SOCIAL AND ECONOMIC VALUES IN THE TRANSFORMATION OF THE PRACTICE OF LAW

***1.-The beginning of the change in legal professions*.**

Not too many years ago, in Portugal and Spain, the paradigm of the legal professional was of gowned lawyers, lawyers practicing before the courts, who intervened, in particular, in disputes, in the pathology of social and economic interrelation in life. The way of practicing this profession was relatively homogenous: there were small offices and not so small offices, almost all of them of a general character. Law itself could almost be covered in its totality.

Faced with this paradigm, lawyers focused on pure consultation, such as company lawyers, had a rather marginal role and seemed not to be lawyers at all in the widest sense of the term.

The beginning of the change could be seen in factors such as those below:

a) Specialization. Julius von Kirschman observed in 1847 ("*The lack of value of jurisprudence as a science*") that just three words from the legislator could reduce hundreds of volumes in a library to ashes. That inflammatory metaphor, to which many other analogues have followed, meant to express the incipient incomprehensibility and essential mutability of a system of law that for centuries was stable and faithful to itself. A tendency to specialize was established with it, particularly according to jurisdictions: criminal, labour, contentious-administrative and civil, which reinforces this generality, a depositary of more than two thousand years of evolution.

b) Association. Essentially personal offices, or organized around a prominent figure become pluricentric and lean towards the integration of surnames and teams, whether within a specialism or taking on the challenge, right from the beginning, of providing legal answers regardless of the problem.

c) Generalization of external consultation. From a model of functional differentiation between the resource to the external lawyer and internal consultation to the company, is transformed into a model in which an increasingly greater number of operations enjoy external, specialized consultation. This is due, in part, to the technification and spread of consultation; and in part to the convenience of externalizing the liability if the operation generates a risk or suffers a problem. As a consequence, the market grows and facilitates the organization of professional activity in increasingly more lawyers' firms.

d) Economic growth and internationalization of markets. The entrance of foreign companies into our markets, firstly, and the entrance of our own companies into other markets, and their interrelation and growth, makes the increase in traffic generate more operations open to either consultation in their coordination phase, or to rectify disputes through legal channels, or, when possible, renegotiation, transaction or arbitration. The appearance of mass or complex operations of markets of capitals and the mergers and acquisitions operates along the same lines, which consume enormous amounts of legal resources which can only be obtained from outside the companies affected and from professional firms of a different scale.

e) Pathologization of legal procedures. The sum of these factors reverses the proportion between professional dedication to disputes and prior consultation of economic transactions: only matters which can afford the time to pass without a solution naturally end up in court, but those in which the parties believe that the legal approach will be an solution that has no end (searching for delays, or the pressure of proceedings for another type of solution), and there are always irreducible disputes of an irrational basis. As the statistics demonstrate, there are a greater number of legal proceedings, but the matters put forward in court are, generally speaking, of a lower quality, and greatly increase the quantity and quality of non contentious consultation.

2.- Diversification of the legal professions.

To begin to define the current situation, we should provide an empirical verification and a projection which uses it as the basis: if we look twenty years into the past, the panorama in the Iberian Peninsula of professional firms has changed drastically: the names and structures have changed. If we were able to look twenty years into the future, the same would probably occur, which necessarily implies the disappearance of some of the current firms and the appearance of others, in a process of rationalization, adaptation of the offer to the demand and concentration.

What we have today are, firstly (by size) large national and foreign firms, in which the function of consultation has a greater weight than defense work within their firms, although these firms are increasingly looking after this area through the legal departments. Then, medium and small firms, in particular those which are “specialized” in jurisdictional branches, wherein the rendering of professional services is less intensive and is not connected to large operations. Also, small-scale, individual or almost individual professionals, who, despite their survival in all the systems, are collectively occupying an increasingly smaller space in the legal market.

On the other hand, there are professionals at the service of state, autonomous or local Administration, or the increasingly numerous regulatory bodies. Or company lawyers who, as a whole, are very highly specialized and technically competent, practically in all sectors and, in sectors. The result is a diversification of the legal professions, in general, and of the practice of law itself, which become heterogeneous according to intervention materials, and in accordance with the organization of the activity and the firms.

The definition of "practicing lawyers" contained in the General Statute of Law of Spain, approved by Royal Decree 658/2001, of 22nd of June, is exceedingly wide: "*Law is a free and independent profession which renders a service to society in public interest and which is practiced in free and loyal competition, through consultation and defense of public and private rights and interests, through the application of the legal sciences and techniques, in accordance with harmony, to the enforceability of the rights and freedoms, and Justice*" (art. 1.1). But the definition of "lawyer" is even wider in art. 542.1 of the Organic Law on Judicial Power, which attributes that "*only the person with a degree in law who professionally practices the management and defense of parties in any proceedings, or legal consultation is called a lawyer*", to continue to remind the reader of the freedom and independence of lawyers in section 2.

In Portugal a similar thing occurs with the definition of "*estoppel*" of lawyers in Law no. 49/2004, of 24th of August, although its illustration is somewhat more based on cases (as well as the practice of the forensic mandate, and legal consultation, the drawing up of contracts and preparatory acts for the constitution, alteration or termination of legal businesses, negotiation for the payment of credits and exercising their mandate in the scope of administrative and fiscal acts are also defined as the estoppel of lawyers) with the safeguarding clause of "*notwithstanding the jurisdiction attributed to other professions or activities whose practice is regulated by law*".

