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THE FOUR CHALLENGES OF THE 21st CENTURY FRENCH LAWYER

Report

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Centre de recherche et d'étude des avocats (CREA)

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Summary

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EDITORIAL

1. The current relevance of an age-old question for the legal profession

All the signs of a globalized economy (abolition of distances, acceleration of time caused by technical progress, open and interdependent economies) were already in place and commonly acknowledged at the end of the 19th Century. From the 1980s onward, these same phenomena reached a new peak as a consequence of the responses to the crisis that brought to an end the unprecedented economic growth after World War II. Since then, much ink has been spilled in numerous reports on the challenges raised by globalization in France.¹ These reports all describe the challenges, more or less, the same way and recommend not positioning oneself against an unavoidable globalization, but within, by relying on one's assets and becoming aware of one's weaknesses and by acting in a way such that this necessary openness does not entail a loss of identity while benefiting the largest number of people. Law and legal professionals do not escape the requirement to face these challenges. Today, legal systems and legal services, offered to clients who are more "consumer-minded", now compete against each other.² As a result, government regulation of legal services are now compared in light of their economic virtues (i.e., by their capacity to empower legal actors to be competitive). Competition regulated by the market's rules is one of the main reasons for the great transformation of the profession of attorney.³

2. The Market for Legal Services and the Great Transformation of the Legal Profession

Popularized by the illustrious economist Karl Polanyi, the metaphor of the great transformation points to the transformation of traditional societies into market societies.⁴ This happens when the economy is no longer embedded in social relations and transforming all social relations, one after the other, to become successively embedded in a global system. Everything becomes a commodity, which brutally challenges the traditional structures that regulated society until the great transformation. The market successfully spreads out because its logic espouses the move toward a rationalization of society and an emancipation of the individual. This constitutes the fundamental project of modernity. There is no

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1. See especially, Commission des affaires économiques du Sénat, Report d'information n° 242 (1996-1997), J.-F. Poncet ; Commission des affaires étrangères de l'assemblée nationale, Report d'information n° 1279 (2003), R. Donnedieu de Vabres ; Groupe de travail sur la mondialisation, dir. P. Morand, Report à la demande du ministère de l'économie (2007) ; Report pour le Président de la République sur la France et la mondialisation, H. Védrine (2007).
 2. On this comparison of legal systems under the influence of analysis economic of law, see the World Bank Group's Doing Business Reports, published annually since 2003.
 3. Th. Wickers, *La grande transformation des avocats*, Dalloz, 2014.
 4. Karl Polanyi, *The Great Transformation, The Political and Economic Origins of our Time*, Boston, Beacon, 2001.
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reason why the market rationale, which has gradually succeeded in incorporating elements as fundamental as land, money and labor, would suddenly yield on the doorstep of the legal profession. In the context of slow growth since the Great Recession, legal services now represent a new frontier, a land that was left unexploited and which must urgently be tended to reap its fruits. To attain this end-goal, classic market-based recipes, such as competition and technological innovation, are applied.

3. Intensification of competition and the Development of a Market for Legal Services

Casting French legal services in this new (commercial) light has disrupted the traditional codes as a guarantee of quality control. These codes are now perceived as erecting a set of roadblocks that our competitors have been faster or better at reducing or removing. The idea that the legal market can gain both in breadth and depth if there is more competition, has become widely accepted. There is now a demand for legal services that the current supply cannot meet. It is becoming increasingly difficult to provide services in a profitable way under the old economic model, not least its outdated method of calculating fees. It is commonly accepted that increased competition will lead lawyers to invest capital in new technologies, research and development or marketing and to consider the benefits they could gain from merging with other professions. These developments explain why the European Commission urges EU member States to liberalize their legal professions.⁵ They also explain why the French competition authority is vigorously engaged in several regulatory programs concerning the legal profession, including the creation of a countersigned instrument by lawyers, as well as increasing the number of law firms licensed to represent clients before the highest courts.⁶ As a result, our legislature has already responded to these demands, notably by expanding the array of structures under which the profession of counsel is practiced.⁷ It also has successively promoted multi-professional shareholding and operational practice, bringing the structures closer to the Alternative Business Structures established by Australia and the UK, among others. In a significant way, the UK Legal Services Board concluded in its last report on the development of Alternative Business Structures that, "In the absence of strong competition, there is little impetus for law firms to take the greater risks (and rewards) involved with using external capital [...]"⁸ It is a clear, but uncertain, bet on the future. For now, the disruption caused by the ongoing transformation has not generated as much creation as Schumpeter's thesis of creative destruction would entail. One of the teachings we can draw from the US experiment is that law firms' profitability goes downward as competition intensifies. Yet another reason to rethink the economic models regulating the profession of legal counsel.

5. Especially since the 2004 Monti Report, available at the following address: http://europa.eu/rapid/press-release_IP-04-185_fr.htm.

6. See Opinion (avis) n° 16-A-18, 10 Oct. 2016, concerning the enforcement of article 57 of the statute of August 6, 2015. The Competition Authority declares openly that it is impatient to broaden its intervention.

7. See Statute n° 2015-990, August 6, 2015 on Growth, Activity and Economic Equality of Opportunities (pour la croissance, l'activité et l'égalité des chances économiques), published at the Official Journal (Journal officiel), August 7, 2015 (JORF n°0181 du 7 août 2015 page 13537).

8. Evaluation : ABS and investment in legal services, 2011/12-2016/17. Main Report. An analysis An analysis of investment in legal services since the introduction of ABS licensing, June 2017.

4. An Invitation to Rethink Economic Models

Like others, the French legal market is evolving and lawyers must adapt their economic model to these ongoing changes. Where will this take us? Some choices stir little controversy while others appear revolutionary. None should be left aside in the ongoing debate. Should we favor groups, networks or franchises to reduce the number of French lawyers practicing as sole practitioners and force them to face the competition of Anglo-Saxons law firms ? How should we define the secondary business activities that lawyers can now provide ? Is it efficient and relevant to open the capital ownership, or the management of law firms, to non-regulated professions ? In the latter case, how could we guarantee to lawyers that they will retain control over their professional practice ? Whatever choices will be made, we should not forget the consequences of financing the training of entry-level lawyers. Finally, all this must be planned in accordance with the influence new technologies have, and will have, on professional activity.

5. From the Regulatory Shock to the Technological Shock

The impacts of digital technology on legal professions, in general, and on the profession of legal counsel, in particular, is an object of endless debate. It is commonly accepted that we are witnessing a very profound and durable movement. There are three reasons justifying the use of new technologies. First, at least in its mechanical dimension, the use of coding breeds a movement of rationalization (whose roots are very old) comparable to the one characterizing the adoption of the civil code. Second, these technical tools reduce the number of intermediaries and transform the very nature of intermediation itself. In so doing, they fulfill the desire for autonomy and collaboration that characterizes the 21st Century justice consumer. And finally, the digital revolution promises a more effective, cheaper and quicker access to justice. Too many factors are involved to make safe predictions. For example, how are we to find a basis upon which we can measure the capacity of an algorithm to execute a task today performed by a lawyer, and therefore, to replace him/her? We can hesitate between parameters such as the quantitative and linear progress involved in the multiplication of computing power, the plunging cost of data storage and the new technologies developed in the field of artificial intelligence. That these developments are dependent upon an investor's appetite hardly points toward more predictability. Based on the elements that will be taken into account or the way they are combined, we will find, either, that digital technology is the great "disruptor" of the legal profession⁹ or, on the contrary, it is part of the solution to fundamental issues raised by the market structure transformation.¹⁰ We must also ask ourselves what the digital tool modifies in the relation between an attorney and his or her clients. Where will we now trace the boundary between what is billable and what is not? Will this boundary be drawn in terms of "customer experience", in order to add to the collaboration and simplicity a pedagogic dimension allowing the client to achieve a kind of legal self-training? Finally, how are lawyers going to retain control over their professional practice when lawyers and clients are connected via a digital (?) platform? Will they be able to decide freely the fee they will charge and take the exact measure of the matter at stake, or will the resolution of these issues be driven by the platforms' required standardization? Legal ethics and the platforms business model appear far from being on a path of natural adjustment. This is an important challenge because what is at stake is the possibility for lawyers to retain their political role, that is to say, a spokesman of the public, in a position to link public interest with

9. R. Suskind, *The end of Lawyers ? : Rethinking the nature of legal services*, Oxford University Press 2008.

10. Jaap Bosman, Lisa Hakanson, *The death of a law firm*, JBLH, The Hague, 2015.

their clients' personal interest. It is on this covenant with the public at large, dating back to the 19th Century, that the profession of law built its value to society.

6. Credibility and Mobility

In such a competitive and open context, the profession of legal counsel has an advantage over other legal professionals in that it touches upon the entire legal market. This market offers room for action which is diversified and wide, and extends well beyond judicial activity. Individual autonomy was conquered through an expansion of the realm of law, which has become omnipresent and fundamental because it is the only common reference in our days. Law is both more flexible and more complex than before, and it is important to develop the skills to guide clients who navigate, against their will, in "troubled waters". At first sight, nothing prevents the Empire of Law from becoming the empire of the profession of legal counsel. This leads to a questioning of the status of auxiliary justice and the credibility and mobility of lawyers; sensitive topics that are all interdependent. Those legal systems that offer certainty will conquer the trust of the people in general, and that of the economic players, in particular. Legal certainty rests not only on substantial rules but also on the way conflicts are handled. The level of trust placed in lawyers, which depends on the lawyer's relationship with the judge in the judiciary sphere, and exclusively on legal ethics outside the judicial arena, will be determinative of the role lawyers will play in the future. Should we give more weight to Section 4.4 of the Code of Conduct for Lawyers in the European Union and alter the relationship between attorneys and the truth? What kind of legal ethics can we adopt when auxiliary judicial services are also a sort of supplementary support to the business community? What kind of disciplinary proceedings should we promote to guarantee the effectiveness of prosecution and sanctions? Can we multiply the scope of subject matters and tasks involved in lawyering without increasing the risks of conflicts of interest? Furthermore, how are we going to respond to the demand of entry-level lawyers who appear to be very conscious that they belong to a unique sector and desire to find confirmation of this uniqueness in their professional practice? The very controversial issue of the state of the legal profession and of the political gains its advocates expect for legal practitioners remain speculative. One can not wish to engage in this path and prefer to offer the freedom to move from one profession to the other, or create gateways between these professions and the regulating institutions. How, in this context of growing mobility, are we going to capitalize on newly acquired experiences without generating new conflicts of interest?

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INTRODUCTION

At the onset of the 21st Century, the legal profession faces considerable challenges. This report aims to identify a few of these challenges and to provide, if not outright solutions, food for thought, to empower licensing authorities with tools to respond to these challenges. Facing such risks, one may be tempted to seek shelter behind walls, and to return to the familiar. Problems appear can so delicate and novel that even to formulating them is, in itself, difficult to accomplish, without falling into the trap of magical thinking that risks exacerbating these challenges. For fear of uttering self-fulfilling prophecies, or hopeless words, many would prefer to remain in a state of denial. This is the wrong attitude. What is at stake now is the identity, even the very existence, of the legal profession.

The challenges are immense because they are linked to the profound transformations of our epoch. What are those changes? First and foremost, globalization itself is, *largo sensu*, the experience of a de-territorialization, of an expulsion from, and therefore a privation of, traditional reference points in time and space. Second, technical progress is also responsible, in large part, for compressing distance and accelerating time. Third, even though economic openness and interdependence are not new (national economies were open and interdependent and perceived as such at the end of the 19th Century), this phenomenon has now reached an unprecedented intensity that is shattering social structures. Fourth, another profound transformation, political this time, is the shrinking government, whose crisis of public finances is a symptom, and not the cause of, ongoing changes. Fifth, this political crisis coincides with the rise of civil society and its autonomy thanks, *inter alia*, to new tools to self-organize and coordinate (notably social networks). Finally, we are experiencing an ongoing anthropological mutation, which we feel without truly understanding. These evolutionary changes arise all at once; they form a force that directly impacts the legal profession. This is hardly a surprise, given that the legal profession is situated at the junction between the market, the public and government. Paraphrasing Lucien Karpik's famous words, the legal profession cumulates the tyranny of the first one (the market?), the insecurity of the second one (the public?), while at the same time tasked with the protection against a privatization of the law that the effacement of the third one (the government?) breeds. Each of these issues are, of course, intertwined.¹¹

The law is precisely the place where the "real" economy is the closest to the symbolic economy. The most brilliant theories of the Law & Economics movement fail to explain why Americans spend so much on their legal and judicial system. What are they buying? Why, comparatively, does France earmark so little money to its law and justice system? As our societies become more and more secularized, the law is increasingly becoming the conservatory of a symbolic dimension essential for social life. That is to say, it is a mutual recognition of the memory of our founding covenants, of the sublimation of violence; it forms the intermediary between a true market and a semi-rhetorical exchange system, a semi-ritual of (social?) goods that are "priceless". Let's take the example of large law firms which are often presented as the avant-garde of modernity and the future of the

11. Lucien Karpik, *Les avocats. Entre l'État, le public et le marché*, Paris, Gallimard, 1995.

legal profession. How can we explain that the best paid lawyers feel the need to dedicate part of their time to pro bono representation? Maybe it is because a business lawyer loses some fees by engaging in pro bono activity, as a way of recalling the original sense of his/her calling. The symbolic dimension, that is to say society's shared beliefs, explains why the stage of globalization, with its accompanying flattening of goods, men and cultures, is the stage on which these systems of beliefs come to clash. The American and the French legal professions represent two extreme opposites of these financial and symbolic components: on one side of the Atlantic Ocean, the Bar bets on the market in a country where money is perceived as the ultimate regulator of US society, while it simultaneously worships the myth of material wealth as the sign of a moral election (choice?) (and not uniquely a social one). On the other side of the Atlantic, in more Catholic lands, the lawyer is distinguished by selflessness, expert knowledge and symbols, such as the gown and social status. Both models are undergoing a crisis today, partially for the same reasons.

Finally, a system of belief always echoes a "libidinal economy", that is to say that self-love and professional pride, which are inseparable from each other. We acquire social credit when we are respected, even admired by others. We love each other through other's perceptions, through social fame. The ongoing transformation profoundly troubles this libidinal economy. It is completely different to face competition from accountants and in-house lawyers than to be ridiculed by young geeks, who are not lawyers, and who claim to have science on their side to challenge the way we practice law. To add insult to injury, some of these young tech geeks have public opinion on their side. The fact that all regulated professions are facing the same challenges is no consolation. It is therefore essential that lawyers get back on their feet by inventing not only a new economic model but that they also find a new narrative that explains their profession and its struggles, which can be heard and admired. In short, that they find new reasons to love themselves in the new (paradigm ?) universe.

One sure way to fail in mitigating these challenges is to proceed vindictively, by camping on the symbolic attributes of the past and by attempting to resurrect a world that has ceased to exist. In other words, by living in denial. Twenty-first century French lawyers must understand (and contribute to writing?) the rules of the game in the new world. The sooner they understand the new rules, the sooner they will master them and the sooner they will thrive.

This report aims to provide a modest explanation of these challenges. We don't intend to give lessons to lawyers or to propose "ready-made" solutions. Our task is to organize the challenges and to show the depth and the hope that they may generate. To this end, we must start by casting a crude light on the issues at hand. This viewpoint may appear unforgiving, but it is hoped that this harshness will be beneficial and diminish other less informed and less well-intentioned analysis. Ultimately, our goal is to assist the legal profession as it adapts to its new circumstances, with the intention to protect its irreplaceable contribution to a democratic society and to the rule of law, which are more indispensable than ever.



ENHANCING CREDIBILITY

Chapter 1: ENHANCING CREDIBILITY

The first challenge the French legal profession must face is its perceived credibility. Threatened by the competition of certain newly emerging professions, lawyers seek shelter behind their regulated professional status without understanding that this status is perceived more as a barrier to entry than a contribution to the public interest. Lawyers think they are protected by a set of rules of legal ethics which sets them apart. But is it enough to brandish rules of legal ethics to convince the public ? Granted, a regulated professional status and its associated rules of legal ethics aim at building trust with the public. But trust is not something that can be decreed. It must be earned. If trust matters in all human relations (marriage, politics, the marketplace...), credibility has a narrower meaning. It can be defined by what makes a statement believable. Applied to an individual, it means earning the trust of one's interlocutors. How can French lawyers enhance their credibility with the other actors in a courtroom ? How can they attain a new legitimacy with the public ? How can they gain greater recognition on the international stage compared to their foreign colleagues ?

