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ARTICLE

Challenges to the Legal Profession in a "Liquid Society"

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Abstract The experiences of the 20th century shaped the concept of a democratic society based on the rule of law and also defined the role of the bar as an institution entrusted with protection of the rights of citizens against abuses by the authorities and other persons.

However, often unnoticed, yet always in the name of improving security and protection of moral values, institutions of a democratic state of law that arose after World War II are being threatened or liquidated. We are witnessing "freedom fatigue" and acceptance of limitations on freedom and privacy.

In an era of such challenges to democracy and basic freedoms the role of the bar and each and every individual lawyer is to uphold core values such as independence, confidentiality and prohibition to act in a conflict of interest. The bar has an obligation to shape its actions and its organisational form in a way that will continually and effectively defend the existence of a liberal democracy governed by the law and values essential to a civil society.

Keywords Rule of law · The bar · Lawyers · Globalisation · Human rights · Democracy · Independence · Civil society

1 The Effects of Globalisation on the Rule of Law

The experiences of the 20th century shaped the conception of a democratic society based on the rule of law and also defined the role of the bar as an institution entrusted with protection of the rights of citizens against abuses by the authorities and other

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persons. The bipolar world that arose after the Second World War, a world of competing socioeconomic systems implementing diametrically opposed conceptions of the functioning of the state, represented a kind of laboratory for testing the correctness of the conception of a liberal democracy, rooted in the ideal of an open civil society.

But the mechanism of institutions of law and the justice system designed in accordance with these conceptions, including the bar, does not operate in a vacuum. It is subject to tension and the actions of societal attitudes as well as the constantly changing economic reality, which has an impact also on political reality, generating feedback with unpredictable effects. From the perspective of the rule of law, such effects may be beneficial or harmful to varying degrees. They affect the institutions of the rule of law, including the bar, and cause deviations from the course laid down by this ideal – sometimes to such an extent that it is impossible to return to the course unharmed.

Such changes in reality continually ebb and flow. Any attempt to describe them is bound to be either too complicated to comprehend or embarrassingly naive.

The recent decades have provided numerous examples of more or less visible changes exerting a dramatic influence on the mentality, behaviour and emotions of societies, as well as on the nature of decision-making by persons acting for institutions.

Changes occurring in the world should be looked at like atmospheric events, rather than in categories of good and evil. It is nonetheless necessary to analyse them so that the mechanisms of the functioning of institutions of the state and the civil society can be adapted effectively and at the right time to ensure that core values are not lost.

In a global sense, the bar is no exception. It is also subject to internal changes, which may be compared to a change in the course charted with the help of the ideal of the rule of law. Operating as it does within a changing external environment, the bar is forced to adapt its internal mechanisms in order to effectively perform its basic function, as well as its overriding purpose of protecting the rule of law by defending the rights of citizens.

Globalisation of the economy is a phenomenon that is neither good nor evil. Opposing it would be like trying to hold back a tidal wave. But, participating consciously in the life of the society, we nonetheless have a duty to examine the effect that globalisation has on critical institutions of the rule of law, and to consider in this respect how to adapt the shape of these institutions and their interrelations so that the rule of law stays on-course.

2 The Media Society and the State

A profound social change in recent decades in the world of liberal democracies is the elemental development of a "society of consumers," which replaced the earlier "society of producers."[1] The role of the state as the guardian of the sovereignty of the market has also crystallised.[2]

[1] *Bauman* [2], p. 57.

[2] *Bauman* [1], p. 65.

As a result, the social consciousness has lost a sense of the significance of social ties and the ability to understand the substance of such institutions as "separation of powers," "checks and balances," "constitutional court," "political party," "media ethics," "judicial autonomy," "independence of the bar," "presumption of innocence," and many, many other more or less fundamental institutions.