Practically everything is included, in Spanish regulations, under the name and exclusive function of "lawyers": defense, consultation and even legal counsel, if it is practiced "professionally" which is, so to speak, the tautological element of the definition: practicing as a lawyer is the legal profession *par excellence*, and the other legal professions would be defined against it according to opposition or exclusion, insofar as they are professions belonging to different associations (such as solicitors, with more specific duties) or with a different public legal statute, such as judges (who do not exactly give "counsel"), Notaries, Property Registrars, university lecturers, legal representatives of the state, or certain administrations or public bodies with their own statute, and some others.

The social reality is even more vague and the tendency is towards greater doses of jurisdiction and deregulation with the addition of more operators with blurry jurisdictional limits or questionable “reserves of activity”, of which the most important is still, from legal regulations, that of defending a client in court, outlined in the aforementioned art. 542 of the Organic Law on Judicial Power, complemented with regards to compulsory affiliation in art. 544.2.

Within the legal professions, lawyers have a both general and residual position, where the greatest heterogeneity is found in their duties, in their material content, in their organization to render the service to the client and in the role of the lawyer within the organization to render the service, from an individual and personal service, to the collective service wherein, regardless of the legal relationship between the lawyer and the organization, it does not exclude – or substitute, an individual service.

Therefore, a lawyer employed in a professional firm is still a “lawyer” if his duties consist of rendering services including defense, consultation and legal counsel, as was established in number 1 of the first additional provision of Law 22/2005, of 18th of November, later expanded upon in Royal Decree 1331/2006, of 17th of November. This regulated the special labour relation of lawyers who render their services in individual or collective law firms, in clear reference to this freedom and independence as a defining detail of lawyers as proclaimed by our General Statute and which is maintained even in the cases in which the lawyer works for a firm, highlighting the personal nature of the act of professional service.

On this stage where practicing law as a basic legal profession is rendered personally and in essential conditions of freedom and independence, on the fringes of how the activity is organized and the material it is about, the diversity of services is extraordinary: lawyers who personally attend to their client, and those who intervene in just one phase or aspect of a complex provision of service, without contact with the client, but their intervention being necessary for the legal service; those who attend the jurisdictional or arbitration courts, those who intervene in negotiation processes, or in the preparation of the negotiations; company lawyers; those who participate in the determining of risks of an activity, with the capacity to generate liabilities, responsibilities or commitments; those who assess them from a legal point of view, those who prepare and supervise the actions of social bodies; lawyers who assist their client in prison, or during a marriage crisis; those who prepare documents and those who review them. All this is extended over a multidimensional structure, focusing professional actions in just a few directions.

In the context of the diversification of the legal professions it is necessary to highlight the condition of *lawyer* in *company lawyer*, who is not recognized as such in all legal systems, although he is in Portugal and Spain.

Recently the ruling of the European Court of Justice of 14th of September 2010, in the Akzo case, denying the confidentiality of communications between a company lawyer and the company, has considered that the relationship of labour dependence existing between lawyers and companies implies the inexistence of independence, and this absence of independence would break the confidential nature of the relationship between the lawyer and the client. Paragraph 45 states that: *"As the Advocate General observed in points 60 and 61 of her Opinion, the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship.*". He adds: "*an in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client.*". To conclude he states that "*in these circumstances, an internal lawyer cannot face up to any conflicts of interests between his professional obligations and the objectives and wishes of his clients in as an effective way as an external lawyer can*". The reasoning in some points seems to consider the difference as a difference of level or nuance. But the effect is corrupt: since the working relationship "*does not allow independence comparable to that of an external lawyer to be ensured*", and "*internal lawyer is in an essentially different position to external lawyer*", confidentiality guarantees the possibility that the regulator or the jurisdictional body apprehend and use this internal communication.

In Portuguese law, the matter is expressly considered in art. 68 of the Statute of the Order of Lawyers, approved by Law 15/2005, of 26th of January: it corresponds to the Order of Lawyers to qualify the contract that allows the lawyer to practice as such in a position of legal subordination in his company, maintaining the requisite of independence, which is not a formal independence in the form of absence of connection, but a material independence with independent judgment. Even the nullity of the contractual clause which threatens this independence is anticipated. The last thing that is given up is the condition of practicing as a lawyer.

In Spanish law we do not have a similar regulation, although company lawyers cannot simply practice as such, but for typical duties of a lawyer and which fulfill the law in the activity, such as practicing in court, they must be belong to the Bar Association. And art. 542.3 of Organic Law on Legal Power establishes the duty to adhere to the confidentiality of information of all lawyers, internal or external, regarding all matters or news in their knowledge due to "*any of the forms of their professional action*".

From our point of view it is essential to preserve the condition of lawyer for company lawyers, maintaining the existence of a material or substantial independence in their judgment, as well as the confidential nature of their communication with the company for a lawyer undertaking internal consultation, in the same way that he is subject to other obligations in protection of the general interest and in favor of society and his service to justice, as are other lawyers.

3.- Market demands.

Where the key to change in the legal professions can be discussed, fundamentally in the practice of law: perhaps in the size of the organizations who render services of consultation, representation and defense, or perhaps in their functional correlation, in the specialization of the lawyers with a sufficiently sized firm, or in the specialization of the firm itself. But any of these assessments, which have something to do with the reality, do not exhaust it, leaving out a fundamental circumstance: the active behaviour of legal operators as agents in a market of professional services with a strong national component, due to the diversity of the national legal systems and – still – certain access and restriction barriers to free circulation of professionals, but increasingly more internationalized.

