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IUDEX MEDIATOR: THE JUDICIAL TASK IN AN ETHICAL PERSPECTIVE

Introduction

Some time ago a Dutch newspaper carried a picture of a well-known Dutch criminal lawyer at work. We did not see the traditional pose of a practicing lawyer, robed and pleading on behalf of his client in court. Instead we saw him outside the court building on his mobile phone while the court was actually in session. Attempting to effectuate the futility or insignificance of the proceedings, he was absent rather than taking part, or so it seemed. Why? Is this picture illustrative for the legal profession? Is it a sign of an increasing effectiveness of assisting the client? Or is it a symbol of a growing distance between the practicing lawyer and other actors in criminal trials? And, if so, what does it tell us about the concerned parties attitude towards the profession?[1]

We see developments in everyday legal practice that cause us to ask these questions. The picture drawn-up so far – the criminal lawyer as 'hired gun' – can be broadened in two respects. First, the criminal prosecutor in Holland has put himself on an equal par with the 'hired gun' labelling himself as 'crime fighter'. As the practicing lawyer increasingly identifies himself with his client's interests, the prosecution office has become a servant of the struggle against crime. An explanation is perhaps the way in which the office has developed. It has departed from being an institution of law and is evolving into an administrative bureaucracy in whom ideals, such as craftsmanship and independence, have been exchanged for efficiency and effectiveness. Consequently, the office has turned from an institution of law administration into an instrument of criminal politics and policy. Second, the picture is not limited to criminal legal practice but has also found its way in private legal practice. While the private lawyer has always been regarded as dominus litis, and in that capacity acts as a gatekeeper of the civil process, today he lives up to a new motto: 'the client is king'. Market forces and growing competition have increasingly endangered his independence.

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[1] It must be understood that the 'legal profession' is used here in its broadest sense, and includes the practising lawyer, the prosecutor, the judge, the corporate lawyer and legal draftsman, and other actors, such as the legal academic. With 'lawyer' in this text we mean any member of the legal profession as defined above, thus, the practising lawyer, the prosecutor, the judge, the corporate lawyer and legal draftsman, and other actors, such as the legal academic.

While the explanation is different for both, the effects are the same. As the practicing lawyer, the prosecutor too thinks himself less responsible for the administration of law in general. Instead, he identifies himself with his specific role within the system. This has resulted in the instrumentalisation of the manner in which the legal profession carries out its functions. It has harmed the sophisticated criminal and civil process and it has led, it may be argued, to the crisis with which the constitutional state saw itself confronted some years ago.

Different views exist about the instrumentalisation of the legal profession. In the Netherlands, the view that does exist is one of relative indifference. If one were to speak at all about the legal profession as a topic of research, the point of departure seems to be that the aforementioned developments are not harmful. The reason for this is that the antagonists are expected to be always on an equal par within the adversarial process. This view relies on the 'adversary principle', as mentioned in the American literature[2]. This principle, however, is in the United States subject to vigorous debate, similar to the debate about the development and nature of the legal profession itself.

The debate shows two broad positions, as we will discuss in more detail later. Briefly, one is the traditional view, as propounded by Kronman and others. They see the developments as eroding the classical ideals of the profession, leading to a loss of culture[3]. The other is the pragmatic view of Posner and others. They see the developments as progress in the sense of an on-going process of rationalisation. The two views lean on different conceptions of the legal profession, and, ultimately, on two different conceptions of law. Paragraph two will address these conceptions in more detail.

In the debate, the positions arise in three different problem areas of thought: the sociology of the legal profession, jurisprudence and legal professional ethics. The problem is that these three areas have been developed quite separately. The debate, as a result, has not been an integrated one. Our view is that only such an integrated approach can do justice to the legal profession. To limit oneself to, for example, professional ethics only, would harm the quality of the discussion. Within an integrated approach, then, we will separate three interconnecting dimensions: a cultural, a moral and a professional dimension.

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2 David Luban, The Adversary System Excuse, in: *Lawyers: a Critical Reader*, Richard L. Abel (red.), New York 1997, p. 3-13.

3 Anthony T. Kronman, *The Lost Lawyer, Failing Ideals of the Legal Profession*, Cambridge (Mass.)/London 1993; Sol. M. Linowitz with Martin Mayer, *The Betrayed Profession, Lawyering at the End of the Twentieth Century*, Baltimore/London 1994; Mary Ann Glendon, *A Nation under Lawyers, how the Crisis in the Legal Profession is Transforming American Society*, Cambridge (Mass.) 1994.

The cultural dimension asks what changes have taken place in legal culture and what is their meaning for the legal profession and society. We address this in paragraph three. The moral dimension looks at the ethical framework of the institutions of law in general and the legal profession in particular. Thus, we first look at the consequences of the aforementioned developments for the institutions of law (paragraph four). We then look at the consequences of these developments for the legal profession (paragraph five). These developments pose questions about the nature of the lawyer's expertise and the legitimacy of its use. The third dimension, that of professional ethics, looks at the moral consequences of the developments (paragraph six). What do they mean for the exercise of the lawyer's functions and duties?

Taking an integrated approach to these questions, we hope to contribute towards a re-evaluation of the legal profession in general, but more in particular of the judiciary. In the final paragraph we draw the conclusions of this all for the judge as iudex mediator.

Two concepts of the legal profession

We can discern two opposites on the spectrum of thought about the legal profession. The traditional concept defines the legal profession from the position of the lawyer as a 'lawyer-statesman'. The pragmatist concept criticises this and draws a picture of the lawyer as a rational administrator; a social engineer. Ultimately, these two opposing concepts also differ fundamentally in their approach as to what law should be about, but this we will not address here, as we limit our discussion to the legal profession. We look at the concepts first by reference to the contemporary protagonists of each: Kronman and Posner respectively.

Kronman's lawyer-statesman

The lost lawyer (1993) portrays a classical ideal of the legal profession, which Kronman refers to as the lawyer-statesman. This ideal exists of three components: technical competence, civic virtue and practical wisdom.

Kronman addresses the first component – technical expertise – rather briefly. In his view, technical expertise lies in knowledge of the law as well as the ability to handle the acute legal problem of a case. The lawyer's competence compared with that of other professionals, such as philosophers and economists, lies in his ability to think and reason in a casuistic manner, where the cases are either real or fictitious, historical or prospective[4]. An obvious criticism is that this ability is neither a necessity nor a sufficient condition for the legal profession. Thus, other professions than the legal profession are also casuistic in nature, medicine for example. And, not all of

[4] Kronman 1993, p. 362.

the legal functions are casuistic, for example the functions of the legal draftsman[5].

The criticism is essentially correct but it does an injustice to Kronman. He merely typecasts the lawyers' expertise in comparison to other professionals in the field of the liberal and social studies, such as the philosopher and economist. It is possible indeed to see the legal profession and other professions as sharing certain familial ties; the casuistic approach is perhaps one of these ties. However, at the same time it is defensible that the casuistic approach is most illustrative of legal thought and action, as it has its unique structure in law (represented by the formal and institutionalised adversarial legal process). Nevertheless, the casuistic approach is not essential to all legal functions, as already indicated by the work of the legal draftsman (even though it has an indirect effect by reference to the intended social effects of new rules). It must be admitted though that Kronman should have devoted more thought to the component of legal expertise. (We attempt to do this in paragraph five).

Kronman addresses the components of civic virtue and practical wisdom in more detail. Civic virtue, or concern for the public good, is in Kronman's eyes particularly meaningful in a pluralist society. It is a disposition, which may show itself when confronted with conflicts about incompatible values. These are values of which both the means and ends are subject of debate and are self-defining for the particular political community that holds one or the other. Solving conflicts about such fundamental values demands statesmanship. This statesmanship consists in the ability to keep and even strengthen the political fraternity between the members of that community. Kronman regards practical wisdom (phronèsis) as the key trait of good statesmanship. This Aristotelian trait or virtue consists of insight and persuasion, it combines expertise and imagination and enables the lawyer-statesman to deliberate on various alternatives and contemplate their consequences for the parties to the debate. It demands, therefore, a certain disinterested but sympathetic detachment, being able to balance between the societal perspective and that of the parties involved. Kronman refers to it as having a 'bifocal character'[6]. He, thus, describes the good lawyer as the Aristotelian phrominos, who can imagine himself in the position of others, without losing the perspective of the legal order[7].

Within the lawyer-statesman concept, the image of the judge is an important image against which any other member of the legal profession can check himself. The emphasis on practical wisdom, civic virtue and political

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[5] William Twining, *Law in Context, Enlarging a Discipline*, Oxford 1997, p. 318.

[6] Kronman 1993, p. 73

[7] Kronman 1993, p. 53-109

fraternity has made the judicial office the paradigm of the legal profession. Other legal functions, such as advocacy, the corporate or academic lawyer, are really offshoots of the judicial office. The lawyer-statesman ideally is a little different for each of them. Thus, for the judge, in addition to his public duty as an administrator of justice, deliberative decision-making and impartiality have special meanings. For the practising lawyer, the ideal demands public responsibility for proper procedure and administration of justice above monetary gain. But, the advocate is partial, which causes tension between his public duty and his duty towards the interests of his clients. The autonomy or independence is also different for the judge and the practising lawyer, both in meaning and value. Thus, for a judge independence is crucial for his impartiality in the administration of justice. This is why the judge's independence is constitutionally ensured. The lawyer's independence is of primary concern to this client. Traditionally, the lawyer, not the client, is dominus litis. The same is true for other legal professionals, each of who give a different meaning to the lawyer-statesman ideal, even though the core values remain identical[8].

The reality of legal practice has removed itself further and further away from this ideal. Kronman points out three developments that have contributed to this: the commercialisation of the lawyer's practice, the bureaucratisation of the institutions of law and the differentiation between practice and academia.

Thus, the commercialisation of legal services has led to a loss of public responsibility in favour to individual interests and monetary gain. The market has made the client dominus litis instead of the lawyer and as a result the latter has lost his independence. This development has not only influenced the professional relationship between lawyer and client but also the practice of law in general. The institutions of law have become bigger and more bureaucratic. This has changed the organisational context of the professional activities dramatically. Judicial institutions are no longer small and non-hierarchical (characterised by face-to-face relationships) but are big bureaucratically and hierarchically structured organisations (characterised by functional relationships). It is normal that these developments threaten the judge's independence, his professional outlook and even his methods. The developments have led also to a greater distance between the practice of law and the study of law. Academic developments have contributed to this distance. Such movements as the law and economy movement and the critical legal studies movement have caused the study of law to lose its character as an autonomous discipline. This, on its turn, has made the connection with legal practice less obvious.

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[8] Kronman 1993, p. 109-165.