I. RESTORE “TRUST” TO THE COURTROOM

Lawyers build their credibility as much on their collective behavior as on the procedural system and the culture in which they operate. Let's start with our legal tradition, which is often disparaging of lawyers. In criminal matters, the prosecutorial services and judges decide the facts by building a narrative that lawyers can only challenge with great difficulty. To paraphrase Henri Leclerc, one of the most illustrious representatives of the French criminal defense Bar, the criminal defense lawyer is reduced to the role of a “justice supplicatory”, or, similarly, to that of an intimidator of judges and jurors. In civil matters, the situation is different because legal counsel has a more active role, but his or her initiatives are thwarted on the one hand by difficulties in obtaining the whole of the relevant evidence and, on the other hand, by the central, even hegemonic, character of scientific expert witnesses. More generally, the effectiveness of lawyers in the civil trial is hampered by the pre-eminence of matters of law over matters of fact. In both criminal and civil justice, the level of trust between the lawyer and the judge is often weak. Worse, we could even say that the civil trial rests on a mutual defiance: the judge does not give much attention to the often-baseless briefs and pleadings prepared by lawyers. This gives lawyers a negative inspiration to be rigorous. But our legal system is evolving. The procedure is being transformed and each reform gives a greater deal of attention to defense matters (e.g., the recent Sapin 2 Statute or the Hamon Statute on class actions). Nonetheless, they don't go as far as overhauling civil procedure and providing counsel with the full capacity to express their skills and render judicial institutions more accountable.

Indeed, the credibility of lawyers is partly related to a deeper issue, cultural this time, which characterizes the French judiciary. Justice institutions in France are not highly regarded by government elites and suffer from a budgetary anemia which borders the scandalous. They also suffer from a “sealed-off” mentality, an inward-looking attitude observable in the behaviors of all and in the sorry state of facility maintenance. This is a matter of prime importance because it is an indicator of the regard in which an institution is held, and it has repercussions on the esteem of all. It is not simply a matter of personal investment because people are overworked. Rather, it is more the consequence of a preference for formalistic concerns over the social impact of judicial decisions.

Lawyers suffer from a lack of credibility because they are perceived as untrustworthy. Many trials are not handled in a “trustworthy” manner in the sense that they occur too late. Their participants do not have the means to acquire a comprehensive view of the matter, either because the decisions are not enforced or because the debates are poorly argued or the decisions poorly reasoned. The institution of the judiciary (?) loses credibility as a result of procedural and managerial denial. If comparable countries are facing the same challenges, the French judiciary distinguishes itself in that it has not yet embarked on its “realist revolution”.

Because alternative dispute settlements are not a complete alternative to justice institutions, it has become urgent not only to derail this vicious circle, but also to reverse the course in order to enhance the judiciary’s efficiency, certainty and respectability. How can we do that? By encouraging a new relationship to truth, by rehabilitating the role of the courtroom hearing, by instituting a procedural framework with shorter and stricter deadlines, by introducing a system of “actual” sanctions for observed breaches.

1. Common Respect for Truth

To make a real impact and inspire respect, a judicial system must demonstrate that its end-goal is truth-seeking, or at least to give the appearance of pursuing that goal. But French lawyers have a rather “loose” relationship with truth. They are not bothered by making false/baseless statements, sometimes even outright lies. They know that these behaviors will not be punished and will not trigger any social retaliation; they are admitted and even justified in theory. “If you want to change that in France, you should not thrive at reforming the procedure. Rather, you should move to another country”, once said a chairman of the Bar (Bâtonnier) in a professional meeting. Such arrangements with truth are considered a cultural phenomenon and it is known that they are not tolerated in other traditions where scruples, transparency and procedural “fair play” are more valued.

It is admitted in France that French lawyers have a strong tendency to stretch the limits of truth and have a malicious relationship with it. This does not provide judges with much incentive to trust lawyers’ statements, because they do not display enough respect for truth. Judges take as a matter of course that the lawyer’s work product is filled with mere allegations and, as a result, pay greater attention to materials that do not come from the interested parties. This leads to two flaws (in the justice system?). On the one hand, judges consider that they are the only actors concerned with truth-seeking in the course of a trial. As a result, judges tend to overestimate their skills and their capacity to strike the right balance. On the other hand, judges undervalue the materials that scrupulous lawyers provide to them. How to distinguish trustworthy lawyers from non-trustworthy ones? In this context, the role of the expert witness in fact-finding is de facto enhanced,

which is a substantial problem because it is not the function the expert witness serves.

A change of behavior could inspire judges, in the short run, to favor countersigned acts through which opposing lawyers in a proceeding would agree on facts that would accordingly be removed from the judge's review and be accepted without further investigation.¹²

The relationship of US lawyers to truth is very different. Not that they never lie, but that they know doing so carries considerable risks. It is indeed extremely hazardous for a lawyer or a party in litigation in the US to hide elements from the judge or the opponent. In US proceedings, the relationship to truth is warranted by two unknowns over which the lawyers have no control and which are inoculated against influence: what the facts will reveal, and what the jury will decide. These two mechanisms over which lawyers have no control can be called third party *veridiction* because nobody has control over them. Without having to enter into metaphysical considerations on truth, their respect guarantees that the maximum is done in search for the truth in judicial proceedings.

A third characteristic is that these two mechanisms carry immediate and severe sanctions for any discovered mistake, or, worse, any attempt to deceive the fact-finder. The lawyer who has displayed untrustworthiness is barred from winning his case. A lawyer's ethical shortcomings may spell his defeat and, ipso facto, crown his opponent's demands.

What is interesting here is not the risk of sanction itself, but that it is commonly accepted. Few challenge a verdict per se, which differs from challenging its possible biases. In other words, justice institutions enjoy a social prestige, a common belief in them, which explain their efficient functioning. Sadly, justice institutions do not enjoy the same prestige in our country.

As the adage goes, "Da mihi factum, dabo tibi jus" (give me the facts, I will give you the law). Such a division of labor between the parties, who supply the facts, and the judge, who supplies the law, is outdated. For example, many lawyers consider they could legally "dress" the facts not on the basis of reality but based on the theory of the case, and that they therefore have no obligation to reveal case law which is detrimental to their client. For Daniel Soulez-Larivière, this attitude reveals a lack of a sense of community on the part of French lawyers who, unlike their colleagues in many countries (and not only the US) do not "share the same attitude about truth, its reality and its representation."¹³

The soft focus observed in many French judicial proceedings is largely attributable to the circumstance that it is difficult in our proceedings to gather all the relevant exhibits concerning a matter, which can be frustrating. But even with a procedural tool such as article 145 of the Code of Civil Procedure, there is no shared sense of a duty, be it among lawyers or litigants, to produce all documents in one's possession – including those that are detrimental to their case, which is an essential feature of Common Law discovery or disclosure. These two latter proceedings also have their flaws, but they contribute to generate (or translate) a respect for facts which is foreign to French civil proceedings.

This obsession with credibility in the United States is prolonged by an obligation on the part of the US attorney to cooperate during the proceedings to reach a concrete solution. Loyalty and cooperation are considered by the judge as the attorney's inescapable professional obligations and not as mere *à la carte moral* duties. It is even more so important that the trial is not the logical end-point of the proceedings – most cases are settled out-of-court – the US judge expects the

12. See article 2062 of the Civil Code and article 1543-6, 1o of the Civil Procedure Code.

13. Daniel Soulez-Larivière, *Face aux Juges*. Chap. 4, Mensonge et Vérité. Albin Michel 2017.

attorney to cooperate throughout the proceedings to produce conditions favorable to an out-of-court settlement.

Thus, US attorneys must demonstrate that they are trustworthy not only in all the steps of the proceedings, but also in the actual resolution of the conflict. In the US system, the attorney is at the same time a zealous agent of his client and an officer of the court, that is to say the guarantor of the good conduct of the investigation phase. Furthermore, attorneys are not the only actor in US proceedings to be held by a pervasive obligation to demonstrate their credibility and who have to inspire an infallible trust. All actors must permanently demonstrate their trustworthiness (including, inter alia, the expert witness, the judge, etc.). The judge must be wary of appearing consistent in what he writes and the way he treats the parties.

However, the French system is not radically opposed to the US system in all its facets. Without having to cross the Atlantic Ocean or the English Channel, we can observe proceedings that leave room for a more virtuous articulation of the work of judges and lawyers. For example, the failings highlighted above do not (normally?) occur before administrative courts. Even though French administrative justice has become more oral and gradually left more room for debate, there are few conflicts between judges and attorneys. Here, specialization is key. Administrative matters usually involve highly technical subject matters, which are handled by highly specialized practitioners. The role and the task of the reporting judge also helps considerably because this judge's intervention leaves less room for improvisation and clearly delineates the boundaries of the matter.

Another key issue is the trustworthiness of the lawyer's work product, because it is the basis of a virtuous dynamics of mutual recognition among judges and lawyers. It is also an important issue among lawyers. The permissiveness we are accustomed to has become a serious problem for diligent lawyers whose work product does not get the credit it deserves. The unfolding of this issue of credibility is the key for lawyers to have a more active role in the trial. This brings us to a new question; namely, are lawyers ready to take a more active and central part in fact-finding and in the conduct of the trial? The generalization of the countersigned act in the examination phase in civil proceedings points in this direction. It places upon their shoulders a burden many are not yet ready to bear. In addition, it would deprive them of an opportunity to derive indirect benefits from the current dysfunction.

2. Judges at the Level of the Best Actors in the Trial

It would be unjust to envisage the imbalance between judges and lawyers in only one direction. An observable trend in recent years has been an increase in the quality of work performed by lawyers, which is not matched by a similar increase in the training of judges. The Bar has professionalized and, following the example of Anglo-US law firms (sometimes even under direct influence), developed community work. It is also the indirect consequence of a movement of judicialization that brought to the courtroom certain "big" defendants who were de facto immune from legal action (the political class, among others). Elites are now forced to take criminal justice seriously and, reciprocally, justice was forced to open itself to the outside world. A matter which has been subject to several hundreds of hours of billable fees by a large law firm cannot be disposed of in a written judgment in a couple of hours by a judge who is not a specialist in the subject matter at hand. This leads to the imperative to increase the credibility of the judge. It is therefore urgent to rethink positively the contribution of lawyers to judicial truth-seeking.

It is possible to formulate two conclusions to increase public trust in justice institutions and to restore trust in judicial proceedings. First, the proceedings must place each actor in a position to give their best. Second, any public institution which does not manage to incentivize its members to give the best of themselves is ultimately doomed.

3. Rehabilitate the Hearing

Another way to make the lawyer more accountable and, in general, all the trial actors, including judges and expert witnesses, would be to rehabilitate the hearing, so as to preserve a value added to the judicial path as compared to alternative dispute resolution. We can contribute to this rehabilitation, not only by reinforcing oral debates at a moment when the hearing is fading and remains all too often the mere act of dropping off the court-filed documents onto the judge's desk, but also by demanding that all the trial actors be physically present during the whole trial phase. We must hold trials where the litigants are physically present and take all the time that is necessary for constructive debates. Because, in itself, physical presence constrains. A lawyer does not display the same behavior when he simply drops off his closing argument onto the judge's desk than when the various parties have the possibility to cross-examine him, to speak up, to challenge a fact or a statement. The same goes for expert witnesses, who must answer the questions raised by the litigants and when judges publicly voice their doubts. Not only would the trial phase then be taken more seriously, but it would also recover its role as the natural regulator of courtroom relationships. The desire for positive public opinion, the will to preserve one's reputation with one's peers, and the fear of shame or of public indictment, are powerful means to strengthen the sense of accountability on the part of the actors and to apply efficient pressure on them.

We can go further and rethink the lawsuit so as to promote the full investment of actors from the very first hearing. At first sight, this investment will be greater if all actors know that their own credibility depends on their full dedication at the onset of the trial and that there won't be any escape route or second chance. Is it not it reasonable to consider that these actors would fully engage in the dispute if they knew this hearing will not be repeated, that it is their sole and unique opportunity to voice their point of view? If one knows, on the contrary, that there are many ways to skin a cat, there is little incentive to be diligent, and even less to attempt mediation. To follow this path, we should be ready to impose a radical solution. We should adopt a more restrictive standard of review on appeal affording more deference to the lower court's findings and not make it a complete re-run of the trial. This would theoretically shift the center of gravity of the case resolution from the appellate phase to the first instance, and avoid the mentality of kicking the can further. Such a transformation of appellate procedures could be envisaged only if the trial phase is reinforced to exhaust the litigation.

Of course, several conditions must be met for such a change to occur without sacrificing the quality of the justice rendered. If many lawyers are sentimentally attached to appellate courts and particularly the *de novo* standard of review at the appellate level, it is because they want to guarantee access to quality services for their clients. These lawyers are conscious of the weaknesses of certain lower courts and often inherit the matter from an uninspired colleague. Bringing back the center of gravity at the trial court level implies rethinking the economic model of the judicial institution in general and of law firms and expert-witness firms in particular. This could only be achieved once a collective choice is made by public decision-makers and the legal professions. This choice implies a requirement to review the system's economic and procedural balance. We are left with one last condition, which is related to the preceding observations ; not leaving room for calculations designed to delay the adjudication of a case.

4. Incentives to Process Matters According to Strict Deadlines

As long as it remains possible unduly to delay the resolution of a case, the credibility of justice institutions will be negatively impacted. Despite a few improvements in recent years, the lawyer representing the defendant always enjoys a pernicious weapon; namely, delaying the case resolution so as to render its outcome obsolete. In effect, a matter which is not finally adjudicated is naturally resolved through the passage of time, giving up the rule of law to the force of nature. Depending on the circumstances, time may be the best or the worst of judges; a soothing force or vigilante justice.

It is essential to modify profoundly the relationship to time in order not to adjudicate a matter only when the judge and the parties have the impression that they have conducted a comprehensive inquiry, that they have covered all aspects of the issue at hand. Instead, the collection of evidence and the presentation of arguments must be driven by the temporal imperative of a date chosen at the onset of the proceedings. This is how it is being handled in many jurisdictions abroad, not least the most prestigious ones. Independently of the issue of the availability of funds to make a change, one important misconception must be put to rest; namely, that justice institutions do not build their credit on having all the time to adjudicate a matter but rather on delivering a verdict in due time, under the parties' pressure. As Guy Canivet, the former Chief Justice of the Cour de cassation, put it: "the examination phase, which involves disclosure of evidence and exchange of arguments, must occur in a mandatory timeframe, even if technical investigations through expert witnesses are involved. It is the trial date as originally scheduled which will determine the examination phase's pace under a schedule rigorously enforced by the court". This inversion of the procedural logic implies a change of culture and a reorganization of case management.

5. Showing Concern for the Real Social Impacts of Judgements

Such a solution is not financially possible today. Budgetary constraints lead to a satisfaction of the demand for judicial services without *ex ante* regulation and to a degradation of the quality of adjudications made by the courts. This is a slippery slope. It is better to have fewer but higher quality hearings than to process poorly the current stockpiles of cases with the same, or diminishing, financial resources. This involves a "realist revolution" within the judiciary which has barely started. The productivity imperative makes judges forget not only the quality, but also the effectiveness of their judgments. The liquidations of case stockpiles and the satisfaction of performance indicators trump considerations for the impacts of judgments. A judge tasked with matters concerning minors may continue to render decisions which are not enforced by social services for an entire year! Unenforced judgments pile up, one on top of the other. Judges who sacrifice themselves for justice cannot bear all the blame. To guarantee an impact, should we not contemplate an increased role for the enforcement judge (*juge de l'exécution*) to accelerate and render judgments more effective?

A renewed credibility of judicial case resolution depends upon the good will of actors involved in the judicial process, but that is not enough. Restoring trust also requires a new system of social control (in the sociological sense). To be trusted, this system requires an instance of veridiction, a social ritual and public accountability (which is ultimately the arbiter of credibility today), the passage of time, and the expectation of social effectiveness. It will likely not be possible to obtain a strong consensus around these reforms. This shifts the difficulty elsewhere; how are we to handle cases which will not pass these tests? This is where a new field opens for lawyers to regain legitimacy outside the perimeter of the courtroom; that is to say, in civil society.

