de réserve, et quand les États-Unis optèrent pour le flottement de leur monnaie, les autres membres furent obligés de les suivre. Cela signifie qu'il y a une inadéquation entre l'idée même d'une valeur légale de la monnaie exprimée en or, ainsi que l'idée d'une parité légale avec le dollar USD défini en or, d'une part, et le système monétaire international contemporain d'autre part. La détermination légale de la valeur en or de la livre est un atavisme déplacé, non conforme aux règles du jeu, et une entreprise impraticable vu que le dollar lui-même n'est plus défini en or.

Toutefois, à supposer qu'une détermination légale de la valeur de la livre libanaise existe, s'imposerait-elle aux fins de conversion des dettes monétaires exprimées en monnaie étrangère ?

B. Subsidiairement, le domaine d'application limité d'une valeur légale de la livre

Selon l'état du droit positif libanais, le principe d'une détermination légale de la valeur de la livre en or (ou provisoirement en dollars) est maintenu (art. 2 et 229 du CMC). Cependant, aucune valeur n'est fixée. Subsidiairement, à supposer que le législateur – ou le gouvernement délégué par lui – procède à la détermination d'une telle valeur, qu'elle soit transitoire

43 Reuters: <https://www.reuters.com/quote/XAU=X> ; Bloomberg: <https://www.bloomberg.com/quote/XAU:CUR>; liens consultés le 30 juin 2021.

ou non, quel en serait le domaine d'application ? Une lecture attentive des textes permet d'observer que l'usage du taux légal ne s'impose pas aux paiements privés (1), et que le législateur reconnait, en outre, l'existence d'un taux du marché libre qui, lui, a vocation à s'appliquer à ces paiements, indépendamment du problème de son identification (2).

Prix et valeur

Toutefois, avant de progresser, arrêtons-nous sur les termes « *valeur* », d'une part, et « *prix* » (ou « *cours* », dans le contexte de la monnaie) d'autre part. S'il est d'usage de les substituer indifféremment[44], ils ne signifient pas exactement la même chose. La valeur renvoie à une appréciation interne de la chose (comme quand le législateur définit le grammage de la livre en or), alors que le prix (et le cours) renvoie à une conception plus subjective et relative, dans laquelle entre en considération l'appréciation donnée par les parties, qui peut être égale, supérieure ou encore inférieure à la valeur : la valeur est le point de départ du prix, mais n'est pas le prix[45]. Cette distinction permet de suggérer que si le législateur peut déterminer la valeur légale de la monnaie (que ce soit en or, ou en dollar), ce sont les particuliers qui en fixent le cours au gré de leurs transactions. Toutefois, nous ne saurons tirer de cet argument plus qu'il ne le permet[46].

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44 Selon le Larousse, la valeur est « *ce que vaut un objet susceptible d'être échangé, vendu, et, en particulier, son* ***prix*** *en argent* », et le prix est la « ***valeur*** *d'échange, en monnaie, d'un bien, d'un service* », *Larousse.fr*; V[is] « prix » et « Valeur », Larousse.fr : encyclopédie et dictionnaires gratuits en ligne, consulté le 30 juin 2021. Les termes cours et prix sont utilisés indifféremment dans le contexte de la monnaie. V. *supra* note n° 6.

45 Dans ce sens : R. LIBCHABER, *Recherches sur la monnaie en droit privé*, p. 41 n° 49 ; Th. LE GUEUT, *Le paiement de l'obligation monétaire en droit privé interne*, p. 119 note 174. À reprendre un exemple donné par Rémy Libchaber, un immeuble objet d'une vente peut avoir une valeur, mais le prix fixé dans le contrat ne sera pas nécessairement équivalent à cette valeur, car d'autres facteurs sont pris en considération. V. une déclaration du FMI du 18 décembre 1946 reproduite par J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 150 : « *L'acceptation de ces taux ne doit pas, toutefois, être interprétée comme une garantie par le Fonds que tous les taux demeureront inchangés […] le Fonds est parvenu à la conclusion que la seule méthode à suivre est d'accepter comme valeur initiale les taux de change existants* ».

46 Pour un descriptif de la terminologie utilisée par les lois libanaises, V. *supra* note n° 7.

1. Le domaine d'application de la valeur légale de la livre libanaise

L'hypothèse que nous voulons défendre est que la valeur légale ou la parité légale servent à des fonctions bien précises, relatives à la comptabilité publique de l'État et ses relations et paiements internationaux, et ne s'imposent pas aux relations privées[47]. Nous nous basons sur l'article 229 du CMC et sur les lois de 1973 mentionnées ci-dessus : en effet, ces textes mentionnent les hypothèses dans lesquelles le taux « *légal* » va servir, et de l'ensemble de ces hypothèses, aucune utilisation privée ne ressort.

L'article 229 CMC, qui introduit la « *parité légale transitoire* », donne une liste des utilisations de ce prix. Ces utilisations sont reprises par la loi du 5 octobre 1973 (mise en exécution par le décret 6105). En effet, l'article 229 CMC dispose dans ses alinéas 2, 4, 5 et 6 :

> « *2. L'élément or de la couverture des billets émis par l'institut d'émission actuel sera comptabilisé sur la base de la parité légale transitoire ;*
>
> *4. Les droits et taxes à percevoir sur les sommes libellées en monnaie étrangère, actuellement calculée sur la base de la parité fixée à l'article 1 de la loi du 24/5/1949, seront calculés sur la base de la parité légale transitoire […]*
>
> *5. Les devises étrangères perçues par l'État seront comptabilisées à la parité légale transitoire ;*
>
> *6. Les dépenses extérieures de l'État fixées en livres libanaises, seront révisées en fonction de la parité légale transitoire et seront transférés dorénavant au cours du marché libre*[48] ».

La loi du 5 octobre 1973, mise en exécution par le décret n° 6105, délègue au gouvernement la compétence de déterminer la nouvelle parité légale transitoire de la livre libanaise, suite à la dévaluation du dollar américain, et reprend presque à l'identique les alinéas de l'article 229 CMC dans son article 2 : calcul des « *impôts et taxes perçus sur les sommes libellées en devises* » (correspondant à l'alinéa 4 de l'article 229), réévaluation des actifs d'or et de devises incluses dans le budget de la Banque du Liban (correspondant à l'alinéa 2 de l'article 229), les devises perçues par l'État (correspondant

47 V. : Appel Beyrouth, 1re ch. civ., n° 248, 10 févr. 1959, *Recueil Hatem*, vol. 37, p. 34 : la convention monétaire franco-libanaise ne concerne que les virements interétatiques, et ne s'impose pas aux relations des personnes entre elles.

48 Traduction publiée par la Banque du Liban en 1963. L'expression السعر الإنتقالي القانوني, est traduite par « *parité légale transitoire* ».

à l'alinéa 5 de l'article 229), alors que les dépenses extérieures de l'État demeurent régies par le prix du marché libre.

Il est évident qu'aucune de ces utilisations ne concerne les interactions entre particuliers : ni dans les opérations de change, ni dans les paiements.

Une question d'interprétation se pose : les textes susvisés ne mentionnent pas les relations privées entre particuliers ; cela signifie-t-il, *a contrario*, que ces relations ne sont pas régies par la parité légale ? Ou, comme rien n'indique que la liste soit exclusive, une telle inférence *a contrario* ne s'impose pas du point de vue logique ? Quoiqu'il en soit, ce que nous pouvons inférer des textes, *a minima*, c'est que la parité légale – qu'elle soit transitoire ou définitive, au reste – ne s'impose pas aux interactions privées faute de texte.

Cette constatation est également corroborée par une série de textes de l'époque du Mandat[49] qui fixaient le prix de la livre sterling britannique, la livre égyptienne et la livre palestinienne, dans le but expressément spécifié de l'évaluation de l'assiette des taxes douanières à percevoir sur les marchandises dont les prix sont fixés en ces devises ; par une série de décrets plus récents qui déterminent le prix du dollar pour calculer la valeur des marchandises qu'il faut déclarer aux douanes[50]. En effet, nous pouvons constater que chaque fois qu'un texte légal ou règlementaire mentionne un cours légal ou officiel, c'est à des fins particulières ayant trait au budget[51], aux impôts, aux

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49 Les arrêtés du Haut-Commissaire : n° 91 du 29 sept. 1931 (taux de change de la livre anglaise), n° 167 du 5 oct. 1931 (taux de change des livres égyptienne et palestinienne), n° 107 du 3 déc. 1931 (taux de change des livres anglaise, palestinienne et égyptienne en piastres libano-syriens) ; n° 165 du 24 janv. 1932 (modification du taux de change des livres anglaise, palestinienne et égyptienne dans les opérations douanières). Nous reproduisons pour exemple le texte de l'un de ces arrêtés :

مادة ١ من القرار رقم ٩١ تاريخ ١٩٣١/٩/٢٩ (تحديد معدل تحويل الليرة الإنكليزية): "حدد معدل تحويل الليرة الانكليزية الى الغروش اللبنانية السورية بمبلغ ٥٧٠ غرشا لبنانيا سوريا عند تعيين القيمة الواجب دفع الرسوم الجمركية عليها عن البضائع المعينة اثمانها بالليرات الانكليزية وذلك الى ان يصدر امر اخر. يطبق هذا التدبير على البيانات المتعلقة بوضع البضاعة برسم الاستهلاك المسجلة في الجمرك ابتداء من يوم الثلاثاء الواقع في ٢٢ ايلول سنة ١٩٣١". <http://legiliban.ul.edu.lb/Law.aspx?lawId=178434>.

50 Décret n° 1512 du 31 juill. 1991 dont l'article 1er fixe le prix du dollar à 200 livres (texte arabe reproduit ci-après); modifié par le décret n° 2291 du 12 mars 1992 qui a élevé le prix du dollar à 800 livres.

مادة ١: "من اجل احتساب قيمة البضائع الواجب التصريح بها للجمارك, يحدد سعر الدولار الاميركي بمايتي ليرة لبنانية".

51 Par ex., art. 35 de la loi budgétaire du 5 mars 2020 qui prescrit l'usage du taux officiel exigé par la BDL en matière d'impôts et taxes.

finances publiques[52] en général ou aux paiements internationaux dans des domaines cruciaux[53].

C'est ce que nous apprend également l'expérience de la loi monétaire de 1949, dont la parité officielle déclarée au FMI « *ne ser[vait] pratiquement qu'au règlement d'une minime partie des dépenses extérieures de l'État et constitue, d'autre part, la base de calcul de certains droits et taxes, notamment des droits de douanes. La masse des transactions se fai[saient] au cours du marché, librement formé sous la loi de l'offre et de la demande. Ce cours libre exprime, par conséquent, la valeur extérieure réelle de la livre libanaise*[54] ». Co-existence d'un cours libre et d'un cours officiel ? De quoi nous étonner, nous libanais accoutumés depuis 1997 à un taux unique et omniprésent. Pourtant, la multiplicité des taux n'a rien de surprenant.

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52 Comme par ex. la loi n° 7/85 du 10 août 1985 relative aux rémunérations des fonctionnaires en mission à l'étranger, et les arrêtés d'application du ministre des Finances n° 50 du 18 févr. 1986, n° 428/1 du 22 déc. 1987 et n° 256 du 16 juin 1988 qui fixent des parités entre le dollar et la livre mais aux seules fins d'actualiser les salaires des missions diplomatiques ; ou encore le circulaire du ministre des Finances n° 2679 du 27 nov. 1967 relatif à la détermination d'une nouvelle parité avec la livre sterling, après que la Grande-Bretagne a modifié la parité livre sterling/USD, et ceci dans le but de convertir les dépenses externes de l'État.

53 Nous trouvons en jurisprudence une illustration de la dualité de taux : le ministère de l'Économie nationale a conclu un contrat avec messieurs S., S. et co., pour l'importation de farine canadienne, s'engageant à payer en pound sterling « *french account* » (c-à-d compte en sterling désigné par la nationalité de son titulaire ; le Liban était bénéficiaire d'un compte sterling ouvert par la France suite à un accord conclu pour régler certaines conséquences financières du Mandat). Messieurs S., S. et co., pour payer la farine canadienne, se sont procuré des pounds sterling selon le prix du marché libre, alors que le ministère les a remboursés en pounds selon le taux officiel, inférieur. Ils ont pu obtenir une indemnisation en 1er degré, réduite suite à un appel interjeté par l'État. Les deux parties étant insatisfaites, l'affaire finit devant la Cour de cassation, qui rejette le pourvoi de l'un et les demandes reconventionnelles de l'autre. L'arrêt contient en outre des passages originaux sur la théorie de l'imprévision. Cass. civ. lib. 1re, n° 48, 21 avril 1956, *Légiliban*.

54 J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 202 et aussi p. 161. V. aussi sur l'existence de plusieurs cours dans les années 40-50 : M. MARAACHLI, *La « force » de la Livre libanaise sur le marché de Beyrouth et ses effets sur l'économie nationale*, thèse en sciences économiques, Aix-Marseille, 1980, p. 29.

2. La dualité, voire la multiplicité, des taux

La constatation précédente, celle que la parité légale a un domaine d'application limité qui exclut les dettes monétaires privées entre particuliers, rend nécessaire l'existence d'un autre taux qui doit leur être applicable. L'article 229 CMC reconnait légalement l'existence d'un taux de change du marché dans son alinéa premier :

> « *Un cours de change réel, aussi voisin que possible du cours du marché libre, sera adopté pour la livre libanaise, par référence au dollar USA défini par un poids d'or fin de gramme 0.888671. Ce cours sera la "parité légale transitoire" de la livre libanaise*[55] ».

Nous en déduisons donc l'existence de deux taux : un taux légal transitoire, calculé à partir du taux du marché libre. Cette diversité des taux, consacrée par le Code de la monnaie et du crédit, existait déjà dans les années 50, où le cours officiel de la loi de 1949 était doublé d'un – ou plusieurs – cours libre ; et la Bourse de Beyrouth affichait le cours officiel et le cours libre des devises[56].

La parité légale transitoire est donc supposée être le taux de change réaliste de la livre libanaise par rapport au dollar étatsunien, qui doit être autant que possible conforme à la réalité.

Quant au cours du marché libre, la question cruciale est de savoir comment il est déterminé, dans la mesure où le Liban s'est affranchi de tout contrôle des changes dès les années 50. Affiché par la Bourse de Beyrouth dans un 1er temps[57],

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55 Traduction de la BDL. Toutefois, concernant l'expression « *cours de change réel* », traduction de سعر القطع الحقيقي, nous aurions préféré « *réaliste* », pour éviter la confusion avec la notion de taux réel, qui vise un mode particulier de calcul du taux, intégrant les niveaux des prix (V. *supra* note n° 8). Le fait que le cours « *réel* » visé par l'art. 229 doive être le plus proche du taux du marché indique qu'il s'agit d'un taux de type nominal. M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma », p. 75 traduit « *realistic* ».

56 Pour ce qui concerne la multiplicité des cours dans les années 50 avant le CMC, V. *supra* note n° 54 ; pour ce qui concerne la Bourse de Beyrouth et ses règlements, V. *infra* note n° 73. À noter également le décret-loi n° 67 du 5 août 1967 relatif au timbre fiscal, dont l'art. 17 dispose que les sommes stipulées en monnaie étrangère sont converties selon le taux de change du marché libre.

57 Les art. 2, 9 et 10 du décret-loi n° 120 du 16 sept. 1983 organisant la Bourse de Beyrouth prévoient un marché des devises ; toutefois, l'an de la promulgation de ce texte, la bourse a dû arrêter ses activités jusqu'en 1996. Depuis lors, aucun marché des devises n'est opérant. Il suffit de consulter le site officiel de la Bourse (www.bse.com.lb) pour constater l'absence d'aucune mention de ce marché. V. aussi M. FAWWAZ qui commente : « *Although the BSE provides the required floor and infrastructures required for*

puis par la Banque centrale dans un 2nd temps[58], la plateforme Sayrafa va-t-elle prendre le relais, en ce qu'elle est censée refléter le prix moyen d'achat et de vente du dollar auprès des bureaux de change et des banques[59] ?

Le cours du marché libre a son droit de cité en jurisprudence[60], mais dans le contexte actuel libanais, n'a pas pu déloger le taux « *officiel* » de la Banque du Liban[61].

En effet, en fin de ce paragraphe, il faut noter que les quelques décisions récentes accessibles discutent de la notion de « *prix légal* » : elles rappellent que le législateur a compétence pour déterminer la valeur de la livre libanaise, elles reconnaissent que pratiquement, une telle valeur n'a jamais été déterminée, finissent enfin par appliquer le taux « *officiel* » de la Banque du Liban, mais peuvent diverger sur les justificatifs apportés : en effet, comment bien fonder le lien logique entre la notion d'une parité légale, et l'application du taux de la BDL, en l'absence de textes clairs qui imposent ce dernier taux[62] ?

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currency transactions, traders have not used it for that purpose. Therefore, no price for currencies is ever declared at the end of trading sessions at the BSE". Ceci est vrai pour l'après 1996.

58 Quand le taux publié par la BDL correspondait plus ou moins au taux du marché.

59 Sur la plateforme Sayrafa, V. *infra* notes n° 120, 121 et 122.

60 Par ex., un arrêt antérieur à la promulgation du CMC, où il s'agissait de convertir une dette stipulée en livres sterling : le débiteur insistait sur le cours officiel alors que le créancier exigeait le cours libre. La cour d'appel décide la conversion selon le cours libre au jour de la sommation de payer. Après cassation partielle, la Haute Cour confirme le choix du taux, mais désigne le jour du paiement comme date de conversion. Cass. lib. civ. 1re, n° 48, 29 avr. 1954, *Recueil Baz* 1954, p. 129.

61 Par ex., Juge d'exécution, Jdeidé, 28 juin 2021, inédit, où le juge constate que l'art. 229 reconnait un cours libre, mais finit par appliquer le taux de la BDL.

62 Parmi les arguments invoqués : application du taux de la BDL à titre subsidiaire (JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com*) ; existence de lois spécifiques qui font référence au taux de la BDL (Juge d'exécution, Jdeidé, 28 juin 2021, inédit, qui invoque l'art. 35 du Budget 2020 relatif aux taxes et impôts) ; l'existence d'une jurisprudence constante qui réfère au taux de la BDL (TGI Beyrouth, 6e ch. civ., n° 289, 1 déc. 2020, *idrel.com* ; السعر الرسمي المعمول به في لبنان لغاية تاريخه) ; invocation de l'art. 70 du CMC qui confie à la BDL la compétence d'assurer la stabilité de la monnaie ; le caractère officiel de l'institution qui déclare le taux (TGI Beyrouth, 3e ch., n° 56, 24 juin 2021). *Contra*. Appel Beyrouth, 1re ch. civ., n° 315, 17 juin 2021, inédit, qui n'approuve pas l'application automatique du taux de la BDL, et l'opinion dissidente dans TGI Beyrouth, 3e ch., n° 56, 24 juin 2021 et n° 63, 1 juill. 2021, inédits.

Ce que nous pouvons apprendre, donc, est que le juge constate l'absence d'une valeur légale, et fait face dès lors au dilemme de choisir un taux. Il est sans doute évident que la stabilité des échanges ainsi que les soucis d'équité rendent nécessaires l'existence d'un taux de change déterminable, publié par quelques institutions officielles ; et il parait évident que la jurisprudence opte pour le taux « *officiel* » affiché par la Banque du Liban. C'est de cette notion qu'il s'agira dans le second paragraphe.

Paragraphe 2. La nécessité d'un taux de change fiable et déterminable

La jurisprudence des trois décennies passées n'a jamais eu à résoudre la question de la disparité entre taux officiel et taux du marché. Au début des années 1990, la livre libanaise a connu de sombres moments, mais le taux affiché par la BDL a toujours été plus ou moins conforme à la réalité. L'ancienne jurisprudence référait au taux de change officiel, ce que continue à faire la jurisprudence actuelle ; et par taux de change officiel, il faut comprendre le taux de la Banque du Liban. Il convient dès lors d'examiner dans un premier temps cette notion de taux officiel (A), car il va de soi que le juge ne peut lui-même préciser le taux de change et doit référer à un indice quelconque qui soit fiable. Dans un second temps, nous verrons le mal qu'il y a aujourd'hui à suivre un taux déconnecté de la réalité (B).

A. La narrative du taux officiel

Un examen du droit positif nous renseigne que les références au taux « *officiel* » sous-entendent le taux déclaré par la Banque du Liban (1) ; ce qui rend nécessaire de scruter le véritable rôle de cette dernière en matière de taux de change (2).

1. La notion de taux officiel

Nous avons essayé de chercher, dans les textes et dans la jurisprudence, les emplois de l'expression « *taux officiel*[63] », afin de sonder son origine.

63 Nous avons recherché les termes suivants : سعر صرف رسمي et تسعيرة رسمية dans les bases de donnée *Sader online* (Lebanese laws) et *Légiliban* – recherche dans les textes législatifs et règlementaires et dans la jurisprudence. Notons que la publication de la jurisprudence – en ligne ou papier – en droit libanais est moins que satisfaisante, surtout en l'absence d'une publication systématique des décisions.

La notion de taux officiel dans les textes

L'expression apparait rarement dans les textes législatifs[64], davantage dans ceux règlementaires ; et quand ces textes désignent la source de ce taux officiel, c'est de la Banque du Liban qu'il s'agit.

Au niveau des lois, l'article premier de la loi n° 193 de 2020 relative au « *dollar estudiantin* » mentionne : « *selon le taux de change officiel du dollar 1515 L.L.*[65] », et l'article 35 de la loi budgétaire de 2020 réfère aussi au taux officiel de la BDL à des fins fiscales[66].

Outre ces deux textes particuliers, notre recherche nous a permis d'observer :

- Des textes qui réfèrent au taux officiel de la Banque du Liban[67] ;
- Des textes qui réfèrent au taux de la Banque du Liban sans le qualifier d'officiel[68].
- Si plusieurs textes réfèrent à un taux officiel sans le préciser, aucun texte ne réfère à un taux officiel autre que celui de la Banque du Liban.

Il faut donc se rendre à l'évidence : dans l'esprit du droit libanais, le taux officiel est le taux de la Banque du Liban, comme il apparait des différents textes susmentionnés. Toutefois, ces textes – et qui sont majoritairement

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64 La loi n° 193/2020 dite du « *dollar estudiantin* » ; la loi budgétaire n°6/2020. V. *supra* note n° 42.

65 "بالعملة الأجنبية او العملة الوطنية اللبنانية وفق سعر الصرف الرسمي للدولار ١٥١٥ ل.ل".

66 "وفقا للتسعيرة الرسمية التي يفرضها المصرف المركزي اللبناني".

67 Décret n° 1022 du 7 juill. 2017 - décret d'application de la loi sur l'échange des informations à des fins fiscales, art. 4 al. h ; Circulaire du 25 octobre 2017 du président de la commission de contrôle des assurances en application du décret n° 1022 ; instructions du ministre des Finances n° 167 du 21 janv. 2012 relatives à la perception de la TVA quand le prix du service ou du bien ou de l'impôt est fixé en devises, art. 8.

68 L'arrêté du ministre de la Santé n° 119 du 21 janv. 2020 posant les bases des prix des médicaments au Liban ; l'art. 2 de l'arrêté n° 158 du 22 mars 2019 du ministre des Finances qui réfère au taux de clôture du dollar américain selon la Banque du Liban à la date de l'échéance des impôts et amendes visées par l'arrêté ; la loi n° 7/85 du 10 août 1985 relative aux rémunérations des fonctionnaires en mission à l'étranger, et les arrêtés d'application du ministre des Finances n° 50 du 18 févr. 1986 et n° 428/1 du 22 déc. 1987 – ces derniers arrêtés font référence à la moyenne mensuelle des taux publiés par la Banque du Liban ; arrêté n° 111/1 du 22 févr. 1982 relatif au plan comptable général, art. 2.

règlementaires – n'ont jamais une compétence générale, mais restreignent leur domaine d'application à des secteurs particuliers de l'activité des autorités publiques.

Se pose également la question du fondement juridique de cette compétence. Le CMC ne contient aucune disposition qui confère à la Banque centrale la compétence de « *fixer* » un taux officiel ; son article 70 ainsi que les articles suivants donnent à la Banque des compétences en matière de politique monétaire et des devoirs quant à la stabilité de la monnaie nationale, sans toutefois lui octroyer le droit de fixer la valeur de la livre libanaise[69]. Aucune délégation dans ce sens n'a été faite par le législateur. Nous reviendrons à cette question[70], mais pour le moment, observons le comportement de la jurisprudence.

La notion de taux officiel en jurisprudence

Avant l'établissement de la Banque centrale, les décisions de justice référaient aux cours de la Bourse de Beyrouth[71], cette dernière étant censée publier les cours officiels et les cours du marché libre[72]. L'avènement de la Banque centrale en 1964 a éclipsé le rôle de la Bourse, surtout qu'elle est devenue inopérante de 1983 jusqu'en 1996[73].

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69 *Contra* : JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com.*

70 Ci-après, « 2. Le rôle de la Banque centrale : constitutif en amont, déclaratif en aval ».

71 Par ex., Cass. civ. lib., n° 38, 8 mars 1960, *Légiliban* : document de la Bourse de Beyrouth relevant le prix officiel du franc français en livres libanaises ; Cass. civ. lib., n° 44, 27 mai 1958, *Légiliban* : conversion d'une somme de francs belges en livres libanaises selon le prix « *libre* » à la Bourse de Beyrouth au jour du paiement ; Cass. civ. lib., n° 58, 22 avr. 1960, *Recueil Hatem*, vol. 41, p. 41 : conversion d'une somme de livres anglaises pour décider de la compétence judiciaire.

72 Le Règlement du 3 mai 1957 (sous l'empire de la loi du 2 févr. 1957) dispose que la Bourse de Beyrouth publie quotidiennement une liste des prix, y inclus les cours des devises, que ce soit dans le marché officiel ou dans le marché libre (art. 77).
"تتضمن هذه النشرة ايضا اسعار الذهب اليومية سبائك ونقودا واسعار جميع العملات الاجنبية المعامل بها في السوقين الرسمية والحرة في بيروت".

73 J. AJACA, « L'impact de la loi n° 161 du 17 août 2011 sur le droit des sociétés commerciales » (en arabe), *in Droit des marchés financiers* (coord. G. CHAHINE), Actes du colloque international du 12 avr. 2019, USEK, PUSEK, 2021, p. 8 et s. (partie arabe), http://webapp.usek.edu.lb/files/Law/ActesDuColloque/AR/ALL%20AR%20Coll%20Droit%20marches%20financiers%20N25_2.html ; « The Beirut Stock Exchange – History », 2018, <http://www.bse.com.lb/TheBSE/History/tabid/63/Default.aspx>, consulté le 30 juin 2021. La Bourse de Beyrouth a connu des statuts successifs : les lois du 18 juin 1954, du 2 févr. 1957, du 30 août 1961 et du 19 sept. 1981.

Les décisions peuvent référer à un taux de change sans donner plus d'indications[74], à un taux de change officiel sans préciser lequel[75], ou enfin, plus spécifiquement au taux officiel de la Banque du Liban[76], ce qui est plus visible dans les décisions récentes qui ont à trancher la question du taux applicable.

Le taux de la Banque du Liban est donc considéré comme le taux officiel, et c'est le taux appliqué dans les offres réelles et consignation[77], créant de graves dilemmes et de sérieux dommages aux créanciers.

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74 Appel Beyrouth, 1re ch. civ., n° 310, 8 juin 1992, selon lequel la conversion d'une dette stipulée en devise en monnaie ayant cours légal se fait au jour du jugement déclaratif de faillite, selon le taux « *courant* » السعر الرائج; Cass. civ. lib. 5e, n° 14, 28 mai 1992, *Légiliban* : la Cour rejette un pourvoi contre un arrêt d'appel qui avait réévalué des indemnités fixées en référence au franc français à cause de la dépréciation de la livre libanaise, la Cour mentionne le taux de change du jour du paiement, sans autres précisions ; Cass. civ. lib. 5e, n° 14, 28 mai 1992 (du même jour que l'arrêt précédent), où la Cour constate la liberté du change selon le taux courant du dollar. V. encore : CE lib., n° 229, 29 avr. 1993, *Légiliban* ; Cass. civ. lib., n° 69, 27 oct. 2009, *sader online* (contre-valeur en livres d'une somme en dollar sans mentionner le taux).

75 Par ex., Cass. civ. lib., n° 71, 26 nov. 2019, *sader online* (paiement d'un loyer stipulé en dollar selon le taux officiel au jour de l'échéance) ; Cass. civ. lib., n° 71, 14 juill. 2011, *sader online* (selon le taux officiel au jour du paiement) ; JU d'exécution de Beyrouth, 15 janv. 2020, *idrel.com* ; CE lib., n° 120, 25 nov. 1998 (référence au prix officiel du dollar dans les allégations des parties - les motivations de la cour ne reprennent pas l'adjectif « *officiel* »).

76 Juge d'exécution Beyrouth, n° 20/2020, 6 mai 2021, *idrel.com* ; JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com* ; TGI Beyrouth, 6e ch. civ., n° 289, 1/12/2020, *idrel.com* ; etc.

77 Par ex., cette décision récente qui illustre le dilemme du créancier (Juge d'exécution Beyrouth, n° 20/2020, 6 mai 2021, *idrel.com*) : une banque refuse l'offre réelle et consignation d'un débiteur d'un prêt bancaire commercial stipulé en dollars, consistant en la contre-valeur de la somme en livres libanaises selon le taux quotidien affiché par la Banque du Liban. Le créancier prétend que les prêts commerciaux, contrairement aux autres, ne sont pas soumis au circulaire n° 151 (V. *infra* note n° 87) mais aux stipulations contractuelles et que l'offre réelle doit être faite en dollars. La magistrate rejette cet argument, car selon la hiérarchie des normes, le cours légal de la monnaie locale ne peut être évincé par un circulaire du Gouverneur de la BDL, et comme le créancier n'a pas discuté du taux de change, le jugement admet la validité de l'offre faite selon le taux mentionné. V. aussi JU Beyrouth, n° 15/2021, 22 févr. 2021, *idrel.com*.

Il convient de remarquer, également, que la Banque du Liban affiche plusieurs taux : un taux quotidien et un taux moyen mensuel[78], et que la référence générique au taux de la Banque du Liban, sans précision, ne manque pas d'ambiguïté : la jurisprudence, en faisait référence au « *taux officiel* », indique rarement expressément le type du taux en question[79], quoiqu'il s'agisse probablement du taux quotidien quand le texte (ou la décision) indique l'application du taux tel qu'il est au jour du paiement.

La multiplicité des taux en présence a également posé la question du juge compétent à déterminer le taux applicable. Est-ce le juge du fond, ou bien le juge de l'exécution ? En droit français, l'application de l'un des taux publiés par la Banque Centrale, est décidé par « *l'huissier de justice procédant à l'exécution forcée du jugement*[80] » ; en droit libanais, vu les variations substantielles entre le taux officiel et le taux du marché, la jurisprudence penche à donner cette compétence au juge du fond[81].

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78 La BDL publie :
- Le taux de change quotidien de 7 devises principales (USD, EUR, CAD, AUD, JPY, GBP, CHF) en livres libanaises, téléchargeable en format excel, mis à jour chaque deux semaines : <https://www.bdl.gov.lb/tabs/index/6/289/Daily-Exchange-Rates.html> ; pour le dollar, le dernier taux moyen affiché (entre « *bid* » et « *ask* ») est 1507.5.
- Le taux de change moyen mensuel des principales devises en livres libanaises : https://www.bdl.gov.lb/statistics/table.php?name=t5282usd, concernant le USD, le taux est aussi de 1507.5.
- À côté de ces deux taux, existe un taux de change adopté par la BDL dans ses transactions avec les banques, qui correspond toujours au taux moyen mensuel (V. la décision intermédiaire de la BDL n° 13260 du 26 août 2020, art. 1er). Informations accessibles sur le site de la Banque du Liban, liens dernièrement consultés le 30 juillet 2021.

Dans ses bulletins mensuels (dernier en date accessible sur le site : févr. 2021, n° 321, Banque du liban (bdl.gov.lb), et sur la page d'accueil de son site, elle affiche un taux de change unique de 1507.5 livres pour le dollar, et c'est ce taux auquel il est fait référence dans les décisions de justice. V. *infra* parag. 2, A, 1 : « La notion de taux officiel ».
Cette multiplicité de taux n'est pas spécifique à la BDL. La Banque centrale européenne elle aussi « *propose plusieurs taux de change selon différentes parités (quotidiennes, mensuelles ou fin de mois). La loi ne fixe aucune règle à cet égard ; les quelques décisions de justice mentionnant une conversion ne donnent pas plus de précisions […]. Aussi, il incombe à l'huissier de justice procédant à l'exécution forcée du jugement de choisir le taux de change idoine* », D. CARREAU et C. KLEINER, *Rép. Droit Intern. Dalloz*, V° « Monnaie », juin 2017, n° 129.

79 Parmi les décisions qui précisent le genre du taux : Juge d'exécution, Beyrouth, n° 20/2020, 6 mai 2021, *idrel.com.* V. *supra* note n° 77.

80 D. CARREAU et C. KLEINER, *Rép. Droit Intern. Dalloz*, V° « Monnaie », n° 129. V. *supra* note n° 78 *in fine*.

81 En droit libanais, vu le grand écart entre les taux, la détermination du taux affecte le fond du droit - le montant de la dette à payer - et cesse d'être un problème simplement

D'une part, il est compréhensible que les juges, faute d'existence d'autres taux, optent pour le taux officiel de la Banque du Liban. Mais d'autre part, il faut constater que leur choix n'est pas imposé par la loi, comme aucun texte légal ou règlementaire ne vienne exiger l'application du taux « *officiel de la Banque du Liban* » d'une manière générale, en dehors de cas particuliers, et les juges demeurent libres d'opérer un revirement et d'opter pour un autre taux. Pourquoi donc la jurisprudence ne s'est-elle pas encore départie du taux officiel tel que déterminé par la Banque du Liban ?

2. Le rôle de la Banque centrale : constitutif en amont, déclaratif en aval

Les Banques centrales sont vouées à jouer des rôles centraux dans les politiques monétaires de leurs pays. C'est à ce titre qu'ils peuvent affecter les taux de change de leur monnaie nationale. Cependant, « *Sutor, ne ultra crepidam* », dit l'ancien adage romain ; « *juriste, pas au-delà du droit* », dirons-nous. Nous allons éviter de nous aventurer dans les méandres des sciences économiques ; toutefois, sans grand risque d'errement, nous pouvons dire que les pays adoptent, *grosso modo*, soit des taux de change fixes, soit des taux de change flottants[82] ; le système de Bretton-Woods, soucieux de stabilité, a établi un régime de taux fixes ; le « *Nixon shock* » a rendu inévitables les taux flottants. Quant au Liban[83], d'un régime de taux de change flottant,

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lié à l'exécution, ainsi que l'explique l'arrêt rendu par la cour d'appel de Beyrouth, 1re ch. civ., n° 315/2021 du 17 juin 2021 ; dans le même sens : Appel Mont-Liban, n° 73, 3 févr. 1997, *Rev. Jud. Lib.* 1997, p. 1073 ; Juge d'exécution, Beyrouth, n° 167, 28 octobre 2020, الإيفاء بالليرة حتمي وتحديد سعر الدولار من صلاحية محكمة الأساس لا التنفيذ/ علي الموسوي – مجلة محكمة (mahkama.net) qui cite et réfute une opinion doctrinale contraire ; Juge d'exécution, Jdeidé, 28 juin 2021, inédit, selon qui la question des principes d'équités dans la détermination du taux de change est une question de fond ; V. aussi :

ح. **الحجار** و هـ. **الحجار**، أصول التنفيذ الجبري، دراسة مقارنة، ط ٣، ٢٠١٠، رقم ١٥٤ ص ٣٣١ وما يليها.

82 D. CARREAU, *Rép. Dr. Intern. Dalloz*, V° « Taux de change », 2009, n° 8 ; F. CARAMAZZA et J. AZIZ, *Fixed or Flexible? Getting the Exchange Rate Right in the 1990*, International Monetary Fund, Economic issues series, n° 13, 1998, <https://www.imf.org/external/pubs/ft/issues13/>, consulté le 30 juin 2021.

83 V. : S. EKEN *et al.*, *Economic Dislocation and Recovery in Lebanon*, International Monetary Fund, February 1995, p. 32 et s. (l'étude est antérieure à la stabilisation de la livre libanaise en 1997) ; P. HONOHAN et A. MAZAREI, « Lebanon's Monetary Meltdown Tests the Limits of Central Banking", Peterson Institute for International economy, Sept. 2020, p. 3-4, <https://www.piie.com/system/files/documents/pb20-12.pdf> ; K. DAKHLALLAH, *Exchange-Rate-Based-Stabilization Policy. The Case of Lebanon*, Dissertation, Claremont Graduate University, 2003, p. 55 ; J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 162 où il explique

on est passé à un régime de taux fixe *de facto*, la livre étant fixée (« *pegged* ») au dollar américain depuis 1997, la Banque du Liban intervenant déjà depuis 1992 sur le marché de change. De 1997 jusqu'en 2019, la BDL a pu maintenir la stabilité effective du taux de change entre la livre libanaise et le dollar américain.

Afin de stabiliser le taux de change, la Banque centrale use de procédés techniques[84] qui trouvent leur assise dans les articles 70 et suivants du Code de la monnaie et du crédit. Selon l'article 70, référence inévitable dans les motifs des circulaires de la BDL :

> « *La Banque a pour mission générale la sauvegarde de la monnaie, afin d'assurer la base d'un progrès économique et social durable. Elle exerce à cet effet les pouvoirs qui lui sont conférés par la présente loi* ».

Les articles 71 et 72 posent les fondements de la coopération entre la Banque et le gouvernement dans les questions financières et économiques ; l'article 75, quant à lui, dispose :

> « *La Banque utilisera les moyens qu'elle jugera de nature à assurer la stabilité des changes. À cette fin, elle pourra notamment, en accord avec le ministre des Finances, intervenir sur le marché en achetant ou en vendant de l'or ou des devises étrangères* ».

