Global Business & Development Law Journal

Volume 16 | Issue 2 Article 5

1-1-2002

Book Review Man in His Original Dignity: Legal Ethics in France

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Man in His Original Dignity: Legal Ethics in France†

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Not that long ago, there would have been scarce interest in, and little perceived need for, a book in English about French legal ethics. In the years after World War II, a few dozen American law firms established foreign branches and there were some lawyers within the United States that practiced or even specialized in international law or handled international transactions,[1] but issues relating to trans-border legal practice or to the regulation of the Bar in other countries were far from the minds of the overwhelming proportion of lawyers within the United States.[2] The realities of modern economic life have, however, induced many businesses and professions to devote substantial attention to identifying and carrying out potentially desirable cross-border transactions, and as a result, the demand for the legal expertise needed to serve such clients has multiplied many times over. Somewhat more surprisingly, in recent years the essential character of the legal profession itself has changed. A profession that has traditionally been viewed as intimately intertwined with the governmental structure, culture, and language of a particular nation is now increasingly seen as an industry providing legal services, within which free-market competition for clients and ease of relocation by professionals (even across national borders) should be permitted.

In the modern and rapidly changing world of trans-national commerce and trans-border lawyering, Professor John Leubsdorf's concise, elegant book on the history, structure, and ethics of the French legal professions offers deep insights into what it means to be a lawyer.[3] His study of French lawyers will be of great utility to anyone attempting to determine when a national[4] Bar should fight to

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† By JOHN LEUBSDORF, Ashgate, 2001.

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1. *See* Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967). Many of the earliest foreign outposts established by U.S. firms were located in Paris. *Id.* at 1284 n.5.

2. Indeed, a recent comprehensive review concludes that even within the United States "most clients" legal matters were confined to a single state. 2002 A.B.A. COMM. MULTIJURISDICTIONAL PRAC., REP. 3.

3. *See* JOHN LEUBSDORF, MAN IN HIS ORIGINAL DIGNITY—LEGAL ETHICS IN FRANCE (2001). A full survey of French lawyers would go far beyond even the professions discussed in this review and would touch upon judges (who in France follow a separate career path from the *avocats* discussed later), *agreés, agents d'affaires,* and *huissiers. Id.* at 79, 101-06.

4. It is convenient here to treat the "French" Bar as a single entity, even though in fact there are 180 separate local organizations of *avocats. Id.* at xi. Professor Leubdorf's investigations focused on the history and traditions of the Paris Bar, and he was even permitted to attend a meeting of its committee responsible for responding to inquiries from *avocats* raising questions of professional ethics. *Id.* at vii, 2. Much less is known about the early histories of the Bars outside Paris. *Id.* at 64-65. Despite the variations that occur from Bar to Bar

preserve its own distinctive organization and ethical precepts against the encroachment of multi-national or supra-national institutions. Likewise, the balanced approach that he takes and the careful analyses that he advances will allow such Bars and other participants in the decision making process to identify those elements of their traditional rules and structures that may be harmonized across borders without substantial loss, or with only such potential loss of professional identity as are justified in light of the gains likely to be achieved.

French lawyers were traditionally divided into a number of distinct professions, and Professor Leubsdorf devotes substantial care to identifying them and tracing the paths by which they have been reshaped in recent years (mostly through merger with one another).[5] French *notaires* have long held a monopoly on a number of functions relating to the drafting and recording of contracts and other documents.[6] The *conseils juridiques* were legal advisers who assisted clients with matters not calling for court appearances.[7] *Avoués* conducted the preliminary stages in civil cases, including many of the dealings with clients. Recently, the latter two merged with the *avocats* (except for work done by the *avoués* in the Courts of Appeal, where they remain a distinct profession).[8] Professor Leubsdorf focuses on the role of the *avocat*, who was almost exclusively devoted to providing in-court advocacy. Professor Leubsdorf notes: "On the whole, *avocats* limited themselves to litigation even more than English barristers, who have traditionally provided legal opinions out of court and now may be employees of businesses and the government."[9]

The centerpiece of the vivid portrait that Professor Leubsdorf develops of the professional outlook of the French *avocat* is "independence" viewed from a variety of perspectives. It is independence "from the state (including the courts), from clients, and from other *avocats*" that so frees an *avocat* in his or her professional role that the lawyer may properly be considered the "man in his original dignity" referred to in the title of the book.[10] While this comprehensive and ambitious professional aspiration does explain some of the rules under which French *avocats* practice law (such as the requirement that they practice as individuals rather than in firms or as employees), Professor Leubsdorf observes that the differences in ideology between French *avocats* on the one hand and Anglo-American lawyers on the other "are far greater than the differences

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in France, there is a distinctively "French" self-identity for the Bar and a cohesive system of professional regulation that implements it. Similarly, in the United States, lawyers are admitted to practice law by individual states, yet the professional roles assumed by lawyers and the bounds of acceptable conduct are generally quite similar from jurisdiction to jurisdiction. Legislation passed in 1990 created the *Conseil National des Barreaux*, the first French organization in the national level overseeing the admission of *avocats* to practice.