II. THE LAWYER AS THE EXPRESSION OF JUSTICE INSTITUTIONS AND CIVIL SOCIETY

Outside of the courtroom, the lawyer's legitimacy must be built from scratch. Let us first consider that, very much like other judicial actors, lawyers don't often recognize that they have a social function that extends beyond the courtroom. Furthermore, the courtroom remains the common horizon profession of legal counsel, whatever the level of specialization. But this is quite incorrect. Lawyers continue to extend their range of activities and now get involved outside the courtroom, sometimes upstream from judicial proceedings, sometimes in parallel, and at other times in a completely autonomous way from the judicial scene. This trend coincides with the diminishing supply of judicial services caused, on the one hand, by a lack of budget and, on the other hand, by the evolution of our liberal society, characterized by the autonomy of civil society. More and more, civil society demands to be free from government interference in the management of its own affairs. Lawyers must therefore find their place, possibly a central one, in a civil society whose advances are constantly heralded.

This role of a spokesperson of society is very old because the history of civil society is largely intertwined with that of the legal profession. As early as the 18th Century, the legal profession has taken a primordial role in the development and the management of civil society. Through its governance mode, we can even say that the legal profession has successfully managed to embody the qualities of civil society. A novel phenomenon has gained traction in recent years; many professional politicians have decided to become members of the Bar after they were ousted from political positions.¹⁴ In the same period, high-ranking administrative judges and sometimes even members of the judiciary have joined the workforce of large law firms as part of a strategy of the latter to increase their standing by recruiting people from the highest spheres of government. Some see in this strategy an attempt to purchase the address book of these new hires for business purposes. For other commentators, such as Antoine Vauchez and Pierre France, the end-goal pursued by these law firms is less to transform their trophy hires' clout into business opportunities than it is to acquire a "deeper knowledge of those public administrations and of their psychology".¹⁵

Lawyers must build a tailor-made response to resolve the conflicts of daily life. The growth of alternative dispute resolution can provide them with the opportunity to occupy a new place role(?), but gaining legitimacy in this domain depends on very demanding requirements. Lawyers who venture into these new fields of activity must, of course, know the law and legal practices, but they must also know the techniques of conflict resolution. To be in a position to provide their client with a guarantee of efficiency, they must first capitalize on their experience. Because licensed practitioners cannot rely on their status as a regulated profession in alternative dispute settlements, they find themselves in competition with non-profit organizations and other (unregulated) professions. It would be a mistake to think that because lawyers know the law, they are also masters of the out-of-court settlement. In recent years, conflict resolution has been professionalized. Mediation is a true profession in which attorneys must train themselves. Legal knowledge, which has for a long time been the lawyer's privilege, is no longer sufficient. Legal knowledge must now be supplemented with the development of practical knowledge.

14. See "Les avocats et le lobbying : un gisement d'opportunité", *Le Monde du droit*, 1 Feb. 2008.

15. Pierre France, Antoine Vauchez, *Sphère publique, intérêts privés. Enquête sur un grand brouillage*, Paris, Presses de Sciences-Po, 2017, p. 47.

This knowledge can only be acquired with an attitude of modesty, and it will only transform into opportunity if lawyers acquire an awareness of its limitations and of its advantages. What will be their “value added” as compared to other professions?

Lawyers’ legal knowledge is not very useful if it is not supplemented by a practical knowledge of the entire chain of conflict resolution, from the first intake to the conclusion of the trial. Thanks to their counsel, the parties can be linked with the judicial institution if necessary. Legal knowledge is not reducible to a mere technique of dispute settlement; it also implies knowledge of the triangulating political elements of civil relations in a democracy. Law rests on the covenant between citizens, and it is the mastery of this covenant that confers on lawyers the status of natural representatives of citizens. If lawyers still enjoy this status, their mission is rapidly changing. The mission of legal representation, premised upon the lawyer’s knowledge of the law, must now aim at social peace. The knowledge of how to litigate a matter is no longer sufficient to characterize that mission. The same evolution has already been engaged in reconstructive restorative (?) justice, a form of justice in the shadow of the law without official intervention of the judiciary, but which is not yet a-legal. Restorative justice requires a different use of law, a more creative use because it goes beyond law enforcement.

Referring to the example of US attorneys, we should emphasize that they have precisely shaped their image and developed their legitimacy and their range of activities by positing themselves as social facilitators who are able to assist in settling a conflict. The threat of litigation, which involves a money pit, is only one incentive to move in that direction. The US attorney personifies a redeeming figure in a corrupt and violent world¹⁶. France knows no equivalent. This is why it is the lawyers’ task to invent their role in a disoriented society in search for references. Lawyers must posit themselves as social peace-makers who can mediate between citizens and government institutions or assist in settling a dispute with a large administration (like the tax administration or the school system) by grounding their involvement, not on the threat of legal action, but on heedfulness of the law. They should do all this without, necessarily, being on the look-out for situations of conflict, all the contrary. They must explore other legal fields, such as disciplinary law. Lawyers’ legal knowledge and their symbolic status acquired by oath and the prerogatives it carries must induce them to conceive of this new role.

One strong advantage of legal representation is that it can make a settlement enforceable thanks to the use of the lawyers’ deed (acte d’avocat), which remains under-used and raises an obvious issue of credibility. The legitimacy that lawyers enjoy does not rest upon a great institution like the judiciary, but on the seal of quality and effectiveness that the lawyer’s involvement provides to the settlement and the terms of the settlement agreement. It is more difficult to guarantee effectiveness – that is to say a genuine and durable hold on reality – than it is to enable an institution by way of a complaint. To guarantee this effectiveness, lawyers will need to be supported by the licensing authorities to evaluate, analyze and reflect on adapted solutions and their implications. Indeed, it is also quite a novelty to them. It is a task that requires the research capabilities of a large organization. Only the licensing authorities appear to be in a position to fulfill this task, which cannot be handled by the various associations that interact with the professions. This is in spite of the fact that many associations involved in social work now also have research units.

To diversify their roles in society, lawyers must demonstrate their ability to enforce ever more stringent rules of ethics. In this respect, we see in collaborative justice, the lawyers involved in an out-of-court settlement commit at the onset of the matter not to represent the parties in a full-scale litigation if those parties do not reach an out-of-court settlement. This requirement is even more onerous for a part of the profession which performs only transactional tasks. In such a case, the issue of

16. See in this respect the movie, *Young Mr. Lincoln*, John Ford, 1939.

credibility arises exclusively within the lawyer/client relationship and the issues of heightened transparency, conflict of interest rules and professional confidentiality become fundamental.

That leaves us with the most difficult issue, which economic model to turn to? It is important to consider social harmony and to think of the possibility for a higher award in an out-of-court settlement, as occurs in certain countries¹⁷.

The Openness Challenge

Generally, lawyers are too focused on the protection of their prerogatives to the detriment of opening their horizons. They have displayed defiance toward social work and mediation, they were late in investing in constitutional litigation, in the penitentiary field, etc. This reaction reflects the isolation of law from social sciences in the roman-canon tradition and more particularly in the French legal tradition¹⁸. The preoccupation with the preservation of the law's purity has led to the separation of the law school from the economic sciences and the creation of political science institutes. This may, ultimately, not have been such a good option for law schools. It is by opening the profession, and not looking inward, that lawyers will acquire the necessary skills to fully play the role of social facilitators. This is their calling.

As we can see, the transformations under way prefigure a major development in the duties of lawyers. A more assertive civil society needs efficient counsels who are available, centered on the individual and decentralized. Lawyers will only succeed in transforming the obvious demand for social harmony into a business opportunity if they become trustworthy in the eyes of the public. In order to reap the benefits of this opportunity, they must first ensure the transition from relying on the prominence of their status to a dedication to their role as social pacifiers. Mediation is not reducible to a mere appeasing of conflicts: it is also a formatting, a staging and a conceptualization of a more autonomous and mature human coexistence. In other words, it is a full-scale institution that lawyers must understand in order to succeed in adding to their skills as litigators to those of a permanent representative of civil society in the full extent of its meaning, that is to say as agent and master of the relationship.

III. THE ATTRACTIVENESS FACTOR

Credibility, professionalism and care for factual truth are universal values. In this respect, they export well and explain in large part the success of legal professions which now succeed on a global scale. This is why legal certainty is a prime element of the attractiveness of French law. The "yellow lines" we should not cross, whether we are a French avocat or US lawyer (or more generally a lawyer in a common law jurisdiction), but also a German lawyer, who belong to the Continental legal tradition, are not the same. It is with respect to these yellow lines that the parties will select a legal system after performing a risk analysis. This is truer in the context of globalization, where openness produces a benchmarking that is not particularly flattering for French lawyers. The difficulty is that these standards are not aligned with French culture, but to a higher obligation. We must say that countries with legal professions succeeding on the global stage are countries where law is taken seriously – this is not always the case in France.

17. See *infra*, Chapter 3.

18. See, Christophe Jamin...

The English Bar has understood the importance of legal ethics for the economic development of the profession. In a January 2017 Report entitled *The Future of Legal Services*, the Law Society argued that it is legal ethics which will determine the future of the profession and provide lawyers with the tools to articulate economic development and public trust.¹⁹ Legal ethics represents the eye of the needle through which British counsel may become a demanding business partner, and implies promotion of legal ethics, heightening professional standards, and innovation in the supply of services.

This challenge of competitiveness is becoming even more important in a post-Brexit context. The French attorney has a European and global card to play and the issue of its attractiveness is reformulated by the Brexit, which gives French lawyers a great opportunity to catch up. In this new redistribution of attractiveness, France has a strong opportunity to lift its game to become an attractive legal destination in the globalized world. Certainly, legal ethics will be a worthwhile element to promote.

IV. PROMOTE EFFECTIVE LEGAL ETHICS

Words alone cannot awaken consciousness. They need to be supplemented with examples. Legal ethical standards which are never enforced are like unenforced statutes. They amount to no more than wishful thinking and convince only those who have an interest in believing them. This does not work with public opinion. Worse, the more we repeat such empty statements, the more we excite the desire to bring down all the special statuses which are now viewed with suspicion and associated with rent-seeking systems. This has long been true, but even more so today because of the digital revolution supported by libertarian ideology. The internet constitutes the prime tool of this revolution because it brandishes figures in the face of principled statements. It offers an unforgiving X-ray of any institution. All regulated professions face this challenge. In our era, no one can claim the protection of vested interests. Everyone must face fierce competition and, in this context, credibility becomes a question of competitiveness. Moral stakes are reformulated in the language of economics.

Legal provisions sanctioning departures from the truth do exist. They can be found in the oath every attorney takes, as well as in Article 4.4 of the Code of Conduct for Lawyers in the European Union which provides: "A lawyer shall never knowingly give false or misleading information to the court." Theoretically, nothing prevents filing claims before the chair of the bar on this ground to ask him or her to order the amendment of the other side's pleadings. In practice, however, this seems impossible for French lawyers and, save the case where the brief contains defamatory statements, a judge will not direct a lawyer to amend the content of their pleadings (whereas such an obligation is obvious for a US or British lawyer who knows they must comply to avoid sanction). The credibility of French lawyers implies a capacity to design and apply an efficient disciplinary policy. How can we get there? Should we not find inspiration in outside experiments, national or foreign? The French judiciary accomplished undeniable progress in terms of discipline to the extent that French judges are now among the most often sanctioned professions. It goes without saying that this increased severity did not occur without clashes and resistance from representatives of the judicial body.

Concerning the legal counsel profession, it is difficult to make a quantitative assessment because only the Paris Bar maintains updated statistics that take

19. <http://www.lawsociety.org.uk/news/stories/future-of-legal-services/>

into account all the rendered decisions. This, in passing, is good publicity for them. However, the regional chambers do not keep statistics and do not publish reports. This amplifies the lack of homogeneity of disciplinary case law. It would be simple to remedy these weaknesses. The regional chambers could publish a bulletin every six months or every year, they could publish decisions rendered with the name of attorney redacted. In addition to promoting transparency, this would have a pedagogic impact upon colleagues (this was a determining factor in the development of the high judicial council (CSM) case law concerning judges).

The 2005 reform, which transferred the Bar local council's ethics jurisdiction to regional chambers for each appellate jurisdictional resort (except Paris) has led to improvement. This reform brought a distance between the lawyer and the disciplinary judge which can lessen the potential for bias on the part of the judge and, therefore, give more credibility to his or her decisions. Further improvements are possible in three different directions.

The first concerns enforcement authorities. Even if the disciplinary proceedings now fall under the jurisdiction of the Regional Council of Ethics (Conseil Régional de Discipline) and not, as before, under the jurisdiction of the Chair of the Bar, the latter still has a central function and proceedings very much depend on the Chair's personality. This is particularly true when legal ethics investigations are conducted prior to the initiation of formal disciplinary proceedings. These prior inquiries can be conducted by the Chair of the Bar, either upon the request of the general prosecutor or upon the request of an interested third party. At the end of these investigations, the Chair will decide whether disciplinary proceedings should be instituted in a report communicated to the prosecutor. The Chair of the Bar can decide to drop the charges, give a warning to the offender, or refer the case to the disciplinary regional council. These competing functions of the Chair of the Bar generate problems because the Chair is elected by his or her peers and this is hardly compatible with independent and objective disciplinary powers. The close relationship that a lawyer may have with the Chair (particularly in local bar associations) can cast doubt on the credibility of the proceedings, despite the fact that the general prosecutor may have external involvement.

The second source of issues concerns the status of the plaintiff in disciplinary proceedings. Though the plaintiff is now heard and informed of the results of the proceedings, he or she is still not formally a party to the proceedings and does not appear at hearings. The client who files a grievance is heard by the prosecuting authority but not by the disciplinary judges and is not informed of the reasoning of the decision. Today, this procedure is justified by the desire to separate disciplinary jurisdiction from criminal justice, but this is hardly adequate. There would be considerable advantage if the plaintiff could obtain formal recognition in the proceedings. The credibility of the profession would greatly benefit if the client could be assisted by counsel and appear at trial, if the lawyer could make an appearance, if the plaintiff could have access to the entirety of the trial exhibits, and if the plaintiff could appeal the decision within strict deadlines.

The third proposition, which is supported by a part of the profession, consists of mixing professional and non-professional jurors at all stages of the disciplinary proceedings. A professional judge could chair the regional chamber in a first instance hearing and be reciprocally flanked with two attorneys on appeal. Indeed, disciplinary proceedings in other regulated professions, like doctors or midwives, are chaired by an administrative judge and the outcome is largely positive. The mixing of professional judges and members of the profession at all levels favors transparency and enhances the legitimacy of decisions. This is one of the keys of the trust issue; namely, that the system cannot claim to be trustworthy or loyal if it does not function in these ways. Mixed courts contribute to increasing objectivity, particularly in the often raised dilemma of deciding whether a procedure should

pursue an objective of retribution or deterrence.

Also, informal sanctions should not be neglected. They often have an essential role to play in countries where lawyers enjoy strong legitimacy, such as the UK or the US. Reputational sanctions are as important as formal sanctions in dealing with offenders. An English barrister who has not fulfilled his or her duty to the court will no longer be invited to formal dinners at the Inns of Court. In the US, the bar is its own small world where everything ends up being known by one's peers. An expert witness who is inconsistent to support a thesis puts their trustworthiness on the block, in full view of colleagues. When the judge decides a lawyer did a bad job, that may be more consequential than disciplinary sanction.

Finally, concern for effective and modern ethics must be shared by all and engrained in young, entry-level lawyers. Because the code of conduct is written in a rich and very clear format, partners and experienced lawyers tend too often to presume that everyone knows the code. When entry-level lawyers start their first job, it is taken for granted that they are trained in legal ethics. This is a mistake as they have never practiced law. Legal ethics is practical. It is lived. It must be understood more as the art of raising the right questions than as a set of ready-made solutions. Institutions should inspire law firms to foster internal ethical debates. Legal ethics is no longer about putting a veil on scandals. It is about promoting a permanent questioning on the part of professionals which attests to an outward-looking attitude and proactive law firms.

Perhaps it would be useful to set up a legal ethical reference point that would be not only at the level of the bar authorities, but also at the firm level. A representative of the bar could be tasked with training lawyers in law firms. This type of representative exists in large organizations, but it has not yet spread to mid-sized and smaller firms. Their presence would provide an opportunity to respond to the ever-growing legal ethical dilemma, and thereby help to anticipate or avoid legal ethics liabilities.



2

**APPROPRIATE
THE DIGITAL
REVOLUTION**

Chapter 2: Appropriate the Digital Revolution

The second challenge lawyers face today concerns the digital revolution. Platforms and legal technology companies have stormed the legal market and are profoundly altering the quasi-monopoly that lawyers have enjoyed in law enforcement, legal advice and defense. The arrival of these efficient, agile and innovative newcomers, many without legal training, is disrupting an old profession unwilling to share the rewards of its prerogatives. But the legal market disruption, which has generated a new way to practice law, is only one aspect of a deeper transformation which can be likened to a symbolic revolution affecting all the categories by which we used to decipher the world. Digital disruption must be understood as a graphical revolution. Previously, the law was above all a body of texts and lawyers derived their status in society from their ability to decipher it, understand it and interpret it. This surge of a new narration in the legal the world is not only disrupting the legal practice tools, it also disrupts the authority of legal texts.