Ces articles et surtout le dernier encadrent le rôle de la Banque centrale dans le « *façonnement* » des taux de change, mais il s'agit d'actions concrètes, sur le fond. Ceci ne veut pas dire que la Banque est compétente pour « *créer* » un taux de change à coup de circulaire ou de publication. Par contre, elle ne fait qu'afficher les taux de change tels qu'ils sont, ayant été affectés en amont par ses interventions. Les taux déclarés en aval doivent donc refléter le véritable taux obtenu par les interventions – ou l'absence d'interventions – de la Banque en amont.

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comment la livre est devenue flottante vis-à-vis du franc au début des années 50 ; A. AWDEH, « Monetary Policy and Economic Growth in Lebanon », *Journal of Central Banking Theory and Practice* 2019, vol. 8, issue n° 2, p. 147-171, http://dx.doi.org/10.2478/jcbtp-2019-0018. Liens consultés le 30 juin 2021.

84 Sur le rôle des Banques centrales dans les politiques monétaires, d'une manière générale, V. : P.-B. RUFFINI, *Les théories monétaires*, éd. du Seuil, 1996, p. 189 et s. (Chapitre L'action par la monnaie) ; J. COUPPEY-SOUBEYRAN, Monnaie, banques, finance, PUF, coll. Quadrige Manuels, 2017 – sur le cas libanais : F. KHALAF, *L'effondrement de la livre libanaise 1982-1992, une histoire qui nous hante*, [s. d.], 2020 ; J.-B. DESQUILBET, « Les contraintes de la politique monétaire libanaise (1993-2004) : endettement public, dollarisation et taux de change fixe », *L'activité économique* 2007, vol. 83, n° 2, p. 163-199 ; A. AWDEH « Monetary Policy and Economic Growth in Lebanon » et les autres références citées dans la note précédente.

En d'autres termes, la Banque du Liban n'a pas un pouvoir magique qui lui permet d'établir un taux de change par simple déclaration. Les taux de change qu'elle publie ont seulement un effet « *déclaratif*[85] ». La fonction des chiffres publiés par la Banque Centrale (les taux moyens quotidiens ou mensuels) est « *descriptive* » et non « *normative* ». Ce qui est officiel, n'est pas le chiffre publié, mais l'institution qui le publie, ce qui procure un indice fiable – ou tout au moins, supposé l'être – et c'est là que réside la raison de l'attachement à cet indice.

Nous excluons les domaines où la Banque centrale peut agir en vertu d'un pouvoir règlementaire qui lui est propre, comme pour les banques[86] (où la BDL a émis le circulaire de base désormais célèbre n° 151 qui oblige les banques à payer leurs clients titulaires de comptes en dollar, en livres libanaises selon un taux de 3900 L.L.[87]) ou pour les bureaux de change[88] (où la Banque a imposé des marges aux prix de change[89]) ; nous excluons également les domaines où la Banque subventionne les dollars employés à des fins spéciales, comme pour l'achat de l'essence ou de médicaments[90].

Or ce qui arrive aujourd'hui est que le taux de change affiché par la Banque du Liban, inchangé depuis 1997, est devenu complètement détaché

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85 Dans un article récemment publié, le juge Mohammed Fawwaz défend aussi cette idée de l'effet déclaratif : « *Although the BDL is not entitled to set an ER [exchange rate] and is allowed only to declare and publish the AER [average exchange rate]* ". M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma », *The MENA Business Law Review*, Lexis Nexis, n° 2, 2021, p. 76. Dans le même sens, V. l'opinion dissidente du magistrat T. Salameh dans la décision suivante : TGI Beyrouth, 3e ch., n° 56, 24 juin 2021.

86 Art. 70 et les art. 174 - 177 du CMC ; V. sur les compétences de la BDL : F. NAMMOUR, *Droit bancaire*, 2012, p. 54 et s.

87 Selon l'article 1er de ce circulaire, tel que modifié par le circulaire intermédiaire du 9 oct. 2020. Le nouveau circulaire n° 158 du 8 juin 2021 propose une nouvelle procédure.

88 Art. 13 de la loi n° 347 du 6 août 2001 (organisation de la profession des bureaux de change).

89 Décision intermédiaire du Gouverneur de la BDL n° 13223 du 27 avr. 2020 modifiant le règlement de la profession des bureaux de change.

90 La politique d'avoir certains taux de change particuliers à certaines activités n'est pas spécifique au Liban : certains pays peuvent opter pour une pluralité de taux de change, afin « *de favoriser ou de défavoriser telle ou telle catégorie de transactions* », quoique cette pratique est mal vue car discriminatoire. D. CARREAU, *Rép. Dr. Intern. Dalloz*, V° « Taux de change », n° 7. Toutefois, il faut faire attention : la pluralité des taux de change dont il s'agit dans cet article est différente, c'est la pluralité entre le taux officiel et le taux du marché libre.

de la réalité. Il suffit d'une simple consultation du site de la Banque du Liban pour lire qu'un dollar vaut 1507.5 livres libanaises, alors qu'il est tout à fait impossible pour un libanais d'acheter des dollars à un tel prix. Il y a divorce complet entre droit et réalité. Et comment maintenir ce taux officiel alors que la Banque du Liban admet elle-même dans ses circulaires[91], la dépréciation de la livre libanaise ?

B. À la recherche du taux perdu

À notre avis, le taux officiel de la Banque du Liban ne s'impose pas aux particuliers dans leurs relations privées. Toutefois, la stabilité exige l'existence d'un taux déterminable, publié par une institution fiable, surtout pour les paiements des dettes monétaires, et ce taux, par principe, ne doit pas être irréaliste, mais se rapprocher du taux du marché libre[92], dans l'esprit de l'article 229 CMC. Nous développerons deux arguments en particulier, le premier se réclamant de la volonté présumée des parties dans les dettes monétaires de source contractuelle (1), le second, d'une ambition plus large, déduit de l'essence même de la monnaie (2).

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91 La décision du 27 avril 2020 modifiant le « règlement d'application de la loi réglementant la profession de changeur », commence par ces lignes : « *Et considérant la hausse du prix (taux) de change du dollar américain vis-à-vis de la livre libanaise d'une manière injustifiée ces derniers jours* ».

قرار وسيط لحاكم مصرف لبنان رقم ١٣٢٢٣ تاريخ : ٢٠٢٠/٤/٢٧ (تعديل النظام التطبيقي لقانون تنظيم مهنة الصرافة المرفق بالقرار الأساسي رقم ٧٩٣٣ تاريخ ٢٠٠١/٩/٢٧): "ونظراً لارتفاع سعر صرف الدولار الاميركي مقابل الليرة اللبنانية بطريقة غير مبررة في الايام القليلة الاخيرة،

وبما انه من الضروري تنظيم عمليات الصرف التي تقوم بها مؤسسات الصرافة حماية لاستقرار سعر صرف الليرة اللبنانية وذلك محافظة على الامن الاجتماعي وعلى القوة الشرائية للبنانيين سيما ذوي الدخل المحدود".

92 Mohamad Fawwaz semble préconiser l'application du taux de change le plus proche du taux du marché tel qu'indiqué par l'article 229 CMC, mais se ressaisit en expliquant les effets dévastateurs que l'application de ce taux aura sur les locataires et les emprunteurs dont les dettes sont stipulées en dollars, et propose donc une solution législative qui assure une transposition en douceur. M. FAWWAZ, « Hyperinflation in Lebanon: The exchange rate dilemma », p. 78. L'arrêt de la cour d'appel de Beyrouth, 1re ch. civ., n° 315, 17 juin 2021, inédit, qui conteste l'application du taux de la BDL ne propose pas d'alternative et renvoie les parties au juge compétent ; les opinions dissidentes (dans : TGI Beyrouth, 3e ch., n° 56, 24 juin 2021 et n° 63, 1 juill. 2021, inédits) prises à l'occasion d'offres réelles et consignations faite selon le taux de la BDL, quoique excellement motivées, prennent position contre la validité de l'opération sans indiquer un taux alternatif. Ceci sans mentionner l'opinion, tant en doctrine qu'en jurisprudence, qui est pour le paiement en dollars des dettes stipulées en dollar (G. ZOUEIN, article mentionné *supra* note n° 17 ; Juge des référés, Nabatieh, 25 nov. 2019 ; Juge des référés, Tyr, n° 22, 8 avr. 2020, *Al-Adl* 2020, 2, p. 835).

1. Respecter la volonté des parties : la clause valeur-monnaie étrangère

Notre hypothèse de base dans cet article est le paiement d'une dette monétaire libellée en monnaie étrangère. Il s'agit en principe d'obligations de sources contractuelles[93].

La pratique de la stipulation des dettes monétaires en dollars s'est propagée à la fin de la guerre civile libanaise, comme moyen pour les créanciers de se parer contre la dépréciation aigue de la livre libanaise. Les créanciers de dettes stipulées en livres libanaises sont démunis face au principe du nominalisme monétaire qui leur impose de recevoir en paiement, le même nombre d'unités de livres libanaises, même si entretemps cette livre a perdu des centaines de fois son pouvoir d'achat. Partant, la détermination de la dette monétaire en dollar a l'avantage de préserver la valeur de la dette. Dans ce cas, le paiement se fera en livres libanaises mais selon le taux de change au moment du paiement – précisons : selon un taux de change supposé réfléchir la réalité et reconstituer le pouvoir d'achat initial.

En droit libanais, le recours à la monnaie étrangère comme monnaie de compte n'est pas interdit, sauf exceptions[94], et la stipulation de la dette monétaire directement en devises étrangères s'analyse comme une clause monétaire de type clause valeur-monnaie étrangère[95], dont la validité n'est

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93 On conçoit mal un juge libeller une dette de réparation en monnaie autre que la monnaie nationale – toutefois ceci peut arriver, et n'est pas illégal, car la monnaie étrangère est considérée comme monnaie de compte.

94 L'art. 301 COC limite l'usage de la monnaie étrangère comme monnaie de paiement, et non comme monnaie de compte. Ce dernier usage peut toutefois être limité par des textes spécifiques, comme par ex., l'art. 5 du Code libanais de la protection du consommateur (Loi n° 659 du 4 févr. 2005), qui oblige les professionnels à afficher les prix de leurs produits en livres libanaises. La monnaie de compte est la monnaie qui sert à quantifier la dette, la monnaie de paiement est la monnaie par laquelle se fait le paiement effectif.

95 Concernant la stipulation directe d'une dette en monnaie étrangère, nous remarquons deux tendances dans la jurisprudence française. Certains arrêts y voient une indexation déguisée, illicite si elle ne respecte pas les dispositions des ordonnances de 1958 et 1959 reprises dans les articles L. 112-2 et s. du CMF relatives aux indexations (Cass. civ. fr. 1re, 11 oct. 1989, n° 87-16.341 : la fixation de la créance en monnaie étrangère constitue une indexation déguisée non-admise ; Cass. civ. fr. 1re, 12 janv. 1988, n° 86-11966 : la fixation de la créance en monnaie étrangère est prohibée, sauf lorsque l'un des contractants est banquier ou financier ; Cass. civ. 3e, 2 oct. 2007, 06-14725 : illicéité de la fixation d'un loyer en dollars américains ; Aix-en-Provence, 9 novembre 2017, 15/11494 : dans le cas d'un prêt libellé en francs suisses, monnaie de compte, et payable en euros, « *monnaie de paiement indexée* », la cour considère que la clause de monnaie de

pas contestée en droit libanais[96], ni même limitée. Cette clause valeur-monnaie étrangère ne transforme pas la dette monétaire en une dette de valeur, mais l'en rapproche, en tant qu'elle ancre le *quantum* de la somme à payer (en monnaie locale) à la valeur fixée en monnaie étrangère[97]. Dès lors, l'exécution se fait en deux moments[98] : la détermination du montant à payer en livres (monnaie locale) – étape qui fait intervenir le taux de change – , et ensuite le transfert effectif des unités de paiements.

Le recours à ce procédé vise à protéger le créancier des dangers de la dépréciation de la monnaie locale. Toutefois, afin que cette clause joue son jeu, il faut que le taux de change corresponde à la réalité économique, afin de reconstituer le pouvoir d'achat initial.

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compte stipulée dans le contrat est licite car en relation directe avec les activités d'une partie au moins). D'autres arrêts interprètent la stipulation comme monnaie de compte, valide tant que le paiement se fait en monnaie locale, sans la soumettre aux restrictions des indexations (Cass. civ. 1re, 10 mai 1966 : un contrat qui exprime une dette en francs suisses est valide tant qu'il n'oblige pas le débiteur à payer en devises étrangères, mais seulement en francs français selon le cours des devises ; Cass. civ. 1re, 20 févr. 2019, n° 17-19.495 : concernant un prêt libellé en francs suisses et remboursable en euros, la Cour confirme la distinction entre monnaie de compte et monnaie de paiement). V. sur les clauses monétaires en droit français : J. FLOUR, J.-L. AUBERT et É. SAVAUX, *Les obligations. Le rapport d'obligation*, Armand Colin – Delta, 9e éd., 2015, vol. 3, p. 118 et s. ; A. BÉNABENT, *Droit des obligations*, p. 140 ; H. MAZEAUD *et al*., *Leçons de droit civil : Obligations, théorie générale*, Montchrestien – Delta, 9e éd. (par Fr. CHABAS), 1998, t. II, vol. 1er, p. 973 ; Th. LEGUEUT, *Le paiement de l'obligation monétaire en droit privé interne* p. 62 et s. ; J. CARBONNIER, *Droit civil, Les biens – Les obligations*, p. 1565 n° 692 et p. 1574.

96 En droit libanais, il n'y a pas de dispositions similaires à l'art. L. 112-2 du CMF et aucun texte ne restreint les indexations (sauf l'interdiction des clauses de paiement en or ou en devises – art. 301 COC). V. Cass. civ. lib., n° 13, 28 mai 1992 : le principe est la liberté. Dans le même sens : F. NAMMOUR et al., *Droit des obligations : droit français – droit libanais : perspectives européennes et internationales*, Bruylant – Delta – LGDJ, 2007, p. 518 n° 564. Dès lors, que le contrat stipule que « *le montant de la dette est l'équivalent, en monnaie locale, de 100 dollars* » (clause valeur monnaie étrangère standard) ou bien qu'il stipule directement que « *le montant de la dette est 100 dollars* », il n'y a aucune différence, tant que dans les deux cas, c'est la loi qui interdit les stipulations de paiement en monnaie étrangère. *Contra* : M. SIOUFI, *Théorie générale des obligations et des contrats*, [en arabe], 2e éd. revue par M. SIOUFI, 1994, vol. 2, p. 235-237.

97 Sur la notion d'ancrage à une valeur, V. : R. LIBCHABER, *Recherches sur la monnaie en droit privé*, p. 263 n° 329 et s.

98 Il est possible de parler d'une « *structure évolutive* » : « *initialement le quantum de la dette n'existe effectivement qu'en puissance, sous forme d'une méthode de calcul donnée dont l'application chiffrée ne s'effectuera qu'à l'instant de raison préalable au paiement de la dette ou bien lors de la liquidation de la dette, dit-on également* ». Th. LEGUEUT, *Le paiement de l'obligation monétaire en droit privé interne*, p. 60 n° 94.

Les parties contractantes ressentent rarement la nécessité de préciser eux-mêmes le taux de change qui sera appliqué. Elles sont silencieuses sur ce point, et réfèrent implicitement à l'application d'un taux « *supplétif* » appliqué par le juge en cas de litige. Dans la situation libanaise actuelle, ce taux « *supplétif* » adopté par les tribunaux est le taux de change officiel, c'est-à-dire le même taux de change d'avant la crise, ridiculement inférieur au taux de change du marché, et qui ne traduit nullement la perte du pouvoir d'achat de la livre libanaise vis-à-vis du dollar[99]. Dans ces conditions, la clause valeur-monnaie étrangère ne permet plus de circonvenir la dépréciation de la monnaie locale[100] : le paiement fait au créancier selon le taux officiel dérisoire ne lui garantit pas un pouvoir d'achat équivalent à la somme initialement stipulée en dollars.

Or, la volonté des parties, exprimée par la clause valeur-monnaie étrangère, ne vise-t-elle pas exactement de se prémunir contre la dépréciation de la monnaie locale[101] ? Le maintien par les tribunaux d'un taux de change pré-dépréciation neutralise complètement l'effet de la clause, dans un irrespect flagrant et un mépris total de la volonté des parties. De là la nécessité, pour les tribunaux, de délaisser le taux « *officiel* » irréaliste, et tendre vers un taux « *honnête* », un taux qui reflète la réalité, afin de respecter la volonté des parties.

L'argument qui précède a ses limites, car il ne concerne que les dettes de sources contractuelles. Un autre argument, plus général celui-là, milite également pour le délaissement du taux « *officiel* ».

2. Assurer la plénitude des fonctions de la monnaie

La différence de nature entre une opération de change instantanée, et la conversion d'une dette monétaire *a posteriori* au moment de l'exécution, et par conséquent, la différence entre le rôle joué par la monnaie étrangère dans

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99 Au moment de la rédaction de cet article, la livre libanaise a perdu plus de 10 fois sa valeur vis-à-vis du dollar.

100 Dans un schéma idéal, une dette d'un dollar conclue en 2018, alors que le dollar équivalait à 1500 L.L., doit être payée en 2021 15 000 livres libanaises (ou plus) selon le taux effectif de la livre vis-à-vis du dollar. Mais comme les tribunaux insistent sur le taux officiel, cette dette sera payée 1500 en 2021. La clause valeur monnaie étrangère n'a eu aucun effet. Autrement dit, l'insistance sur le taux officiel neutralise les effets de cette clause.

101 Dans ce sens, l'opinion dissidente du juge T. Salameh dans TGI Beyrouth, 3e ch., n° 56, 24 juin 2021, inédit.

chacun des deux actes, justifie-t-elle l'utilisation de deux taux différents ? Dans le premier cas, la détermination du taux est principalement une question contractuelle, dans le second cas, c'est le juge qui applique un taux « *supplétif* ». Cela justifie-t-il d'acheter ou vendre le dollar aux alentours de 15000 livres mais de payer un loyer à raison de 1500 livres pour un dollar ?

L'opération de change est définie comme « *l'opération par laquelle on échange une monnaie contre une autre et, plus particulièrement, la monnaie nationale contre une monnaie étrangère*[102] ». C'est un acte de commerce par nature[103]. Que ce contrat soit qualifié de vente ou d'échange[104], la monnaie étrangère y fait figure de marchandise[105].

La profession des bureaux de change est organisée au Liban par la loi n° 347 du 6 août 2001, qui en interdit l'exercice aux personnes et établissements non-inscrits dans les registres de la Banque du Liban (article 1er, et article 20 qui pose la sanction). Cette dernière exerce un pouvoir règlementaire sur les établissements de change en vertu du CMC et de la loi

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102 E. TYAN, *Droit commercial*, Hachette - Antoine, 2e éd., 2017, t. 1, p. 48 n° 40.

103 Les opérations de change sont des actes commerciaux par nature (art. 6 Code de commerce libanais, al. 4 : « *les opérations de change* » ; art. L110-1 Code de commerce français, al. 7 : « *Toute opération de change* »). Quoique le Code libanais utilise le pluriel, la répétition n'est pas une condition. Par contre, est une condition l'intention de réaliser un bénéfice ou l'existence d'une cause commerciale, E. TYAN, *Droit commercial*, t. 1, p. 48 et 49.

104 Si l'opération de change est considérée comme une vente : la monnaie étrangère est la marchandise objet de cette vente, et la monnaie locale en est le prix. Selon une distinction relayée par le doyen Carbonnier, la monnaie étrangère fait fonction de monnaie spécifique, et la monnaie locale fait fonction de monnaie générique. V. sur cette distinction : J. CARBONNIER, *Droit civil*, *Les biens – Les obligations*, p. 1931 n° 927 et R. LIBCHABER, *Recherches sur la monnaie en droit privé*, n° 142 qui ne partage pas forcément cette analyse. Si l'opération de change est considérée comme un échange : selon la conception classique de ce contrat, le prix en est exclu par définition (Ph. MALAURIE, L. AYNÈS et P.-Y. GAUTIER, *Les contrats spéciaux*, p. 454 n° 802 ; P. PUIG, *Contrats spéciaux*, p. 66 n° 74) et par conséquent, ni la monnaie nationale ni la monnaie étrangère n'y joue le rôle d'une monnaie mais d'une marchandise.

105 *Contra* : Thomas Le Gueut, qui adopte une définition assez large de la dette monétaire, en déduit que la monnaie étrangère est toujours une monnaie, et ne peut changer de qualification au gré des usages, et pourtant il qualifie le contrat de change de contrat d'échange (Th. LE GUEUT, *Le paiement de l'obligation monétaire en droit privé interne*, p. 73-74 n° 111). Rémy Libchaber, qui analyse la monnaie selon son modèle construit sur la distinction entre unités de valeur et unités de paiement, considère que l'opération de change porte sur des unités de paiements et non de valeur, et n'est donc pas une dette monétaire dans le sens qu'il retient (R. LIBCHABER, *Recherches sur la monnaie en droit privé*, p. 118 et s.).

n° 347[106]. Actuellement au Liban, le gros des opérations de change manuel[107] est assuré par des changeurs irréguliers, dans ce qui est désormais connu comme le marché alternatif, ou libre, ou noir[108]. Ceci pose la question de la licéité de leurs activités : les personnes non enregistrées qui exercent des opérations de change à titre de profession tombent sous l'interdiction de l'article 1er de la loi n° 347 et la sanction de son article 20. Néanmoins, le fait s'impose au droit[109], et surtout, l'irrégularité de leur situation n'affecte pas la validité des opérations qu'ils effectuent[110], et par conséquent, le taux qui résulte de la masse de ces opérations.

Le rôle de la monnaie étrangère dans une opération de change se distingue donc de son rôle de monnaie de compte d'une dette monétaire. Marchandise dans la première hypothèse, elle est véritable monnaie dans la seconde[111], quoique dépourvue de cours légal. Dans le premier cas, la détermination du taux de change est un élément essentiel du contrat (prix ou objet de la prestation) ; dans le second cas, sa détermination ne se pose en

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106 Sur l'organisation des bureaux de change en droit français : Chr. GAVALDA et J. STOUFFLET, *Droit bancaire*, LexisNexis, 9e éd., 2015, n° 1228 ; *Droit bancaire* (coord. J. LASSERRE CAPDEVILLE), Dalloz, 1re éd., 2017, p. 105 et s.

107 Le change manuel consiste dans l'échange immédiat, au taux du marché majoré de commissions, de monnaies de devises différentes. En général, il assure la couverture de dépenses personnelles ou touristiques. Les autres catégories de change sont le change tiré et le change scriptural. Chr. GAVALDA et J. STOUFFLET, *Droit bancaire*, n° 1226 ; *Droit bancaire* (coord. J. LASSERRE CAPDEVILLE), p. 105, n° 191.

108 Sur ces appellations, V. *supra* l'introduction et les notes 12, 13 et 14.

109 F. GEMAYEL, « Les changeurs, nouveaux rois du dollar », 6 déc. 2019, <https://www.lecommercedulevant.com/article/29468-les-changeurs-nouveaux-rois-des-dollars> ; L. ALAMEDDINE, « Au Liban, tout le monde est devenu agent de change », *L'Orient-Le-Jour*, 4 avr. 2021, <https://www-lorientlejour-com.ezproxy.usek.edu.lb/article/1257511/-au-liban-tout-le-monde-est-devenu-agent-de-change-.html>.

110 Cass. civ. lib., n° 13, 28 mai 1992, *Légiliban* : « *Attendu que si ces actes sont contraires aux instructions de la Banque centrale non publiées dans le Journal officiel, elles demeurent valides en ce qui concerne les relations entre le demandeur et le défendeur au pourvoi* ».
"وحيث انه اذا كانت هذه الاعمال مخالفة لتعاليم المصرف المركزي غير المنشورة في الجريدة الرسمية فهي تبقى صحيحة بالنسبة للعلاقات المتكونة بين المميز والمميز عليه".

111 J. CARBONNIER (*Droit civil, Les biens – Les obligations*, p. 1931 n° 927) et R. LIBCHABER, (*Recherches sur la monnaie en droit privé*, p. 130 n° 162) : une dette monétaire libellée en monnaie étrangère doit être payée en monnaie locale ; si la monnaie étrangère est de la marchandise, l'obligation devient de nature et doit être exécutée en nature ; or, il n'en est rien à cause du cours légal, qui impose la conversion de la somme en monnaie locale avant paiement, ce qui est une preuve de l' « *originalité monétaire persistante* » de la monnaie étrangère dans cette hypothèse.

général qu'*a posteriori*, au moment de la quantification de la dette avant son paiement extinctif.

De prime abord, cette dualité de situations peut justifier une dualité de taux de change : taux du marché libre pour les opérations de change où la monnaie étrangère est une marchandise et où règne la liberté du change[112] ; taux « *officiel* » pour les paiements où le débiteur doit être protégé des risques de l'inflation. Mais en pratique, cet état des choses perturbe le bon fonctionnement de la monnaie, définie par ses fonctions essentielles : intermédiaire des échanges (monnaie de paiement), étalon de valeur (monnaie de compte) et réservoir de valeur (thésaurisation)[113], comme nous allons l'expliquer.

Pour que la monnaie assume effectivement ses fonctions, il faut que le créancier qui accepte d'être payé en une unité monétaire, soit confiant de pouvoir utiliser la même unité monétaire pour désintéresser ses propres créanciers (chacun d'entre nous étant, en même temps, créancier et débiteur de dettes monétaires). La monnaie a donc besoin de l'acceptation – voire de la foi – réciproque de tous les créanciers et débiteurs de la communauté dans laquelle elle circule, et cette acceptation doit porter sur la valeur de la monnaie avant toute chose. Cette acceptation peut être conventionnelle, comme par exemple pour les monnaies locales complémentaires en France[114], mais en général, pour une plénitude d'effectivité, c'est l'État, détenteur du monopole d'émission[115], qui en impose

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112 Le change est libre au Liban depuis le décret n° 7393 du 26 janvier 1952 qui a abrogé les dernières traces du contrôle des changes. J. OUGHOURLIAN, *Histoire de la monnaie libanaise*, p. 160-161 et M. MARAACHLI, *La « force » de la Livre libanaise sur le marché de Beyrouth e ses effets sur l'économie nationale*, thèse, p. 22-30, selon qui le Liban a été précurseur, même aux dépends des engagements envers le FMI.

113 Ph. MALAURIE, L. AYNÈS et Ph. STOFFEL-MUNCK, *Droit des obligations*, p. 639 n° 1094 et s.

114 Art. L 311-5 et L 311-6 du CMF français. Le Bitcoin, aussi dépourvu de cours légal, a également une base conventionnelle, mais sans cadre légal jusqu'à maintenant que ce soit en France ou au Liban.

115 Le monopole étatique d'émission est un lieu commun des débats sur la monnaie. Son critique le plus célèbre est sans doute Friedriech Hayek qui y voit la source des pathologies de la monnaie fiduciaire, Fr. HAYEK, *Denationalisation of money : the argument refined*, Institute of Economic Affairs, London, 3e éd., 1990 (1re éd en 1976) ; V. aussi G. SELGIN, « Milton Friedman and the case against currency monopoly », *Cato Journal* 2008, vol. 28, n° 2, p. 287 et s. En droit, V. surtout R. LIBCHABER, p. 48 et s. : « *le fait que l'État prenne une part active au fonctionnement monétaire ne signifie pas que sans lui, ce fonctionnement serait entravé* » ; et aussi Th. LE GUEUT, *Le paiement de l'obligation monétaire en droit privé interne*, selon qui le monopole étatique est un élément essentiel à la confiance en la monnaie.

le cours légal[116] : légalement, toute personne sur le territoire de l'État doit accepter cette unité monétaire en paiement.

Or, au Liban, le moyen principal pour le libanais de se procurer des dollars est le marché de change, et conséquemment, les marchands calculent le prix des biens importées en dollars, selon le taux du marché libre[117]. Malheureusement, la coexistence d'une multiplicité de taux de change créé ainsi une disparité entre les différentes situations d'une même personne, qu'elle soit débitrice ou créancière[118]. Dans l'économie libanaise dollarisée, le taux de change entre la livre et le dollar est un élément important de l'équilibre créancier/débiteur. Vu l'état actuel des choses, un créancier d'un loyer, par exemple, est tenu de recevoir en paiement une monnaie qui a une valeur X, alors que s'il veut acheter une calculatrice, il en paiera le prix avec la même unité monétaire qui aura la valeur d'un 10^{e} de X[119]. Ceci est une attaque portée contre la notion même de monnaie, et contre l'efficacité de la monnaie nationale ; de là un besoin essentiel d'aligner les divers taux de change d'une manière réaliste.

Il faut reconnaitre que la Banque du Liban tente d'unifier les prix de change, en instaurant une plateforme électronique appelée Sayrafa. Le projet a été conçu au début comme plateforme pour les changeurs[120], mais comme le dollar s'échangeait à des taux plus élevés dans le marché parallèle, la plateforme a été suspendue[121]. Le projet a été relancé mais cette fois-ci en

116 Définition du cours légal : *supra* note n° 2.

117 Il suffit de consulter les prix dans n'importe quel supermarché ou n'importe quel site d'online shopping.

118 Qu'elle soit débitrice ou créancière d'une dette monétaire libellée en dollars (1 USD = 1507.5 L.L.), qu'elle soit acheteuse ou vendeuse de dollars (1 USD = 15000 L. L. ou plus), qu'elle soit dépositaire (1 USD = 3900 L.L.) ou débitrice (1 USD = 1507.5 L.L.) d'une banque, qu'elle soit vendeuse ou acheteuse de marchandises importées (1 USD estimé à 15000 ou plus).

119 Dans ce sens : « *Money works as a medium of exchange, in part because its value is mutually agreed on in transactions. Lebanon is now reckoning with the economic consequences of when that is no longer true* », A. VOHRA, "Nobody Knows What Lebanon's Currency Is Worth Anymore", *Foreign Policy*, 5 avril 2021, https://foreignpolicy.com/2021/04/05/lebanon-currency-inflation-exchange-rates/, consulté le 28/6/2021.

120 Circulaire de base n° 5 (décision n° 13236) du 10 juin 2020 sommant les établissements de change de s'inscrire à plateforme électronique des opérations de change « *sayrafa* » afin d'y déclarer les taux quotidiens suivis par chaque bureau de change. Ces bureaux sont supposés vendre et acheter selon l'offre et la demande (art. 2).

121 <http://www.businessnews.com.lb/cms/Story/StoryDetails/10969/Sayrafa-exchange-platform-had-shy-volume-on-first-day>.

y associant les banques, qui serviront de relais entre leurs clients et la BDL pour acheter des dollars selon un taux de change propre à cette plateforme[122]. (Notons qu'assez bizarrement, sur les marchés internationaux de devises, la livre libanaise a toujours la même parité[123]).

EN CONCLUSION, il faut admettre que tout le monde est d'accord pour déplorer l'état actuel des choses, car il est anormal de continuer à appliquer un taux artificiellement surévalué de la livre aux paiements des dettes stipulées en dollars, alors que dans toute autre interaction, c'est le taux du marché qui s'impose. Mais il faut aussi reconnaitre la difficulté de se départir du taux officiel. La réticence des juges peut être expliquée par les raisons suivantes :

- D'une part, il y a un véritable besoin d'un taux qui soit transparent et fiable, et apparemment seul le taux de la BDL satisfait à ce besoin – ce qui conduit, par exemple, à rejeter le cours du marché libre[124], réfractaire à toute systématisation en l'état actuel de la situation ;
- D'autre part, existe un risque latent de « *nourrir* » davantage l'inflation, en adoptant un taux de change plus dévalué, dont les effets pourront être une hausse uniforme de tous les prix[125]. Une

122 Circulaire de base n° 157 (décision de base 13324) du 10 mai 2021 : les banques sont de droit inscrites à la plateforme ; les banques pourront effectuer des opérations de change. V. aussi : M. ABBOUD et Ph. HAGE BOUTROS, « Relance de Sayrafa : la BDL publie enfin les circulaires dédiées », *L'Orient-Le-Jour*, 11 mai 2021, en ligne, consulté le 30/6/2021. Le jour du lancement de la plateforme, le taux a été de 12000 livres pour un dollar. "Sayrafa exchange platform had shy volume on first day. Rate was set around LL1,000 below parallel market – Lebanon" (businessnews.com.lb); Lebanese central bank launches new foreign exchange system | Reuters ; V. enfin: F. GEMAYEL et Ph. HAGE BOUTROS, « Relance de Sayrafa : la BDL s'apprête à vendre des dollars », *L'Orient-Le-Jour*, 21 mai 2021, en ligne, consulté le 30/6/2021.

123 Sites consultés le 27 juillet 2021 : 1 USD = 1508/1510 LL Lebanese Pound (LBP) Forex Price Quotes – Barchart.com ; 1 USD = 1512 LL USD LBP | US Dollar Lebanese Pound – Investing.com ; 1 USD = 1507 LL Convert 1 Lebanese Pound to US Dollar – LBP to USD Exchange Rates | www.xe.com.

124 Juge d'exécution, Jdeidé, 28 juin 2021, inédit.

125 Le droit est toujours réticent à la correction des effets de l'inflation par le jeu des clauses monétaires. Libchaber explique pourquoi : l'inflation ne signifie pas que tous les prix augmentent uniformément ; la systématisation des clauses monétaires (ou d'un taux de change plus dévalué, dans notre cas) aura pour conséquence d'augmenter les prix qui n'étaient pas encore affectés par l'inflation, surtout en tenant compte du facteur

sorte de boite de Pandore que personne n'ose ouvrir, faute de pouvoir prévoir ses conséquences, et sur ce point, le juriste n'est pas à blâmer, puisque l'économiste lui-même est en défaut[126].

– Sans mentionner enfin les perturbations liées à un revirement relatif au taux de change, et l'iniquité qu'il créera entre les anciens créanciers désintéressés selon le taux de 1507.5 et les nouveaux créanciers.

Décidément, la question ressemble à l'hydre de Lerne : si on se félicite d'avoir tranché un problème, tout de suite un autre problème va ressurgir.

Les décisions que nous avons pu consulter traduisent une hésitation ou alors une sorte de résignation, comme si les juges appliquent le taux officiel avec réticence[127]. Mais comme nous avons essayé de le démontrer dans cet article :

– La détermination légale de la valeur ou de la parité de la livre n'a rien à voir avec les paiements privés internes et ne peut servir d'argument ;

– L'application du taux publié par la Banque du Liban est un construit qui ne s'impose pas au juge et que rien en droit positif n'interdit de déconstruire, tout au moins pour le paiement des dettes monétaires stipulées en devises.

Pour les raisons expliquées ci-dessus, nous nous rallions à la solution de principe exprimée par certains auteurs[128], qui proposent l'adoption du

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psychologique. La hausse uniforme du taux de change aboutira à une hausse uniforme des prix, hausse injustifiée. (*Recherches sur la monnaie en droit privé*, p. 250 et s.).

126 N'a-t-on pas dit qu'un économiste est un expert qui saura demain pourquoi ce qu'il a prédit hier ne s'est pas réalisé aujourd'hui ? (Laurence Peter).

127 Ce qu'énonce la décision du Juge d'exécution, Jdeidé, 28 juin 2021, résume bien l'état d'âme des juges : « *Attendu que, si le prix officiel déterminé selon les bulletins de la BDL à 1507.5 L.L. n'exprime pas la réalité de l'économie libanaise, il reste que les autres cours manquent, en apparence, de légitimité et de justification légale saine en l'état actuel de la législation* ».
"وحيث وإن كان السعر الرسمي المحدد بحسب نشرات مصرف لبنان بمبلغ ١٥٠٧,٥ ل. ل. لا يعبر عن الواقع الحقيقي للإقتصاد اللبناني، يبقى أن سائر الأسعار المتداولة تفتقد من حيث الظاهر إلى المشروعية القانونية والتبرير القانوني السليم في ضوء الوضع التشريعي الحالي".

128 M. FAWWAZ, « Hyperinflation in Lebanon : The exchange rate dilemma », p. 79;
ج. **زوين**، "الإيفاء بالعملة الوطنية لدين محرّر بالعملة الأجنبية في ضوء عدم قابلية الليرة اللبنانية للتحويل بسعر صرفها الرسمي".

taux le plus proche du taux du marché libre. La plateforme Sayrafa s'adresse aux changeurs et aux banques, mais est-ce une raison pour l'écarter[129] ? Cette plateforme répond aux exigences de fiabilité et de transparence, et est supervisée par une institution publique, rien autre que la même BDL, et son taux traduit la moyenne des taux suivis par ses membres (banques et bureaux de change) ; enfin, l'adoption du taux de Sayrafa, inférieur au taux du marché irrégulier, mais décidément beaucoup plus réaliste que le taux officiel actuel, permet d'aligner la valeur de la livre libanaise vis-à-vis du dollar dans ses différents usages, sans toutefois inhiber irraisonnablement l'inflation.

Reste que l'aspiration véritable de tout libanais est de revenir à la stabilité monétaire des beaux jours, mais hélas…

> « *C'est un autre deuil, que je vis moi aussi, depuis quelques mois. Un deuil que je ne voulais pas reconnaître, que j'ai encore du mal à admettre maintenant, mais qui est réel et qui s'impose et me submerge. J'ai du mal à le dire, à l'écrire… mais il s'agit de ce pays qui agonise, qui dépérit, il s'agit du deuil de tout ce que nous avons fait, la splendeur de nos vies passées, de ce dont nous avons rêvé* ». Charif MAJDALANI[130].

129 V. le circulaire de base n° 157 (décision de base 13324) du 10 mai 2021, art. 1 et 2 qui détaillent le domaine d'application de la plateforme. Post Scriptum: bien après la remise du manuscrit à la Revue, la cour d'appel civile de Beyrouth a adopté le taux de Sayrafat en ce qu'il est « *le taux le plus proche du taux du marché libre* »: Appel Beyrouth, 9e ch. civ., n° 611/2021, 26/10/2021, avec l'opinion contraire de la Présidente de la chambre, idrel.com.