Firms have been growing to adapt to market demands, to compete in better conditions with other firms, and achieve the postulate of the provision of legal services from a single point, capable of providing the client with any answer to any imaginable demand, understanding the different legal specialisms. They come onto the market, display marketing and communication strategies unthought-of years ago, especially in countries like Spain and Portugal. This phenomenon has important consequences in the type of professional rendering of services and in their regulation or deregulation needs which may weaken traditional values – which are perhaps essential – of the profession.

With regards to the rendering of services, there is a certain risk of losing independence in one of its more important aspects: independence in the face of the client, since he is not seen as just subject to the law to be clarified or of the interest to defend, but as a firm's asset which must be, firstly, attracted, then maintained, and always satisfied. The problem lies in conflicting situations between the client's objective interest, as justiciable, and their own and unspecialized perception of their interest, which will define their behaviour to the provider of legal services. Article 2.3 of the Code of Ethics of Spanish legal practice obliges lawyers to maintain their independence in the face of all kinds of pressures, demands or satisfactions which limit it, even though they may come from the same client.

The problems gets worse if the singular or bilateral client-lawyer relationship is transcended and we attend to the client, in general, as a company asset, since then the

relationship of economic dependence is unquestionable. The surmounting of these potential conflicts requires a delicate balance between values which are not always in line and which are only at the reach of the best. This is what competition is like.

With regards to the needs of regulation or deregulation, these appear with regards to the professional activity considered from the point of view of the market and the competition. We live in an era which considers itself as deregulatory of professions; of removal of access barriers from the practice of activities called "professionals" and of the obstacles in the way of freedom of establishment and free rendering and circulation of services. All this is within the framework of the EC directive (EC 2006/123) regarding services in the internal market; a directive which excludes the principle of free rendering of services in "*the cases in which the member states, in accordance with community law, reserve an activity to a particular profession, for example the obligation to reserve the rendering of legal counsel to lawyers*" (Preamble, 88).

In this framework the existence of professional associations is questioned or, at least, compulsory affiliation where this exists, as in Spain, is required for professional practice and can lead to an access barrier or a barrier which prevents people entering a profession; or a practicing barrier, in the form of regulation of this practice with regards to prices, advertising, legal form of those rendering the services or conflicts of interest; regulation which is also questioned, in particular with regards to the professional associations themselves.

Lawyers cannot shy away from the debate and not study in depth the social and economic transformation in our profession and the environment in which it is being rendered. We should, in fact, take advantage of the debate and actively participate in it to highlight how our Bar Associations, although they naturally offer services to their members, and should render them in greater and better measure, do not justify themselves, in their obligatory nature, by these services, but by public service to society and the protection of the general interest inherent in effective legal protection and in the realization of the value of justice, which is the stage and tool of lawyers.

In this way, the regulation of access and practice of the profession which Bar Associations entail should pass the test of proportionality which permits verification of the extent to which professional regulations truly contribute to the general interest and can be objectively justified, as the European Court of Justice considered in 2004 in the ruling of the Cipolla case (C-94/04 and C-202-/04), regarding professional legal services: *"The protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding*

requirements relating to the public interest capable of justifying a restriction on freedom to provide services, on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective." Therefore, Bar Associations should attend to the purposes of general interest as a priority.

Therefore, in Spain, the management of free legal aid which, by legal imperative, corresponds to the Bar Association; or the voluntary extension of a similar function through guidance services or legal aid, whether or not this is through an agreement with public Administrations. In similar terms of protection of general interests, the ethical control of the profession can only be carried out independently through the Bar Associations. Or training to access the profession of practicing law, as outlined in Law 34/2006, on access to the professions of Lawyer and Solicitor, still without regulatory development, which is reserves the General Board of Lawyers a role in the verification of the Legal Practice Schools which can organize and teach courses which permit access to the profession, and in the assessment tests of professional aptitude; and, in particular, it attributes to the Association the function of holding conferences with universities to establish a placement scheme, the appointment of tutors, places or institutions where placements will be carried out and the mechanisms of control of their practice.

Something similar, although without this regulated nature, occurs with continuous training of lawyers as a guarantee of the quality of the professional service needed in an increasingly demanding society and where professional excellence is no longer an additional value which positively classifies the activity carried out by lawyers, but is a requirement of their practice. In the face of the multiplicity and heterogeneity of public and private centers for specialized training which exist for our professionals, the Bar Associations must perform an extremely important role of coordination, guarantee of quality and genuine practical guidance, of the training system, notwithstanding that they may also be the receiving parties in the training process.

They are not marginal justifications of public interest to the associations' activity to corporately defend the current state of our regulation, comprising the position of the Bar Associations. It would be sufficient to mention here the defense of the right to defend where one is committed, particularly in the action before the Courts of Justice where the decision, whether it is regarding the merits of the case or concerning the judicial process, asserts or denies the right of the party to court proceedings.

This is the essence of Bar Associations which justifies their existence and the first thing to be committed where the Associations are made to disappear or are weakened until their

legal or social relevance prevents them from fulfilling these functions, which require a Bar Association which is strong, with an institutional voice and weight to make itself heard in situations of conflict or crisis.

However, the tendency to deregulate and the increase in the effective competition in the professional service market cannot be obviated. These, today, and without damaging the validity of the general principles that we have outlined, mean not just the multiplication and diversification of legal professionals, but the appearance of professional activities, not linked either to gaining a degree in law or affiliation as a lawyer, which occupy spaces that, until recently, we understood were *de facto* or *de iure* reserved for jurists or lawyers. Therefore, for example: the growing importance of labour relation and social security law consultants in disputes and even in labour proceedings; the appearance of other professionals, such as psychologists and social work assistants, carrying out mediation and conciliation; or the opening, for constitutional reasons or protection of fundamental rights, of certain processes in these rights is at stake, such as those litigated before the European Court of Human Rights, to direct action, without legal management, of the concerned parties, or the representative action of those who, not being lawyers or perhaps jurists, are, however, experts and are technically competent in the defense of the interests compromised which, on many occasions, improve the services rendered by law professionals, or, at least, of some law professionals.

