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Comments

PROFESSIONAL INDEPENDENCE AND THE ASSOCIATE IN A LAW FIRM: A FRENCH CASE STUDY

*Tang Thi Thanh Trai Le**

In June 1977, as a result of a case brought before the *Tribunal de la Seine*,¹ a "mini-revolution"² erupted in French legal circles. A young woman associate of a law firm was discharged at mid-month and paid half (F. 1250) her monthly salary. Mme X considered her dismissal improper and filed a complaint with the *Bâtonnier* (President) of the Paris Bar.³ After a hearing, the *Conseil de l'Ordre* (Executive Committee of the Bar) advised the firm to pay Mme X an additional F. 1250 in settlement. Not satisfied, Mme X took her case to the *Tribunal de la Seine* requesting compensatory damages of F. 2750 (F. 2500 for one month's notice and F. 250 for vacation time not taken) and punitive damages of F. 10,000.

Why did Mme X's case stir such great interest in the French legal community? For the first time in French history, an *avocat* (practicing attorney) asked a court to apply labor law⁴ in the resolution of an employment dispute with another *avocat*. By doing so, Mme X represented herself as being an employee despite her status as an *avocat*. Thus, Mme X rekindled a perennial debate of the

* Member, Board of Editors. This Comment is the partial result of a study on Comparative Legal Ethics funded by the Dana Foundation.

1. Mme X. . . . c. Association d'Avocats Y. . . . et autres, Tribunal d'instance de Paris, 8 April 1977, J.C.P., II, 19676; *Recueil Dalloz Sirey* at 589. The parties are designated X or Y when readily identifiable in the community. See text accompanying n. 85 infra for a discussion of the decision of the Tribunal.

2. The term was used by *Le Monde*, 26 April 1977 at 16; also *Le Monde*, 3 September 1977 at 1. Civil proceedings are rarely covered in the French press. One commentator observed that Mme X's case so aroused the interest of the legal community as to warrant the attention of the daily press. Denis, Note, Tribunal d'instance de Paris, 8 April 1977, *Dalloz* 1977 at 591.

3. Under art. 33 of the Internal Rules of the Paris Bar, all claims brought by an *avocat* against another *avocat* must first be heard by the *Bâtonnier*. The *Bâtonnier* can recommend a settlement or refer the matter to the *Conseil de l'Ordre*. (The term *Bâtonnier* was first used in 1602. It comes from the *bâton* carried by the head of the Bar, symbolizing his authority.)

4. French labor law is an autonomous body of law originally providing special protection for industrial workers. It was later extended to cover white-collar employees. The autonomy of French labor law has been strengthened by the establishment of separate tribunals which follow special procedures.

French legal profession: Can an *avocat* be characterized as an employee?

At the core of this debate is the principle that the profession of *avocat* is "liberal"⁵ and "independent." This concept has been recognized over the centuries⁶ and was codified into law in 1971.⁷ The Internal Rules of the Paris Bar make the principle of independence a matter of professional ethics.⁸ Thus, the characterization of an *avocat*, even an *avocat* who is also a *collaborateur* (associate), as merely an employee threatens the mandated independence of the profession. Any infringement upon the independence of the *avocat* would be a violation of ethical rules.⁹

Before discussing the threat to professional independence by the characterization of a *collaborateur* as an employee however, a few remarks on the organization of the legal profession in France are in order.

THE FRENCH LEGAL PROFESSION

The various functions normally performed individually by American attorneys are performed by a variety of French legal professionals. Prior to the 1971 reorganization of the legal professions, the practitioners included the *avocat*, the *avoué*, the *agréé*, the *notaire* and the *conseil juridique*.¹⁰

During the Gaullist period, an attempt was made to integrate the French legal professions into a single "great profession."¹¹ The treaty establishing the Common Market contained provisions dealing with free movement of services and freedom of establishment among Common Market countries.¹² These provisions provided the

5. For an explanation of the term "liberal," see text accompanying n. 46 *infra*.

6. The first oath of the *avocat* asserting the principle of independence is contained in an ordinance issued by Philippe le Hardi in 1274. The present oath is essentially identical: "I swear as an *avocat*, to exercise the defense and counsel with dignity, conscience, independence and compassion, with respect to tribunals, public authorities, and the rules of my Order, and not to say or publish anything which is contrary to the law, regulations, good morals, security of the state and public peace." Decree No. 72-468, 9 June 1972 (*Journal Officiel*, 11 June 1972 and *J.O.* 6 July 1972) art. 23.

7. Law No. 71-1130, 31 December 1971 (*J.O.* 5 January 1972) art. 7.

8. *Règlement Intérieur du Barreau de Paris*, Preface and art. 18.

9. *Id.*, Preface.

10. The *avocat* is a member of the self-governing bar and is responsible to the *Conseil de l'Ordre*. The *avocat* is required to remain independent of his client and, somewhat like the English barrister, specializes in oral advocacy. The *avoué* is an *officier ministériel* (ministerial official) appointed by the state. The *avoué* is considered the client's agent and is restricted to written advocacy. The *agréé* performs functions similar to those of the *avocat* and *avoué* before the commercial courts. The *notaire* is responsible for drafting instruments concerning landed estates, inheritances, corporations and the status of persons. *Conseils juridiques*, free of regulation until the reform of 1971, give advice in the commercial and financial areas.

11. See Herzog & Herzog, "The Reform of the Legal Professions and of Legal Aid in France," 22 *Int. & Comp. L.Q.* 462 (1973).

12. Treaty Establishing the European Economic Community (Common Market), 298 *U.N.T.S.* 140, Arts. 52-66.

incentive for bringing the French legal profession into line with the legal professions of the other Common Market countries. The Government and the *Association Nationale des Avocats* favored this reform.¹³ Other groups of legal professionals however thought the proposed reform too brutal¹⁴ and an unnecessary "upheaval of institutions."¹⁵

Ultimately a compromise was effected. Law No. 71-1130 promulgated on 31 December 1971, modestly entitled "Reform of Some Legal Professions," merged the professions of *avocat*, *avoué*¹⁶ and *agr*. Further, the law simply regulates the profession of *conseil juridique* to facilitate its eventual merger with that of *avocat* in the future.¹⁷

Thus, despite the reform, the French *avocat* has a more restricted practice than his American counterpart. Similarly, the status of the French *collaborateur* differs from that of the American associate.

The term "*collaborateur*" designates an *avocat* working for another *avocat*. Since the particular process by which a law student makes the transition to *avocat* is highly formalized when contrasted with the process by which an American law student moves from law school into practice, some explanation is required.

To become registered with a local bar as an *avocat*, a candidate must first be a French citizen and have the degree of a *Licence en droit* (after four years of study) or a *Doctorat en droit* (after qualifying for a *Licence*, taking advanced courses, and preparing a dissertation in a specific field). Second, the candidate must pass a professional examination, the "Certification of Aptitude for the Legal Profession" (C.A.P.A.). Finally, the candidate must take an oath and register with the bar. The candidate is then an "*avocat stagiaire*" (lawyer in training) and his name is placed on the "*liste du stage*" (list of *avocats* in training).¹⁸

The period of training,¹⁹ normally three years, is conducted in conjunction with the Centers of Professional Training, partially funded by the State and located at the seat of each regional *cour d'appel* (intermediate appellate court).²⁰ Instruction is given by law professors, judges, prosecutors and members of the bar. The *avocat stagiaire* attends programs organized by the Centers and acquires

13. Herzog, *supra* n. 11 at 462.

14. See report of Zimmerman, *J.O., Assembl Nationale*, 13 October 1971 at 458.

15. Lobin, "Rflexions sur certains aspects de la rforme des professions judiciaires," *Dalloz*, 1972, *Chronique*, at 36.

