

Female Litigation Lawyers: The Present-day Action Heroes?

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This year, the International Bar Association (IBA) has launched a global survey to investigate why female lawyers leave law firms. The chair of the IBA Women Lawyers' Interest Group, Isabel Bueno, commented that: "Women leaving law firms to the degree at which they are presently doing is very worrying. This specific issue lies within the broader serious problem of a major lack of diversity in the legal profession, particularly within senior roles". The questionnaire aimed to collect data in order to identify the root cause(s) for such circumstances, address diversity issues and develop retention strategies for law firms and legal associations. The survey ended in 30 April 2017 and its findings are to be presented at the IBA Annual Conference in Sydney, Australia in October 2017.

Considering this issue, we looked at available data and found that in Portugal, according to 2015 data, 53% of lawyers are women and the number of female lawyers has been increasing at a greater rate than its counterpart¹. Women are therefore a valuable workforce resource and the future growth of law firms could be at risk if they start fleeing the profession. In few months, this issue, almost unnoticeable in a day to day basis, has become a paramount matter, with several female colleagues making significant changes in their professional lives with the very undisclosed purpose of reaching the so called *work-life balance*.

The IBA also tackles this issue. The "Balancing Report" on *Strategic Trends in National Laws and Multinationals' Policies on Work-Life Balance and the Implications for Human Resources Law*, prepared specifically by the Global Employment Institute, in March 2012, found that work-life balance was singled-out by both human resources lawyers and multinationals as an important issue in the next 10 years². The results of the survey in which the report was based "have confirmed the fact that women generally ask more than men for working conditions that ease the process of reconciling work and personal life". This approach may generate potential negative effects on women's professional careers as a consequence, however, "the majority of multinationals do not provide for specific policies aiming at neutralising these possible effects and the same happens with regards to national regulations". Therefore, "[i]t seems difficult to accomplish further promotion on the integration of women at the workplace without developing specific policies to avoid negative consequences in their careers as the result of the implementation of work-life policies." ... and this is the challenge.

As female lawyers looking at this reality, our immediate concern is to better understand the adversities of the profession, specifically regard-



ing litigation practice, and most of all to learn the instruments (or super powers?) required for promoting work-life balance, as well as to overcome some legal adversities.

Foremost, the bad and old news which lawyers are very well aware of must be faced: the law practice as a liberal profession offers little to no protection in case of illness or parental leaves, as well as correlated workers' rights to assist family or dependants, or even paid annual leaves. On a positive note, however, in Portugal the major medium to big size law firms have been providing for most of these leaves albeit the obvious impact in the lawyers' performance³.

When it comes to litigation, one may uphold that the scenario is worse than in other legal areas of practice. Working in dispute resolution invariably involves strict time limits to file submissions, attend hearings, and legally available justifications to reschedule such acts do not coincide with the grounds generally accepted as reasons for absence from work provided for employees in general. In fact, in Portugal only in 2009 a law was enacted aiming to extend to litigation lawyers the right to postpone hearings when similar situations to the "justifiable absence" occur, including in what concerns to two indisputable cases of professional unavailability: maternity or paternity, and death of a close family member.

In its preamble, Decree-Law no. 131/2009 of 1 June, reads as follows:

«Although legal practice is mostly undertaken as a liberal profession, some of its most important work acts are judicial acts – trial hearings and other procedural acts – whose scheduling does not depend on practitioners and which they cannot miss, except as provided by law. For this reason, lawyers do not have certain rights and benefits that the majority of citizens do, in particular an justifiable absence from work during certain periods of time, in case of

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maternity or paternity, or death of a close family member. It is therefore important to extend these rights to lawyers, in order to make the exercise of the profession compatible with family life, in balanced terms, without excessively affecting the necessary speed of justice⁴.

As a result of this worthy legislative initiative, in case of maternity or paternity, lawyers may currently exercise their right to postpone hearings for a minimum two months in case these acts were scheduled for the first month following the birth of a child, or for one month regarding all hearings scheduled within the second month following the same event. In case of urgent judicial proceedings the allowed postponements are reduced to two weeks and one week respectively. On the other hand, in the event of death of a parent, child or spouse of the appointed lawyer, the law allows for the deferment of any hearing scheduled on the day of the event or on the two following days.

Despite legislators' best intentions in paving the path for some changes, this law has revealed to be clearly insufficient "to make the exercise of the profession compatible with family life".

Additionally, to make the practice of a litigation lawyer a little more difficult and almost incompatible with personal life matters, even with no family in the equation, Portuguese courts have constantly provided for an ultra-demanding and very strict interpretation of the provisions on "just impediment"⁵. Indeed, in a recent Lisbon Appeals Court decision, the trail left by many previous decisions from superior courts in the past was unfortunately followed:

"The illnesses of the lawyer may only constitute a just impediment in extreme cases: i) when manifestly and absolutely obstructing the practice of certain acts; ii) when appearing in such a sudden and serious way so as to make it impossible to take prompt and necessary steps to ensure that the act is carried out, in particular by advising the case party, if necessary, to establish a new representative or to delegate the mandate, with or without retention of powers⁶".

