

IS OUR SOCIETY IN NEED OF A NEW LAWYER?

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The reason for writing this paper is the general observation that the number of lawyers in our society is on the increase¹. The way these lawyers work is not stimulating mutual solidarity among people and is divergent in its effect rather than convergent. The paper is not the place to go deeply into the subject, so I shall limit myself to underpinning a proposition. My proposition is that there is a need for a new type of lawyer: a proactive lawyer. Recently I have been asking myself what are the social developments that justify the advent of this new lawyer. This article deals with two of them: juridicalization and the lack of experience of happiness.

What was conspicuous in the studies into the situation of law in Dutch society was the continual reference to the juridicalization of society². An easy conclusion could be that the increasing influence of law on the life of the citizen would make it necessary to have a new lawyer to guide him through the forest of legal obscurities. This lawyer will have to be primarily focused on the citizen rather than on law. His interventions will lead not so much to the most elegant legal outcome of a dispute, but rather be solution and people focused. The human measure should return to professional legal practice: the proactive lawyer. Also, there is a good number of professional developments underway. For example, the image of lawyers is undergoing a shift. Whereas a lawyer used to be a university

¹ See Paul Scheffer, *Het land van aankomst* (Amsterdam, 2007). Cf. Richard Susskind, *The Future of Law* (Oxford, 1996) and Lawrence M. Friedman, *The Legal System: a social science perspective* (New York, 1975).

² Raad voor de Maatschappelijke Ontwikkeling, *Toegang tot Recht* (The Hague, December 2004). Cf. A.R.J. Groot and H.J.L.M. van de Luytgaarden, *Zonder meer Recht*, publs. Tjeenk Willink (Zwolle, 1993). See also R. Sennett, *Respect* (Amsterdam, 2003).

graduate oriented towards the general interest, nowadays he or she tends to become an entrepreneur focusing on organizations and individuals. The power of the market has grown, resulting in a greater importance of the influence of practically oriented lawyer-entrepreneurs. The classical lawyer was a generalist as a provider of services and a specialist in law, and the new lawyer will have to be a specialist in human-scale services and a generalist in law. The context lawyers work in has changed. Whereas most lawyers used to work on their own, for example as a partner in a partnership, nowadays they can be found in large bureaucratic offices, institutions or institutes. Therefore, their clients may be external but equally well internal to the organisation. In addition, the nature and scale of the professional's activities are changing due to internationalisation and globalisation.

This paper tries to give an analysis of the need for a new lawyer. This is done on the basis of two social tendencies: juridicalization and lack of experience of happiness.

Juridicalization

Juridicalization of society is on the increase. The pressure put on society by the juridical world is rising strongly due to two movements. The first is the increasing affluence, resulting in an ever greater number of complicated contracts of sale and service being made, with all the legal consequences in case of disputes. The second is the shifting of legal relationships: public services are being privatised³.

This results in an exponential increase of the influence of law on our lives. The citizen anyhow comes into contact with the law more now than, for example, fifty years ago. The law has become extraordinarily complex, and the increase in complexity, in spite of government intentions of

³ See Sennett's analysis (note 2), Chapter 7.

deregulation⁴ and decentralization, is a condition conducive to the unrestrained growth of the number of legal professionals. For example, there were 5,000 lawyers (members of the Dutch Bar Association), in the Netherlands in 1990, and now there are over 16,000.

Juridicalization is often seen as a negative phenomenon. But it can be interpreted both negatively and positively. Juridicalization as progress refers to the phenomenon that in the development of the welfare state, much legislation and regulation was introduced that offers a social safety net to the unprivileged. The legal safety net and the lawyers engaged in maintaining and preserving it, i.e. social advisors, legal aid desk, legal aid lawyers, CWIs (Employment and Income Centres) and UWVs (Administrative Bodies for Employee Insurance), in principle work on the improvement of the protection and quality of the underclasses. In that sense, juridicalization can be seen as a positive development in which new lawyers can do important work, both directly with the client (front office) and indirectly by organising the legal support (back office)⁵.