The combination of all these developments has caused the lawyer-statesman ideal to be eroded and has led to a crisis in the legal profession. Kronman sees the crisis as a moral one. The moral orientation in the exercise of his professional function has been stolen from the lawyer. It has also led to a collective identity crisis, because the lawyer's self-image has changed beyond recognition, which has led to feelings of frustration and alienation. As long as lawyers shared an ideal that was based on the concept of virtues, such as serving the common good, it gave their activity a meaningful place. But now the legal profession, indeed law itself, has become a business, lawyers experience the 'demystification of the world' that other professionals already have experienced before them and which, as Weber argues, is characteristic of the modernisation of our culture. Kronman believes 'this loss of culture' to be irreversible[9]. Even if there were to be a counter movement that aims at restoring such professional virtues as serving the common good (such as the new republicanism), it would not be able to restore the connection between the lawyer and his profession. The intrinsic satisfaction that a lawyer should get from his work can only be restored when the work itself appeals to those virtues, which the lawyer thinks of as valuable and part of his self-image. The ideal of the lawyer-statesman, according to Kronman with a touch of nostalgia, does not know any alternative.

Posner's social engineer

The traditional stance of Kronman leaves us empty-handed. Were it to be true that the ideal of the lawyer-statesman has been lost forever, the urgency arises to look out for alternatives. Posner seeks to offer such an alternative: the pragmatist concept. This alternative not merely offers an alternative to the legal profession but also to the concept of law itself - the two of which he sees as indissoluble[10]. Posner describes the legal profession as a cartel – comparable to the guilds of the late Middle Ages –, which protects its members against market forces, regulatory measures and the effects of internal competition. As a side effect, the cartel regards the system of law as existing autonomously, which demands practitioners to be independent from state control and market forces. Posner refers to certain aspects that characterise law as an autonomous discipline. Her refers to law's own language (jargon), methods and doctrines, and its great faith in its independent ability to solve problems and to resolve conflicts. In addition to these knowledge theoretical characteristics, the profession also shares a unique ideologically. As with the guilds, a personal

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[9] Kronman 1993, p. 370.

[10] Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, in: *Harvard Law Review* 1990, p. 761ff; idem, *Overcoming Law*, Cambridge (Mass.)/London 1995, p. 13ff.

morality as well as a system of institutional mysticism offers the legal profession its legitimisation. The aspect of personal morality is further emphasised by such things as loyalty, equality, conformity, personal responsibility and a patient professionalism with attention to detail and quality. The institutional mystique heightens the quality of the work and the unique craftsmanship of trained connoisseurs and sets it apart from mediocrity and mass-production.

In his most recent work, Posner is even more negative about this aspect of professional mysticism, which he refers to as 'bad professionalism'[11]. He argues that it is maintained by certain techniques, such as the cultivation of an obscure language and the use of educational criteria that limits entrance into the profession. These techniques emphasise the unique character of esoteric knowledge, aim at cultivating a charismatic personality and resist algorithmisation of methods. The techniques further refer to sub-specialisation, the absence of a hierarchy, altruistic pretence and anti-competitiveness. The use of such techniques really points to vulnerable knowledge claims, Posner asserts, and other indicators of such claims consist of irrational selection criteria (social background, nepotism) as well as the inability to face new challenges.

Posner argues that the legal profession is in a crisis since the sixties. This crisis shows resemblance to the crisis in the guilds of the Middle Ages and the shift to modern industrial production. The cause of this development lies predominantly in the economic growth of the law, which has led to an increasing demand for legal services. The market, therefore, stimulates growth of the legal profession, which has led to increased competition and sub-specialisation. The cartel has been exchanged for free enterprise mass production of services, which also have become standardised. This has harmed the autonomy of the legal profession. Posner mentions two additional causes that have harmed this autonomy. He refers to the scattering of political consensus in society as a whole and within the profession in particular. It means that when the aim and direction of law became less obvious, the demand for the societal effects of law became acute and controversial.

He also refers to the rise and growth of the social sciences, such as sociology, psychology and economics, as they ensure an empirical and multidisciplinary approach to law. Legal craftsmanship and its emphasis on the casuistic approach, the interpretation of legal texts and the argumentation of practical judgements, lost terrain to the empirical approach. The latter emphasises the importance of rational direction to individual behaviour and social processes. Thus, the legal academic now resembles his colleagues from other discipline more than that he resembles the judge. He no longer is a

[11] Posner 1999, p. 185-190.

lawyer-statesman but a social engineer. Posner refers to this development as 'good professionalism'. Its essence, then, is the application of a specialised system of knowledge to activities that are valuable for society.

We can detect from this positive meaning of professionalism a variety of underlying symptoms: a decline in trust in the autonomy of the discipline, a decline in the cultivation of the charismatic personality of the lawyer (i.e. the erosion of the lawyer-statesman ideal), the on-going specialisation and growth of hierarchical structures, the decline in professors with practice experience, a resistance against irrational selection and the wavering faith in the beneficence of law. (The latter is also expressed in the debate about the legalisation of society.)

Thus, Posner, contrary to Kronman, regards the crisis of the legal profession not as a loss of a culture but a source of legal and societal innovation and progress. The on-going professionalisation of the legal function, according to Posner, is no more than a manifestation of Weber's modernisation; a manifestation of the on-going rationalisation of life. Law itself is still in a transition period of professionalisation and offers, consequently, a transition period in the evolution of social control. As long as law remains characterised by a lack of consensus about its aims and goals, it continues to be part of the political and ideological domain, instead of becoming part of a focused, instrumental rationality. If so, the road to full professionalisation might permanently remain obstructed. We, therefore, must strive to complete professionalism, which demands more attention from the empirical disciplines[12].

Comment

This concludes our observations about the traditional and pragmatic approaches, which also have influenced our thoughts on the legal profession in the Netherlands. On second thought we think that both approaches are deficient, and on equal grounds. We like to support this contention with two arguments: one methodological argument and one concerning content.[13]

The methodological argument links up with Posner who criticises Kronman of holding an anti-evolutionary perspective on the development of law and the practice of law. In the end, Posner asserts that Kronman's traditionalist approach remains stuck in nostalgia to a 'paradise lost' of ideals lost[14]. However, Posner does not escape similar criticism, but in reverse. As traditionalism denies looking forward, pragmatism refuses looking back for

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[12] Posner 1999, p. 206-211.

[13] For a further discussion on the two concepts we refer to Kronman 1993, p. 354-364, Posner 1995, p. 92-94 and Posner 1999, p. 198-199.

[14] Posner 1999, p. 199.

future's sake. History is regarded as dead weight. Law and the legal profession are solely placed in the context of instrumental rationalism. When Posner regards the dissensus in law about its aims as an obstacle for professionalisation – and law itself regards as a phase in the evolution of social control – then he misunderstands the specific character of law. He does so in two respects.

First, he ignores the existence of law, as we know it and practice it. Modern Western law belongs to the domain of politics and morality. This is not an obstacle for further professionalisation, nor a transitional phase of law, but rather the essence of law. This is also determining the nature of the legal profession. Law is politics and morality institutionalised; it offers the language, the institutions and the procedures, and thus the ability to deal with political and moral conflicts in society. It exists by virtue of pluriformity. Second, using his unhistorical approach, Posner misunderstands the manner within which law and lawyers fulfil this function. It is not done, as he assert, by generating optimal solutions in the approach of instrumental rationalism. Instead, it is achieved by modernising past doctrines, rules and precedents to build a bridge to the future. It is our contention that this hermeneutic process is also relevant when we are called upon to reconsider the fundaments of the legal profession, as it will avoid the pitfalls of traditionalism and pragmatism alike.

Traditionalism forces to stand with our backs to the future. Pragmatism induces us to ignore our roots. The hermeneutic process shows a third way: the re-interpretation of classical ideals of the legal profession in the light of changing circumstances. Thus, we don't argue for a return to classical ideals, nor do we wish to escape to an alternative concept of rationalism but instead we seek to modernise the foundations of the legal profession for the reality of today (building on the elements of both traditionalism and rationalism).

The second argument in respect of the deficiency of both concepts concerns criticism of content, which we also see mirrored in both. It concerns the meaning of the moral foundation of the legal profession or, to put it in other words, the role of professional ethics in both theories. We can summarise this as follows: where traditionalism is characterised by a surplus of morality, pragmatism is characterised by a shortage of morality. With 'surplus of morality' we express the idea that the legal profession is burdened with a too high an ideal of the function of a code of professional ethics. The virtues Kronman describes constitute a demanding aspiring morality. They concern the professional ideals that seem to be exaggerated in light of legal practice, even for the judiciary, but definitely for the other legal functions. The ideal of civic virtue and concern for the common good thus raises questions for the theory and practice of advocacy, which is characterised by the partiality of the practising lawyer. Kronman fails to address these questions adequately. This

leads his approach to be too far removed from the day-to-day reality of legal practice. The lawyer approaches, according to Kronman, the image of Plato's king-philosopher. It would be presumptuous to suggest that the lawyer would fit that image. Kronman's approach, therefore, has been criticised for paternalism and elitism[15].

Posner's pragmatism reveals a moral deficit. It appears that he has brushed aside every notion of morality from his concept of the legal profession, as the lawyer strives to realise policy goals. Thus the lawyer's professional activities serve instrumental rationality; given the political goals, the lawyer is responsible to design and execute the legal means. The created image of the lawyer as social engineer has reduced law to a technique and the lawyer to a technocrat. This reductionism is to us socially unacceptable and contestable. It is contestable because this approach rests on a separation of goals and means, values and facts, which were typical to an ignored positivism. It is unacceptable because it delivers the lawyer and law into the arms of the politics or morality of the day. This shows Posner as misunderstanding the moral foundation of law itself and of the legal profession, as together they are a guarantee against an immoral application of the law. Any lawyer, who works in a legal system, sees himself as an interpreter of the values of that system, such as fairness and due process. In addition, he feels himself bound in the exercise of his function by those moral restrictions that make up his code of professional ethics (for example, integrity and independence). Both the moral foundations of law as the professional ethics of the lawyer demand continuing adjustment and re-interpretation of classical professional ideals, values and norms in the light of changing circumstances. We want to contribute to this process of adjustment and re-interpretation and, therefore, we choose our direction between the moral surplus of traditionalism and the moral deficit of pragmatism. We envisage an alternative concept; it must be possible to draw a more realistic picture of the lawyer than that of either a king-philosopher or legal technocrat. It means that we will investigate now the contours of such alternative concept.

Changes in legal culture

If we wish to understand the legal profession, as it exists within the field of tension between traditionalism and pragmatism, we need to investigate the changing circumstances in which the lawyer works. In this paragraph we look at certain changes in legal culture and deliberate on their consequences for the nature and function of the legal profession. Against the background of this cultural history changes we emphasise the growing importance of the notion of procedural justice, which has been developed in the legal institutions.

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[15] Twining 1997, p. 321-325.