5. *Id.* at 77-78.
6. *Id.* at 96-100.
7. *Id.* at 78.
8. *Id.* at 89.
9. *Id.* at 78.
10. *Id.* at 1.

between the rules that the ideologies are used to justify."[11] A few examples drawn from the rich array assembled by Professor Leubsdorf may suffice to give the flavor of the distinctive ideology he attributes to the *avocat*. Perhaps most striking from an American perspective is the independence of *avocats* from their clients. American lawyers are expected to exercise independent professional judgment in representing their clients, but numerous rules emphasize the need for the client to be provided adequate information and to make the most critical decisions.[12]

> As envisaged in France, however, independence from clients goes well beyond anything proposed in the United States or England, and reflects a radically different lawyer ideal. A French client is not entitled to know much of what passes between his *avocat* and opposing counsel. He cannot waive the attorney-client privilege attaching to his own communications to his *avocat*. A French corporation cannot put an *avocat* on its payroll. *Avocats* continue to refer to clients and other non-lawyers as *les profanes*, the uninitiated.[13]

Unlike the usual situation in the United States, where prosecutors may serve as defense attorneys before or after government service, or in England, where barristers often both prosecute and defend, Professor Leubsdorf notes that French *avocats* are always on the defense side in criminal cases.[14] Prosecutors are not members of the Bar, but rather magistrates who have their own training program distinct from *avocats* and an entirely separate career path. Nor are French judges generally drawn from among the corps of experienced *avocats*, since most of them are specifically trained as judges and their experience is limited to that sphere.[15] Professor Leubsdorf describes the relatively limited procedural opportunities available to criminal defense lawyers in France and ties the *avocats*' determination to preserve their independence from the state to their sense "that the system is stacked against them."[16]

While the French Bar strives to maintain the multi-faceted independence that has at most times been a distinguishing feature,[17] the recent period has been one

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11. *Id.* at 51. The name given to a French Bar's ethics committee, *commission de dontologie* (Doentology Committee), is likely to strike an American lawyer as redolent of the philosophical contemplation of professional duty, while the more prosaically-titled Committee on Professional Responsibility advising American lawyers can be expected to limit itself primarily to the application of specific rules.

12. *See, e.g.*, MODEL RULES OF PROF. CONDUCT 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication).

13. LEUBSDORF, *supra* note 3, at 13.

14. *Id.* at 84.

15. *Id.*

16. *Id.* at 83.

17. A grievous lapse from this ideal occurred during World War II when "[m]ost of the bar practiced business as usual, which included handling the many cases that arose under Vichy's anti-Semitic legislation. . . . Much of the bar was glad to exclude Jews." *Id.* at 74-75.

of significant changes and the pressure for even more sweeping revisions is strong. As a response to the competitive pressures facing *avocat*s, legislation has been adopted allowing them to depart from the traditional insistence on solo practice limited entirely to litigation advocacy. Now *avocat*s may form the larger firms that are better-suited to attract corporate clients, open branch offices, and provide services to their business clients going beyond litigation.[18] It is no longer possible for the French Bar to maintain in all respects the unique perspective and self-identity that it has developed in the centuries-long evolution described by Professor Leubsdorf. Since 1998, lawyers from any of fourteen other European nations are effectively free to move to France and practice their profession. This may be done immediately, even as to advising on French law, so long as the lawyer uses her Home-Country professional title.[19] After "effectively and regularly" practicing French law in France for three years under her Home-Country title, the attorney would be eligible to become an *avocat* without the need to obtain legal training in France or pass any examination.[20] The creation of an "internal market" for legal services within the European Union has stimulated efforts to develop a common Code of Conduct, and such rules are already in place with regard to cross-border practice.[21] Now that the International Criminal Court has begun operating at The Hague, there has also been recognition of a need to determine the qualifications for practice before that court and to set standards of professional conduct that will apply to lawyers from diverse Bars.[22]

Just as French lawyers have been reassessing their forms of professional organization and notions of appropriate conduct in light of changing circumstances and rapidly increasing cross-border practice, the legal profession in the United States is likely to find it necessary to devote much greater attention to the questions generated by the rapid internationalization of the market for legal services. Foreign lawyers seeking to practice within the United States have long been frustrated by the absence of any alternative to seeking admission to the Bar of each state in which work would be done, and of course those same frustrations (perhaps even at a higher level of intensity) are experienced by lawyers within

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18. *Id.* at 19.

19. Council Directive No. 9 8/5/EC, art. 5. *See* Jonathan Goldsmith, *Easier Access to Professional Titles: A European Perspective*, 67 B. EXAMINER II (1988); *see also* Katarzyna Gromek-Broc, *New Opportunities for EC Lawyers*, 25 INT'L LEGAL PRAC. 116 (2000).