Nothing else can be expected in an open world which is in competition. As jurists we are expected to tackle and drive this debate to trace the limits from which general interest requires the qualification of legal professions, affiliated or not, and to what point they can and should operate principles more in keeping with free competition or freedom of establishment.

4.- The progress of uncertainty.

In this transformation process there is an objective factor which is of vital importance since it affects not only the model of “law”; but the function of the professionals and, above all, of lawyers: the progress of uncertainty.

The historical process of codification in the 19th century, under the common model of the Napoleonic code, had the intention of legal certainty through which the incomprehensible multiplicity of sources of law in what Calasso considers the long era of common law was to be ended. This would run from the Middle Ages to the very codification itself. It was a legal system produced by historical accumulation from Roman sources, in a stratified, asystematic and fragmentary succession of notes, commentaries, *consilia*, treaties and, sporadically and in much lesser quantitative terms, regulations dictated by what we could call the incipient public powers. This was sometimes a reflection of more or less local customs, approximate versions

of Roman sources sifted by the study of legal advisors, or pure organizational emanations of sources of public law. A law which is extensionally disperses and in its temporal nature: uncertain.

The Codes fulfilled a role of social pedagogy, to give the community a message of new order, emanating from the will of the people expressed through the Law as a single source of law, although in reality it continued to be Roman material passed through this historical jurisprudential development and later by the rational order of humanist and natural law thinking and the system of concepts of the German pandectists. The codes involved disperse and uncertain laws in a two-dimensional, flat space presided by the law of excluded middle, without contradiction and without loopholes: all law that was possible and a true law. Parallel to this, judges could not stop judging, claiming the silence of the darkness of the Law, expression of a consistent and complete law, as the practical totality of the first civil codes stated. Nor, under the principle of separation of powers, could the judges intervene in the process of creation of law, which would assimilate judicial power to legislative power, through an interpretation of the regulations which were beyond this logical, mechanical process, which saw a kind of legal syllogism in any act of regulatory application.

Until approximately half way through the 20th century, law had moved within the codification model; but progressively suffering the effects of a multiplication of sectorial regulations aimed at protecting general interests and providing specific answers to a social and economic reality which was becoming increasingly complex and technical. In this situation, which Irti called "*the age of decodifying*", the civil Codes lost their function as the center of the private law system (or of all law, as occurred with the Roman *vetus ius civilis*); a function which for the totality of the legal system as a whole has been undertaken by the Constitutions as sources of principles and values and references of legal certainty and security, principles which they proclaim and embody themselves.

However, this model also causes a crisis when the Constitution is not enough to face up to legal pluralism as sources of the law, both in the local and intrastate law, as well as in the supranational or EC law; and the overflowing of the concept of law itself, where the decisions of the regulators gain more importance based on undetermined general principles and legal concepts which possess a high technical, evaluative content which is outside the law.

The legal regulations are no longer expressed in the abstract terms of the civil Code, where the owner opposes the holder of a limited real right; and the creditor opposes the debtor, or the guarantor the guaranteed debtor, and the lessor the lessee, in simple and basic distinctions which seem that they cannot fail to be as they are. Ihering talked along these lines of the chemistry of the law to refer to the law of obligations and its necessary character, where the

jurists were searching for those simple elements whose combination he explained, such as in the *ars combinatoria* of Raimundo Llulio or Leibniz, the totality of legal institutions and relationships. Under the diversity of these there was something like a universal alphabet with which one could speak the language of law, and whose regulations the jurist had to discover. Laws – those of the regulations – regulated by laws – those of this language – specific. A space of certainty.

When in 1974 our civil Code prohibited the abuse of the law and its antisocial practice, and required the subjective rights –that old name for freedom- had to be exercised in accordance with good will to recognize the effectiveness of the act of this practice, a part of the legal community feared what judges would do with such general and undetermined regulations, that demanded such high doses of adjudication of the judges. In time, jurisprudence came to "complement" the legal system, as if the courts assimilated to the legislators and could break the old axiom of the separation of powers. It was the risk of insecurity, which, of course, was not followed by the prudent exercise of jurisdictional function. Those principles put in place the judicial resolutions, making them more open to the evaluative purposes and components, but they did not often establish a decision on their own and when they did, it was justified. The model of law and its aspiration to certainty did not change.

Now it is doing so. The problem is not conceptual, but practical. If today a large company, from anywhere in the world, wishes to carry out an operation of economic concentration, acquiring another which operates, even partially, in the same sector and contributes in a secondary official market, and must state a public offer of acquisition of stock, it is hard to know *a priori* whether or not the operation will be carried out; if the legal system and the group of institutions which govern it are able to give it an affirmative or negative answer in the form of authorization or refusal, with conditions which are not completely legally predetermined, and a temporary extraordinarily variable and uncertain, but long, horizon.