130 Ch. MAJDALANI, *Beyrouth 2020, Journal d'un effondrement* Actes sud/L'Orient des livres, 2020, p. 85.

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Motivation in a technical course

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Abstract

Technical courses are often tedious, and teachers who deliver them often face the problem of motivating their students. This motivation can be enhanced by promoting active learning, itself based on communication skills. Communication, however, is a two-ways interactional process. This paper aims at addressing this motivational problem in three steps. First, by laying the theoretical framework of the approach. In fact, the human dimension in the instructor/student relation is a very important one: the teacher should aim at understanding the students and teaching by setting an example and fostering a positive atmosphere. Second, the paper tackles the motivational techniques: teachers should deploy a diverse array of these techniques, while encouraging students to take initiatives and getting involved. Low stake and high-stake exercises, combined with a comprehensive grading strategy, guide the students through the learning process while ensuring a fair assessment. Finally, teachers should convey to the students that their course is the corner stone of all future endeavors: well-thought long term outcomes are important for an authentic motivation of the students. We base our paper on authoritative literature in the field of teaching and learning, and on our own experience as teachers and authors of technical legal courses.

Since transmitting knowledge and skills are part of existence, neither society, nor culture could rise without them. That is why some basic skills are needed for every instructor in order to ensure an academic success for all students such as understanding his own material and being able to simplify information to the level where anyone in class could get it easily.

"*If you can't explain it simply, you don't understand it well enough*[1]".

An instructor is an individual who chose to get knowledge, grow in learning and share his information with his students. True but one can never become great by keeping what he has already learned to himself. He must first learn the art of teaching and while teaching, part of him is transmitted to the students. In other words, one can never teach if he is not committed to his job.

Moreover, being a great instructor demands more than the acquisition of skills, a great instructor must work hard to develop his own methods of teaching and learning which are always able to grow.

In fact, investing time to develop our own skills in teaching is better than spending time in teaching badly[2]. Therefore, promoting active learning is crucial to shape a vision of academic success for all students. In order to achieve the abovementioned, as instructors, we think that we should work on promoting the act of communication as a two-way interactional process. In addition, a better understanding of the actual meaning of student behaviors will put us in a better position to respond to nonverbal feedback. It is worth mentioning that the shift from school to university is very hard.

Consequently, students' academic motivation regresses following this transition[3]. In this order, we usually face real issues in trying to motivate students in general, and in particular; whenever they are enrolled in uninteresting, tedious and technical courses. In order to make the course more appealing and interesting, we should be designing the course in a well-structured way as we should develop critical thinking in education. We should as well work on the necessity to build trust in a classroom, empower students and enhance collaboration and communication.

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1 By Albert EINSTEIN.

2 W. MCKEACHIE and M. SVINICKI, *McKeachie›s teaching tips: Strategies, research, and theory for college and university teachers*, Wadsworth - Cengage Learning, 14th ed., 2014, p. XVII.

3 J. HYUNGSHIM, "Supporting students' motivation, engagement, and learning during an uninteresting activity", *Journal of education Psychology* 2008, vol. 100, n° 4A, 798-811.

In order to understand how to motivate students in a technical course we should start by analyzing insights into our approach to the theory of motivation (I). We should then focus on the deployment of motivational techniques (II) and finally stress that this course is the corner stone of all future endeavors (III).

I. Insights into our approach to the theory of motivation

In his book, McKeachie stresses on the indices that motivate students to learn. In fact, he mentions: choice, effort and persistence, "*students who are motivated to learn choose tasks that enhance their learning, work hard at those tasks, and persist in the face of difficulty in order to attain their goals*[4]". There are many theories that researchers rely on in order to enhance learners' motivation. Decy and Ryan plead for autonomy and self-determination. In this order, as instructors, we should grant students some space, let them feel in charge and promote their autonomy. Some researchers consider that this type of motivation should be taken into consideration[5]. In fact, they distinguish between intrinsic and extrinsic motivation. Students who are extrinsically motivated are looking for external rewards of recognition such as grades, scholarships… whereas intrinsically motivated students are interested in the value of the subject itself. In fact, students come from different backgrounds and they have different ways to learn and to be motivated, therefore, in order to engage as much as possible our audience, we should diversify our motivational techniques by targeting intrinsic and extrinsic motivational techniques.

Some researchers encourage expectancy-value theory. In fact, they stress on the idea that not all students know the value of our course; therefore, we should always foster the importance of what we are teaching. According to Maehr and Zusho, instructors should support intellectual risks and push students to do some enhancement, let them learn from their mistakes. "*These perceptions of mastery goals have been linked to positive outcomes in a range of studies, including a preference for challenging tasks, enjoyment of learning seeking and adaptive learning strategies*".

Being an instructor is not only about having a great mastership of the course, it is above all about being human, being the support, acknowledging

4 W. J. MCKEACHIE and M. D. SVINICKI, *Mckeachie's teaching tips, strategies, research and theory for college and university teachers*, p. 140.

5 K. BAIN, *What the best college teachers do*, The Belknap press of Harvard university press, 2004, p. 32.

the changing nature of students, understanding the background and educational goals of the students, being the confident, a caring interesting and encouraging person, to help students "*reach their highest potential*[6]".The wide range of differences in the learner's culture and way of communication compels us as instructors to focus on the unique needs and characteristics of each student. Therefore, it is crucial to know who our students are. In fact, knowing them and understanding their educational environment and background, will enhance a better learning by the students. In this order, every gesture from our side (eye contact, touching the student, speaking loudly…) or from the student (avoiding eye contact, smiling, nodding his/her head, refusing to be in the spotting…) could be interpreted differently depending on the student's culture and background. Hence, before interpreting in a wrong way the student's reaction and jumping into conclusion, we should get to know better our students. In fact, by understanding them more, we will most likely gain a better understanding of the actual meaning of their behaviors, so we could accordingly move on to another topic or repeat the same notion again. Nevertheless, learning is not an easy task, and the instructor teaching a technical course as we do in the legal methodology, usually faces several problems, especially when it comes to students at their first semester. How to make learning more meaningful to them in such circumstances?

How to motivate them?

First, we should always start by projecting our own interest in the material. If we do not show the students that we love the course despite its technical, theoretical or tedious part, they will never love it! Learners usually identify themselves to us, so it is our duty to send them a positive and motivational image. In order to do so, we should be explicit in the purpose and meaning of the course, make our value clear and definitive. We should as well rely on real life situations, as often and as practically possible. In fact, by showing the importance of this course in our daily life and how we use the material on a regular basis, we shall enhance students' motivation and willingness to learn. Other than the importance of personal utility of the course, learners should perceive high autonomy while working on that course[7].

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6 M. FISCHER and D. MASSEY, "The effects of affirmative action in higher education", *Social Science Research*, 36 (2), 531-549.

7 J. HYUNGSHIM, "Supporting students' motivation, engagement, and learning During an uninteresting activity", 798-811.

In addition to the abovementioned, as instructors in a technical course, we should start from the first session using examples and informing our students that they will be working through examples. In fact, it is crucial to "*move from the concrete to the abstract, to link what is in your head with what is in the students' heads, you need to use examples that relate the subject to the students' experience and knowledge*[8]".

If we want our students to be motivated, we should always work on adding some suspense to the course. If our way of teaching is very traditional, then students will be bored, the more we diversify our teaching methods and add suspense the more the learners will be glad to learn and will enjoy the learning process. In addition, we should never forget that if we have a positive attitude, we will transmit it to students. We should think positive, act positive and speak positive both proactively and reactively. The positive atmosphere should be planted in class in a way to bring out the best of every student. As instructors, we should break the ice with them, let them feel secure and safe to ask questions, since it is by asking that they will learn. We should push them, not only to ask any questions, but to ask provoking questions; questions that reflects their critical thinking and sense of logic and argumentation required in every course. Finally, whenever they do so, we should always communicate our belief in their capabilities and abilities, in order to enhance their learning process and push them beyond their expectations.

After having determined the insights into our approach to the theory of motivation, it is convenient to stress on the deployment of motivational techniques.

II. Deployment of motivational techniques

Using active learning with motivated students is way easier than facing a class with unmotivated and unengaged students. Therefore, we should, in such circumstances try to diversify our motivational techniques. However, when it comes to teaching a technical and tedious course, we should as well use different motivational techniques to enhance learners' concentration and ability to follow the rhythm of the class. As discussed previously, each instructor should project his own interest in the material. In addition to this, we should encourage the learners to ensure a meaningful educational experience. This step could be achieved by fostering initiative.

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8 M. SVINICKI and W. MCKEACHIE, *Mckeachie's teaching tips, strategies, research and theory for college and university teachers*, p. 64.

In fact, when students feel involved and take part in the learning process, they will tend to give more, to be more productive. In this order, we should let them choose papers and project topics that interest them, whenever it is possible. We could for instance, offer several topics and let them pick the one that awakens their curiosity and makes them eager to learn more. Furthermore, we should diversify our learning strategies in a technical course. In fact, writing assignments could be used as a great learning strategy. In this order, we can use low stakes and high stakes exercises. Low stakes writing assignments present many benefits for us as instructors as well as for the students. We could for instance ask students to do a ten minutes low stakes writing at the start of the class about the readings they were supposed to do for the said session. This will allow them to recall what they are supposed to learn, understand the course material better and contribute actively in all the discussions. We can also read in class some answers or make a student read his colleague's answer which will involve students more and more in the subject matter of the course. By not grading the assignment, we will help students keep up with assigned readings and help them improve high-stakes writings. Therefore, students will be warmed up and more fluent before they write something graded. The ultimate goal is like McKeachie states: "to *get students to process what they are studying and connect it with the rest of their experiences, thoughts and feelings*". However, high stakes writings are as well of a great added value. In fact, as instructors, we need this type of writing in order to give a fair course grade. We shall ask learners to write an essay about a specific topic that will be followed by a detailed feedback which provides students with constructive feedback about strengths and weaknesses. Our comments should be done by using everyday language and should always start by motivating the student then adding constructive remarks. We could as well ask them to revise their work based on our remarks and comments. Therefore, grades should not be the main concern of the learners, we should stress more on intrinsic goals that would motivate them to learn. As Ken Bain mentioned in his book What the best college students do: "*They aren't interested in the grade per se but in what it says about how well they are thinking and acting. Keeping up their grades means maintaining high intellectual and artistic standards. Grades offer a simple shorthand for something more substantial, and deep learners focus on that higher-order meaning rather than the symbols themselves or their point value in a competitive game. Motivation remains intrinsic*[9]".

9 K. BAIN, *What the best college students do*, p. 46.

In addition to the aforementioned, the use of technology is crucial in order to motivate students in a technical course: "*Many instructors consider the motivation level of learners the most important factor in successful instruction*". The use of technology in the course such as PPT and internet sources breaks the routine. We could also use interactions that invite, encourage and assist students to set and achieve goals as ways to motivate their participation. Getting to know better our students will allow us to gain their trust, which will facilitate the art of communication in a two-way interactional process. Constructing the course in an interactive approach will be considered more like a conversation between us and the student, which will facilitate to build trust and integrate students more easily in class: by getting to know who our students are we will understand their cultural stressors as well and try to deal with them. In fact, building trust takes time and it is more behavioral than verbal. How one communicates through body language, availability, and constructive feedback contributes to building trust.

We should as well diversify the learning activities in order to stimulate interest and break the routine. We could use case studies that allow them to apply the theory they have learned in real-life situations. As we can ask them to work in groups, do some oral presentations to enhance their communication capacity and enhance their self-esteem, followed by discussions based on previous readings. In fact, according to Dennis Relojo, there are five ways to make learning more meaningful to students. First of all, as instructors, we should make the content as meaningful as possible. Second, we should adopt a student-centered approach. Third, we should promote self-knowledge. Fourth we should bring real world in his classroom. Finally, we should encourage sharing knowledge and resources[10]. In the same order, Mark Basnage stresses on making learning meaningful by adopting six priorities for whole learning. In fact, he mentions disciplinary knowledge, innovation and creation, self-knowledge, collaboration, communication and responsibility[11]. In addition, we should encourage shared responsibility. If the student is responsible for learning and being ready for exams, we should consider dropping questions or parts of an exam missed by a big number

10 D. RELOJO, "5 ways to make learning more meaningful to students", *American psychological association's psych learning curve*, October 9, 2017, <http://psychlearningcurve.org/learning-more-meaningful/>, last accessed on 30/6/2021.

11 M. BASNAGE, "6 priorities for whole learning", <https://www.teachthought.com/education/21st-century-learning-2/>, last accessed on 30/6/2021.

of students and reteach them the missed subject. In this order, learners will understand that we care about their learning more than penalizing them for what they do not know[12].

III. The corner stone of all future endeavors

When learners are enrolled in a technical and tedious course, they tend to lose interest quickly and this is where we should play a big role, as previously mentioned, by deploying several motivational techniques. However, these strategies are not enough. We should not only teach students how to learn, but they are compelled to work on enhancing their desire to learn such a technical and tedious course. How can we realize this difficult task? Usually, students learn just in order to pass the course and will, most of the time, forget what they have learned by the beginning of the next semester. However, if they understand that this course is the corner stone of all future endeavors, they will have a new approach in learning, a new goal and several long-term outcomes in addition to the short ones. At this point a crucial question arises: What do we want students to learn? In order to answer this question, we should formulate the learning outcomes using the appropriate "*Bloom's taxonomy*" action verbs in order to emphasize the student performance. The learning outcomes should be very clear, significant and important in terms of their educational value for learners.

In addition, the technical course is often a prerequisite for other major courses. In other words, learners must validate this course before enrolling in any other course. "*To be accepted into some courses, you will have to prove that you have a certain amount of knowledge about the subject already. Prerequisites are a way of making sure that students, enter into a course or subject with some prior knowledge. This not only helps the professor to teach at a certain academic level, but it also helps* ***you*** *to feel more comfortable and confident with the subject matter*[13]". In this perspective, if students don't have enough information and knowledge about this specific course, how can they be comfortable and pass a subject that is more developed and complicated. Therefore, when students understand the value of the course, its importance, and that it is a corner stone of many other courses, they will probably be more motivated to learn.

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12 D. DUNN, B. BEINS, M. MCCARTHY and W. HILL, *Best practices for teaching beginnings and endings in the psychology major, research, cases and recommendations*, Oxford university press, 2010, p. 23.

13 <https://www.newyouth.ca/school/university-colleges-and-more/prerequisites>.

If we manage to fulfill the aforementioned, we will build in every learner a purpose and meaning for our studies and life and will develop critical thinking, logical reasoning and curiosity which are crucial for other courses and in their life and career. The process called metacognition "*allows people to engage in a valuable conversation with themselves, exploring their backgrounds, questioning and correcting their thinking in process, and pursuing the dynamic power of their own minds*[14]".

As mentioned previously, in tedious courses, we should give the student the freedom to choose. In fact, when they choose, they will be ready to overcome difficulties and messy situations and they would want "*more than a rote challenge or prestige from their careers. They sought an education that didn't leave out contemplation or a sense of wonder, even if they had to blaze their own trail*[15]". Being able to pass such a course by finding intrinsic and extrinsic motivation, will allow learners to be ready to face any future problem or difficulty. In such cases, they would know how to motivate themselves and how to find adequate solutions and turn mistakes into opportunities: "*If something bad happened, I tried not to become obsessed with it, but to try to find a solution if I could. To believe in solutions is to believe that the world is flexible, that you can change I with effort*[16]". In this order, when we wish to motivate learners in a technical course, we should shed the light on the importance of passion and lifelong learning.

Furthermore, one of the tools of motivation in a technical course consists in showing to students the importance and needs for a long-term view of learning. In fact, such a course will allow learners and give them the ability to continue learning after leaving the university. "*We need to identify the most important topics in our courses and then simultaneously promote multiple kinds as a way of increasing the likelihood that students will keep on learning after the course is over*[17]".

In addition to this, leadership in teaching and learning is crucial in order to enhance students' motivation and success. Whenever we build a sense of safety in the class, this will develop learning and will motivate students to learn. In addition to what previously said, it is worth mentioning that

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14 K. BAIN, *What the best college students do*, p. 24.

15 *Ibid*., p. 214.

16 *Ibid*., p. 125.

17 L. DEE FINK, *Creating significant learning experiences, an integrated approach to designing college courses*, Jossey-Bass, 2013, p. 63.

emotional intelligence has a huge impact on learning. Emotional intelligence is defined as the ability to identify, assess, and control one's own emotions and the emotions of others. In this perspective, reciprocity of learning about self and others is crucial: we must develop an understanding of ourselves and others, emotionally as well as intellectually to be able to learn how to direct our own activities and our interactions with others successfully. We should work on promoting self-awareness (knowing one's internal states, preferences, intuitions…) and self-regulation (managing one's internal states and impulses). In addition to this, empathy, which is the awareness of other's feelings, needs and concerns is crucial. We should as well develop some social skills, which are the adeptness at including desirable responses in others. In fact, we should be able to manage other's emotions to move people in the desired direction. In other words, interpersonal intelligence (the capacity to understand the intentions, motivations and desires of other people) and intrapersonal intelligence (the capacity to understand oneself, to appreciate one's feelings, fears and motivations) help explain performance outcomes and enhance learning[18].

In conclusion, motivation is crucial in every course, especially in technical and tedious ones. Therefore, each instructor should understand that learners come from different backgrounds and should always work on improving the way they teach. In order to achieve this goal, instructors should first of all, understand the theory of motivation, then they should deploy and diversify their motivational techniques and finally they should reflect to the students that their course is the corner stone of all future endeavors. Moreover, how can we make sure that each instructor will reach the mentioned learning objectives and outcomes?

In order to do so, he needs to get feedbacks from his peers and learners. Then, he should work on the weak points and continue to improve. In fact, not only the learner should keep on learning, but the instructor as well should never stop learning.

Finally, like Albert Einstein said: "*Once you stop learning, you start dying*".

18 L. DAVID, "Emotional Intelligence (Goleman)", *in Learning Theories*, July 20, 2014, <https://www.learning-theories.com/emotional-intelligence-goleman.html>, last accessed on 30/6/2021.

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A Concept of "Crisis Communication" for Western Governments in reaction to Islamic Terrorist Attacks

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Abstract

This article analyses how Western governments do and should communicate the threat of terrorism. The main goal behind this analysis is to find out how statements after the most significant Islamic terrorist threats and attacks were influenced by and did influence the socio-political narratives in the UK, France and Germany. The central argument is that even though different political structures, socio-political contexts and cultural norms influence the basic settings of statements given by the political leaders of the UK, France and Germany and reactions to them by members of the public, demographic changes and an ever faster globalisation have a strong and similar effect on all three countries. These aspects challenge political communicators and strongly affected the content of the statements analysed. The systematic analysis shows that, as long as they are communicated in a way that fits inside current socio-political frames with consideration of the broader normative contexts that define what is appropriate in times of threat and uncertainty, aspects such as awareness of counterterror and domestic political intentions, timing, credibility in the broader political context, content related aspects such as root causes of Islamic terrorist threats and attacks, the consideration of demographic changes and the length of statements can have direct impacts on the efficacy of statements in reactions to Islamic terrorist threats or attacks.

Keywords: Islamic Terrorism, Counterterrorism, Crisis Communication, language, UK, France, Germany

With the advancements of modern technologies and through them Social Media platforms that enable individuals and organizations to communicate with large audiences, the exchange of opinions and interpretations of realities have drastically increased over the past 15 years. Despite all the advantages that come with targeted mass communication and a faster exchange of information, these developments also brought along new threats to democracies as they intensified and widened the communicational playing field beyond the boundaries that were set by other forms of mass media such as newspapers, radio and television, and thus also beyond the boundaries of political competition within democratic systems. These changes affect the potential force of first mover advantages regarding filling vacuums of understanding, but also give competitors a wider range of opportunities to interpret and redirect the intentions behind statements given by political leaders. The constructive (mis-)use of these opportunities enables actors to contribute to the destabilisation of groups within society and in the worst case can be a tool for terrorist organizations to use in the process of radicalising vulnerable individuals or to encourage acts of political violence. Thus, the scrutiny of political statements as tools of crisis communication has gained a new dimension and needs sophisticated examination beyond the field of political communication. This includes the study of socio-political developments, historical backgrounds, cultures and sub-cultures, and counterterror measures.

Under these considerations, this article explains the comparative narrative analysis of statements given by the leaders of the UK, France and Germany in reaction to Islamic terrorist attacks between 2005 and 2017 in order to contribute to the development of a concept of crisis communication in reaction to 21st century Islamic terrorist attacks for western governments. The statements analysed in this article were given by Tony Blair after the 7/7 2005 London attacks, Theresa May after the Manchester Arena attack in May and the London Bridge attack in June 2017, Francois Hollande after the January 2015 Paris attacks, the November 2015 Paris attacks and the Bastille Day attack in Nice 2017, and Angela Merkel after the Hannover Arena plot in November 2015, the attacks in Würzburg and Ansbach in July 2016 and the Berlin Christmas market attack in December 2016[1].

1 See T. BLAIR, "The prime minister's first Commons statement after the bomb attacks in London", <https://www.theguardian.com/politics/2005/jul/11/uksecurity.terrorism>, consulted on 3 May 2021; T. MAY, "PM statement following terrorist attack in Manchester: 23 May 2017 Prime Minister Theresa May gave a statement in Downing Street following the terrorist attack in Manchester", <https://www.gov.uk/government/

The comparative analysis will be conducted in two main steps. First, the quantitative and qualitative contents of the statements will be compared and put in relation to the socio-political contexts before and after the times of the statements. This will be based on a systematic analysis of socio-linguistic aspects of government communication in reaction to terrorist threats and attacks. The foundation of this analysis will be based on Lasswell's Communication Model[2]. The model includes the following components: sender, message, medium, receiver, and feedback. Narrative Analysis puts the stories told by the leaders of the countries analysed in the centre of the human experience of terrorist threats and attacks and thus focuses

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speeches/pm-statement-following-terrorist-attack-in-manchester-23-may-2017>, consulted on 4 May 2021; T. MAY, "PM statement following London terror attack: 4 June 2017 Prime Minister Theresa May gave a statement in Downing Street following the terrorist attack in London", <https://www.gov.uk/government/speeches/pm-statement-following-london-terror-attack-4-june-2017>, consulted on 5 May 2021; F. HOLLANDE, « Déclaration de M. François Hollande, Président de la République, sur l'attentat contre l'hebdomadaire 'Charlie Hebdo', le meurtre d'une policière et les deux prises d'otages des 7, 8 et 9 janvier 2015, à Paris le 9 janvier 2015. Personnalité, fonction : HOLLANDE François. FRANCE. Président de la République » <http://discours.vie-publique.fr/notices/157000058.html>, consulted on 6 May 2021; F. HOLLANDE, « Déclaration de M. François Hollande, Président de la République, sur les attaques terroristes à Paris, le 14 novembre 2015. Personnalité, fonction : HOLLANDE François. FRANCE. Président de la République », <http://discours.vie-publique.fr/notices/157002978.html>, consulted on 6 May 2021; F. HOLLANDE, « Déclaration de M. François Hollande, Président de la République, sur l'attentat terroriste à Nice, à Paris le 15 juillet 2016. Personnalité, fonction : HOLLANDE François. FRANCE. Président de la République » <http://discours.vie-publique.fr/notices/167002202.html>, consulted on 6 May 2021; A. MERKEL, "Statement von Bundeskanzlerin Merkel zur Absage des Fußball-Länderspiels in Hannover im Bundekanzleramt", https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/statement-von-bundeskanzlerin-merkel-zur-absage-des-fussball-laenderspiels-in-hannover-847118>, consulted on 7 May 2021; A. MERKEL, "Bundespressekonferenz von Bundeskanzlerin Merkel, Thema: Aktuelle Themen der Innen- und Außenpolitik", <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/bundespressekonferenz-von-bundeskanzlerin-merkel-844918>, consulted on 8 May 2021; A. MERKEL, "Pressestatement von Bundeskanzlerin Merkel zum mutmaßlichen Anschlag am Breitscheidplatz in Berlin im Bundeskanzleramt", <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/pressestatement-von-bundeskanzlerin-merkel-zum-mutmasslichen-anschlag-am-breitscheidplatz-in-berlin-842764>, consulted on 9 May 2021.

2 H. D. LASSWELL, "The structure and function of communication in society", in *The communication of ideas: A series of addresses* (ed. L. BRYSON), Institute for Religious and Social Studies, 1948, p. 37-51.

the research on the statements given in reaction to such events, enabling the researcher to study the past experience, present opinions and future plans and actions of the politician at the time of the statements analysed. Reconstructing the broader socio-political contexts that existed around the times the statements were first published in response to Islamic terrorist threats or attacks and then breaking the communication process down to the different aspects used to disseminate the message enables a sophisticated systematic analysis of this form of political communication and its effects. The advantage of hindsight strengthens the analysis as it makes it possible to understand better why certain things were communicated the way they were and which aspects were deliberately left out. Thus, the messages were analysed regarding their content, terminology, linguistic forms, meanings and Social Actors. Social Actors are participants in causes that influence the representation and interpretation of events[3]. The way in which certain Social Actors that were involved in the social event covered are included or excluded and how they are represented shapes a story and its interpretation. Emphasising their contribution in a statement helps understanding in which ways recipients of texts are influenced and further shows the intentions of the author[4].

In the second step, the role of the quantitative and qualitative contents and their relationship to the current socio-political context will be put in the broader normative context in which historical conflicts have been interpreted in the three domestic core cultures. This will show how political statements in reaction to Islamic terrorist attacks fit into the broader context of counterterrorist decision making in each country analysed. Structural aspects of the statements will then be compared and again put in relation to the socio-political contexts as well as the contents of the statements in order to indicate potential broader strategies or contradictions. The main intention behind this comparative analysis is to highlight similar patterns or changes that occurred in aspects of statements in all three countries and how these underline the importance of the consideration of broader normative contexts and temporary socio-political contexts in public statements by political leaders in reaction to Islamic terrorist threats or attacks. This will also help to explain how far normative contexts that have a strong influence on counterterror measures in each country give a basic foundation for public

3 N. FAIRCLOUGH, *Analysing discourse: Textual analysis for social research*, Taylor and Francis, 2003, p. 145.

4 *Ibid*.

communication in reaction to such threats or attacks in times of increasingly strong populist opposition parties and how these findings contribute to the understanding of existing academic literature in the field of counterterrorism in the UK, France and Germany. Before drawing a broader conclusion, the key aspects detected through this analysis will be divided into six practical recommendations.

Comparative Analysis of UK, French and German Political Statements in reaction to Islamic terrorist attacks

Comparative analysis of quantitative and qualitative content

One aspect that strongly influences the content of political statements is the speaker's party background. Considering only the positions of the political parties the leaders whose statements are analysed could be divided into centre-left (Tony Blair – New Labour[5] and Francois Hollande – Parti Socialiste[6]) and centre-right (Theresa May – Conservative Party[7], Angela Merkel – Christlich Demokratische Union[8]). These very basic ideological aspects set the political foundations that need to be considered in this comparative analysis and will be further elaborated wherever relevant.

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5 For more information concerning Tony Blair's politics and New Labour see: M. POWELL, *Modernising the welfare state: The Blair legacy*, Policy Press, 2008, p. 2; THE LABOUR PARTY, "The Labour Party manifesto 2005", <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13_04_05_labour_manifesto.pdf>, consulted on May 12 2021.

6 For more information concerning Francois Hollande and the Parti Socialiste see: R. LEFEBVRE, « 'Dépassement' ou effacement du parti socialiste (2012-2017) », *Mouvements* 2017, vol. 89, n° 1, p. 11-21.

7 For more information concerning Theresa May and the Conservative Party see: A. CRINES *et al.*, "The Conservative Party Leadership Elections of 2016: An Analysis of the Voting Motivations of Conservative Parliamentarians", *Parliamentary Affairs* 2018, vol. 71, n° 2, p. 26-282; H. D. CLARKE, M. GOODWIN and P. WHITELEY, *Why Britain Voted to Leave the European Union*, Cambridge University Press, 2017, p. 4; B. WILLIAMS, "Theresa May's Premiership: Continuity or Change?", *Political Insight* 2017, vol. 8, n° 1, p. 10-13.

8 For more information concerning Angela Merkel and the Christlich Demokratische Union see: U. ZOLLEIS, "Auf die Kanzlerin kommt es an – Die CDU unter Angela Merkel" *in Politik im Schatten der Krise – Eine Bilanz der Regierung Merkel 2009-2013* (eds. R. ZOHLNHÖFER and T. SAALFELD), Springer VS, 2015, p. 73-91; S. JAKOBS and U. JUN, "Programmatic Change in the Two Main Parties: CDU and SPD on Their Way to the Grand Coalition", *in Germany after the 2013 Elections: Breaking the Mould of Post-Unification Politics?* (ed. G. D'OTTAVIO and T. SAALFELD), Routledge, 2016, p. 129-153.

Regarding the content of the statements, several aspects need to be comparatively analysed in order to be able to get a better understanding of how the leaders of the UK, France and Germany reacted to the broader contexts and socio-political changes between the attacks analysed.

The first aspect that needs to be considered is the consistency and changes of quantitative factors (the number of times different Social Actors were mentioned; length of statements; approval ratings) between statements. Certain quantitative changes are not only between different leaders as was the case in the UK (Blair after 7/7 and May after the Manchester Arena bombing and the London Bridge attack) but also between statements given by the same leader at different points in time noticeable. The most noticeable change is that with the increase in the number of Islamic terrorist attacks carried out in the UK, France and Germany the number of times the Social Actors responsible for the attacks and terms condemning the attacks were mentioned increased too. In the case of the UK, the different political backgrounds of Tony Blair and Theresa May may have contributed to this development between 7/7 2005 and the Manchester Arena attack in 2017. Nevertheless, just comparing May's statement after the Manchester Arena attack with her statement in reaction to the London Bridge attack very clearly underlines this development in similarly long statements (8min 7sec and 7min 57sec). Social Actors considered responsible for the attacks and terms condemning the attacks are mentioned 17 times in the statement after the Manchester Arena attack and 30 times after the London Bridge attack. Blair used similar terms 12 times in his first Commons statement after the bomb attacks in London. Even though not as strong as between Theresa May's statements, a similar trend is noticeable in the comparison of Hollande's statements in reaction to Islamic terrorist attacks that were carried out in France (09/01/2015 – 14; 14/11/2015 – 16; 15/07/2016 – 20). Even when considering the length of the different statements the increase in references to attackers and condemnation of the attacks between the President's statement in reaction to the Ile de France and the 13 November Paris attacks is obvious (09/01/2015 – 5min 5sec; 14/11/2015 – 3min 50sec; 15/07/2016 – 5min 57sec). A small decline in the number of times such terms were mentioned in proportion to time speaking can be noticed between the statement of 14/11/2015 and 15/07/2016. We will come back to the larger meaning of this quantitative change below. In Merkel's case, a similar development is noticeable when considering the length of her statements (18/11/2015 – 1min 58sec – 0; 28/07/2016 – 14min 24 sec – 29; 20/12/2016 – 4min 36sec – 11).

The main reason for these changes seems to be general changes in emphasis in the statements due to adaptations to socio-political changes, mainly socio-political narratives and approval ratings. A closer look at these aspects underlines this claim. Looking at the above explained socio-political changes in each country and the public reactions to the statements analysed here highlights likely reasons for these shifts from an emphasis on unity based on shared values to a stronger emphasis on in-group vs out-group interpretations of the threats and attacks. Another quantitative comparison further highlights this change between the different statements. Considering the length of the statements there is a steady decline in the number of times Francois Hollande used uniting pronouns such as *nous*, *notre*, *nos* (09/01/2015 – 5min 5sec – 27; 14/11/2015 – 3min 50sec – 21; 15/07/2016 – 5min 57sec – 29). Putting aside her statement in reaction to the Hanover Arena plot, which was a threat and not a successfully executed terrorist attack, a similar development is noticeable when comparing Merkel's statements in reaction to the Würzburg/Ansbach attacks and the Berlin Christmas market attack (28/07/2016 – 14min 24sec – 55; 20/12/2016 – 4min 36sec – 15).

The UK case does not quantitatively support this development, which can be detected in the statements of the two continental European leaders analysed. However, a look at the qualitative aspect of the narrative analysis shows a change in the understanding of unity that is communicated in the statements. One reason for that seems to have been due to the political backgrounds of Blair and May. While Blair explicitly tries to include the Muslim minority group into the in-group of UK citizens, May leaves her interpretation of "*we*" open in her statement after the Manchester Arena bombing. In her statement in reaction to the London Bridge attack she implicitly excludes parts of the UK population from the in-group (e.g. when talking about fighting extremism – "*we need to live our lives not in a series of separated, segregated communities but as one truly United Kingdom*"). Similar qualitative changes are noticeable in the comparison of Hollande's statements in reaction to Islamic terrorist attacks. After the Ile de France attacks in January 2015 Hollande said: Not being divided means we must not paint people with a broad brush, we must reject facile thinking and eschew exaggeration. Those who committed these acts, those terrorists, those fanatics, have nothing to do with the Muslim religion. In his statement on 14 November 2015 the President explained his understanding of unity as "[…] *I call for unity, for people to pull together and stay calm*". In his statement on 15 July 2016 Hollande did not refer to unity in any explicit way anymore. Considering Hollande's usage of uniting pronouns and the qualitative content of his statements, therefore, shows that his emphasis shifted from

broad unity to narrower in-group vs out-group interpretations of the attacks, besides his small decline in usage of terms condemning the attacks and attackers in his statements.

Even though not as strongly as in the case of Francois Hollande, the analysis of Angela Merkel's statements in reaction to terrorist threats and attacks indicates a decline in a broader understanding of unity too. While unity and the idea of an in-group was not a major aspect of Merkel's brief statement in reaction to the Hanover Arena plot in November 2015, she quite explicitly explained who she considers part of the in-group in her statement in reaction to the Würzburg/Ansbach attacks. In several parts of her statement, Merkel referred to her broader understanding of unity, most strongly in the very last paragraph of the statement where she said: "[…] *all people in Germany* […]". In the fourth paragraph of her statement the chancellor also describes refugees in Germany as victims of the attacks ("[…] *we owe it to the many innocent refugees who also have to deal with the fact that in the case of the attackers of Würzburg and Ansbach the men who carried out the attacks came to Germany as refugees* […]" and further underlines this point in the fifth paragraph ("[…] *it [the attacks] ridicules all the other refugees who are actually looking for help against violence and war* […]". Even when considering the much shorter length of her statement in reaction to the Berlin Christmas market attack, it is obvious that Merkel only referred to such points very briefly when she said: "*It would be particularly despicable towards […] the many people who actually need protection and who are trying to integrate into our country*".

Thus, even though there are changes regarding the emphasis on unity and in-group vs out-group in interpretations of events in all three countries, the extent of these changes differs between countries and leaders. To understand these variations, a deeper look has to be taken at the broader contexts the leaders were facing at the time of the statements. Obviously, the political background of the leaders influences the way they interpret events, but the broader socio-political situations seem to have been even more influential. The strongest changes regarding the communication of unity are noticeable in the comparative analysis of Francois Hollande's statements. In order to be able to draw broader conclusions, it needs to be analysed to which extent aspects that led to the changes in his statements were of similar or different nature in the cases of Angela Merkel in Germany and Tony Blair and Theresa May in the UK.

Frank Foley conducted a comparative analysis between those broader contexts that influence reactions to terrorist attacks in the UK and France[9]. Foley points out that key norms and historical narratives had strong impacts on the sometimes significantly different decision making when it comes to repressive instruments in counterterrorism. Past experiences of threat and terror explain a norm contestation in the UK counterterror discourse, which is quite different to the French discourse where security is usually regarded as the highest priority[10]. Foley further highlights the little media scrutiny of counterterror operations in France compared to high media scrutiny in the UK, which influenced the state's decision making in reaction to terrorist threats and attacks. Considering these findings, it can be concluded that Francois Hollande stepped away from an in France common "*talk tough*[11]" counterterror approach in his statement in reaction to the Ile de France attacks. Even though his public support increased after his statements in January 2015, more conservative politicians and parties benefited more from the attacks with their more indiscriminate messages[12]. Thus, Hollande took two steps back regarding the importance of unity and inclusion of minority groups in his statements after the attacks in November 2015 and July 2016.

Theresa May's statements in reaction to the Manchester and London attacks in 2017, on the other hand, appear rather "*tough*" regarding domestic measures compared to Tony Blair after the 7/7 bombings and the general broader patterns in UK reactions to Islamic terrorism. This indicates the impact of more recent events in society and politics, mainly Brexit. However, in the broader international picture, the content of May's statements was still within a frame of norms that differentiate it from statements that would be considered appropriate in other cultures.

Even though Germany was not included in Foley's comparative analysis, important aspects regarding the broader context that influences German counterterrorism and therefore also the Chancellor's statements can be drawn from Peter Katzenstein's article "Same War: Different Views:

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9 F. FOLEY, "Terrorism and state repression: Strategic choice and the domestic normative context", *When Does Terrorism Work?* (ed. D, MURO), London, Routledge, 2018, p. 71-84.

10 F. FOLEY, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, Cambridge University Press, 2013, p. 55-64.

11 F. FOLEY, *When Does Terrorism Work?*, 82.

12 OPINIONLAB, « Politique/Popularité moyenne de l'exécutif », <http://opinionlab.opinion-way.com/populariteMoyenneDeLexecutif.html>, consulted on 13 May 2021.