A characteristic feature of the "society of consumers" is dependence on the media, and as a result, total submission to media manipulation. Techniques of manipulation developed and perfected through developments in social psychology allow the attitudes and decisions of citizens and entire societies to be shaped at will, thanks to intellectual laziness and a lack of contemplation or self-reliance. The disappearance of journalistic ethics and subordination of the actions of the media to achievement of sales targets directs the media's impact to the spread of socially harmful characteristics. Voyeurism and an unrestrained desire to keep up with the celebrities who are omnipresent in the media produce a society of frustrated individuals, driven mainly by existential despair and fear of the loss of the capacity for consumption dictated by the media.

The effectiveness of manipulation, polished to perfection, makes political parties into clients of the media, and campaign costs make parties dependent on special interest groups. In effect, the parties themselves become special interest groups, forgetting the role entrusted to them in a liberal democracy, and they cease to cooperate for the good of the civil society.

Retaining power at any price has become the only incentive to act. Ceasing to serve the civil society, political parties place themselves in a stark conflict of interest with it, and of necessity seek out an electoral constituency among consumers driven by fear. The media can create such voters by spreading anxiety, which is later exploited by parties promising security with populist slogans, at any price and in every field of life.

3 Freedom and Security

However, the price for security is freedom – in a figurative as well as a literal sense – and thus when political parties that win the elections exercise the sovereign authority of the state, they do not limit themselves to using their legitimate coercion for the good of the civil society, but only overthrow the norms of a democracy governed by law.

Another attribute of power is to stir up divisions and label enemies. This is the most important threat to efforts at achieving social integration in the spirit of the ideal of a civil society. The increase in incidents and the relations toward immigrants in numerous European countries, as well as decisions by the governments of France and Hungary in relation to the Roma, clearly show the degree to which political elites and societies of the European Union have begun to succumb to the instinct of self-preservation. The further away from the experiences of the mid-20th century, the further away from the Second World War, the closer they grow to a new policy of exclusion of minorities by a nationally pure majority – always in the name of the fight for security. This phenomenon is the driving force behind global terrorism and provides it fertile ground. The negative feedback brought about in this way generates the

societal delusion of "freedom fatigue," and acceptance of limitations on freedom and privacy, offences to dignity, consent to restriction of due process guarantees in criminal procedure, needless expansion of "security" services, and acceptance of abuses of authority by such services.[3]

The use of torture condoned by the authorities of countries regarded as democracies is already not just an alarming state but represents the need to mobilise all of the forces in the society in order to restore respect for the values for which societies – especially in Europe – paid a horrendous price in the 20th century.

4 The Role of the Bar in Society

The bar is made up of people, and thus it is part of the fabric of society. Like the rest of the society, it participates in social change – taking part in elections, succumbing to media manipulation, participating in raging consumption, displaying a lack of respect for ethical norms, and accepting restrictions on freedoms as the price for increased security.

The persons who make up the bar, however, have taken upon themselves the duty to carry out the role and purposes entrusted to this institution. That is why the bar has an obligation to shape its actions and its organisational forms in a way that will continually and effectively defend the existence of a liberal democracy governed by law and the values essential to a civil society.

A basic element enabling performance of the function of defending the rights and freedoms of a civil society is the trust that the society demonstrates in the bar. Trust is a mandate without which it is not possible to perform this function, just as an advocate without an appointment has no right to represent a client in court. The mandate in the form of societal trust enables the bar to take a position in the dialogue with state authority in a number of important processes shaping the condition of democracy.

While defending the rights of a client, a lawyer also performs a service. That is a truism. This service, which is subject to the same legal protection as any other service provided on the market, has a direct bearing on maintaining the equilibrium of the system of a liberal democracy under the rule of law. This has to do not only with procedures intended to defend or establish rights, but also ordinary advice, which helps a client take decisions that are consistent with the legal order. In consequence, the sum total of all legal services provided by the bar within the global community, and the voice of the bar in the dialogue with authority with the purpose of compelling respect for the rights of a civil society, is one of the most important foundations of a democracy under the rule of law. The tendency toward abuse of power, by act or omission, is after all a psychological trait of practically every person, and will almost always manifest itself when the external conditions encourage it.