With regards to logical rigor, even more geometrical, of the precepts of the civil Code for obligations and contracts (the chemistry of law as Ihering discussed), art. 16 of the Law on Defense of Competition says that, following the processing of the record, the Court of Defense of Competition, will appreciate "*whether a project or operation of concentration can hamper the maintenance of effective competition in the market*", based on the analysis of its "*restrictive, foreseeable or contrasted effects*". The level of generality, indetermination and openness towards the economic and technical reality of the concepts of the regulation is maximal. Although a body of doctrine by the regulators involved is formed, the answer will, with difficulty, be foreseeable. Add to this that the action of the regulators is, ordinarily, revisable in the contentious-administrative jurisdictional headquarters; which together with the national regulators are the EC regulators; and that in all these processes, as has in fact

happened, the action of the Courts can be raised without waiting for the action of the regulators, invoking the same regulations which they have to apply before the jurisdiction.

Processes and operations of great relevance for the economy and markets become unforeseeable, being extremely difficult to rationalize *ab initio*, for the operators involved, including legal advisors, what will be the response from the legal system and, within it, the multiple applications which, in one way or another, must intervene in – or be declared – the operation to approve it, reject it, suspend it or condition it and when.

It is an absolutely general and global process which affects all systems, and which grants a greater importance to the jurisdictional function, guarantor of any dispute and always limiting the action of the public powers. This process leads, probably, to a change in legal paradigm as important as that which lead to the codifying process in its day: this law which, unorganized and multiple in the Middle Ages and in the long lasting age (was it really?) of common law, had been simplified, ordered and compiled in the Codifications, and is now overflowing and multiplying, as if it were running the opposite way. It also loses evaluative neutrality and the abstraction and logic are contaminated with technical elements which permit extraordinary discretion. It is becoming uncertain once more.

This uncertainty affects the function of the lawyer who is – or was – a certain factor, based on the aspiration of certainty of the law itself, and which now faces open regulations, undetermined legal concepts and the crucial uncertainty of the result. Its function is purely of a medium, activity, whilst certainty is a purpose, linked to the predictability, whether this is the result of a duly designed and executed operation, or of his *sub specie iuris* labour of clarification and establishment. Lawyers just render another service, like the economic, competence, or strategic consultation by the financial director or the managers of these departments in a company. Lawyers, or the legal consultation they render, tends to thus become a commodity: a more or less fungible and substitutable asset, whose rendering is measured per hours, not by quality, and is compared by prices.

Faced with the current conflicts, the problem is the vehicle or channel: our courts are not set up to deal with disputes with the level of complexity and the technical dimension of those generated today by social interrelation. When this class of problems are taken to law huge dysfunctions arise and, sometimes, disconcerting rulings. The swiftness of economic traffic does not admit the taking to court of disputes either. In fact, the disputes we are discussing are caused and resolved – when they are resolved – before the regulator. There the lawyer is a different style of interlocutor: he should inspire confidence, be communicating very closely with the company and assess the operation; offer alternatives which arise from

dialogue, quickly respond to the objection or suggestion. Naturally, this state of things is not true of all lawyers; but it generates a new function for the legal profession.

5.- The influence of new economic factors of change in advocacy.

If we project these ideas on what appears to be the situation in the coming years, the result could be the following:

a) The increase of non-contentious advocacy and risk prevention.

This is the continuation of the process in which we already live: in front of the "*solicitor with robe*", it will increase even more, in relation to the number of possible functions within the legal professions, non-contentious advocacy, employed to exercise before the courts, jurisdictional, as usual, or arbitral. Consequently, the legal profession is enhanced in the promotional role of law order of social life and the legal profession is integrated in its own economic activity, participating to a greater extent in making business decisions. Legal advice is provided within or outside the company, ceases to be something external, or additional, to the decision: it is part of the decision itself, it´s creation.

And as a consequence it is also necessary to strengthen the expertise of legal counseling, not by jurisdiction, nor by disciplines or materials, but by business sector: the law of energy, the environment, the stock market, insurance, financial sector, food or distribution, transport, segmenting economic activities, both horizontally and vertically.

This advisory advocacy is geared not only to the prevention of conflict, but to risk prevention, which is in itself an economic impairment of value. Risk is, in this sense, any situation, or any qualification of a situation, capable of generating a contingency, a liability, responsibility, or a loss of value. Both the operational or business risk, such as the regulatory or compliance risk, whether the source is heteronymous or autonomous, when it is the company itself, the person himself, who self imposes control mechanisms whose non-compliance must be considered and therefore must verify and reveal.

The *Serbanes Oxley Act* of 2002, contained a specific section, 7245, developed with great prolixity, to establish rules of professional responsibility for lawyers that later developed

with great prolixity, to establish rules of professional responsibility for lawyers who act on behalf or defense of issuers, for lawyers that, in any manner, act in representation or defense of issuers, including in-house lawyers, so that they had an obligation to report any evidence of breach of a rule or a fiduciary duty within the company, or by an agent acting on behalf or in the interest of the company, the responsible of legal advice or the Chief Executive Officer of the entity, and if they do not respond properly, to the Audit Committee of the Board of Directors, who extends its functions far beyond the original scope of the auditing of accounts, to understand all the operational risk or business of a company, and where also internal and external lawyers have to intervene increasingly more in expensive processes of compliance and self-evaluation to exclude potential risks.

b) The importance of conciliation, mediation and arbitration.

Between the preventive lawyer and the lawyer of the conflict, the lawyer of conciliation and mediation will become increasingly more important; in all sectors of the activity, not only in economic or commercial, but also in personal and family. The lawyer possesses through his professional activity and experience, the educational jargon of today regarding skills, abilities and competences suitable for mediation, for submission to dialectical contradiction of the interests of a party seeking a compromise.