I. Triple A Professions

The digital disruption generates much angst among lawyers who fear they will be substituted by machines. Today, entire professions face this existential threat. Notaries have reason to be worried by blockchain technologies, law professors are threatened into extinction by the sudden appearance of e-learning and MOOCs²⁰ while legal counsels risk being overshadowed by the rise of predictive justice. The precision and reliability of delivered information delivery as well as the capacity to reach an immense audience at lower costs are all rendering obsolete those professions, which are stuck in the aristocratic and ancient era of the craftsman. Namely, as digital newspeak puts it, the “Triple A Professions”.

This revolution is heralded in a provocative way by the legal tech companies (“legal tech”). One of its most remarkable effects is that it creates fear among legal professionals that their work will be replaced by algorithms. This is triggering an identity crisis. “Triple A” lawyers are reacting defensively by building ethical levees which, ultimately, will not prevent the flood. The mere invocation of humanitarian values (including concern for the client, careful listening, sentences catered to the individual and their circumstances, and interest in students) hardly creates a convincing argument in the present context. The proponents of legal tech are spreading the idea that new technologies will invigorate the very values that lawyers claim are being endangered by legal tech, thereby defeating the professionals at their own game. Bringing down existing rent-seeking systems is one of the strongest arguments of the libertarian ideology upon which the digital world is thriving.

20. Mass Online Open Courses.

Furthermore, the paradigm change deprives those who sincerely worry about a qualitative drop in legal services and law-making of the very references they could use to base a claim that there is indeed a decline. Every change they point to as evidence of a decline in quality is turned on its head and presented as a sign that heralds the emergence of a new model. How are we to distinguish among them?

The digital revolution forces us to question our practices and to bring about a change. Of course, lawyers will resist this technological bluff, but they must be smarter in doing so. They cannot afford to stick their heads in the sand. Rather, they must conduct a precise inventory of the reasons to worry if they are to rebound and take advantage of this technological revolution to modernize their profession. They must, therefore, be well grounded and face the idea that this revolution is devaluing the importance of legal knowledge, that it challenges the lawyer's role as a mediator, and that it deprives them of the very symbols upon which their social utility rests at the very same time it intensifies their workload. Once the shock is absorbed and the risk is precisely assessed, it will become possible to identify new legal markets that lawyers can win, and to leverage these new constraints to transform the profession.

A Devaluation of the Importance of Legal Knowledge

Attorneys are familiar with crossing swords with notaries (as in the past with "avoués" before their role was eliminated), accountants or in-house counsels. But in all these conflicts, they were among family members, in the tribe of lawyers, or at least among members of regulated professions with well-delineated boundaries. To the contrary, the digital revolution pitches amateurs against professionals, school drop-outs against degree collectors, mathematicians against lawyers, businessmen against clerks, audacious young people against respected elders, start-ups against large corporations (like in the legal publishing industries), and unimpressed business school graduates against experienced practitioners. This leaves an open and understandable wound in the professional vanity of lawyers. In this new world, science has not vanished but it suddenly appears to be a secondary element. Law is no longer a legal discourse. Instead, it tends to be reduced to a mere database. Judgments do not elaborate case law anymore, they merely feed into a database. It is less the quality of a judgment which matters than the quantity of collected data. Legal culture yields to artificial intelligence. What a sacrifice!

Start-ups see no limits in the infinite power of science, or more precisely of one kind of science, and accordingly they see no limit to their playing field. This utopist optimism entitles them to proudly herald the death of law. Unlike their revolutionary predecessors, they do not do so by waving a red flag; instead, they brandish numbers. Unlike the 20th Century revolutionaries, these upstarts do not pretend to bring down the current law to replace it with one that is more just. Rather, their ambition is to substitute it with algorithms. If we listen to them, they say, in substance, that predictive justice will replace justice altogether. Algorithms will read statutory or contractual provisions much better than a lawyer ever could, and blockchain will be a much more reliable and credible umpire than any human institution. In a general way, some commentators advocate for a recourse to artificial intelligence to remedy "the cognitive biases induced by our brain", so law enforcement would depend "neither on the person behind the judge nor on the circumstances".²¹ Circumventing the human, it is argued, would allow justice, to present itself as a rigorously scientific institution in the sense that it would be possible to reproduce a judgment the same way we repeat an experience. Lawyers

21. L. Alexandre, O. Babeau, Confions la justice à l'intelligence artificielle *Les Échos*, 21 sept. 2016, https://www.lesechos.fr/21/09/2016/LesEchos/22281-042-ECH_confions-la-justice-a-l-intelligence-artificielle--.htm#.

should find consolation in the fact that they are not alone, because all instituted knowledge, including the knowledge of the hard sciences, is challenged the same way. As Chris Anderson²² puts it “the data deluge makes the scientific method obsolete”.

Like their fellow citizens, lawyers are torn between these evolutions. On the professional stage they denounce what they enjoy in their personal lives. Digital disruption stirs in each person a permanent conflict between the “consumer-self” and the “economic agent-self”, between one that is in search of material abundance and one who wants to earn a living. The first one wants goods that are ever more accessible, ever more user-friendly and affordable, whereas the other wants to be protected by the law. One claims an exception for the services they perform by measuring the energy and the financial resources required for their production. Lawyers are now at this junction. They attempt to demonstrate that their function is highly respectable and that their contribution to the rule of law is unique. They call the government to their rescue, forgetting that it, too, is embattled. The blockchain challenges sovereignty on its own turf, in its most fundamental prerogatives, such as fiat money, granting citizenship rights, controlling territory, and levying taxes.

Disintermediation or Alternative Intermediation

Legal tech disrupts the legal professions because they present themselves as a new intermediary between the instruments of regulation and justice users now perceived as a multitude; that is to say, without regard for their symbolic representations or for what can shape common bonds. Technology is performing the immense work of disintermediation. More accurately, it acts as a new form of mediation which makes the traditional legal mediators (counsels, notaries and other lawyers) redundant. They are made redundant because digital technology offers the world a type of mediation that many consider to perform better and be more reliable. This is regrettable, but inescapable. Digital technology plays the role of an accountability judge before which all the older human activities must appear. How does this labor of disintermediation operate? Of course, it rests upon a range of new legal services, but more fundamentally it rests upon a facilitated access to law which starts with free online availability of information formulated in a common language as opposed to the technical nomenclature which is understood only by professionals. This takes the monopoly of legal interpretation away from lawyers. Technology brings mass access to knowledge and information. But the creators of legal tech do not limit themselves to facilitating quantitative access to law for the masses. This would not be enough to explain their success. They flatter our taste for individual autonomy by providing us with the tools to draft a variety of legal documents, such as wills, business enterprise bylaws and other common instruments, which were, until now, prepared by lawyers. Like any other consumer market field, the legal services consumer wants to be an actor, not simply a passive bystander. He or she is, as we say, a consumer. From the perspective of professionals, the feeling of being subjected to unfair competition is aggravated by the fact that these sites not only provide downloadable forms or even raw data, but that they are also able, through targeted questions, to provide personalized advice. Not being licensed to officially supply free legal consultations, legal tech operates in a circumventing manner. For example, they present their advice as statistical data, explaining to the user that a given percentage of persons in the same situation have selected a given type of contract or a given type of corporate structure.

22. The editor in chief of Wired Magazine.

Legal tech takes on lawyers in an forward manner. The value-add of lawyers was based on their ability to supply precise and tailor-made advice. But they then succumbed to a tendency to commoditize the matters, particularly in mass litigation, to facilitate their processing and generate greater profits. It is a sensible principle of management that is common to all business enterprises. But the processing of mass data (big data) now makes it possible to supply individualized information by crossing data and metadata. It is also true for defense strategy because legal tech can supply numbered and precise indications, whereas, until now, lawyers relied on their own experience, necessarily limited, and expected the client to trust them. The day this technology matures and the costs drop, technophobic lawyers will have serious reasons to be worried.

The field of information and legal advice is not the only point of impact. New online judicial assistance services are now assisting clients in litigation where counsel representation is not mandatory, from the beginning to the end of proceedings. Certain technological platforms can also put the clients in touch with other persons facing similar legal issues. This new technological development could aid the introduction of class actions into the French legal system or other domestic legal systems. These online services are supplemented with online dispute resolution platforms (ODR) which may be linked with the judicial authorities of the country to give them greater credibility, like Canada. Their effectiveness may soon considerably increase thanks to blockchain, which can guarantee the enforcement of settlement agreements. This, for now, is the Achilles' heel of these types of dispute settlement mechanisms. In certain cases, an offer to settle an eventual claim takes place at the same time as the site registration or the finalization of a settlement (e.g., Ebay). This revolution therefore disrupts the relationship with time, another fundamental element of judicial conflict resolution. Not only does digital technology accelerate the pace of justice, but it also alters the temporal structure of judicial proceedings. The various stages of judicial conflict resolution – occurrence of the legal problem, realization of that problem, making the decision to seek legal advice, going through the proceedings, and enforcing judgment – occur at once and are now merged.

Other legal tech products can put their users in touch with a legal professional. Unlike a mere directory or word-of-mouth, they use selection software to find the professional who has the largest number of relevant qualities, to maximize the chance of success. They could also help select the one that is geographically closest or the most affordable. The selection of the "best" professionals can be made on the basis of a set of criteria, such as success rate and, possibly, tomorrow, the ratings of lawyers by their clients. To the great dismay of lawyers, performance evaluations, a key element of all platforms, did not spare the legal sector.²³ The totality of the judicial cycle (information, lawsuit, enforcement) is impacted by digital disruption.

In all these scenarios, platforms present themselves as new intermediaries that directly empower citizens to act. They are intermediaries that are constantly negating their power and effacing themselves before the tasks they perform, positioning themselves at the opposite end of the spectrum of old-world powers. Building on this position, they are experiencing a golden era before being usurped by blockchain, which promises to suppress radically all mediation. This is all happening before users realize that power corrupts and that the platforms (which, in fact, exert a real kind of power) are no exception to the rule (e.g., the collusion between the GAFA firms and the NSA.) This is when the law, with its servants, comes back into the picture. Platforms exert a considerable downward pressure on the possible price of legal services charged to clients. At the same time, platforms are characterized by a small margin of action in the apprehension of

23. E.g. La fourchette.com, Trip Advisor, etc.

matters for which they may nevertheless incur liability. Lawyers will only retain control over their professional activity if they manage to find common ground on which to determine the attitude they should have toward these platforms.²⁴ In this respect, we should not forget the digital economy's propensity to concentrate economic power. It is stronger here than in any other sector of activity and it is here that we see the creation of genuine economic giants that share a libertarian conception of the law.

Finally, even if lawyers succeed in articulating the difference between their activity and that of legal tech in a balanced manner, they will nonetheless find themselves as a mere component in a larger system of service delivery. Whereas once they were the unique producers of legal services and held a dominant position, they have now become a mere cog in the wheel of an industry in which the dominant players of the future may well be marketing, finance and strategy firms, among others.

A Symbolic Destitution

Like all prior revolutions, the digital revolution challenges old authorities. Not only does it frustrate their power; it also derides their attributes. It is in this sense that we can talk of a de-symbolization process. This process has several aspects concerning lawyers. Symbols such as the gown, the exclusive language (understood only by a small group of initiated members), and the rituals have lost their meaning. They do not inspire respect anymore and they suddenly bring the judicial world closer to the caricatured representations by Daumier. These enigmatic aspects, which once characterized the profession have now become a mere mystification in the eyes of performance-hungry consumers.

De-symbolization does not come only from digital performance; it is also characterized by a new relationship with reality. Digital technology empowers us to compare, grade and rank because it has channeled reality into numbers. At the same time, it accelerates transparency and proposes a hypervisibility of judicial activity. As such, it does not content itself with merely seeing what is, but offers a version of the real that is directly operational to transform it into something that is quantifiable. It produces a digital image of the institution like an X-ray or, even better, a scanner, and it reveals a hyper-reality, like that of a skeleton in a living body.

This piercing gaze acts on professionals like an instrument of control. Let's take the example of judges. Legal tech can provide judges with the means to know, very precisely, what they decide by establishing nominal statistics and by revealing to all, and in a very precise manner, the types of decisions they have rendered throughout their entire career (including the judges because they do not often fully know themselves). They are often blind to their biases and they know even less about what their colleagues next door are doing. At first sight, there is no "veil of ignorance" in this field that so characterizes human perception.

Thus, legal tech operates like a hyper-perception of the real, but of a real of a particular nature. It is not "the real" such as it is lived in its complex but quantifiable reality. The sole reality considered is the quantifiable one.

The new and crude light that digital technology and big data has cast upon the judicial institutions has evaporated its aura. This unemotional look dissolves all fictions while making them even more fictitious; this is the meaning of efficiency against the fictitious.

24. See. The practical guide on lawyers' cooperation with third party platforms published by the CNB. Guide de l'avocat numérique. CNB/ Lexis Nexis. 2016.

This X-ray vision also affects the relationship between lawyers and their clients. As long as the relationship was based upon a respect for the subjective traits of the person behind the practitioner, it was difficult to weigh and evaluate performance. Now, it is transparent. When the professionals invoke their rules of ethics, that triggers a cynical response of those who observe the capture of a market that has been rendered inefficient by so many statuses and mysteries.²⁵ The professional rules which, yesterday, were perceived as a guarantee of the quality of the services rendered, linked to an ideal of justice that placed those who abided by them above market consideration are today considered as illegitimate means to deprive the legal market of the depth and the extent that it claims to deserve. The profession finds itself reduced merely to its business dimension. The new technological platforms become powerful tools to build, or destroy, the reputation of a lawyer. This calls to mind the lawyer-rating software that was recently found legally acceptable by the French Cour de Cassation.²⁶

The digital revolution inaugurates a new regime of collective beliefs; namely, that we have less faith in the symbolic attributes of the function than in the cold, hard numbers that cast light on consumer satisfaction ratings. It is, therefore, not surprising that lawyers are shrill when they surrender the protection of the symbol. But they can find consolation in the fact that symbols are as important as the air we breathe. The goal is, therefore, more to symbolize technology than lament the disappearance of the old-world.

A Democratization of Law

The symbolic dimension of protected statuses is derided as magical thinking by the young tech geeks who now seem to have the means to show, numbers in hand, its negative impact on the values that form the basis of these statuses. That symbolic dimension generates uncertainty in the rules of etiquette which is supposed to certify the social relationships; it introduces opacity in a law that “nobody can ignore”, and it generates discrimination in the enforcement of a law before which we are supposed to be equals. Legal tech is therefore leading the battle against lawyers directly on their own field of values. Technology puts them in a position to realize that they are, at the same time, prophets and kings.

The digital revolution thrives on the vocabulary of democracy, which it doesn't challenge. On the contrary, it pretends to bring democracy to life. This explains why it is so difficult to criticize the digital revolution. If we do not understand that the digital economy's legitimacy is founded upon politics above all, we will not react in a constructive manner. Digital tools empower a fragmented group to assemble, to communicate, and to make its voice heard. Blockchain empowers the creation of autonomous communities – a dream as old as democracy, which haunts the utopist and the pirate alike (it is, therefore, not a surprise this image is returning in our era). The digital tool brings a new promise, closely linked with the ideal of rationalization and its immensely seductive power. It empowers a rationalization of law and, beyond, of the entirety of social relations. People were already dreaming of achieving such a rationalization in the 17th Century, and the Civil Code is, indeed, one of the most illustrative advancements in this process of rationalization. This appeals to all justice users who seek emancipation from arbitrary power, and also to the economic actors who are pressed to have, at their disposal, a law as predictable and reliable as a machine, upon which they can coldly base their calculations. The hyper-individualization we witness and which we seem always to want to push to new frontiers owes everything to this

25. Alan Turing had foreseen this development in a conference held in 1947.

26. Cass, 1^{re} civ. 11 mai 2017.

rationalization. And this rationalization process starts with the transformation of social organizations in which we live to emancipate us from non-chosen forms of dependence.