From classical to modern law

The developments of the last two centuries reveal traces of at least two different legal cultures. We call these the classical and modern legal culture. Their relationship is complex. Thus, we should guard against stigmatising one culture as passé and the other as current. Even though the modern culture is more dominant, both are visible in today's legal practice. We first look at both cultures separately and later we examine their relationship.

The ideological basis of classical legal culture – the social contract theories – starts from a particular natural order that has certain inherent human values. Thus the classical liberal theories have at their basis the idea that man by their very nature is free and equal. The state has the duty, and law has the function, to protect and guarantee this idea; hence the great emphasis in classical law on the classical civil and political rights.

This automatically poses the question why we need the institution of law to guarantee, that which is given to us by nature. To answer this question, we must look at the role of society. As human behaviour is strongly guided by considerations of self-interest, there is a constant competitiveness in individual relations. Where people's interests clash there is a threat of conflict and thus discord: a war of all against all. Nature is not able to control this discord and thus unable to realise preserving the original value of equal freedom for all. In other words, in society the original natural freedom for all is always corrupted. "Man is born free, and is bound all over", as Rousseau believed. Thus, if freedom cannot be guaranteed naturally it must be done so artificially. Law is its edifice. But if the edifice is to succeed making people live in harmony and with respect for each other's freedoms it must break away from society and place itself above society. It can do so if it can abstract itself from the individual interests that determine the dynamic of society. Law can only bring people together if it can convince them to consider their personal interests in the interests of the common good. It is not the enumeration of many and often opposing personal interests – the will of all – but rather the common good that must be the foundation of law. As a natural consequence, the vehicle of law consists of its acts, which, like natural law, are general in nature and application.

This abstract notion of law, as symbolised in its acts, also signifies the limited function law ought to fulfil. To preserve its general character, it is necessary that legal regulation should not mingle with the distribution of wealth; this is done in the market. It merely creates the conditions to ensure that the market functions in a fair manner. Thus, theft is punished and ownership is protected. To encroach further on the market, as a distributor of wealth, would mean that law takes position against the personal interests; it

would loose its neutrality and general character and its ability of pacifier of individual conflicts. Redistribution must be a purely private matter.

Characteristic for classical law, thus, is the reality in which law is seen as a reflection and protection of certain unchanging values while governing society with a concern for the common good that rises above the level of personal interests.

Modern legal culture differs from classical law in a number of essential aspects. Any comparison between classical and modern legal culture centres around the perception we have of the identity of the individual. Classical law departs from the notion that in his natural condition, man exists independently. His identity can be understood separately from the society in which he lives. This is quite different in modern legal culture. It departs from the notion that individuals are by necessity interdependent. Identity is socially determined. People depend on each other: children depend on their parents and later parents on their children, patients rely on their doctor, doctors rely on their teachers, etc. A society is a complex maze of interdependent relationships. These complex interrelationships imply, on their turn, a complex whole of moral values. Interdependence means that success can never be attributed to oneself. Others have contributed to it. This creates duties. An essential problem, though, is how to determine the scope of these duties and to whom they are owed. The complex maze of relationships also illustrates that these duties cannot be easily calculated, as we not have an objective measure. What remains is that only through negotiation and compromise the distribution of wealth can be achieved.

We can recognise this aspect of modern legal culture in the complex system of social insurance that forms the crux of the modern welfare state. Mutual rights and duties of people are not directly translated into legal standards but indirectly through insurance. Thus these rights and duties towards others exist in, on the one hand, the duty to pay the insurance premiums and on the other, the right to be paid out when the need arises. The scope of these rights and duties is a constant topic of negotiations between the social partners, notably employers and employees.

Comparing the law in the culture of the modern Welfare State with the classical legal culture a number of differences arises. Modern legal culture does not depart form a pre-societal natural order. Society itself, with its complex maze of interrelationships, is the point of departure. This implies that law does not have an Archimedian point of reference to determine just legal standards. There are no natural – unchanging, objective and inalienable – rights. Instead, there are social rights and duties. But these cannot be objectively determined because they depend on the interdependency of human relationships. This also means that we cannot determine the common

good, which rises above personal interests. Thus, in the absence of general objective standards, the personal interests themselves determine the standard. This has a third implication: it is not the laws that bind people, but negotiations. The discord in classical legal culture, which is a rearguard battle, is overcome at the level of state and laws. In modern legal culture this battle can only be won through negotiations and compromise. And, because modern legal culture is particularly concerned with compromise, the results that follow are repeatedly renegotiated. The Dutch model, referred to as the 'polder model', is a reflection of this legal culture. It could be argued that within this culture social cohesion is not achieved at the level of legal regulation but rather at the level of society itself, through negotiation and dialogue.

Another important difference between classical and modern legal culture is that in the latter law and society have merged; they are not opposites. In our time we speak of the 'socialisation of law'. This socialisation can be seen in two different ways. The phrase points to the aforementioned process, which sees law as the result of negotiations between the social partners. We can also speak of the socialisation of law, as far as it is law's primary task is to facilitate this process of negotiations. Law is not superimposed on society – as is the case in classical legal culture – but is part of it. This has also implications for the neutral status that law enjoyed in classical legal culture. In modern legal culture law is not neutral but used to achieve a social equilibrium in constantly changing circumstances and has become the instrument of distribution. The civil political rights, with their emphasis on formal equality, characterise classical legal culture while the social rights, with their emphasis on material equality, characterise modern legal culture.

From applying law to balancing interests

We already mentioned that both cultures are visible in today's legal practice. But, it is clear that modern legal culture has gained more influence. This is most visible in the changes that have occurred in the way in which we have resolved legal disputes over the last hundred years. As the nature and contents of law have changed, so too have the nature and contents of legal dispute resolution.

Different authors have examined this development. Some argue it is a development that has moved from principle to pragmatism[16]. The principled, and rigid, application of law is typical to the Nineteenth Century. Law was seen as a set of necessary rules to control society. The rules were aimed at regulating behaviour and were, as a result, drawn up for future events. Mill

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[16] P.S. Atiyah, *From Principles to Pragmatism, Changes in the Function of the Judicial Process and the Law,* An Inaugural Lecture Delivered before the University of Oxford on 17 February 1978, Oxford 1978; idem, *The Rise and Fall of Freedom of Contract*, Oxford 1979.

stated that "the task of law is to prevent injustice and not merely to patch-up the consequences of injustice"[17]. This notion of law fits well in the classical legal culture. The common good is central to this principled notion of law, according to Atiyah. The rigid rules are necessary because individuals are motivated in their behaviour by their personal interests and therefore too shortsighted to consider the common good. Certainty of the law comes first; there is no room for a flexible application of the law on the basis of what is fair and reasonable. To allow for exceptions to the general rules could lead to people trying to bend the law to their own will and sacrifice the common good. A rigid application of the law is therefore mandatory. The nature of law and its practical application has been drastically changed in the Twentieth Century, according to Atiyah. Law has lost its rigid character, it is no longer aimed at future events and the common good is no longer being served. Instead, the emphasis is now on finding solutions for past conflicts and solutions should be satisfactory to all the parties involved. This implies that the rigid application of law has lost terrain to a more flexible application of rules that enables a fair and reasonable solution of the conflict. The principled approach has been pushed aside by a pragmatic approach.

Hirsch Ballin has characterised the development of law and legal practice in even sharper tones when he refers to the transition from the so-called 'application jurisdiction' towards the 'interests jurisdiction'[18]. The former has pre-determined rules at its centre while the latter makes room for an ex post construction of a rule on the basis of the complexity of the particular set of circumstances. Thus, the circumstances, not the pre-determined rule, dictate how the dispute needs to be resolved or how the rule should be determined and applied. As a result, the function of law moves from regulation to integration. Hirsch Ballin's description of law underlines what we have said about modern legal culture, which refers to law as an instrument to reach compromises between competing societal interests. He speaks about law as a 'trait d'union' between different rule systems – related to a diversity of interests – that exist in society. The mutual tuning of these rules and interests is also a task of the judge. And such open rules as 'fairness and reasonableness' assist the judge to carry out this specific task. These rules "enclose, as it were, those other rule systems in the administration of law, or incorporate them in their fortuity, definiteness or even uncertainty"[19].

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[17] Atiyah, 1978, p. 100.

[18] E.M.H. Hirsch Ballin, Onafhankelijke rechtsvorming. Staatsrechtelijke aantekeningen over de plaats en functie van de Hoge Raad in de Nederlandse rechtsorde, in: *De Hoge Raad der Nederlanden. De plaats van de Hoge Raad in het huidige rechtsbestel*, Zwolle 1988.

[19] Hirsch Ballin 1988, p. 230.

The conclusion is that the role of the judge has changed. The regulation of society and achieving social cohesion is no longer realised by prescribing and applying general rules but through negotiation and compromise. The judge's role has shifted from being an administrator of law towards being a mediator between conflicting interests and values. The judge is iudex mediator, a go-between between opposing views and conflicting interests in a pluralistic society. Before we examine the consequences for the legal profession, we must first consider the value of these aspects for modern legal culture. The reason being that we will be able to better understand Kronman's traditionalism and Posner's pragmatism. In addition, we will be in a better position to argue the need for an alternative concept of the legal profession.

Modernity and procedural justice

The broad culture-historical perspective in which we should put the developments described above can itself be appreciated in different ways. Particularly modern culture –with which modern legal culture is related – is subject to intense sociological and philosophical debate.[20] The debate shows both negative and positive evaluations. The relationship between the common good and personal interests in modern legal culture illustrates this. Positive is that individual freedom has gained in importance. Personal wishes about what we find important in life cannot be easily ignored with an appeal to the common good. Respect for the individual has increased. The result is a more pluralistic society in which 'a thousand flowers can blossom'. But this individualisation also has a negative aspect: societal disintegration. We think only of ourselves and only of others if that serves our own interests. This may pose a threat to social cohesion. What comes of the common good then? Pluralism, in which everyone determines his or her own criteria, can lead to lawlessness. Universal values, such as those derived from Christianity no longer give meaning and structure to life. In this sense, our lives have become meaningless or devalued or demystified. This lawlessness may ultimately lead to a pure technocracy if we are no longer able to reach compromise about certain fundamental values in our pluralistic society. Thus, modern culture has given scientific interpretation of decision-making a chance. Its apparent objectivity has reduced decisions to technical matters. Instrumental reasoning has become dominant; efficiency criteria and cost-benefit analysis have reduced the interpretation of many social matters to simple, cold calculations.

Much more can be said about this. But in the context of our analysis of legal culture it suffices to determine that the move from classical legal culture to modern legal culture calls for a critical debate. When we look back at the

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[20] See, for example, Charles Taylor *The Ethics of Authenticity*, Cambridge 1991; Lawrence M. Friedman *The Republic of Choice. Law, Authority and Culture*, Cambridge 1990.

opinions of Kronman and Posner on the significance of the legal profession in our society, we can see that they already have chosen sides in this debate. Kronman belongs to the pessimists. He anticipates the demise of the great legal values. His only solution to counter the devaluation of law and the legal profession is to hold on to past tradition. Posner appears to be the realist. He sees the devaluation as a given. For him, the only sensible development is that of a scientific approach towards law and the legal profession.