The generalization of such activity extends, even to the fields of public law and legislative: lawyers as “mediators”, perhaps in the broader sense, among individuals, individual or collective enterprises, consumer and citizen associations, grouped sectorilly or by any centers of interest, of one side, and the public powers, as tutors of public interest, on the other, being in the executive power or in the legislative. That “mediation” expresses the contact negotiated between social agents and organizations and public powers, being generalized in the preparatory phase of the legislative or regulatory processes, in the form of representation of collective interests for the transfer of positions and demands, the negotiation or the mere advice.

Neither is there doubt about the growing importance of commercial arbitration, as much locally as internationally, imperative for reasons of negotiating neutrality, in order to avoid the dependency of the jurisdiction of one of the contracting parties. However, the perspective of the future is not solely of the lineal growth of the arbitrations through the

extension in time and in the space of arbitration that, as the institution that we nowadays know.

The reasons that, as we will mention, drive the most complex judicial processes , there isn't a motive for them to not operate in a manner similar to that one in the arbitration world. They do them, weakening the claim of speed and efficiency that is inherent: the pressure for "winning" the arbitration, or hinder and delay the loss, exerted by well-advised clients, aware of their rights and of the responsibilities of the lawyer, or of the team of lawyers, they lead to import from the jurisdiction to the technical arbitration of exception and procedural incidence, when not interfering arbitration with jurisdiction.

Arbitrations tend to be substantiated in much longer periods and stopped at the beginning too many times by exceptions and incidents. And in the arbitration, still in greater measure that in the jurisdiction by influence of the practice of lawyers (and referees) originating from the systems of *common law,* the process is focused on the revelation of information and documents given place to that greater intervention of arbitral tribunal in the practice of the tests, regularly before the final *hearings*, which forces the referees to reach an agreement, with or without the parties, consuming additional time. The speed and effectiveness of arbitration appear to be in doubt.

c) The transformation of the judicial process.

The growing complexity of the economic life will probably lead to the increase of the judicial processes. In the recent years, such and like Spain demonstrate the statistics of the General Council of Judicial Power and the certain numbers of which we dispose of in the Law School of Madrid, deducted from the management of the free legal aid to citizens without resources that the school organizes, the number of processes have grown in an extremely difficult to assume sequence and process by lawyers and courts, without exceptional measures of physical improvements, organizational and , above all, of management, that are not being adopted.

But along with this increase of the number of the procedures, concurs another factor that worsens it: the growing complexity of the process, that will surely do of it something different since the birth of our procedural laws.

It is not a stranger to this phenomenon, the pressure of the clients over the lawyers, that know that they are “monitored” by companies or probably well-advised individuals at the margin of the intervening lawyer in the process, or by internal lawyers, if it is about a company, or by the possible consulting of other lawyers, something normal in a market that is every time more open and dynamic. As well as the pressure of the professional responsibility, every time more imposed and otorgated by our judges and courts. It is enough to enter in a database the data of jurisprudence the voice " professional civil responsibility" to prove that, in the recent years, most of the queries that appear under that search criteria address the liability of legal professionals that work in the process: lawyers and attorneys (with the clear “advantage” for the first ones).

As a reaction, the lawyer finds himself obligated to develop all the possible imagination and to promote all the resources and imaginable incidents, rushing to the limit – and most times beyond the limit – the formal possibilities of the defense:

- The proliferation and focus of previous procedural issues, which hinder the activities and expand dramatically the duration of the process: issues of jurisdiction, jurisdictional issues, forum, several parties, and plurality of processes that generate accumulations and lis pendens, or that can produce a judged issue, among others.

- The guardianship of collective or diffuse interests, referred to in our procedural laws, creating a breeding ground for the *class actions ,* where the uniqueness of the case can reflect the entire social problem, including the possibility of punitive damages similar to those of other systems.

- The focus of the process in the disclosure of information and documents, giving a greater intervention of the jurisdictional organism in the practice of the tests, and to a greater involvement from the lawyer for his contribution and practice. Faced with the idea that any procedural posture is legitimate, if it serves the interest of the client, we are faced with the increase of the obligations of the procedural good faith and to the cooperation to the truthful and fair result of the process.

- The search of a balance of quality between the courageous actions of the lawyers and the answer of the court. It will not be possible to maintain the extraordinary current asymmetry. The quality and complexity of forensic writings produced by the firm has

grown enormously in recent years. The quality of professional service and is no longer a plus to be added to certain actions, but a prerequisite of order and provision. The organization and specialization of professional offices also go in the same direction. However, the judicial decisions are dictated almost by the same means, in addition to computers for word processing and access to databases; with similar means but with a lot more pressure, by the number and complexity of the issues weighing over the court. The combined effect of all these factors: a large, probably intolerable, imbalance between in which what puts the professional and the party that supports him, and the product that is obtained in the form of a sentence. An asymmetry that is also starting to see itself in the world of arbitration, subject to a kind of mimicry or judicial contamination.

e) The dependency of the economic transformations.

The above transformation vectors have an unquestionable economic substrate:

The demands of the economy are the ones that force to eliminate the risk of contingencies that may represent a business or professional cost; and the lawyer's role is fundamental to this is when the risk, or guidance for avoidance , they are socialized and institutionalize forcing to comply with an increasingly complex regulation, whether self-imposed by a code of conduct or hetero-imposed by a rule.

The enthronement of autonomous means of conflict resolution, like the conciliation, the mediation and the arbitration, are largely the effect of the increased emphasis on civil society, that seek forms of a lot faster autolayout, economic and controlable for the parts that some courts of justice of saturated work and uncertain of result. And they are not only a means of conflict resolution: a new law will arise from its action and of its resolution criteria, as a sort of ius pretorium of modernity.