In the field of law, as elsewhere, digital technology increases our personal capability and it empowers us. All the possibilities we have mentioned above aim at rebalancing the relationship between client and lawyer. Who would complain about that? The double asymmetry that has affected the relationship between an individual and the legal professional is partially rebalanced. Information asymmetry, on the one hand, is rebalanced thanks to easy access to precise and relevant information. Relational asymmetry, on the other hand, is rebalanced because the possibility of aggregation of users alters the balance of power. To this end, many platforms propose to put their users in touch with others who have made identical requests.

The machine says it can further democratic values by placing citizens at the center, by giving them more power, by rendering them more transparent and by re-calibrating the balance of power. Technology could factually fulfill these promises, but it is less capable of organizing the representation of it. It is less the institution which is important than the effectiveness of the service rendered, such as the price/quality ratio, speed, reliability and, more generally, the customer experience. The service itself tends to be a substitute to institutional significance, performance takes over meaning and the service rendered trumps the message.

A Workload Increase

The digital economy brings us into a stark new world. This intensification comes not only from a workload increase and the virtual effect on subject matter, but also, above all, from the feedback loop. The pressure comes, first, from forced companionship with the machine. If a lawyer has handled, at the most, several hundred cases of a certain kind throughout his career, how could she be competitive against a machine which can process thousands of cases in a few minutes? Compared to a machine, all human labor looks appears imperfect/flawed. The lawyer, as well as the judge, finds himself a little bit in the position of a "Go" player or a chess player who must fight against a machine. He will never match its potential. Nothing seems to perturb the forecast of an exponential increase of computing capacities. Better, still, even though the progress of artificial intelligence would not be as fast and important as its promoters would like, it won't necessarily hamper its development on the legal market. In addition to the fact that the demands of justice users may not be as high as lawyers tend to believe, it is sufficient to slice the services supplied by professionals can be sliced into multiple sub-tasks to cause them to such that they lose all their mystery and suddenly appear naturally subject to automatization. This is one of the main propositions of Richard Susskind.

The pressure is also horizontal. Competition will intensify as the activity of lawyers becomes transparent and, as a result, becomes more dependent on the type of cases. It could also have a polarizing effect, directing more and more clients toward fewer successful law firms, and it could make it even more difficult to become a member of the "happy few" club. Such a trend, if it is confirmed, would increase the difficulty of integrating younger generations in this environment, unless they use technology effectively to voice their concerns.

The pressure may also come from clients. They now expect a lot more from lawyers in their role as legal experts. The image of the lawyer as a "wizard" is gradually disappearing, including in criminal law. Consumers' defiance is growing, which applies even more pressure on lawyers from their clients. Finally, the trend toward

automatization of repetitive tasks will force lawyers to focus on specific activities where their expertise is not easily replaceable by a machine. The platform “Votre bien dévoué”, which proposes to slice the activities of lawyers into small tasks is emblematic of such a change. As it processes criminal matters in real time, technology has the power to eliminate non-billable time and to commodify each moment. This is in the continuity of a long process of commoditization of time and of rationalization of all human activities at the heart of western capitalism.²⁷ In so doing, technology accelerates and intensifies “professional time”.²⁸ Lawyers must be optimally productive at all times, they must always be “on top of their game”, they have no right to err, nor the time to train themselves (a kind of professional time that exists on the margins?). Lawyers can only pretend to have reached such a level after extensive study and long training periods as apprentices. These are negative but unavoidable externalities of the job and, really, of all jobs. The acceleration of professional life (the great consequence of the digital revolution is that everything must go faster) suppresses all the margins, the alternation of intense episodes and quieter moments; in brief, the breathing room which will put lawyers in a frame of mind to think about their business in a mature way.

Reasons to Hope

Much of what has been covered in this chapter are projections or suppositions and should not feed into dark fantasies. Like everything which has not yet come into existence, the reality will be, without doubt, radically different and likely more prosaic. We should not become pessimistic or too impressed by technological bluster. The digital revolution also gives us reasons to hope, but only after reforming ourselves.

II. A New Demand for Law

We are entering into a knowledge economy. In this new economy, lawyers no longer enjoy a monopoly over legal matters. Consumers can inform themselves of their rights due to dynamic and individualized access to legal information. This considerably changes the type of inquiries addressed to lawyers. It is the task of the legal profession to organize to respond best to the challenge and to demonstrate with facts, rather than merely with statements, their irreplaceable nature.

Who will be gullible enough to comply in a docile way with the predictions of algorithmic justice? Who will believe that the parties to a smart contract formulated entirely in the form of algorithms won't have a dispute? Lawyers are sufficiently used to human affairs and passions to understand this will not happen. Shouldn't we consider that, deprived of symbolic weight or weak symbolic weight, the legal products coming from IT will be readily challenged?

At the time when consumers have facilitated access to legal information, lawyers must rethink their added-value. It is necessary to set aside the spite and the narcissistic wounds to recreate proximity with clients. The legal profession must build upon the “customer experience” to transform it into a purveyor of truth.

27. See, *La religion industrielle. Monastère, manufacture, usine. Une généalogie de l'entreprise*, Fayard, collection « poids et mesures du monde », 2017.

28. See Hartmut Rosa, *Accélération. Une critique sociale du temps*, trad. de l'allemand par Didier Renault, Paris, La Découverte, 2010.

The information made available to parties, lawyers and judges may, in fact, operate as a transfer of liabilities onto the shoulders of the parties. “Now that we all know what the judges will decide, what are you recommending?” This will be the question lawyers will be asked. Furthermore, it is similar for judges who will have an idea of what their colleagues have decided. The so-called prediction of judgment is only one additional indication which brings a new register of meaning to the decision.

Simulated results software will determine the behaviors of clients. Knowing a little more of what we can expect, many among us would opt to settle. Hence the necessity for lawyers to train themselves for out-of-court settlements.²⁹

Finally, we can bet that the oracles of predictive justice will cause the justice users of this “new justice without lawyers” to find their way back to law firms. Lawyers will welcome them with open arms, but they will have to respond to new expectations. To meet them, they will have to know the new tools of predictive justice, and not deride them. They must be able to relativize them and to criticize them, while also making the best of it. This is what their “neo-clients” will expect.

To find their place on this new legal services market, lawyers will need to be better trained in technology and innovation. Particularly in certain legal fields, it will be vital for their profession to understand the operation of these machines and algorithms. The computerization of case management as well as the availability of predictive justice tools will never be neutral. All these systems rest on choices made by human beings. Through digital training, lawyers who have the knowledge and the experience of law will better understand why the digital tool directs them toward one choice rather than the other.

III. A Developing Sector

The best response to the expectation of an ever more demanding clientele is to be better trained in constantly evolving new digital technologies. It is true for particular clients, but also for digital professionals. In the business field, the digital sector is in full bloom. Lawyers must give themselves the means to take advantage of this growth and train themselves in this respect. This sector is also a big consumer of legal services, but it has a particular culture. It cannot satisfy itself with merely a preliminary consultation on a precise legal matter by giving the lawyer the time to reflect. Start-ups have a new relationship to time, which is messy and accelerated. Put simply, they don't have time. This compels lawyers to herald themselves as people who know but who must test solutions at the same time as their clients.

For start-ups, the most urgent matter is not the law, but to have users and to get a technology that works to market before the competition. It is a fundamentally different approach. In the same vein, judicial risk, and even an adverse court decision, provides businesses with the power to test their innovations, to design the boundaries of their legality and, eventually, to reform their economic model.

Therefore, an adverse court decision does not have the same value anymore; in certain cases it can even provide an opportunity to come out of a matter in an honorable way. In this new economy, lawyers must situate themselves within the start-up ecosystem and develop innovations on the side.

29. See *Supra*, chapter 1.

In this new competition, lawyers will have to position themselves upstream to participate in the transformation by developing a dual set of skills (e.g., law and digital tools) or by going toward other less explored paths (e.g., risk managers). Shouldn't lawyers train themselves in coding to understand the enforcement difficulties of contracts drafted in an algorithmic form, also known as smart contracts? First, it will give them the opportunity to read those contracts and it will position them at the same level as the engineers who code based on what they are told. Thus, lawyers will become less dependent on the engineers. The coding lawyers will be able to raise the right questions and rethink their way of practicing law (like the way they draft contracts) with the requisite level of detail.

Such a knowledge of technology will make it possible to enhance trust in the lawyer/client relationship. A US study showed that out of 100 lawyer positions before the 2008 economic crisis, 10% of jobs will be irremediably lost and will not come back, and that 15% will be replaced by technical support jobs.

IV. A Powerful Inducement to Reforms

To face the challenges raised by the digital economy, lawyers must therefore appropriate it to build a new and more diverse supply of legal services. They must rethink, from top to bottom, their development strategy, their relationship with their clients, their internal organization and their economic model.

Strategically, the digital revolution can empower lawyers to become more efficient, and some law firms understand this. This is illustrated by Thierry Wickers' pyramids. By paying little attention to the low value-added market at the bottom of the pyramid, lawyers are leaving that segment open to platforms which they will then perfect themselves, gain in quality and push even more lawyers toward the top of the pyramid. Work product quality will not necessarily increase, but the concern for "client satisfaction" and the immediacy of response will be appreciated by consumers. In addition, as mentioned, repetitive work that can be commoditized will be considered in their entirety and sliced into distinct sub-tasks. They will lose their mystery and seem eminently susceptible to automation. Lawyers will, therefore, see their market segment decrease even more. The technological platforms which attract clients, thanks to lower costs, will continue to become better at providing legal services, and those services will ultimately equal in quality the services provided by lawyers in many fields.

What is at stake is whether lawyers will desert this low value-added market to leave it to legal tech, and instead focus on higher value-added markets (thereby taking the risk that there is no room for everybody) or whether they will decide to partner with their own technological platform or third-party platforms to allow them to remain present in these markets. The poker game that they must play, sometimes with genuine titans, appears delicate. Lawyers must find a way not to content themselves with a figurative role.

In addition, technological platforms are going to acquire new skills and may ultimately venture on this high value-added market as well as the higher margin one. Lawyers must therefore imperatively reposition themselves on the mass market.

Concerning the way they organize their practice, lawyers must inventory the tasks that are susceptible to automatization to free some time to position themselves on other legal markets or on high value-added markets. By segmenting each task to make it susceptible to being automatized, technological platforms will become competitors on the smaller playing field. This decoupling allows automatization. Concerning their economic model, lawyers must ask themselves what should be left in free access – or which services yesterday performed for a fee should now be free; and reciprocally, which new tasks should be performed for a fee? Lawyers will also need to consider how to share the benefits of an integrated service resulting from association with developers? These are the questions they must respond to in the years to come.

V. Human + Machine > Human Alone or Machines Alone

It is possible to summarize, with an equation, these incomplete developments. Humans alone, that is to say those who think they can refuse the machines, or machines designed to act as a human substitute, will never be as powerful as humans and machines together. Therefore, lawyers have no choice. Instead of wasting their time in rear guard opposition, they must quickly rethink their openness to another culture, not to submit to it, but to build with it the 21st Century legal profession.



ADAPTING THE ECONOMIC MODEL TO A PARADIGM CHANGE

Chapter 3: Adapting the Economic Model to a Paradigm Change

The third challenge facing lawyers in the 21st Century is for them to find a way to understand their era to adapt better their existing economic model to the current situation. There is no shortage of research attempting to describe and make comprehensible the way law firms are undergoing this transformation. But this research is characterized more by a divergence of opinion than by consensus. According to Thomas Kuhn, this is a sign that we are witnessing a paradigm change. When a new element considered an anomaly disrupts a paradigm, resistance and divergent opinions on the solution are the sure signs of paradigmatic change. In this case, the group concerned by the paradigm change will first tend to lean toward finding “some minor or not so minor articulation of the paradigm, no two of them quite alike, each partially successful, but none sufficiently so to be accepted as a paradigm by the group. Through this proliferation of divergent articulations (more and more frequently they will come to be described as ad hoc adjustments), the rules of normal science become increasingly blurred. Though there still is a paradigm, few practitioners prove to be entirely in agreement about what it is. Even formerly standard solutions of solved problems are called into question.”³⁰ This prophecy is happening right before our eyes and this invites us to depart from irrelevant, older analyses to explore new paths.

I. An Exhausted Model

The legal market is often analyzed in macroeconomic terms. This perspective presupposes that it is the great shifts that cause actors to change their behaviors. The best example of this is the famous Schumpeterian model according to which the economy evolves through a succession of periods of expansions and crisis, the famous “creative destruction”. New entrepreneurs appear with innovations that disrupt the stability of existing economic circuits. Each technological breakthrough leads to periods of destruction which particularly affect low value-added tasks. This destruction is counter-balanced by job creation and by the arrival of new activities which ultimately bring about positive replacement or renewal. The legal market does not escape this phenomenon. But the Schumpeterian model does not seem to manifest itself in its purest way in the digital economy, at least not as well as it did for other technological revolutions because there was a longer time of adaptation. In the era of the digital revolution, it may be best to take the perspective of the actual players on the field and view things from their microeconomic level. The “Structure Behavior Performance” method used in industrial economy can help us better understand the crisis facing the legal professions. It provides that, in a competitive environment, the market structures determine the actors’ behaviors and, as a consequence, , impacts

30. Kuhn, *The Structure of Scientific Revolution*, Chicago, University of Chicago Press, 1970 [2d Edition Enlarged], p. 83.

their performance. By studying their behaviors, it is possible to determine the profitability of different tasks. Concerning lawyers, the first question we must, therefore, ask is whether we are in the presence of a true competitive market and, from this perspective, to find out what kinds of barriers to entry exist to cast light on what determines a lawyer's behavior. It is not our ambition to dive into a detailed economic demonstration,³¹ but rather to look at the results of digital disruption and illuminate the current economic realities characterizing the activity of lawyers.

The changes occurring both on the supply and the demand side will necessarily influence the current, yet outmoded, business model of law firms. On the demand side, the technological revolution impacts market access conditions and the organization of the profession. The organizational factors are those that are first impacted by the digital economy and big data. How can the legal profession anticipate these changes? In small structures, of which there are few remaining in France, the pressure incurred by the diffusion of new technologies will encourage them to pool certain activities. The large structures will have to fend off a direct challenge to their pyramidal organization.

The most widespread model found today in large business law firms is one that is shaped like a pyramid with the partner at the summit who produces fewer billable hours than those beneath her, namely the senior associates who produce fewer billable hours than those beneath them and so on. Everything exists in order to produce a leverage effect. This business model is based on a cost-plus billing theory; that is, the costs are multiplied by a ratio (on average at 3.5 in global standards) which must be divided by the number of days and the number of hours to calculate the hourly fee. In this model, which is applied in the majority of business law firms, the junior lawyers bill 90% of their time while the more experienced lawyers maintain a ratio of 60%, and the most experienced ones maintain a ratio of 45%. The partner must therefore control everything and spend time seeking out a large volume of business to keep those at the bottom of the pyramid busy. The shape of this pyramidal model imposes a certain type of behavior on the part of the lawyer, and affects the way the firm is positioned on the market. Certain activities will be considered more quantitatively labor-intensive while others will be considered more qualitatively labor-intensive, which generates two different leverage effects. For example, in a bottom-heavy pyramid model, it is possible for many entry-level lawyers to conduct due diligence working 12, 14 and even 17 hours per day, billing the entirety of their time. But if the pyramid is inverted, the ratio will be lower and the partner will spend time working on very high value-added and strategic matters because the partner is not replaceable in those matters. In this case, the partner does not need the assistance of four or five junior associates.

Until recently, the leverage effect of this type of model was very high and some law firms could reach a very profitable ratio of one partner for 17 associates. But this golden age is gone and, today, the global ratio is on average at 1:3. Only the "Big Four" (PwC, EY, Deloitte or KPMG) reach leverage levels ranging between 1:6 and 1:9. There are many reasons explaining this drop in profitability but the results are here and they are unforgiving, forcing lawyers to rethink their business model and to reposition their activities.

The legal market is also disrupted on the demand side. Unlike the healthcare market, for example, the legal market does not seem to benefit from induced demand. The technological revolution, as we have seen, transforms the behaviors of the consumers of legal services and generates new market segments which did not exist before.³² Clients become more sophisticated and demanding and, except in a few particular areas, it is no longer possible to blindly bill clients for the

31. We refer here to the article of Bruno Deffains and Stéphanie Baller, "Intelligence Artificielle et Devenir de la Profession d'Avocat: l'Avenir Est Présent". *Revue Pratique de la Prospective et de l'Innovation*, Mars 2017 – No 1.