However, juridicalization is a problem, too. First of all, this is because the body of rules and procedures in society is growing and becoming more complicated as a result. In addition, for that matter, to the fact that rules are anyhow increasing in complexity, this development threatens the extent to which they can be known and managed. There is hardly any sense of reality anymore in the phrase 'everyone is supposed to know the law'. Lawyers, too, are undergoing a process of extreme specialisation and it is common rather than exceptional for a lawyer trained in general subjects not to dare give an opinion in a specialist field such as rent law or environmental planning law. So the dwindling significance of the above-mentioned phrase about knowledge of the law seems to apply to lawyers as well. In the first meaning of juridicalization as progress, the democratic and social constitutional state has acquired its shape. But apparently there are also fields where society has been juridicalized to death. Regulation in

⁴ See the Government Memorandum *Deregulering* (The Hague, 2004).

⁵ P. Ippel, *Modern recht en het goede leven* (The Hague, 2002), pp. 22-33.

education, tax law, disability law and the amount of bureaucracy involved with EU regulation are pregnant examples, often prompted, for that matter, by government action. For it is through regulation that this same government is trying to give social impulses and change or even guide policy. Because a few legal specialists are the only ones left that can understand these rules, this form of juridicalization seems to be negative. The danger here is that there will be a price to pay. Due to the excessively growing governmental mania for regulation, even lawyers are losing track of the situation, making it almost impossible for them to keep using common sense and reasonable argumentation in the specialist legal fields. It rather seems that the influence of law is becoming such that the phenomenon of legal alienation occurs even in the legal profession. Legal alienation is traditionally seen as the situation where the forest of rules has become so dense that it is impossible for the citizen to see the law. But it is more, actually, varying from powerlessness to conflict of values⁶. A person seeking justice easily feels that he himself or she herself can do little about his or her case and that it is a matter for the specialists. Such a person does not understand the pattern of legal thinking, wondering what is important and what is not. This is why it is important that the new lawyer is focused on changing things as regards the negative consequences of juridicalization which can lead to legal alienation. In my view, the new lawyer has an important task in refamiliarizing the citizen with the law. The essence is that it will precisely be the new lawyers who will be able to explain law to the citizen by their actions, simplifying law where solutions are at hand which, while not being completely perfect legally, are legal all the same. For the sake of good understanding, the new lawyer should here be seen as the translator of legal reality into everyday reality. For this, the new lawyer should have a broad multidisciplinary social basis and an active role in society, or, as it were, be a proactive lawyer. For this purpose he will have to be taught working methods different from the traditional legal ones. His skills should

⁶ M. Hertogh, *Rechtsvervreemding, tussen rechtstaat en rechtsgevoel* (The Hague, 2006), passim.

become preventive and proactive rather than reactive, social and communicative rather than legal, and psychological rather than economic. However, this social function of the new lawyer will fit extremely well in what is, as a development, a part of juridicalization, namely the socialisation of law.

The term socialisation of law is used to describe the development where lawyers are to use law as a guiding instrument to arrive, from a strict, formal and relatively hard legal order, at a more focused, solidary and social legal order. This is the development model of going from repressive to responsive law. Law reacts to developments in society, trying to adjust society where necessary, on a course of optimizing the ideal of justice and social connectedness, equality and solidarity. Socialisation of law is important to show that one of the spearheads of law is the removal of inequality in power and real social opportunities for the citizens. Righting, by means of imperative law, the unequal balance of power between parties and between citizens is and remains of essential importance. This is the lawyer's function of solidarity. Viewed this way, the principles of law are steadily gaining in importance, not so much as usable legal instruments, but particularly as moral starting-points, guidelines for making law function properly in the social context. The qualification 'properly' here means as much as 'in accordance with the current views of society on the content of the principles of law such as, for example, equality, freedom, justice'. Law, the study of law and its application almost owe it to themselves to amply reflect on this. The socio-moral dimension of law seems to become more important all the time. In my view, the new lawyer can and must play a large part in this. He is a free professional, not bound by rules but by principles, moral ones and principles of law.