16. The *avous* practicing before the *cours d'appel* (intermediate appellate courts) were unaffected by the reform.

17. The legal training, good morals, professional practice and registration required of *avocats* are now also imposed upon the *conseil juridique*. See Law No. 71-1130, *supra* n. 7, art. 54-56.

18. *Id.*, art. 11; Decree No. 72-468, *supra* n. 6, art. 23-24.

19. Candidates with legal experience such as magistrates, law professors and former *avous* are exempt from this period of training. See *id.*, art. 46.

20. Law No. 71-1130, *supra* n. 7, art. 12-14; Decree No. 72-468, *supra* n. 6, art. 26-42.

practical skills through working with various legal practitioners such as *avoués*, *conseils juridiques*, *experts comptables* (certified public accountants) or *avocats*.²¹ Positions in the office of an *avocat* are the most sought after since exposure to a law firm is considered the best means of acquiring practical knowledge of the legal profession. During this training period, the young *avocat* must use the title of "*avocat stagiaire*" and not simply that of *avocat*.²² The *avocat stagiaire* may cultivate his own clientele and represent them in court.²³ The status of *collaborateur-avocat stagiaire* is a temporary one, ending with completion of the training period. Upon the *Conseil de l'Ordre's* finding that he has performed his duty satisfactorily, the *avocat stagiaire* is accepted as an *avocat titulaire* (full-fledged lawyer) entitled to all the rights of a regular member of the bar, including the right to elect the *Conseil de l'Ordre*.²⁴

An *avocat titulaire* is faced with a number of alternatives. He may (1) establish a solo practice; (2) practice *en groupe* in either an *association* (loose partnership) or in a *société civile professionnelle* (professional corporation); or (3) work with one or more other *avocats* as a *collaborateur*.²⁵ The first alternative requires no explanation. The *avocat* choosing to practice *en groupe* shares mutual responsibility with his colleagues. Each member is equal in stature.²⁶ However, the *avocat* who chooses the third alternative of working as a *collaborateur* does not share in the liability and responsibility of the *avocat* with whom he is associated. Other aspects of his status are somewhat unclear. For example, the same definition is given for the temporary collaboration of the *avocat stagiaire* and the more permanent collaboration of the *avocat titulaire*. The Internal Rules of the Paris Bar provide that "collaboration" for both requires the lawyer "to undertake to devote, without any bond of subordination and to the exclusion of any occasional or temporary help, all or part of his activities to the practice of another

21. An *avocat stagiaire*, although in training, can be a partner (*associé*) of a firm. This can occur, for example, if the *avocat stagiaire* can bring a substantial clientele to the firm.

22. Decree No. 72-468, supra n. 6, art. 82. *Règlement Intérieur du Barreau de Paris*, art. 1(5). Understandably, young *avocats* are not happy with this restriction and have worked for its suppression. See Lemaire, *Les Règles de la Profession d'Avocat et les Usages du Barreau de Paris* 177 (1975).

23. Decree No. 72-488, supra n. 6, art. 38.

24. *Id.*, arts. 1,3,5.

25. Law No. 71-1130, supra n. 7, art. 8.

26. Until 1954, legal practice *en groupe* was not authorized in France. It was believed that any association among *avocats* would infringe upon both the independence of the *avocat* and the client's need for confidentiality. A decree of 1954 (No. 54-406, 10 April 1954) first authorized grouping among *avocats*, but only under a form (*association*) not cognizable as a legal entity. The *association* cannot be registered with the bar as such. It simply creates obligations between *avocats* in *association*, such as the duty not to represent a client whose interest contradicts that of another member's client and not to accept a case objectionable to another member of the *association*. The more cohesive form of group practice, the *Société civile professionnelle*, applicable to all "liberal" professions, is comparable to the professional corporation in America.

lawyer.”²⁷ The ambiguity of the *collaborateur*’s status is compounded by the ambiguity of the law governing collaboration between lawyers.

THE AMBIGUOUS CONTRACT OF COLLABORATION

Until 1977,²⁸ no satisfactory characterization had been given to the legal relationship between an *avocat* or firm and the *collaborateur*. The principal question was whether the employer-employee relationship could exist between lawyers. Law No. 71-1130 of 31 December 1971,²⁹ creating and organizing the new profession of *avocat*, purposely left the question unanswered. The law stated only that the legal profession is a “liberal” and “independent” one and that all activities which impair the independence of the lawyer or the “liberal” character of the profession are “incompatible with the practice of this profession.”³⁰ The law does not address the question whether wage-earning by a *collaborateur* is incompatible with the legal profession. The law simply requires that a written contract be executed “to assure the *collaborateurs* an equitable remuneration and guarantee their independence.”³¹ Significantly, the contract is not characterized in any way. The law is silent in this regard largely because of the considerable debate that took place in the *Assemblée Nationale* and the *Senat* during consideration of the matter. Originally, the government *projet de loi* (bill) provided that “the lawyer may practice his profession as a sole practitioner, in a partnership, as a member of a professional corporation, or an associate, *employee or not*, of another lawyer or law firm”³² [emphasis added]. The *Commission des Lois* (Law Commission) of the *Assemblée Nationale* deleted the words “employee or not.” During discussion of the bill however, the government attempted to reinsert the words by amendment, arguing that:

[T]here is nothing incompatible between working for wages and the practice of a “liberal” profession. This can be seen in other professions. Wage-earning honestly and openly accepted is without doubt preferable to the more or less clandestine kickback of honoraria. This is even more so when the recipients are deprived of the social advantages which accompany wage-earning.³³

Those opposing the amendment considered this argument specious. One deputy, to the hearty applause of his colleagues, declared:

[T]he independence or dependence of the lawyer is at

27. *Règlement Intérieur du Barreau de Paris*, Art. 65.

28. The new characterization is given by Law No. 77-685, 30 June 1977 (*J.O.* 1 July 1977). See text accompanying n. 100 *infra*.

29. See n. 11-17 *supra*.

30. Law No. 71-1130, *supra* n. 7, art. 7.

31. *Id.*, Art. 8.

32. See Blanc, *La Nouvelle Profession d'Avocat* 58 (1972). Giverdon, “Réflexions sur un avant projet,” *Dalloz*, doctrine at 136.

33. *J.O.*, *Assemblée Nationale*, 8 December 1971 at 6531.

stake. . . . Take a look at any treatise on labor law and you will discover that the bond of the employee, arising as it does from a contract for the hiring of services, necessarily entails for the employee an obligation to obey the will of his employer, his *patron* . . . Contrary to what some people may think, the lawyer has for his god only the law and for his master only his conscience! The youngest *avocat stagiaire* and the oldest *bâtonnier* are equal under the Robe, and it would be unacceptable that one would call the other his *patron*.³⁴

In the *Senat*, the government again tried to introduce the concept of *salariat* (employment) into the *projet de loi*. The Minister of Justice emphasized the social and economic benefits such a classification would bestow upon the young lawyer. In urging the legislators to do away with the fiction of *collaboration* whereby a *collaborateur* only pretends not to take wages, the Minister of Justice concluded the "legislator[s] could do better . . . to look to what really happens."³⁵ Nevertheless, a majority of the *Senat* remained unconvinced. As one Senator noted:

The matter of accepting wages is certainly not, in itself, something which degrades the dignity of the one who receives them. But when one accepts a salary one is incontestably placed under the authority of the *patron*. It is thus not possible for a lawyer, if he is an employee, to remain entirely independent and to decline to argue a case as required by his *patron*.³⁶

Ultimately, the words "employee or not" were deleted. Instead, a new paragraph requiring a written contract of *collaboration* was added to assure the benefits of fair remuneration as well as to safeguard the *avocat's* independence.³⁷ The Minister of Justice noted that the Government yielded to this compromise because the Ministries of Justice, Economy and Finance had "practically reached [an] accord to define [the] status of the *collaborateur* [as one] which will give him the same benefits as those given by *salariat*."³⁸ The Minister thereby implied the creation of a new type of contract, distinct from the contract of employment and applicable only to *collaboration* between lawyers.