32. See *Supra*, Chapter 2.

entirety of law firm activity. In particular, clients may now refuse to pay for tasks that are performed by junior associates or legal interns. In a way, they refuse to fund the training of inexperienced lawyers. In brief, it is the entire logic of the legal market which must be rethought.³³

II. Facing the Crisis of Profitability

The argument, largely echoed in the media, that there are considerable gains of productivity due to digital innovation, does not apply to law firms. In fact, these gains are offset by increased competition. The transformation of the legal market structure therefore leads to a profitability slump. The statistics from the US legal market, where we can observe profitability trending downward at approximately at 8%, spell bad news because they indicate levels of profitability comparable with those observed in other sectors.

Lifting Certain French Taboos

We can observe a trend toward de-concentration which contrasts with a trend observed in the 1990s, when the size of French law firms was growing. After a period of strong concentration, we are now witnessing the dismantling of these structures. Over and above the great global trends and the economic crisis, a cultural factor complicates the transition and the adaptation of the law firm model in France. This cultural factor is the ambivalent and insincere relationship that French lawyers, in general, have with money. To hide this would amount to denial and it would delay the needed research for solutions that could increase the profitability of the French legal market and ultimately make it sustainable. This complex and complicated relationship with money is deeply rooted among lawyers and, more generally, in French society. We must also consider both political individualism, which historically shaped the French lawyer, and economic individualism, which currently incentivizes the French lawyer to seek personal gain. Political and economic individualism led to a mode of operation in the legal profession in France which is more individual than collective. In other words, the French legal profession never succeeded in institutionalizing profit distribution. Large French law firms risk having more and more difficulty in positioning themselves among their international competition. To overcome these complex relationships and renew them with a durable profitability path, one solution would be to create fully-fledged European law firms.

Before getting there, however, it is urgent to renew the fee strategies. The profitability fluctuations lawyers are facing necessarily have an impact on billing methods. France is relatively behind its peers on this point. We do not find more than two or three billing modes here. By comparison, we can find a dozen billing modes in the UK. It is therefore urgent that lawyers delve into this issue and diversify their approaches to augment their competitiveness.

Refardless, legal tech will force them into this renewal, if it has not already done so. Legal tech forces questions about the fee strategies of law firms and their sacrosanct hourly fee, which generated the very success of the system.³⁴ This method rested too much on "exchange value" when other means exist. We can, or maybe we should, move toward a model based on the "usage value" and

³³. See the study on German Law firms conducted by Boston Consulting Group in partnership with the University of Hamburg.

³⁴. See Antoine Fourment, *Autopsie de l'honoraire*, *Revue Pratique de la Prospective et de l'Innovation*, Mars 2017 – N01.

stop imposing a qualitative hourly fee with an embedded automatic cost transfer charged to the end user. A fee strategy based on the “usage value”, would make it possible to bill, not on the basis of the lawyer’s hierarchical position within the firm (partner, senior or junior associate, intern), but by reference to the added-value the task at hand brings to the matter’s resolution.

Artificial intelligence will hasten this reorientation of fee strategies. Already, many law firms have tested new solutions and are using artificial intelligence, not only to supply legal services, but to complete the reproducible and repetitive tasks of invoicing. It is a sizeable organizational revolution because lawyers must learn to master these techniques. This will put lawyers in a position to assess the price of matters which have received an insufficient amount of considered analysis. It is important to develop artificial intelligence and algorithms to analyze the entirety of a law firm’s files, to organize these files and to fix arbitrary fee rules for all new files. With artificial intelligence, it will be possible to anticipate, ahead of time, the time spent on each file, its specific path (in order to avoid surprises) and the amount of billing, so as to propose flat fees which could be refined over time (each new matter providing an opportunity to modify the framework). If they manage to go down that path, law firms will be able to reach the 90% flat fee nowadays demanded by clients and they would be more in phase with the lawyers’ fiduciary duty.

Regroup in Order to Last

Another important action, which is not new, is the need to regroup. Because this phenomenon is global and across sectors, lawyers will not be spared. The new economy brings a kind of “hourglass effect”; on the one hand, very large businesses will leave a large footprint, an international footprint, owing to the weight of their enormous resources, their vast networks and their long history. There is little doubt that many will adapt to these new circumstances. Beneath them, and found on the other end of the hourglass, are the very small businesses, start-ups and niche specialists, which are reactive to demand, agile and can rapidly change strategies to respond to novel situations. Applying this metaphor to the legal market, this could result in a few large international players at the top of the hourglass and, at the base, a bottom tier of small, specialized boutique law firms, making mid-sized firms uncompetitive. Strangely, it is the segment of those mid-sized firms squeezed in the middle of two profitable segments, which is growing in France. While in the UK, Scandinavia, the US, Germany and the Netherlands there is a greater emphasis on the creation of boutique law firms, France continues to create mid-sized business law firms in large quantities much to the detriment of the legal profession’s competitiveness.

French lawyers overwhelmingly continue to practice as sole practitioners and, contrary to what many think, this trend is on the rise. Judging from the CNB Observatory data, sole practitioners, which accounted for 33.8% of lawyers in France in 2005, represented 36.3% of legal practitioners in 2015.³⁵ There is therefore an increase of individual practice, whereas, over the same period, the rate of partnership has remained stable. This situation is untenable in the face of “task pooling” and the important funding needs on the horizon. The challenge of regrouping is, therefore, essential, but the French tendency to organize as sole practitioners slows the necessary restructuring. In the US and the UK, regroupings, which are accelerating, generate greater economic leverage and allow for a “task pooling” effect.

35. See Observatoire du Conseil National des Barreaux. Les Chiffres Clés de la Profession Actualisés pour l’Année 2016.

The restructuring of tasks is necessary to encourage client loyalty, as is the marketing of secondary activities as well as the development of branding and an overall marketing strategy. Whether the regulations are European or national, this restructuring is of utmost necessity for France to make up for lost time (despite that fact that there may be a movement under way through the SPFPL, la Société de Participations Financières de Professions Libérales, which is more really more likeakin to a holding entity than an operationally collective structure).

III. Diversify Financing Structure

Consider Opening Up Law Firms Capital?

The issue of opening up capital to persons who are not licensed professionals, or more broadly to capital owners who are situated outside the regulated professions, is more and more discussed, particularly among large transactional law firms or international litigation firms. This possibility feeds two fears among lawyers. One is the fear of creating legal “supermarkets”. The other is the fear of losing their independence to shareholders who are ignorant of their mission. Lawyers fear, above all, becoming a sort of externalized general counsel’s office in the service of large business structures.

But the trends of the global market as well as the urgent need to diversify sources of funding should not prevent lawyers from considering opening their capital to non-lawyers. In fact, this could be compensated by counter-balancing measures. We must, therefore, look closely at applicable foreign experiments and not a priori discard their lessons learned.

An interesting experiment was conducted in the UK with the ABS (Alternative Business Structure), an innovation which also exists in certain US states, as well as in Australia (where this phenomenon is gaining strength). Although the results of the British experiment are ambiguous, they have been well documented in many studies, particularly the studies under the aegis of the Legal Services Board (LSB), so we can reasonably expect to find some useful lessons there.

In the UK, this ABS system concerns, predominantly, solicitors (pre-litigation), and barristers (litigators), who have been the most hostile to the system. This innovation, which appeared about 10 years ago (in a 2007 statute) grants individuals or legal persons who are not members of the profession the right to own stock and voting rights in law firms. Persons outside the law firm and the profession can inject capital into law firms. Certain law firms are even listed on stock exchanges. This type of structure makes it possible to call for expertise outside the legal profession, such as expertise in accounting. For those who desire this approach, the model offers a mix of capitalistic and operational multi-professionalism.

The outcome of these structures in the UK is not easy to assess. The analysis provided by the LSB can be useful but should be approached with caution because of the LSB has a flair for self-promotion. The fundamental idea in the background is that the legal market must grow in scale and in depth to respond to the unsatisfied demand for services. As the LSB report shows, even in the UK, lawyers do not spontaneously choose this path. It is thought that in order to inspire them, competition must intensify and, therefore, convince them that they have an interest in securing a capital injection that would allow them to be in position to resist their competitors by investing in research, marketing and new technologies.

From this perspective, an organization which is too small is not likely to seduce investors. On its face the open legal market appears a reality, but the culture of lawyers has not fully accepted and adapted to that reality. It is therefore with a view to accelerate that change of mind that we propose a change of structure, which should perhaps be managed by a non-lawyer. Because the interests of the legal market and investors are converging, it is not the culture of investors which must be changed. Lawyers are therefore asked, by adapting to the new structure, to adopt the vision and behavior which go hand in hand with their way of thinking of the appreciation of their activity.

For now, the ABS development, which is not as significant as its promoters expected, is nevertheless real and certainly not catastrophic. They tend to favor a more innovative approach in terms of performance and to have generated new business models. For small law firms, this favored the creation of common networks of marketing and communication services, which allowed certain law firms to augment their visibility. The large multidisciplinary audit and consulting firms have seized the opportunity to launch law firms as accessories to their main activity. In certain sectors, these "supermarket" law firms offer wills, divorces and other tailor-made products to their clientele. A few large law firms have used ABS to buy other firms from the sector to remain leaders in their field, but this did not solve the profitability problem. Another model appeared, that of private equity, whereby investors seek growth and solely expect profitability of their investment. Finally, in a few cases, the ABS was used as a mode of outsourcing the legal department of the business which transferred the in-house legal department to an external organization, which, in effect, has only one client.

Envisage Other Possibilities

The prohibition of finder's fees and other types of fee sharing, in accordance with current ethics rules, is an obstacle to multi-disciplinary practice and to the regrouping of professions because this requires a type of sharing that must, necessarily, be done with other professions. Currently, the only way to circumvent these prohibitions, considered by some as obsolete, is to create a professional operation structure. Could one consider the possibility of a multi-professional practice?

Another source of possible financing is third-party litigation funding. Already strongly used in arbitration proceedings as well as in civil litigation in other systems (US, Australia, UK, etc.), we see an evolution in the funding of law firms by third parties. It is often used to open new branches and sometimes to remedy capital issues. We cannot neglect the risks if such a system renders it possible to finance trials that would not otherwise take place. This is risky because low-value litigations could be used as a blackmailing tool or even be transformed into junk assets which could be traded on secondary markets. This is what is happening in the US, among other places, where it is relatively easy to initiate commercial litigation with mere allegations and without concrete evidence. The debate remains open.

Invest in Research and Development

It is important to encourage a cultural change, and not only one of an economic nature, but one that understands that innovation and R&D have a role to play in a service industry like legal services. Across industries, the average R&D investment ranks between 3 and 4% of revenue. In certain industries, such as telecommunications, R&D investment can reach 13%, or even 20-30% in the

biotechnologies.³⁶ But the legal industry is stuck at less than 1%, illustrating that it is guided by a rationale driven by expenses and not by development. Revitalizing efforts in this area is desirable.

We should also consider the organization and the methods of R&D. As Bruno Deffains and Stéphanie Baller put it, one essential issue is to determine whether it must be the privilege of lawyers or whether, on the contrary, it should take place in a more collaborative way so as to generate a capacity of innovation for everyone, including clients, partners, and even potential competitors.³⁷ Some highlight the advantages that the recourse to franchised networks might present, to promote a collaborative approach. This would encourage the development of a good franchise network that could invest in R&D which, in turn, could be translated into the creation of procedures that the franchisees would not have to pay for since they would not, individually, have been in a position to do so.

Disrupt Activities

The position of law has changed with globalization. It has changed directly with the apparition of a global law and of a systemic justice, and also indirectly because of businesses which impose a repositioning of the lawyer. The 1990s represented a true disruption, to paraphrase Clayton Christensen who fathered the idea of "disruptive innovation", which impacted all professional services. Disruptive innovation, inseparable from market transformation, according to him, manifests itself "by a massive and simple access to products and services which were until now little accessible or expensive".³⁸ Regarding the consulting business, this disruption coincided with a "power take-over" by the general counsel and his/her legal department. They must now, in order to assist clients the best they can, know their business, their culture, their policies, their strategies, their operative framework, and have the best lawyers in house. Their role is not only reactive, it is also proactive.³⁹

Facing this transformation of the office of the general counsel, businesses have started exclusively to hire attorneys to have, in-house, someone on staff with the skills needed to find answers to the legal problems of their clients. This has had a great impact on outside counsel who no longer benefits from the advantage of information asymmetry, which they once used to their advantage when counseling companies devoid of a legal department or the required skills that forced them to seek external assistance. Today, outside counsel has remained outside the business but they now face alter egos within the very business enterprise they counsel. These alter egos are skilled lawyers who have the advantage of knowing the sector very well. This changes everything and requires a rethink of the value-added of external counsel.

In addition, if once outsourcing of legal skills could only be handled by outside counsel, general counsel now has much greater choice. This brings into question the multidiscipline of law firms because general counsel prefer to manage the organization themselves by working with several services suppliers who span several sectors and several geographical zones. Now, the "secondment" of lawyers or alternative staffing are more and more in fashion and developing in Europe where legal consultants and the legal tech companies are gaining more market share.

36. US data 2016, University of Georgetown, cited in Deffains & Baller, *op. cit.*

37. Deffains & Baller, *op. cit.*

38. <http://www.latribune.fr/blogs/inside-davos/20140310trib000819144/-la-disruption-est-une-transformation-irreversible-du-capitalisme-clayton-christensen.html>

39. Olivier Chatudeau, *La direction juridique de demain*, LGDJ, Lextenso Éditions, 2014.

Create Interest in New Money-Generating Activities for Lawyers

The pyramidal model has not completely disappeared; in fact, it is actually on the rise in the field of regulatory investigations. This trend is correlated with the heavy sanctions that regulators can impose on businesses that find themselves under investigation. When this happens, considering the risks such businesses face, they do not balk at costs; on the contrary, they often sign blank checks to law firms that represent and assist them in the course of such investigations. It is therefore urgent – even more so since the enactment of the Sapin 2 Statute – that French lawyers take their place in that market segment if they do not want to lose market share to new players. A collective examination is needed concerning the skills that lawyers bring to regulatory investigations. This analysis could be inspired by what is happening in the US. What are US lawyers doing? Do they bring a technical added-value, a new relationship skill, or a collaborative culture? It is not per se a new legal field, even though it is one of the most profitable of legal activities in the US. For businesses, the mere act of hiring a reputed law firm is perceived as a kind of signal that indicates its willingness to cooperate with the authorities. The millions spent on billable hours by a business during an investigation can attest to its level of cooperation, and may result in the authorities reducing the punishment. The benefit for the lawyer who places herself ahead of others is considerable because these new tasks are not formalized and are therefore hardly reproducible. The US attorney sells, at a premium, his ability to understand unwritten rules which, in substance, are merely a certain way of “doing things”. It is paradoxical for a lawyer to sell, not his legal knowledge, but, in a way, his experience in a novel post-legal scenario. He sells his behavioral and relational abilities because, very often, he has had gained an understanding of these “club” rules because he is, himself, a part of that very club. The lawyer is hired because she is prepared to answer someone and knows what to say! Her experience of adversarial proceedings and her relationship with a law which is taken more seriously there than in France, among other countries, seals the deal. It is, thus, very important for French lawyers to understand that this novel cultural phenomenon is not only American, but global, and now it is even more important to understand the specificities of their own culture (see Chapter 1 on Trustworthiness). This double awareness is fundamental for French lawyers if they want to enter this market and shape it while businesses are, more and more, using audit firms for their “capacity”. The Big Four have made a significant come-back in the US legal market, particularly because they have the technology and the teams to do so.

Believe in Training

Settled routines are deeply entrenched and opposed, for now, to change. But the newcomers in the legal profession have no prejudice and no scruples. Hence, the importance of training. Training is at the heart of rethinking the economic model and it must be considered a major investment in the future of the profession. New generations hold the keys to face these challenges.

Entry-level lawyers must be trained in their two initial years of practice, which requires a heavy investment on the part of law firms. But clients are no longer willing to pay for the labor of these entry-level lawyers precisely because they are not yet fully-trained lawyers. Law firms pay and invest a lot to train entry-level lawyers, who are not well-regarded by clients. It is a double punishment, because there is no direct return on investment. Nor is there a delayed return because between their second and fifth year of employment with a firm, 50% of

lawyers leave. Sometimes, they go to work for the clients themselves, who have not invested in their training and therefore enjoy a free ride. It is a vicious circle of which the profession is conscious of, but it has not set to work on collectively. However, training is the right way to resist the marginal productivity fall and these difficulties must lead lawyers to rethink how they train entry-level lawyers. How do they organize the transmission of their practical knowledge? How do they manage their investment? Simply put, training must be more diversified and go beyond basic technical legal knowledge to include the broader subjects of legal culture, including negotiation and cooperation with regulators. The challenge is to formalize and constitute a reproducible global theoretical/practical knowledge.

