David Edward

The significance of independent legal professions for the rule of law

It is 20 years ago since as President of the CCBE I came here to the Präsidentenkonferenz, which was organised by Dr. Schuppich. Dr. Schuppich, I think, played an essential role at that time in bringing together lawyers from East and West. Vienna of course at that time was an outpost so-to-speak of Western democracy and very close to the East. It was through Vienna that we came to know and enjoy the company of so many lawyers from the East. Now I was particularly glad to meet again Dr. Anczyk from Krakow whom I met at that time.

Of course, the accession of Austria to the European Community has meant an even closer association with Austrian lawyers. May I say that one of the great pleasures of working in Luxembourg is to have Dr. Peter Jann as a close colleague, whose sense of humour and practicality is always a pleasure for me, if not always, I think, for all of our colleagues.

Rather contrary to my intentions the notes which I prepared for the interpreters have been distributed to all and you can read them quickly and then go to sleep. But my intention is really first of all to mention two points which I think important about the meaning of Rechtsstaat and of the expression “independent legal profession”, then to speak a bit about the underlying principles, what is the role of the lawyer in general and then to speak to a greater extent about the contemporary challenges to the role of the lawyer in society and then, if possible, to draw some conclusions.

The expression Rechtsstaat – I think this point has been made yesterday – has a particular significance in German legal science and it is not quite the same as État de droit in French. Although it is common to translate Rechtsstaat by the English expression “rule of law”, the traditional Anglo-American concept of the rule of law is not really the same technically speaking as that of the Rechtsstaat. In the common law world, the notion of the rule of law had a different philosophical basis.

The great English constitutional lawyer, Albert Dicey, distinguished three senses of the rule of law:

First of all the absence of arbitrary power on the part of government. I think that this is one aspect of the Rechtsstaat that there must be a Gesetz, there must be a legal basis for action on the part of government.

Secondly – and this is different – every man, even an official of the state, is subject to the ordinary law administered by the ordinary courts. That was a principle which was very important in Britain in the 19th century and early 20th century but it is a principle that is observed more in the theory than in practice in the modern structure of the British courts.
The third meaning of the rule of law identified by Dicey was the general rules of constitutional law, they are the result of the ordinary law of the land, i.e. the common law produces the constitutional law. That is a concept very different both from the notion of Rechtsstaat and Etat de droit. For present purposes, I think all these differences are unimportant. We know what we mean. We know what we are talking about now.

We are talking about the role of the lawyer in a society where law rather than arbitrary power is the basis of government action and the relations between citizens. I think it is important not to forget that when we use terms like Rechtsstaat, "rule of law", we do not necessarily mean always exactly the same thing. These terms come with a degree of intellectual baggage, which we have to understand. One of the great attractions of meetings like that, indeed of all European Community activity, is that one learns progressively more about the way in which other people see the law and see society.

Now the other point that I want to emphasise is: What do we mean by “independent legal profession”? Because here again there is a marked difference of approach between the common law world and the structure of the profession and of legal activity in most of mainland Europe.

In the common law world, all those who practice law in any way, including the judges and including most of the law teachers and including all those who are government advisors, are members of the legal profession, and essentially of the same legal profession. In America they are called attorneys, in Britain solicitors or advocates and barristers. There is a case report by the United States Supreme Court, where one of the judges says: “We recognise the spirit of public service with which the profession of law is practised and to which it is dedicated. The present members of this court, licensed attorneys all, could not feel otherwise.” In other words the Justices of the United States Supreme Court see themselves as belonging to the same profession as those who practise before them and indeed all those who take part in legal work for government. That means, as far as we are concerned, lawyers in the common law world share a common outlook and to a great extent a common professional code of conduct.

Yesterday you heard of the Dean of the Faculty of Advocates in Scotland, I still pay my subscription to the Faculty of Advocates and recognise the Dean of the Faculty of Advocates as the leader of my profession in that respect. Of course, the notion of the common outlook also applies to lawyers, as I said, working for government, for public administration and for companies. I will come back to that point.

Let me now come to the basic principles about the place of the lawyer in society. May I begin with a quotation from an English judge, Lord Justice Scott. He said: “The maxim that ignorance of the law does not excuse any subject, i.e. any citizen, represents the working hypothesis on which the rule of law rests in the British democracy but the very justification for that maxim is that the whole of our law written or unwritten is accessible to the public”, in the sense of course that at any rate its legal advisors have access to it at any moment as a right. I am going to use the word “citizen” in this talk to mean what the French mean by justiciable. I do not necessarily mean somebody who has the nationality of the state concerned but simply the Bürger, the person other than the power, the authority of the state.
The citizen must be assumed for legal purposes to know his/her legal rights and obligations. Conversely ignorance of the law is no excuse.

