

Nobile officium negotium est

The term ‘access to justice’ ran as a red thread through the conference Innovation & Future of the Legal Profession organised by the Council of Bars and Law Societies of Europe (CCBE), 21 October 2016 in Paris. What access to justice means is a debate in itself. Scholars would probably chastise me for using the term loosely but, arguably, we all have a right to meddle in the debate solely on the basis of being citizens. Most would agree that access to justice does not simply equal legal aid. Sometime after the second World War western societies started to agree that if we want a system which purports to uphold legal rights, then one of the most basic requirements would be the right to legal redress irrespective of your monetary means, education or status in society. In the meantime, there are those that argue that access to justice does not simply mean access to lawyers and courts. It is about the possibility to inform yourself of your rights and, if you are not treated fairly, being able to access all levels of public organs, including police, ombudsmen and advisory government agencies. Others say that the increasing reliance on lawyers and courts is the consequence of a philosophy of self-help and personal responsibility in aversion to Big Government. In a market-based economy, legal aid seems to have gone out of fashion as fast as the antiquated idea of a ‘welfare state’. But whether we like it or not, with complexity of law and faster changes in society comes an increased need for lawyers.

As part of a recent survey, I interviewed business leaders of a few large international corporations on their vision of the legal department in ten years’ time. Not surprisingly, they all proclaimed that laws and regulations will grow ever more complex. Some of the interviewed also pointed out that, while artificial intelligence and other technology will probably help their company to deal with increased complexity, the same technology will not reduce the need for lawyers at all. On the contrary, it will lead to much more work simply because technical innovation will also make supervisory authorities more efficient and omnipresent. The mesh in which breaches of the law become entangled will be made finer and finer until every infringement will be caught. One of the interviewed business leaders pointed to the parking supervision in inner cities as an instructive likeness. Not so long ago, if you parked your car illegally, perhaps to run an errand, you might or might not be caught, depending on if a traffic warden would pass by. Today, surveillance cars equipped with scanners continuously drive through the streets and catch nearly all illegally parked cars. With these kinds of supervision systems on every level of business and society, the work load of the legal system will be tremendous.

The risk is not only that we will be faced with more efficient supervision, but also with faster evolving and increasingly challenging rulemaking and compliance requirements. Our societies are right now grappling with large questions, including populism, immigration and nationalism. There is a risk that new rules will emerge at a faster pace, responding to events and their perceived regulatory shortfalls rather than being the result of long-term strategic planning. Event-driven rules are more likely to be motivated by perceptions rather than all relevant facts that are collected in a slow moving due legislative process. As a consequence, shorter regulatory time-to-market might increasingly be given more priority in our societies.

At the same time, legal aid is shrinking in most countries while the group of people having right to legal aid is being more narrowly defined. UK press could report beginning of 2016 that the number of cases granted legal aid in the UK has dwindled. In 2014/15, the annual figure of social welfare cases that were awarded funding had shrunk to 54,635 from having been 275,678 the previous year. In many countries, budget cuts have reduced courthouses and police stations to urban or more populated areas, leaving other areas of a country without physical proximity to the formal justice system. As laws and regulations grow ever more complex and the available means to access justice are decreasing for a large part of the population, it is not difficult to imagine a growing sense of separation. From this perspective people watch large corporates, financial institutions and government officials 'get away' from justice with few scratches. It becomes easier for populists and demagogues to gain a foothold if an increasing part of our society feels that Might seems to equal Right and that there is no longer a level playing field. The root cause of the increasing support for anti-establishment politics might not even be so much a case of stagnant real incomes amongst the middle class as a sense of unfairness in the system as a whole. Ordinary citizens have to play by all the rules. On the occasion that they do not, they will pay the price. Drive your car 10 km/h above speed limit and you will get fined. Fail to pay an invoice and the bailiff will be at your door. If a large company and its executives breaks the law, often there is relatively little consequence. Corporates and the ruling classes seem permitted to legally avoid tax too. If more and more people do not feel represented in a democratic society, then something else will step in and take over.

The nobile officium in search for profit

The lawyers that, in part, must meet the need for justice are facing the same economic challenges as everyone else without having been prepared for them. For the lawyers that will practice 'the law of everyday life', the rules surrounding the majority of citizens, there are few employers that will pay them a salary and take away the headache of financial worries. These are the lawyers that provide access to justice for the vast majority of the population. Whether they like it or not, they are entrepreneurs, having to keep a business running no matter how small. In many places, lawyers are shutting down their practice simply because it does not sustain their living any more.

Twenty years ago, being a lawyer meant exercising a profession very much like a doctor. You did not work as a lawyer; you *were* a lawyer. This is to a certain extent still true, but lawyers are increasingly forced to operate as a business: generating turnover, making investments and understanding cash flow. At some point in the past decades the *nobile officium*, the honourable profession of being a lawyer, changed into being a business undertaking. Practicing law is a business. The lawyers and law firms that do not realise this will be left behind by reality, clinging to their status as profitability dwindles.

Large actors with deep pockets have unlimited access to legal support of the best kind. But this legal support is provided by a minority of lawyers that have already capitalised on understanding the business of law to a tee. Relatively few lawyers work for the big law firms serving an international corporate clientele. The reality is that the vast majority of lawyers and members of

bar associations are sole practitioners or part of a small outfit serving private clients locally. These clients are either private individuals or small businesses that do not have deep pockets. There is no legal budget. The lawyers serving this sector is, at best, competing with the plumber, the car mechanic and the home repair man. Their clients are also not repeat players the way the large corporates are: hiring a lawyer to get justice is often a onetime incident that is stressful and has a potentially significant impact on their lives.