Effective performance of this function by lawyers and by the bar is impossible unless there is compliance with and respect for core values, by the institution of the bar as a whole and by individual lawyers as members of the profession. These core values include independence, confidentiality, and the prohibition against acting in a conflict of interest.

[3] *Bauman* [2], p. 67.

The prohibition on acting under conditions of a conflict of interest guarantees that independence is maintained, and is a foundation of client trust, without which the lawyer cannot conduct a matter. The duty to maintain the confidentiality of everything that the lawyer learns when handling a matter is a guarantee of the proper protection of the rights of citizens and is a necessary right for the proper functioning of the society.

5 European Integration and the Area of Freedom, Security and Justice

The late 20th century witnessed sweeping change toward European integration. The Maastricht and Amsterdam treaties identified freedom, security and justice as fundamental values within the European Union. At the summits of the European Council in 1998 and 1999, a plan was adopted to create an area of freedom, security and justice. Freedom was defined to include the free movement of people, protection of fundamental rights, and combating all manifestations of discrimination. The area of security was defined as establishment of common policies to combat crime. The area of justice was defined to mean equal access to judicial institutions by all citizens of the Union and the right to a fair trial. In 2000 the Charter of Fundamental Rights of the European Union was adopted. Although the charter is not part of any treaty, because it enshrines all individual, civil, political, economic and social rights set forth in the European Convention of Human Rights and the constitutions of the member states, as well as international conventions on fundamental rights, it offers basic interpretive guidelines for the European Court of Justice, the European Commission and the European Council with respect to implementation of the articles of the Treaty on European Union.[4]

In this manner the foundations of the European policy of freedom and security of EU citizens were established. These foundations constituted a kind of bequest, from the generation that had survived the tragedy of the Second World War and the totalitarian communist system that functioned after the war, to the political and administrative elites who assumed decision-making authority through the natural progression of generations. Notably, the "testators" themselves were a generation brought up with the ideals of a democratic welfare state. Tragic experiences, whether their own or their parents', enabled them to perceive the vital essence of freedom and security, because the true reason shaping the content of these values was preserved in their memory. This reason, clearly, was the division of Europe into nation states at war with one another, and after the Second World War, the symbolic Iron Curtain and the unlawful force employed in the communist part of Europe.

The 21st century was ushered in with the shock of the terrorist attacks on 11 September 2001 and the elemental revival of terrorism in general, which from the mid-1950s had exploded in many parts of the world, reaching a peak in that era in the 1970s. Without exploring the differing roots of the terrorism that occurred in the 20th century and the terrorism that is raging today, it is nonetheless clear that there are differences in the response to terrorism in the 20th century and today.

[4] *Hix* [3].

In the 20th century the responses and countermeasures were carried out in a way that did not call into question the institutions of liberal democracy or create statutory exceptions weakening these institutions, but in the 21st century the reaction of political and administrative elites is characterised chiefly by carving out exceptions to the rules and imposing restrictions on institutions of the rule of law and the civil society.

This position is perhaps over generalised, and it would be possible to point out many counterexamples. Nonetheless, in my view, it depicts a general trend, which may well be linked with what Zygmunt Bauman has called the transformation from a "society of producers" into a "society of consumers," and the related transformation from a welfare state to a "a ghetto without walls, a camp without barbed wire (though densely packed with watch towers!)."[5]

The European policy of freedom and security was formulated on the basis of assumptions of a democracy society based on the rule of law, by people who understood the importance of all of the elements of this institution. It is now being put to the test as it is subjected to decision-making by generations whose collective memory has drifted away from events that required abstract content to be conceived of in practical terms.