Germany, Japan, and Counterterrorism[13]". Katzenstein explains that norms of appropriate behaviour and therefore also political decision-making in reaction to threats and attacks are strongly based on two main experiences from Germany's history. The first one comes from the Weimar Republic, which taught Germany that the lawful state (*Rechtsstaat*) and the democratic system with room for debates (*streitbare Demokratie*) must prevent people who are trying to misuse the constitutional democracy from using the cover of the rule of law to attack Germany's polity. The second lesson comes from the Nazi regime and taught the country that the state's security forces need to be under close control by the parliament and that the gathering of intelligence must be strongly limited. The contradiction between these two lessons explains the importance of the right balance between liberty and security in the German norms of appropriate behaviour, which Merkel also mentioned in her statements in reaction to the terrorist threats and attacks her country was facing. The importance of this balance is underlined by the conviction of the vast majority of important Social Actors in Germany, including the public, that a successful security service requires a legally guaranteed system of norms that ensure the protection of human rights. The strong media scrutiny of counterterror operations contributes to the adherence of these norms. Even though these norms appeared to be challenged by populist right-wing politicians who gained public support around the time of the attacks, they still appeared to have a strong influence on the messages communicated by the Chancellor in reaction to Islamic terrorist threats and attacks.

This indicates that the changes regarding the communication of unity in the content of the statements were influenced by domestic norms of appropriate behaviour that date back to historical events and contributed to cultural standards in all three countries. Even though other at the time influential factors had an impact on the content of the statements all leaders were limited in the range of messages that would be accepted by the majority of the public as legitimate due to these norms.

What the political leaders of the UK, France and Germany had in common at the times of their statements was increased pressure from right-wing parties. This pressure came in the case of May mainly and in the case of Merkel partly from within their coalition governments. In the case of Blair, Hollande and Merkel as well strongly from opposition parties that

13 P. J. KATZENSTEIN, "Same War: Different Views: Germany, Japan, and Counterterrorism", *International Organization* 2003, vol. 57, n° 4, p. 731-760.

were on the rise and had gained extra support after the Islamic terrorist attacks[14]. In all three countries, these right-wing movements strongly influenced the broader socio-political discourse, which again was reflected in the changes regarding the contents of the statements the political leaders gave at different points in time. This highlights a challenge the centrist leaders, left or right, were facing in France, Germany and the UK. A larger group of citizens in all three countries started to identify stronger with left or right-wing parties, which made it much more difficult for centrist politicians to gain majority support. Since right-wing parties attracted mainly those people who felt neglected by their governments due to demographic changes that were in many cases the results of globalisation, the challenge for political leaders was to include those parts of their populations in their communication and decision making without losing the support of those who were supportive of the changes that came with globalisation[15]. The changes in statements of leaders from all three countries show that the pressure from the right wing won the upper hand at least to some extent regarding communication with the public in times of uncertainty and insecurity.

Comparative analysis of organisational aspects

Besides the similar changes regarding contents of statements in reaction to Islamic terrorist attacks by all political leaders analysed, regardless of their political backgrounds, differences between the statements that need to be considered in this comparative analysis can be found by comparing organisational aspects, which could also be considered as strategic.

The first one is the timing of statements in reaction to Islamic terrorist attacks. Francois Hollande reacted to all major Islamic terrorist attacks that were carried out in France during his presidency immediately. In the cases of the Ile de France and 13 November 2015 Paris attacks, he even gave statements while the attacks were still on-going and addressed the public again immediately after the attacks ended. This way the President's interpretation of the events was one of the first the public would hear and thus enabled him to act only in reaction to the attacks but not in reaction to the media. Instead, the media had to react to Hollande's narratives when

14 C. E. DE VRIES and E. E. EDWARDS, "Taking Europe to its extremes", *Party Politics* 2009, vol. 15, n° 1, p. 5-28.

15 E. GRANDE, "Globalizing West European politics: the change of cleavage structures, parties and party systems in comparative perspective", *West European Politics in the Age of Globalization* (eds. S. BORNSCHIER et al.), Cambridge University Press, 2008, p. 320-347.

reporting about the attacks. The comparison of the analysed statements after Islamic terrorist attacks and the largest national newspaper headlines after the attacks showed that there were more similarities between contents of Hollande's statements and French newspaper headlines than there were between the national leaders' statements and newspapers in the UK and Germany. Even though he had the lowest approval ratings of all leaders analysed, the interaction between Hollande and the national newspapers appeared to be the closest[16]. The opposite was the case for Tony Blair after the London bombings on 7 July 2005. Even though he gave his first brief statements shortly after the attacks, he was strongly reactive in his first

16 The author compared articles that were published after Islamic terrorist attacks in the most read newspapers in each country and the content of the politicians' statements in reaction to the same attacks. In the case of Francois Hollande see: A. BRÉZET, « A. Brézet: Quand la guerre est là, il faut la gagner », <http://www.lefigaro.fr/vox/societe/2015/01/07/31003-20150107ARTFIG00452-alexis-brezet-quand-la-guerre-est-la-il-faut-la-gagner.php>, consulted on 15 May, 2021; L. JOFFRIN, "'Charlie' vivra",<https://www.liberation.fr/societe/2015/01/07/charlie-vivra_1175877>, consulted on 15 May, 2021; LE PARISIEN, « Attentat à Charlie Hebdo: la France sous le choc », <http://www.leparisien.fr/faits-divers/en-direct-paris-fusillade-au-siege-de-charlie-hebdo-07-01-2015-4425881.php>, consulted on 15 May, 2021; J. BELLVER, « 'Le 11 septembre français' à la Une du 'Monde', pas un mot à la Une en deuil de 'M' »>, consulted on 15 May, 2021; C. CORREVIN, P. GONZALES and J.-M. LECLERC, « Attaques terroristes sans précédent en plein Paris »,<http://www.lefigaro.fr/politique/2015/11/14/01002-20151114ARTFIG00019-attaques-terroristes-sans-precedent-en-plein-paris.php>, consulted on 15 May, 2021; 20MINUTES, « Les unes de la presse française en date du 14 novembre 2015 », <https://www.20minutes.fr/medias/1730263-20151114-attentats-presse-francaise-guerre-plein-paris#&gid=1&pid=1>, consulted on 15 May, 2021; LIBÉRATION, « Carnages à Paris », <https://boutique.liberation.fr/products/carnages-a-paris-14-et-15-novembre-2015>, consulted on 15 May, 2021; LIBÉRATION, « Le monde 'choqué', solidaire de la France après les attentats de Paris », <https://www.liberation.fr/planete/2015/11/14/le-monde-choque-solidaire-de-la-france-apres-les-attentats-de-paris_1413369>, consulted on 15 May, 2021; M. CHERIF, « Carnages », <https://www.liberation.fr/debats/2015/11/15/carnages_1413562>, consulted on 15 May, 2021; L. JOFFRIN, « À Paris, l'horreur », <https://www.liberation.fr/france/2015/11/14/l-horreur_1413333>, consulted 15 May, 2021; C. GÉVAUDAN, « Attaques à Paris: comment la solidarité s'est organisée », <https://www.liberation.fr/france/2015/11/14/attaques-a-paris-comment-la-solidarite-s-est-organisee_1413448>, consulted on 15 May, 2021; LIBÉRATION, « Carnages à Paris », <https://boutique.liberation.fr/products/carnages-a-paris-14-et-15-novembre-2015>, consulted on May 15, 2021; 20 MINUTES, « Les unes de la presse française en date du 14 novembre 2015 », <https://www.20minutes.fr/medias/1730263-20151114-attentats-presse-francaise-guerre-plein-paris#&gid=1&pid=1>, consulted May 15, 2021; LE FIGARO, « L'horreur, à nouveau », <http://kiosque.lefigaro.fr/le-figaro/2016-07-15>, consulted May 15, 2021; LIBÉRATION, « Pourquoi ?», <https://www.liberation.fr/liseuse/publication/16-07-2016/1/>, consulted on May 15, 2021; LE MONDE, « Nice – La Terreur – Un 14-Juillet », <https://www.lemonde.fr/kiosque-journal-le-monde/edition-du-16-7-2016/>, consulted May 15, 2021.

longer statement after the attack on 11 July, four days after the attacks[17]. Merkel's reactions to the Hanover Arena plot and even more to the attacks in Würzburg and Ansbach were similar as they were given after the national newspapers and other politicians had already shared their interpretations of the events. It seemed that Merkel had learned from the challenges that developed due to her delayed reactions to the attacks by December 2016 and was the first government representative who gave a public statement in reaction to the Berlin Christmas market attack the morning after the attack[18]. That was still after national newspapers reporting the Berlin attacks were printed but since the attacker had not been caught at that time only the tabloid *Die Bild* made assumptions that implicitly referred to the national discourse regarding Merkel's immigration policies at the time. Merkel used her statement to try to influence this aspect of the socio-political narrative proactively. Theresa May gave each of her first public statements the day

17 F. FOLEY, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, p. 43-50.

18 The author compared articles that were published after Islamic terrorist attacks in the most read newspapers in each country with the content of the politicians' statements in reaction to the same attacks. In the case of Angela Merkel see: RP ONLINE, "Pressestimmen zur Länderspiel-Absage", <https://rp-online.de/sport/fussball/nationalelf/deutschland-niederlande-abgesagt-um-1919-uhr-stand-der-fussball-still_bid-18406645#14>, consulted on May 16, 2021; SÜDDEUTSCHE ZEITUNG, "Schlagzeilen", <https://www.sueddeutsche.de/news/page/5?search=l%C3%A4nderspiel+hannover&sort=date&dep%5B%5D=politik&typ%5B%5D=article&sys%5B%5D=sz&catsz%5B%5D=szTopThemes&all%5B%5D=time>, consulted on May 16 2021; DIE BILD, "Deutschlandspiel abgesagt, Bomben-Angst", <https://meedia.de/wp-content/uploads/2015/11/Bild18-11.png>, consulted on May 16, 2021; ZEIT ONLINE, "Zwölf Menschen verletzt durch Bombe in Ansbach", <https://www.zeit.de/gesellschaft/zeitgeschehen/2016-07/ansbach-explosion-sprengstoff>, consulted on May 16, 2021; A. BACKHAUS, A. GEISLER and P. FAIGLE, "Das Phantom von Ansbach", <https://www.zeit.de/gesellschaft/zeitgeschehen/2016-08/anschlag-bayern-taeter-ansbach-terror>, consulted on May 16, 2021; HORIZONT, "Tageszeitungen: Die Titelseiten Vom 19.7.2016", <https://www.horizont.net/covershows/Die-Titelseiten-vom-19.7.2016-2621>, consulted on May 16, 2021; K. BIERMAN et al., "Was wir über den Anschlag in Berlin wissen", <https://www.zeit.de/gesellschaft/zeitgeschehen/2016-12/berlin-breitscheidplatz-gedaechtniskirche-weihnachtsmarkt#english-version>, consulted on May 16, 2021; HORIZONT, "Tageszeitungen: Die Titelseiten vom 20.12.2016", <https://www.horizont.net/covershows/Die-Titelseiten-vom-20.12.2016-2883>, consulted May 16, 2021; HORIZONT, "Tageszeitungen: Die Titelseiten vom 21.12.2016", <https://www.horizont.net/covershows/Die-Titelseiten-vom-21.12.2016-2884>, consulted on May 16, 2021; A. ZOCH, "Der Schock von Berlin", <https://www.sueddeutsche.de/politik/anschlag-auf-weihnachtsmarkt-der-schock-von-berlin-1.3302931>, consulted on May 16, 2021.

after the Manchester Arena bombing and London Bridge attack, thus, after the national newspapers reported the attacks and influenced the public influenced the public interpretation of the events[19].

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19 The author compared articles that were published after Islamic terrorist attacks in the most read newspapers in each country with the content of the politicians' statements in reaction to the same attacks. In the case of Theresa May see: A. ROSS and K. RAWLINSON, "What happened in Manchester? What we know so far about the attack",<https://www.theguardian.com/uk-news/2017/may/23/manchester-arena-attack-what-we-know-so-far>, consulted on May 17, 2021; T. BURROWS et al., "BREAKING NEWS: Manchester bomber is named as British Libyan jihadist Salman Abedi who killed 22 including a girl aged EIGHT – in terror attack on packed Ariana Grande concert", <http://www.dailymail.co.uk/news/article-4531940/Emergency-services-rush-Manchester-Arena.html>, consulted on May 17, 2021; B. MALKIN, "'Terror at the Arena': how the papers reacted to Manchester attack", <https://www.theguardian.com/uk-news/2017/may/23/terror-at-the-arena-how-the-papers-reacted-to-manchester-attack>, consulted on May 17, 2021;
TWITTER, "The Sun, Tomorrow's front page (Final edition): London Bridge Terror", <https://twitter.com/TheSun/status/871182378282176512/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E871182378282176512&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fuk-news%2F2017%2Fjun%2F04%2Fhow-the-papers-reported-the-london-bridge-and-borough-market-attacks>, consulted on May 17, 2021; M. NIXON, "#MailonSunday 2am edition Terror Strikes London Bridge", <https://twitter.com/MattNixson/status/871170938808807426/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E871170938808807426&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fuk-news%2F2017%2Fjun%2F04%2Fhow-the-papers-reported-the-london-bridge-and-borough-market-attacks>, consulted on May 17, 2021; SUNDAY HERALD, "Late breaking news Terror on London Bridge", <https://twitter.com/newsundayherald/status/871135622072643585/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E871135622072643585&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fuk-news%2F2017%2Fjun%2F04%2Fhow-the-papers-reported-the-london-bridge-and-borough-market-attacks>, consulted on May 17, 2021; SUNDAY TIMES NEWS, "Our update front page: Terrorists mow down crowds on #Londonbridge", <https://twitter.com/ST_Newsroom/status/871168233138728960/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E871168233138728960&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fuk-news%2F2017%2Fjun%2F04%2Fhow-the-papers-reported-the-london-bridge-and-borough-market-attacks>, consulted May 17, 2021;
THE INDEPENDENT, "'Night of terror as brutal attack strikes capital': this morning's final edition of The @Independent", <https://twitter.com/Independent/status/871212406155988993/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E871212406155988993&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fuk-news%2F2017%2Fjun%2F04%2Fhow-the-papers-reported-the-london-bridge-and-borough-market-attacks>, consulted on May 17, 2021.

After the London Bridge attack, even more than after the Manchester Arena attacks, newspaper coverage of the events appeared to have influenced May's statements stronger than had been the case with Blair, Hollande and Merkel. Changes in approval ratings would indicate that Hollande's approach might have been most successful [20]. The analyses show that waiting for too long after a severe threat or attack puts leaders into a position where they have to focus more on implicitly defending their previous policies instead of using the socio-political situation to actively and explicitly shape their next steps regarding security and immigration. The length of the statements could be considered another indicator of this argument. Hollande's first statements after Islamic terrorist attacks in France were over, were all of similar length, between 3min 50sec after the Paris attacks of 13 November 2015 and 5min 57sec after the attack in Nice on 14 July 2016. May's statements, which were all given the day after the attacks in Manchester and London are also similarly long, 8min 7sec and 7min 57sec. Merkel's statements given the day after the Hanover Arena threat and the Berlin Christmas market attack were 1min 58sec and 4min 36sec long. The length of the statements here might have been due to the fact that the Hanover Arena plot was not a successfully executed attack while the Berlin Christmas market attack killed 11 people and injured 45. Nevertheless, both statements are short compared to her

20 For comparison of approval ratings before and after statements given in reaction to Islamic terrorist attacks between France, UK and Germany see: OPINIONLAB, « Politique/Popularité moyenne de l'exécutif », <http://opinionlab.opinion-way.com/popularite MoyenneDeLexecutif.html>, consulted on May 18, 2021; L. FLENADY, "France: 'Nuit debout' movement shakes politics", *Green Left Weekly* 2016, vol. 1091, n° 1; YOUGOV, "YouGov Survey Results", <https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/z56a3650h8/Results_170525_Favourability_W.pdf>, consulted May 18, 2021; YOUGOV, "YouGov Survey Results", <https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ovy5dhg86p/InternalResults_170612_Favourability_W.pdf>, consulted on May 18, 2021; U. ZOLLEIS, "Auf die Kanzlerin kommt es an – Die CDU unter Angela Merkel", *in Politik im Schatten der Krise – Eine Bilanz der Regierung Merkel 2009-2013*, (eds R. ZOHLNHÖFER and T. SAALFELD), Springer VS, 2015, p. 73-91; S. JAKOBS and U. JUN, "Programmatic Change in the Two Main Parties: CDU and SPD on Their Way to the Grand Coalition", *in Germany after the 2013 Elections: Breaking the Mould of Post-Unification Politics?* (eds G. D'OTTAVIO and T. SAALFELD), Routledge, 2016, p. 129-153; DW, "Merkel's approval ratings improve", <https://www.dw.com/en/merkels-approval-ratings-improve/a-19083943>, consulted on May 18, 2021; J. KARAIAN, "Angela Merkel's domestic approval rating", <https://www.theatlas.com/charts/HJngd-yMl>, consulted on May 18, 2021; B. SILLS and P. SUZARA, "World Leaders' Political Health Check", <https://www.bloomberg.com/news/features/2018-10-31/how-long-will-world-leaders-last>, consulted on May 18, 2021.

14min 24sec statement given eleven days after the Würzburg attack and four days after the Ansbach attack. Tony Blair's first commons statement given four days after the 7/7 bombings was almost 1.5 times longer than Theresa May's statements (1551 words compared to Theresa May's 1151 words after the Manchester Arena attack and 1060 words statement in reaction to the London Bridge attack). Obviously, the form of attack and venue the statement is given at, both affect the length of the statements. However, even though they had different numbers of victims, both London attacks caused a strongly felt threat in the population. These felt threats play a larger role in the public communication of political leaders than the objective facts behind such attacks do [21]. And, the politicians deliberately chose the venues at which the statements were given and even though they differ it can still be assumed that the targeted audiences were similar and were reached through similar media. These points apply to all statements given by political leaders analysed and thus allow these comparisons without substantial emphasis on the precise objective facts behind the attacks or the venues the statements in reaction to Islamic terrorist threats and attacks were given at.

The second organisational aspect that needs to be considered in order to get a better understanding of different public communication in reaction to Islamic terrorist attacks is the structure of the different statements analysed.

The structure of statements given by Blair, May, Hollande and Merkel differ quite significantly. Mainly the beginning of the statements and the order in which the speakers express their empathy for the victims and explain and condemn the attacks show a structural difference between the statements analysed. Even in the comparison of statements by the same leader, it is difficult to detect a consistent structure that applies to all statements made by that politician. However, structural changes in different statements can also be useful to detect broader strengths and weaknesses in statements.

Hollande only expressed his empathy explicitly in his statement in reaction to the Ile de France attacks after having explained the events of the previous days. In his statement after the 13 November 2015 Paris attacks, he starts his statements condemning the attacks, describing them as "*act of war*" and even after that only implicitly expresses empathy for the victims. In his statement immediately after the attack in Nice on 14 July 2016, Hollande starts his statement by condemning the attackers and the attack before he explicitly expresses his empathy with the victims.

21 See also: D. RANDAHL, "Terrorism and Public Opinion: The Effects of Terrorist Attacks on the Popularity of the President of the United States", *Terrorism and Political Violence* 2018, vol. 30, n° 3, p. 373-383.

In her statement after the Manchester Arena bombing, May starts her statement similarly, by briefly condemning the attack and then expressing her empathy for the victims of the attack. In reaction to the London Bridge attack, May only expressed her empathy implicitly after having condemned the attack.

Merkel condemned the attacks and only after that implicitly expressed her empathy for the victims in her statement in reaction to the attacks in Würzburg and Ansbach. Merkel's empathy appears to be broader though than that of the other political leaders in their public reactions to Islamic terrorist attacks since she also includes people who were indirectly affected by the attacks. In her reaction to the Berlin Christmas market attack and also, even though in an understandably softer manner, after the Hanover Arena plot Merkel expresses her empathy more explicitly at the beginning of her statements. The structure of the beginning of her statements is similar to the structure of Tony Blair's first Commons statement after the London attacks of 7 July 2005. No indicators of connections between the structure of the statements and the form of political measures that would be taken in reaction to the attacks can be detected here. To understand these relationships, a comparative analysis of a larger number of statements and the public reaction to the implementation of the measures communicated in these statements after terrorist attacks would need to be conducted.

A comparison of these structural aspects of the statements analysed shows that the leaders of the UK, France and Germany had no consistent structure that may have been considered ideal in order to reach a concerned public.

Towards a concept of "*Crisis Communication*" in reaction to 21st Century Islamic terrorist attacks for Western governments

The comparative analysis has shown that none of the political leaders whose statements in reaction to Islamic terrorist attacks were analysed managed to make use of the opportunities that come with crises such as terrorist threats or attacks over the long term. It rather highlighted uncertainty and instability in the content of statements as well as a lack of organised communication patterns in all three countries. The analysis further underlined potential reasons for these inconsistencies, which appeared to be partly due to volatile approval ratings and increasingly divided societies within countries. These divisions were often encouraged and strengthened by changes in socio-political narratives that were implemented by right-wing parties that gained more support and thus more influence within

the timeframe in which the statements in reaction to Islamic terrorist attacks analysed were given. In all three countries, Islamic terrorist attacks strengthened right-wing populist parties as they contributed to the broader socio-political discourse in Western Europe regarding mass immigration of refugees from Muslim majority countries[22]. At the same time, political leaders were limited in their options of messages they could communicate through their public statements in reaction to Islamic terrorist attacks by normative contexts in which historical conflicts were interpreted in different cultures. Different forms of media scrutiny and public oppositions forced political leaders to consider different contexts in their public communication, which narrowed down the behaviour that was considered appropriate in times of threat and discomfort and made it more difficult to gain majority support while succeeding in the battle over hearts and minds against Islamic terror sympathisers and right-wing populists. The analysis indicates that populist parties managed to use the threats and attacks to their benefit while public reactions to immediate reactions to Islamic terrorist attacks make it seem that government representatives were less successful.

Even though, as this comparative analysis has shown, political leaders from the UK, France and Germany react differently to similar threats and attacks from Islamic terrorist organisations, a basic foundation of a concept of "*Crisis Communication*" in reaction to Islamic terrorist threats and attacks can help political leaders to cover the most crucial aspects successfully in order to provide effective statements in all three countries. This has to imply the following aspects:

1) The role of public statements in reaction to Islamic terrorist threats or attacks needs to be considered in the counterterror as well as the domestic political context.
2) Timing is crucial.
3) The political leader's credibility in the broader political context must be ensured.
4) Content of statements needs to be rational and logical under consideration of root causes of Islamic terrorist threats and attacks and how these fit into normative and socio-political contexts.

22 A. C. D'APPOLONIA, S. REICH, "The Securitization of Immigration: Multiple Countries, Multiple Dimensions", *in Immigration, Integration and Security. America and Europe in Comparative Perspective* (eds A. C. D'APPOLONIA and S. REICH), University of Pittsburgh Press, 2008, p. 1-22.

5) Demographic changes and their potential consequences for society need to be considered.

6) Under consideration of the aspects mentioned above, statements should be kept as brief as possible.

Aspect 1. The role of public statements in reaction to Islamic terrorist threats or attacks needs to be considered in the counterterror as well as the domestic political context.

In order to develop the foundation of a concept of Crisis Communication in reaction to Islamic terrorist attacks, one important question that needs to be discussed again under consideration of the findings of the analysis conducted is how important government communication in reaction to terrorist threats or attacks actually is and to whom. The results of the analysis show that government communication in reaction to terrorist threats or attacks is important as it contributes to narratives that can be either developed in reaction to Islamic terrorist attacks or contribute to existing narratives[23]. In the cases of the UK, France and Germany populist right-wing parties used Islamic terrorist threats and attacks successfully to strengthen their anti-immigration narratives[24]. This showed that effective communication as the first response to terrorist threats or attacks is not only important to gain the upper hand in the battle over hearts and minds between governments and terrorist organisations that are trying to radicalise and recruit vulnerable individuals, but also introduces a third actor that needs to be considered: political opposition from the right end of the political spectrum within the countries. Aaron Hoffman and William Shelby's research concludes that communicating counterterrorism measures increases confidence in the government to protect its citizens from terrorist attacks in the future[25]. Thus,

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23 Research has shown that in the US terrorist attacks do not have short-term effects on the popularity of the President. Similar research needs to be conducted in the UK, France and Germany. A similar outcome would underline the assumption that political public communication in reaction to terrorist attacks is important due to the broader political discourse, not the actual terrorist attacks. For more information see: D. RANDAHL, "Terrorism and Public Opinion: The Effects of Terrorist Attacks on the Popularity of the President of the United States", *Terrorism and Political Violence* 2018, vol. 30, n° 3, p. 373-383.

24 P. DEMANT, *Islam vs. Islamism: The Dilemma of the Muslim World*, Praeger Publishers, 2006, p. 69-71.

25 A. M. HOFFMAN and W. SHELBY, "When the 'Laws of Fear' Do Not Apply: Effective Counterterrorism and the Sense of Security from Terrorism", *Political Research Quarterly* 2017, vol. 70, n° 3, p. 618-631.

effective public counterterror communication can strengthen the position of the government and protect it from opposition parties trying to use public uncertainty to their advantage.

Aspect 2. Timing is crucial.

No response or a response given too late can give populist opposition parties an advantage in filling the information vacuum after unexpected events by communicating an interpretation of the event that supports their general narratives and ideologies[26]. A quick but flawed response with content that could be used against the narrative favoured by the government or even contradicts its narrative and ideology could have the same effect. Thus, a response to Islamic terrorist attacks by the government needs to be given as soon as enough relevant facts are confirmed but not before that. The speaker needs to have access to the crucial facts behind the attacks. Assumptions that are disproven after the statement is given would undermine the trust in the government in dealing with the situation and potentially underline the suitability of the opposition. How many crucial facts the political leader needs to have access to differs from country to country and depends on normative contexts in which historical conflicts are interpreted and how these influence the general counterterror culture in each country[27]. Since political communication in reaction to Islamic terrorist attacks is an important aspect of counterterrorism these are also applicable in this context. Normative contexts explain why Francois Hollande gave public statements during and immediately after Islamic terrorist attacks in France while Tony Blair and Theresa May took slightly more time before they gave in-depth statements and Angela Merkel was very hesitant when it came to public statements in reaction to Islamic terrorist attacks. In France, counterterrorist agents act quickly and indiscriminately. The highest priority is security and the vast majority of influential actors, including the public and the media, support this approach with little scrutiny[28]. The UK has a slightly different approach to counterterrorism, partly due to

26 M. W. SEEGER and T. L. SEELNOW, *Narratives of Crisis: Telling Stories of Ruin and* Renewal, Stanford University Press, 2016, p. 8-10.

27 F. FOLEY, "Terrorism and state repression: Strategic choice and the domestic normative context", in *When Does Terrorism Work?* (ed. D. MURO), Routledge, 2018, p. 71-84; P. J. KATZENSTEIN, "Same War: Different Views: Germany, Japan, and Counterterrorism", *International Organization* 2003, vol. 57, n° 4, p. 731-760.

28 F. FOLEY, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, p. 62-64.

its experiences in Northern Ireland, of which officials later declared some as mistakes[29]. These past mistakes contributed to an understanding that responses to terrorist threats and attacks need to be "*proportionate*" and that the exacerbation of problems has to be avoided[30]. This led to more targeted operations in UK counterterrorism under stronger scrutiny by the public and media. The historical conflicts that influence German understandings of norms of appropriate behaviour are even older and their lessons were not learned from counterterror operations but from the Weimar Republic and the Nazi regime and led to a strong emphasis on the importance of the lawful state (*Rechtsstaat*) and the close control of the state's security forces by the parliament with strongly limited gathering of intelligence[31]. These norms led to a high importance of an appropriate balance between liberty and security, which is highly scrutinised by the vast majority of influential actors, including the public and the media. Considering public statements in reaction to Islamic terrorist attack as one aspect of the broader counterterror operations carried out by a state, these differing norms explain why political leaders from the UK, France and Germany react with different urgencies to threats and attacks in their countries.

This dilemma between the collection of facts and communication of quick responses are further highlighted by Merkel's and Blair's explicit protection of particular minority groups in their statements. The normative contexts, which forced them to wait for the confirmation of certain information before going public with them, gave opposition politicians and media who are not as bound to those norms as political leaders are, the advantage of sharing their interpretations of the events to their advantage in the broader socio-political discourse, to which Merkel and Blair had to react. This again underlines the importance of a fast gathering of information in order to enable quick communicative reactions to Islamic terrorist threats and attacks, which enable a proactive interpretation of the attacks and the

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29 A. EDWARDS, "Misapplying lesson learned? Analysing the utility of British counterinsurgency strategy in Northern Ireland, 1971-76", *Small Wars and Insurgencies* 2010, vol. 21, n° 2, p. 303-330; R. ENGLISH, *Armed Struggle: The History of the IRA*, Macmillan, 2003, p. 140-141. For more information regarding the direct political effects of the conflict in Northern Ireland see also: G. WALKER, "Scotland, Northern Ireland, and Devolution, 1945-1979", *Journal of British Studies* 2010, vol. 49, n° 1, p. 117-142.

30 F. FOLEY, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, p. 261-262.

31 P. J. KATZENSTEIN, "Same War: Different Views: Germany, Japan, and Counterterrorism", *International Organization* 2003, vol. 57, n° 4, p. 731-760.

shaping of narratives in a way that they support broader socio-political goals of the government. It also shows again that political statements in reaction to Islamic terrorist attacks are part of counterterror but also of broader political operations.

Aspect 3. The political leader's credibility in the broader political context must be ensured.

These normative contexts that influence the timing also affect other aspects of political statements in reaction to Islamic terrorist threats and attacks. One crucial aspect is credibility[32]. If the political leader does not find the right balance between the aspects described above, it could harm his/her credibility, which could cause long-term consequences for the individual but also for the party[33]. Credibility also means that the person who is by the public regarded as responsible for their protection in times of insecurity and threat needs to talk to the nation. As seen after the Hanover Arena plot, a statement by a government representative that is not the leader of the country can lead to disappointment due to the message communicated through the statement but even more due to the implied assumption that the government does not take the threat or attack seriously enough to get the Chancellor, Prime Minister of President directly involved.

Aspect 4. Content of statements needs to be rational and logical under consideration of root causes of Islamic terrorist threats and attacks and how these fit into normative and socio-political contexts.

Even though the battle over hearts and minds seems to have shifted from governments against terrorist organisations to governments against populist oppositions due to changes in broader socio-political contexts in Western Europe, the broader terrorist threat regarding future radicalisation and recruitment should not be completely neglected in the construction of government statements in reaction to Islamic terrorist attacks. It is still important for government leaders to understand the psychology behind terrorism as well as the ambitions and *modus operandi* of the organisations that could be a threat to the country. In particular the psychology behind terrorism and ambitions of Islamic terrorist organisations need

32 R. ENGLISH, *Terrorism: How to respond*, Oxford University Press, 2009, p. 140-143.

33 M. W. SEEGER and T. L. SEELNOW, *Narratives of Crisis: Telling Stories of Ruin and* Renewal, p. 1-8.

to be countered in statements in reaction to Islamic terrorist attacks[34]. Demographic changes, multiculturalism and diversity that come with it are the keywords here. Research has shown that Islamic terrorist attacks were very likely to have contributed to increases in hate crimes against Muslims and other members of minority groups within the countries analysed[35]. At the same time, the explicit protection of members of minority groups through messages communicated in statements decreased with an increase in

34 R. KUMARI, "Why people support terrorism: psychological issues in understanding terrorism and attitudes towards terrorism", *in The Psychology of Counter-Terrorism* (ed. A. SILKE), Routledge, 2011, p. 48-61.

35 For more information regarding discrimination and hate crimes against Muslim minorities in the UK, France and Germany see: M. KÖNIG, "Incorporating Muslim migrants in western nation states – a comparison of the United Kingdom, France, and Germany", *Journal of International Migration and Integration* 2005, vol. 6, n° 2, p. 219-234; R. GALE and P. HOPKINS, *Muslims in Britain: Race*, *Place and Identities*, Edinburgh University Press, 2009; R. J. PAULY JR., *Islam in Europe: Integration or Marginalization*, Routledge, 2004, p. 95-126; S. BRIGHTON, "British Muslims, multiculturalism and UK foreign policy: 'integration' and 'cohesion' in and beyond the state", *International Affairs* 2007, vol. 83, n° 1, p. 1-17; J. HALLIDAY, "Islamophobic attacks in Manchester surge by 500% after arena attack", <https://www.theguardian.com/uk-news/2017/jun/22/islamophobic-attacks-manchester-increase-arena-attack>, consulted May 22, 2021; A. MONDON and A. WINTER, "*Charlie Hebdo*, Republican secularism and Islamophobia", *in After Charlie Hebdo: Terror*, *Racism and Free Speech* (eds D. Freedman et al), Zed Books Ltd, 2017, p. 31-45; J. LAURENCE and J. VAÏSSE, *Integrating Islam: Politics and Religious Challenges in Contemporary France*, The Brookings Institute, 2006, p. 195-220; B. TESTÉ, C. MAISONNEUVE and M. COHU, "L'effet 'Charlie-Hebdo': Répercussions des attentats de Janvier 2015 en France sur les Préjugés à l'égard des Maghrébins, l'orientation à la Dominance Sociale et le degré d'attachement au Principe de Laïcité", *Revue Internationale de Psychologie Sociale* 2016, vol. 29, n° 1, p. 50-58; D. REYNIÉ *et al*, "Xenophobia before and after the Paris 2015 attacks: Evidence from a natural experiment", *Ethnicities* 2019, vol. 19, n° 2, p. 271-291; A. MONDON, *The Mainstreaming of the Extreme Right in France and Australia*, Routledge, 2016, p. 107-119; J. BRITTON, "Muslims, Racism and Violence After the Paris Attacks", *Sociological Research Online* 2015, https://doi.org/10.5153/sro.3736; C. L. ADIDA, D. D. LAITIN and M.-A. VALFORT, *Why Muslim Integration Fails in Christian-Heritage Societies*, Harvard University Press, 2016, p. 3-28, 77-124; R. TARAS, *Xenophobia and Islamophobia in Europe*, Edinburgh University Press, 2012, p. 167-168, 171-172; A. HÄUSLER, "The PRO-Movement: A New Motor of Anti-Islamic Right-Wing Populism within the Extreme Right in Germany", *in From the Far Right to the Mainstream* (eds F. ANSARI and F. HAFEZ), Campus Verlag, 2012, p. 29-44; S. POYNTING and U. M. VIETEN, "Contemporary Far-Right Racist Populism in Europe", *Journal of Intercultural Studies* 2016, vol. 37, n° 6; J. DAHINDEN, P. HOLTZ and W. WAGNER, "German Muslims and the 'Integration Debate': Negotiating Identities in the Face of Discrimination", *Integrative Psychology and Behavioral Science* 2013, vol. 47, n° 2.

the perceived threat of Islamic terrorist attacks in the country. This makes it easier for Islamic terrorist organisations to radicalise and recruit vulnerable individuals that feel marginalised by society[36]. The analysis further indicates that these changes were due to increased pressure from right-wing politicians and parties. This shows the difficulty of balancing the two main challenges regarding the battle over hearts and minds in government statements in reaction to Islamic terrorist attacks. A way to approach this challenge would be to run campaigns that fight discrimination and lay a foundation of public differentiation between terrorists and Muslim compatriots, as was done by Francois Hollande in 2015[37]. Obviously, such campaigns are expensive and do not sensitise an entire nation immediately. Therefore, more explicit measures need to be taken as part of the statements. Government statements in reaction to Islamic terrorist attacks need to ensure that the audience understands the actual problem in the same way the government should be assumed to understand it: rationally and logically. Long lasting anti-discrimination campaigns can make the communication of these aspects in times of tension and insecurity easier.

Eli Berman, Joseph Felter and Jacob Shapiro highlight the importance of endurance and sustainability in battles over hearts and minds in their book *Small Wars*, *Big Data*[38]. They explain the difference between leasing hearts and minds and winning wars, and underline the importance of consistency in campaigns aimed at gaining support from former enemies, an example that fits well into the context of public communication in reaction to terrorist attacks. The key aspect of this theory is to consider the macro and not only the micro perspective. Thus, statements in reaction to Islamic terrorist attacks should not only refer to the attack itself but also take into account the root causes of the broader threat and ensure that messages that contradict other counterterror measures that are directed at these root causes are avoided.

Even though the political leaders of the UK, France and Germany were not equally liberal regarding immigration, the factors of logic and rationality should help to understand the importance of the protection of

36 T. ABBAS, "The symbiotic relationship between Islamophobia and radicalisation", *Critical Studies on Terrorism* 2012, vol. 5, n° 3, p. 345-358.

37 DEUTSCH – FRANZÖSISCHES INSTITUT, *Frankreich Jahrbuch 2015 – Frankreich nach der Territorialreform*, p. 158-159.

38 E. BERMAN, J. H. FELTER and J. N. SHAPIRO, *Small Wars*, *Big Data*, Princeton University Press, 2018, p. 305-308.

minority groups, since the consequences of the opposite would include broader social and economic damages[39]. Protection of minority groups without disappointing more conservative members of the public requires a sophisticated understanding of the different cultural stakeholders within the broad target group of the statement[40].

Merkel and Blair attempted to find a balance between protection of minority groups, mainly the Muslim minority, and satisfying more conservative parts of the population in their statements by comparing the current events to events from the past that conservative citizens are more likely to be able to identify with. Hollande used a more direct approach by explicitly explaining that the attackers behind the Ile de France attacks had nothing to do with the Muslim religion. It is not possible to determine how well the audiences reacted to these particular parts of the statements. However, it can be assumed that at least Merkel and Hollande did not consider their approaches as ideal since they did not use the same approaches again in statements in reaction to other Islamic terrorist attacks in their countries. This underlines the importance of the consideration of normative contexts again and the challenges political leaders are facing when they have to react to Islamic terrorist threats and attacks as well as populist interpretations of those without stepping out of the given frame defined by norms of appropriate behaviour within each national culture. Hollande did step out of such frames in his statement by giving protection of minority groups similar importance as security of the state.

Aspect 5. Demographic changes and their potential consequences for society need to be considered.