Nevertheless, the decree of 9 June 1972 implementing the law of 31 December 1971 did not clarify the nature of the contract of *collaboration*. The new decree only accentuated the ambiguity of the nature of the contract. The decree prescribed the format of the contract of *collaboration*, requiring that it be written,³⁹ but left the

34. *Id.*

35. *J.O. Senat*, 17 November 1971 at 2021.

36. *Id.*

37. Law No. 71-1130, *supra* n. 7, art. 8.

38. *J.O. Senat*, December 1971 at 3108.

39. Decree No. 72-468, *supra* n. 6, art. 74.

terms to be determined by the parties within the framework of the bar's internal regulations.⁴⁰

The ambiguity is further accentuated by seemingly contradictory provisions. For example, although under the law a *collaborateur* is the master of his own argument, he must inform "the lawyer to whom he is bound" of the manner in which he plans to handle each case.⁴¹ A *collaborateur* can ask to be relieved of an assignment which he considers contrary to his conscience or beliefs,⁴² but the lawyer for whom the *collaborateur* works remains responsible for the *collaborateur's* professional activities.⁴³ These seemingly contradictory provisions justify a commentator's conclusion that "the authors of the reform deliberately abstained from any attempt to characterize the contract of *collaboration*."⁴⁴

TRADITIONAL V. FUNCTIONAL APPROACH TO COLLABORATION

In order to understand why salaried employment of *collaborateurs* has met with such staunch opposition by segments of the French legal community, despite convincing pragmatic arguments to the contrary, one must understand the traditional approach to the profession of *avocat*. In contrast to the functional approach, the traditional approach refuses to let pragmatic considerations interfere with the traditional model of the *avocat* as a free, independent professional.

The Traditional Approach

The characterization of the profession of *avocat* as "liberal" and "independent" is at the heart of the matter. Unfortunately, the law uses the terms "liberal" and "independent" without defining them.⁴⁵ Professor Jean Savatier, in his definitive work on "liberal professions," says that any discussion of the subject must focus on the relation between the professional and his client. To Savatier, this relationship involves three aspects: (1) the nature of the professional's activity; (2) the type of interests entrusted to him and (3) the social mission he assumes.⁴⁶

First Savatier distills the qualities of the professional's activity: it is intellectual, independent and disinterested. However each of these characteristics standing alone is misleading. For example, "intellectual" is not totally appropriate since non-"liberal" professionals such as magistrates and bankers engage in highly intellectual

40. Id., art. 75. The internal rules of the Paris Bar, elaborating art. 75, require that the contract of *collaboration* contain an express provision excluding any bond of subordination. *Règlement Intérieur du Barreau de Paris*, art. 65.

41. Decree No. 72-468, supra n. 6, art. 76.

42. Id.

43. Id., art. 77.

44. Denis, Note, supra n. 2.

45. See n. 30 supra.

46. Savatier, *Étude Juridique de la Profession Libérale* 35 (1947).

activities. Also, although "independence" is an important attribute of a "liberal" profession, it is not absolute. For example, doctors employed by clinics or hospitals practice a "liberal" profession even though they are subordinated to their employers. The characterization of a "liberal" profession as "disinterested" explains certain rules applicable to the legal profession such as the "honorarium" concept of legal fees and the traditional ethical rules forbidding lawyers to press their claims against clients for unpaid fees. Savatier asserts however that a profession which allows one to earn a living cannot truly be considered "disinterested." According to Savatier "disinterested" more accurately suggests that a professional must consider the client's interest before his own. Thus, a merchant could refuse credit to an insolvent customer but a doctor could not ethically refuse to treat an insolvent patient.

Second, to Savatier, the nature of the client's interest is the most characteristic feature of the "liberal" profession. Savatier considers the client's interests "sacred" because they are so closely related to the client as a human being. They affect the stability, honor and life of the client. The client looks to the lawyer for what Savatier calls "*secours humain*" (human help). More than pecuniary and material interest, the client delivers to his lawyer a "part of himself."⁴⁷

Third, to Savatier, the professional fulfills a social mission by protecting his clients. However, the professional also owes a duty to society at large. Professionalism consists in striking a balance between these two social missions. For this the professional needs independence. He needs independence in order to protect his client's interests; he also needs independence to organize. It is through the ethical rules formulated and imposed by professional organizations that the professional will temper the ardor he feels for his client's interest with a thorough regard for the interests of society at large.⁴⁸

Another proponent of the traditional approach to the "liberal" profession, *Bâtonnier* Damien, defines the profession as one which recognizes

material and intellectual independence, a liking for a job well done, a certain disinterest which does not exclude greed or thrift, a certain benevolent fraternalism toward the underdog, public favor considering it one of the ornaments of society, high sense of duty, absolute legal non-accountability, and finally autonomy thanks to its powerful connections, for it is in the last trait that resides the secret of this social category: it belongs to the class who holds power.⁴⁹

Thus, under the traditional approach, *avocats* perceive themselves as the protectors of the ideals of independence.

47. Id. at 40.

48. Id. at 34-46.

49. Communication of *Bâtonnier* Damien to the *Institut de France*, *Gazette du Palais* 1977, doctrine, at 69.

Although the principle of independence had always been understood by lawyers, it had never been expressed in any legislative document or regulation prior to its codification into law in 1971. The silence of the law on the matter of independence is best explained by the belief that "[i]t is not necessary to express something which is obvious."⁵⁰

The breadth of professional independence can be best delineated by reviewing the ethical rules governing *avocat* conduct set forth in the various texts regulating the legal profession. The *avocat* must be independent vis-à-vis his client. This means, among other things, that *honorariums* (fees) must not be tied to the client's pecuniary interest in litigation. All contingent fees are prohibited.⁵¹ This prohibition is imperative, any agreement to the contrary will be considered null and void,⁵² and the *avocat* drawing this form of remuneration will incur severe disciplinary sanctions.⁵³ Independence also dictates that the *avocat* be free to accept or refuse representation of the client, free to conduct his argumentation and free to defend the client's interest according to his and not the client's judgment.⁵⁴

It is in the concept of "incompatibilities" that the principle of independence is made explicit by the law. Incompatibilities are situations which subject the *avocat* to a "bond of servitude," but also those situations "which, although they do not degrade the character of an individual or give occasion to any depreciation of his abilities, nevertheless restrict his will, give others the right to prevail upon his time, and subject him to personal obligations or duties of a subordinate to which he is required to accommodate himself under pain of reprimand or the loss of a more or less lucrative position."⁵⁵ Incompatibilities also involve situations in which the *avocat's* activities are simply motivated by pecuniary gain. Thus, with a few rare exceptions such as teaching or serving as substitute judges,⁵⁶ the profession of *avocat* is incompatible with any *emploi à gages*⁵⁷ (employment for a salary) or *louage de service*⁵⁸ (hiring for services) because of the legal subordination inherent in such a relationship. However, while the texts are unanimous in the belief that the legal