As I have mentioned, the *Rechtsstaat*, the idea of a society governed by law implies that disputes between citizens and the state or between citizens themselves will be resolved through a legal process. Very often it is through the legal process in one form or another that the individual citizen as opposed to the voter, ie the citizen as an individual becomes an effective participant in the process of democracy. It is through the workings of the legal systems that the individual citizen very often becomes involved in the democratic process. Since the citizen cannot be assumed to know all the law, the citizen must rely on the lawyer to explain what the law is or if the lawyer does not know what the law is, at least he knows where to find it.

The consequence is that the lawyer plays an essential role in the relationship between the citizenship and the state and in a relationship between citizens in at least four respects:

First of all simply in ensuring that the citizen is aware of his/her rights and obligations. It is a professional responsibility of the lawyer to tell the citizen what his/her rights and obligations are even if the hearer does not want to know that, even if it is not very attractive to be told.

Secondly, the lawyer must defend the citizen against the power of the state.

Thirdly, the lawyer must enable the citizen to assert rights and obligations against other citizens.

Fourthly, the lawyer must enable the citizen to be an effective participant in the process of democracy, including the administrative process and the process of law making.

It is sometimes said of course that we have reached a state where we do not need lawyers and many people I think would see that as an ideal to be worked towards. But nevertheless while we are in the position of needing them, the importance of the lawyer has been recognised by the law and by the structures of society in a variety of ways:

First of all, by the recognition by the state of the legal profession and of its professional bodies. In some cases the legal profession is directly regulated or indirectly regulated by the state in the sense that the state takes a direct part in the creation of the professional bodies.

Secondly, the importance of the role of the lawyer is recognised by the special status accorded to members of the legal profession before the courts and public agencies. In most countries those who are admitted to be members of the legal profession – attorneys, solicitors, barristers, advocates – have a special status and sometimes an exclusive status before the courts and certainly they have a privileged status before many public agencies.

Thirdly, the state recognises the status of the lawyer by special legal rules which protect the relationship between lawyer and client. That is particularly true of the rules of confidentiality, the rules that govern the confidentiality of communications between the lawyer and the client, sometimes called the professional secret or in common-law terms "legal professional privilege".

The European Court of Justice has said that this confidentiality serves the purpose, whose importance is recognised in all Member States, that any person
must be able without constraint to consult a lawyer, whose profession entails the giving of independent legal advice to all those who need it.

A further way in which the law recognises the importance of the lawyer is by recognising the existence, sometimes imposing legal rules which are designed to protect the independence of the lawyer.

Then again the counterpart of these ways of recognising the special status of the lawyer is that the lawyer is subject to discipline, subject to a set of rules and subject to discipline and if necessary to sanctions if the rules are not respected.

Lastly and very importantly, most states recognise in one way or another the need to provide legal aid to those who are not in a position to pay for the services of lawyers. Legal aid may be provided directly by subsidy from the state or indirectly through the professional bodies.

That is the general background, so it seems to me, the general principles which underline the role of the lawyer in a free society. However, that role or the traditional conception of the way that role is exercised is subject to a number of challenges nowadays.

I quote from the English historian Taylor who said that until August 1914 a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state beyond the post office and the policeman. The post office is now privatised and the policeman now carries a gun regrettably in many societies.

The citizen’s relationship with the state has changed. In those days the structure of the legal profession and the rules relating to it were really related to the function of the lawyer in the administration of criminal law as the defender of the accused person before the court or in relation to the civil law of property, status and obligations. That was really the field in which the lawyer operated.

Today we see a variety of different trends, which change both what the lawyer does and the way in which he/she has to do it.

First of all, there is just much more law, much more law in a wide variety of areas and the law is more complicated. Just to mention a few: taxation, social security, health, education, safety at work, food, water quality, housing, time planning and the relationship between employer and employee at work. These and many more areas of the law have become extremely complicated and extremely technical. There are many many pages of regulations, which govern the citizen in some form or another, in relation to these matters.