Regarding the content of the statements, the comparative analysis shows that all leaders considered it necessary to refer to the importance of *unity* within their countries and decided to end almost every statement in reaction to Islamic terrorist attacks with a reference to *unity*. If politicians manage to give the term *unity* the right connotation, this could underline the inclusion and thus protection of minority groups. The connotations of the word *unity* need to be considered part of the broader normative context within a country and therefore, can only be changed over time through

39 E. HUTCHINSON and R. BLEIKER, "Emotions in the war on terror", *Security and the War on Terror* (eds A. J. BELLAMY *et al.*), Routledge, 2008, p.57-70.

40 D. COLEMAN, "The demographic effects of international migration in Europe", *Oxford Review of Economic Policy* 2008, vol. 24, n° 3, p. 452-476.

"*collective programming*[41]". Demographic changes could contribute to it in the UK, France and Germany, but it still takes the effort of political leaders to put the term *unity* repeatedly throughout a longer period of time into the desired context in order for it to have the desired effect in their statements[42]. If then positioned correctly within the structure of the statement it could subtly but strongly contribute to a balance between protection of minority groups and satisfaction of conservative parts of the population that leads to a desired reaction from the majority of the audience.

The comparative analyses also show that the creation of in-groups and out-groups, strengthened by the use of strong references (families, la France, Opfer vs attackers, fanatiques, Täter), was the preferred way for leaders in the UK, France and Germany to describe Islamic terrorist attacks. Thus, statements in reaction to Islamic terrorist attacks should aim to achieve that all stakeholders consider the majority group as well as minority groups as members of the in-group. This can help cement a broadly shared interpretation of attacks, which is a crucial step in the development of general acceptance of under different conditions potentially unpopular measures.

Aspect 6. Under consideration of the aspects mentioned above, statements should be kept as brief as possible.

This also refers to another important aspect of government statements in reaction to Islamic terrorist attacks: the length of the statement. The findings of the analyses indicate that the political statements did not contribute to long lasting effects on approval ratings as long as the politicians did not contradict the norms of appropriate behaviour and their general political ideology within the socio-political discourses the content of the statements could directly or indirectly relate to (it could be argued that Hollande proved that statements in reaction to Islamic terrorist attacks can have a long lasting negative effect if the politician does drastically change his socio-political narrative). Therefore, it could be argued that country leaders should stick to their political ideologies throughout their statements and keep them short so that the main aspects described above can be covered without expanding too far on the broader topic. This also makes it harder for third parties (e.g. journalists, opposition politicians) to take parts of the statement out of context and enables fuller media coverage of the statement.

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41 G. HOFSTEDE, *Cultures and Organizations: Software for the Mind*, McGraw-Hill, 2010, p. 3.

42 J. ELLUL, *Propaganda: The Formation of Men's Attitudes*, Vintage Books, 1965, p. 17-18.

This basic foundation of a concept of Crisis Communication in reaction to Islamic terrorist threats and attacks shows that political leaders have to consider the difficult connections between normative and socio-political aspects as well as the natures of counterterrorist and broader political work. This underlines the interdisciplinary approach required in the study of political statements in reaction to Islamic terrorist attacks. Existing research of counterterrorism measures in different countries especially that by Frank Foley and Peter Katzenstein, lay a good foundation for the study of political statements in reaction to Islamic terrorist attacks as they show why states react differently to similar threats. The findings should be used to add more depth to the political communicational aspect of counterterrorism studies, which has not been given as much academic scrutiny outside the US War on Terror as other aspects of counterterrorism have.

While the majority of the population only becomes indirectly aware of counterterror operations, public statements are directed directly at them and therefore need to consider a wider range of aspects that are of minor importance in other parts of counterterrorism studies. Thus, this first foundation of a concept of "*Crisis Communication*" for Western governments in reaction to 21st century Islamic terrorist attacks needs to be expanded through further research with emphasis on demographic changes in Western societies that gives a better understanding of how sub-groups within society react to different forms of political statements. Another field of research that needs to be stronger included in counterterrorism communication is that of intercultural communication within national populations. This would help to develop a more sophisticated idea of how to communicate ideally with culturally different groups within the population and where compromises have to be made to ensure a content of statements that satisfies the vast majority of the population. Adding to the research conducted, the psychological effects of terrorist attacks on the broader population also need to be analysed in order to develop further layers of a concept that goes beyond the first statements after an attack but also indicates at which points in time the public would be open to accept different messages regarding the interpretation of and broader political reaction to attacks[43].

43 Lance Y. Hunter, David J. Bennett and Joseph W. Robbins, as well as other influential scholars have conducted important research related to the broader aspects of psychological effects of terrorist attacks on the broader population. A good first impression of their work can be found in: L. Y. HUNTER, D. J. BENNETT, J. W. ROBBINS, "Destabilizing Effects of Terrorism on Party System Stability", *Terrorism and Political Violence* 2018, vol. 30, n° 3, p. 503-523.

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Is the "French Initiative" in Lebanon sparking European mistrust or reassuring the European Union zone of influence?

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Abstract

The article examines how unilateral actions like the "*French Initiative*" (FI) in Lebanon play out within the European Union (EU) strategy. To do so, the article delves into what Lebanon represents for the EU's security structure in a moment where the EU is reinvigorating its geopolitical positions and is learning the language of power. The article addresses some of the geopolitical implications that such an initiative could bring to Lebanon. It exposes as well how this initiative could spark mistrust among other EU member states. Therefore, it sheds some light on why the FI towards Lebanon has more chances to succeed if it involves the EU. How could the FI represent a good opportunity for the EU to reassure its zone of influence? How would this initiative represent a paradigm shift concerning the French foreign policy to the Middle East region? The article shows how the FI towards Lebanon will succeed if France decides to move away from its re-assurance approach towards a leadership position with concerted European cooperation. Only of this way the FI will not become a disruptive element that could jeopardize the trust of other EU member states with a geopolitical interest in the Middle East.

Keywords: French Foreign Policy, French Initiative, Geopolitics, Power Projection, European Union, Lebanon, Middle East.

1. Introduction

The European Union (EU) and Lebanon are not at their best. Due to their different natures, they face a series of challenges and threats that could threaten the very viability of both entities. On the one hand, the EU must deal with the hypothetical domino effect that BREXIT could provoke, as well as a series of internal dilemmas such as Euroscepticism and the rise of the extreme right that, in one way or another, threaten the integration project it champions. On the other hand, it must face a series of threats of external origin that place it in some geographical areas at the epicenter of the resurgence of geopolitical competition between Great and Major Powers. For example, Turkey's persistence in the Eastern Mediterranean concerning the delineation of Economic Exclusive Zones to control natural resources (natural gas and oil) *vis-à-vis* EU member states such as Cyprus and Greece[1]. In addition to renewed Russian pressure from Eastern Europe. This presence in areas of former European influence has whetted the appetite, not only for implementing an integrated approach to external action as stated in the EU Global Strategy (EUGS)[2], and hard power. We argue that unilateral actions, such as the "*French Initiative*", detract from the legitimacy of EU external action because they do not come from the EU directly. Such an initiative has aroused more mistrust than confidence in the Lebanese actor-network and has thus increased the legitimacy deficit. Despite this, it seems that the EU has made the definitive leap from a normative power to an active and decisive geopolitical actor in order to defend its geopolitical interests and values in its traditional zones of influence or in its attempt to expand the "*European Security Community*[3]", where Lebanon, as a "*Third State*[4]", is more critical

1 T. DEMIRYOL, "Between security and prosperity: Turkey and the prospect of energy cooperation in the Eastern Mediterranean", *Turkish Studies 2019*, vol. 20, n° 3, p. 442-464.

2 EUROPEAN UNION, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", *European External Action Service (EEAS) 2016* <https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>, consulted on March 17, 2021.

3 Professors Emanuel Adler and Michael Barnett state that the Security Community consists in "*a transnational region comprised of sovereign states in which their respective people share a certain dependence on the expectation of recording any changes, and to resolve any dispute that might arise between them peacefully*". See: E. ADLER and M. BARNETT, *Security Communities*, Cambridge University Press, Cambridge, 1998, p. 30.

4 T. TARDY, "CSDP: getting third states on board", *European Union Institute for Security Studies (EUISS)* 2014, Brief Issue 6, <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_6_CSDP_and_third_states.pdf>, consulted on April 7, 2021.

than ever. Therefore, it is eminently fair to ask whether crisis diplomacy can be effective in terms of power projection[5].

Lebanon, for its part, is not only facing the impact of a series of simultaneous crises but has become a "*Failed State*[6]". The financial, banking, institutional, and above all political crises, which the interference of regional powers has exacerbated, have put the country of the cedars on the ropes. It is on the verge of total collapse, especially since the explosion that devastated the port and part of the city of Beirut on August 4, 2020, one of the most tragic events in the cedar country's not so long history[7]. International aid has come to a standstill because Lebanon has suffered a process of isolation by the international community that is partly due to the excessive influence of the Shiite Hezbollah formation within the Lebanese political scene. Despite this, there have been several attempts to revive the usual dynamic of international aid from certain countries through bilateral or multilateral channels via international organizations. Among them, the most exciting and potentially most fruitful initiative, has been the "*French Initiative*", which in its initial phase was fully taken on by the French authorities. This bilateral initiative that did not, at first, involve the EU or its EU partners, aroused some misgivings. Therefore, the article examines how unilateral actions like the "*French Initiative*" (FI) in Lebanon play out within the European Union (EU) strategy. It delves into what Lebanon represents for the EU security structure in a moment where the EU is reinvigorating its geopolitical positions and is learning the language of power. The article addresses some of the geopolitical implications that such an initiative could bring to Lebanon. Likewise, it exposes why this initiative could spark mistrust among other EU member states and sheds some light on why the FI towards Lebanon will have more chances to succeed if it involves the EU. How could the FI represent a good opportunity for the EU to reassure its zone of influence? How would this initiative represent a paradigm shift concerning the French foreign policy to the Middle East region? The article shows how the FI

5 N. CHABAN, A. MISKIMMON and B. O'LOUGHLIN, "Understanding EU crisis diplomacy in the European neighborhood: strategic narratives and perceptions of the EU in Ukraine, Israel and Palestine", *European Security* 2019, vol. 28, n° 3, p. 235-250.

6 N. SHEHADI, "Failed state or battered state – the narratives dividing Lebanon", *The Arab News* 2021 (March 21), <https://www.arabnews.com/node/1829371>, consulted on March 23, 2021.

7 I. THAROOR, "Lebanon's crises are only getting worse", *The Washington Post* 2020 (August 12), <https://www.washingtonpost.com/world/2020/08/12/beirut-blast-lebanon-crisis/>, consulted on March 21, 2021.

towards Lebanon will succeed if France decides to move away from its re-assurance approach towards a leadership position with concerted European cooperation. Only in this way will the FI not become a disruptive element that could jeopardize the trust of other EU member states with a geopolitical interest in the Middle East.

2. Geopolitics is back in the Eastern Mediterranean: European Union strategic compass and the EU language of Power

The MENA region is becoming a patchwork of intersecting violent conflicts and several dysfunctional regimes, surviving thanks to their repressive security apparatus[8]. The EU can see itself involved in some dynamics of power competition far away from its geopolitical comfort zone. Therefore, it is eminently fair to ask whether the "*French Initiative*[9]" in Lebanon represents an excellent opportunity for the EU to reassure its zone of influence or not. The EU, like other outside powers, has many interests in the region's stability. For instance, and without being exhaustive, we could highlight the appealing of hydrocarbon resources, market opportunities for European products, production, and labor force, among other factors.

The EU policies, in general, do not cope very well with classical geopolitics. However, such policies provide another way of thinking about strategic interest. Mainly, because of shortfall in terms of hard power, the EU has been perceived as a *sui generis* actor of international relations, who can do more than it has done, especially in areas of geopolitical contestation like the Middle East. The EU is an actor of the international arena that is still seeking its global power status. The level of soft power is not in balance with the level of hard power needed to assume more responsibility in managing global issues. Despite this gap, the EU has made a significant effort to increase its level of hard power through some political mechanisms like the Permanent Structured Cooperation (PESCO) "*as an ambitious*,

8 J. HILTERMANN, "The MENA Region's Intersecting Crises: What Next?", *Global Policy* 2019, vol. 10, p. 31.

9 It is a proposal for the formation of a new government of mission capable to implement the long- awaited reforms in order to unlock International funds that will help put the country on a path to recover. The reforms included auditing the Central Bank and State's finances, investigating the Beirut Port explosion and reforming the electricity sector to crucially unlock billions of dollars of foreign aid to Lebanon. See: J. MACARON, "Paris Is Using Its Ability to Engage the Major Foreign Powers Competing in Lebanon by Asking the United States, Iran, and Saudi Arabia Not to Disrupt This French-Backed Process, at a Minimum", *Arab Center* 2020, Washington, p. 1-4.

binding, and inclusive legal framework aimed at incentivizing cooperation among member states in the field of defense capability development and operations[10]*. In this effort, the promotion of the EU security community becomes essential*".

Towards that end, the EU is trying to achieve much more in strengthening its inherent capacities for autonomous action in security and defense matters, without infringing on member-states' sovereignties. In fact, this determination compels it to push back against rival powers within the European sphere of influence, especially along the Southern and Eastern Mediterranean. To show a higher level of deterrence, the EU insists on learning the language of power not to be pushed over again. It may be safe to state that the EU must learn how to build leverage in armed conflicts and be more effective in supporting reforms as necessary[11]. Therefore, the EU must learn the language of power to protect its geostrategic influence where Lebanon is part of it. To understand the complexity of such endeavor, the EU is dealing with a high penetrated system where the international relations were characterized by a frequent shift of alliances (bandwagoning strategy or power balancing strategy[12]), a high level of penetration by Great-Powers and regional powers based on a sort of Zero-Sum game strategy, and finally, by the inability of any of the regional powers to become the regional hegemon[13].

The EU has been promoting strategic autonomy that goes hand in hand with other increasingly prominent notions like geopolitical power and European sovereignty. These notions seem to push the Union in a similar direction[14]. In this vein, the progress has been important considering that

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10 D. FIOTT, A. MISSIROLI and T. TARDY, "Permanent Structured Cooperation. What's in a name", *European Union Institute for Security Studies (EUISS)* 2017, Chaillot Paper n° 142, <https://www.iss.europa.eu/sites/default/files/EUISSFiles/CP_142_ONLINE.pdf>, consulted on March 27, 2021.

11 J. BARNES-DACEY and A. DWORKIN, "Promoting European strategic sovereignty in the southern neighborhood", *European Council on Foreign Relations* 2020, Policy Brief n° 1, <https://ecfr.eu/publication/promoting-european-strategic-sovereignty-in-the-southern-neighbourhood/>, conculted on April 2, 2021.

12 S. WALT, "Alliance Formation and the Balance of World Power", *International Security* 1985, vol. 9, n° 4, p. 3-43.

13 L. C. BROWN, ed., *Diplomacy in the Middle East: The International Relations of Regional and Outside Powers*, I. B. Tauris, London and New York, 1984, p. 6-8.

14 R. YOUNGS, "The EU's Strategic Autonomy Trap", *Carnegie Europe* 2021 (March 8), <https://carnegieeurope.eu/2021/03/08/eu-s-strategic-autonomy-trap-pub-83955>, consulted on March 15, 2021.

since the EUGS, the Union has been provided itself with new tools seeking to boost capability development (Permanent Structured Cooperation (PESCO) and the European Defense Fund (EDF)), synchronize defense investment plans (Coordinated Annual Review on Defense (CARD)) and enhance its operational capacity (Military Planning and Conduct Capability (MPCC) and the European Peace Facility (EPF))[15]. Likewise, at the strategic level, we need to highlight the importance of the strategic compass. This document presented in the informal meeting of defense ministers in Zagreb (Croatia), on March 4 and 5, 2020, does not try to replace the EUGS but to enhance the politico-strategic direction for EU security and defense. Therefore, the strategic compass will be helpful to understand how the EU member States collectively understand threats. Likewise, it would be helpful to shed light on the three levels of EU ambition[16] that include: 1- Engage in crisis management; 2- Support capacity building for partners; 3- Protect the EU and its citizens. For our case study, levels 1 and 2 are essential. That is why we need to reflect on whether or not the French Initiative will be better off if launched in a coordinated way under the umbrella of the EU. Indeed, the perception of the threats provided by the strategic compass will back such an argument because it reflects the need to act conjointly rather than unilaterally. For instance, some of the EU member States perceived threats, issues like "*failed state*, *ethnic and religious strife*, *illegal migration*, *organized crime*, *terrorism and the influx of refugees and asylum*[17]". Lebanon is suffering from all these threats that are affecting, likewise, EU security interests.

Likewise, the strategic compass will help the EU to deal more efficiently with crises. It will help the EU increase its resilience, capacities, and instruments to improve strategic partnership where Lebanon could represent an excellent example. In our analysis, we will use the definition of resilience provided by the EU in its EUGS, where resilience is conceived

15 D. FIOTT, "The EU's Strategic Compass for Security and Defence: What Type of Ambition is the Needle Pointing to?", *Centre for Security, Diplomacy and Strategy* 2021, Brussels School of Governance, CSDS Policy Brief 2 (March 9), < https://brussels-school.be/sites/default/files/CSDS_Policy_brief_2102.pdf>, consulted on March 19 2021.

16 COUNCIL OF THE EUROPEAN UNION, "C*ouncil conclusions on implementing the EU Global Strategy in the area of security and defence*", 14149/16, November 14, 2016.

17 D. FIOTT, "Uncharted territory. Towards a common threat analysis and a Strategic Compass for EU security and defence", *European Union Institute for Security Studies* 2020, Policy Brief 16 (July), p. 5, <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2016%20Strategic%20Compass_0.pdf>, consulted on March 21, 2021.

as "*the ability of states and societies to reform, thus withstanding and recovering from internal and external crises*[18]". Thus, state and societal resilience to our East and South have been identified as one of the five priorities for the EU's external action. The other priorities are the following: building the Union's security, pursuing an integrated approach to conflicts and crises, supporting cooperative regional orders, and a commitment to a reformed multilateral rules-based system of global governance[19].

To understand the importance of expanding the scope of cooperation between the EU and neighboring areas, we should consider the definition of "*Security Community*" provided by professors Emanuel Adler and Michael Barnett. They argue that a Security Community consists of "*a Transnational region, comprised of sovereign states in which their respective people share some dependence on the expectation of recording any changes, and to resolve any dispute that might arise between them peacefully*[20]". The Southern area of the Mediterranean should be considered if we need to guarantee the state and societal resilience of the entire Mediterranean region and countries like Lebanon.

This security community and the element of perpetual peace of Kantian inspiration are the two concepts of security that the EU has embraced so far[21]. Peace has been, and remains, the cornerstone on which pivots the regional integration project, which represents the EU[22]. This issue will explain why the EU includes within its EUGS the potential interest of the Southern of Mediterranean for its security. Whatever the case may be, the EU's security interest cannot ignore the potential challenges and risks from this geographical area. Indeed, the EUGS clearly stated that "*fragility*

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18 EUROPEAN UNION, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", p. 23.

19 A. E. JUNCOS, "Resilience as the new EU foreign policy paradigm: a pragmatist turn?", *European Security* 2017, vol. 26, n° 1, p. 3.

20 E. ADLER and M. BARNETT, *Security Communities*, p. 30-34.

21 F. MOUSTAKIS and M. SHEEHAN, "Democratic Peace and the European Security Community: The Paradox of Greece and Turkey", *Mediterranean Quarterly* 2002, vol. 13, n° 1, p. 70.

22 "*Peace conceived as a democratic peace could be justified and interpreted in terms of normative reasons (cultural), and institutional reasons (structural)*". See: B. RUSSETT, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, Princeton, New Jersey, 1993, p. 38-40.

beyond our borders threatens all our vital interests[23]". Therefore, the goal for the EU consists in guaranteeing sustainable security in the Mediterranean area, which means that it should work towards greater European unity in adopting joint policies towards the region, including through flexible and open coalitions of member states.

Naturally, the EU would still face significant geopolitical risks, which swell on the other side of the Mediterranean. Political risk factors like terrorism, radicalization, organized crime, illegal migration, authoritarianism, geo-sectarianism, lack of protection of human rights and democracy, corruption, etc., can create a critical level of uncertainty, insecurity, and disorder, capable of affecting the EU's security interests. In this context, the EU should revisit the EU's security partnership with third states to determine how these countries will fit in the security framework of European goals. In doing so, the EU will expand the scope of the "*European Security Community*". What seems evident is that the EU must adapt to the region instead of trying to adapt most of its governments and peoples to its prisms.

Expanding the European Security Community's scope is becoming more critical than ever because the Eastern Mediterranean is becoming a contested area by the geopolitical competition among Great and Regional Powers. Indeed, we should bear in mind that the Levant is one of the subcomplexes within the regional security complex (RSC) of the Middle East[24]. It is within this specific RSC where we can notice different sets of dichotomies that can be helpful to understand why the FI towards Lebanon will have more chances to succeed if it involves the EU. For instance, and as part of the power distribution among actors, we notice the influence of the following dichotomies: "*anarchy*" versus "*integration*"; "*amity*" versus "*enmity*" and "*securitization*" versus "*de-Securitization*[25]".

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23 EUROPEAN UNION, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", p. 23.

24 The regional security complex (RSC) presented by Professors Barry Buzan and Ole Waever, is defined as "*a set of units whose major processes of securitization, de-securitization, or both are so interlinked that their security problems cannot reasonably be analyzed or resolved apart from one another*". See: B. BUZAN and O. WAEVER, *Regions and Powers. The Structure of International Security*, Cambridge University Press, Cambridge, 2003, p. 44.

25 R. H. SANTINI, "A New Regional Cold War in the Middle East and North Africa: Regional Security Complex Theory Revisited", *The International Spectator* 2017, vol. 52, n° 4, p. 97.

3. What does Lebanon represent for the European Union's security interest?

Due to its limited capabilities and institutional deficits concerning its projection of power and external influence, it is a mistake to think that the EU cannot play a vital role in stabilizing the Middle East in general and Lebanon in particular. Its interests and capabilities go beyond managing its chief concern, namely, to control the flow of refugees, even if few officials seem ready to enlarge their political scopes[26].

The Middle East is a highly securitized part of the world. It contains certain liabilities like religious radicalism, ethnic assortment, widespread terrorism, unfinished state-building projects, democratic deficits, repressive gender relations, major power patrons, strained resource base (water, arable land, and forest), substantially rich natural resources (oil and gas), growing poverty, large-scale human migration among others[27]. Therefore, considering the EU strategic compass, we can immediately identify how some of the EU state members share those liabilities[28].

On the 10th anniversary of the European External Action Service (EEAS), Mr. Javier Solana, the previous High Representative for the Common Foreign and Security Policy, clearly stated that to recuperate its presence, the EU should not abandon Syria or Lebanon. This statement defines and engages Lebanon as the main actor in European presence in the Middle East region. Towards that end, the role of the EU is more necessary than ever due to the current delicate situation. On the verge of total collapse, Lebanon faces not only the spillover effects of the Syrian war and the risk of being isolated, but the rekindling of an outbreak of a new conflict between Hezbollah and Israel remains all too real. Lebanon has to confront with a domestic situation marked by the absence of an effective government, weakness in state institutions, lack of efficiency of power-sharing mechanisms, the incidence of communalism and sectarianism, and the existence of several different insurgency movements that challenge the state's viability and encourage the increase of sectarianism. Lebanon faces three elements, like sectarianism, communitarianism, and insurgency, that

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26 M. BECK and T. RICHTER, "*Fluctuating Regional (Dis-)Order in the Post-Arab Uprising Middle East*", *Global Policy* 2020, vol. 11, p. 72.

27 A. SWAIN and A. JAGERSKOG, *Emerging Security Threats in the Middle East. The Impact of Climate Change and Globalization*, Rowmann & Littlefield, London, 2016, p. 1.

28 D. FIOTT, "Uncharted territory. Towards a common threat analysis and a Strategic Compass for EU security and defense".

coexist and lead to prevailing instability today. These are all elements that may seem to be similar but should not be conceived as being of equal weight or consequences. Everything pivots around the loss of importance of the state figure with its progressive weakness, which raises the question as to whether Lebanon is a "*Failed State*[29]". In the affirmative, this illustrates the fragility of the state that, in turn, facilitates the emergence of insurgent movements and terrorist groups. When these two kinds of political violence surface, a process of disintegrating of vital state institutions and the privatization of violence ensue.

Inasmuch, as national disaffection gains prominence due to the inability of the government to guarantee certain essential services like electricity, water, and garbage collection, what is even more problematic is to notice how the government can neither guarantee public order,which is the cornerstone of any rule of law nor retain a monopoly over the use of force. Therefore, the role of the EU in Lebanon concerning societal resilience, and the state-building process, as a "*set of actions undertaken by [the EU] to establish, reform, and strengthen State institutions where these have been seriously eroded or are missing*[30]", is more vital than ever. Both elements could be included in the second level of ambition aforementioned. Especially if we talk about corruption in Lebanon because it can undermine the "*implementation of policies, weaken the balance of power between the three branches of government, and erode the integrity of legislative and presidential elections*[31]".

Lebanon and the EU suffer from multiple transnational threats like terrorism, illegal migration, and hybrid threats like cyber and resilience issues. Common threats are justifying more than ever the necessity of increasing the cooperation at security and governance levels. Thus, Lebanon represents a good case study to think about in terms of what the EU can actually do, with what specific capabilities it can deploy, and with which local

29 D. ENDERS, "Lebanon year in review: Is the country a failed state?", *The National* 2017 (December 21), <https://www.thenational.ae/world/mena/lebanon-year-in-review-is-the-country- a-failed-state-1.689695>, consulted on April 7, 2021.

30 A. R. MENOCAL, "State Building for Peace: A new paradigm for international engagement in post-conflict fragile states?", *Third World Quarterly* 2011, vol. 32, n° 10, p. 1715-1736.

31 E. DRAPALOVA, "Corruption and the Crisis of Democracy: The Link between Corruption and the Weakening of Democratic Institutions", *Transparency International Anti-Corruption Helpdesk* 2019 (March 6), <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-and-Crisis-ofDemocracy_2019.pdf>, consulted on April 15, 2021.

actors it must get sustainable security for all parties. In this sense, Lebanon has shown to be a relatively responsive partner[32].

One of the most critical geopolitical risk factors that Lebanon is facing nowadays consists of managing the Syrian refugees' presence on Lebanese soil. According to the United Nations Development Program (UNDP), more than 1,5 million Syrian refugees are in Lebanon[33]. Due to this influx of a displaced population, Lebanon has become the country with the highest per capita concentration of refugees worldwide. The conditions of the Syrian refugees in Lebanon are not ideal despite the effort displayed by the Lebanese government. We are noticing lately that some problems like xenophobia, radicalization, social exclusion, corruption, etc., are harming the traditional resilience of the Lebanese population. If the international community does not carry on a proper support effort, then Lebanon will become a source of problems and political risks for the region and the strategy of the EU in the south of the Mediterranean may suffer both directly as well as indirectly for potential shortcomings.

Importantly, the partnership between Lebanon and the EU, which was contextualized through its European Neighborhood Policy (ENP) and revised in November 2015, only partially addressed these concerns. As the EU works with its Southern and Eastern Neighbors to foster stabilization, security, and prosperity — in line with the Global Strategy for the European Union's Foreign and Security Policy — much more was required. In order to evaluate the partnership between Lebanon and the EU, we have to answer what Lebanon represents for the EU's security interest and what Lebanon can provide to the EU's security policy. Finally, it is also important whether and to what extent Lebanon shares core EU's values[34].

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32 E. AOUN, "The EU and the Management of the Syrian Refugee Crisis in Lebanon", *Studia Diplomatica* 2015, vol. 68, n° 1, p. 50.

33 S. DAGHER, "Death by a thousand cuts: Syrian refugees face dire conditions as Lebanon unravels", *Middle East Institute* 2021 (May 3), <https://www.mei.edu/publications/death-thousand-cuts-syrian-refugees-face-dire-conditions-lebanon-unravels>, consulted on May 5, 2021.

34 T. TARDY, "Revisiting the EU's security partnerships", *European Union Institute for Security Studies (EUISS)* 2018, Brief Issue, n° 1 (January 30), p. 2, <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%201%20Security%20Partnerships.pdf>, consulted on March 19, 2021.

To answer the first question, and according to the EU/Lebanon Association Agreement[35], the agreement will provide more opportunities to market European products and services, attain and exploit resources, all to solve social and political problems. Indeed, thanks to this agreement, the EU can watch the situation of Human Rights, public governance, political dialogue, free movements of goods, economic cooperation, and institutional provision. The EU can also pursue its sustainable security strategy, its human security doctrine, its security sector reform paradigm[36], and its external projection as a peace project through its cooperation with Lebanon. Therefore, Lebanon is an essential partner in the southern Mediterranean because it may help resolve some of the most critical trans-Mediterranean challenges and political risks.

Concerning the second question focused on what Lebanon can provide to the EU's security policy, we have to remark that Lebanon is a very significant and loyal partner in their joint fight against terrorism by preventing radicalization, illegal migration, and organized crime. Lebanon can increase the control of the Euro-Mediterranean borders. Likewise, it can help the EU in the management of the Syrian refugees' migration into Europe. As a result, Lebanon participates in what became known as security compacts, which are becoming the best platform to guarantee cooperation in security and defense among the EU and the third states.

The level of ambition of the EU-Lebanon relationship will depend on the degree of Lebanon's commitment to shared values and its capacity to implement jointly agreed priorities in compliance with international and European norms and principles. In this sense, we can stress the compatibility of values existing between the EU and Lebanon regardless of the need for improvement of the latter. Indeed, Lebanon is one of the most similar states concerning sharing values. Democracy, Human Rights, pluralism, freedom of speech, tolerance, the rule of law, and division of power, can be labeled as shared values between Lebanon and the EU, even if most are now challenged by some officials who wish to distance Beirut from Brussels and the rest of Western civilizations. Therefore, the partnership relation and the EU's effort to improve governance, accountability, and transparency are worthy for both entities.

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35 EUROPEAN UNION, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy".

36 T. TARDY, "Tackling the challenges of SSR", *European Union Institute for Security Studies (EUISS)* 2016, Alert Issue, n° 14 (April 8), <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_14__TT___RY_.pdf>, consulted on April 15, 2021.

4. Implications for French Middle East Policy: From a non-reassurance approach to the French leadership in a concerted European cooperation

The French initiative is slowly becoming a nuisance for the French administration. The lack of trust and loyalty shown by some Lebanese domestic political figures has called into question France's leadership in a zone of influence considered traditional. French President Emmanuel Macron has shown his international mobilization and influence through several international conferences that have had no real impact due to the disloyalty shown by this political elite[37].

Be that as it may, the French initiative raises more questions than it answers, not just in terms of proposal specifics but rather about the geopolitical game that the Lebanese chessboard represents. We might think that President Macron is treading a dangerous path towards an unavoidable and undesirable *cul-de-sac*. This scenario could be explained by the fact that France is faced with a dilemma to solve. Indeed, it must decide to lower our standards and liberal democratic values for the sake of geopolitical interests[38]. At the same time, it must do everything possible to ensure that the other member states of the European Union are on board. If we consider the sequence of events, we can understand the suspicion and indifference that this French initiative aroused among several other EU partners. The French initiative was launched in an accelerated manner, not to say improvised, perhaps with a view to capture all the credit. It was when the initiative stalled that the French administration began to involve the EU more formally.

The question now is whether France is willing to move beyond its traditional reassurance approach strategy focusing on reassuring government partners in the region that their positions are not open to challenge[39]. In this sense, we could say that the French administration has given some signals that it is willing to go beyond the implementation of economic sanctions and restrictions on access to French territory, leaving the door

37 V. ANCHAL, "Lebanon's Failure Is Partly Macron's Fault", *Foreign Policy* 2021 (June 23).

38 A. SAMRANI and A. AJOURY, "Behind the scenes of Macron's failed gambit in Lebanon", *L'Orient Le Jour* 2020 (November 21), < https://today.lorientlejour.com/article/1241924/behind-the-scenes-of-macrons-failed-gambit-in-lebanon.html>, consulted on April 17, 2021.

39 C. LONS, "Une compassion très politique pour les Chrétiens d'Orient", *Orient XXI* 2016 (April 26), p. 14, <https://orientxxi.info/magazine/une-compassion-tres-politique-pour-les-chretiens-d-orient,1300,1300>, consulted on February 15, 2021.

open for new measures that could be even more drastic. For instance, and regardless of the continuous critiques exerted by Emmanuel Macron against the current Lebanese political elite, the measure against them could be diversified. Not only to ban the entrance of those opposing the formation of a government and suspect of practicing corruption but also to form a temporary international government to avoid the country's total collapse. Even concerning Hezbollah, Macron has recently stated that it will require a new strategy to combine coercion and dialogue[40]. Be that as it may, Lebanese citizens perceive the French initiative as yet another effort to keep the current political elite in power, which they continue to hold responsible for the problems that distress the majority of Lebanese citizens.

To increase pressure on the ruling economic-political elite, the French administration took the Lebanese case to the EU, intending to increase its pressure. This fact aroused some misgivings within the EU framework because it is hard to understand how France changed its strategy concerning its *modus operandi* in the Lebanese case. How is it possible to transform a failed unilateral initiative into a multilateral initiative with options under the EU umbrella?

Regardless of the outcome, what is clear from a geostrategic point of view is that the Lebanese case represents a unique opportunity to achieve a step forward in the EU's longed-for strategic autonomy. The problem is that France will most likely continue to implement a pure realist strategy in the MENA region where it will continue to show a somewhat paternalistic approach, where the importance of personal relations with heads of state (political elites) is paramount, and where it will continue to show a certain complacency when it comes to cooperating with authoritarian regimes[41]. This realistic approach in considering the MENA region as a scenario of geopolitical contestation between Great Powers will continue to allow France to punch about its weight given the level of independence it shows in the way it interacts with other Great Powers[42]. Moreover, France has

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40 THE DAILY STAR, "France's Macron says will need new approach on Lebanon", *The Daily Star* 2020 (March 18), <https://www.dailystar.com.lb/News/Lebanon-News/2021/Mar-18/518562-frances-macron-says-will-need-new-approach-on-lebanon.ashx>, consulted on April 7, 2021.

41 M. LAFONT RAPNOUIL, "Alone in the desert? How France can lead Europe in the Middle East", *European Council on Foreign Relations* 2018, Policy Brief n° 10 (April), p. 6, <https://ecfr.eu/publication/alone_in_the_desert_how_france_can_lead_europe_in_the_middle_east/>, consulted on March 17, 2021.

42 C. LONS, « Une compassion très politique pour les Chrétiens d'Orient », p. 7.

a historical background as a colonial power that undoubtedly facilitates its tactical and maneuvering possibilities and its ability to influence local, regional and international actors operating in arenas such as Lebanon. Perhaps the latter may explain the suspicion that France's conduct arouses in some EU partners that do not have the capacity for influence and leverage that France does.

Another argument that could be used to raise suspicion among EU members is that France would be willing in its geopolitical adventures to take advantage of EU assets such as reform support, migration policy instruments, development aid, and trade arrangements[43]. These resources would be used to gain more political leverage and influence in countries such as Lebanon. Such leverage would allow France to continue to exert its influence and increase its leverage without undermining both its preferences and geopolitical interests in the event of a disagreement. In this way, France would not have to deal with political costs and would continue to control its sphere of influence.

Concerning the latter, it should be noted that France continues to benefit from Britain's preference for bilateralism, Germany's lack of international assertiveness due to a lack of a clear interest in the regional framework, as well as Italy's and Spain's apparently unnoticed leadership when it comes to regional affairs. Moreover, when the EU does take certain risks and decides to use its geopolitical leverage, as in the case of reconstruction in Syria for example, France chooses not to take the reins of the situation, considering it contrary to its national interests. One way or another, when we talk about leverage, it is better to bear in mind that one thing is not to have the political will to use leverage, and another is not having such leverage. The EU, regarding issues like the Arab Israeli conflict, prefers not to use leverage when it supposedly should use it in order to put pressure on both sides to reach a potential solution[44]. Regrettably, the EU is still confronted by its perennial structural problem: a lack of political will, especially when we talk about the marginalized role of Human Rights in its external relations.

All of these factors continue to facilitate France's unilateral assumption of geopolitical responsibilities in a region as convulsive and chaotic as

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43 M. LAFONT RAPNOUIL, "Alone in the desert? How France can lead Europe in the Middle East", p. 24.

44 B. OPPENHEIM, "Can Europe overcome its paralysis on Israel and Palestine?", *Center for European Reform* 2020 (February), <https://www.cer.eu/sites/default/files/pbrief_paralysis_paestine_fin_26.2.20.pdf>, consulted on April 7, 2021.

the Middle East. The Libyan case is a clear example of the French *modus operandi* where it is not clear that France wanted to Europeanize its political initiative in such a scenario but rather the opposite. What this type of unilateral intervention in pursuit of particular interests produces is an increase in the perception that France is more obsessed with portraying itself internationally as an authentic global power than as an honest and full partner in the dynamics of regional integration and cooperation within the European security community[45]. A security community where the role of third countries with the European security architecture is more important than ever because of the origin of some of the transnational threats to the security of European citizens.

A good example that explains the lack of trust among EU member states was the 2013 French decision to establish an International Support Group for Lebanon, which was set up around a P5 format that, initially, did not include Germany, Spain, and Italy. This raised concerns within the EU framework that it was not clear whether France wanted to Europeanize its policies but, instead, wished to shape Europe « *à la Francaise*[46] ».

Both France and the EU have to confront a series of false dilemmas that in one way or another hinder the effectiveness of their actions in the Middle East. The first of these is the choice between security and democratic change. To date, and concerning the Lebanese case, France and the EU seem to be willing to sacrifice political regime change that could translate into a series of legal and political reforms that would considerably improve the democratic health of the country of the cedars. The second false dilemma would show how France and the EU would have to choose between cooperating with the authorities or cooperating with the extensive network of social groups. In this case and considering the latest visit of French foreign minister Le Drian, France would be willing to a more significant role to these social groups. The EU would instead opt for continued collaboration and cooperation with the much-maligned Lebanese authorities. The third and final false dilemma would be to choose between cooperation through multilateral or bilateral channels. In this case, it seems that France would continue to insist on a bilateral approach in the first phase of contact and a multilateral approach within the EU umbrella if necessary. The French initiative, as explained

45 France argued that as long as the EU does not have a single (but only a common) foreign policy, key member states can still legitimately aspire to take part in such formats.