Our question was whether there is an alternative. It is possible to think of a concept of law and of a legal profession in which there is space for the fundamental values while, at the same time, we can account for the need for a plurality of values and positions in a society?

We already have stated that in modern legal culture, law is known for its mediating role. Individuals can reach compromises about their individual interests without appealing to a higher, objective standard. It is tempting to think that this can only be achieved in a manner as described by Posner, using, in the end, a kind of cost-benefit analysis. One could reach such a conclusion if one examines the development of modernism with its instrumentalisation and economic standards. But if we were to do so, we would ignore the critical and moral force of modern legal culture. The weaknesses of modern legal culture – which the traditionalists refer to as the inability to provide clear standards and material rules – reveal also the strength of modern legal culture. And the strength of modern legal culture lies in its form. Whether one speaks of 'pragmatic law', the 'jurisdiction of interests' or 'the law of rules', modern law embraces certain notions of procedural justice, which offer an alternative to those of Kronman and Posner in respect of the nature, function and responsibility of the legal profession.

Thus, the special contribution of law and the legal profession in the modern epoch is the value of procedural justice. We will consider this value later. First, we briefly mention the extra worth of a perspective in which the value of procedural justice takes a central position against the perspectives of our two protagonists.

The notion of procedural justice relates to the developments in modern society, which in our eyes are characterised by a certain kind of pluralism. As already mentioned, a pluralistic society to an important extent lacks general values and standards overarching certain interest groups. However, each group will profit if its interests are represented as best as possible. This assumes certain procedures and procedural rules that ensure satisfactory solutions for all parties involved. From the perspective of procedural justice, it does not matter whether the outcome is the 'right' one. Important is whether parties in the given circumstances can live with the result, at least temporarily. This is called to compromise, where formal rules, not material rules, guide the

parties to a solution. The force of this approach as opposed to that of Kronman is evident: it proceeds side-by-side the historical development of society. It is also morally 'fashionable' as it creates the procedural space for the recognition of all sorts of individual values and interests within the framework of the particular procedure that is followed. As opposed to Posner's perspective, our approach leaves space for historically grown values and allows having conflict resolution take place in a morally accepted context. Economic considerations do not allow for compromise, as these are either sound or unsound and, therefore, tend to ignore too quickly the moral status of the parties to the conflict because their opinions are simply reduced as economic considerations.

It may be argued that this notion of justice is too meagre to be valuable to contribute to solving societal disputes. But one must remember that the notion of procedural justice itself includes certain important material values. As Hampshire argues, it revolves around the value that is captured in the maxim *audi et alteram partem* (hear also the other side)[21]. This rule does not merely refer do a 'formal rule of play' but includes an important material value: that of mutual respect. Perhaps it may not be too daring to suggest that the modern Western legal systems agree on its meaning and importance[22] (see, for example, Dworkin and Rawls). In a societal context that cannot pre-determine a right decision, a decision must be made within the dynamic of legal debate. The quality of the decision is determined, and is dependent, on the quality of the debate and how arguments are presented. Justice cannot be seen apart from the procedure and the battle within the procedural framework. In this sense, justice is always also conflict.

Institutionalised ethics: law as organised debate

Thus far, the conclusion is that law personifies the idea of procedural justice. If this conclusion is true, certain values must exist in its institutions and procedures (e.g. due process, fairness, etc.). Law as an institutionalised system of ethics is the subject of this paragraph, therefore. We first consider the relationship between law, conflict and social cohesion. In this context, we subsequently pay attention to the legal rituals and contrast these with the more informal methods of conflict resolution. Finally, we synopsise the conclusions about this system of institutionalised ethics so to continue our debate about the legal profession.

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[21] Stuart Hampshire, *Justice is Conflict*, Princeton, New Jersey 2000, p. 8.

[22] Ronald Dworkin, *Law's Empire*, Cambridge (Mass.) 1986; John Rawls, *A Theory of Justice*, Oxford/London/New York 1971.

Conflict and cohesion

"Law serves to keep up communicating with other means". Thus so expressed Luhman the kernel of the social importance of law.[23] Law is not an instrument to achieve consensus, to distribute wealth or to prevent and control conflict. Law is rather the domain in which conflicts are generated. Law's social worth exists in that it makes conflicts possible because it conceptualises that about which we argue and consequently allows us to communicate. Law makes conflicts possible because it creates space to communicate; it excludes oppression and therefore allows for differences of mind. Society benefits because law allows it to maintain conflicts without having to resort to violence or to forced compromise.

Differences of opinion remain possible insofar one observes the rules of play. At least two elements are imminently important. First, law will only work if one can submit oneself to the special forms of communication that have been developed in this arena. And these start with past texts that have now been given canonical value. Legislation and judicial decisions determine the latitude of communication and allow the power of words to update old texts to present-day reality. The second element lies in the importance of judgement. As consensus is not law's aim, because at times pragmatic reasons may make it necessary to end the conflict, we must accept that ultimately a judgement is made about the question who must be – given what has been submitted – declared to be in the right and who in the wrong. This is the deeper meaning of the maxim lites finiri oportet.

But how does law achieve social cohesion, we may wonder? Not because it solves the original conflict by taking away its causes. Law solves the conflict because it adopts the conflict and transforms it in legal terms by way of judgement with which the parties are satisfied, or to which parties resign. The result is that the original conflict is resolved at a judicial or legal level, while at the same time the parties retain space at a different level to continue to differ. Law does not offer a permanent and all-embracing solution to the original dispute and hardly ever reconciles the parties. Indeed, in the legal process reconciliation is not a primary aim. On the contrary, it attempts to separate the parties by determining who should get what.

But on a different level, a macro level one might say, law does bring parties together. The underlying value of procedural justice is that it informs parties of the insight that they each partake in a mutual enterprise: society. To judge is both to separate and to reconcile, but on different levels. Thus, the legal procedure is not only pragmatic nor does it aim at ending an uncertain relationship or provide legal certainty. It also serves to create mutual respect and understanding between the parties about their role in society. It instructs

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[23] A. Luhman, *Soziale Systeme*, Frankfurt, 1984, 511-12/374.

people to realise that they are partners in society. In the end, law's function is to separate people from each other at an appropriate level by distributing among each their equal share and to make them understand at a more general level that they can equally make a claim on a part in our society[24].

How is the latter function achieved? The level of mutual respect is expressed in the quality of communication between the parties. The legal process is not solely concerned with the outcome: as equally important is how this is achieved. Nor is the legal process controlled solely by the parties' strategies but also by their communicative actions. The worth and value of the latter is beautifully expressed in a text from the Talmud.[25] Beth Shammai and Beth Hillel have been debating a precarious problem for three years.[26] Each is convinced the other is wrong. A voice from Heaven declares one day that both are right but also declares that Beth Hillel is right. How can we explain this paradox? The solution is clear. Beth Hillel wins because of his attitude during the debate. "He was said to have been friendly and modest. He studied his own opinions as well as his adversary's and went so far as to repeat his words before his own". What is praised is not an attitude that was geared towards a strategy to study the other in order to defeat him. Instead, Heaven praised, and rewarded, a type of communicative action that understood the value of the other party's arguments so that Beth Hillel could learn from him. It could be said that he took his adversary serious, acknowledged him and respected him.

And this is what law strives at: to recognise that all arguments – pro and contra – are important because they represent the positions that are worthwhile to be considered. The body of legal decisions is, as a source of law, not merely a summing-up of ultimate judgement but constitutes the collective memory of arguments pro and contra.

The moral meaning of the legal ritual

Law, and the legal process in particular, is an institution that allows dispute to take place because it offers an armoury of complex arguments with which 'the communicative aspect can continue with other means'. It separates parties far enough to avoid that power resolves the dispute; it keeps them proximate enough to prevent that they study each other's arguments only strategically (in the manner described above). Thus law keeps them apart at such a level to ensure that they accept the legal distribution of goods and, at the same time, to ensure that they co-operate as partners in a mutual enterprise.

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[24] Paul Ricoeur, *The Just*, Chicago 2000, p. 131ff.

[25] Erubin 13b (compare Robert Gibbs *Why Ethics*, p. 216).

[26] The question whether it would have been better for humanity not to have been created.

If one can understand, from a proper distance, the fragility of the result the value of the complex system of legal rituals that characterises the legal process becomes visible. If one is to understand the specific moral meaning of the judiciary in respect of attaining this proper distance, one cannot understand this meaning apart from what is characteristic to the legal ritual. We must, therefore, provide a brief sketch of this ritual.[27]

As already hinted to above, the legal process takes place in a particular dimension of time and space. Let us first consider its space.

As in the past, we continue to stake out the space in which justice will be done. In past times, the forum was its space, now it is a functional construction of brick and mortar. But, as in the past, all elements of the legal process are ultimately realised in that space. It is important to emphasise this because the delineation of the physical space makes it clear from the very start that legal reality has its own place aside the reality of everyday life.

On its turn, the courtroom knows its own divisions of space. In court, the judge is placed on an elevated platform. This is again a reference to legal reality being separate from everyday-life reality. The positions of the parties are also thought out. Thus, in the civil process the parties meet each other face to face. In the criminal process, the prosecutor stands on the same elevation but separate from the judge (their functions are different but both serve the common good and are not concerned with the personal interests that occupy everyday life). The suspect has his place at ground level, facing the judge.

The space of time of legal procedures is distinct also. A criminal trial, for example, starts with a formal exclamation. The suspect is brought in and asked his name, is given the caution, the prosecutor reads the indictment and the judge considers the facts and other circumstances. The pleadings follow the prosecutor's case and the process finishes with the suspect having the last word. Time and space are interwoven in a complex manner. From beginning to end, the parties have, in the surroundings of the courtroom and in a limited period of time, the possibility to put forward their side of the dispute and the judge, or a collegial court, has the time to consider that what has been said in order to pass judgment. After the procedure, the judge withdraws in his chambers to consider the case and to come to a verdict. A civil trial takes place much along the same lines.

Essentially, all revolves around an important value: due process. For all concerned it must be important to know the considerations, which may inform the judge in his decision. This implies that the judge must have been given all the relevant information clearly and lucid. But honesty implies more than clarity: it is also necessary that both parties have been given a real and

[27] See also, Antoine Garapon, *Le bien juge, Essay sur le rituel judiciaire*, Paris 1997.

equal chance to put forward their opinions. Audi et alteram partem is the kernel of due process. In addition to defining the physical surroundings and the duration of the process, time and space also determine the nature of the arguments. The specific meaning of the courtroom, as a physical space, implies that not any odd argument or fact can be tabled. Only those facts or arguments are allowed, which relate to what the courtroom represents; namely the law. Thus, the indictment, read out at the start of a criminal trial, informs us of the charge, which, on its turn, arranges the argumentation and information at the trial. The courtroom symbolises that what is under discussion is the word of law.