50. Blanc, *supra* n. 32 at 55.

51. See Law No. 71-1130, *supra* n. 7, art. 10, 70. The same prohibition applies to *conseils juridiques*.

52. See Brunois, Note, Cour de Cassation, 4 July 1972, *Dalloz*, 1973 at 251.

53. Lemaire, *supra* n. 22 at No. 471.

54. Law No. 71-1130, *supra* n. 7, art. 7; Decree No. 72-468, *supra* n. 6, art. 57-69.

55. Douai, 31 July 1843, *S.* 43, 2.460, cited in Lemaire, *supra* n. 22 at No. 137.

56. The other exceptions are: associate judges of Tribunals for juvenile delinquents, and members of Social Security Commissions and Agricultural Credit Unions. See Decree No. 72-468, *supra* n. 7, art. 62.

57. *Règlement Intérieur du Barreau de Paris*, art. 37. The term "*gage*" is generally used to designate a salary received by a domestic employee. But in the language of the bar, it simply means "salary," regardless of the type of employment. See Lemaire, *supra* n. 22 at No. 139.

58. Decree No. 72-468, *supra* n. 6, art. 62.

profession is incompatible with legal subordination, there is a divergence of opinion as to whether wage-earning by an *avocat* working for another necessarily implies legal subordination.

It is beyond dispute that an *avocat*'s employment by a non-*avocat* will result in that *avocat*'s disbarment. An *avocat* cannot work as a permanent *collaborateur* of an *avoué*, a *notaire* or a *conseil juridique*. Also, lawyers cannot be registered with the Bar if they work "in house" for private or public employers. Only permanent *collaboration* with another *avocat* is permissible.

The question remains however whether an *avocat* employed by another *avocat* can be a wage-earner. As previously discussed,⁵⁹ the law organizing the legal profession is vague on this point. For example, the law uses the term "remuneration" rather than "salary" and "the person to whom he is bound" rather than "the employer."⁶⁰ Traditionalists insist that the receipt of a salary from any source, even from another *avocat*, entails legal subordination and is thus incompatible with the profession. Although it has been argued that *collaboration* is an employment contract in view of the superior's liability for the *collaborateur*'s activities, traditionalists maintain that this liability does not stem from a relationship of *respondeat superior*, but is simply a function of the non-delegability of the duty owed the client by the *avocat*. They characterize the contract between the *avocat* and his *collaborateur* as a *contrat d'entreprise* (work contract) in which the *collaborateur* retains his independence.⁶¹ Nevertheless, confess the proponents of this concept, to classify the contract of *collaboration* as a work contract sheds only the palest glimmer of light on the problem, considering the multitude of uncertainties which continually assail such a concept.⁶² They admit that "the legal nature of such a contract is not easy to grasp."⁶³ Despite this difficulty, traditionalists are convinced that considering *collaboration* as salaried employment would be irresponsible in light of the law.⁶⁴

Of course, there are certain external similarities between *collaboration* and employment. In both situations, the worker is assigned a particular place to work. The worker must conform to a time schedule set by his superior. There are no salaried employees below the *collaborateur*. Finally, the superior supplies the worker those things necessary for his work. These elements are adopted by the *Cour de Cassation* and other French courts to find an employer-employee relationship.⁶⁵ Despite these similarities, the traditionalists remain firm in their insistence that *collaboration* is not an em-

59. See text accompanying n. 29-44 *supra*.

60. Law No. 71-1130, *supra* n. 7, art. 8, and Decree No. 72-468, *supra* n. 6, art. 74-76.

61. Jestaz, *Revue Trimestrielle de droit civil* 657 (1975).

62. *Id.*

63. *Id.*

64. See *Procureur Général Picca's conclusions*, Cour d'appel de Paris, 23 Feb. 1977, *Dalloz* 1977 at 193.

65. Camerlynck, 1 *Traité du droit du travail* No. 37-45.

ployer-employee relationship, since such a view would render the relationship a "legal incompatibility."⁶⁶ They conclude that *collaboration* is a *contrat innommé* (contract without a name), a category by itself, unlike any contract known to French law.⁶⁷

The Functional Approach

Other segments of the French legal community, especially "*doctrine*" (law professors and academicians), are critical of the traditionalist view. According to the Functionalists, it is unrealistic to deny the existence of an employment contract when the legal relationship between the *avocat* and the *collaborateur* exhibits all the characteristics of employment.⁶⁸ They insist there is no textual basis for characterization of the contract of *collaboration* as unique. Such characterization would place the *collaborateur* in an uncertain status and deny him the social and financial advantages associated with the status of employee.⁶⁹

The Functionalists argue that the *avocat's* independence is not compromised by the classification of a *collaborateur* as an employee. Merely calling the relationship one of employment does not sacrifice the *avocat's* independence, since the crucial question is that of legal subordination. If legal subordination exists in any relationship, be it partnership, association or whatever, incompatibility is present. Incompatibility occurs only if employment actually impairs the *collaborateur's* independence. For example, if a *patron* refused a *collaborateur* his own clients there would be an incompatibility. Also, if a *collaborateur* were threatened with dismissal for refusing to accept a case offensive to his conscience, there would be an incompatibility. A *collaborateur* would then be forced to choose between withdrawal from the relationship with his *patron* or disbarment.⁷⁰

Functionalists cite the realities of other liberal professions to support their view. Architects are authorized to practice their profession as employees of other architects, as members of firms or as employees of municipal governments.⁷¹ Doctors remain members of the Medical Association and retain their professional freedom even though they are employed and paid by hospitals, are unable to set

66. Picca, *supra* n. 64 at 196.

67. Blanc, *supra* n. 32 at 58.

68. Chaput, Note, Tribunal d'instance de Paris, 5 April 1977, *Semaine juridique* 18676.

69. If *collaborateurs* are employees, the *patron* is required by law to pay their professional tax, social security contributions and other benefits such as vacation, right to notice and so on. Their relationship is governed by labor law which is geared to the protection of the worker. The law cannot be displaced by private agreement providing fewer benefits than those provided by law. See n. 4 *supra*.