In connection with that, the sources of law have expanded. Law no longer comes from the legislator, the Gesetzgeber. It comes from a variety of administrative agencies, ministerial decrees, but the law is created in a variety of different ways. The consequence is that the administrative law – the law which deals specifically with the civil relationship between the citizen and the state, other than the penal relationship – has had to develop new dimensions. It has had to develop new concepts and developed old concepts. One can see this in the working of the European Court of Justice. The development of concepts, such as equal treatment, or the counterpart non-discrimination, legitimate expectation and proportionality: These are concepts which so-to-speak form part of the judge’s toolbox. They are tools with which the judge can seek to strike an effective balance between the interests of the citizen and the interests of the state.
A further complication as regards sources of law is that the law is no longer created nationally. New norms are created by the Convention on Human Rights, by the European Treaties and in a variety of other ways. The old notion – that one could simply solve legal problems by reference to a hierarchy of norms, that one identified which norm would be applied in preference to another in terms of a hierarchy – has now been replaced by a situation in which there are a number of norms of equal rank. It is necessary for the lawyer and for the judge to decide which of them is to be preferred in a particular case. To use an analogy, the judge used to be operating an on-off switch. He just decided which was the rule to be applied and applied it.

Now the judge is operating a machine, like the synthesiser, by which you regulate the power of various wave bands for your music centre. There are a number of wave bands: human rights law, Community law, world trade law, etc. One has to decide in any particular case which of these particular norms is to have the greater influence on a solution of the case.

In addition, as far as the citizen is concerned, there are new types of obligation – the obligation not to discriminate, the obligation of the employer in particular not to discriminate on grounds of sex or religion or race. As regards the citizen engaged in commercial activity, the wide extension of risk liability, of liability to pay compensation, without fault, without proof of negligence, but also a much wider liability in fields such as the work of the professions. Certainly in Britain and the United States, the medical profession is subject to legal challenge and the liability to pay damages in a way which was unknown even when I started to practise law.

But most of all and I stress this because I think this is a development which will strike us more and more, modern technology challenges traditional conceptions and methods. Traditional conceptions – what do I mean by that?

Let me take the example of marriage and the status of children. It is true that the law has had to develop to recognise a situation in which partners no longer necessarily go to the formality of marriage before they live together or while they live together and when they have children. The law has had to develop new rules to cope with that situation. But broadly speaking these rules could be developed on the basis of existing concepts.

If you take a world in which you can have in-vitro fertilisation, the implantation of an egg from one woman to another and where you can have what is called surrogate motherhood, one woman bearing a child for another, then one challenges not simply the legal rules but also the vocabulary that the law needs to work. Who in the case of in-vitro fertilisation is the mother? Who is the father? In what sense are they mother and father? These are concepts which are quite fundamental to language but they have to be given a new meaning or a new operation in the context of the modern world.

Likewise modern technology challenges traditional conceptions of place and time. The law of contract presupposes that people arrive at a consensus, traditionally consensus by meeting together or at least by writing on paper or in more modern times by communicating over the telephone. But now you have modern technology, which replaces paper by the marshalling of free electrons. The electron is a concept rather than something that we can identify. We know electrons exist but
we cannot take them out and look at them. Modern communication depends on the jingling together of these things which we cannot see.

On a practical level, what is the consequence for the filing of court documents, the creation of authentic deeds? What is the consequence for that of e-mail? Does one have to – I think this question was raised yesterday – take from the computer, take from the electron box something which one is going to translate onto paper in order that one can have an authentic act or an original document? Of course this applies to courts as well. Does a court have to have a piece of paper, which can be referred to as constituting the application to the court or the defence or is it enough that the application or the defence should arrive in the court through the ether and be translated into another set of electrons in a box. This, from the lawyer's point of view, changes the notion of cross-frontier practice. You can practice the law in one place for clients in an infinity of other places, without either of you ever moving.

Then I come to the changing nature of courts and legal procedures. The work and accessibility of traditional courts are effected by three important elements: an increasing workload, increasing cost and regrettably increasing delay. It is extremely difficult in the modern world to have courts which function as speedily, as cheaply and as efficiently as one would like.

The consequence is that in many cases new courts and tribunals have been created in Britain and new courts have been created to deal within employer/employee problems, which do not work in the same way as the traditional courts. Judges are asked – in order to process cases more efficiently – they are asked to become case managers. Of course this presents the risk for the lawyer that the judge substitutes his/her appreciation of what the case is about, from the lawyer's appreciation of what the case is about, having the right contact with the client.

Then there is the search always and increasingly for alternative methods of dispute resolution. Do not let's go to the courts at all. Do not let's even go to arbitration in a formal sense. Let's find another way of resolving our difficulties.

Finally in the field of legal aid, the provision of legal aid may impose an unacceptable financial burden on the state, or where legal aid is provided by the younger members of the profession, it may impose an unreasonable burden on them.