'Law serves to keep up communicating with other means'. What is special about this is that the communication is possible due to the strictly formal, procedural requirements that exist in this dimension of space and time. This formality, abstracted from everyday life, makes social dispute possible as well as its answers. This aspect gives us a first important reading of the ethics of the judicial profession. Ethics mean no more, or less, than that the judge knows and acknowledges his role. This becomes clearer when we consider the more informal role of the mediator.

Time and space are different here. Both are not well defined and circumscribed. Mediation can take place anywhere at any time. There is no defined beginning or end. Indeed, the procedure ends when it has become clear that parties either agree or continue to be in dispute, and this may not be known in the given period. Parties may change their minds, having slept on it. In the end, mediation does not end with a decision but with an agreement. As it takes place outside the legal realm of space and time, the dispute itself cannot be understood clearly and lucid. Any fact can be introduced and the mediator must first determine its relevance. It lacks a public institution that confronts the private interests and determines their value objectively.

We should not say that the development of these informal procedures has taken place besides or opposite the formal procedure. Indeed, in the formal procedure one can detect a tendency to make the procedure less formal. A good example are the family courts and, in particular, the children's courts. Often, the process takes place in chambers with the child, his parents, a social worker and a psychologist, and the judge sitting at the same table. The administration of law is transformed into a procedure of consultation. The judge often asks the child what he thinks of the situation. He shares the opinions of the experts and considers problems at home or at school with the child. Who ultimately makes the decision here? The expert, the parents, the judge, or the child?

Kafka best illustrates the danger of an informal procedure. In The Trial the court is omnipresent and the process endless. Trials take place in a block of

houses, in rooms next to the office of K. Everyone is connected to the court somehow. Even the painter, who tells K. of the most realistic perspective to hold on to: let the trial drag on, as other options, such as an acquittal, are out of the question.

Of course, the experiences of parties in an informal process will not be as absurd as Kafka makes us believe K experiences. But nevertheless, the informal process represents, as Kafka bitterly describes, the danger that there may be no distance left between what is public and what is private. This distance is the strength of the formal legal process.

Institutionally enshrined ethics

What is ultimately the true value of the administration of law for society? As we have stated, the value lies in the possibility for disputes to be solved according to a communicative method, which leaves space for continuing differences of opinion and at the same time presupposes that parties acknowledge that they participate in a mutual enterprise. The particular dimension of space and time, together with the arsenal of communicative armoury, makes this acknowledgement possible. In addition, parties are addressed as subjects of law and not in person. A loss in court, then, avoids a loss of face.

Thus, law and its procedures create a public space that allows for a means of communication. The communicative aspect may get lost when one attempts to resolve disputes too informally too often. The informal method allows, or forces, the parties to be addressed in person (an added burden), it diminishes the distance between public and private and aims at consensus. This seems a paradox: the formality of legal procedures appears to exclude proper communication but achieves just that; the informal methods appear to allow for communication but achieve to actually obstruct communication.

We have already mentioned that modern society increasingly emphasises procedural justice as a legitimisation of decisions. The legitimisation is no longer exclusively found in the application of material rules. We accept decisions if these are the result of an adequate process, which allowed for all the opposing arguments to be heard and considered. Thus, the legitimisation is bottom-up rather than top-down. That the correctness of a decision depends primarily on the process and not on the application of a material rule has implications for the ethics of the judiciary. Whereas the current tendency in finding the law remains to derive at decisions by the application of general material rules, the emphasis should shift towards the manner in which a judge organises his court. Two aspects are important: an institutional and a professional aspect.

From the start, it must be clear that the professional ethics of a judge should be carried by the institutional ethics. It would be an idée fixe to expect that the legitimisation of a judicial decision could be entirely accounted for by the person of the judge, as this would discount the significance of the legal process itself. Thus, the Aristotelian phronimos has his limits. In the absence of proper institutional backup, no judge is able each time to convince parties to accept his decision. The acceptance of a decision, as said before, does not primarily lie in its contents but rather in the manner the judge has come to his decision.[28] When it comes to the responsibility of the judge to contribute to the cohesion of society, it appears obvious that his responsibility is imbedded in carefully crafted and carefully followed procedures.

Professional knowledge; the lawyer and his expertise

We have arrived at a breaking point in our discussion. Thus far, we have focused on the institutions and procedures (the 'hardware'). Now is the time to consider the software: the totality of opinions, truths, values and ideals, which the legal profession shares. Within this spectrum, we can differentiate knowledge-theoretical aspects from moral aspects. In this paragraph we address the knowledge-theoretical aspects; the moral aspects are considered in the next.

Incidentally, this differentiation is not principled; it is gradual. Examining the nature and use of legal knowledge, it is clear that this knowledge is partly moral – the legal profession is a locus of values as well as knowledge. In addition, the difference between hardware and software isn't principled either, as it may seem at first. This is so because the institutions and procedures reflect, to certain degree, the most fundamental opinions and truths we possess. (We may compare it to an iceberg, most of which exists below the surface.) Considered as such, the legal profession is no more, or less, than the continuation of what we have described in paragraph 4 as the institutionalised ethics of law.

Were the professions to have one pretension, it is that their representatives possess a certain aptitude or expertise. This also counts for the legal profession, but with the distinction that the nature of the claimed expertise appears dependent on which concept of the profession is defended (see

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[28] Rabelais informs us about this when he tells his tale about judge Bridoy. Bridoy decides by throwing dice. He decides by lot because he sees no truth in legal affairs. But important is that prior to throwing the dice, he allows the parties to state their case. He reads all the documents, hears witnesses and the parties themselves, so to give them the idea that they are taken serious. Then the time has come to make a decision and the parties, tired of debating and arguing but satisfied and content that they could have clarified their respective position, accept the decision of the wise Bridoy. Rabelais *Gargantua and Pantagruel*, books 39,40.

paragraph 2). This paragraph will show that both concepts relate to the development of how the profession obtained its legitimisation, which can be referred to a development from character (personally traits) to technique. However, both are now caught up by a more contemporary opinion of professional knowledge, the contours of which we will describe. In this light we can finally indicate the legal profession's own nature, as a locus of knowledge and values.

From character to technique

Ever since the rise of the liberal professions in the Nineteenth Century the manner of their legitimisation has undergone changes. Their legitimisation of the legal profession has to do both with what its members do and how they do it. In regard to what they do, the legitimisation ensures that the profession contributes to realising culturally valued results. As medicine serves our state of health and the art beauty, the legal profession serves values such as order, fairness and justice.

In regard to how they do it, its legitimacy ensures that professional activities are performed in a socially acceptable manner. In this respect, an important development has occurred. This development can be characterised as a shift from the 'legitimacy of character' to the 'legitimacy of technique'. Thus, in the Nineteenth Century personal traits of the professional legitimised his work, such as his social background, his education and experience, wisdom and courage. This fitted the tradition of an all-round education, erudition and craftsmanship. (Kronman's 'lawyer-statesman' is an echo of this tradition.) In the last century, though, there has been a gradual shift because professions generally became increasingly legitimised by principles of formal rationality and scientific (or academic) demands.

In respect of the legal profession, we may add that its increasing scientific nature of practice could not be seen apart from both the increasing commercialisation of legal services and the increasing bureaucratisation of the legal institutions. Together, these developments have redirected the tradition of erudition and craftsmanship towards a pursuit of effectiveness and efficiency. (Posner's social engineer is the fruit of this development.) Abbott synopsises this development thus[29].

The major shift in legitimation in the profession has thus been the shift from a reliance on social origins and character values to a reliance on scientisation or rationalization of technique and on efficiency of service.

The result of these developments, thus, has been the creation of a model of professional knowledge as the instrumental application of scientific

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[29] Andrew Abbott, *The System of Professions, an Assay on the Division of Expert Labor*, Chicago/London 1988, p. 195.

knowledge to concrete problems. This positivistic model – known in the literature as the model of formal or technical rationality – is now embedded in our thoughts about scientific research (pure versus applied science; science versus technology) and education (knowledge versus skills). Furthermore, it lies at the basis of some other embedded dichotomies, such as between means and ends, and consequently between fact and value.

This assumption has led the professional's field of activity to be limited by the objectivity of his scientific knowledge; his expertise is limited by the means (the facts), others choose the ends (the values). The model leads a stubborn existence in the exact sciences, but in the social sciences, including law, it is not ignored either. We do not have to go back to the triumphant days of legal positivism, when legal practice adhered to the aim of objectivity and legal certainty, to realise this. Posner's image of the lawyer as social engineer is not a mere accidental linguistic link between the domain of the exact and social sciences and law that gradually continues in the key of instrumental rationality. It is a curious paradox that such extremes as the formalistic and realistic approach of law meet in this instrumental belief about professional knowledge and practice.

Nevertheless, this belief has been subject to criticism from the sixties onwards. The criticism comes from different angles and has caused the current identity crisis within the legal profession. The positivistic points of departure of the model of technical rationality have been undermined by the developments of the philosophy of science. It, therefore, no longer can offer the solid base we expected it to have. Ever since Kuhn, Habermas, and others, science itself is seen as a social practice that distinguishes itself by discursive specifics. This has caused us to view the ideal of objectivity differently. Furthermore, the professions have seen themselves increasingly confronted with social problems, which they cannot offer solutions for, or worse, which they have caused themselves, for example the arms race, environmental pollution, etc. There is no engineering course that does not address the social responsibility of the engineer. The empirical sciences too are confronted with a dilemma. They either withdraw to safe scientific terrain when aiming at scientific objectivity (and risking being irrelevant) or they justify the relevance of their research by addressing social problems (and risking constant uncertainty about the scientific character of the research)[30].

Against this background, Posner's suggestions seem not radical enough for the crisis in the legal profession. He pleads, after all, for a further professionalisation of law by shifting towards the empirical social sciences. But it appears that the social sciences too are in crisis because the knowledge

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[30] Donald A. Schön, *The Reflective Practitioner, how Professionals think in Action*, New York 1983, p 42.

model upon which they are based is what has caused the crisis. Under these circumstances, it is not a solution to refer the lawyer to other disciplines where he will be confronted with similar knowledge theoretical problems but in a different guise. What we need to do is to contemplate on these problems themselves, and think of an alternative model to that of instrumental rationality: a knowledge theory derived from practice, which connects purity of thought to relevance.