Court proceedings are folded in turn in relation to economic change, even if it only was, in first place, to shelter delinquent defaulters that find in the slowness and inefficiency of the process, the appropriate way to take responsibility over time. But, ironies to the margin, there is no doubt that the judicial process also becomes a sophisticated tool of economic and competitive strategies, in which very capable operators undergo the tensions for which historically was not prepared, by the complexity and economic transcendence of the issues

established. Never before have we seen big corporate deals with some of their aspects in the Courts; judges and magistrates never have had such a media presence by the transcendence for public opinion and for the social and economic life of their decisions.

We have also referred to in the preceding pages to the importance of the regulation organisms and supervisors in areas of law such as the competition right, the market of values, the financial sector, the energy or the telecommunications, for putting extremely obvious examples, they develop a network of norms, criteria of acting and decisions of extraordinary importance for the economic life that determine a greater protagonism of the lawyers, obliged to have a presence and a constant interlocution with such controllers that don't make a lot more predictable their response if it generates a new form of professional activity, which consumes a large amount of resources.

It is unknown in which way the economic crisis in which we are installed, like Spain and Portugal we know very well, can condition and re-orient this process of change. It is, for example, evident that the businesses control more the resources dedicated to the external juridical counseling, they internalize more these type of functions and, when they externalize them " they measure" a lot more than ahead of the costs. But it is not clear at all that it is the sign of an involution.

The social answers, like the physical systems by the second law of the thermodynamic, tend to the complexity. If we draw an arrow in an arbitrary direction of time and see that it progresses through a series of increasingly random events, its direction will be that one of the future, as Eddington said in 1929 (*The nature of physical world*). And probably , that is what is going to happen to the juridical professions, obliged to give solutions every time more precise and more (economically) efficient in times of crisis.

6.- Social values of law.

In intimate connection with what I have just affirmed, gaining generality and perhaps losing some intensity, the juridical professions have to respond to the globalization of law, of the social and economic relations, and of the organization of the juridical operators.

Once explained, as a professor of civil law, the construction contracts and leasing services, have always made me dislike the simplistic image of the simplistic and commoditized image of

the lawyer defined by the bilateral and contractual relationship with his customer, as if his function is exhausted after the fulfillment of that professional task that he received from the client, and by his account, he is a defender of this charge.

The Code of Ethics of Lawyers in the European Union in Article 1.1 contains a definition of the role of the lawyer in society, in its Article 1.1, is remarkably accurate:
" *It is a society based on the respect of the State of Law, the Lawyer plays an essential role. His obligations are not limited to the trustworthy fulfillment of the entrusted, in the scope of the applicable legislation. A Lawyer should serve the interests of the Justice, as well as the rights and liberties that have being entrusted to him to defend them and make them valuable".*

In Portugal, the Statute of the Order of Lawyers even has a separate article, 85, to account for the lawyer's duties to the community: the lawyer is obliged to defend the rights, liberties and guarantees and to follow the correct application of the laws, the fast administration of justice and the improvement of culture and the juridical institutions. Later on, it appears a clear relationship of more specific duties. Between them, not advocating against law , or use illegal means or records, not to promote manifestly dilatory proceedings, useless or prejudicial for the correct application of the Law or the discovery of truth
In Spain, our General Statute of Lawyers defines, more sparingly, the lawyers like *"a free and independent profession that provides a service for the public in interest public and that exerts in regime of free and fair competency".* Even when the Royal Order of Carlos IV of 1794 reached an agreement to reduce the number of lawyers of Madrid, it was said that two hundred *"would be enough for the public service".* The vocation of public service is a constant and is an essential part of advocacy.

In Title XXII of the Book V of the Novísima Recopilación de las Leyes de España (1804) were collected already numerous rules that reflected the orientation of the advocacy to general interest:

- Law III is about the oath that the Lawyers should make in the time of receiving, and it is affirmed *"that they will not help in desperate causes, and which they know and understand that their parties have no justice".*

- In Law IV mentions " *that the Lawyers, examined Lawyers,…will not claim or say anything that is not true".*

- In Law VIII, picking a pragmatic from the Catholic Kings of 1495, it was prescribed *"that the Lawyers…will not allege malicious things, or will ask for terms to prove what they know or believe that they are not going to take advantage of, or that cannot be proved".*

There are many aspects, of this profession oriented to public interest, inclusive superimposing itself to the private interest of the client if this one is, in patent form, a spurious interest. The General Statute of Spanish Lawyers imposes as fundamental duty of the Lawyer, as long as it participates in the public function of the Administration of Justice, of cooperating with it in the manner that in no case the guardianship of the interests that are entrusted to them *"justify the deviation of the supreme goal of justice to which the lawyers has been vinculated";* and justice is not a name, a *flatus vocis*, but a superior value of our juridical order under the article 1 of the Constitution. In analogous form, the article 2.3 of our Code of Ethics obliges the lawyer to preserve his independence ahead of all classes of pressure, demands or compliances that limit it, even if they come from the client himself.

The Lawyers, that are in permanent contact with the superior value of justice and the fundamental rights of the parties, have obligations ahead of the society in all the profesional intervention. But also have them beyond that professional intervention.

The social function and, as a coincidence, the social responsibility are inherent to advocacy.