If this is not done, law firms may stop hiring entry-level lawyers; instead, they will be trained, increasingly, by businesses. These business trained lawyers will leave to recreate consulting businesses with contacts immediately exploitable as business opportunities. If that happens, the generational link will have been broken and the legal profession will be seriously imperiled.



ENTER GLOBALIZATION

Chapter 4: Enter Globalization

A recent report on the future of the legal profession calls the mobility of lawyers the “sum of all challenges”.⁴⁰ It is with this in mind that we complete our review of the challenges facing the 21st Century French lawyer. It is thanks to their increased mobility that French lawyers will earn their place in the globalized world if they succeed in becoming more mobile. It is, therefore, the task of the licensing authorities to seize upon this issue vigorously and lay out a clear solution as readable in France as internationally.

“A legal career is no longer linear. The lawyer who takes the oath no longer lives in a static world like his predecessors. Of course, he belongs to a local Bar which remains territorialized, but the boundaries of his environment have been disrupted and he cannot remain the only actor to ignore that his clients or subscribers’ lives are experienced in a very different way than in the past in territories which may be abroad or even virtual; and that his mobility may eventually require him to venture beyond the boundaries of his profession”⁴¹. Analyzing the issue of lawyers’ mobility involves an inquiry into their relationship with other legal professionals, such as notaries, judges, in-house counsel, researchers or professors. The overarching aim is to create a community of lawyers in France like in other partner countries.

This requires an analysis of the important challenges from the perspective of increasing mobility – entry-level training, the arc of a professional career, working conditions, and the criteria of entry into practice, as well as the internalization of structures and inter-professionalism – because they are all determinative of the profession’s attractiveness. How to streamline the profession? By establishing revolving doors between the professions? By fashioning a common language, common references and a same “reason for being”? By increasing opportunities for dialogue? By shaping a common culture? In short, how can we render the French lawyer compatible with globalization?

I. International Benchmarking

How do French lawyers compare to UK or US lawyers? It is not to say that their Anglo-Saxon counterparts should necessarily be taken as an example, but they have undeniably succeeded in dominating the globalized legal market. In Paris, like everywhere in France, the lawyer practices law largely as a sole practitioner and is primarily a litigator with a dream to become a well-respected trial lawyer or celebrity of the bar. By contrast, UK and US lawyers have a less personalized practice of law with fewer “celebrity” lawyers and stronger professionalism. This can be explained by the organization of legal practices which is different from (see chapter 3), and based less on *intuitu personae*, than the practice in France. This relates to a cultural difference between the Anglo-Saxon and the Latin world. Finally, the Roman-Canon legal system is much less

⁴⁰. Report ordered by Mr. Jean-Jacques Urvoas, Minister of Justice and Chancellor to Kami Haeri, Avocat at the Paris Bar, February 2017.

⁴¹. *Ibid.*

business-friendly than the Common Law. Very early in its history, the Common Law tradition became a unified body after it absorbed the law of merchants. This is illustrated by the famous saying that English contract law aims at facilitating business life, not constraining it. Contrary to the Civil Law tradition, and particularly in France, it is significant that the Civil Code has so often been presented as the “Civil Constitution of France” and that we have presumed to keep the market at the periphery of our system, with its sole expression, at first, a commercial code without a logical structure and left in the shadow of its elder, and then, much later, a consumer protection code. Everything happened as if the law could not play its role of social cement and, at the same time, promote market development. These two principles of social organization have been presented in France to be at odds with each other. Outside France, even if we question the relevance of the criteria used to prepare the World Bank Group’s Doing Business Reports, the reluctance of civil law countries to play by the rules of competition is a strong sign. The ascent of the Anglo-US lawyer owes much to their conception of law as a business like any another, illustrated by expressions such as “legal services” or

“legal industry”, which are not translatable in French. As a result, the Common Law system has exported well. The Common Law trial, as we have seen, is very expensive but also more open to professionals; it forces the participants to give the best of themselves. It also reproduces inequalities in wealth among the parties, which is in favor of the most powerful party, essentially the business community. Another asset of the Common Law tradition is its professionalism in fact-finding. For the UK or US lawyer, the solution lies in the facts much more than in the law; that is, legal categories. Facts circulate easily and are more conducive to consensus building around fact-finding methods than that of legal categories. Thus, the common lawyer is characterized by shared values of pragmatism and realism which contrast with the kind of contempt for facts that can characterize French lawyers, often to the dismay of outside observers. For this reason, civil procedure is unattractive in France. It is not centered around a culture of evidence and the procedural tools are inadequate. The development of a true “law on evidence” in France would be a serious asset.

This is not a mere doctrinal debate because globalization, as a force bringing humans, goods and culture together, creates the condition of a type of legal Darwinism where the most high-performing law chases the least economically efficient one. This may explain why, given the choice, parties often select UK or US courts over civil law courts even though litigating a matter before a Common Law court is far more expensive than in Civil Law jurisdictions. The reason why parties prefer to litigate their matter before these courts over Continental ones is that they offer much greater certainty. In this respect, we should emphasize that, in the context of global competition, UK judges do not hesitate to select one solution in a matter over another in a given case on grounds that it will promote the competitiveness of their law compared to that of their neighbors.⁴² In the same vein, the notion of public policy is, in France, a lot stronger and is more often used to cancel the will of the parties than in UK or US law. Of course, it is a watered-down notion of public policy which applies in international contracts, but it is sufficient to handicap French law. Those who have understood before others that soft law tends to become hard law have gained a decisive advantage. It is thus important to be active as upstream as possible. American lawyers are more powerful due to the American Bar Association (ABA), which includes prosecutors, bailiffs, judges, etc.. Going through the revolving doors of one profession to another are routine career moves. For example, the same people repeatedly move from the Department of Justice to private practice and back. This practice gives them political might and

42. E.g. Colman, J. in *Lordsvale Finance, Plc V. Bank of Zambia* [1996] QB 752, and the explanations of E. Peel in *Boilerplates Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, 2011, p. 162. What was at stake was the attractiveness of English Law in terms of Infrastructure Funding.

fire-power unknown to the French lawyer. This fluidity also puts them in a position to build a common culture and to impose it thanks to the commercial power of the United States and a much more pragmatic approach to law.

In France, the partitioning of legal professions is a source of weakness on the international stage as well as internally. Access to the legal profession, and its agility, gives them a freedom to think that other legal professionals do not have. French legal professionals share a possible path toward becoming a counsel; but the reverse is rare. For example, it is more difficult for a legal counsel to become a judge or a civil administrator than the reverse. And we should emphasize that many more elected officials are now joining the profession of legal counsel than the reverse (contrary to what was happening in the beginning of the 20th Century).

In the UK or the US systems, this fluidity among professions works rather well because the rules of the game are clear and the system has mechanisms in place that prevent small dealings among friends and fosters a kind of common ethics rules over all functions. To this, we should add that the efficiency demonstrated in each function is strongly rewarded, if not by money, by better career prospects, so there are only inconveniences in mixing genres and in disobeying rules of ethics. What matters is efficiency and leaving a good impression. It is the cult of performance and the attention paid to one's reputational capital where we see the extent to which reputation controls lawyers' accountability. This is contrary to the practice in France, where what matters most is to remain esteemed by one's peers.⁴³

II. The Major Challenge of Mobility

The New Mobile Generation

Mobility is not merely a public policy goal. It is also one of the central values of the new generation, identifiable among young lawyers and young non-lawyers alike.⁴⁴The need for continuing education, multi-disciplinary exchange, and mobility and meaning illustrates this anthropological mutation which has very much to do with a new relationship to time, space, employment, labor and institutions (what we have called "symbolic revolution" in Chapter 1). The distance between this new sensitivity and a legal community which is gradually losing sight of the common sense of its social worth explains why lawyers' professional practice, their dialogue with civil society, their clients and future clients, has degraded. A recent study shows that 68% of young lawyers do not envisage practicing the same profession throughout their entire life⁴⁵. The profession of lawyer is not thought by the young generation as an end-goal but as a stage in their professional life, a moment in a larger career. The current linearity of the legal profession is a mindset which is alien to the younger generations because it restricts their horizons. For young graduates, mobility is natural, as is collaborative work, access to economic or circular tools, or the desire to find meaning in their present or future activity. Most young lawyers do not understand why one cannot easily enter and exit the profession to become judges, work as in-house counsel, or join the workforce of a regulatory agency. Whereas during their studies, they felt they were becoming part of a professional community, they now have the impression that professional

43. Philippe d'Iribarne, *La logique de l'honneur*, Editions du Seuil, 1989.

44. See, K. Haeri, *op. cit.*

45. *Id.*

practice is separating them from that very community. This gap is made worse by digital tools which put them in a position to keep in close relationship with their fellow alumni. Thus, at the moment of transitioning from law school to professional practice, they regret a fragmentation of the legal chain.

Geographical Mobility as a Means of Career Advancement

The relationship of young graduates to institutions is very different from what their elders experienced. Young generations do not balk at the idea of joining the workforce of entities operating in sectors and within environments where the norms and ethics are being created in opposition to traditional large law-making and law-enforcement bodies. The desire for mobility must thus be understood as a form of defiance toward institutions, whether in the political, professional or business realm. Young lawyers feel that these very institutions betrayed their elders and they consider individual practice and strong mobility to be a protection against the repeat of such perils.

Borders have no true importance in their eyes. Thanks to dual degrees or internships abroad, the young generations have, very early in their lives, become familiarized with an international context. Digital technology has simply increased the sense that they are citizens of the world. It has become obvious for them that they will be as mobile geographically as career-wise. This geographical mobility is a sign of maturity and advancement in their career.

Can the legal profession satisfy this desire for mobility? It is difficult see this happening today, for the reasons explained above. French lawyers are not easily exportable because French law is not exportable and because of the outdated nature of their practice of law. Similarly, territorial mobility at the national level is slowed because of barriers to entry in other local bars. Allowing lawyers greater territorial mobility by facilitating their membership in several bars is indeed a recommendation found in the report on “the Future of the Legal Profession”.⁴⁶ Nevertheless, the title of lawyer brings into play a “universal status”. It is, therefore, urgent to adopt a reform favoring professional mobility outside of the profession of counsel and beyond the chain of legal professions. This would be coherent and attractive for the young people of France as it is abroad.

An essential condition to this fluidity is mastering foreign languages, which is not a strong point for French people in general. Decisive progress must be achieved on this point.

Promote Agility

A new virtue indistinguishable from mobility is agility. By this, we mean the capacity or the intelligence to move, to seize opportunities and to adapt to new demands in a new world where the rules of the game are not always explicit. To illustrate this new professional, or more accurately inter-professional, quality, let's start with the current reality. A full 28% of French general counsel offices are staffed with no less than 25% of people who have passed the bar exam. This demonstrates that many young lawyers who formally train to join the ranks of the formal bar consider becoming in-house counsel as their end-goal. Litigation, which is the heart of the profession, has estranged itself from the transactional activity, which is closer to what in-house counsel are doing. Facilitating mobility outside the Bar responds to the skill of agility expected from 21st Century lawyers. This awareness is well

46. Id.

under way and lawyers are making use of the new professions and legal markets. The multiplication of regulating entities or the growing place of law within the business organization call for seizing upon the issue of fluidity within the legal professions so that lawyers can win new markets. With the digital economy, we have entered a society of innovation, which entails multi-disciplinary practice and excellence. We must aspire to making the lawyer the central character of this new legal age through her training, her

adaptability and her know-how.

To reach such an objective, we must start with more openness toward collective intelligence and organize true partnerships with lawyers. Simultaneously, they will be the trailblazers and the beneficiaries of these new fields. Let's take the example of internal investigations and regulatory compliance programs. Regulators are in the front seat with businesses and must share their experience to synthesize and transmit it. They must, therefore, change their perspective on the business community which is ahead of them. Thus, what is necessary is a cooperative logic between businesses and regulators to help the business enterprise manage its regulatory risks. This is even more important in the context of normative competition, which is a central feature of the globalized world. In-house counsel and lawyers (and beyond them judges and law professors) must, therefore, invent together a French

alternative, and more largely a European alternative, to US hegemony in this field.

French businesses are currently too influenced by US fashions and, therefore, by law firms. At minimum, French businesses should include a French law firm in their legal counsel and set up dual jurisdiction legal teams. However, this could only be done if French lawyers acquire skills in this field. The only path for French lawyers to earn a privileged status in global law is through global firms.⁴⁷ To conquer this market segment, the French lawyer who joins the rank of a US law firm must respect compliance and stop looking at it with contempt because it is not, strictly speaking, law. The profession could pay a high price for this contempt by granting a monopoly to US practitioners. There are signs that French lawyers have indeed deserted this field, which is in full development and is full of promises, to the benefit of other French actors like audit firms and new types of consulting businesses occupying this niche, such as Ethic Intelligence and DayOne. Their intransigence has led to the development of new professions outside their field of activity such as monitors, trainers, regulatory analysts and lobbyists, among others, who are now well-established.

Encourage Mobility Between Transactional and Litigation Practices

Lawyers who are building professional careers on the revolving door culture between professions remain few. In the elite civil service, which is a very particular culture in France, departures are on the rise, but they are one-way exits. Executive civil servants should not be afraid of crossing between the public administration and the private sector, because these career moves provide them with the opportunity to acquire complementary experience, which reinforces public regulators' credibility.

⁴⁷. See the report, *The Included Third, The General Counsel's Role and Challenges Under Globalisation*, March 2016, Antoine Garapon, IHEJ, available at the following address: https://www.cercle-montesquieu.fr/global/gene/link.php?doc_id=774&fg=1

In effect, the increase of control and sanctions powers of certain regulators requires opening recruitment based on experience. Business lawyers, and also criminal lawyers, who are trained in the culture of evidence and adversarial practice, are very much in demand. This new trend in our country compared to the US, which benefits from a community of lawyers who go from the public to the private sector with little difficulty. Signs of openness are starting to appear in France, which remains largely handicapped by its culture of honor and privileges. This change is, however, encountering pockets of resistance. The statute reforming independent administrative authorities, for example, prohibits the hiring of a person who has worked in the same domain, with the likely consequence that it will deplete the pool of skilled applicants.⁴⁸ As a result, the decision-making power within these institutions is at risk of being taken by services staffed with people who retain the technical knowledge. This new trend goes directly against that observed in the US, where the government has understood it can profit from skills acquired in a given domain thanks to mobility. The French legislator applies a sort of blocking policy which benefits the bureaucratic apparatus while weakening the weight and the credibility of regulators.

Judges must also question their skills. The exclusively technical legitimacy they enjoy thanks to their selection process is not sufficient in an era when they have to call the shots on much more sensitive societal issues, such as medically-assisted reproduction or surrogate mothers. An analogous difficulty can be encountered in technical and economic litigation that requires the judge to be knowledgeable on subjects other than the law, and being capable of understanding practices on the ground. In international economic matters, particularly in competition litigation or in merger rules, the absence of knowledge of the market by bench judges is a problem. Contrary to lawyers who are facing demanding clients and who, in a way, receive training by their clients, the judges remain ignorant of the market throughout their entire career. We must, therefore, imagine a new judicial profession as a long career which allows the integration of the best legal counsel and therefore allows it to remain up-to date with international standards on the quality of justice. This could put the French judicial profession in a position to compete with UK, German and Dutch courts.

This observation also applies to research, which plays a key role in the streamlining of the profession. Researchers suffer from a silo mentality and are locked in dated schools of thought; not only do they restrain themselves within the context of their own environment, but they are out of sync with the wider world where practices are in constant flux. Here again, openness is only at its debut.

To conclude, each legal profession could remedy its current flaws by becoming more open to other professions. Without an outward-looking attitude, the executive civil service cannot be in sync with the globalized world, the university won't plug into emergent practices which transcend the legal field, in-house counsel will be prevented from transferring onto others the benefits of their experience, judges will miss the opportunity to acquire new skills, legal research will fail to investigate new fields of study, counsel will fail to gain a central place in this circulation of ideas and, last but not least, the government will not participate in the establishment of the rules of the world to come.

In brief, what is needed is more power and credibility for each.

48. Statute No2017-55 of 20 Jan. 2017, on the general status of independent administrative authorities and independent public authorities.