The necessity for this can also be argued from the perspective of the theory of finding the law. Throughout the ages, the debate on finding the law has struggled with how we can come to a legal judgement from the law itself. In the Netherlands, the contribution of Scholten to this debate has been influential. The kernel of his argument exists in the belief that the uncertainties in the administration of law are never solved by an unequivocal method of legal practice but, instead, are repeated in the uncertainty about the methods of interpretation (how to discern the meaning of a legal rule)[31]. Vranken added that this could never be lifted by meta-rules because the uncertainty continues to repeat itself at that level also[32]. It appears perpetual.

Here, we recognise the structure of the paradox of rule adherence, as worded by Wittgenstein: how can a rule teach me what to do when everything I do can be harmonised with that rule[33]? The simple fact that the rule is not self-applying brings us back to him who applies the rule because he knows how to act. Scholten may have introduced the image of the person of the judge but has only one-sidedly emphasised the function of his conscience in forming judgements. Vranken pointed to the discursive character of legal judgement but omitted to place it in a broader context of the questions about the nature and function of the practical aspects of forming judgements. Having said this, it appears to us to be more obvious to first pay attention to the more general question about the nature and function of professional knowledge and postpone the question about its moral and practical character.

In the literature we come across different approaches, from different angles, that aim at providing theoretical answers. Adherents of the theory of science ask attention, following the 'Erklären/Verstehen controversy' (Explanation/Understanding controversery), for the hermeneutic tradition in the humanities[34]. The tradition of the humanities is revived in, among others, the Law and Literature movement. This movement centralises law as a community of culture and examines the role of the (literary) imagination in

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31 P. Scholten, *Algemeen deel*, Zwolle 1974, p. 129.

32 J.B.M. Vranken, *Algemeen deel*, Zwolle 1995, p. 51.

33 Ludwig Wittgenstein, *Philosophical Investigations*, Oxford 1953, §198, p. 120.

34 Georg Henrik von Wright, *Explanation and Understanding*, London 1971, p. 1-29.

the formation of legal judgements[35]. In ethics one increasingly falls back on the Aristotelian distinction between the domain of theoretical reason and practical reason – between èpistèmè and phronèsis – and the respective particularity of rationality in their discourses[36]. A revival of professional ethics shows that questions about the specific consequences of legal practice are no longer avoided[37]. Finally, the sociology of the professions shows the contours of a knowledge theory of practice, from which we can draw more inferences about the nature and function of used-based knowledge[38]. From these different traditions and in the context of various discussions the building blocks for an alternative concept of professional knowledge are gathered. Let's try to describe this alternative concept in broad terms, and in contrast with academically and scientifically generated knowledge.

Academic and professional knowledge

Before we consider the ideas about finding the law, let us first imagine a lawyer at work. What does he do when a client presents him with a problem? Three phases can be distinguished: diagnosis, deliberation and response. The lawyer's first task is to make a correct diagnosis of the problem. He must distil from his client's story those facts that are legally relevant and which can be proven. Diagnosing thus forces the lawyer to sift irrelevant from relevant facts. This demands a special interview and interpretation technique. Thus, while diagnosing, he must at the same time interpret the facts in the light of the available categories of law to seek a foundation for possible legal action. Thus, diagnosing and interpreting goes hand in hand. They couple the problem to the lawyer's special knowledge. The next step is to consider the action of the case. This deliberation is a purely professional deliberation, contrary to diagnosis, which is rather a process where the lawyer negotiates between the wishes and needs of his clients on the one hand and his knowledge on the other. The deliberation takes place in, we may say, a virtual world in which the lawyer imagines his arguments and how these might be rebutted. Some times, he might go as far as to test the action in real life to seek out its effects. In both cases, though, the aim is to seek a proper response. The response is the third phase in which the lawyer reacts with taking action. The response is the mirror image of the diagnosis, as it were:

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[35] James Boyd White, *Justice as Translation, an Essay in Cultural and Legal Criticism*, Chicago/London 1990; Martha C. Nussbaum, *Poetic Justice, the Literary Imagination and Public Life*, Boston 1995.

[36] Albert R. Jonsen, Stephen Toulmin, *The Abuse of Casuistry, a History of Moral Reasoning*, Berkeley/Los Angeles/London 1988, p. 19.

[37] David Luban, *Lawyers and Justice, an Ethical Study*, Princeton, New Jersey 1988.

[38] Abbott 1988, Schön 1983; Donald A. Schön, *Educating the Reflective Practitioner*, San Francisco/London 1987.

again, the lawyer negotiates between his knowledge and reality, but in an opposite direction[39].

Why is this process different from the application of academic knowledge? What are the differences between professional and academic knowledge?

Three differences exist. First, the knowledge of the professional is differently organised than the knowledge of the academic discipline from which he initially gained his knowledge. The knowledge of the legal academic is organised according to the principles of logical rationality (from general to special), as he is interested primarily in the system of law. Hard cases for him are matters that are difficult to fit in. The knowledge of the practising lawyer is organised according to the principles of practical relevance (from standard to particular). He is concerned with the application of the law. Hard cases are matters that he will not come across quite often. The difference is primarily that of organisation, because different circumstances appeal for expertise and obviate a different organisation of knowledge. (Differences also exist in the contents of the knowledge but these are secondary). This is also the reason that the legal academic normally feels ill at ease in practice while the practising lawyer appears to be ignorant between the walls of the academy. A transition from academia to practice, and vice-versa, demands a repositioning of the available knowledge and a filling in of the loopholes this repositioning creates. However, there is another reason why this transition is a difficult one, and this reason is also the second difference between professional and academic knowledge.

Professional knowledge, more so than academic knowledge, consists of practical insight or prudence or wisdom or whatever we want to call it. Here we touch upon the classical distinction between theoretical and practical knowledge (between *èpistèmè* and *phronèsis*): 'knowing how and knowing that'[40]. This distinction can be characterised by three other differences. (I) Theoretical knowledge relates to what is necessarily true; to general validity (such as the laws of geometry). The exact sciences are primarily interested in such general laws; special cases are only interesting insofar they cast a new light on the general law. Practical knowledge, on the other hand, relates to what is conditionally true, to the contextual validity (such as a judicial decision). A practical science, such as law, is primarily interested in specific cases; general knowledge is interesting insofar it casts a new light on a specific case. (II) Theoretical knowledge is by its nature conceptual and propositional. In other words, it is expressed in terms, in propositions and argumentation; in language. Theoretical knowledge, therefore, can be communicated more directly. It can be written and talked about meaningfully. Practical knowledge

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[39] Abbott 1988, p. 35-39.

[40] Gilbert Ryle, *The Concept of Mind*, editie Penguin 1980. p. 28-32.

is coined in terms of perception and disposition. In other words, it is based on aptitude, on the ability to see what the circumstances demand and to act accordingly. Scholten emphasises the perception of the judge as such[41]:

> His legal knowledge and his experience shape the intuition of the judge, who, immediately after the case has opened before him, discerns the decision, even though he might not yet know how to motivate it.

Thus, new cases are often solved by analogy with passed cases. Their similarity with past cases is recognised, and they are subsequently resolved. Practical knowledge is by its nature not driven by language and communicates, therefore, rather indirectly. It is implicit knowledge, which is communicated through example and correction[42]. (III) Finally, there are differences in the manner of argumentation. Following Aristotle, Perelman distinguishes analytical argumentation (aimed at proving truths) from dialectic argumentation (debating two sides of one argument). The first are the subject of logic, the latter of dialectics and rhetoric[43].

The third difference between practical and theoretical knowledge is that the former has a stronger moral dimension. The problems in everyday legal practice are characterised by indefinites, such as that they are never clear, often unique and almost always relate to a conflict of competing values or interests. The professional cannot but take sides, in that he must decide on a moral stance when he makes a concrete decision. This demands the application of moral knowledge, which is both theoretical and practical. It is theoretical in that it involves general knowledge of relevant and general moral principles as well as general knowledge of the reservoir of passed cases in which these principles were previously applied. It is practical in that it concerns the capacity to take a morally right decision. In other words, it concerns the capacity to take a decision the situation demands, and that recognises the competing values or interests. The kernel of the lawyer's expertise lies in his ability to judge, in addition, of course, to his knowledge of the law and his feeling for factual relevance. Thus, as we did before, we can conclude that judgement as deliberation – with others or by oneself (the interior monologue) – and which Kronman refers to as 'practical wisdom', appears to be the kernel of the legal profession.

Deliberation in law demands – to use again Kronman's metaphor – an attitude of 'bifocal character'[44]. It has a methodological dimension. Thus, the

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41 Scholten 1974, p. 132.
42 Michael Polanyi, *The Tacit Dimension*, 1966.
43 Ch. Perelman, *Rhetorica en argumentatie*, Baarn 1977, p. 15-21.
44 Kronman 1993, p. 72.

lawyer must observe the case from the perspective of the parties as well as from the perspective of the relevant legal rules. To alternate these perspectives, the lawyer keeps a disinterested but sympathetic detachment (see also paragraph 2). It also has a moral dimension (which is ignored by Kronman (at least here)). As others do too, the lawyer gives a prima facie judgement. But, contrary to others, the lawyer will suspend his judgement until he has been able to critically test his first impression: '(...) excellence of judgement is the work of the whole mind, including the capacity to suspend conclusion', according to James Boyd White, who refers to Dante for acknowledgement[45]:

> Whenever you are uncertain, put lead on your feet, to make you slow to reach either Yes or No: for a quick judgement often takes the wrong way; and then the feelings bind the intellect.

An important part of a lawyer's education and training exists in determining the moment when all the necessary information and perspectives are processed in a legal judgement that fixes, as it were, the fluctuating images. The legal judgement embodies the equilibrium between all the variables and, as such, can be regarded as a reflective equilibrium[46]. It is equilibrium because at last knowledge and values, deliberation and response meet. It is reflective because the judgement is a result of the comparison and evaluation of the existing variables. As every result of practical judgement is, the legal judgement is both optimal and conditional. It is optimal because it is the best possible continuation of the law[47]. It is conditional because it can be affected in the light of new circumstances[48]. It is not unimaginable that the ability to judge in this manner is a disposition, which is a character trait and which can also be learned. This brings us back to the ideal of the lawyer as an Aristotelian phronimos, which Kronman acquainted us with. Would the lawyer, through self-selection and training, be better equipped to judge in this manner than others would be? Some think this to be self-evident, such as David Luban, who argues[49]:

> But it is not too farfetched to expect that legal training with its cultivation of practical judgement should enable lawyers to form a better picture of the

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[45] James Boyd White, *From Expectation to Experience, Essays on Law and Legal Educatin*, Ann Arbor 1999, p. 183.

[46] John Rawls, *A Theory of Justice*, Oxford/London/New York 1971, p. 20.

[47] Dworkin 1986, p. 226ff.

[48] Jonsen en Toulmin 1988, p. 35; Vranken 1995, p. 69.

[49] Luban 1988, p. 71.

human consequences of institutional arrangements than can those of us who have no comparable training.