The social corporation responsibility has been converted for the businesses in a demand of the market – of the society, while that – it obliges it to go beyond the legally established obligations to attend its employees, consumers, partners and suppliers, and improve the situation of the communities where it is projected its action. They should do it with transparency, of a regular form that tends to be homogenized to facilitate the evaluation and the comparison; inclusive ahead of the basic mandate for the mercantile companies to maximize the benefit of its shareholders. The contradiction can be saved saying that the corporation social responsibility is necessary in order to attract investors and make loyal clients and employees; by the demand is before the capacity of taking advantage of its

competitive advantages. What is at stake is an integrator and axiological concept of "value creation" or "wealth" versus "profit" in the short term in the pure commercial sense.

But, if that occurs in the dominion of the commercial companies, oriented towards economic benefit, that should not occur with the professionals of law, and especially with the lawyers, that we operate with the value of justice as a tool of work and plans and solve complexes with the council, the mediation or the defense, accustomed to self-impose this social function that transcends the relationship with the client under the perspective of a paid commission and we put together optimal conditions to lead the search for social peace.

The profession of the lawyer is suffering everywhere , a deep transformation, and, without doubt, one of the most characteristic vectors of that transformation of its globalization: in the clients, in the issues, in all the Courts. And, as a consequence, in their own structure of the offices of lawyers. But that is only a fact. We lawyers can be a reference in a world without borders. Said in another manner: we want to contribute activitely , to make a world without borders: or, being more precise, a world where borders will not be a factor of being excluded, but of being included, to indicate till where it reaches, with all its efficacy and from our complete responsibility, the positive actions driven to guardianship and conform the general interest. In this manner, the values of justice and of solidarity will not depend in such a large measure from the principle of territoriality, insufficient to explain the complexity of the relations that give themselves today a multidimensional space where they surge in a network, in front of the States and its replicas, multiple centers of interconnected power, in a civil society that no longer needs official impulse or of large measures to raise your voice and articulate a plural discourse, consistent and transformation as it could be – it should be- of the advocacy and the juridical professions supported in its organizations, institutional or of free association and voluntary.

In this global society in which we live, precisely because the globalization has supervened in spontaneous and precipitated form, global institutions are missing that order the consequences of globalization. Institutions that will allow: the management of immigration, the management of the inequalities and the injustices; the management of the generalized economic crisis or the management of the international conflicts. It is evident that the juridical professions in general, and the lawyers gathered here, especially, particularly, we cannot remedy all of this; but a few sectors of the civil society can help to overcome this shortage.

Talking today about globalization of the juridical profession, thinking in a projection of future, is staying very short. The globalization in law will appear, precisely, like the one put in the network of actors and juridical operators, implicated in the decisions that conform the economic life and of relationship. And this answer to the demands of a global society cannot remain in a mere technical adequateness, structural and organizational to the ingredient of the globalization in the juridical traffic and to the speed and or multiplication of the communities and information. There should be, from the commitment and responsibility, an axiological answer, that will incorporates the alues of justice and solidarity that demands the actual society and that, from always, have been in the base than to do with lawyers.

After the above mentioned it should be asked if there is any room for the legal professional attached to tradition, for the personal lawyers, alone with himself and with the client alone, or in front of a paper or a blank screen. As Professor of Civil Law, I have always tried to escape from the definitions. However, by this time, the classic definition sheds some light on what is defined: civil law is the right of the person of a more general character, in which he contemplates it in himself, in the family medium and in his basic life of interrelation. Is there a need for so many intermediaries ("juridical operators") and so many apparent complexities that give an advice as a jurist or to bring a lawsuit, as lawyer, to otorgate a testament, or to get rid of the conflict for not otorgating them; to draft a housing lease, or to defend an immigrant on the verge of being expelled?

The law, together with tasks of enormous capacity of transformation, linked in general to the economic and technological activity, conserves entire zones without changes, almost the same to those of 2500 years. Still, we can read in a Civil Code the right to follow for two consecutive days a swarm of bees, or how they can open holes in the dividing wall of 30 centimeters, tucked with iron wire. I still think that if a Roman citizen today lifted his head, law would be one of the few topics of conversation.

The juridical professions have, like the law itself, values that tend to be maintained in time and from its deeply personal, individual character, they possess an extraordinary social transcendence. This is what occurs to a lawyer with the values of independence, freedom and the defense of the human rights, that the Spanish lawyers oblige ourselves to defend to incorporate ourselves to the profession and commit ourselves formally and solely with the principles and constitutional values.

But, under them, in our daily whereabouts, there will always exist the solidarity of lawyer before the sheet of paper, the last day of a notice, or at half a meter of the crystal in the misleading privacy of the auditorium in a prison. It is from these values as it must be approximated, while that the socially implicated jurist, to the preventive problem, palliative, decision-making or of the advice or design of a future activity, that will compromise our professional intervention, being whatever it is the form of organization of juridical service. The form, the conditions of contour, the methods, are the diverse; the affected by the modernization and change; not in the essence of advocacy. With the perspective that gives the long history of law, it is not difficult to look at the future and orient in the changes, that we ourselves have promoted in the constant search of social peace, the solidarity and justice.

Surely we all agree with the basic diagnostic. To our global society are missing global institutions to manage and resolve the problems of globalization: the international conflicts, the world economic crisis, inequality. The lawyers, the judges, the professors of law, the jurists, at the end of the day, we cannot be mere spectators; not even mere defenders. We have the obligation of exploring the road and propose the legislative and institutional reforms that are necessary, as much national as international. We have, beyond a commitment with the victims, that professional contact with a part of the human reality that lives in the conflict or in the social disadvantage, surely, more than the rest, and it allows us to use a more precise language, better prepared to give account to the diversity and of the intolerance of certain diversities from the perspective of human rights.

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