

The impact of economic values on the future of the legal profession

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Introduction

Thank you for inviting me to speak to you today. I agreed with the organisers that I would address issues relating to the future of the legal profession.

The future rarely, if ever, comes out of nowhere. It comes out of changes which are presently taking place. The trick is to know which are the changes which will develop into important structures for the future, and which are dead-ends.

The particular development that I want to talk about, since it seems to me to be vital to the future shape of our profession, is the relationship between economics and its laws and values on the one hand, and lawyers and their regulation on the other. That sounds very dry, I know, but the relationship between the two is the battleground on which the future of the legal profession is being fought, at least here in Europe.

I shall differentiate between the impact of economics and its laws and values on the practice of being a lawyer, and on the regulation of lawyers. There is obviously a very great difference between the two, with economics forcing through changes in both areas. Lawyers' practices have always been subject to economic laws and necessities, but it is only recently that lawyer regulation has come to the forefront in this area. We have always seen our profession as one devoted to higher, non-economic values – helping others take advantage of their rights, ensuring the proper administration of justice, regardless of the cost – while at the same time acknowledging economic factors in the practice of our law firms so that we can make a living. But the advance of economic factors into all areas of life has made that division no longer sustainable.

Outsourcing

I shall begin with the effect of economics on lawyers' practices, since it is useful to tell those who are assaulting lawyer regulation on an economic basis that we are aware that economic values have a central place in the practice of law, even if we don't always agree with them on its place in regulation.

The impact of economics on a law practice can be put crudely in this form: if something can be done more cheaply and efficiently in a different way, then the new, cheaper and more efficient way will soon find its way into legal practice. It is irresistible, and we have seen in this way technology change the manner in which the law is practised over the last decades – computers, mobile phones, blackberries, and a whole range of helpful software. It is technology which makes possible one of the major new changes to legal practice, which I want to talk about today: outsourcing. I want to talk about it because it is a good example of how we will have to incorporate radical change if we are to survive in the future.

Outsourcing is an interesting modern phenomenon. We are used to it in the industrial sector. Many thousands of jobs have been lost in the western world as the making of goods sold here, and previously made here by our workers, have been sub-contracted to cheaper manufacturing outlets in the east. Most of the clothes and shoes we are wearing here today, pens we are writing with, briefcases we are carrying will have been made elsewhere. Partly as a result, there has been a growth in the services sector in Europe and other western countries to replace manufacturing. We could no longer compete in manufacture, but we have led the way in services, which includes legal services. For some countries, like the United States and the United Kingdom, the export of legal services is significant. In many others, it is a significant domestic activity. Who would have thought that it would become subject to the same economic forces that have led to the manufacture of our clothes and shoes in other, cheaper countries?

But this is exactly what is happening. As you may know, there is a thriving market in the outsourcing of legal services in India, providing legal services to the United States and Europe. You may think that outsourcing is not something that will affect the Swedish legal market, but I want to question that.

Here is some background:

- there are about 100 Indian legal outsourcing companies that employ between 600 and 800 Indian attorneys – you may not think that that is very many, but it is already more than exist in some of the smaller European countries like Estonia, Slovenia or Iceland;
- India is estimated to have 80,000 new law graduates every year – that is more in just new law graduates than exist in most European countries as qualified lawyers;
- a newly minted law graduate from a top 10 university in India can expect to earn about \$6,000 to \$7,000 a year, in comparison with the \$160,000 per year earned by some of their American counterparts;
- an often quoted figure puts the current value of these offshore services in India at \$80 million per year, with the expectation that it will reach \$4 billion by 2015;
- one firm had 12 lawyers when it started in 2004; today, there are about 100 lawyers servicing more than 150 clients, more than 25 of which are Fortune 500 companies
- the kind of projects undertaken by outsourcing firms are those which are time-consuming and laborious: patent drafting, contract drafting, document review, electronic discovery services, corporate secretary work, legal research and writing, contract management and corporate due diligence;
- some examples of outsourced work: a worldwide survey of certain technology regulations; or a review of documents for a real estate transaction; or some 60 lawyers are tasked with a single document review for a patent suit;
- many outsourcing companies have offices in the U.S. to lead the client-development charge.

Of course, this is all English language work. There are no large Swedish-speaking former colonies in the developing world. But that does not mean that Sweden will not be affected by outsourcing in due course. For instance, I understand that all transactional work undertaken in Sweden by the large law firms is in English if the clients or one of the clients are English-speaking, or if the assignment or any other reason requires it. And a few large Swedish law firms also have English as their in-house language. In any case, if there are such large savings to be made, it will still be cheaper to use an outsourcing outfit along with a translator, a Swedish advocate and whatever else is required. Of course, this work is mainly concentrated at present on very large cases undertaken by very large law firms, but its developments over the years may encompass a wider range of practice. I read recently of a solo practitioner in New York who sends his legal research to an outsourcing company in India: he sends it in the evening when he leaves the office, and the research is with him - and to a quality with which he is satisfied - when he comes to the office the next morning, because of the time difference between India and the US.