When we talk about profit, some might hear echoes of Gordon Gekko in the film *Wall Street*, preaching that greed is good. Discussing profit and lawyers in the open somehow seems to be in bad taste, reminiscent of all those stereotypical lawyer jokes. That there would be a connection between profit and access to justice might at first seem misguided and inappropriate. This is where remnants of *nobile officium* might distract us. Profit is not a dirty word. It is just business. In simple terms, profit is what is left from an income once all costs have been deducted. For every lawyer, that profit needs to be enough to make a living out of.

The dream machine

So, what do we do? How do we fix this problem? We tend to focus on technology as part of a solution for access to justice. Indeed, technology can make services more transparent and easier to approach. Let us take the time to dream just for a little while. We are at the dawn of artificial intelligence and have already started to understand what this can potentially do for us. It will not fully replace the lawyer but it can do legal tasks that reach pretty far and even do it in natural human language. Imagine all citizens have access to a free internet portal powered by artificial intelligence that would act as a first point of contact. If you have a grievance you would be able to explain your problem to this computer program as if it was a real person. Based on a series of questions and answers in spoken language, the artificially intelligent program would be able to determine whether you have a legal problem or not and where best to bring it. It could proceed to conclude if you are entitled to legal aid and, if appropriate, estimate if your case would be worth pursuing or not based on gain versus cost. If necessary, it could inform you which type of lawyer you need. This kind of chat bot would, through human language dialogue, be able to narrow down the essential circumstances and facts and come to a first diagnose that would guide you into the justice system. It would not provide legal advice. It would be an expert system that would give citizens help to assess perceived injustices and act as a filter. Lawyers would receive clients with more viable causes and courts would be less inundated with cases. More importantly, it would increase the perception of having access to justice, of your problem being defined and diagnosed without having to resort to Google.

Increased access to justice depends to a large extent on public confidence in the justice system, as well as an understanding of your rights and the means for claiming them. A person with a physical ailment is often tempted to consult the internet unleashing a flood of advice that ranges from sensible to downright dangerous. But luckily for us in the western world, access to proper medical advice is more or less well organised and rather close by. You will be able to get to a medical expert and doctors in most countries will not ask for your wallet first. Strangely enough, even though we value our democracy highly, access to justice is not treated in the same way.

The technological innovations that emerge today in the legal field tend to be the ones that earn a return on investment because they have to rely on the involvement on an investor. My dreamt-up artificially intelligent chat-bot would have to be a task for government, and perhaps universities, to set up because it has to be a non-for-profit tool. It is a big ask in times where governments are busy scrutinising how they can make savings on just about everything. But when it seems an increasing part of the population feels ignored and even nurture a growing suspicion that the system is rigged against them, providing for a technical service that would directly help address frustrations might not be a luxury but a necessity.

Legal education – with a bit of business on the side

A second remedy to part of the access to justice problem arguably lies with the legal education. There are already voices calling for a change in what law schools teach students, but these are mostly focused on introducing more technology onto the curriculum. By and large, law schools teach students to reproduce the law. Legal education is about gathering legal knowledge and learning to read the map of the legal landscape. However, to which extent law students should learn technology is a debate this article leaves for others, but what *will* be argued here is that law schools should teach students the basics in the business of law. Law students do not quite comprehend that there is a business side of being a lawyer. Being a good scholar does not equate to understanding how to make a living out of practicing law. Working as a lawyer also means pulling in the work. Gone are the days where you can sit behind your desk and wait until the phone rings or another lawyer dumps a case on your desk. You have to generate your own turnover, whether you are a sole practitioner or partner in a law firm. Once the work is in, the challenges of keeping books, managing cash flow, understanding costs and hiring and firing becomes crucial. Teaching young lawyers business is not only beneficial for the ones who want to hone their skills in time for making partner in a large law firm. It is even more essential for those lawyers that will be their own 'start-ups' and business managers. For law schools to provide students with a checklist of essentials for a starting law office would be one of the easiest wishes to fulfil.

Impending lawyer retirements, continued population growth, and the growing complexity of law and legal regulation, have all been cited as the reasons why the legal market will grow and that law students can look forward to good job market conditions. Even if this turns out to be true, and no matter how much law graduates burn for their vocation, they will still be left to carve out their own existence. If we can agree that having lawyers in all places of society will be a vital part of a civil society based on justice for many decades to come, then it would be perilous to leave their chances of success to the good fortune of being born 'business savvy'. Populists, although rejecting the term themselves, variably calls on 'ordinary citizens' to purge the system from a self-serving elite. When complexity in rules and regulations are on the increase and the access to lawyers are becoming more unattainable the ordinary citizen may be tempted to conclude that the justice system is no longer for them, supporting the narrative of the populist. Perceived unfairness and injustice fuels a sense of 'us' and 'them' more than anything else. Law is like any other business sector. It is affected by the economy just like any other business. An economic downturn hits the unprepared and the practices with small margins harder. If we do not want

access to justice to deteriorate further, we need to arm the lawyers that are part of providing it with at least a few skills in how to set up a resilient business.

It is a comparatively easy task to teach the basics of the business of law, but the impact could potentially be so much more valuable. Learning the business of law might not be the silver bullet for solving the current shortcomings of access to justice. But every little bit helps. Wanting to uphold a *rechtsstaat*, a state based on justice and integrity, it is essential to ensure that those who enter the legal profession are as well-equipped as they can be. Accessible justice for all citizens might prove to be pivotal in preventing populism from gaining ground.

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