46 G. E. YILDIRIM, "Deciphering France's Mediterranean and Foreign Policy against Turkey", *Insight Turkey* 2021, vol. 23, n° 1, p. 161-182.

above, would amply prove this dilemma. In this sense, if there are lessons to be learned, both France and the EU should lay their cards on the table and deal with these disagreements to make their actions, both individually and as a group, more efficient and legitimate.

Be that as it may, the French Initiative presents interesting signals that will allow us to ask whether France has decided to change its reassurance paradigm by opting for governance and democratization. The key question is whether France would be willing to go all the way in the transition to a new order, including military force, if the political strategy does not succeed.

The options remain open, but if the answer is yes, a commitment to democratic change at the expense of security and order will present an unflattering scenario in which elites would not only see their hegemonic position in jeopardy but could be expected to stage a whole range of subversive activities that would represent a real challenge for France and the EU.

The next question is whether France can lead the EU in the Mediterranean or envisage a scenario similar to the Libyan one where France and Italy support opposing sides. Indeed, it is not unreasonable to envisage a scenario in which, in the event of the disintegration of the Lebanese state authority and the *de facto* division of Lebanese territory, we see France supporting one side while other EU member states decide to support other local actors.

5. Conclusion

It remains to be determined whether France can save Lebanon alone. The so-called French Initiative could be understood as an attempt to regain French influence in the Eastern Mediterranean when another dynamic of geopolitical confrontation is being played out between Iran and the United States. In this attempt to regain an essential element in its traditional zone of influence, France must confront not only the false impression that this is yet another ploy to demonstrate a *de facto* French mandate over Lebanon but also to help resolve the dilemma between renationalization and efforts to facilitate a common European approach. In this sense, until France could Europeanize its policies in this geographical area, other EU member states will remain suspicious of the legitimacy and real intentions derived from its behavior as an EU member state. If France wants to continue fighting on a level that does not correspond to it, it will have to find ways to make the EU more assertive in its geopolitical behavior. Only then can there be a win-

win situation for both France and the EU. However, France must therefore learn to take the lead in European initiatives in the Mediterranean area.

As we have argued, if we need to understand how Lebanon can fit in the EU's security partnership, we need to reconsider the relationship between the EU and the MENA countries. Indeed, the traditional way of thinking based on attraction and repulsion cannot work anymore[47]. The EU's security interest and the Lebanese's security interest are somehow interconnected. For this reason, the scope of the European security community must be expanded for the benefit of the EU and third countries. Heretofore, the EU has been mainly reactive concerning the security challenges coming up from the Southern part of the Mediterranean. The fear of suffering another kind of "*Balkanization*" in this geographical area has obliged the EU to increase, even more, its level of solidarity. In this vein, relations between the EU and Lebanon cannot be too unequal because the partnership will not work in the medium or long run. We are discussing one relation between one security provider (EU) and one security consumer (Lebanon). The EU should treat Lebanon with special care because, as we discussed above, Lebanon can help the EU to guarantee its security interests. Lebanon can play an essential role for the EU in its fight against illegal migration, border protection, international terrorism, and several other pertinent concerns.

Cooperation between Lebanon and Europe can have different forms and scope but regardless of the form that finally shapes this relation, what is important is to improve and develop the potential of the European Neighborhood Policy (ENP) and bilateral agreements to reach a win-win situation. However, the danger will remain the implementation of bilateral measures such as the French Initiative, which arouses more mistrust than confidence among European partners. As discussed in this essay, unless France changes its traditional re-assurance approach towards a leadership position with concerted European cooperation, such initiatives will be limited in their effectiveness by the lack of commitment and trust shown by EU partners, as well as by the lack of cooperation from local actors that will continue to see the EU as an entity without leadership and political weight.

The partnership between the EU and Lebanon still has room for improvement, and it can be developed in the coming years because the country of the cedars can become a model of cooperation to be followed by other countries of the south of the Mediterranean. To do so, the EU should

47 G. CORM, La Nouvelle Question d'Orient, Editions la Découverte, Paris, 2017, p. 27.

change the well-known "*refugee diplomacy*[48]", which consists in proving that the EU is only doing something for a comprehensive and multidimensional diplomatic approach capable of addressing the root causes of regional turmoil. In this way, the Europeans will assume their responsibilities as peace and security actors in their neighborhood to avoid another big failure like the balkanization experience. In doing so, the EU will take advantage of the tool of crisis diplomacy to enhance its power projection and achieve certain diplomatic breakthroughs like the formation of the Lebanese government. Therefore, to not reach this kind of scenario, the EU must take advantage of the strategic compass and the renewed spirit of "*animus dominandi*" to become once for all the active geopolitical player that it wants to be. To do so, the EU should renew its commitment and political will at the international level to make sure that any initiative presented by one of the member states will be handled by the EU and not by particular member states regardless of whether the event belongs to its traditional zone of influence or not. Only in this way, will the EU act as a coherent, comprehensive, and geostrategic actor with a clear vision and credible capabilities.

48 W. MALEY, "R*efugee Diplomacy*", *in* A. F. COOPER, J. HEINE and R. THAKUR, *The Oxford Handbook of Modern Diplomacy*, Oxford University Press, Oxford, 2013. p. 678.

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Liability for damage caused to the elderly by robots: A French perspective

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Abstract

While the share of the elderly is structurally growing in Western countries, artificial intelligences are increasingly called upon to play a role in the service of this population whose vulnerabilities are reinforced. The question which naturally arises is about the responsibility of robots, which are gradually becoming more and more autonomous. Does French positive law already contain certain provisions intended to deal with any form of liability related to damages caused by these new devices? Should the law evolve, be changed? Or does it have sufficient instruments to face these emerging issues. This article aims to clear some aspects of this unprecedented and yet already very present questioning.

There are countless scientific studies dealing with artificial intelligence in the most varied of fields and every day, every week, every month, throughout the year, for years, since the beginning of the last decade, an endless flow of studies, research, papers of all kinds covering a wide range of fields of knowledge, has tumbled out onto websites and the pages of many journals. The phenomenon is global. It should be recognized that the greatest specialists agree that artificial intelligence – which we will be careful not to define as it refers to a very wide variety of realities[1] – is the new revolution, comparable to that of electricity, it goes beyond the advent of printing and surpasses the agricultural revolution. These assertions naturally suggest a major impact for the vast majority of Men who inhabit this old Earth.

However, and this is an important feature that should be highlighted, this new turning point in the history of humanity is coupled with other unprecedented upheavals that the greatest observers of our societies also point out. A particular one that holds our attention is the aging of the world's population[2]. On a global scale and over several centuries, our societies are advancing in age. In industrialized countries in particular, the elderly represent a growing share of the population and it is thus the fringes of our communities which are all being transformed, giving rise in new issues.

These major developments can be observed in France, each one raising new questions and even more challenges. These events are unprecedented in the history of mankind, as is the way they have combined together. On this last point, many of us see the darkest of scenarios. Some would even dispense with Man entirely. Others, on the contrary, have a humanistic streak, and see extraordinary opportunities[3] insofar as artificial intelligence could probably come to the rescue of our aging societies. The best of the new technologies could provide greater support for the elderly by promoting their autonomy and developing their capabilities[4]. These multiple futures are inherently uncertain and the years and decades to come may or may not see these different scenarios come to pass.

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1 However, see the site <https://www.hub-franceia.fr/>.

2 For data on Europe, V. Eurostat, "Population structure and aging", July 2019.

3 T. MAGNIN, *Thinking human in the time of augmented man*, *Facing the challenges of transhumanism*, Albin Michel, 2017.

4 S. BRUGÈRE and F. GZIL, "Aging and new technologies: ethical and legal issues", published in November 2019.

In 2021, robots[5] are already a daily reality. They are now much more present than one might imagine in the ordinary life of individuals. They may sometimes be burrowed away, but in other circumstances they come to light. They gradually intrude into every part of our lives. Despite being perfectly absent in some cases, they prove to be essential in others. This growing presence of robots raises many legal questions[6], in an area that has already been well plowed by lawyers[7].

The question of liability for damage caused by robots has already been addressed by some members of the profession and it seems that very little needs to be added on this subject at this stage of the development of robots in our companies. It will be observed that researchers often have a clear-cut opinion. Some feel that there is no need to initiate any special law. Others call for the emergence of a new branch of this science in order to create a corpus of suitable rules. Still others believe that the robot must be entitled to the status of subject of law and thus acquire legal personality, giving it a set of prerogatives; this in turn suggests the possibility of its being found responsible for damage for which it will therefore have to answer.

However, there has been little work on the hypothesis that robots can be the cause of damage to an elderly person[8]. This is unfortunate because these objects will certainly play an even more important role with regard to this category of the population[9]. For this reason, we propose to focus more specifically on hypotheses of damage caused to elderly people by robots that interact with them. This question seems to be of particular interest precisely because of the conjunction of the two mass phenomena that we have been able to highlight. In fact, more and more innovative technological devices are gradually being put in place to support the elderly, especially

5 We deliberately limit our study to robots, a particular form of artificial intelligence – not all robots are artificially intelligent – that can accompany and serve our elderly population.

6 It is the growing presence of robots that has led the law to take this phenomenon into consideration. In the absence of a robot, no legal questions arise since there is no relation to this subject. It is the introduction of the robot in increasing numbers and increasingly rapidly, that suggests the emergence of legal questions around the links that can be woven between the robot and its environment.

7 N. NEVEJANS, *Traité de droit et d'éthique de la robotique civile*, LEH édition, 2017.

8 A. MEYER-HAINE and J.-Cl. ESCARRAS, « Robots, personnes âgées et droit de l'Union Européenne », *Rev. de l'UE* 2019, p. 246 and *seq*.

9 Robots have already been specially designed for the elderly. For example, Mobiserv is a personalized companion robot for the elderly, also Giraffplus (www.giraffplus.eu).

those who are dependent. A very wide variety of technological solutions are emerging to serve this segment of the population, who are least versed in new technologies. This type of support robot is already appearing in France, but also in many other countries, and performing a wide variety of task. They are particularly intended for use in nursing homes[10], often to brighten up and enliven the daily lives of residents, and they are also gradually being introduced to assist caregivers[11]. The robot can prevent certain household accidents, identify and deter intruders and control access points such as open doors and windows. It works as a coach for seniors alongside retirement home staff[12]. These few examples are already a reality...

First, let us imagine Sandra, a humanoid robot, playful and boisterous, but perhaps a little too much so. We then see Sandra turn, set off, turn around, then disaster! Sandra drops Simone, 88, who was only visiting her old mother Emma, 108 years old and a resident in a nursing home. What will happen next? The day will come when robots cause harm to a user who is vulnerable due to his old age. The law will then seek to determine liability of each party. The situation that we propose to study is thus one in which a user[13] who is more fragile due to his age, suffers damage caused by a robot. The origins of the damage could be very varied: design error, programming, fall, collision, etc. This is then a faulty robot. However, damage can also be generated by a particular use of the robot[14].

In our opinion, this question of liability following damage caused by a robot is far from trivial. In fact, we believe that it plays a central role in the

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10 In France, we refer to an Accommodation facility for dependent elderly people – EHPAD.

11 Take the example of Robear, a Japanese robot that can help patients get up, stand, walk and can also carry them. This experimental robot is intended to alleviate the shortage of nursing staff in Japan. In a different vein but with a similar objective, the Robadom program has made it possible to design a "*butler*" robot capable of interacting with a person with a mild cognitive impairment in order to help him in his daily life by providing material assistance, psychological support and stimulation of cognitive abilities. The program also tested the acceptability and ease of use of this type of device.

12 Humanoid robot Zora.

13 We reject the hypothesis of an operator who suffers harm caused by a robot because we would then fall within the scope of labor law which is not the intended purpose of this exercise.

14 Criminalists will readily speak of an unintentional attack on the physical integrity of the vulnerable person, or more seriously, of reckless homicide. However, we will exclude criminal liability for this study.

use of these new technologies. Indeed, the risk of absence of responsibility or, at the very least, the uncertainties that could legitimately arise in such a situation, could result in a rejection of these technologies on the part of the population. For them to be acceptable, therefore, robots must take their share of the blame. Consequently, certain theories which predict a legal vacuum in matters of civil liability, especially in the presence of autonomous robots since manufacturers would not be able to control their evolution in the future, should in our opinion be revisited since they only favor hypotheses of irresponsibility which are traditionally rejected in our societies. In any case, in our opinion, this is a false debate. Even in the presence of an autonomous robot, there is always a human will behind any technical device, even if the device subsequently escapes human control[15]. We propose to examine to what extent our positive law is or is not already equipped with the appropriate rules for these damage hypotheses. In particular, it will be necessary to note the specificities of these new situations and to what extent our national law can effectively cope.

Because our law is elastic, it has on numerous occasions in the past been able to adapt to societal and technological developments. We believe that it will be able to adjust again, making some changes in these unprecedented situations[16]. Our aim is therefore to carry out a non-exhaustive inventory of the rules contained in current Legal Science and which could be mobilized to deal with a legal problem of this kind.

Classical law quite naturally requires us to imagine two very different situations. First, we consider that the robot causes damage to a vulnerable elderly person within the framework of an already existing contractual relationship. In this situation, the law of contractual liability is applied (paragraph 1). In a second situation, we imagine that the robot causes damage to a vulnerable elderly person outside of any pre-existing contractual relationship. In this situation, it is advisable to apply the law of extra-contractual liability (paragraph 2).

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15 We must still from the outset reject a thesis that may have emerged here or there and which advocates applying legal responsibility to robots; this would suggest recognizing that these objects have a legal personality. This notion, as attractive as it may seem, is in our opinion an artifice which should be rejected. We retain the *summa divisio* between subject and object and thus take our position from the Directorate General for Internal Policies of the European Commission.

16 All the more so as lawyers generally tend to reject the establishment of new legal standards to deal with new situations.

Paragraph 1. Damage caused by a robot and contractual liability

In this first case, a contract was concluded between the elderly person who suffered damage and another person who provided the robot. A link therefore exists between the two protagonists before the damage occurs. First of all, we must observe this convention, an expression of a common will. The existence of the contract justifies the use of contractual liability. Its content makes it possible to specify its foundations (A). It is then necessary to come back to the conditions for implementing this contractual liability (B).

A. The foundations of contractual liability

A contractual relationship exists between a vulnerable elderly person and an economic actor with whom he has entered into a contract. This can cover a very wide range of situations. We can imagine the provision of a companion robot at the home of the elderly person either by a local authority or by a private economic actor. We can also consider the use of a robot by the nursing home where the elderly person lives[17] or the use of a means of public transport which requires an assistant robot for certain actions. In all of these situations, the cause of damage to the elderly person would be the robot. From the outset, it is possible to consider that we have a form of failure in the performance of the contract. The counterparty has not delivered one of its obligations, for instance not harming the physical integrity of the elderly person.

This obligation not to do something can be set out in a contract, whether it is named or unnamed. Its purpose does not matter. The obligation may be tacit. In this case, it will be a safety obligation incidental to a main contractual obligation requiring the professional debtor not to create a danger to human health. However, this obligation will generally be expressed and even sometimes essentialized[18], unless it is considered essential by the judges, so clearly is it an obligation in terms of common sense. In our opinion, the wording of the obligation not to do something is of little importance and can be concise. It could be very directly inspired by Asimov's 1st law of robotics: "*A robot may not injure a human being or, through inaction, allow a human to come to harm*".

17 A residence contract will then have been signed between the elderly person and the EHPAD.

18 The parties always have the possibility of "*determining the means of their happiness*" – a famous formula attributed to J.-J. DE CAMBACERES.

In this contract, the parties may also set out their rights and duties in the event that damage is attributed to a robot. One or several special provisions relating to damage caused by robots that have a certain autonomy could be inserted into the general conditions of this type of agreement. We will recall here the principle of legality of these contractual arrangements based on the will of the parties. This being said, it is difficult to imagine a hypothesis of limitation of professional liability, and even less of cases of non-liability of the professional. Indeed, the issue we are facing is an essential obligation, in addition to professional liability. In order to correctly define the rights and duties of each party in the event of an accident, specific insurance could be taken out by the professional in order to overcome this risk. This additional contract could be brought to the attention of the other party, unless the parties prefer to append it to the main contract.

By noting a disconnection between this rule of the parties and the reality which presents itself to them, the judges will use the legal instruments traditionally called upon in such circumstances. Because the non-compliance with the obligation is irreversible, because the damage is not in the future but already present, the action for execution, the exception of non-performance or the resolution for non-performance are not appropriate tools to repair the damage[19]. Only the questioning of contractual liability is appropriate.

Traditionally, there is non-compliance with the obligation when one finds either non-performance or improper performance. There can be no doubt that the damage caused by a robot to an elderly person constitutes non-performance or poor performance of the contract. In this context, the co-contracting party, here an elderly person, can obtain compensation for damage suffered from the person who has an obligation of care and attention to him and with whom he is bound by a contract. The elderly person simply has to ensure that they comply with the standard conditions for implementing contractual liability.

B. The conditions for implementing contractual liability

The violation of the contractual link has the consequence of bringing into play the contractual liability of the party who has not fulfilled their obligation. The obligee of the unfulfilled obligation must report the existence of fault, damage and a causal link. Contractual liability can then be implemented.

19 Resolution for non-performance could still be used in conjunction with contractual liability action.

In general, a contractual fault is a distortion between what was fixed in the contract and what occurs. With regard to an elderly person, we will tend to consider that the co-contracting party has an obligation of result[20] here, insofar as the elderly person – like his entourage – cannot accept the existence of doubt regarding the fact that the robot does not hurt the person. This is even an obligation of security of result, which has long been equated with an obligation not to do something. There is here a certainty of the expected result. This qualification is not neutral. It gives rise to the presumption of a fault which could only be ruled out by proof of force majeure. But we could also drift towards an obligation of guarantee which leads to automatic liability, including in the case of force majeure. The description of the obligation may be specified in the contract in order to avoid uncertainties of praetorian law, but it is quite possible cannot be excluded that because of the imbalance between the parties, both economic and informational, the judges may decide, on their own that this obligation could be reclassified.

The exemption hypotheses should not be swept aside but, in our opinion, they are not significant. The co-contracting party who is accused of failure to comply with his obligations may attempt to prove that the elderly person is the sole source of the fault that caused the damage or even that he is in the presence of a case of force majeure. It will also be necessary to determine whether the fault should be qualified as voluntary, serious or simple, or even slight. Again, this characterization of the fault is not trivial. It has side effects such as the exclusion of any legal or conventional limitation of liability, allowing full compensation. At this stage, in the absence of dedicated case law, we are probably looking at fault defined as serious[21].

The origin of the breach must still be questioned. On this point, two hypotheses can be constructed:

– We may find vicarious contractual liability. Given the context, some might consider that the robot could be qualified as an agent of the debtor or an auxiliary of the debtor. However, these qualities can only be recognized in a subject of rights and not in an object of law. As the robot is currently not granted legal personality[22], it must be

20 The obligation not to do something has always been considered an obligation of result; C. civ., art. 1145.

21 Lack of intention to commit a fault which is nevertheless gross in that it reveals the inability of the perpetrator to carry out his duties.

22 At least to date, despite the resolution adopted on the basis of the Mady Delvaux report, containing recommendations to the European Commission concerning civil law rules on robotics, 2015/2103 (INL), 27 Jan. 2017.

considered that this regime would apply specifically to the employees of the co-contractor. The agent is the employee, whose faults are attributable to the debtor of the obligation, while the auxiliary of the debtor is the person he calls on to enable the proper performance of the contract; this is the case of the subcontractor, the service provider for whose breaches the debtor is held liable. Case law will consider without prejudice, that the acts of these third parties are deemed to be those of the debtor himself, including in the event of gross negligence elsewhere. And it seems to us true that the presence of a robot as the cause of the fault is not important and rather suggests that we direct our work to the contractual responsibility for the fact of things.

– In this other area, case law is established. The debtor is responsible for things that he does to fulfill his contractual obligation. Starting from the observation that the robot is a thing, whether it is animated or not, autonomous or not, we can legitimately consider that the praetorian law, which is very developed in this field, can be transposed without any difficulty to the robotic thing. Indeed, the robot, whatever its qualities – and its faults – in no way, calls into question the responsibility of its author.

It is generally assumed that damage consists in the failure to perform the obligation owed to the debtor. In this case, the fact that the robot caused damage to the elderly person constitutes in our view this non-performance. Contractual damages may be due for the prejudice suffered by the elderly person. These will be compensatory damages that repair the damage caused by the irremediable failure of the debtor. Several kinds of damage can be noted:

– Material damage, property damage. In this case, some of the elderly person's belongings will have been damaged or destroyed. Here, we can imagine any type of deterioration of his property.

– Non-pecuniary damage, emotional damage, can be an attack on the honor, modesty or affection of the elderly person[23] and must also be able to be dealt with.

23 The question of the loss of the robot has already been addressed and it seems certain that the elderly person could obtain damages due to the… premature disappearance of the robot.

– Bodily injury that takes the form of personal injury, whether bodily injury or moral injury (deterioration in well-being) can also be noted.

All such damages give rise to the right to compensation, in accordance with art. 1231-2 French Civil Code. The fact that the damage was caused by a robot has, in our opinion, no impact on the existence of this damage. What is meant here is the damage without positive law taking no account whatsoever of the instrument which caused this damage. It must be predictable when drawing up the contract.

Finally, a causal link must be reported. In this case, the damage suffered by the vulnerable person must have been directly caused by the robot. Positive law generally refers to direct damage, an immediate consequence of the non-fulfillment of the agreement. In some cases, a plurality of causes can be identified: several facts combine to create the damage. This could be the case, for example, of an elderly person pushing the robot. In such a case, we could then move towards a sharing of responsibility, with the proportions decided by the judge. But here the question arises of the vulnerable victim's awareness. Judges do not usually take this into consideration. What will happen to a vulnerable, dependent or even fully assisted person? Should there not be some limitation in place when considering the degree to which the victim is at fault? Only the diversity of the hypotheses will make it possible to determine such changes in the praetorian law.

As long as these three conditions are met, one can imagine a remedy which, in the presence of an obligation not to do something, takes the form of damages, with any other form of reparation being impossible by definition. The reparation must be complete and correspond to the damage assessed on the day of the debtor's final conviction, as in matters of extra-contractual liability.

Paragraph 2. Damage caused by a robot and extra-contractual liability

We must all answer for our actions. More particularly, when we cause damage to others through any act considered anti-social, article 1240 of the French Civil Code requires us to make reparations. In these countless situations, there is no connection between the perpetrator and the victim of the damage. For centuries, this tort liability has been based and then developed on the idea of fault. In this respect, art. 1240 of the French Civil Code clearly expresses the philosophy of guilt and reparation in civil

matters. Other provisions were added to complete this formula and for a long time they proved sufficient. However, with the growing development of technology from the end of the 19th century, throughout the 20th century and still today, there has been a proliferation of accidents and damage, the causes of which are not always obvious. Hence the deployment of special compensation systems dedicated to hypotheses born out of extraordinary developments in our societies.

In our case, in the presence of damage caused to an elderly person by a robot managed by another person with whom the victim has no connection, personal liability can quite naturally be invoked (A). But liability for defective products could just as easily be invoked (B)[24], it being noted that this can also be used in the presence of a contractual relationship.

A. Recourse to liability for the act of things

Here, we examine the situation in which an elderly person is the victim of a robot held by another person with whom he is not bound by any agreement[25]. In this case, the victim has an option. He may decide to call into question the liability for the personal act of the person who caused the damage. We refer to this as personal responsibility[26]. However, the fault will then have to be proven by the victim. In reality, in the situation under consideration, the victim will often favor an action for reparation based on general liability for the facts set out in Article 1242, para. 1[27] of the French Civil Code, as case law generally favor this basis when the two articles 1240 and 1242 have been invoked[28].

Observing therefore general responsibility for the fact of things, it will be noted first of all that the courts have an extensive approach to the concept

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24 We could focus on other types of tort liability also likely to be used such as, for example, traffic accident liability - law of July 25, 1985, unless this type of responsibility has to change rapidly, especially with the advent of self-driving cars, which can be driven by older people.

25 In the event that the robot causes damage to its elderly guardian, liability for defective products will be preferred.

26 C. civ., art. 1240.

27 «*We are responsible not only for the damage we cause by our own doing, but also for the damage caused by the actions of the people for whom we are responsible, or the things we have in our care*». (C. civ., art. 1242)

28 N. NEVEJEANS considers that this is probably the most suitable foundation. V. in this sense N. NEVEJANS, *Traité de droit et d'éthique de la robotique civile*, p. 603.

of a thing[29]. And indeed, automatic machines have long been associated with this great "*family of things*". Returning to the praetorian law in this area, note that only goods that fall under a special regime of responsibility for the act of things[30] or things without an owner[31] are excluded. Thus, we will make no distinction according to the nature of the thing between a piece of furniture and a building[32] between things operated by the hand of man and things endowed with their own dynamism or affected by an inherent defect which caused the damage. A robot causing damage fits easily into these different categories, whether it is movable or immovable, operated by the hand of man or not, with or without its own dynamism. The variety of situations in which the robot would be likely to cause damage seems to have already been discussed so many times by the courts that the robot can easily be viewed as a thing like any other. Thus, we can consider that in the presence of a robot, the law does not seem to require adapting in any way and that the condition of the victim, especially his great age, is of no consequence.

Concerning the guardian of the matter, as we have noted that the robot cannot be defined other than via analyses whose foundations definitively escape us, it is a question here of recalling the jurisprudential construction of the past century and repeating the view of our predecessors, i.e. that the person in charge is not so much the owner but the person who has power of use, direction and control of the thing. This being the case, we can estimate that in certain cases, the robot has its own dynamism. It will then be necessary to find out whether it is the guardian of the thing or the owner of the thing that has responsibility[33]. Whichever is the case, one cannot exonerate oneself by showing that one has not committed any fault. At the most, one can demonstrate a case of force majeure to exonerate oneself from responsibility. The question of the victim's fault probably deserves some digressions because we are dealing with a victim who has certain vulnerabilities. This being the case, because the elderly make up a significant proportion of the national community, and insofar as this proportion is likely to increase, we

29 "*The provision of s. 1st of art. 1384 anc. [1242 new] is absolutely general*". Cass. ch. req, March 6, 1928, *DP* 1928, I, p. 97, note Josserand.

30 L. n° 85-677 of July 5, 1985 aimed at improving the situation of victims of traffic accidents and speeding up compensation procedures, known as the Badinter law or the law of July 5 1934 relating to collisions in inland navigation.

31 There remains the hypothesis of *res nullius*, the abandoned robot without a master. To be explored but marginal due to the very residual value of the property.

32 Hypothesis of a robot fixed to the ground and thus defined as a building by destination.

33 In this case, the manufacturer.

can estimate that the hypotheses in which one would recognize a fault by the victim related to his age should be significantly reduced.

The problem of autonomous robots is still lying in wait for us, and many authors are currently debating this issue. However, we consider that control over this type of robot is maintained by the sole effect of the initial will of the guardian. Some wonder about a possible assimilation of robots to animals, thus invoking article 1243 of the French Civil Code[34], which would suggest a plasticity of praetorian law and at the same time of the notion of animal... We admit that we can be versed in this argument. Finally, some authors propose the creation of a specific provision relating to autonomous robots and submit article 1243-1 to cover this subject. For our part, we consider that article 1242 of the French Civil Code is more than enough: control over the robot is maintained although the robot is autonomous by virtue of the initial will of the guardian. The case law gradually built up over the centuries in this area has made it possible to highlight the extensible nature of art. 1242 and we believe that this provision should easily adapt to accidents caused by autonomous robots.

In our view, this does not exclude the establishment of a dedicated law in the years to come, probably in order to set up a no-fault liability system due to the need to move towards a form of guarantee of compensation. In a way, whoever manipulates a robot would have to guarantee the damage that may result from it, especially since compulsory insurance would be in place. It is likely that our societies will move more and more in this direction as robots are introduced into our lives, and the elderly will thus benefit from automatic protection, which will be no different from that enjoyed by other citizens. Until then, however, the legal arsenal at our disposal seems to be adequate.

A causal link should be identified between the robot act and the damage. On this point, the courts demand that the thing is the instrument of the damage, if only in part, and that the robot thus materially intervened to produce the damage[35]. However, we generally distinguish between three main scenarios:

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34 Interview with N. NEVEJANS; for an approach in this direction, V. Responsibility of robots: "Let's apply our rules of law!", *Le Point.fr*; April 11, 2017.

35 It is now agreed that contact between the thing and the victim is not necessary; V. in this sense Cass. civ., Jan. 22, 1940, *Poyet*, *S*. 1940, 1, p. 19; *DC* 1941, p. 101. The robot may therefore not have touched the elderly person.

- Either the thing is inert, and it is quite possible to imagine that a robot is attached to an immovable property. In this case, the victim must provide proof of the material intervention of the object in causing the damage. The elderly person will thus have to prove that the robot was in an abnormal position or that it was in poor condition. We can consider that the robot which would have to be fixed in an environment where there are elderly people, should be placed in a secure area, specially designed to avoid any impact with this more fragile public, who are more dependent and likely to pay less attention to their surroundings. In the case of an environment especially for the elderly, could these robotic objects not have to meet certain technical standards which would make it possible to limit accidents? And conceivably the manufacturers of robots that meet these standards would be in a favorable situation in the event that their liability was called into question.
- Or the thing is in motion and has come into contact with the elderly person. It is then presumed to be the cause of the damage. The elderly person benefits from a presumption and they have no additional evidence to report, except that of the contact between them and the robot. The assumptions of an active role on the part of the robot can easily be conceived and the elderly person will thus, given the current case-law construction, already be protected.
- Or finally, the thing is in motion but has not come into contact with the elderly person. In this case, the presumption of responsibility cannot be applied. The victim will have to prove that the thing was in some way the instrument of the damage. This will be the case, for example, when the robot has collided with something that has been thrown at the elderly person. Also, when the robot appeared before the elderly person without warning and surprised him so much that it caused him some damage.

In the light of these few reflections, it seems that the whole of the praetorian construction in the field of responsibility for the fact of things should be able to be transposed without difficulty to the situation that we are putting forward. With just a few adjustments, this liability law should be able to accommodate these assumptions[36] and the age of the victim could

36 Report National Strategy in Artificial Intelligence, Artificial Intelligence and Legal Issues, Contribution of subgroup 3.2.B to working group 3.2, "Anticipating the economic and social impacts of artificial intelligence", March 2017, p. 11.

possibly be taken into account in some very specific cases where the robot should have been less exposed to these people.

Ultimately, does the robot not cope very well in these various situations? We are convinced of it. The field of liability for defective products is another area in which accidents with robots can naturally be approached.

B. Liability for defective products

Article 1245 of the French Civil Code states that "*the producer is liable for damage caused by a defect in his product, whether or not he is bound by a contract with the victim*". At first glance, although it also concerns the hypothesis of damage caused within the framework of a contractual relationship, this special regime, which has recently appeared, seems to be perfect for our case, mainly because of the wide scope of the word "*product*". It is also strict liability regime which essentially relates to the notion of default. That said, the question arises, which has already been addressed by some members of the Doctrine, as to whether the law of May 19, 1998, resulting from the transposition of the European directive of July 25, 1985, is likely to include robotic products which one would find that they are defective. For this case, several points must be clarified.

It will be noted first of all that the question of the responsible person is not directly relevant to our study. Indeed, whether the person in charge is the producer, the economic actor who manufactured the product, or a similar person such as the seller or the professional lessor, this does not affect the issue[37]. In all cases, the responsible person will be the supplier of the product. The issue surrounding his responsibility will therefore not depend on his status nor on his relationship with the victim. As for the victim, by convention it is considered that he must be a consumer or a professional user. No mention is made of a person who stands out because of their age. Consequently, the elderly are not specifically provided for by these provisions and any attention that may be paid to them will depend on the posture of the jurisdictions which do not usually categorize victims on this basis.

Art. 1245-2 of the French Civil Code specifies the concept of a product which must be understood as any movable property, even if it is incorporated

37 This does not exclude the question of the distribution of responsibility between the various actors involved with the robot (manufacturers, installers, actors in charge of maintenance).

into a building, including products from the soil, livestock farming, hunting and fishing. A robot seems to fit into this very loose category of products without any difficulty, provided it is defective. In this regard, it will be up to the victim to prove the damage, the defect and the causal link between the defect and the damage. The question of damage[38], like that of the causal link[39], has no specific features relating to this regime. Common liability law will be the reference. It is therefore necessary to focus more particularly on the security flaw in the robotic product. It is now widely recognized that this security is something that can be legitimately expected. This robot safety could, for example, be stipulated in a technical standard, although compliance with technical standards is not exempt from all liability[40]. However, this compliance remains a way for the producer to limit the extent of his responsibility and expresses his good will[41]. But is it not possible that this security could be different depending on the expected uses of the robot? Thus, when robots are used for and by vulnerable elderly people, can we not imagine that the security that we should be able to expect would be enhanced? This assumption should not be overlooked and is also currently being studied by certain national and regional standardization bodies which are working on drafting standards around AI. For example, it could be stipulated that the producer of the robot would be obliged to provide the user with specifically adapted information, which is easily understandable with the systematic use of pictograms. We could also imagine that robots that are able to move are systematically equipped with sound, light and even odorous warning devices. All of these additions would help improve identification of the robot and thus ensure that it is better detected by the elderly.

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38 This damage must be proved by the victim – art. 1386-9. All damages are considered here (material, moral and bodily injury) and it is not possible to limit this liability, at least not between a professional and a vulnerable elderly person. Put simply, it will be specified that the damage caused to the vulnerable elderly person will be the subject of full compensation, while the material damage can only be compensated from the moment the amount exceeds € 500.

39 Its existence will have to be reported by the victim.

40 Art 1245-9 of the French Civil Code provides: "*The producer may be liable for the defect even though the product has been manufactured in compliance with the rules of the art or existing standards or that it has been subject to administrative authorization*".

41 See our work *Articulation between the technical standard and the rule of law* (Preface by J. SCHMIDT), ed. PUAM, 2003, p. 203 and 204.

However, art 1245-13 which states that the producer's liability towards the victim is not reduced by the action of a third party who contributed to the damage, cannot be used, not even in the event of the robot being assimilated by some to this third party. Other exemptions from liability remain possible but they are the classic exemptions such as, for example, the hypothesis of a lack of circulation of the robot on the market as it was not intended for sale, fault on the part of the victim assimilated to a case of force majeure or a three-year prescription from the time the victim knew of the damage.

Based on these few reflections, starting from the premise that we are likely to witness an increase in situations where the elderly are confronted with robots, it is safe to say that hypotheses relating to liability will multiply. Although at first sight the positive law appears to have been adapted, it will probably be appropriate in the not-too-distant future to initiate a general discussion on establishing a legal derogation system[42] which should tend towards automatic compensation, a system of insurance which dispenses with the search for fault. However, we would then switch to a rationale of spreading the burden of responsibility giving rise to an unprecedented use of insurance and guarantee funds, what is occasionally called a form of risk socialization. Other avenues are just as desirable, such as the field of soft law with national and international standardization bodies that could develop standards for robot use[43].

42 As was done for traffic accidents.

43 In this case, this is not really a "*futurible*". Standardization bodies have already embarked on this work and there are defining standards, such as the one on safety requirements for personal care robots - ISO 13482: 2014. This standard deals with physical contact between robot and person, and defines the terms

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De Véronèse à Jean-Paul II : une proximité et une altérité / From Véronèse to John Paul II: proximity and otherness

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Abstract

From Veronese to John-Paul II: a proximity and an alterity, is a study that treats the comprehension of the contemporary debate and the position of the Catholic Church concerning the artistic and liturgic expression and all relational difficulties between the art and the church, based on a legal document from the 16th century.

This legal document is the proceedings of the Court of Inquisition following the interrogation of the painter Veronese on Saturday July 18, 1573.

The painter is condemned for having profaned the religious art. Based on this approach of proximity and alterity, Veronese divided his painting between the sacred where he included Jesus and the apostles and the profane, where he drew the heretic Germans.

This situation cultivates an ambiguity between cultural and physical proximity and alterity, exceptional, with the different chronological periods, since the Antiquity passing through the Medieval, the Modern, until the contemporary.

Keywords: the alterity, the proximity, the Last Supper, the judgment.

Notre étude est une contribution sur la compréhension du débat contemporain et la position de l'Église catholique concernant l'expression artistique, liturgique et toutes les difficultés relationnelles entre l'art et l'Église, entre religion et art à partir d'une œuvre artistique et un document juridique du XVI[e] siècle. L'œuvre picturale est une immense toile de peinture, réalisée en 1573 par le peintre Paolo Caliari, né à Vérone, dit Véronèse (1588-1528). Aujourd'hui, l'œuvre est conservée au musée de l'Academia à Venise.

Le document juridique est le procès-verbal du Tribunal de l'Inquisition suite à l'interrogation du peintre Véronèse le samedi 18 juillet 1573. En effet, l'artiste vénitien fut appelé au Saint-Office, par-devant le Tribunal sacré afin de répondre aux accusations portées par les pères dominicains du couvent Saints Jean et Paul contre le peintre et son refus de remplacer les figurines animales par la figure de Marie-Madeleine, dans l'œuvre picturale, réalisée suite à une commande[1].

C'est dans un contexte politique, social et religieux extrêmement critique et tendu que naquit le scandale de cette toile et le jugement qui en résulte. Sur le plan politique la République de Venise perdit de son pouvoir et de sa domination économique. Sur le plan religieux, la seconde moitié du XVI[e] siècle fut le théâtre de tensions terribles entre catholiques et réformés protestants. Au niveau de l'expression artistique religieuse, elle fut marquée par un regain d'une double censure de la part des autorités religieuses catholiques et protestantes.