70. Chaput, *supra* n. 68 at 18677.

71. Law No. 77-2, 3 Jan. 1977 (D. 1977.71), art. 14; cited in Jestaz, Note, Cour d'appel de Paris, 23 Feb. 1977, *Dalloz*, 1977, at 198.

their own fees and are unable to choose their own patients.⁷²

The Functionalists argue that there is a distinction between "external" and "internal" independence and that the traditional incompatibility between the legal profession and the notion of "hiring for services" is based only on the fear that the *avocat* may be subjected to the will of an "outsider." An *avocat* cannot be a *salaarié* vis-à-vis his client or any other "outsider." However if the employer is another *avocat*, the independence of the *avocat collaborateur* is assured since the law requires the strict absence of any legal subordination in such a relationship. Moreover, there is no express legal prohibition against the *avocat collaborateur's* characterization as a *salaarié*. The debates on the Law of 31 December 1971 emphasize the legislature's deliberate silence on the matter. Thus the Functionalists conclude that even though an *avocat collaborateur* may be considered an employee of another *avocat*, there is no reason why this characterization should impair his independence.⁷³

The Functionalists insist that the debate as to the status of the *collaborateur* must leave the realm of metaphysics and face contemporary realities. In recent years, legal practice has grown in both size and complexity. The practice of law in contemporary Europe requires large, sophisticated firms capable of dealing with the increasing diversification of the law. The efficiency required to render legal service dictates more structural organization within law firms.⁷⁴ To the Functionalists, the subordination inherent in the employment status must be viewed as a positive organizational tool rather than a threat to the traditional concept of *avocat* independence. Currently, such "subordination" is no more than the "integration of a professional into the structure of a service or of an enterprise."⁷⁵ To the Functionalists, "legal subordination" should be more appropriately termed "administrative subordination."⁷⁶

Independence and employment do not exclude one another. For example, the Functionalists point to corporate executives who, although they are employees of the corporation, still retain the almost total independence necessary for making the decisions essential to the organization's existence. The Functionalist's approach is an attempt to reconcile the traditional ethical requirements of *avocat* independence with the organizational necessities of the new profession of *avocat*.

The Avocat View

The *avocats* themselves are divided on the question of charac-

72. Soc. 23 Jan. 1974, *Bull. civ.* V, No. 60, p. 55; 5 June 1975, *id.*, V, No. 312, p. 272; *Dalloz* 1975, I.R., at 168, cited in Note, *supra* n. 71.

73. Note, *id.*

74. Chirez, "La Qualité de Non Salarié de L'Avocat Collaborateur," 5 *Droit Social*, n. 65 at 145 (1978).

75. Camerlynck, *supra* n. 65 at No. 37-43, cited in Chirez, *supra* n. 74 at 146.

76. Chirez, *id.*

terizing the relation between the *collaborateur avocat* and his *patron*. The division of opinion exists in both the membership of the National Association of *Avocats* as well as the membership of the National Association of Young *Avocats*.⁷⁷

The split of opinion among senior *avocats* is largely pragmatic. Those who favor the classification of *salarie* for their *collaborateurs* do so largely on account of the organizational benefits inherent in such a relationship. The benefits include a more integrated office, greater *collaborateur* loyalty to the firm and total devotion of the *collaborateur's* time to the firm's affairs. Other *avocats*, especially the vast majority having smaller practices, find the organizational benefits minimal compared to the social and financial burdens resulting from the characterization of *collaborateurs* as employees.⁷⁸

Although these social and financial burdens may be warranted as adequate compensation for the services of a full-fledged lawyer in permanent collaboration, they appear exorbitant for the minimal services rendered by the *avocat stagiaire*. Even those advocating the status of *salarie* for *collaborateurs* are aware of this problem. Many express the concern that few young lawyers will be able to find *patrons* willing to train them if they must be extended the benefits of a *salarie* as provided by law. A compromise has been suggested, providing that the collaboration of the *avocat stagiaire* be subject to the less demanding laws regulating apprentices of artisans.⁷⁹

The young *avocats* in favor of the *salarie* status for *collaborateurs* are understandably attracted to the social and financial benefits of such a classification. Despite the obvious benefits, the majority of young *avocats* oppose the *salarie* classification.⁸⁰ A recent congress of the *Association Nationale des Avocats de France et de la Communauté* explored the "Challenge of the Liberal Profession." One of the speakers, although admitting the material benefits of *salarie* to *collaborateurs*, urged his colleagues to "beware of the consequences of *salarie*." *Salarie*, he said, would deprive the *collaborateur's* rights to private clientele, the right to be free economically and intellectually. He urged the *avocats* to fight for a legal status incorporating all the fiscal and social benefits of *salarie* without being one. Hearty applause accentuated his remarks that *avocats* should resist the "employee mentality" and that sacrificing one's independence for immediate social and monetary benefits was to "besmirch the face of the (legal) profession."⁸¹

77. See Chambonnaud, "La controverse collaboration-salarie" in *Le Défi de la Profession Liberale*, Association nationale des Avocats, 203 (1974). The National Association of Avocats and the National Association of Young Avocats are private organizations.

78. See n. 69 supra.

79. Chaput, see n. 68 supra at 18677, and Jestaz, n. 71 supra at 199.

80. Chambonnaud, supra n. 77 at 196.

81. Id. at 210-15.

THE DEBATE BEFORE THE COURTS

Although the French courts retain the ultimate power of review over the administrative proceedings of the French Bar,⁸² until Mme X brought her case before the *Tribunal de la Seine*, the Courts had not entered the debate over the status of the *collaborateur*. This was due largely to the fact that disputes between *collaborateurs* and their *patrons* were rarely pursued beyond a hearing before the *Bâtonnier*, since *avocats* as a profession are generally reluctant to air their "dirty linen" in public. Mme X, however, was not satisfied with the *Bâtonnier*'s recommendations and took her case to the *Tribunal de la Seine*. Applying the procedures of labor law, the *Tribunal* ordered the parties to appear for a *conciliation*. The defendant Association of *Avocats* failed to answer the summons and the *Tribunal* declared the *conciliation* unsuccessful. The *Tribunal* then ordered the parties to appear on 5 July 1976. During the personal appearance, the defendant refused to respond, alleging that the *Bâtonnier* of the Paris Bar had ordered it not to argue the merits of the case. The defendant argued that sitting as a labor court, the *Tribunal* lacked jurisdiction since the law dictated an inviolable incompatibility between the legal profession and a "hiring for services" contract.

On 9 July 1976, the *Tribunal* entered a judgment ordering an investigation into the facts surrounding Mme X's *collaboration* with the defendant. The *Tribunal* did not rule on the merits of the defendant's jurisdictional argument. The defendant appealed and was joined by the *Bâtonnier* representing the Paris *Conseil de l'Ordre*.⁸³

Before the Paris Court of Appeals the appellants argued that by ordering an investigation into the facts of Mme X's case, the *Tribunal de la Seine* had implicitly conceded the possibility of the existence of a labor contract and that such a concession prejudiced the appellants' case. Further, the appellants reiterated the argument that the entire matter of Mme X's *collaboration* was outside the jurisdiction of the labor courts due to the incompatibility between the status of *avocat* and the status of *salaire*.

In rejecting the appellants' arguments, the Paris Court of Appeals declared that in ordering an investigation into the nature of the legal relationship between the plaintiff and her employer, the lower court had not prejudiced the case. The Court further declared that the determination of the jurisdiction of the lower court is predicated upon the nature of the contract between the parties; absent a written contract required by law, the lower court was justified in

82. Law No. 71-1130, *supra* n. 7, art. 24; Decree No. 72-468, *supra* n. 6, arts. 99-103, 119-126. The *avocat* and/or the prosecutor appeal the decisions of the *Conseil de l'Ordre* before the *Cours d'appel*.