6 Challenges for the Legal Profession in Europe

The Council of Bars and Law Societies of Europe (CCBE), alarmed for several years about the means being employed to carry out security policy, particularly with respect to combating crime, but also competition policy equating legal services with any other services, published the "CCBE Position on Regulatory and Representative Functions of Bars."[6] This position paper stresses the importance of the core values that the bar must live up to and the manner in which a lawyer must practise his or her profession in order to serve as a strong and fundamental pillar of a democratic society based on the rule of law. The CCBE has also stressed these values in its submission to the European Commission concerning the Commission's report on competition and professional services,[7] and, more extensively, in the CCBE's comments on the OECD's "Report on Competitive Restrictions in Legal Professions."[8]

The CCBE's central argument is that stripping legal services of their specific character as services that further the protection of the rule of law, and lumping them together with all other types of consumer services, in conjunction with solutions adopted for combating crime as part of the implementation of security policy, would have the effect of depriving the legal profession across Europe of the independence it must have if the rule of law is to function properly. Moreover, statutory elimination of professional confidentiality with respect to the specific crime of money laundering

[5] *Bauman* [2], p. 37.

[6] http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf.

[7] http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf.

[8] http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_comments_on_1_1232621722.pdf.

for the purpose of financing terrorism, and with respect to terrorism as such, constitutes a deviation from the foundations of a democratic society based on the rule of law – eventually leading to the elimination of this institution in all cases.

Implementation of policy developed at the EU level occurs through drafting of laws, i.e. regulations and directives, and decisions, handled chiefly by the European Commission. The motivations for the actions of political and bureaucratic elites vary. Politicians fight for re-election because they like the taste of power, and the bureaucracy seeks to increase its influence over political decisions and its own budget, as well as obtain greater discretion in creating its own organisational structure and establishing policy.[9] Administrative officials also strive to achieve the goals set for themselves in a way that requires the least expenditure of effort.

Understood in this way, the motivations of two of the principal groups shaping the institutions of the state are of fundamental importance for the existence and condition of the rule of law. The contemporary evolution of democratic electoral systems, as mentioned, feeds on societal emotions, and these rise when policy operates at the level of manipulating social fear and pointing out enemies and imaginary or oversimplified shortcomings of the legal system. Arguments appealing to populist demagoguery are the easiest to absorb, even by educated societies, particularly when they are not organised in the form of a civil society but are only a patchwork of special interest groups that are not integrated with one another.

As a result, a synergy develops between the elites of politics and bureaucracy, placing these two groups in a conflict of interest with the civil society. The creation of statutory exceptions defining social groups or whole categories of cases in which principles of legality and the values comprising the rule of law do not apply is spreading to an ever-wider circle, and providing an opportunity to administrative officials, and in particular prosecutorial authorities, to abuse their power. It must be pointed out that this arrangement has developed in instances where the warped goals of political elites overlapped with all possible defects of the administration. It is not the result of any conspiracy between these groups, but that is precisely why it constitutes one of the greatest threats to democracy and the rule of law since the fall of the Berlin Wall.

7 Threatening the Independence of the Legal Profession

For the political and bureaucratic establishment, the bar is a thorn in the side, a barrier to easy achievement of its purpose. It prevents politicians from creating exceptions to the rules, or at least makes this task harder. The bar also makes more work for officials by requiring them to respect the rules of a democracy governed by the rule of law. It makes it more difficult for them to abuse their bureaucratic authority in the service of a supposed higher necessity.

The dual nature of legal services and the legal profession has been clear for ages, and it is no great discovery to state that lawyers perform a service. Given its purpose, however, this service holds a special place defined by the architecture of the system. It is this service that enables implementation of the principles of due process and other

[9] *Hix* [3], p. 431.

fundamental rights – even when the service involves actions other than protection of rights in a criminal or civil proceeding. Proper performance of legal services has an impact on the decisions taken by clients to act in compliance with the legal order and with respect for the rights of others. Of course instances do occur in which the profession is misused for purposes inconsistent with its guiding principles. In an age of the commercialisation and mercantilisation of life, examples of such abuses are frequent. This does not mean, however, that such abuses can justify elimination of the independence of the bar as an institution of the rule of law.