The huge savings available through outsourcing are being driven now, as I understand it, not by Indian outsourcing firms themselves, although they market themselves hard, but by large purchasers of legal services, principally in-house counsel, who demand that for laborious and time-consuming activities, like document review on electronic discovery or large-scale research, cheaper labour be used to keep down costs. Given the savings generated in legal bills, can it be long before similar activities spread to other countries, as appropriate to their legal systems? Technology has made all this possible.

There are large problems relating to the ethics of outsourcing, which are now being considered, principally in the United States. For instance:

- the Indian lawyers appear to be practising US or some other foreign law, without being qualified to do so. Are they in breach of the foreign jurisdiction's ethical rules or laws? Are they in breach of their own home rules or laws in India?
- What about confidentiality and professional secrecy, when client matters are referred to a third party like that?

- What about the responsibility for the outsourced work, since most professional codes of conduct put the onus on the lawyer to supervise work done by the firm – can the US lawyer become responsible for an Indian lawyer's breach of a code or other mistake?
- What about conflicts of interest, if the outsourcing firm is, unknown to the law firm, also doing outsourcing work for the other side in the case?
- Does the lawyer need to notify the client that the work has been outsourced?

It is obvious that not all of these issues are solved by the fact that the work does not go direct from an outsourcing firm to a client but goes through a lawyer qualified in the US or other foreign country.

There are many challenges thrown up for the bars in the combination of globalisation and technology, of which outsourcing is the most obvious example. But there are others, with which I will not deal today. The combination of globalisation and technology has led to much more cross-border practice, of which again outsourcing is an example. But cross-border practice itself raises the question of which bar's rules are to govern a particular transaction. There is no global solution to that, and even here in Europe, we solve it only partially by saying that both bars' rules must apply.

If you want to know what the challenges of the future are for the legal profession, they lie here in the conjunction of globalisation, technology and cross-border practice.

Regulation

Now I turn to the impact of economic values on the regulation of lawyers.

We can see the growing influence of the market in many European developments affecting regulation of the legal profession – for instance, in the initiatives of DG Competition of the European Commission, which has applied the economic values of competition law to the regulated professions in general, and particularly to lawyers. It has published reports on the economic effects of regulation on the legal profession, as has the OECD. The Commission has also published a specific report looking at the relationship between regulation, quality and price in the conveyancing sector of the legal market. Just yesterday, I learned that the International Association of Legal Expenses Insurance (RIAD) has published a report entitled 'Regulation of the legal profession and access to law', which was another economic study of our profession's regulation.

We can see the trend also in the way that national competition authorities around Europe have undertaken similar reviews, targeting a range of measures in lawyers' codes of conduct: sometimes obvious ones like advertising rules or fixed fees, sometimes looking at the very structure of the profession. There have been well-known developments in the United Kingdom, where the interests of the consumer have been considered to be vital, as if we are all consumers now - and no longer citizens - with economic interests as our only interests. It is for the same reason that regulation and representation have been split from each other in the United Kingdom and, I assume, in Denmark, because it is assumed that people make decisions only on an economic basis, and so lawyers, when regulating themselves, will make a decision on the basis of their own economic interests. The European Commission is now itself propagating the split between representative and regulatory functions.

We are all of us now in the west, in the United States and in Europe, living in market-driven economies, whether we like it or not. In Europe, and this country is a good example, there has been a European social model to protect the weakest. But market forces, especially since the end of the Cold War, have been seen as the appropriate underpinning of our democratic capitalist societies. The market will decide. These forces, although they have always applied somewhat to the legal profession, are now concentrating their full force on us, and so the struggle is taking place as to what is able to be judged by economic values within our profession – by market forces alone, if you like – and what is not. I could devote a whole speech to why it is happening now to us. In brief, the end of the Cold War, leading to the victory of democratic capitalism, has been one factor, and the social changes brought about by democratic capitalism, where everyone is seen on the same level, and there are no special groups to which deference should be given, has been another. These factors have been around for

decades now, but it has taken that long before they begin to lap at the feet of sectors of society which have been partially exempt from economic forces, like lawyers' regulatory regimes.