Other will argue that this argument tends too much towards a belief of moral superiority and as such ought to be rejected as being presumptuous. But it cannot be denied that, if one believes lawyers to have a particular expertise in this regard, they also have by necessity a particular moral responsibility. Does the opportunity and capacity to act not create de responsibility to act then?

The legal profession as a locus of knowledge and values

It appears that we have returned to where we started. We said before that in the Twentieth Century the legitimisation of professional exercise has evolved from a legitimacy of character towards a legitimacy of technique. The failure of the positivistic model of professional knowledge as applied academic knowledge, caused us to examine the nature of professional knowledge in more detail. Far from extensive, the examination has clarified that the use of professional knowledge involves, without a doubt, the professional himself, with all his intellectual and moral baggage. Does this mean that we have to reconsider the profession's legitimacy and conclude that it has remained one of character? Was Kronman right all along with his lawyer-statesman ideal? This would be a too quick a conclusion to draw. The societal and political context has changed drastically since (paragraph 3), and has made Kronman's lawyer-statesman ideal too unrealistic to accept. Selection on grounds of background instead of capability is in the present societal circumstances simply unimaginable. Furthermore, the character traits referred to must in the present circumstances be put in perspective considering the growth of the legal profession and, with that, a change in the (structure of the) regulation of professional exercise. Professional ethics of today emphasise (disciplinary) rules and regulations more so than character traits. The result is that professional exercise is controlled and checked differently than previously (see paragraph 6). It means though that the lawyer's professional knowledge remains partly moral in nature and remains to appeal to character traits. What remains to be answered is whether the lawyers' knowledge differs in this respect from that of other professionals.

The conclusion is that a profession, such as the legal profession, is a locus of both knowledge and values. But we should not give them the moral meaning as if they were able to prevent us against a lawless society, such as Emile Durkheim did. He, fearing for public morality and the lawlessness of the new industrial society, sought refuge to such communities of minds (the Roman colleges, the guilds, etc.) and praised them for their common

education and training, mutual solidarity and a similar outlook on life[50]. However, history has proven him wrong.[51] To us it appears not feasible though that the professions by themselves have the moral stamina to prevent us from a declining and retarding society, were this to happen.

But this does not mean that the profession is not a source of values and ideals that until this day regulates the professional character. As such the professions remain a locus of values, which is meaningful in our pluralistic society. Stuart Hampshire states approvingly[52]:

> I think the true communities in modern life are to be found in professions and shared pursuits, in the communities of people who work together. Most lawyers, most actors, most soldiers and sailors, most athletes, most doctors, and most diplomats feel certain solidarity in the face of outsiders, and in spite of their differences, they share fragments of a common ethic in their working life, and a kind of moral complicity.

However, the legal profession differs in one important respect form the other communities. Although the legal profession is a locus of values and knowledge, it is not a homeport of yet another moral community in society. It is a particular moral community because it feels responsible to mediate between other communities with their own locus of moral values and opinions. This responsibility is most evident in the person of the judge; he really is a *iudex mediator*. Though other legal professionals share this responsibility too. Thus, practising lawyers contribute from their respective positions to the process of mediating between conflicting personal interests and values. They do not act as a pseudo-judge but act out their own specific role (generally looking after the personal interests of one of the parties, their client). This double-role takes the profession (as a whole) even closer into contact with the public interest and prevents, thereby, the lawlessness that Durkheim feared so much, but with the exception that the public interest is now not defined by its contents but rather by the realisation of procedural justice. This responsibility, then, is nothing more than the execution of the purpose and meaning of the legal institutions and procedures, such as we have discussed before (see paragraphs 3 and 4).

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[50] Emile Durkheim, *The division of labor in society, preface to the second edition*, New York, London, Toronto, Sidney, Singapore 1984.

[51] See also Lukes 1985, p. 265.

[52] Stuart Hampshire 2000, p. 45.

Professional ethics; the lawyer and his role

What we normally regard to, as the ethics of the legal profession is nothing more than the visible component of the whole of institutionalised ethics that the system of law encapsulates. The role-bound duties of the lawyer are the complement of values and ideals of law itself and must be interpreted as such. But the role of the lawyer also interconnects with the opinions of the lawyer as a person. And here lies a source of innovation and animation. The concept of legal professional ethics is drawn against this background in a manner that holds a medium between on the one hand, minimalist moral duty (as customary among practising lawyers) and on the other, moral activism (as argued by some legal theoreticians).

Institutionalised ethics and professional ethics

We have already pointed out that the ethics of the legal profession are partly framed in institutions and procedures (the hardware) and partly part of the total of values, opinions, convictions, ideals and what we commonly refer to as professional ethics (the (disciplinary) rules of professional and ethical conduct). Academic debate so far has not paid much attention to the connection between these two parts and unjustifiably so. It can partly be explained because of the apparent invisibility of the ideals and values that are enshrined in the legal institutions. The connection is visible in everyday legal practice where in most cases no professional dilemma occurs. This does not mean, a propos, that the lawyer's work in such cases is morally indifferent or neutral. On the contrary, but the lawyer's morality is enshrined in the legal institutions and their procedures. This is perhaps the reason that lawyers do not have much time for the moral dimension of their professional activities. This, on its turn, is arguably the result of us striving for societal authority and towards the objectivity of law, which is so closely connected to the law having become more technical. Another reason, of course, is that the moral dimension of everyday legal practice is also hidden in the course things normally take. Except in extraordinary cases do the normal procedures fall short and do they confront the lawyer with a moral dilemma. In these cases, an appeal must be made to the lawyer's professional opinion upon which he is forced to reflect. Thus, sooner or later, every lawyer will be confronted with questions that will challenge his professional self-image. These questions often arise in what we would normally call legal professional ethics.

However, our view is that these questions cannot be answered without appealing to the dimension of institutionalised legal professional ethics, which we described in paragraph 4 (and for this reason, we described first). The point of departure of institutionalised ethics finds, in the context of the regulation of professional practice, its execution in the idea and practice of

role morality. A role is a dynamic aspect of a position, according to Luban, a status in flux[53]. A status, as distinct from the person, ought to be regarded as a collection of rights and duties. F.H. Bradley referred to 'my station and its duties'. In the moral context, the professional role (or status) is two-folded. On the one hand, it can serve to justify actions, which would have been rejected in a different moral context (the institutionalised excuse). On the other hand, it serves as a source of regulating professional practice. We should distinguish here though the legal profession as a whole from the different professional roles.[54] Thus the legal profession as a whole is tied to those values and ideals, which have been institutionalised in law and which find their concrete meaning in the role-bound rights and duties. It is therefore a misconception to regard the practising lawyer as quasi-judge with similar duties and responsibilities. The practising lawyer fulfils a totally different role within the institutions and procedural systems of law. He is partial by definition, as much as the judge must be impartial. This does not mean that the practising lawyer does not have further-reaching responsibilities than simply acting in the interest of his client. On the contrary, his role-bound duties and responsibilities are the reflection, or execution, of communal values and ideals of the system of law. In this respect, the denial of any role-bound character of the lawyer's responsibility is as one-sided as to see no difference between the role and the person of the lawyer. It is our view that here lies the point of departure for a judgement in the topical debate about the task and responsibility of the practicing lawyer (see below).

The question about the relation between the role-bound responsibilities and other moral obligations is as classical as it is far-reaching. Luban's answer, in brief, is that professional responsibilities and other moral obligations do not derogate each other. Normal moral obligations do not disparage professional responsibilities, because the lawyer would be seen as being excused from his professional responsibilities in the face of professional dilemmas. They would not have much meaning otherwise. Professional responsibilities do not, because they would otherwise limit the moral responsibility of the lawyer to his task or function. This limitation has led to unacceptable consequences in

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[53] Luban 1988, p. 105.

[54] Luban highlights the first. Especially the question about the extent of the institutionalised excuse concerns him. In this context he distinguishes four levels: (i) the institutions (for example the adversarial system), (ii) roles (for example the advocate), (iii) role duties (for example acting in the interest of others), (iv) role attitudes (for example procedural tasks and functions) (Luban 1988, p. 132). This 'fourfold root of sufficient reasoning' ought to be amended in respect of the question about the role as source of regulation because on the one hand, the role and its duties coincide conceptually but on the other, the role and the profession do not.

bureaucratic organisations[55]. Luban concludes that professional responsibilities and other moral duties ought to be weighed against each other when there is a conflict, without there being a pre-determined outcome[56]. Luban is right not to accept that the professional responsibilities should prevail over all other moral duties, accepting the conclusion that both do not compete on an equal footing. In everyday legal practice role-bound duties (the professional responsibilities) are more important of course, otherwise what would be their meaning? We do not act out a role only to deviate continually from the script. Partaking in professional practice presupposes a commitment to act professionally even, or especially, in those cases where that would suit less (only then prove these duties their full worth). Professional obligations give rise to prima facie reasons to act, that is to say, reasons, which are motivating[57]. But this does not mean that there are no reasons not to act differently (and deviate from the script), taking all circumstances into consideration. Luban, thus, is right not to regard role-bound obligations as exclusive reasons (a reason not to act on the basis of other reasons, which obliterate their purpose). But, Luban is wrong not to regard them as prima facie reasons.

The crucial question is of course when, under which conditions, role-bound obligations can be put aside by other moral obligations. Although the circumstances of the case could really only determine this, we could distinguish between two situations. The most obvious one is a conflict between role-bound obligations and a moral value, which is dear to the lawyer. Perhaps even so dear that it shapes or defines his moral responsibility. Thus, although a lawyer sees it as his responsibility to act in the defence of a suspect, even if he considers the latter's conduct morally despicable, this does not exclude individual cases which lawyers experience as an assault on their personal integrity. (It is known from certain well-known Dutch criminal lawyers that they would not defend certain suspects). In these cases the professional obligation to defend a client is set aside by strong moral reasons. Another situation would be fulfilling a professional obligation that would lead to a breach of a professional value or ideal. These situations, however, are exceptional because role-bound obligations are generally the concrete form of the professional values and ideals. Indeed, Dworkin showed that the discrepancy of the relationship between legal rules and legal principles is a source of a re-interpretation and re-evaluation of the legal rules[58]. The

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[55] M.A.P. Bovens, *Verantwoordelijkheid en organisatie, beschouwingen over aansprakelijkheid, institutioneel burgerschap en ambtelijke ongehoorzaamheid*, Zwolle 1990.

[56] Luban 1988, Ch. 6.

[57] Joseph Raz, *Introduction, in: Practical Reasoning*, Joseph Raz (ed.), Oxford 1978, p. 11.

[58] Dworkin 1986, p. 15ff.

dynamics between role-bound professional obligations on the one hand and professional values and ideals on the other, could act as a motor of rejuvenation of the lawyers' professional morality in a similar way. Some writers go even further and claim that this dynamic aspect is characteristic of legal professional ethics and would even be an example for the classical moral theories[59].