Throwing legal services into one pile with all other services and analysing them from a purely economic point of view is inappropriate and is a threat to the independence of the bar. This happens because in the popular mind, the ability to appreciate the practical significance of the independence of the bar is being lost. The independence of the bar is perceived as an undeserved privilege of a professional group providing legal services, which in the common understanding do not differ from other services, provided in other sectors of the economy. Thus, paradoxically, as many EU officials assert, this privilege upsets a certain balance and manifests a form of discrimination against other professional groups. This view undermines the basis for society's trust in the bar and enables those abusing political and bureaucratic authority to deprive the society and its members of professional representation in their dialogue with authority.

The ability to think abstractly, and thus also to comprehend the practical importance of the independence of the bar and lawyer-client confidentiality, depends on immediate human experience, which is what fires the imagination. It is telling that despite drastic abuses of the institution of the independence of the bar by certain lawyers defending members of the Baader-Meinhof Group in Germany in the 1960s and 1970s, the notion of limiting the independence of the bar or lawyer-client confidentiality did not occur to the political establishment of Western Europe at that time. The collective memory instilled the ability to link cause (elimination of institutions protecting against abuse of authority) and effect (the condition of the political system and civil society).

Memory of the experiences of the Second World War and examples of everyday violations of human rights in the Soviet Bloc served as a natural immune system restraining the political and bureaucratic elite from eroding one of the fundamental elements of the legal order. Today lawyers and the bar are accused of abusing the privileges of independence and confidentiality not only in the area of criminal law, but also in other fields. Condemnation of the bar as a professional group hindering the proper functioning of the market and seeking to restrict competition in the legal services sector is applauded by the public.

EU directives from 1991,[10] 2001[11] and 2005[12] aimed at constructing a system to prevent money laundering and development of sources for financing terrorism struck

[10]Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

[11]Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC.

[12]Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

at one of the essential institutions of the rule of law: lawyer-client confidentiality. Groups that point out the need to maintain the principle of proportionality in the means and methods used in combating crime do not underestimate terrorism. It must be pointed out, however, that lawyer-client confidentiality, like the independence of the bar, is a fundamental institution for the protection of a society threatened by abuse of authority, particularly abuse of police and judicial authority. Hundreds of years of experience have shaped the model of a criminal trial now in place in Europe. Lawyer-client confidentiality, as one of the procedural guarantees supporting the presumption of innocence, arose because the evolution of this process required that imperfections in human nature and in the psychology governing people's actions be taken into account. After all, the tendency to abuse power is rooted in human nature.

In any trial to determine guilt and impose punishment, a confession by the accused is overwhelming evidence. The *auto-da-fé* continues to be the crowning moment of a criminal trial. The techniques developed under the Inquisition, absolutism and totalitarianism were not limited to torture. A full array of methods for exerting psychological pressure were perfected along with the development of psychology. These methods were and still are supplemented by evidence drawn from information supplied by the accused themselves while exercising the rightful defence of their own interests. It was for these reasons that the institution of lawyer-client privilege developed, preventing a lawyer from being forced to testify against his or her own client and preventing information gathered by defence counsel from being used against the accused.

Every policeman, prosecutor, or other public official conducting a procedure has his or her own goal based on the duties assigned to that person. It is clear that anyone will seek to achieve a goal at the least cost and in the shortest time. The common belief that strength and force assure the quickest achievement of a goal leads to aggression and abuses – oftentimes even unconsciously. From the psychological perspective, there is no such thing as impartiality. "Psychological bias" is the rule. Antipathy, distaste, a belief in the correctness of ungrounded, instinctive impressions and the opinions derived from them lead to prejudgement – and these, by and large, are the sentiments governing the behaviour of law enforcement officials. The helplessness of the accused in the face of the soulless machinery of unsympathetic officialdom is so great that the procedural guarantees functioning within a European democracy based on the rule of law, including lawyer-client confidentiality, are the bare minimum and the last bastion enabling the accused to seek a just and fair verdict.

Even if a society condones the elimination of institutions that are a guarantee of lawfulness within that society, regulations affecting the principles of the rule of law, particularly those involving the bar, cannot allow exceptions to be made in any other way than through a decision by an independent court in a specific case.

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