Repressive law is the more traditional view of law, responsive law relates to socialisation. In my view, a third step for the development of law that should be added is proactive law: repressive through responsive to proactive. All three views of the law are equally important. However, the

essence may be that the new lawyer will tend to enter the fields of responsive law and proactive law, while the repressive part will be practised particularly by hardball litigators, since it is largely done in court.

It is evident that the consequences of juridicalization of society are enormous. Both financially and humanly, society is in the grip of law. If this development is not stopped, the human measure will silently disappear. Whether this will lead to greater happiness of the person seeking justice is very questionable. Does a citizen's happiness depend on the way justice is administered to him? I think it does, and would like to explain this below.

Law and the happiness factor

As early as in the eighteenth century Jeremy Bentham⁷, one of the great thinkers of the Enlightenment, made the proposition that the best society and the best legal system are that society and that system which further people's happiness. In our society, no such idea was accepted either in the nineteenth century or in the twentieth one⁸. The starting-point in the proposition that the legal system is there primarily for people's happiness is subjective, since happiness cannot be measured. What is a fantastic feeling to one, has no value to another.

Still, everyone will agree with me that regaining happiness is important to humans and therefore to society in general. However, the happiness factor in the administration of justice is hardly ever a subject of discussion. This poses a challenge to the professional practice of the new lawyer.

⁷ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, 1996).

⁸ See J. van der Horst, *Nederland, de vaderlandse geschiedenis van de prehistorie tot nu* (Amsterdam, 2000), p. 361 et seq.

What are the factors in a feeling of happiness? In the economic sciences this has been analysed before. Three factors⁹ are mentioned: status, security and trust.

Looking at the domain of the administration of justice, I would say that maximum experience of happiness also involves three - other- factors:

1. Is the application of law in accordance with a citizen's sense of law? In other words, does he understand, on the basis of his own sense of justice, the current legislation, administration of law and enforcement of the rules? This is the *sense of law* factor;
2. Does the administration of justice, in the widest sense of the word, give the citizen the feeling that he lives in a country where his interests are sufficiently protected and where he feels (relatively) safe? This is the *security* factor;
3. Can the citizen trust the legal system? In other words, if he himself comes into contact with the law and rules, are his interests sufficiently and fairly taken into account? This is the *trust* factor.

So, sense of law, security and trust are the key concepts in gauging whether the law functions as it should and consequently contributes to a feeling of happiness of the citizens in our society.

However complex the gauging of these general observations. I think the administration of justice primarily focuses on law and the application of law and is very little concerned with increasing the happiness of the person seeking justice. Of course, principles of justice, prohibition of arbitrariness, equality and so on are at the basis of the legal rules. But whether the application of law by lawyers furthers people's happiness, i.e. whether in their work lawyers take account of the citizen's sense of law and trust and give him protection, is surely not something that get lawyers' primary attention. I do not condemn this, but think there are opportunities for lawyers for a new legal practice.

⁹ See R. Layard, *Happiness* (London, 2005), p. 7.

How does a person experience the law he has to deal with?

The elements of sense of law, security and trust refer to a description of happiness from the ideas of the Enlightenment. In their texts, philosophers such as Montesquieu, Rousseau, Hobbes and Jefferson refer to a subjectively measurable feeling of happiness. For example, happiness was the basis of the American Declaration of Independence of 1776, in which 'the pursuit of happiness' plays a central part¹⁰.

It is much different from, for example, Aristotle's view on happiness. He uses the term *eudemonia*. This term refers to what he defines as worthy behaviour and philosophical reflection. Humans are moral beings. They are moral because in their actions they seek to do good. Simple as this axiom seems, it embodies the complexity of our theme. What is 'to do good'? Does it automatically lead to happiness? According to the Aristotelian definition of happiness it is a principle of action: do good in order that you excel in your role, in what you are supposed to do. This rather process-like way of thinking about happiness is not what I am referring to in this article. Happiness, in the context of experience of law, means actually feeling that, according to one's own standards, justice is done and that there are safeguards that it will be repeated, or continue to be done, in the future, and that there is sufficient confidence in this.