20. Council Directive No. 98/5/EC, art. 10.

21. Conseil des Barreaux de l'Union Europeénne ("CCBE"), *Code of Conduct for Lawyers in the European Union* (1988; last amended Dec. 6, 2002), *available at* http://www.ccbe.org (last visited Apr. 3, 2003) (copy on file with *The Transnational Lawyer*).

22. For example, in February 2003 the International Bar Association submitted a proposed Code of Professional Conduct for Counsel Before the International Criminal Court. Article 21 states that "[i]f there is any inconsistency between this Code and any other code of ethics or professional responsibility which Counsel is bound to honour, the terms of this Code shall prevail in respect of Counsel's conduct before the Court." *See Code of Professional Conduct for Counsel Before the International Court*, INT'L B. ASS'N, *available at* http://www.iccnow.org/documents/otherissues/IBAFinalCode20Feb03.pdf (last visited Apr. 3, 2003) (copy on file with *The Transnational Lawyer*).

the United States who wish to handle matters that cross state boundaries. After exhaustive study, the ABA's Commission on Multijurisdictional Practice proposed a number of reforms designed to ease both the multi-state practice of law and practice that spans international borders, and all of those proposals were approved by the House of Delegates in August 2002. Amended ABA Model Rule 5.5 greatly facilitates multi-jurisdictional practice within the United States, and a new model rule on motion admission was also approved. In an entirely new development that responds to the increasing interest of foreign lawyers in representing clients engaged in transactions involving entities within the United States, the House of Delegates approved a Model Rule for Temporary Practice by Foreign Lawyers. While not as expansive as the protection that revised Model Rule 5.5 gives U.S. lawyers against accusations of unauthorized practice of law when engaged in multi-state transactions, the model rule applicable to foreign attorneys allows many activities that would be subject to challenge under existing law.[23]

The need to reach an international consensus on "what it means to be a lawyer" and what standards of conduct should be enforced in legal practice will become even more pressing in the future as American lawyers continue their efforts to "export" legal services and foreign lawyers step up their efforts to get the United States to accept similar "imports."[24] The General Agreement on Trade in Services (GATS) has the potential to dramatically affect the market for legal services, and the Doha Round of negotiations under that agreement is likely to lead to easier access for those seeking to provide legal services across borders.[25]

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23. For example, the model rule in most situations allows foreign lawyers to perform legal work (1) undertaken in association with a locally-admitted attorney; (2) reasonably related to a pending or potential proceeding before a tribunal outside the United States; (3) in an arbitration or alternative dispute resolution proceeding reasonably related to a lawyer's practice in a jurisdiction in which admitted; (4) for a client from a jurisdiction where a lawyer is admitted or concerning a matter that has a substantial connection to such a jurisdiction; *or* (5) governed primarily by international law or the law of a non-U.S. jurisdiction. Taken together, these exceptions cover a substantial proportion of the legal services which foreign attorneys would be interested in performing. *See* A.B.A., Comm. on Multijurisdictional Practice, Report to the House of Delegates, *available at* http://www.abanet.org/cpr/mjp/201j.doc (last visited Apr. 3, 2003) (copy on file with *The Transnational Lawyer*). None of the proposals approved by the ABA House of Delegates will be effective until adopted by the states and other admitting jurisdiction within the United States.

24. A number of foreign lawyers have already found ways to provide legal services in the United States. A foreign lawyer may qualify as a "foreign legal consultant" ("FLC") to advise on the law of her Home Country. In addition, those trained in foreign law schools are permitted to take the Bar examination in a number of states, although sometimes only after some study in a U.S. law school. *See generally* Pamela S. Hollenhorst, *Options for Foreign-Trained Attorneys: FLC Licensing or Bar Admission*, 68 B. EXAMINER 7 (1999). New York has attracted far more FLCs than any other jurisdiction. *See* Sidney Gribetz, *Legal Consultants in New York*, 67 B. EXAMINER 7 (1998). New York has also admitted far more foreign-trained lawyers than any other jurisdiction. In 2001, the latest year for which statistics are available, 1,420 of the 6,785 examinees passing the New York Bar had been trained in law schools outside the United States. National Conference of Bar Examiners, Bar Admission Statistics, *at* http:www.ncbex.org (last visited Apr. 3, 2003) (copy on file with author).

25. For an introduction to the complex issues raised by GATS in this context, consult the handbook recently published by the International Bar Association, principally based on research and analysis done by Professor Laurel S. Terry. LAUREL S. TERRY, INT'L B. ASS'N, GENERAL AGREEMENT ON TRADE IN SERVICES:

Professor John Leubsdorf's thoughtful analysis of the ethos of the French Bar will be of great value to all those participating in the ongoing process of identifying the standards, rules of conduct, and enforcement mechanisms that will shape the emerging global Bar.

A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002).