One obvious sign of this change has been the sudden interest in the core values in the international legal profession which has taken place over the last few years – leading both the International Bar Association and the CCBE, for instance, to develop core values independently but simultaneously. This coincidence was produced, in my opinion, by the need to buttress the profession against the onslaught of economic arguments. When separate legal organisations take the same steps without consulting each other or trying to copy each other, there is usually a larger reason behind it.

But there are other effects of the creeping scope of economic values. It has changed our whole view of lawyer regulation.

Let me begin by going back some decades to our own view of the legal profession in those days. I cannot speak for Sweden, or indeed for other European countries, since I was operating only at a national level then. But if lawyers in the United Kingdom, where I come from, had been asked to describe their profession to the public in the 1960s and 1970s, they would have said 'Men and women of affairs whom you can trust'. 'Man or woman of affairs' was a term to describe a lawyer who could look after all your legal matters. That arose out of the range of work undertaken by solicitors. Not all lawyers have the same scope of practice around Europe. But the term 'man or woman of affairs' was not the main part of the phrase. The main part was 'whom you can trust'. That came out of the fact that lawyers were regulated. And I suspect that 'trust' would have been the main self-image that all lawyers around Europe chose then, on the grounds of their regulation.

It is not surprising that regulation was what lawyers chose in those days, because it is what distinguished them from others in the market. If you went to a lawyer, you were guaranteed that they were subject to a code of conduct which was enforced, subject to disciplinary proceedings if things went wrong, and subject to a training regime to become a lawyer.

But regulation has changed its meaning through what I believe to be the corrosive effect of economic values, so that what stood for trust now stands for distrust. Economic values undermine everything but themselves. Their force overpowers other instincts. So, whereas we used to be citizens with rights and duties, we are now consumers taking decisions in our own economic interest, which is a very different thing.

Economic values ask questions like: Would not legal services be cheaper if everyone could provide them, even those without a lawyer's title? Would not consumers get a greater choice and better service if they could visit a one-stop shop of lawyers and other professions? Or if non-lawyers could own legal services and list them on the stock exchange? Or if non-lawyers regulated lawyers? Or, to take an example that resonates even in liberal Sweden, if in-house counsel could be members of the bar and companies did not have to go to private lawyers?

Under the economic outlook, codes of conduct turn from principles to protect the public into conspiracies to advance the economic interests of lawyers (or, as George Bernard Shaw called the professions a long time ago 'a conspiracy against the laity'). Lawyer training turns from a public guarantee of a certain quality to a plot to keep out as many as possible so that the pay and status of lawyers already in the profession rise. Lawyer discipline becomes a case of lawyers protecting their own. That is because economic values trust no-one. In their reductive way, economic values assume – they have to assume – that the only motivation that anyone has to do anything is for economic benefit. In my view, that does not correspond to human behaviour. Some people sometimes behave like that; we all take decisions in our economic interest; but we do not all always do so, as economic values suggest. If we allow economic values to dominate our lives, we will be reduced just to economic actors, without conscience, without civic responsibilities, just consumers judging everything by what is in our economic interest.

There have been consequences to this undermining of the value of regulation. I have already said that it has led to our restating our core values with vigour. That is obvious, because we have felt the need to highlight our definition when under such assault. But something else has happened, too. I said before that lawyers used to define themselves on the trust which arose out of their being regulated. That is no longer available, now that that trust has been mocked. And so lawyers have been casting

around, blindly and without co-ordination, to try to find a new brand with which to define themselves, since the trust brand has been devalued. What have we come up with?

I will give you some interesting pieces of information, not connected to each other but which give the answer very clearly:

- The American Bar Association, which was founded in 1878, established a Central European and Eurasian Initiative (CEELI) in 1990, with sister initiatives in Asia in 1998, in Africa and Latin America and the Caribbean in 2000, and in the Middle East in 2003. Recently, all the regional initiatives were consolidated into a single entity known as the ABA Rule of Law Initiative. This year the ABA President has as his special initiative the World Justice Project which aims to assist in the spread of the rule of law around the world.
- The International Bar Association, which was founded in 1947, established its Human Rights Institute in 1995 and the IBA Council passed a Resolution on the Rule of Law in Prague in 2005, followed by the establishment of annual Rule of Law symposiums.
- The CCBE was founded in 1960. We established a Human Rights Committee in 2002. At around the same time we began to do work on Corporate Social Responsibility. We launched a European Rule of Law Projects initiative in 2007. Our current strap-line says 'Representing Europe's lawyers', and we are currently investigating the possibility of changing it to include the fact that we also promote the rule of law.