83. The *Conseil de l'Ordre* has the authority to enter any dispute affecting the practice of the profession, particularly where "the rights or prerogatives given to *avocats* by laws, decrees or regulations have been ignored or questioned." See Cremieu, Note *Dalloz*, 1955.417; and Law No. 71-1130, *supra* n. 7, art. 21.

looking to the facts of the case to determine whether there was an employer-employee relationship cognizable by labor law. The Court of Appeals thus found the lower court had not improperly attempted to determine the jurisdictional question. The appeal was dismissed.⁸⁴

Following the decision, the investigation ordered by the *Tribunal de la Seine* continued. After the completion of its investigation, the *Tribunal* handed down its decision on 8 April 1977.⁸⁵ The court began by noting that there was no written contract between Mme X and the firm of *Avocats* as required by law. In the absence of a written contract, the *Tribunal* was required to look into Mme X's particular employment situation to determine the nature of the relationship between the parties. The *Tribunal* found the following facts crucial: (1) Mme X was employed full-time according to a schedule determined by her *patron*. (2) She was not the master of her arguments. Those cases she argued in court were prepared by other *avocats* of the firm. With few exceptions Mme X could not meet the clients. (3) Mme X engaged in no intellectual work, handling only material, trivial chores "similar to those handled by the clerical staff." She took oral or written orders from her superiors. (4) Mme X's compensation was fixed and unrelated to the actual work done. The *Tribunal* remarked however that *salarial* and *avocat* independence are not incompatible, as evidenced by the practices of the medical profession. (5) Mme X worked in a *salle commune* (common room). Although it was not forbidden for Mme X to receive her private clients, she had to receive her clients in the *salle commune* "in the midst of voices, the sounds of telephones, tape recorders, dictaphones and general hustle and bustle. . . ."⁸⁶ Only rarely, if the client was "important," could Mme X use a partner's or permanent *collaborateur's* office. The *Tribunal* considered this lack of privacy for Mme X and her clients an impairment of her right to client confidentiality regardless of the client's financial importance.

The *Tribunal* found that Mme X was integrated into the structure of service in which her work was effectively directed and controlled by oral and written orders for which she was responsible; thus there existed between her and the association of *avocats* employing her a bond of subordination rendering her dependent upon her *patron*; [and] that this dependence was a serious impairment of the freedom that an *avocat collaborateur* should enjoy.⁸⁷

The *Tribunal* also found that fixed compensation constituted a salary, indicative of subordination. The *Tribunal* believed that al-

84. Cour d'appel de Paris, 23 Feb. 1977, *Dalloz* 1977, at 193.

85. Tribunal d'instance de Paris, 8 April 1977, *Dalloz* 1977. I. 589.

86. Id. at 590.

87. Id.

though the *salariat* is compatible with independence, Mme X's situation went beyond a mere *salariat* to legal subordination. The *Tribunal* found in Mme X's situation an association of six *patrons* with twelve *collaborateurs* which destroyed the equality that should exist among *avocats*. The *Tribunal* concluded that Mme X's association "was in fact an enterprise including employers and employees; [resulting in the modification] of the nature of the contract between Mme X and her *patrons*, requiring direction and control which are the characteristics of subordination and dependence."⁸⁸

Based on its findings as to the nature of Mme X's employment, the *Tribunal de La Seine* found it had jurisdiction to act as a labor court and rule on the merits of her complaint alleging improper termination of her employment. The *Tribunal* dismissed the intervention of the *Conseil de l'Ordre* and, under the applicable provisions of labor law, ordered the defendants to pay Mme X F.2500 as one month's wages for notice, F.250 for accrued vacation time and F.10,000 as punitive damages for abusive termination of her employment contract.

Regrettably, the *Tribunal de la Seine*'s decision provides at best a confused answer to the question of whether *salariat*, by its very nature, engenders subordination incompatible with *avocat* independence. The *Tribunal* began by intimating that *salariat* and *avocat* independence were compatible. The *Tribunal* went on however to state that the receipt of fixed compensation was indicative of subordination. Although the *Tribunal* entertained the concept of "administrative subordination" in stating that integration into a structure necessarily implied direction and control, it left unanswered the question whether "administrative subordination" runs counter to *avocat* independence. Although the *Tribunal* apparently answered this question in the affirmative by noting that "an association of six *patrons* facing twelve *collaborateurs* would render non-existent the equality which should, in theory, reign (among the *avocats*) of this firm[.]"⁸⁹ the questions remain whether a *collaborateur* should be disbarred for agreeing to be integrated into such a structure and whether sanctions should be imposed upon the *patron* for providing such a structure.

THE LEGISLATURE'S INVOLVEMENT

The defendants and the *Bâtonnier* of the Paris Bar appealed the judgment of the *Tribunal de la Seine* to the Court of Appeals of Paris. While the appeal was pending, an attempt was made in the French Parliament to influence the outcome of the appeal. This attempt took the form of a rider attached to a *projet de loi* (bill) introduced by the government to modify the requirements set in Law No. 71-1130 for obtaining the degree of a *licence en droit* and for admis-

88. Id.

89. Id.

sion to the legal profession.⁹⁰ The government had tried unsuccessfully to effect the reform by *décret* (executive order).⁹¹ A new school year was almost at hand and the government was eager to have the legislature validate its proposal.⁹² Since the *projet de loi* had a very limited objective,⁹³ it was curious that a member of the *Assemblée Nationale*, a former *Bâtonnier* of the Bar of Chartres, would seize the occasion to introduce an additional article to the government's *projet de loi* which was totally beyond the bill's objective. The new provision, art. 3, provided that "the *avocat* who practices his profession as an *avocat collaborateur*, as a member of a legal corporation or partnership, cannot be an employee. The present disposition, which is interpretive, has the effect of *ordre public*."⁹⁴ The amendment was so remote from the objective of the original *projet de loi* that the *Commission des Lois* of the National Assembly rejected it outright. In explaining the rejection of the amendment however, the President of the *Commission* made the mistake of commenting upon its merits. In expressing his opinion that it was wrong to deny the *collaborateur* the status of employee since the *collaborateur* often lives in difficult conditions and needs at least a minimum "social cover,"⁹⁵ the President of the Commission unleashed a renewal of the perennial debate.

The Minister of Justice endorsed the Commission's rejection of the amendment and urged the National Assembly to do the same. The Minister pointed out that since Law No. 71-1130, organizing the new profession of *avocat*, contemplated the ultimate consolidation of the professions of *conseil juridique* and *avocat*, and since the *conseil juridique* can retain other *conseils juridiques* as employees, to refuse *avocats* the status of employee would be tantamount to a termination of the ongoing merger negotiation between the two professions. A member of the National Assembly questioned the Minister as to whether he was advocating a union of *conseil juridique* and *avocat* which would result in the demise of *avocat* independence.⁹⁶

The author of the amendment confronted his colleagues with this logic: either the legal profession is "liberal" and "independent" with the result that no lawyer can practice his profession as an employee, or *collaborateurs* are employees and are subject to legal subordination. The first alternative is the "obvious" choice and emphasizes the need for the amendment. The second alternative is clearly against the law.⁹⁷ Ultimately, since the government did not

90. See n. 18 supra.

91. The *décret* was challenged on the ground that, being issued by the Executive, it cannot modify a law.

92. The proposed new *Licence en droit* requires three years of study instead of four. Admission to the legal profession requires an additional year and a *matrèse* (master degree).

93. *J.O., Assemblée Nationale*, 23 June 1977 at 4105.

94. *Id.* at 4107.

95. *Id.* at 4104.

96. *Id.* at 4107-08.

97. *Id.* at 4109.

wish to jeopardize the chances of quick approval of the bill by risking what would have been a protracted debate on *avocat* independence, the amendment was quickly approved by the National Assembly.