Of course there are the changes in society. The citizen is more aware of his/her rights and is becoming more litigious, also more mobile. We have the internationalisation of crime, terrorism, drugs, corruption, money laundering, traffic in human beings, including illegal immigration.

At the same time the corporation, the fictional person created by the law, has frequently become more powerful than the state. There are many multinational corporations, which are far more powerful in financial and practical terms than most of the states of the United Nations. There is really no equality of arms to say that the individual citizen and the powerful corporation are equal before the courts. Is is rather a fiction than a truth because the powerful corporation can bring together resources which the individual citizen with all the help of the legal profession cannot provide.

So the question is raised: should the law treat the corporation the same way as the citizen? In what sense does a corporation have fundamental rights? Should
the rules of professional confidentiality apply between the lawyer and the corporation in the same way as the law applies between the lawyer and the individual citizen? These are questions which are asked.

Government, frequently supported by public opinion, feels it necessary to impose new obligations on the corporation and sometimes on the individual citizen and, correspondingly, to remove some of the protections which traditionally have been accorded to the citizen. The lawyer is also subjected to new obligations of disclosure. There are new conceptions of the right to silence, the right to confidentiality, the right to privacy and the right of protection of personal data. The consequence, so it seems to me, is that the citizen is actually in greater need of the trained lawyer than ever before.

Now this has an effect on the legal profession. It has an effect in causing the lawyers to become more specialised in what they do and, correspondingly, because their work is more specialised and the content of the law is changing more rapidly, there is a need for deeper professional education and for more extensive continuing professional education. One cannot assume that one goes to university, one learns the law, one sets out in practice and one needs to learn nothing more until one retires.

Correspondingly because of the needs of the corporation but also the more complex needs of the citizen there has been a change in the structure of legal practice. There are far more firms, there are far more partnerships, and there are far more big partnerships. The growth of the multinational law firm is there. It has arrived and it will grow. At the same time and perhaps for the same reason new market criteria are being applied to the practice of the law. Lawyers are being expected to advertise, to state what they claim to be able to do for the citizen and in what field. There is pressure that lawyers should work for contingency fees, that they should work for nothing and then recoup something if the client is successful at the end.

At the same time there are calls for greater regulation of the profession and with that goes questioning of the traditional structures of the profession and the traditional rules. The structure of the bar, the structure of the law societies, the structure of the Kammern, these are all put in question by government, by the public and by lawyers themselves. One has to ask oneself the question whether the existing methods of qualification, legal education, continuing education and discipline are adequate for the modern world.

Most dangerously, we are entering a world I think – if we have not long ago entered it – in which some lawyers have become far too closely associated with the client, losing that degree of independence which enables the lawyer to tell the client what his/her rights and obligations are, whether that advice is welcome or not. Correspondingly – and this goes together with the problems of disclosure – the traditional rules of professional confidentiality have been invoked to harbour the participation of lawyers in crime committed by their clients.

The consequence, so it seems to me, is that there is a danger that lawyers will lose the confidence of the state and of the public. This will lead in turn to cause the removal altogether of the status and privileges, which the state has given to the lawyer. But the corresponding danger is – going back to the beginning – that by removing that status, by removing those particular rules which protect the rela-
tionship of lawyer and client, the state will remove an essential protection of the citizen. The citizen will be left unarmed against the power of the state and in reality against the commercial power of the large powerful corporation, which as I say in many cases has greater power than the state.

These dangers have always existed and they must be guarded against. Nevertheless, and this is my conclusion, it is in the ultimate interest of the state to recognise and to continue to recognise that the legal profession plays an essential part in the maintenance of a society governed by law, whether one calls that the Rechtsstaat, the rule of law, Etat de droit or whatever. The special rules, the special privileges, which are seen as being conferred on the lawyer are in reality conferred on the lawyer for the benefit of the citizen. Both the state and the lawyer must bear that constantly in mind. In arguing to face the challenges that I have mentioned, both sides - the state and the citizen, and the lawyer and the lawyers' profession - must bear in mind that we are talking ultimately about the interest of the citizen and not about the interest of the state or the interest of the profession. That means that lawyers have an individual responsibility to ensure that they are worthy of the trust that the state and the citizen put in them. In particular they have to be independent.

From my point of view, the independence of the lawyer is not a question of legal status or professional status. It does not matter whether you are a lawyer advising government, advising a multinational corporation, advising the proprietor of a small shop on the street corner or advising a widow. Ultimately, independence is a state of mind, it is not a question of status and it is not a question of who the client is. It is a state of mind which has to be taught, which has to be developed by the professional bodies and which so it seems to me must also be protected by the state.