These three examples, taken from very different bodies representing a large number of lawyers, tell their own identical story. In recent times, these bodies have all moved, or been pushed, to put first human rights, and then the rule of law, into the forefront of their work. Why? When bodies like this, based in different countries and not co-ordinating their activities, follow similar paths, it cannot be accidental.

The answer to me is obvious. We have instinctively felt the loss of value in the 'trust' brand, and have instinctively reached out for another way of distinguishing ourselves in the market-place in which we also act. You can see from the examples I gave above that we tried human rights first, but there are many people who undertake human rights work who are not lawyers – Amnesty International and a host of other NGOs, for instance. The one thing, however, which distinguishes us from all others is our promotion of the rule of law. It is true that there are other actors in the administration of justice like prosecutors and judges, but we are the ones who are in the market-place, not they, and so it distinguishes us from others with whom we need to compete.

That is why I believe that 'the rule of law' has become our new branding. That is why the IBA, the ABA and we at the CCBE are putting it in the forefront at the same time. Global pressures cause global responses. And in the jungle of the market-place, where everyone is calling out for their wares to be sold, the phrase 'the rule of law' does several things for us:

- it distinguishes us from our competitors;
- it promotes a value which is one of the most fundamental in any well-ordered and democratic society; and
- it also protects us to a certain extent from the full force of economic judgements, because it tries to encapsulate in that small phrase that the legal profession is promoting a value which is beyond economics, and without which economic activity cannot safely take place.

There are consequences, though, to adopting 'the rule of law' as our catch-phrase. The first is that we have moved our self-description from status to function. The old catch-phrase of 'trust' was based on our status as a regulated profession. It did not describe what we did; rather it described who we were. We did not have to do anything in particular, we just had to make sure that we were well-regulated with proper codes, training and discipline. That is where the catch-phrase came from. But now we describe ourselves in terms of function – we do work that promotes and safeguards the rule of law.

The second consequence of this change follows from the first: if we say that that is what we do, then we had better do it. Otherwise, our branding will ring false, and we will lose our market position. So, if

you look at the organisations which I have mentioned, which I take more or less at random because I know them, you will see that they have all spent considerable resources over recent years on human rights and the rule of law. At the CCBE, we decided two years ago to invest in a project to promote the rule of law in our neighbouring countries to the east in Europe, and by the time the first two years will have gone by we will have spent a considerable amount of money on it. In other words, substantive action and expenditure of resources have followed the words, and have changed the identity of the organisations described. We at the CCBE are no longer an organisation that concentrates just on regulatory issues related to the bar. Our members have agreed that we should also spend resources first on human rights and then on the rule of law. That has been a sea-change in direction, led by the undermining of the value of regulation by economic values.

Conclusion

So, if I look into my crystal ball into the future, I see a number of things.

First, the change in how law is practised will continue rapidly. I gave outsourcing as an example, but there are others. E-justice, meaning electronic filing, access to cross-border databases, rapid identification of lawyers across borders, will also develop rapidly. The revolution brought about by cheap technology will carry on relentlessly, pulling us in its wake.

Second, and from the point of the bars more significantly, the drive to judge matters by economic values will continue, at least until the next political system takes over in the distant future. This requires a number of things from us:

- First, we need to learn the language of economics, so that we can reply appropriately to competition authorities and governments in defence of our core values. This has already begun. The CCBE hired a firm of economists to reply to one of the European Commission's competition reports. And the Danish Bar hired a firm of economists to look at the economic impact of lawyer regulation, which reported largely positively in favour of the bar's regulations. We need to think in terms of economics, not necessarily because we agree with economic values being applied willy-nilly to lawyer regulation, but because otherwise our voice will not be heard in the current debate.
- And second, we need to think of a better defence of lawyer regulation. We can no longer base it solely on trust, for the reasons I have described. We need to reflect deeply on what 'the rule of law' means. It is one of those ideas which have many definitions, even though everyone knows basically what it means. We will presumably now base our regulation more and more on its contribution to the rule of law, which is a good thing and which places it beyond economic values. But we need to give thought to how all the practice of law – real estate work, large commercial transactions, wills and probate, divorce – fit into a framework of 'the rule of law'. We will presumably need to justify all our regulatory decisions – whether on professional secrecy, conflicts of interest, competence, independence and so on - on that new basis. I do not see this as happening overnight or in one go. It will probably not happen in a conscious way, but blindly and instinctively, as the other developments I have described have taken place to date. It will be a gradual movement leading us to a new place.

Speeches such as this give me an opportunity to reflect on the changes happening in our profession, and their likely impact on our work, and so I thank you deeply for having invited me here today and given me the opportunity to speak aloud my thoughts. I need not add that all the views are my own, and are not the views of the CCBE. Thank you.

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