Dans ce climat de polémique et de querelle à tous les niveaux de la vie quotidienne, le réformateur protestant Martin Luther (1483-1546) opposa à l'Église catholique de Rome une révolution de l'image. D'ailleurs au cours de la Réforme, tous les protestants ne considérèrent pas les images comme des idoles. Seulement, les images de celles que nous mettons à la place de Dieu. Ainsi, dans l'Ancien Testament, Dieu n'interdit que les images cultuelles, qui pour Luther devaient continuer à être interdites ou mieux, à perdre leur fonction[2]. Le luthéranisme par exemple était favorable à la transmission de la foi par l'image. Ainsi, la Réforme s'appuya non seulement sur le texte biblique, mais aussi sur l'image comme un outil capable de transmettre et de diffuser efficacement les nouvelles idées. L'artiste Albrecht Dürer

1 V. le procès-verbal dans C. YRIART, *Patricien de Venise au seizième siècle*, E. Plon et Cie Imprimeurs et Éditeurs, Paris, 1874, p. 439-442.

2 H. BELTING, *Image et culte. Une histoire de l'image avant l'époque de l'art*, Les Éditions du Cerf, 1998, p. 617.

(1471-1528) qui embrassa le protestantisme fut par son talent l'ultime support à la propagation de la foi protestante. Donc, dans ces temps modernes, nous pouvons déceler deux types d'images : adoration et propagation de la foi[3].

Pour l'Église catholique qui adopte la création comme outil d'adoration et de propagation, la censure des images fut nécessaire. Elle visait le contrôle de la pensée, et ainsi tout écart visible vis-à-vis du dogme devait être immédiatement corrigé. Les images représentent un moyen solide de discipliner le peuple des fidèles. Hans Belting affirme que : « *la politique des images tout comme leur présentation, sont conçues sur un ton expressément défensif, voire agressif […]*[4] ». Il faut mentionner qu'au XVI[e] siècle, l'image est une affaire de l'Église tout entière dont dépend fortement son identité, d'où le zèle quasi militant des ordres de l'Église romaine dans leur pratique.

C'est ainsi qu'en 1573, les religieux dominicains du couvent Saints Jean et Paul de Venise passèrent une commande pour leur réfectoire : une *Cène* destinée à remplacer un tableau précédent auprès du peintre vénitien Titien (1488-1576). Cette dernière fut détruite lors d'un incendie. Les Pères s'adressèrent alors à l'un des principaux et célèbres peintres de la ville de Venise, Paul Véronèse (1528-1588). Cette commande était pour le peintre le prétexte pour recréer le luxe et l'abondance de la réalité quotidienne de la vie mondaine de Venise, dans de vastes scénographies peuplées de personnages et d'animaux aux attitudes pittoresques durant un banquet[5]. Il fallait donc des toiles immenses et coûteuses. En conséquence, « *l'unique possibilité réside dans les commandes religieuses qui favorisent les deux thèmes de la Sainte Cène et des Noces de Cana pour la décoration des réfectoires monastiques*[6] », note Marie Viallon.

La fiche technique et le thème de l'œuvre sont donnés par Véronèse lui-même lors de son interrogatoire. À la question des juges sur le tableau, Véronèse répondit : « *C'est le tableau représentant la dernière cène que fit Jésus-Christ avec ses apôtres dans la maison de Simon* ». C'est une toile qui se trouve dans le réfectoire des frères des saints Jean et Paul. Les dimensions de cette

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3 H. BELTING, *Image et culte. Une histoire de l'image avant l'époque de l'art*, p. 617.

4 *Ibid.*, p. 652.

5 Dans le carnet artistique de Véronèse huit œuvres sont de type scène des noces et de banquets : en 1559 il réalisa *La Sainte Cène à Emmaüs* ; en 1560 *La Sainte Cène chez Simon ;* en 1563 *Les Noces de Cana* ; en 1570 *Le Repas chez Simon* ; 1572 *Le Banquet de Saint Grégoire le Grand* ; en 1573 *Le Repas chez Simon* ; en 1573 *Le Repas chez Lévi* ; en 1580 *Les Noces de Cana*.

6 M. VIALLON, *Véronèse : noces et banquets*, Publications de l'université de Saint-Etienne, Juillet 2004.

toile sont données en pieds de mesure ; en hauteur : « *Il peut mesurer dix-sept pieds* », et en largeur : «*Trente-neuf environ* ».

La Cène est présentée dans le cadre luxueux des festins vénitiens. Le tableau figure le dernier repas que le Christ a pris avec les apôtres le soir du Jeudi saint, avant la Pâque juive, peu de temps avant son arrestation, la veille de sa crucifixion et trois jours avant sa résurrection. Après y avoir mangé la Pâque avec eux, Jésus institua l'eucharistie. Saint Mathieu, le *Levi* (Lévi est le nom donné par saint Marc et saint Luc à saint Mathieu) décrivit la scène :

« *Or, tandis qu'ils mangeaient, Jésus prit du pain, le bénit, le rompit et le donna aux disciples en disant : "Prenez, mangez, ceci est mon corps". Puis, prenant une coupe, il rendit grâces et la leur donna en disant : "Buvez-en tous ; car ceci est mon sang, le sang de l'alliance, qui va être répandu pour une multitude en rémission des péchés*[7]*"* ». Autour d'eux, une foule de personnages vêtus à la mode italienne du XVI[e] siècle s'affairent à diverses tâches dans l'indifférence la plus complète.

Pour Marie Viallon, cette peinture « *est un hymne religieux à l'eucharistie*[8] » mais dans l'apparence d'un somptueux banquet de noces ou de dîner. Remigio Marini reproche à Véronèse une illustration profane d'un thème évangélique sacré[9]. Mais dans la tradition vénitienne de la Renaissance la beauté créée sur une toile est un fragment du monde divin et du monde profane. Le pape Jean-Paul II disait :

> « *Tout ce qui est contenu dans la notion de beauté est aussi contenu en Dieu. Les créatures – les œuvres de la nature, les œuvres de l'homme, les œuvres d'art – contiennent seulement une lueur, un reflet, un fragment – si l'on peut-dire – de la beauté*[10] ».

Sur le plan esthétique, la structure de la toile est bien précise. Elle est sobre. La distribution spatiale est mesurée. Un équilibre pictural est établi entre les personnages et l'espace. La distribution des éléments dans l'espace est structurée. Véronèse place le Christ et ses apôtres sous trois grandes arcades probablement inspirées du grand architecte vénitien de la Renaissance Andrea Palladio (1508-1580) lesquelles, tel un décor théâtral, servent à la mise en scène. Ainsi, la *Cène* n'a pas lieu dans une auberge de

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7 Mt 26, 26-29.

8 M. VIALLON, *Véronèse : noces et banquets*.

9 R. MARINI, *Veronese*, Rizzoli, 1968, p. 105.

10 K. WOJTYLA, *L'Évangile et l'Art*, Salvator, 2012, p. 30-31.

Palestine comme le décrit l'Évangile, mais dans un riche palais italien, d'architecture classique de la Renaissance.

Le Christ est entouré de saint Jean, de saint Pierre et des autres apôtres. Face à eux Judas et Mathieu en position symétrique. Sous les arcades les apôtres sont entourés d'une foule de serviteurs. Malgré l'abondance de personnages la composition montre qu'il s'agit bien du dernier repas du Christ avec ses apôtres.

À gauche de la composition, Véronèse s'est fait représenter en autoportrait, en personnage en tenue verte. Tous les personnages dans la composition sont reliés entre eux par un geste ou un regard. Le peintre aimait saturer l'espace de personnage et créer des groupes d'opposition (un profil régulier contre un profil camus, un pâle cuisinier contre un visage africain, etc.).

Dans cette scénographie, les effets fantastiques et excentriques sont accentués par le contraste entre les couleurs vives des premiers plans et le froid contre-jour des architectures du fond. Nous retrouvons également des oppositions dans les couleurs complémentaires.

Paul Véronèse, la *Cène* ou le *Repas chez Lévi*, 1573.

Nous devons à la seule imagination flamboyante de Véronèse le pouvoir indécent de mêler le passé au présent, la liturgie à la vie quotidienne, le sacré au profane, l'art en général à l'art religieux et l'art à l'art sacré. Dans ce sens, *Le Repas chez Lévi* rappelle fortement l'autre tableau de Véronèse intitulé les *Noces de Cana*, ou l'art du banquet nuptial. L'œuvre est très mal réceptionnée

par les Pères dominicains. Indignés d'une représentation aussi désinvolte du dernier repas du Christ, ils arguèrent de la présence d'un chien ou d'un singe au premier plan, insistaient avec le peintre pour modifier son tableau et remplacer l'animal par la dévote Marie-Madeleine. Véronèse choqué à son tour, refusa catégoriquement la demande des Pères. Le conflit éclata entre les deux parties. Cela valut à Véronèse une convocation mémorable auprès du Saint-Office, la déclinaison romaine du tribunal de l'Inquisition, rétabli en 1541.

Le manuscrit du procès-verbal de l'interrogatoire du samedi 18 juillet 1573, l'un des rares conservés en la matière, étonne encore par son incroyable fraîcheur tant l'artiste y joue l'insanité et l'ignorance dans le but de désarçonner ses juges, bien décidés à confondre un hérétique suivant les indications de suspicion hérétique, données par les frères du couvent Saints Jean et Paul. Par ce jugement et à travers ce tableau de Véronèse, nous allons détailler la relation tumultueuse entre l'art et l'Église, entre le respect du dogme de l'Église et la beauté de l'imagination et de la foucade. Parce que finalement, l'œuvre reste l'expression libre d'un artiste qui respecte son honneur et celui de son travail avant que d'être une illustration directe et fidèle d'un événement évangélique.

À ce niveau, nous sommes très loin de l'allocution du pape Paul VI (1897-1978), prononcée lors de la messe dans la chapelle Sixtine pour l'Union nationale italienne de la messe des artistes. Nous sommes loin aussi, du message du Mgr Karol Wojtyla (1920-2005) – le pape Jean-Paul II –, prêché aux artistes il y a plus de cinquante ans à l'église Sainte-Croix à Cracovie en Pologne, pendant la Semaine sainte. Au cours de cette retraite du carême, le Mgr Wojtyla touche au problème relationnel de l'art, de l'artiste et de la création. Il montre le lien solide entre l'art et la beauté de la vie qui forme l'unité de trois idées fondamentales : de la Beauté, du Bien et de la Vérité[11].

Pour ce qui est de la Vérité, les juges cherchèrent à l'arracher de la bouche de Véronèse. C'est pourquoi, l'artiste fut convoqué en la paroisse de Saint-Samuel, au Saint-Office, pour se présenter devant les juges du Tribunal sacré. Véronèse debout, demeura ferme et inébranlable. Il voulait défendre par l'imagination, la Beauté et le Bien de son œuvre. Il croyait fortement que le talent avait toujours une matière. Et devant le Tribunal, l'artiste en tant qu'homme ayant reçu le talent, comme le disait le pape Jean-Paul II, a créé des œuvres d'art.

11 K. WOJTYLA, *L'Évangile et l'Art*, p. 15.

Au début de l'interrogation, les juges interrogèrent le peintre sur son nom et son prénom. Il répondit à une question sur sa profession comme ci-dessous : « *Je peins et je fais des figures* ». Autrement dit, je suis un homme de talent, qui est d'ailleurs bien perceptible, « *un facteur qui me mobilise, qui donne sens à ma vie* » *décl*ara le pape Jean-Paul II[12]. *À* la question : avez-vous connaissance des raisons pour lesquelles vous avez été appelé ? Véronèse *répliqua par un simple non*. Un non significatif, sur le conseil de Jésus-Christ *:* « *Que votre parole soit oui, oui, non, non ; ce qu'on y ajoute vient du malin*[13] ». Et le juge ajouta : vous imaginez-vous quelles sont ces raisons ? Et dites ce que vous pensez à cet égard. *Véronèse ne voulait pas c*acher son don comme le mauvais esclave, car tout ce qui est un don dans l'homme devient un défi et par conséquent engendre la responsabilité. Il *déclina :* « *Je puis bien me les imaginer* ». L'artiste imagine la situation suivante :

> « *C'est au sujet de ce qui m'a été dit par les Révérends Pères, ou plutôt par le prieur du couvent des saints Jean et Paul, prieur de qui j'ignorais le nom, lequel m'a déclaré qu'il était venu ici, et que Vos Seigneuries Illustrissimes lui avaient commandé de devoir faire exécuter dans le tableau une Madeleine au lieu d'un chien, et je lui répondis que fort volontiers je ferais tout ce qu'il faudrait faire pour mon honneur et l'honneur du tableau ; mais que je ne comprenais pas que cette figure de la Madeleine pût bien faire ici, et cela pour beaucoup de raisons que je dirai aussitôt qu'il me sera donné occasion de les dire* ».

La question ne porte pas sur une figure de plus ou de moins. Le principe posé par Véronèse est l'honneur : « *Je ferai mon honneur et l'honneur de mon tableau* » répliqua l'artiste.

Dans ce tableau le peintre a peint beaucoup de personnages dans le but de remplir la surface du tableau. Il commença par le maître de l'auberge Simon et le Christ *:*

> « *Puis, au-dessous de lui, un écuyer tranchant, que j'ai supposé être venu là pour son plaisir et voir comment vont les choses de la table. Il y a beaucoup d'autres figures, que je ne me rappelle d'ailleurs point, vu qu'il y a déjà longtemps que j'ai fait ce tableau* ».

Et s'il reste de l'espace « *je l'orne de figures d'invention* ».

12 K. WOJTYLA, *L'Évangile et l'Art*, p. 44.

13 Mt 5, 37.

L'imagination et la fantaisie se reflètent dans les expressions données aux figures. *À* la question : « *Dans cette cène que vous avez faite pour Saints-Jean-et-Paul, que signifie la figure de celui à qui le sang sort par le nez ?* ». *Véronèse répondit :* « *C'est un serviteur qu'un accident quelconque a fait saigner du nez* ». *À* une autre : « *Que signifient ces gens armés et habillés à la mode d'Allemagne, tenant une hallebarde à la main ?* ». L'artiste exigea un temps de réponse *:*

« *Nous autres peintres, nous prenons de ces licences que prennent les poètes et les fous, et j'ai représenté ces hallebardiers, l'un buvant et l'autre mangeant au bas de l'escalier, tout près d'ailleurs à s'acquitter de leur service; car il me parut convenable et possible que le maître de la maison, riche et magnifique, selon ce qu'on m'a dit, dût avoir de tels serviteurs* ». Plusieurs figures sont dans le tableau comme ornement et ainsi qu'il est d'usage que cela se fasse. La fantaisie du peintre est marquante dans les attitudes des personnages. *À* la question des juges : « *Que fait saint Pierre, qui est le premier ?* ». L'artiste précisa : « *Il découpe l'agneau pour le faire passer à l'autre partie de la table* ». Et le deuxième personnage : « *Il tient un plat pour recevoir ce que saint Pierre lui donnera* ». Et le troisième : « *Il se cure les dents avec une fourchette* ». Pour Véronèse, saint Pierre est le maître de la maison. Il tient les deux mondes : celui du sacré, le repas avec le Christ et le monde profane.

À la question clef des juges sur les ornements et leur rapport avec le sujet, Véronèse dans l'idée de respecter son honneur et l'honneur de sa toile, esquissa une réponse intègre : « *Je fais les peintures avec toutes les considérations qui sont propres à mon esprit et selon qu'il les entend* ». Les bouffons, les ivres et les Allemands n'intègrent pas l'espace sacré de la Cène. La réponse de l'artiste est claire : « *Je l'ai fait en supposant que ces gens sont en dehors du lieu où se passait la cène* ». Donc, Véronèse divisa son tableau en deux espaces distincts : le premier est sacré où il figura le Christ et les apôtres ; le second est profane, où il dessina les Allemands hérétiques et ignorants et dépourvus de bon sens. Pour les juges, Véronèse est accusé de tourner en ridicule le récit évangélique. *À* ce niveau de l'interrogation, Véronèse est inculpé de toucher à la doctrine de l'*É*glise catholique. *À* cette diatribe, il répliqua *:* « *c'est un devoir pour moi de suivre les exemples que m'ont donnés mes maîtres* ». Pour se défendre, il n'hésita pas à donner la démarche de Michel-Ange, à Rome, dans la chapelle du Pape comme exemple.

En effet, Michel-Ange (1475-1564) représenta Notre-Seigneur, sa mère, saint Jean, saint Pierre et la cour céleste, tous nus. Mais les juges rétorquèrent rudement : « *Ne savez-vous donc pas qu'en représentant le jugement dernier, pour lequel il ne faut point supposer de vêtements, il n'y avait pas lieu d'en peindre ?* ».

Mais dans ces figures, qu'y a-t-il qui ne soit pas inspiré de l'Esprit-Saint ? Il n'y a ni bouffons, ni chiens, ni armes ni autres plaisanteries. Vous paraît-il donc, d'après ceci ou cela, avoir bien fait en ayant peint de la sorte votre tableau, et voulez-vous prouver qu'il soit bien et décent ?

En se basant sur la division diptyque de l'espace de sa toile en deux zones : sacrée et profane, Véronèse répéta la même réfutation :

> « *Je ne prétends point le prouver, mais j'avais pensé ne point mal faire ; je n'avais point pris tant de choses en considération. J'avais été loin d'imaginer un si grand désordre, d'autant que j'ai mis ces bouffons en dehors du lieu où se trouve Notre-Seigneur* ».

À la fin de l'interrogation, les juges ne condamnèrent pas Véronèse pour hérésie artistique, mais lui demandèrent néanmoins de corriger et amender la toile à ses frais, ce qu'il s'empressa de faire ou plutôt de ne pas faire, puisqu'il se contenta de changer le titre qui, de *La Dernière Cène*, devint *Le Repas chez Lévi*, en référence à un épisode de l'*É*vangile selon Saint Luc dans lequel Saint Matthieu (dont le nom hébreu est Lévi) donne un grand festin chez lui.

Suite à cette Inquisition, il fallait attendre des siècles, exactement le 4 décembre 1963, journée considérée comme historique, pour qu'une nouvelle ère s'ouvre dans la prière et la vie de l'Église, mettant fin à l'âge de la Contre-Réforme qui fut celui de l'uniformité voulue par le pape Pie V, en dépit du rôle positif que joua le concile de Trente et le concile de Vatican II en matière de liturgie et d'art sacré[14].

Malgré la volonté de l'Église catholique, et les déclarations de Vatican II, qui confirma la mission de l'art au sein de l'Église, la relation entre art et liturgie reste aujourd'hui même à l'échelle des intentions. En effet, plusieurs questions pèsent sur la place et sur la relation de l'art et de la liturgie.

La liturgie chrétienne peut-elle se passer de l'art, de la beauté, des couleurs ? Si non, comment rendre accessible et compréhensible le monde émouvant de l'esprit, de l'invisible, de l'ineffable, de Dieu, dans un espace géographique et liturgique qui entretient et cultive une situation ambiguë entre proximité et altérité culturelle et physique, exceptionnelles avec les

14 V. l'article de François BOESPFLUG, « Art et liturgie : l'art chrétien du XXI^e^ siècle à la lumière de *Sacrosanctum concilium* », *Revue des Sciences Religieuses* 2004.

différentes périodes chronologiques, depuis l'Antiquité en passant par le médiéval, le moderne jusqu'au contemporain ?

Le problème est que cette disposition artistique et liturgique à travers les objets et les monuments conservés ou mal conservés dans nos églises et couvents, donnent l'illusion d'une situation familière parfaitement connue des fidèles et des curieux. Mais aussi une altérité à l'origine de malentendus sur la façon dont notre monde contemporain s'est appropriée le patrimoine sacré. D'où la fonction et le rôle, essentiels de notre étude.

Dans un article intitulé : *On the state of Medieval art History*, le chercheur américain Herbert Kessler énumère les axes de recherches essentiels ayant dominé l'historiographie récente. Parmi ces axes, Kessler mentionne particulièrement l'intérêt pour l'objet d'art médiéval, considéré dans toutes ses dimensions à la fois matérielle, historique, liturgique, spirituelle et fonctionnelle au sens large des images, des icônes, des objets ou bien de l'architecture des monuments.

L'approche multidimensionnelle d'Herbert Kessler doit être considérée comme le point de départ d'une réflexion qui mérite l'approfondissement étant donné la richesse des perspectives qu'elle ouvre pour l'avenir d'une approche renouvelée de l'étude des relations entre art et liturgie, entre artiste et religion. Comme disait le pape Paul VI, dans son allocution lors de la messe des artistes, le jour de l'Ascension, dans la chapelle Sixtine :

> « *Nous avons besoin de vous, artistes. Notre Ministère a besoin de votre collaboration. Car, comme vous le savez, Notre Ministère est de prêcher, de rendre accessible, compréhensible et même émouvant le monde de l'esprit, de l'invisible, de l'ineffable, de Dieu. Or, dans cette opération qui traduit le monde invisible en des formules accessibles, intelligibles, vous êtes maîtres. C'est là votre métier, votre mission ; et votre art consiste précisément à saisir les trésors du ciel, de l'esprit, à les revêtir d'expressions, de couleurs, de formes, à les rendre accessibles*[15] ».

Puisque la volonté de l'Église est de rendre présente au monde le message du Christ sensible à la raison et le cœur de l'homme engagé dans la révolution humaine et technologique du XXI^e^ siècle, ces instances doivent en contre partie s'efforcer de s'ouvrir plus largement sur les réalités du temps présent. D'ailleurs, le pape Paul VI, par un acte de courage, et dans

15 L'allocation du pape Paul VI le jour de l'Ascension le 7 mai 1964 lors de la messe célébrée en la chapelle Sixtine pour l'Union nationale italienne de la messe des artistes.

cette même allocution, présenta le *Mea Culpa* de l'Église catholique pour les artistes :

> « *Mais pour être courageusement sincère – effleurant à peine la question comme vous le voyez, - Nous reconnaissons que, Nous aussi, Nous vous avons quelque peu contrariés. Nous vous avons en effet, imposé comme première règle l'imitation, à vous qui êtes des créateurs toujours vivants, chez qui, pétillent mille idées de mille nouveautés […] Nous avons emprunté nous aussi des chemins de traverse qui n'ont pas servi l'art, la beauté et – ce qui est pire pour nous – le culte de Dieu* ».

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Coercive Interrogations in Lebanon: Laws regulating the Gap between Written Law and Practiced Law

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Abstract

Coercive interrogation as a form of torture is universally condemned, and no country publicly supports it, yet states are applying it in practice. This shows that governments are aware of its illegality but still apply it in their governmental systems because they believe in its effectiveness. This application is done either in a secretive, illegal way, or in a public, legal way, caused by law gaps allowing states to interpret relevant laws to their advantage.

Accordingly, the problem faced is not with the criminalization or illegality of coercive interrogation, but rather with the way it has been criminalized and enforced; therefore, a deep study of the relevant Lebanese laws is necessary to ensure full applicability and to prevent governmental circumventing of the law as much as possible. The current research aims to identify the challenges faced by Lebanon with regard to legal and enforcement implementation of coercive interrogation and identify major causes.

Introduction

For best outcome of this study, a deep analysis of the coercive interrogation laws recently integrated in the Lebanese legal system is conducted to assess compliance with international law and to highlight gaps. The article clearly demonstrates that the recent law contained many gaps that should have been considered, not for the sake of effectivity, but merely for future reforms due to the second consideration's nature of these gaps, and that the new law n° 65 of the 26th of October 2017, on Punishment of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1], is a necessary and sufficient step to combat torture if applied well. Nevertheless, the broad gap between written and practiced law in Lebanon clearly illustrates the problem of enforcement. The reasons vary depending on the context and can include officers' poor basic knowledge of the law and training, a lack of willingness to abide by the law, an institutional culture inherited from preceding authoritarians leading to great expertise in overcoming the suspect's rights and escaping prosecutions, and the political situation in Lebanon causing a conflict of interest.

Considering this reality, I acknowledge the importance and necessity of criminalizing torture under Lebanese national law, especially after several recommendations, requests, and pressures from the international community, non-governmental organizations (NGOs), and civil societies.

Before exposing the gap between the written and practiced law, it is essential to study the written law in detail and highlight its gaps, because, as Louis D. Brandeis stated, "*If we desire respect for the law*, *we must first make the law respectable*". This famous legal quote calls nations to implement respectable laws before asking for enforcement. The respectability of Lebanese national law against coercive interrogation is related essentially to its compliance and gaps.

This article discusses Lebanese laws related to coercive interrogation while assessing the compliance with Lebanon's international obligations and highlighting the gaps found both under Lebanese national law and international law (I), in addition to comparing the law with the practice in Lebanon (II).

1 Published in the *Official Gazette of the Lebanese Republic*, n° 50, 26 October 2017, p. 3775-3777.

I. Assessing Compliance with Lebanon's International Obligations and Highlighting the Gaps

Although compliance is not merely related to effective legislative measures[2], taking these measures is a requirement for effective enforcement. This section only discusses legislative measures related to provisions concerned with the definition of coercive interrogation, exceptional circumstances, attempts, and participation.

The amendment of 2017[3] made Lebanon's new definition of the offenses consistent with the definition in the Convention and, as a consequence, contained all of the Convention gaps. Therefore, compliance is assessed mainly with articles 1, 2, and 4 of the Convention, and relevant gaps are highlighted.

A. Compliance with Article 1 of the Convention and Gaps

Article 1 of the Convention defines torture used to extract confessions and refers essentially to the types of violence (1), actors (2), the purpose (3), and the *mens rea* (4) related to the crime. On the other hand, article 401 of the Lebanese Criminal Code (CC) criminalized coercive interrogations and reintegrated similar provisions.

1. Types of Violence

With regard to types of violence, article 1 of the Convention refers to severe "*physical or mental*" pain or suffering, and the new article 401 CC refers also to "*mental and physical*" pain as types of violence inflicted. This is not the first text accrediting mental pain in Lebanese law, as this pain was recognized with other crimes, such as slander. However, article 401 CC was the first to recognize mental pain in crimes of torture, because it was

2 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or
Punishment, art. 2, UNCAT, June 26, 2018 (the Convention hereinafter): "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*".

3 Art. 401 CC was amended by the Act n° 65 of 20 October 2017. It provided "*anyone who inflicts violent practices not permitted by the law against another person with the intention to extract a confession of a crime or information related to it will be imprisoned from three months to three years. If the violent practices have led to sickness or caused wounds, the minimum period of imprisonment is one year*".

previously believed that the pain in death and torture was always physical[4]. This new designation under Lebanese law of mental pain in torture, and particularly in coercive interrogations, is vital, since many psychological methods are being used in detention, including insults, humiliation, threats, intimidation, and seeing a relative being tortured[5].

During his detention in November 2017, the well-known actor exonerated of spying for Israel, Ziad Itani, was subjected to many forms of psychological torture. Itani told Human Rights Watch that interrogators "*threatened to rape him and threatened his family with physical violence and legal charges*" during his arrest, and since details of the investigations were leaked to the media within a day of his arrest, Itani added that "*interrogators used the damage to his reputation to put additional pressure on him to confess*[6]". It seems that Lebanese interrogators exploited Itani's reputation and violated the confidentiality of the investigations just to achieve their ultimate goal of obtaining a confession. This illustrates that coercive interrogation has become a quotidian art, and interrogators are creative in determining the best methods of torture according to the victim's status.

Another reason this new designation is vital is related to the negative effects of psychological torture, which have been widely documented[7], and Professor Peter Kooijmans delivered a statement in which he merged the effects of physical and psychological torture with the disintegration of the personality[8]. Likewise, Itani stated that psychological torture is worse than physical torture.

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4 Samir Alya, *The Mediator in Explaining Criminal Law* 249 (University Foundation for Studies: Publishing and Distribution, 2010).

5 CLDH, *Women Behind Bars, Arbitrary Detention and Torture Lebanon* 21 (2015), Available at http://www.rightsobserver.org/files/Arbitrary_detention_and_torture_EN_pages.pdf.

6 Lebanon: Exonerated Actor Details Torture, Human Rights Watch news release, July 15, 2018, https://www.hrw.org/news/2018/07/16/lebanon-exonerated-actor-details-torture.

7 Hernan Reyes, *The Worst Scars are in the Mind: Psychological Torture* 599 (89 International Review of the Red Cross 591, 2007); Human Rights Foundation of Turkey, *Psychological Evidence of Torture: A practical Guide to the Istanbul Protocol for Psychologists* 16-26 (International Rehabilitation Council for Torture Victims, 2004); Petur Hauksson, *Psychological Evidence of Torture* 91 (CPT, Council of Europe, 2003).

8 UN Special Rapporteur, *Report of the Special Rapporteur on the Convention* ¶ 45, UN Doc. A/59/324 (2004).

Therefore, this new designation of mental torture under Lebanese law is necessary to avoid bypassing the law by using legal psychological techniques to obtain confessions.

2. Types of Actors

With regard to types of actors, article 1 of the Convention refers to pain inflicted by or with the consent or acquiescence of a "*public official or other person acting in an official capacity*". Article 401 CC refers to the same actors.

Two observations can be concluded from the above: the first is related to the exclusiveness of public officials; what about coercive techniques used by non-officials? To illustrate, the UN Committee Against Torture (CAT) mentioned that "*unlawful arrests and torture by non-state actors, such as militias affiliated to Hezbollah and other armed militias*" took place in a secret location in pre-trial detention[9]. To determine whether these unlawful acts fall within the scope of the Convention, one shall define the meaning of public officials. The working group drafting the Convention refrained from providing a definition for public official, and it is the jurisprudence of the CAT that made it clear that "*public official*", in principle, refers to *de jure* government control, whereas *de facto* control will be recognized in the absence of *de jure* control[10]. Therefore, and according to articles 4 and 5 of the Responsibility of States for Internationally Wrongful Acts, acts committed by Hezbollah cannot be attributed to Lebanon as *de jure* organs, which require a formal incorporation into the Lebanon's structure, nor as persons or entities exercising elements of governmental authority, which require an empowerment by virtue of the law of the state, i.e. Lebanon[11], and as a consequence cannot be considered "*public officials*". Moreover, article 1 of the Convention cannot be applied to Hezbollah's previously mentioned unlawful acts, and Lebanon cannot be responsible for their acts.

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9 CAT, *Report: Activities of the Committee under Art. 20 of the Convention ¶* 29-31, UN Doc. A/69/44 (2013-4).

10 G.R.B. v. Sweden, CAT Communication n° 83/1997, UN Doc. A/53/44 (1998): "*fear of persecution by the act of Sendeero Luminso is not attributable to public official under the meaning of art. 1 since the latter has only de facto control which does not enjoy the support of Peruvian government*"; Sadik Shek Elmi v. Australia, CAT Communication n° 120/1998, UN Doc. CAT/C/ 22/D/120/1998 (1998); H.M.H.I V. v. Australia, CAT Communication n° 177/2001, UN Doc. CAT/C/28/D/177/2001 (2002).

11 Andreas Zimmermann, *the Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality* 110 (11 Max Planck Yearbook of UN Law 99, 2007).

However, this state responsibility under article 1 increases when such acts are inflicted by the consent or acquiescence of public officials, and this is our second observation with regard to types of actors. The CAT clarified the notion of "*consent*" or "*acquiescence*" under its general comment n° 2. It appears that consent or acquiescence is equated with failure of due diligence to prevent, investigate, or punish acts of torture or ill-treatment committed by non-state or private actors. The issue here is whether the term "*acquiescence*" includes the case in which the public official is not aware of the crime, but it was among his official duties to know. Professor Rita Eid concluded that "*consent*" or "*acquiescence*" requires knowledge; otherwise, the public official cannot show approval. However, in the case that he had doubts about torture being applied and failed to take measures to prevent it, he would be considered to have committed a gross negligence amounting to direct intent[12]. I disagree with Eid and argue that acquiescence does not only include cases in which the "*public official*" has doubts about torture being applied, but also includes cases in which the latter does not know about the crime and it was among his duties to know. This is because, first, the negative incident (the ignorance of the public official of the crime) is difficult and perhaps nearly impossible to prove; second, it was among his duties to know; and third, this failure has serious consequences on people's fundamental rights and shall be interpreted strictly.

Therefore, when actors are non-officials or individuals, article 1 cannot be applied except when the acts are inflicted with the consent or acquiescence of a public official, and this applies even in cases in which the official did not know about the crime, but it was among his duties to know as previously defined. However, this does not negate the fact that the acts committed by the perpetrator, whether a "*public official*" or by another "*with the consent or acquiescence of the public official*", shall be inflicted "*intentionally*", an element that is discussed further in part 4.

3. The Purpose

With regard to purpose, article 1 of the Convention refers to the purposes for which the act must be inflicted in order to be prohibited. These include extraction of confession, obtaining information from a victim or third party, punishment, intimidation, coercion, and discrimination. A similar approach is followed in article 401 CC, where the same purposes

12 Rita Eid, *Torture Criminalization between International Law's Aspirations and Lebanese Law's Hesitation* 36 (Al Adel 29, 2017).

are mentioned. The issue here arises from the phrase "*for such purposes as*", used in both articles 1 and 401. This phrase leaves one to think that any other reason may lead to infliction of torture. Although this list is meant to be indicative, rather than exhaustive, as concluded from the word "*such*", many authors have considered that not every purpose is sufficient to constitute torture, but "*only a purpose which has something in common with the purposes expressly listed*[13]". However, since this expression leaves an open interpretation of infliction of torture, it helps cover more cases of torture, and this illustrative character remains beneficial, facilitating the criminalization of nearly every act of torture.

4. Mens Rea

With regard to *mens rea*, article 1 of the Convention and article 401 CC both describe torture as an act which is "*intentionally*" inflicted. Two issues are present here: the first is whether negligent infliction of pain may amount to torture, and the second is whether the intent required is mere "*general intent*" or "*specific intent*".

With regard to the first issue, I consider whether a forgotten Lebanese detainee who suffers severe pain due to lack of food is considered a victim of torture under article 1 of the Convention. The CAT emphasized that the element of "*intent*" referred to in article 1 is key to the international concept of torture[14], and negligence is not sufficient to qualify an act as torture[15]. Kidus Meskele, an LL.M in Human Rights Law, considered that achieving the given purpose of torture is impossible without acting or omitting deliberately, and an act of negligence therefore does not amount to torture[16]. In the same meaning, Eid considered that it is clear from the

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13 Manfred Nowak & Elizabeth McArthur, *The United Nations Convention against Torture: A commentary* 75 (Oxford University Press, 2008); David S. Weissbrodt, *Review of Herman Burgers & Hans Danelius, the United Nations Convention against Torture: A Handbook on the Convention* 118 (5 Interights Bulletin 21, 1988); David S. Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment* 387 (29 Law & Ineq. 343, 2011).

14 UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by State Parties*, ¶ 15, UN Doc. CAT/C/GC/2 (January 24, 2008).

15 UNVFVT Board of Trustees, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* 4 (The UN Voluntary Fund for Victims of Torture, 2011); *Senate Consideration of Treaty Document 100-20* (December 10, 1984).

16 Kidus Meskele, *Interpretation of Article One of the Convention in Light of the Practice and Jurisprudence of International Bodies 52 (*5 Beijing Law Review 49, 2014).

text that the legislator's intention turned towards making it "*intentionally*". However, I agree with these views and add that the negligence, as one of the mental elements of the crime, is the exception and cannot be applied if the text is not explicit about it[17]. Nevertheless, although the forgotten Lebanese detainee cannot, due to the lack of "*intent*", be considered a victim of torture under article 1 or article 401, he will remain a victim of serious Human Rights violation.

With regard to the second issue, it is necessary to determine the type of intent to apply the relevant rules. "*General intent*" is the case when the will of the perpetrator is directed towards the *actus reus*[18], whereas "*special intent*" is a psychological state related to a specific consequence or a bad motive unrelated to the *actus reus*[19]. "*Special intent*" can be inferred from the provision's content; therefore, the presence of "*special intent*" can be concluded from article 1 and article 401, since the severe pain has to be inflicted for specific purposes, and committing torture for any other purpose not covered by the mentioned articles will not suffice to claim protection. To illustrate, both articles denote that their protection does not include "*pain or suffering arising only from, inherent in or incidental to lawful sanctions*", and it can therefore be concluded that not every pain is a violation of article 401, but only that inflicted for specific purposes. In this regard, Lebanese Criminal Appeal Court dismissed a similar case and considered that the elements of article 453 CC[20] were not fulfilled, despite harm being inflicted, since the "*special intent*" to cause harm was not satisfied[21].

Therefore, it can be concluded by analogy that, when Lebanese Courts are faced with cases in which coercive interrogations are exercised without the intent to inflict severe pain for the purposes expressly stated or for purposes that have something in common with the ones expressly stated, they will dismiss the case. However, it is difficult to find cases in which

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17 Ahmad Srour, *Criminal Procedural Law – General Part* 478 (Dar Al Nahda Al Arabiya, 1974).

18 Alya, *supra*, at 299.

19 Srour, *supra*, at 453; Mahmoud Hesni, *Explaining Criminal Law - General Part* 426-7 (Dar Al Nahda Al Arabiya for Publishing and Distribution, 2016).

20 Lebanese Criminal Code, 340 CC, art. 453, 1943: "*Counterfeiting is a deliberate distortion of the truth, either in fact or in the data evidenced by an instrument or by a manuscript constituting a document, with the motive to inflict harm whether material, moral or social*".

21 Lebanese Criminal Appeal Court, decision n° 6/1300, 5 (June 20, 2013), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=70534&type=list.

coercive interrogations are applied without the "*special intent*" to inflict severe harm, yet this "*special intent*" is not easily proved because it is related to one's intentions, which are not always easy to reveal.

B. Compliance with Article 2 of the Convention and Gaps

Article 2 of the Convention states that "*no exceptional circumstances whatsoever … may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification*". As for Lebanese law, the amended article 185 CC states similarly that no exceptional circumstances shall be invoked with regard to coercive interrogations and mentions necessity defense, order from a superior, and internal political instability.