When the *projet de loi* went to the *Senat* for consideration, the government made a final attempt to have the amendment dropped from the bill, arguing that the status of the *collaborateur* "is a great problem which would require a great debate, . . . which does not find its place in the framework of a *projet de loi* with a very limited and specific purpose."⁹⁸ The *Senat Commission des Lois*, however, did not agree with the government. The *Commission's rapporteur* appealed to the *Senat's* respect for the "sacrosanct power of the Parliament," which had solemnly expounded in Law No. 71-1130 that the legal profession is "liberal" and "independent." The *rapporteur* again reminded the members of the *Senat* that *avocat* independence and *salariat* were incompatible.⁹⁹

Evidently few members of the *Senat* were inclined to challenge the "sacrosanct power" of Parliament. The amendment was quickly approved by the *Senat* on 29 June 1977 and promulgated by the government on 30 June 1977.¹⁰⁰

There is an obvious explanation for the haste with which the amendment made its way through the legislature. The *Conseil de l'Ordre* of the Paris Bar sought such legislation to guide the hand of the Paris Court of Appeals in deciding Mme X's case. It is not insignificant that Mr. Gerbert, the amendment's author, is himself a former *Bâtonnier*. The driving force behind the amendment is most evident in the comments of a *Senat* member who noted that "the courts need to be enlightened," and that the purpose of the amendment was to "make it impossible for the courts to misinterpret the law."¹⁰¹

Art. 3 of the Law of 30 June 1977 on *collaboration* concludes with the provision that it is "interpretive" and has the character of "*ordre public*" (public policy). Because of these two provisions, art. 3's scope is broad.

A law is "interpretive" when "it is limited to identifying, without changing, an existing right which an imperfect definition would make susceptible to controversy."¹⁰² Since it theoretically adds nothing to an already existing law, interpretive laws are retroactive.¹⁰³ Thus the relationship between *avocat* and *collaborateur* as characterized by art. 3 applied retroactively to all such relationships

98. *J.O., Senat*, 29 June 1977 at 1920.

99. *Id.* at 1921-22.

100. Law No. 77-685, 30 June 1977, modifying art. 7,11,12,17 and 54 of Law No. 71-1130 of 31 Dec. 1971 on Reforms of Certain Legal Professions. *J.O.*, 1 July 1977 at 3433.

101. *J.O.*, *supra* n. 98 at 1922.

102. *Soc.*, 19 June 1963, *Gaz. Pal.* 1963 I. 278.

103. Under art. 2 of the French Civil Code, laws are non-retroactive. However, this principle applies only to judges and not to legislators. The non-retroactivity principle can be set aside by (1) a law expressly declared retroactive, (2) a law validating prior

dating back to the time of the promulgation of the 1971 law on the profession of *avocat*. As a result, the new law governs and characterizes the relationship between Mme X and her *patron*. Under art. 3, Mme X could not have been a salaried employee of her *patron*. This finding is strengthened by art. 3, which has the authority of *ordre public*. *Ordre public* governs the freedom of contract and private parties.¹⁰⁴ French law provides that generally parties are free to contract as they please. Such agreements "have the force of law for those who have made them."¹⁰⁵ However, a contract made for an illegal purpose is unenforceable. A purpose is illegal when it is prohibited by law or when it is contrary to *ordre public* or *bonnes mœurs* (good morals). Art. 6 of the French Civil Code provides that "laws relating to public order or good morals cannot be derogated by private agreement." Laws such as art. 6 are *lois imperatives* (imperative laws) which take priority over any parties' agreements to the contrary. A contract in violation of a *loi imperative* is deemed to have an illegal purpose and is thus a nullity.¹⁰⁶

Lois imperatives are unambiguous expressions of the legislature's view of *ordre public* "indispensable to the maintenance of the social order."¹⁰⁷ *Lois imperatives* are considered the means by which the nation is protected from the threat of unbridled private contract.¹⁰⁸ That the authors of art. 3 drafted the prohibition of *salariat* between *avocats* as an *ordre public* provision indicated their intention to leave the Court of Appeals no choice but to rule against Mme X. One commentator observed that "the evil of the *salariat* classification for *collaboration* [must have been deemed by the legislators] so substantial that they decided to use such radical remedies."¹⁰⁹

THE SECOND DECISION

The classification of art. 3 as interpretive made its applicability to Mme X's case automatic.¹¹⁰ Mme X's *patron* and the *Bâtonnier* of the Paris Bar were thus supplied with a formidable weapon. They argued that since the prohibition against *salariat* was *ordre public*, Mme X could not claim she was an employee and ask to receive the benefits conferred by such a status. Additionally, the la-

acts considered null and void or (3) a law expressly qualified as interpretive. See Carbonnier, *Droit civil* 131-35 (1974); Marty-Raynaud, *Droit civil* 184-97 (1972).

104. *Ordre public* is also used by French judges to ignore a foreign law applicable under French conflict of laws rules. In this respect, *ordre public* is comparable to "public policy" in American law, although its scope is broader. See Batiffol & Lagarde, *Droit International Privé* 444-70 (1974).

105. French Civil Code, art. 1134.

106. *Id.*, arts. 1131, 1133.

107. Marty-Raynaud, *supra* n. 103 at 175.

108. Carbonnier, *supra* n. 103 at 108.

109. Chirez, *supra* n. 74 at 149.

110. See n. 103 *supra*.

bor court could not have jurisdiction over the present dispute between *avocats*.

In its decision of 7 November 1977, the Paris Court of Appeals refused to defer to the legislature's will.¹¹¹ The court first addressed the legal profession's incompatibility with the "hiring for services" contract as delineated by the Decree of 9 June 1972.¹¹² The court found this incompatibility to be only an "external incompatibility." As such, the law prohibited only employment relationships between *avocats* and non-lawyers, since such relationships could impair the "liberal" and "independent" character of the *avocat*. When the relationship is between *avocats* exclusively however, the court held that courts must look to the true nature of the specific relationship involved. Absent a written contract, as in Mme X's case, the courts must look to the circumstances surrounding the relationship to determine its true nature. After examining the circumstances, the court concluded that "all the usual characteristics of legal subordination were present."¹¹³ Significantly, the court noted that an employment contract is not *per se* incompatible with the "independence required in an *avocat's* rendering assistance to and representing his clients."¹¹⁴

The court's finding was rather curious. First the court took into account the circumstances behind the bill's quick movement through the legislature. The court emphasized particularly the fact that the bill was introduced while the court was still deliberating upon Mme X's case, despite the opposition of both the *Commission des Lois* and the Minister of Justice. Second, the court ruled that the law applied only to: (1) members of legal corporations, (2) members of partnerships or (3) *collaborateurs*. Outside these categories, said the court, the status of employee is not ruled out. In the present case, absent a written agreement, such a status was found to exist through the conditions surrounding Mme X's employment: Mme X was assigned fragmentary and trivial work, she was confined to a common office, had no real independence, was deprived of any significant initiative, and could only take explicit orders. In short, the court found Mme X's status that of veritable subjection. The court further declared that since Mme X's employers had failed to provide her with a written contract as provided by law, they had failed to abide by the law and hence infringed upon her independence.¹¹⁵ As a result, the court affirmed the lower court's award of both compensatory and punitive damages.¹¹⁶

111. Cour d'appel de Paris, 7 November 1977, *Dalloz*, 1977 at 652.

112. See n. 58 *supra*.

113. Cour d'appel de Paris, *supra* n. 111 at 655.

114. *Id.*

115. *Id.* at 656.