This decision quotes a judgement from the Portuguese Supreme Court issued in 1960⁷ making clear that sometimes it takes more than a half of century to change mentalities in this matter...

In this scenario, must we infer that litigation lawyers are superheroes able to defend clients beyond the limits of their physical capabilities and are, at the same time, highly substitutable no matter how extensive and complex cases are? As much as we would like to conclude this article by revealing that in several years of practice we cannot remember taking one day off for being ill, having a headache, or getting bruised⁸, *hélas* this is not a fictional text.

Indeed, work-life balance is not only a hot topic among several areas of practice; it is above all – and contrary to some court decisions – a challenge which deals with predictable matters that can be planned and improved accordingly. A possible answer for the absence of more comprehensive approaches by judicial courts to reschedule agendas and the actual need for achieving a balanced work-lifestyle in general may be closer than it seems: teamwork.

Promoting solid structure to allow the distribution of cases to teams is

not an innovation in dispute resolution and/or law firms in general. In arbitration practice, for instance, teamwork is the rule to manage cases. When it comes to the issues we have raised above, advantages of teamwork are quite obvious: *first*, the knowledge of the case in hands enables any team member to represent clients in court, as well as to draft and submit respective memorials; *second*, as a principle, teamwork means collaboratively work, i.e. allocation of objectives and interplay between the members, letting them organise their lives (personal and professional) more efficiently.

Our experience says that such – apparently simple – change can make a significant difference for litigation lawyers. However, in order to test results that allow this to become a common reality, teamwork requires efficient implementation: primarily, it has to be a method applied in early stages of proceedings and not a remedy sought later on, and, secondarily, it cannot be seen as an opportunity to allocate more work to the same person on the grounds that responsibilities are shared within different teams.

Of course we are not defending that teamwork can be suddenly seen as a magic potion. However, the implementation of this solution on an increasing basis may definitely contribute to improving the careers of those female litigation lawyers who are more willing to ask for flexible working hours and days off for personal or family reasons and those who simply seek for a more predictable and balanced lifestyle. Moreover, teamwork may play an important role in assessing female careers moving the focus from a tendency of "no matter what" availability to the actual impact of their work as team members. As the White Paper published in May 2016 by Stanford Law School Women in Law Policy Lab Practicum on *Retaining & Advancing Women in National Firms* found: "[t]he misperception of how hard women lawyers work, if real, apparently arises from a combination of two key assumptions or images. The first is the normative assumption, consistent with the high billable hours expectations detailed in this Part above, that "law is a 24/7 profession," such that the "ideal" lawyer needs to have "total loyalty and commitment" to his or her profession at all hours, at the expense of his or her personal life and personal identity."⁹

All in all, this is a topic with as many solutions to discuss as questions to be raised and at the end of the day, one may conclude that the success of balancing policies will always depend on the ability of lawyers to question, reflect, answer and organise themselves collectively to bargain the promotion of work-life balance, inside and outside their firms. An example of this kind of collective initiative, although not directly related to the work-life balance topic but still in connection with some common adversities faced by female practitioners across the globe in dispute resolution practice, is the recent launch of a pledge on equal representation in arbitration last year by a group of women¹⁰ that focuses on "improving the profile and representation of women in arbitration."¹¹

And we end as we started, with a question: does teamwork and other likely initiatives to promote a balanced work-life lifestyle change female litigation lawyers' super powers? The good news is, yes, it actually increases them.

1 Data available at <http://www.pordata.pt/Portugal/Advogados+total+e+por+sexo-245>

2 Report available at https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx

3 For an in-depth analysis of these topics you may find this Manual a very interesting reading. Available at <http://womenlaw.stanford.edu/pdf/balanced.lives.pdf>

4 Available at <http://data.dre.pt/eli/dec-lei/131/2009/06/01/p/dre/pt/html>

5 The Portuguese Civil Procedure Code defines this "just impediment" as an event not imputable to the party nor to its representatives or lawyers that prevents the timely performance of an act (Article 140).

6 Lisbon Appeals Court decision from 22 June 2017, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497ecc/3cd5d3fc09820ae480258154005281db?OpenDocument>

7 Portuguese Supreme Court decision from 26.02.1960 in Boletim do Ministério da Justiça (BMJ), No. 294-271, 18.03.1993 (P. 085089).

8 See M. Night Shyamalan's "Unbreakable" (2000).

9 See pp. 19-20 of the Paper available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf>

10 *The launch of the Equal Representation in Arbitration (ERA) Pledge on 18 May 2016 in London marks a historic moment in international arbitration. The Pledge is a call to the international dispute resolution community to commit to increase the number of female arbitrators on an equal opportunity basis.* – see <http://kluwerarbitrationblog.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/>

11 For more information on the pledge consult <http://www.arbitrationpledge.com/>