III. Unify the Legal Professions

The Risk of a Partition of the Profession

The lawyer's agility takes all its meaning in this new context, because his vocation is to be the natural broker between all these worlds, provided that he would accept the duties associated with this mobility and that his role goes beyond the courtroom. The legal profession has all the resources it needs to take on that challenge. It must be wary of opening itself without imploding. The risk of a partition of the profession is tangible in the dichotomy of transactional and litigious activities. This segmentation is tenable only if we know what unites them. The recent evolution of legislative and case law challenge business secrecy and a separation between these activities is to be feared.⁴⁹ If the profession does not react with vigor, not only will we not see the creation of a genuine in-house counsel status but there will be two professions where there should be one. Lawyers themselves are starting to think of themselves in a different manner depending on which side they are on. Without an inclusive and cohesive discourse, they are at odds. The challenge is therefore to rebuild a common future to maintain a cohesive profession.

Create the Status of In-House Counsel

Much ink has been spilled on the creation of the status for in-house counsel. During the examination of the bill that became the Macron law, this recommendation was publicly debated, but many lawyers were firmly opposed to it for fear of losing certain privileges. Nevertheless, the creation of a large legal profession which unites the professions of in-house counsel and outside counsel appears inevitable. It would promote streamlined relationships between lawyers and in-house counsel. It would also bring the activities of transactional lawyers closer to those of in-house counsel, which are two facets of the same profession operating in a different framework, but for the benefit of the same "person", the business enterprise. Exchange of good practices could only increase collective intelligence and prepare lawyers to face each of these challenges.

Narrate the Change Under Way

Unifying the legal professions is raised, as we see, as a central challenge, but one which encounters profound cultural resistance in France. Nevertheless, it appears to be one of the keys to the success of the US model. In the US, the unity of the legal profession, which is what makes it so powerful, enjoys broad consensus. This is unlike in France, where it awakens interminable conflicts of status and privilege reflecting the survival of older divisions. It is not possible to neglect this cultural dimension if one wants to successfully advocate change. Culture breeds self-esteem. For some, adopting an open attitude is to surrender. As Tocqueville put it concerning the corporations of the *ancien regime*, they prefer to slide down into poverty than ally themselves with others. Thus, professional secrecy is more than a competitive edge over other professions, it is also a sign of distinction.

49. E.g. The recent Sapin II Statute of Dec. 9, 2016 on transparency, anti-corruption, modernization of public life and publication of conflicts of interests. See also the judgment rendered by the Cour de Cassation on March 22, 2016, which held that the confidentiality of exchanges between lawyers only exists if the defendant who is the object of wire-tapping is prosecuted and that the lawyer advising him is officially designated in the proceedings at hand. This would exclude confidentiality in transactional legal advice or outside criminal proceedings.

We must, therefore, develop the very narrative that the profession reads out for itself. We are observing a certain distance between the individual lawyer and the discourse of those representative institutions of the profession. It is regrettable that the latter does not reflect the current awareness and audacity of its individual members.

Contrary to what is observed in the US, the legal profession in France objects to defining itself exclusively through the market. In effect, as Lucien Karpik puts it, the profession was historically first established by reference to the government (13th-17th Centuries) and then by reference to the public (18th – 19th Centuries).⁵⁰ The market surged secondarily and late comparative to the same phenomenon in the US where it appeared in the second half of the 19th Century. Not one of these three rationales managed to completely [missing word?] the profession throughout its history. The alliance with the public helped shape a magnificent professional narrative. Many French lawyers thought they were fulfilling a “political function” of representation of the people. The alliance with the public has effectively, for a while, given the lawyer this function and the credit the profession has enjoyed until recent. Hence, the difficulty to make compromises with business lawyers, the resistance to think of the activity as a business like any other, as a legal industry. We must therefore begin to understand the deeply entrenched, and respectable, reasons for resistance to change.

The new argument that must be made touches on the survival of the profession no less than the reputation of France in the globalized world. Therefore, it is possible to consider a deal with politics which is not a Faustian pact. The survival of a sector and of a profession, as important as it may be, is also an important factor in competition and influence. Thus, the legal profession and what it represents in terms of jobs, influence, modernism, dynamism and presence in the world must be supported by politics. And reciprocally, it is important that this profession supports the political project of modernizing France.

How are we going to develop a relevant argument against a politic elite who knows that, in this world, lawyers can easily export themselves, but “énarques” can not? That is the difficulty our elites are facing. In fact, at the national level (members of the high administrative court, professors, etc.), our elites are losing their influence in a globalized context which promotes the idea of the legal level playing field (judges, lawyers, in-house counsel). It is better that we unite. Everybody has an interest in it: the old elites because they remain in the game and the others because they will gain a more prominent position. This is why the traditional elites should get closer to both the bar and the business community.

The current situation is not clear. It is not even understandable for a French political decision-maker, well-intentioned or not. It is reflective of a great difference here again with the situation in the UK or the US where private law in-house counsel and lawyers belong to the elite and, as a result, rub shoulders with politicians.

50. Lucien Karpik, *op. cit.*

CONCLUSION

We can draw helpful conclusions from the presentation of each of these challenges.

Lawyers will be able to overcome these challenges only if they adopt an outward-looking attitude. Openness requires an intensification of exchanges between lawyers and judges as well as between lawyers and civil society, elites, businesses and associations. More profoundly, openness means accepting the validity of other types of knowledge, such as the human sciences, which can cast a new light on the function they fulfil and serve to evaluate their very impact on the situation. The digital revolution forces law to combine with technology. It is an intimidating task for practitioners who have only received legal training, but it is a necessary one. It does not mean that all lawyers must know how to code but they must listen to the requirements associated with their epoch.

The second condition, related to the first, is to do away with the comfort of status. The existence of various statuses leads to exclusive relationships at the very same time that the ongoing mutations require lawyers be more accountable, accept the sanctions of public opinion, submit to competition, evolve and accept international benchmarking. This is not an entirely new situation, but the pressure has intensified. Globalization weakens national laws, which once propped up statuses, and forces submission to new arbiters. For these reasons, the comparison with US law, which is exasperating for many, is required to understand how to gain credibility on the global stage.

The third condition is related to the two others. The more we open up and include others, the more we venture off the beaten path, the more the rules of ethics (particularly on the topic of telling the truth to the judges) must become a rigorous guide; an ethical guide in all its facets, with rules and principles. A corpus of ethics must be built on a case-by-case basis. This corpus of ethics must be communicated, discussed and evaluated. What is unique about ethics is that, because it establishes a distinction, it brings us closer to others.

These four challenges are considerable, but we have seen that solutions are available. If changes are not materializing fast enough, that's because we have not yet figured out the narrative ; we do not yet know how to tell the story. This is what we have attempted to do in this report. Globalization, like the digital revolution, has not yet found the right narrative. The narratives are too often directed against the government and, in a large part, against lawyers. It is therefore understandable that lawyers stall and resist the temptation to unite to face these challenges, which they share and which, even better, may bring them together.

We should therefore not despair.

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ANNEXES

Annexes

Ce Report a été établi sur la base des ateliers de réflexion organisés par l'IHEJ et le CREA tout au long de l'année 2017.

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Matt LADY, chercheur associé à l'IHEJ pour la relecture.

Dates et titres des ateliers

Mercredi 22 février « Etat des lieux et perspectives déontologiques pour renforcer la crédibilité de l'avocat »

Mardi 18 avril 2017 « L'impact du numérique sur les professions juridiques »

Lundi 22 mai 2017 « Les modèles économiques des cabinets d'avocats français face aux défis règlementaires et technologiques »

Mercredi 14 juin 2017 « Formation, accès, mobilité : comment rendre l'avocat français mondial-compatible ? »

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Remerciements

Le CREA et l'IHEJ remercient l'ensemble des intervenants et participants aux ateliers pour la qualité des discussions et leur liberté de parole

SEANCE 1

État des lieux et perspectives déontologiques pour renforcer la crédibilité de l'avocat

Mercredi 22 février
de 17h30 à 19h30
Annexes du CNB
32 rue de Mogador 75009

Dans un Report sur un projet de réforme de la procédure disciplinaire présenté à l'Assemblée générale de la Conférence des Bâtonniers de novembre 2012, le Bâtonnier Pierre Chatel citait la phrase suivante des Règles de la profession d'avocat de Henri Ader et André Damien : « Avocat n'est pas seulement une profession ou un métier, c'est un état ».

Si les valeurs déontologiques à protéger sont exprimées dans le serment au début de sa carrière puis scellées dans le code de déontologie, qu'en est-il de la réalité et de leur application quotidienne par l'avocat, vis-à-vis du client, de ses confrères et des autres acteurs de la justice ? Qu'en est-il de l'image de la profession et quelles sont ses implications au niveau national et international ? Comment les polices de conduite ont-elles évolué ? Quel sens prend la déontologie dans un contexte de mondialisation où le contentieux explose et où la profession devient de plus en plus disparate et hybride ? Que recouvrent véritablement ces valeurs pour une profession dont l'activité n'est désormais plus limitée au territoire national et à la culture française ? Les autres systèmes judiciaires, et notamment les Etats-Unis, ont-ils les mêmes standards et exigences et quels sont-ils alors ?

Au-delà de l'importance morale, ces questions de loyauté, de confiance, de rectitude, de transparence et de vérité sont un enjeu de crédibilité - interne et externe, nationale et internationale - et donc de compétitivité que l'avocat doit lucidement regarder et passer au crible d'une analyse critique. L'idée est ici de nommer l'état des choses afin de faciliter la radioscopie à laquelle la profession doit se livrer à chaque nouvelle époque sur ces sujets. La tâche n'est pas mince puisqu'il s'agit pour l'avocat de se (re)penser en dehors de lui-même mais l'enjeu est de taille puisqu'il s'agit de l'avenir de sa prestation, de son activité et plus largement, de son identité et de l'unité de la profession.

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SEANCE 2

L'impact du numérique sur les professions juridiques

Atelier du Mardi 18 avril 2017

De 9h30 à 12h30

CNB

22 rue de Londres

75009 paris

Salle rdc

Avocats, directeurs juridiques, magistrats voient leurs activités impactées par le numérique et doivent désormais composer avec.

L'usage des nouvelles technologies a donné une nouvelle dimension aux cabinets d'avocats et a sans aucun doute des répercussions sur la nature et la façon de mener ses activités en matière de conseil comme de contentieux : en quoi le numérique modifie-t-il leur exercice professionnel en la matière ? En quoi change-t-il les usages et mode de fonctionnement ? Avec l'omniprésence d'Internet, le métier d'avocat a beaucoup évolué dans sa relation avec les clients, à tel point de voir fleurir aujourd'hui sur la toile les offres dites disruptives, des conseils d'avocat pour des questions de tout ordre 100 % en ligne. Ces nouveaux venus sont perçus comme une menace d'*uberisation* excessive du droit, d'un autre côté, ils apportent aussi des solutions pratiques et efficaces pour toute direction juridique pour optimiser son fonctionnement. Cela leur permet-t-il de devenir plus productifs et plus compétitifs ? Parallèlement, les difficultés à court et moyen termes ne sont pas en reste et ces professionnels du droit doivent par exemple assurer la sécurité et la confidentialité des données, de leurs échanges et repenser - au regard de l'intrusion du numérique - la mise en œuvre de leurs obligations déontologiques.

Du côté du directeur juridique et de l'entreprise, l'intégration du numérique dans les pratiques s'est faite de facto beaucoup plus rapidement, l'entreprise étant toujours plus réactive et s'adaptant davantage que des structures traditionnelles propres à celles du milieu du droit. Le directeur juridique - ce « tiers inclus »¹ qui occupe la place d'interface entre ces deux mondes - doit relever des défis supplémentaires posé par le numérique qui permet notamment de faciliter les échanges internationaux et de standardiser des contrats. Comment composer avec cette nouvelle configuration ? Le directeur juridique et le juriste ont-ils toujours le monopole du savoir juridique ? Comment développer leur valeur ajoutée dans un contexte de « robotisation » ?

D'autre part, du côté de la magistrature, les enjeux et les défis d'adaptation aux transformations numériques sont nombreux et fondamentaux. Pour cette profession et pour les citoyens/justiciables qui en dépendent, il s'agit d'une

1. Voir le Report d'Antoine Garapon, Convention S / Cercle Montesquieu sur « [Le tiers inclus – Rôle en enjeux de la fonction de directeur juridique dans la mondialisation](#) » Mars 2016

révolution. Le Big Data consiste à créer de manière exploratoire et inductive des modèles à capacité prédictive à partir de masses de données ayant souvent une faible densité d'information. Quel impact cela va-t-il avoir sur les décisions, leur élaboration, leur pédagogie, leur communication ? Il s'agirait alors de discerner ce qui en résulte sur la perception et sur le rôle des principaux acteurs du procès.

Dans l'ensemble, ces trois principales professions juridiques et judiciaires devront, outre modifier leurs pratiques, veiller à ne pas se penser en vase clos et tenir compte des transformations que vivent les autres professionnels. Ils devront mutuellement réfléchir à leurs propres structurations et à l'impact du numérique sur celles-ci.

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SEANCE 3

Les modèles économiques des cabinets d'avocats français face aux défis réglementaires et technologiques

Lundi 22 mai
de 17h30 à 19h30
Annexes du Conseil National des Barreaux
32 rue de Mogador
75009

Les transformations du marché du droit, les récentes (dé)réglementations et libéralisation de la profession d'avocat mais aussi la révolution technologique entraînent une remise en cause du modèle classique du cabinet d'avocat français et posent la question de leur rentabilité économique.

Les impacts de cette libéralisation se font sentir sur les structures en tant que telles et sur leur financement (financiarisation, financement des procédures par les tiers), sur la nature de la prestation de service juridique, sur l'honoraire, sur l'organisation des cabinets (inter-professionnalité, outils technologiques). Tout cela dans un marché à la fois local, national et international désormais bouleversé par de nouveaux « outsiders » dotés d'une capacité d'adaptation très rapide, les *legaltech*.

A travers ces structures et modèles économiques des cabinets d'avocat, c'est donc l'organisation et la rentabilité des « entreprises juridiques » qu'il s'agit de repenser.

Pour y parvenir, il faut réunir les compétences (juridiques, économiques, stratégiques) de tous les acteurs (publics, privés, universitaires, praticiens, institutions représentatives) mais aussi tirer les leçons d'expériences étrangères. Quels sont les atouts et les faiblesses de l'offre française ? Quels sont les évolutions au niveau de la demande ? Quels sont les pièges à éviter ? Comment moderniser les structures pour favoriser des cabinets intégrés, les innovations techniques et l'inter professionnalité ?

Intervenants

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SEANCE 4

Formation, accès, mobilité : comment rendre l'avocat français mondial-compatible ?

Mercredi 14 juin
de 17h30 à 19h30
Conseil National des Barreaux
22 rue de Londres
75009 Paris

Comme le souligne le Report sur « L'avenir de la profession d'avocat » remis au Garde des Sceaux en février 2017, la mobilité de l'avocat fait partie de « la somme de tous les défis » que celui-ci doit intégrer pour trouver sa place dans la mondialisation. De même, les instances représentatives doivent investir ce thème pour construire une réponse lisible en France et à l'international. A l'heure actuelle, « une carrière n'est plus aujourd'hui linéaire, l'avocat qui prête serment ne vit plus dans un monde immobile comme celui que ses prédécesseurs ont connu. Il appartient, certes, à un Barreau encore territorialisé, mais les frontières de son environnement ont été bousculées et il ne peut rester le seul à ignorer que la vie de ses clients ou de ses prescripteurs s'exprime différemment d'autrefois sur des territoires qui peuvent être, aussi bien, à l'extérieur que virtuels ; et que sa mobilité peut aller jusqu'à faire des allers et retours dans d'autres professions. »

En interrogeant la fluidité de l'avocat, on questionne les Reports avec les autres juristes (avocats/notaires ; avocats/magistrats ; Avocats/directeurs...). C'est donc dans le spectre plus large de la création d'une entière communauté des juristes qu'il faut réfléchir.

Réfléchir au profil de l'avocat français en France et à l'international, c'est s'interroger sur sa formation, son parcours professionnel, les conditions et critères d'accès à l'exercice, mais aussi l'internationalisation des structures et l'interprofessionnalité, autant de sujets qui conditionnent son attractivité. Comment fluidifier cette profession ? Comment favoriser des passerelles ? Comment, au-delà de la faculté, faire partager aux juristes un même langage, des mêmes références et une même « raison d'être » tout en instaurant une culture de la mobilité et un dialogue inter-juridiques ? Bref, comment rendre l'avocat français mondial-compatible ?

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