Whatever can be said of this, this dynamic has no place in the traditional approach of Kronman. But that the dynamic is of practical importance, appears from the current debate about the polarisation of parties in the courtroom, particularly in the criminal courtroom. Though it may seem a marginal problem, the polarisation constitutes one of the signals of the tension between the classical ideals of the profession (particularly the ideal of mutual trust between the procedural parties[60]) and the increased willingness of the criminal lawyer and the prosecutor to personify themselves with their respective roles (see paragraph 1). Although the measures to combat this are partly aimed at increasing understanding and respect for each other's position, the problem leads nevertheless to a re-evaluation of the role of the criminal lawyer and the prosecutor. The latter represents the public interest, which, according to the Dutch Standards of professional responsibility 1999, also leads to him being responsible to ensure the suspect having a fair trial. In other words, under the present legal rules the Office of Prosecutions is bound to the principles of due process. These are not binding for the criminal lawyer and his client under current law. They are (merely) bound to the legislation and, for the lawyer, to the disciplinary rules of the profession (of the Bar)[61]. Although this positional difference is not disputed, the debate about the polarisation in the courtroom has also led to institutional proposals that influence the development of criminal trial itself. This development does not only occur at national level but also at European level. This can be concluded from some of the case law of the European Court of Human Rights[62]. The court accepted that the practicing lawyer – as an intermediary between his client and the Bench – has a public responsibility regarding the confidence of the public in the proper administration of law. The problem of the

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59 Vincent Luizzi, *A Case for Legal Ethics, Legal Ethics as a Source for a Universal Ethic*, New York 1993, p. 9ff.

60 Roscoe Pound, *The Lawyer from Antiquity to Modern Times*, St. Paul, Minnesota 1953, p. 13ff.

61 De Roos, *Verdediging van belangen: het belang van de verdediging, enkele principiële en praktische vragen over de rol van de verdediging in strafzaken*, Arnhem 1991, p. 32-33; C.P.M. Cleiren, 'Een grensoverschijdende verdachte?', in: *Grensoverschrijdend strafrecht, een bundel opstellen geschreven door medewerkers van de afdeling straf(proces)recht*, Rijksuniversiteit te Leiden, Arnhem 1990, p. 141-164, p. 141-164

62 ECRM 28 December 1998, *NJ* 1999, 41

polarisation, thus, appears to be a catalyst in achieving a new balance between the classical ideal of mutual trust between the procedural parties, and the role-bound responsibility of the lawyer of looking after his client's interests.

'The man behind the social mask'

As the role-bound obligations of the lawyer interconnect with the values and ideals of the profession, so too do they interconnect with the person of the lawyer. We now touch upon the question about what Luban refers to as 'the man behind the mask'[63]. The bottom line is that there is someone who fulfils the role of the practicing lawyer, prosecutor or judge, and that person has a moral personality, as we all have a moral personality. He has chosen this role and with it comes the responsibility for the manner in which he gives meaning to that role. In that person's life, his professional role (his work) takes a central position. He tries to give shape to it in an authentic manner and in cohesion with his personality and any other role he fulfils in his social and personal life. These are, therefore, also important dynamic sources. Thus, the role he has chosen is given shape, and is defined by, both the role itself (objective) and the lawyer's particular personality (subjective). It should be mentioned that in regard to the former, although the traditional legal professions have lost much of their glamour, the dimension of a noblesse oblige has not disappeared.

White once wrote that the educational process of the law student has a double focus. He stated[64]:

> To learn as completely as you can how the legal culture functions; and to establish a place for yourself in relation to it from which you can attempt to use it in your own way [...]

This double focus is typical when we speak generally about giving shape to a role, including the role of a practicing lawyer, prosecutor or judge. The double focus creates the interconnection between the lawyer and his role, which, potentially, can be very fruitful. This is not merely due to providing a dynamic to the role, which keeps it up-to-date. It also provides a stimulus to mutual improvement: the lawyer lives up to his role that takes the best out of him and it becomes a standard for himself and others, his colleagues for example, to follow. In this manner, the interconnection contributes to an ethical attitude that better equips the lawyer to imagine himself in the roles and positions of

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[63] Luban 1988, p. 114

[64] James Boyd White, The study of law as an intellectual activity, in: *The Journal of Legal Education* 1982, p. 1-11.

others. We presume this attitude to exist for all conscientious exercise of professional tasks[65].

Between minimalism and activism

Important edifying moments for lawyers include of course those situations in which the customary tools of practice lead to unsatisfactory results, which force lawyers to reconsider them. The recent past has seen an increase in this process of reconsidering professional ethics. This is not without reason. Practice increasingly confronts its practitioners with uncertainties, tensions and dilemmas, which the current system of professional ethics is unable to resolve, or worse, which it has caused. In the introduction we gave an illustration. Numerous others can easily complement it. It is obvious then that the system of professional ethics itself is subject of reconsideration. This can be observed in both the theory and practice of law. The stakes of the debate are usually the adequacy of the current system of professional ethics, particularly that of the criminal lawyer. The literature roughly distinguishes two approaches. The first approach represents the domineering legal positivistic view. It takes the position of the practicing lawyer in the criminal legal process as measure for his responsibilities. In this rather minimalist approach the lawyer is merely bound to the law and disciplinary rules, nothing more and nothing less (see above). His task is to try to use all legally permissible means possible to achieve his client's legitimate aims. The minority approach – subscribed to by predominantly theoreticians – points to the lawyer's public responsibility to contribute to a proper administration of law. This more aspiring approach not only looks at the permissible means but also at the legitimacy of a client's aims. The American literature refers to the 'non-accountable view' and the 'moral activist view' respectively[66].

Against the background of what we have discussed, both approaches stumble upon problems. The minimalist approach is accused of its one-sided and limited view of moral duty, denoting a moral minimum without allowing for more aspiring professional ideals and values[67]. But the activist approach fails in drawing the moral boundaries of the legal profession; or where 'lawyering' stops and 'moralising' starts. The question thus is what is the moral knowledge that belongs to the professional baggage of the lawyer and what belongs to his particular personal moral view?

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[65] Nussbaum 1995, p. xvi.

[66] Susan D. Carle, Lawyer's duty to do justice: a new look at the history of the 1908 canons, in: *Law & Social Enquiry* 1998, p. 3-6

[67] W. van der Burg, Morele beroepsdeformatie. Enkele hypothesen over de professionele moraal van juristen, in: *Ethiek en het juridisch beroep, L.E. de Groot-van Leeuwen en L.H.A.J.M. Quant* (red.), 's-Gravenhage 1995, p. 13-34

Simon criticises both approaches from a methodological point of view because both regard any solution for professional dilemmas as a mechanical application of given rules. Both fail to address the contextual manner of making judgements in complex cases on the basis of constituting principles[68]. He says that professional ethics have fallen behind theory and practice in this regard, which have long been able to reconsider the worth of their existence. (It follows from lawyers, who say, 'all that is not forbidden, is allowed'). We believe that Simon has a point here, but he remains vague about its meaning.[69]

We could interpret its meaning in that the explicit standardisation of professional exercise ought to be interpreted in the light of the underlying system of institutionalised ethics. In other words, it ought to be interpreted in the light of the demands of procedural justice and correlating material values, such as parity of esteem, or equality, and mutual recognition (see paragraph 4). In this light the lawyer's special responsibility, as a lawyer complements the minimalist approach in order to realise these values and demands. At the same time the minimalist approach meets its limits here; material conceptions of the good life that are not institutionalised in law may belong to the particular opinion of a lawyer but are not part of his legal expertise and should not be shared with the client. What these limits are is often difficult to discover in concrete cases but they do provide lawyers a direction of thought to consider their attitude in concrete cases. A good example in this respect is the example used in the introduction of this article: a lawyer who strategically withdraws from the legal process inside the courtroom. In the light of the institutionalised ethics in law – which gives a central position to debate and argument – the lawyer has gone too far. A limit has been breached, and in more than one way. The result is that the judge does not answer the legal question whether the absence of the suspect should lead to nullify the trial after considering all the arguments but the attitude and actions of the criminal lawyer.

Conclusion

The preceding *tour d'horizon* of law and its social and moral meaning, and the system of professional ethics of the lawyer and his expertise, has led to a number of observations and conclusions. We have found that the consequences of the respective approaches of Kronman and Posner about the

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[68] William H. Simon, *The Practice of Justice, a Theory of Lawyer's Ethics*, Cambridge (Mass.)/London 1998, p. 1-25.

[69] Simon describes his contextual opinion as such: 'Its basic maxim is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice' (1998, p. 9). But where does the aim of justice come from? And how does it distinguish itself from the values, which moral activism presupposes?

responsibility of the lawyer were unsatisfactory. We have sought to describe a compromise between the two approaches. We described the lawyer as an iudex mediator in which the merits of the approaches were combined. This compromise is in the first place one between Kronman's traditionalism and Posner's pragmatism, as it aims at re-interpreting the social role and meaning of the lawyer in the light of the altered meaning of law itself (the importance of procedural justice). This compromise does not remain stuck in Kronman's nostalgia of days past nor does it deny, as Posner does, the central meaning of the legal institutions. In the second place, the compromise is one between the moral surplus of the opinion of Kronman and the moral deficit of Posner's, as it seeks to link up with the idea of procedural justice as organised debate, which the system of law itself encapsulates. It is our belief that it is the kernel of the legal profession that the lawyer gives shape to this idea and develops it further. This is not without consequence for the system of professional ethics of the legal profession. First, it offers a degree of aspiration. The lawyer's professional exercise ought to be aimed at realising a procedural context in which conflicts can be managed. Second, it also restricts the lawyer, as his professional exercise cannot be reconciled with realising, through law, a particular conception of the good life. The lawyer's role, therefore, is to mediate between conflicting interests and values in society. This is also the aim of his education and training and, consequently, his special expertise.

The synopsis is that the lawyer can be seen as an iudex mediator in at least three respects. First, he is a mediator between the conflicting parties. But as a mediator he does not only seek to reconcile the parties and reach an agreement (this is the essence of mediation). Although it is an important aspect of legal practice, it is sometimes unwanted or impossible. In addition, his aim is to resolve the conflict through reaching a binding decision. As Ricoeur emphasised, this aspect serves in the short term the end of uncertainty and in the long term the repair of social amity. Second, the lawyer is a mediator between the parties and society. Not only because the distribution of goods and rights puts parties at a proper distance, as Ricoeur maintains, but also because it distinguishes the public from the private and vice versa (where the definition of the public space determines what can be debated). Finally, the lawyer is a mediator between the diversity of interests, roles and values that characterise the pluralist society. Law manifests itself as organised debate, or as Stuart Hampshire describes, as the embodiment of procedural justice. The lawyer is at all three levels an iudex mediator, nothing more and nothing less.