Why would seeking happiness be something relevant to law?

It is evident that law is part of society as a whole, and a very important part at that. Happy and more contented citizens are people who give society more tolerance and are better able to improve and creatively shape the knowledge economy¹¹.

At the same time, the tendency of juridicalization showed, earlier in this paper, that the citizen is becoming increasingly dependent on the law and its practitioners. This dependence gives him a feeling of uneasiness diametrically opposed to his experience of happiness.

¹⁰ See D.A.A. Boersema, *Mens, mensura, iuris, over rechtsbewustzijn, gelijkheid en mensenrechten* (Deventer, 1998), p. 289 et seq. Cf. D.H.M. Meuwissen, *Grondrechten* (Utrecht/Antwerpen, 1984), p. 21 et seq. Cf. also R.D. Heslep, *Thomas Jefferson and Education* (New York, 1969).

¹¹ See A. Klammer, *In Hemelsnaam, over de economie van overvloed en onbehagen* (Kampen, 2005), p. 31 et seq.

The law could play an important part in overcoming this. Experiencing law appears to be very important in compensating feelings of uneasiness¹². This is because law often concerns the individual. For example, he may have a conflict about the performance of an agreement, or there is a complaint about his functioning, or he has not completed his tax return correctly or committed an offence, or worse, a crime. Law stimulates individualisation in our society.

According to the philosopher Charles Taylor, individualisation has three dominant nasty consequences:

1. loss of morality;
2. dominance of reason at the expense of feeling;
3. loss of solidarity¹³.

Freely translated, this means that the citizen must define his standards and values by himself and that he can 'stretch' them more and more. The citizen is progressively becoming more rational, losing contact with his own emotions. Finally he no longer knows who is supporting him and feels he is on his own. There is a feeling of loss of the human measure and mutual involvement. Solidarity has gone and in the end he turns to the lawyer.

It will be the new lawyer's task to bring back to the citizen the human measure, attribution of meaning and mutual involvement among people. In this sense, the new lawyer could be a new kind of practically equipped social proactive professional¹⁴. Thus, rather than the legal correctness of any actions, the things that matter would particularly be the consequences to the persons involved and whether they feel themselves supported by an environment sharing the same standards and values or, in other words, whether their sense of law and their trust are safeguarded.

What does this mean for the position of the new lawyer?

¹² See Klamer (note 11), p.11.

¹³ Ibid., p.24.

¹⁴ See Susan Daicoff, "The Comprehensive Law Movement", in: A proactive approach, Scandinavian Studies in Law, Vol. 49 (Stockholm, 2006), pp. 109-129.

Opportunities

As a well-trained professional, practically and theoretically, the new lawyer could acquire skills in 'combating' social developments such as juridicalization in order to increase the experience of happiness of the person seeking justice.

It can be seen from the above that the new lawyer should:

- make law accessible to the citizen again;
- help the citizen to be able to defend himself;
- teach the citizen to strengthen his conflict-solving abilities;
- understand and, where necessary, guide the citizen's emotions;
- support the citizen in preserving and developing his own morality;
- promote mutual solidarity among citizens.

This means he must have a considerable amount of cognitive, social and emotional intelligence, receive training in empowerment and good communication and be able to really listen and analyse problem areas. He must also be able to coach, be well aware of the context in which the citizen is living and be able to step in his shoes. Finally, he should stimulate and enthuse people to look out for each other and help each other wherever possible.

Thus the new lawyer will become proactive, not just a service provider but someone who really helps another to further develop the other's sense of justice, security and confidence in the legal system. He will be a uniting personality who must also be knowledgeable about law, since, after all, he works in an area of society where a complicated system is at work, namely the legal system.

Concluding

I hope this paper has shown that on the basis of two assumptions, juridicalization and its consequences to the citizen's experience of happiness, our society has room for a new lawyer, a practitioner of law who cares more for the human measure in law and society, a proactive lawyer.