116. At the time of writing, the case of Mme X was being appealed to the *Cour de Cassation*.

The Unresolved Issues

Although the commentators did not object to Mme X's vindication in the Court of Appeals, they criticized the court's handling of the concepts at issue in the case.¹¹⁷ For the court to carve out of art. 3 an exception for *collaboration* between *avocats*, to declare that no *collaboration* existed between Mme X and the other *avocats*, is unjustified by any possible meaning attributable to the law. The commentators criticize the court for gutting the law of its substance¹¹⁸ by "sullenly" refusing to apply the law as written. They wrote that the court should have stated in which circumstances the inevitable dominance of the *patron* results in the legal subordination of the *collaborateur*, rendering the relationship between them both illegal and unethical. Rather than draw the line between legally and ethically approved *collaboration* and unallowable legal subordination, the court merely blurred further an already undefined distinction.¹¹⁹

As a result, the "mini-revolution" begun by Mme X's case did little to clarify the legal status of the *collaborateur*. Although the controversy did result in the enactment of art. 3 and its provision that, as a matter of public policy, the *collaborateur* cannot be employed in "legal servitude," the exact nature of "legal servitude" is hopelessly unclear. Thus the conflict between *avocat* independence and the organizational realities of modern collaboration in French law practices remains unresolved.

THE AMERICAN MODEL

In the United States no one disputes the view that associates are employees. The term "associates," when used by the American Bar Association, designates "attorneys who are employed by another attorney or law firm and do not share responsibility or liability for the acts of the firm."¹²⁰ Additionally, the National Labor Relations Board has interpreted the National Labor Relations Act to treat associates as employees.¹²¹

In America as in France, however, the model of the lawyer as an independent professional is still nurtured. The American Bar Association's Code of Professional Responsibility speaks of the "independent professional judgment" of the lawyer on behalf of the client.¹²² Geoffrey C. Hazard, Jr. considers "analysis of the legal and practical dimensions of the clients' position, evaluation of the risks

117. See Jestaz, *Dalloz*, 1977 at 652 and Chirez, *supra* n. 74 at 150.

118. Jestaz, *id.*

119. *Id.*

120. A.B.A. Commission on Professional Ethics, Opinions, No. 310 (1967).

121. However, few associates seem anxious to unionize. They are afraid that unionization may jeopardize their chance for promotion in the firm. Pressures of conformity are such that even among associates there is a perception that those who seek unionization are "either mediocrities in need of such group support, or masochists." See Sloane & Witney, *Labor Relations* 14 (1977) cited in Note, "Unionization of Law Firms," 46 *Fordham L.Rev.* 1008 at 1029 (1978).

122. A.B.A. Canons of Professional Ethics, No. 5.

and potential gains involved in pursuing alternative courses of action . . . and recommendation of what the lawyer believes to be the optimal course of action for the client"¹²³ the hallmarks of the legal profession. The French notion of *avocat* independence is echoed in William Kornhauser's view of the American professional's "extensive autonomy in exercising a special competence."¹²⁴

Despite the theoretical similarity between French and American notions of professionalism, autonomy is perhaps the least visible attribute of associates in American law firms. Unlike their French counterparts, associates are not allowed to have their own exclusive clientele.¹²⁵ If associates do have personal clients, they may be forbidden from receiving them at the firm's offices. If individual associates' clients are brought to the firm, they may be considered the firm's clients rather than the associate's. Generally, inexperienced associates are assigned particular aspects of a client's work. Often the associate is unaware of the client and equally uninformed about the broader aspects of the particular problem upon which he is working.

Although the Code of Professional Responsibility provides that "a lawyer should represent a client zealously within the bounds of the law,"¹²⁶ many associates in reality work for their supervising partner rather than the client. Even where he has contact with the client, the associate can rarely act according to his own beliefs as to the client's best interests. When associates of a large Wall Street firm were asked whom they try to please, their supervising partner or the client, the common answer was that primary responsibility was to the partner rather than the client.¹²⁷ One associate confessed: "I have had to do things I thought were not right for the client, but the client is not the individual lawyer's but the firm's client. When the firm fixes policy, that has to be my own policy."¹²⁸ Another associate felt that associates inevitably become "yes-men."¹²⁹

It has been suggested that associates are traditionally expected to debate questions of law with their superiors.¹³⁰ A partner in a large firm expressed the opinion that if there were cause for a debate upon a legal matter, he "would feel horrified if [the associate] did not raise hell."¹³¹ But associates are well advised to take such

123. Hazard, *Ethics in the Practice of Law* 77 (1978).

124. Kornhauser, *Scientists in Industry: Conflicts and Accommodation* 11 (1962) cited in Smigel, *The Wall Street Lawyer* 265 (1973).

125. A Cleveland firm, perhaps the last bastion of associate autonomy, allowing associates to operate their own private practice while maintaining their affiliation with the firm, finally had to give up this system because "it just became too difficult to manage." *The National Law Journal*, 28 January 1980.

126. A.B.A. Canons of Professional Ethics, No. 5.

127. Smigel, *supra* n. 123 at 299.

128. *Id.* at 298.

129. *Id.*

130. Smigel (n. 123 *supra*) noted that this is the main difference between law firms and other bureaucratic organizations.

131. Smigel, *id.* at 322.

statements with a grain of salt. The associate must know when to desist in any debate with superiors. Although his failure to argue a point of law may detrimentally affect an associate's opportunity for promotion, not to know when to stop is fatal. An associate does not often take the disagreement to the firm's client. Since, as a practical matter, associates work for their firm and not the client, going past a superior to the client might be tantamount to professional suicide. French law protects the *collaborateur's* right to turn down assignments he considers against his conscience, but in American law an associate's right to refuse an assignment is "unusual."¹³² If the Code of Professional Responsibility states "comprehensively the rules by which lawyers should perform their calling,"¹³³ the code apparently does not apply to associates. Since the organizational realities of American law firms dictate that associates obey orders, associates must forego autonomy. As the firm grows larger, the greater is the need for integration and the broader the gap between ethical dictates and organizational realities.

The American Bar allows for the sacrifice of associate autonomy by distinguishing between "internal" as opposed to "external" controls of associates. Essentially, although control of lawyers by sources external to the firm is impermissible, control from within the organization is not merely "proper" but "salutary."¹³⁴ This distinction between internal and external controls however is perhaps little more than an *ex post facto* rationalization of organizational realities, since both controls prevent the lawyer from "performing his calling" and exercising his "independent professional judgment."

Curiously, although individual lawyers and associates feel the strain of the dilemma,¹³⁵ the American legal community has failed to address itself to the conflict between the ethical dictates and the organizational realities of the profession. This indifference is perhaps part of an ideological shift in American society. The autonomy and non-conformity inherent in the Protestant Ethic may have been displaced by a growing belief in the value of teamwork. Teams must be organized to be effective. In a law firm, organization means taking orders and respecting organizational rules.

CONCLUSION

The American organizational model has had an impact on French society.¹³⁶ With the growth and prosperity of France in the "hour of Europe," the French legal community is acutely aware of the need for reconsideration of the value of organizations. But

132. Id. at 331.

133. Hazard, *supra* n. 122 at 19.

134. Commission on Professional Ethics, Opinions, No. 334 (1967).

135. See Smigel, *supra* n. 123 at 205-340.

136. See, for example, Servan-Schreiber, *Le Défi Américain (The American Challenge)*, translated from French by Ronald Steel). This French best-seller extols the virtues of the American organizational model.

many *avocats* are unwilling to renounce professional independence and accept the American model. The tension between the past and the present, the struggle between professional independence and organizational dictates, and the search for a way to reconcile these contradictory forces have all contributed to the as yet unresolved "mini-revolution" concerning the status of the *collaborateur*.