With regard to other exceptional circumstances, I believe that they should also be reconsidered. The illustrative list of exceptional circumstances cited in article 185 CC leaves many questions: What about the person that exercises torture under moral or physical compulsion, or the subordinate that is unable to discuss the legitimacy of the order? What about the violation of the duty of obedience? Are all exceptional circumstances covered even though they are not mentioned expressly?

Moral and physical compulsion are considered to be justifications under Lebanese law when the conditions of article 227 CC, unpredictability and irresistibility, are fulfilled, and according to article 185 CC, they cannot be raised as justifications for coercive interrogation. When the latter is applied, the person being tortured to confess is protected, while the person being forced to torture another to confess is not (both are subjected to some kind of torture, whether physical or mental). However, this seems contradictory. One may argue that the person subjected to compulsion may start an action for compulsive behavior and receive compensation; although this is true, it does not mean that he shall be criminally liable for torturing. The only person that shall be responsible, criminally and civilly, for both acts is the one that imposed compulsive behavior, because he is responsible for the torture[22].

In the same context, a Lebanese criminal judge issued a decision related to a crime committed by a subordinate executing his superior's order without being able to discuss its legitimacy, which leads to the second question. In this decision, a new type of perpetrator was recognized: the "*mental perpetrator*". This is a superior that uses his strict authority and subordination over the

22 Alya, *supra*, at 476; Abed El Wahhab Houmed, *Detailed Commentary on Criminal Code* 669 (the New Printing Press, 1990).

subordinate, who becomes unable to refuse or discuss the legitimacy of the acts ordered and commits them without willingness[23]. In such scenarios, the subordinate will not be liable, and the same shall be applied to coercive interrogation.

The reason behind the "*mental perpetrator*" might be the duty of obedience, which leads to the third question. This duty is recognized in the Lebanese Military Justice Act (MJA), and, if not respected, subordinates will be punished with six months to two years of imprisonment[24]. Therefore, when the superior orders the subordinate to use force during interrogation, the subordinate will be faced with two duties presented in contradictory texts: the duty to obey his subordinate and execute his order, and the duty to disobey his subordinate's order and refuse to use torture. Essentially, if the subordinate executes the order, he will be criminalized according to articles 401 and 185 CC, and if he refuses, he will be criminalized according to article 152 MJA. Either way, the subordinate will be criminalized and I guess no one wishes to be in the place of the officer receiving the order.

In sum, though the amendment aligned Lebanese law with the Convention, it is unclear, it triggers many questions and unfair possibilities, and it creates an incompatibility with other Lebanese texts. The legislator was not precise in amending the article, and it seems as though he did it solely to demonstrate that he is in line with international obligations without considering the possible gaps and its effectiveness in practice.

C. Compliance with Article 4 of the Convention and Gaps

Article 4 of the Convention calls for the criminalization of all acts of torture, as well as the appropriate punishment for acts of torture, attempts to commit torture, and acts constituting complicity or participation in torture. Article 401 CC covers criminalization and the appropriate punishments but does not mention attempts and participation in torture, though they were mentioned in the general Lebanese rule which are studied in this Part to assess compliance.

1. Types of Offenses

Article 4 of the Convention states that "*State Party shall ensure that all acts of torture are offenses under its criminal law*" and "*shall make these*

23 Sole Criminal Judge, decision n° 295 (26/10/2013).

24 Lebanese Military Justice Act, 24 MJA § 3, art. 152 (April 13, 1968); Alya, *supra*, at 458.

offenses punishable by appropriate penalties which take into account their grave nature". Article 401 CC relates directly to the criminalization of coercive interrogation and determines its penalties according to the consequences of the act. These penalties range from one year imprisonment to 20 years fixed-term extended imprisonment, depending on whether the act led to malfunction, injury, temporary or permanent physical or mental disability, death, or to none of the above. I hold that Lebanese law has been in perfect alignment with the Convention in regard to the criminalization of coercive interrogation and the categorization of the punishment according to the consequences, but this categorization is not in line with other related Lebanese texts. For instance, article 547 CC determines the penalty range for intentional unlawful killing as between 15 and 20 years of hard labor. Although both penalties (fixed-term extended imprisonment and fixed-term hard labor) are penalties of felony, which belongs to the same type of crime, hard labor is more severe than extended imprisonment in regard to the degree of the penalty[25]. Consequently, it can be noted that the minimum range in unlawful killing is higher and more severe than the one in coercive interrogations leading to death which is 10 years. I do not find it fair to penalize a torturer-killer with a less severe punishment than a killer; rather, the torture-killer shall be penalized with a more severe penalty, since his acts consisted of both torture and death. One may argue that the torturer may not have the intention to kill, and the unlawful killing resulting from coercive interrogation was therefore involuntary, and the penalty stated in article 547 CC cannot be compared to the one stated in article 401 CC, since article 547 CC requires intent. Still, it is rather difficult to attest the unintentional character of killing, especially when harsh techniques are used. Moreover, though article 547 CC cannot be compared to article 401 CC, article 550 CC, which states that the minimum range of unintentional killing resulting from torture is 5 years of hard labor, can, and the penalty stated in article 550 CC is more severe than that stated in article 401 CC. In this case, it seems that the latter articles are in harmony concerning the duration range of the fixed term but are not in line with regard to the nature of the penalty, which shall be, in both crimes, hard labor.

25 CC, *supra*, § 2 art. 37: "*The customary penalties for felonies are: 1. Death; 2. Hard labor for life; 3. Life imprisonment; 4. Fixed-term hard labor; 5. Fixed-term extended imprisonment*". The penalties of each type of crime are enumerated from the most severe to the less severe.

2. Attempts to Commit Torture

Article 4 of the Convention sets an obligation for State Parties to ensure that the attempt to commit torture is an offense under their criminal law. The attempt of coercive interrogations was not specifically mentioned in article 401 CC or any other article, and general rules shall therefore apply when determining whether the attempt in this case is an offense under Lebanese law. In the absence of a specific text criminalizing the attempt to commit coercive interrogation, the attempt will be considered an offense if the act constitutes felony; otherwise, a specific text to criminalize it is required. Lebanese law has taken the grave nature of the punishment as a criterion to determine the nature of the offense, whether felony, misdemeanor, or contravention[26]. The punishment stated in article 401 (b) (1) CC, "*A minimum of one year and maximum of three years in jail*", reflects the misdemeanor's nature of the offense[27], while the punishments stated in article 401 (b)(2)(3)(4), "*A minimum of 3 years and maximum of 20 years fixed-term extended imprisonment*", reflect the felony's nature of the offense[28]. Therefore, the attempt to commit coercive interrogations not leading to death, permanent or temporary moral or physical injury, or malfunction is not an offense under Lebanese law because it is a misdemeanor, and no specific text criminalizing it exists. However, although some argue that even if no special text exists, attempt covers misdemeanors, since criminal attempt is considered by nature to be a common system including felonies and misdemeanors[29], the Lebanese Cassation Court holds that the attempt to commit a misdemeanor will not be considered an offense if no specific text explicitly criminalizes the attempt to commit it[30]. I agree with the Cassation Court's view, since article 202 CC explicitly states not to criminalize attempt

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26 CC, *supra*, § 2, art. 179/1, "*An offence is defined as a felony, misdemeanor or contravention if it is accordingly punishable by a penalty for a felony, a misdemeanor or a contravention*".

27 *Id*., § 2 art. 39, "*The customary penalties for misdemeanors are: 1. Imprisonment with labor; 2. Ordinary imprisonment; 3. A fine*".

28 *Id*., § 2 art. 37, "*The customary penalties for felonies are: 1. Death; 2. Hard labor for life; 3. Life imprisonment; 4. Fixed-term hard labor; 5. Fixed-term extended imprisonment*".

29 Hesni, *supra*, at 334.

30 Lebanese Cassation Court, decision n° 355, 2 (October 21, 2014), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=70128&type=list; Lebanese Cassation Court, decision n° 107, 4 (April 14, 2005), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=71577&type=list; Lebanese Cassation Court, decision n° 103, 3 (May 8, 1997), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=68043&type=list.

in a misdemeanor if no explicit text says to, due to the minor seriousness of the acts.

However, it is difficult to assess whether the acts are aimed directly towards completing the crime in coercive interrogations. There are no cases issued from Lebanese courts concerning the attempt to commit coercive interrogation, but citing other attempt cases will help determine, by analogy, the acts constituting substantial steps. The Lebanese Cassation Court states that the acts of wearing a woman's uniform, transporting a gun, and walking in the claimant's neighborhood with the intention to kill do not amount to substantial steps, but merely constitute preparatory acts that are not punishable[31]. By analogy, a police officer walking to the investigation room with the intent and the relevant utile to exercise violent practices to extract a confession will not be criminally liable.

In an opposite view the Cassation Court considered that the material acts that show clear intent to commit a specific crime are considered substantial steps[32]. In this view, each material act illustrating a certain intent to commit coercive interrogation constitutes an attempt, and, accordingly, the police officer's act of walking towards the investigation room with the relevant utile to exercise violent practices will constitute a substantial step to commit torture. I agree with this decision and argue that holding the relevant utile while entering the interrogation room or a room arranged for torturing, or carrying out any other material act showing clear intent to commit coercive interrogation is enough to be considered a substantive step, especially because it is not common for a police officer to hold such utile while entering a room to investigate when the defendant is already handcuffed. Moreover, the act of preparing the relevant utile affects the person being interrogated, even if not used, and constitutes mental torture. In other words, any act aimed directly toward the commission of torture leading to the abuse of the victim, even mentally, shall be enough to constitute the attempt to commit the crime[33].

It is important to note that merely approving the act of torture expressly or by implication constitutes the crime of torture and is not an attempt, since

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31 Lebanese Cassation Court, decision n° 108 (March 5, 1964) in Alya's encyclopedia n° 1037, 275.

32 Lebanese Cassation Court, decision n° 46, 3 (February 17, 2014). Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=83667&type=list.

33 Omar Al Housayni, *Torturing the Accused to Confess* 161-62 (Dar Al Nahda Al Arabiya for Publishing and Distribution, 1994).

article 401 CC expressly states the approval in addition to the indictment when defining torture, meaning that the penalties enumerated are applied to the mere approval of the crime. However, the penalties enumerated distinguish between the consequences of the act (leading to death, injury, etc.) and are applied accordingly, whereas mere approval has no varying consequences if not translated into actual acts. The criteria to determine the penalty in such cases thus remain unclear and will lead to different views in future decisions when courts are faced with similar cases.

3. Participation in Torture

Article 4 of the Convention sets an obligation for State Parties to ensure that the act which constitutes complicity or participation to commit torture is an offense under its criminal law. Article 401 CC covers acts of torture committed, induced, or accepted by "*an official or any person acting in an official capacity*" and does not mention other criminal actors, which prompts the question: why stipulate only instigators without mentioning other criminal actors as accomplices, aiders, and accessories; does this mean that non-official capacities are not included? Why stipulate the instigator in the text if the general provisions are applicable? Why are only official instigators among criminal contributors criminally liable?

Excluding non-officials from article 401 CC indicates that the legislator's intent was directed towards linking criminal participation to only the official nature of the officer, but what if the accomplice were a non-official person – would he be punished according to article 401 or other texts? Lebanese Cassation Court, in a similar case, considered the acts of non-officials facilitating the crime of "*official document counterfeiting*", which violates article 459 CC (requiring an official capacity), as constituting the felony of aiding in accordance with articles 219 and 459 CC[34]. Applying the same by analogy, article 401 CC will be applied to non-official contributors as long as the crime was perpetrated by "*an official capacity or a person acting in an official capacity*". In addition, Professor Eid considered that all criminal participants shall be included in article 401 CC, whether officials or non-officials, because it is illogical to apply different texts to contributors to the same offense[35]. In addition, criminal participation is linked to one specific

34 Lebanese Cassation Court, decision n° 113, 4 (March 20, 2014), http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=72105&type=list.

35 Eid, *supra*, at 37.

offense[36], and if other criminal actors were meant to be official actors, they would have been included in article 1 of the Convention like the instigator. Therefore, neither the Convention nor article 401 requires official capacity in coercive interrogations' contributors; the only ones requiring official capacity are the perpetrator and the instigator.

This leads to the second question: why is official capacity explicitly required of the instigator, and why is the instigator treated differently than the other accomplices? Does this mean that non-official instigators are not criminalized under the related articles? It seems that both instigators can be punished under the previously mentioned articles, depending on the circumstances. If the instigator were an official, article 401 CC would be applied, and he would be punished as a main actor according to article 401 CC and subjected to the same penalties as the perpetrator, regardless of commission of the crime. If the instigator were a non-official, article 401 CC would not apply directly unless the conditions of article 401 CC were fulfilled, i.e. the crime is committed by an official capacity, and he would be punished according to general rules (articles 217 and 218 CC) as a contributor to the crime, just like other contributors. The difference lies within the penalty, and I argue that the legislator made this distinction between officials and non-officials to criminalize the official instigator of this crime with the same penalty as the perpetrator when the crime is not committed, therefore closing the door before him to benefit from the general rules, which grant him a less severe penalty in case the crime is not committed[37]. This distinction is quite accurate and important, since official instigators must be subjected to more severe penalties than non-officials because of their position and duty to apply the law correctly.

At the end of this section, it is clear that the amendment of 2017 aligned the definition of coercive interrogation under Lebanese law with the Convention. This was a positive step to fight torture in Lebanon, but it was not enough, as I illustrate in the next section. Further, although the use of coercive interrogation in Lebanon violates international and national law, state officials still use these techniques.

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36 Hesni, *supra*, at 555-547; Mhammad-Zaki Abou Amer, *Criminal Law*, *General Part* 285-89 (Al Dar Al Jamiiya, 1991).

37 CC, *supra*, art. 218 /2-3-4.

II. Law and Practice in Lebanon: Two Contradictory Concepts

If "*unenforced law*" is a penalized crime under Lebanese jurisdictions, Lebanon would be in violation, but this violation, just like coercive interrogation's violations, will be also ignored by law enforcement. In other words, when legal texts concerning coercive interrogations are compared with their applicability, different outcomes are found.

This section exposes the true situation in Lebanon and states how and why the law and practice in Lebanon are two contradictory concepts. In short, the two main reasons are the lack of investigation and lack of prosecution, either because coercive interrogation is becoming a style (A) or because the Lebanese courts are failing to play an essential role in prosecuting and interpreting (B).

A. Coercive Interrogation as a Style, Rather Than an Accident

"*Torture in Lebanon is a pervasive practice that is routinely used by the armed forces and law enforcement agencies*", a UN report concluded[38]. The publicly available Amnesty International annual reports from 1995-2017 illustrate clear cases of torture by Lebanese Security forces over many years[39]. The real danger is not only in using coercive interrogation, but is in the continuity and the increase of such a practice, especially since this technique is becoming more public and well known.

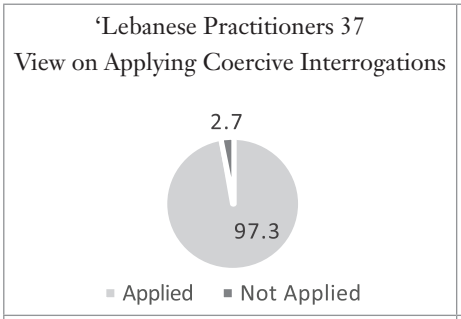


Figure 2 Public View on Using Coercive Interrogations

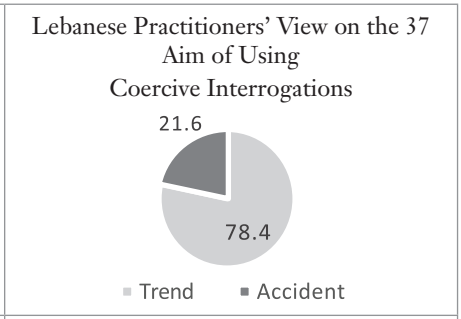


Figure 3 Public View on the Characteristic of Using Coercive Interrogations

38 General Assembly, *Report of the CAT* 270, UN Doc. A/69/44 (2013-4).

39 Amnesty International, Annual Reports (1995-2017),
Available at https://www.amnesty.org/en/search/?q=annual+reports;
See also, Haifaa Zaiter, *Unbelievable Torture in Lebanon* (Raseef 22, 2017), http://www.cldh-lebanon.org/.

This public use begs the question of how police are overcoming the law and escaping prosecution. The simple answer is that they are becoming expert in circumventing the law and sometimes because the law is protecting them.

This section presents why coercive interrogations are considered a style in Lebanon, and not just an accident, by exposing the techniques used during investigations (1), the ways police are overcoming the suspect's rights (2), and the reason behind the low number of justice cases (3).

1. The Techniques Used During Investigations

A report by the Lebanese Franco movement, Support for Lebanese Detained Arbitrarily (SOLIDA), explains that there is a clear tactic established for the best outcome of torture in the Ministry of Defense. The plan consists of two groups of interrogators: the "*active*", who beat, insult, and torture, and the "*passive*", who ask the victim to agree to a certain set of facts without using any brutality. The victim alternates between the two groups until he or she agrees to the facts[40]. This tactic is still used today, according to victim reports[41]. The methods that were reported to have been used the most during interrogations were beatings, suspension, electric shocks, *al-farrouj*, sexual violence and prolonged administrative detention[42].

40 SOLIDA, *the Ministry of Defense Detention Center: A Major Obstacle to the Prevention of Torture. Forgotten Victims, Unpunished* Executioners 11 (CLDH, 2006).

41 Zaiter, *supra*; Lebanon: New Law a Step to End Torture, Human Rights Watch news release, October 28, 2016, Available at https://www.hrw.org/news/2016/10/28/lebanon-new-law-step-end-torture; Lebanon: Exonerated Actor Details Torture, *supra*.

42 CLDH, *Victims of Torture from Syria: Staying in Lebanon and Suffering Repeated Traumatizing Experiences* 11 (CLDH, 2016); CLDH, *Arbitrary Detention and Torture in Lebanon* 22-3 (Arab HR Fund, 2013); Alkarama, *Torture in Lebanon: Time to Break the Pattern* 18 (Alkarama for HRs, 2009).

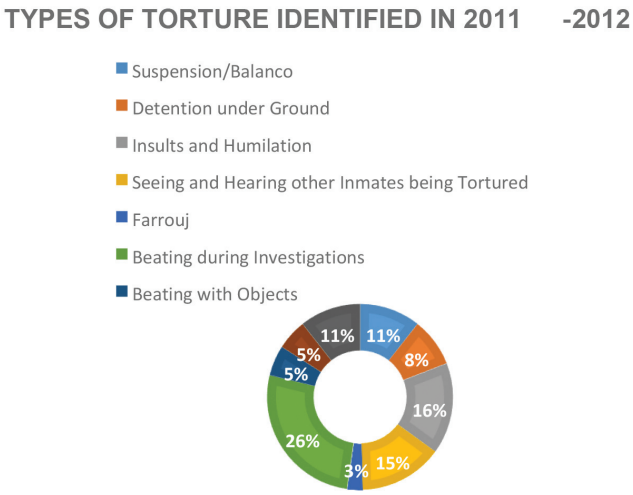
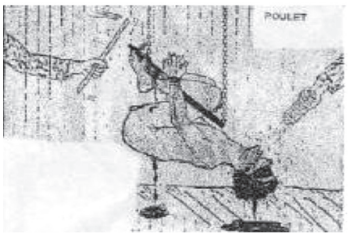


Figure 4 Types of Torture identified in 2011-2012



Picture 1 Al Farrouj

Picture 2 Suspension/Balanco

These brutal techniques are used for nearly every kind of crime, and not only for crimes discussed to be permissible under international law, which makes them a style. This style demonstrates a lack of culture, ethics, and education among interrogators, though interrogators must act as an example for others; it also indicates that inexperienced and useless interrogators exist, because these techniques call for extracting a specific confession, regardless of its accuracy. This will also result in a deficiency in intelligence gathering, since interrogators are searching for a specific confession (which could turn out to be false), rather than useful facts leading to the truth. Moreover,

the style in using these techniques makes it acceptable and normal for interrogators to use harsh techniques after confessions as a punishment, rather than for the sole purpose of extracting a confession[43].

2. How Police Overcome the Suspect's Rights

In this section, I illustrate how police overcome the suspect's rights after subjecting him to torture. In practice, the arrested person claims before the investigative and arbitration judges that he was subjected to torture during the preliminary investigation, which then leads to investigations. One of the most effective measures implemented in article 42 of the Lebanese Criminal Procedural Code (CPC) to investigate torture is the appointment of a forensic doctor for the arrested person to prove moral and physical damage. This appointment is requested either by the arrested, by his lawyer, or by any member of his family, and if any doubts exist, members of the judicial police accused of committing torture will be called for testimony.

These measures are vital in discovering torture, but why aren't they working in Lebanon? The Lebanese Initial Report to the CAT - 2016[44] (State Report hereinafter) states that these measures were taken, but they in fact were not. To start with the request of appointing a forensic doctor, interrogators are denying access of the arrested to his or her lawyer or family before the first court session. In cases in which this right is granted, they would not let the arrested meet with them privately; rather, a state authority would be present[45]. Therefore, a first way to overcome the suspect's right to request a doctor's appointment is denial to meet with a lawyer and family, and it is clear that the arrested will not be able to request a doctor at this stage.

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43 Alkarama, *Torture in Lebanon: Time to Break the Pattern* 22.

44 CAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Initial Reports of State Parties due in 2001, Lebanon*, UN Doc. CAT/C/LBN/1 (14 April 2016), (State Report hereinafter).

45 Lebanon: Investigate Army Beatings, Death in Custody, Human Rights Watch news release, July 17, 2013, Available at https://www.hrw.org/news/2013/07/17/lebanon-investigate-army-beatings-death-custody ; "*his family told Human Rights Watch that Military Intelligence instructed them to pick up Bayoumi's body, which was heavily bruised, from the military hospital three days after he disappeared on June 23*"; Lebanon: Syria Refugee's Account of Torture, Human Rights Watch news release, December 21, 2016, Available at https://www.hrw.org/news/2016/12/21/lebanon-syrian-refugees-account-torture, "*Shadi said that he asked to call a friend or a lawyer, but was refused*"; Lebanon: Exonerated Actor Details Torture, *supra*, Itani said "*I was not able to speak with my lawyer or family before the first court, and after that only through a door in the presence of military personnel*".

The second tactic is to keep the detained in custody until torture traces are erased. To discuss the following tactics as objectively as possible, I conducted an interview with a current interrogator who was not informed of the purpose of the research[46]. He confirmed that the security services in Lebanon do not respect the duration of custody[47], which makes physical torture difficult to document, even during the first court session and after the doctor's appointment[48]. In this regard, Itani recalled one of the men speaking on the phone, saying "*we can't hand him over yet, there are marks on him*[49]". Moreover, the Lebanese State acknowledged in its initial report that "*the perpetrators have full experience in committing acts of severity that do not result in any apparent physical effect*[50]". However, this tactic does not always work, and marks sometimes persist on the body. Doctors' reports confirm this despite the fact that, most of the time, reports take place under the watch of investigation services, which makes the truth difficult to document[51].

If the detainee is lucky and the doctors confirm he was being subjected to torture, the members of the judicial police accused of torture will be called for testimony. However, interrogators have discovered tactics to escape punishment in these cases as well. This tactic is implemented by the interrogator during the interview and is used before the courts, and consists of a prior agreement between the charged interrogators. This agreement holds that, in case they are called to court, they will submit statements defending each other and denying that any form of torture was used against the arrested. For instance, two Lebanese interrogators charged with using coercive interrogation stated under sworn testimony before the court that the confession was free from any use of force[52]. Unfortunately, the sworn testimony is becoming a means of escape for interrogators and a method

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46 Interview by Rindala Zgheib with C.K., a public officer, Jounieh, 60 minutes, October 29, 2018.

47 Donna el Hindi, *Guilty until Proven Innocent – Report on the Causes of Arbitrary Arrest, Lengthy Pre-Trial Detention and Long Delays in Trials* 63-65 (Alef, 2013).

48 CLDH, *Shadow Report Submission to the CAT in Relation to its Examination of the Initial Report of Lebanon* 22 (CLDH, 2016), (Shadow Report hereinafter).

49 Lebanon: Exonerated Actor Details Torture, *supra*.

50 State Report, *supra*, at 70.

51 Shadow Report, *supra*, at 26.

52 Lebanese Cassation Court, decision n° 256, 3 (June 14, 2016), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=124695&type=list.

used by perpetrators to escape punishment, instead of being a method used by courts as evidence against the perpetrators.

However, these are only the released and known tactics; there are surely many other tactics that are kept secret and remain unknown, and interrogators are getting better each day at overcoming torture investigations and prosecution. In the next section, I further discuss the factors that play an essential role in making torture a style in Lebanon.

3. Factors Influencing the Limited Judicial Decision Making

Considering the enormous number of coercive interrogations being applied as a style in Lebanon, one would think that the courts are overwhelmed with related cases. However, while there are indeed many decisions issued from Lebanese courts pointing out coercive interrogations, only one bold, unique decision issued in 2007 condemned an internal security force associate for using torture during interrogations against an Egyptian worker in 2004[53]. Another reference shall be made in this context, which was referred to in the State Report: a verdict issued by the Criminal Court in Mount Lebanon, presided by Judge Joseph Ghamroun and Judges Khaled Hammoud and Nahida Khaddaj, who condemned the judicial officer who caused the death of a person in the Bureau of Investigation in the Antinarcotics department as a result of beatings and torture. However, the State Report failed to add that the judicial officer was released and declared innocent by the Cassation Court[54]. Therefore, there has officially been one single Lebanese decision condemning a police officer for using coercive interrogation.

Many factors have played a role in the limited judicial decision making, as mentioned in a book written by a Lebanese professor and judicial police officer[55]. The two main factors are the fear of torture victims suing officers and the deficiency in public prosecution cases against defendants. Victims are usually afraid to sue officers because they fear later revenge and feel powerless; in addition, officials warn and threaten to harm the victims or their families. The other factor is the lack of cases presented by the public prosecution, either due to their unawareness or to their collusion. Many cases have pointed to coercive interrogations and dealt with the confessions

53 Lebanese Single Criminal Judge in Beirut (March 8, 2007).

54 Shadow Report, *supra*, at 35.

55 Toufic el Hajj, *Torture and Abuse in Light of National and International Law* 62 (Modern Book Foundation, 2016).

extracted under torture (as discussed in the coming sections) without being referred to the public prosecution for investigation and prosecution[56], noting that after confirming that torture occurred, or even in serious doubt, the judge refers all papers to the General Prosecution to complete the procedures and bring suit against members who have committed torture[57]. The Lebanese Center for Human Rights (CLDH) established statistics in 2009 and 2010 illustrating that, in practice, investigative judges do not consider torture allegations (50% of the cases), pretend not to hear the detainee (37.5% of the cases), or even threaten that the detainee will be tortured again (12.5% of the cases).

However, few cases were referred for investigation, such as the presumptive decision issued from the First Military Investigative Judge[58] and that issued from the Investigative Judge in Beqaa[59]. The State Report has stated "*there is no official census of the number of cases in which provisions and penalties imposed on torturers were applied*[60]" but mentioned only the referral of the Military Investigative Judge to prosecution, which prompts the question of why it was done or mentioned in the first place. The referral was done because of the leaked video footage of Roumieh prisoners subjected to torture that was addressed by CLDH in a press release on the International Day in Support of Victims of Torture (June 26, 2015). One can only wonder whether the mobilization of social media is needed to have perpetrators prosecuted.

B. State Courts and Lebanese Judicial Interpretation

Judicial work is the most effective means to cope with human rights violations, particularly national judicial ones, due to the fact that international trial is not always admissible, and the possibility to try before national courts can be a limitation to an international review.

Lebanese courts have played an essential role in dealing with coercive interrogations mainly with regard to admissibility of confessions (1) and the discretion in sentencing term (2), but this collaboration was not effective.

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56 Lebanese Cassation Court, decision n° 11 (February 21, 2005) *in* Badaoui Hanna, *Evidence* 812 (4 Zein Al Houkoukiyya Publications, 2015).

57 Lebanese Criminal Procedural Code, 131 CPC, art. 60, 1948.

58 First Military Investigative Judge, June 2015 in State Report, *supra*, 70.

59 Lebanese Investigative Judge in Bekaa (May 2, 2009), *in* Al Adel 1398, V. 2, 2010.

60 State Report, *supra*.

1. Coerced Confessions' Evidence in Courts

Article 15 of the Convention sets a duty for each State Party to ensure "*that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings*", and article 47 CCP pointed out, in the same regard, that the confession extracted under torture shall be considered void and contrary to the basic guarantees recognized for persons deprived of liberty. However, there are contradictory applications in practice.

The Indictment Chamber considered the coerced defendants' testimonies valid, holding that even a confession made under torture should not be void and without effect, and criminal courts shall assess its validity, especially when other evidence affirms its content[61].

The Cassation Court held another view and considered, in many decisions, the confession extracted under torture as null and void, according to article 47 CCP. The Court also dismissed the case, since no other evidence existed against the defendant aside from the coerced confession[62].

In contrast, CLDH, in its shadow report, referred to the case of Nehmeh el Hajj as "*a blatant illustration of violation of the right of the detainee to see his confession cancelled in case of serious allegations*" and considered in this case that Hajj was sentenced to the death penalty on July 9th, 2004 at Baabda tribunal, where the basis of the condemnation was simply his initial statements, which were allegedly made under torture[63]. However, the Cassation Court, which sentenced Hajj to death again, based its decision on other evidence, rather than just the coerced confession, such as the exact match of the defendant's

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61 Lebanese Indictment Chamber, decision n° 354 (1995); Lebanese Cassation Court, decision n° 108 (May 11, 1964) *in* Samira Alya, *Collection of the Lebanese Supreme Decisions* 200 (University Foundation for Studies and Publishing, 1970); Lebanese Cassation Court, decision n° 149, 5 (October 30, 1999), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=61728&type=list.

62 Lebanese Cassation Court, decision n° 11, *supra* ; Lebanese Cassation Court, decision n° 25, 8 (February 19, 2009),
Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=78686&type=list;
Lebanese Cassation Court, decision n° 168, 8 (March 4, 2007),
Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=75412&type=list;
Lebanese Cassation Court, decision n° 119, 14 (October 5, 2007),
Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=72499&type=list;
Lebanese Cassation Court, decision n° 114, 6 (May 31, 2007),
Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=72165&type=list.

63 Shadow Report, *supra*, at 51.

testimonies (Hajj & Ribah), which stated the exact planning, strangulation, incendiary, doping, etc. and traces found on the crime scene[64].

In other cases, coerced confessions were considered void and null, but other evidence was taken into consideration[65]. I agree with this view and argue that it is both practical and legal. Although using coercive interrogation is certainly unlawful and shall be banned, its use against the defendant does not justify his crime. Therefore, if other evidence exists, the coerced confession shall be deemed null and void, but the perpetrator should be sentenced based on other valid evidence, rather than solely on the coerced one. On the other hand, using coercive interrogation against a perpetrator also does not justify the act of the officer who used it to extract the confession, even if it was useful and in line with the truth; therefore, his alleged acts shall be punished in accordance with Lebanese law. This analysis also underlines the ineffectiveness of coercive interrogations which are always void and null, and no crime will ever be proved or punished if no valid evidence exists. However, the previously mentioned decisions which nullified the coerced confessions remain flawed, not due to dismissing the case or reposing on other valid evidence, but because they failed to refer the papers to the public prosecution for investigation.

In other cases, the Cassation Court refused to assess the validity of the investigations, citing the "*defects correction*" theory, which considers that no one can evoke the validity of the investigations before the Cassation Court or the Criminal Court after the Indictment Chamber's decision has become irrevocable, since this decision erases all investigation defects, including coercive interrogations[66]. This consideration is accepting, confirming, and ratifying the abnormal. The Lebanese jurisprudence is indeed stable as to the effect of the Indictment Chamber's decision to erase all investigations' defects, but this consideration was never meant to be applied to coercive interrogations, but rather to procedural material defects such as failure to

64 Lebanese Cassation Court, decision n° 23, 10-12 (February 12, 2009), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=78053&type=list.

65 Lebanese Cassation Court, decision n° 40, 5 (March 5, 1997), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=65855&type=list; Investigative Judge in Beqaa, *supra*, at 1396.

66 Lebanese Cassation Court, decision n° 283, 15 (October 23, 2015), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=111570&type=list; Lebanese Cassation Court, decision n° 285, 4 (October 2, 2014), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=79769&type=list.

implement the public prosecutor's signal to address the Syrian Interpol[67], mentioning facts not included in the investigations to prove ownership of the fulminant house[68], or rejecting a request to hear a witness[69]. However, coercive interrogations are not simple procedural material flaws; they are serious crimes violating Human Rights, and the Cassation Court's main role is to interpret the law properly and ensure that it is not violated by the lowest courts and not affirming a lowest court's defected decision. Applying a recognized rule related to material procedural defects to facts related to Human Rights violations is improper and wrong, and both the Cassation Court and Criminal Court shall always assess whether interrogations were coerced and take the appropriate measures.

2. Judge's Discretion to Reduce a Criminal Sentence

At this stage, it is assumed that coercive interrogations were investigated, conditions of article 401 CC were fulfilled, and the judge condemned the perpetrator and shall apply the proper penalty. The proper penalty is the one proposed in article 401 CC according to the consequences. However, the judge has the ability to alter that specific sentence at his or her discretion for certain reasons such as good behavior, non-precedents, age, social situation, etc[70]. In this regard, Judge Al Hajjar issued a verdict on March 8th, 2007 condemning a public officer for using coercive techniques during interrogations against an Egyptian worker according to the old article 401 CC[71], with a one year imprisonment based on the doctor's report, which stated that the physical harm resulted from continuous violence and severe beatings at different time points. The doctor further confirmed that the method used was "*Al Farrouj*", but the Judge substituted the imprisonment with a fine of 200 dollars and ordered him to pay a compensation to the victim of 400 dollars[72]. The Appeal Court upheld the condemnation on

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67 Lebanese Cassation Court, decision n° 229, 4 (June 24, 2016), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=123854&type=list.

68 Lebanese Cassation Court, decision n° 183, 3 (June 20, 2013), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=76114&type=list.

69 Lebanese Cassation Court, decision n° 38, 3 (March 29, 2004), Available at http://www.legallaw.ul.edu.lb/RulingFile.aspx?RuliID=82209&type=list.

70 See Courts Decisions in Alya, Collection of the Lebanese Jurisprudence, *supra*, n° 1817 at 482485 & V4 n° 731 at 301-305.

71 The verdict was issued before the amendment of 2017 and therefore the penalty was 1 year imprisonment, check also *supra* note 2 for the old article.

72 El Hajj, *supra*, at 64-5.

March 14th, 2013, but set aside the penalty and substituted the criminal sentence with a fine of 266 dollars.

Legally speaking, the law was not violated, since article 254 CC grants the judge the ability to completely exchange a misdemeanor's penalty with a fine. Realistically speaking, however, coercive interrogations, especially harsh and continuous ones, as in this case, shall never be punished with a mere fine, and the judge's ability to reduce the criminal sentence shall be strictly and wisely used in this matter. Despite the outcome, this judgement remains significant, since it recognized the use of coercive techniques explicitly used during interrogations, as well as the methods used, such as beatings and "*Al – Farrouj*", and took a step no one else dared to.

Conclusion

Although the use of coercive interrogation in Lebanon violates international and national law, state officials still use this technique.

Good laws are necessary but not sufficient. The enforcement of coercive interrogation laws in Lebanon (law 65 criminalizing specifically coercive interrogations and law 62 establishing the NHRI) is faced with many challenges worth considering. To solve the situation in Lebanon, we shall learn from previous cases and avoid taking ineffective measures. To bring concrete changes, an array of measures needs to be implemented in combination with one another. I offer some conclusions with the hope that practitioners at all levels find them useful when they plan future work:

1. Legal measure is a precondition for improved practice but is not enough to prevent torture. At this moment, laws are sufficient to prevent torture, and Lebanese authorities shall work on implementing them properly.
2. Improve and standardize data collection: for the sake of credibility and to put great pressure on Lebanese authorities, several institutions shall be involved, such as Human Rights institutions and relevant civil society organizations, because they are independent and valuable sources of information and are uncompromising advocates of work for the same end as national preventive mechanisms. However, it will be impossible to record completely comparable torture-related data across Lebanon if the government does not have a genuine commitment to eradicate torture.

3. Improve the international monitoring mechanisms and apply important international pressure by visiting places of detention and imprisonment to inspect and raise awareness of the specific Lebanese situation and the places where torture is mostly being applied, as well as to give effective recommendations tailored to the Lebanese situation, by engaging in specific inquiries like the one engaged in 2013-14 by the Committee according to article 20 of the Convention and by appointing UN special rapporteurs to identify cases and causes of torture.
4. Monitoring places where torture is most likely to occur, not just by visiting the place twice a week but by establishing several independent and permanent committees in the detention centers, the essential work of which will be to ensure a safeguard for detainees and suspects in the initial hours or days after arrest, as well as to receive related complaints, request forensic doctors for examination, and refer the papers for the judicial.
5. Training of prosecutors and judges to effectively handle torture cases and apply appropriate sentences, of police to comply with detention safeguards and to provide awareness of the ineffectiveness of torture to extract confessions and to offer him with alternatives to effectively find the truth, and of doctors to identify signs of torture. For effective training outcomes, this shall consist of continuous tests, follow-ups, rewards, or prosecutions when deserved.
6. Conducting continuous analyses for statistics of torture cases and preventing measures' outcomes to track the effective ones for better future plans.

Incorporating all of these measures and having this cooperation altogether in the Lebanese system is not an easy and immediate task, and years of struggles and patience will be necessary to make such a strategy effective, but with the right measures and appropriate cooperation of international organizations, national committees and organizations, NGOs, civil society organizations, academics, and practitioners, the right path will be taken towards a better Lebanon.

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