

**SELF REGULATION OF BARS / LEGAL PROFESSION
SITUATION IN NEDERLAND**

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INTRODUCTION

According to the American writer Water Lippmann, “If everyone thought the same thing, no one would be thinking”.

It's therefore a privilege to exchange opinions with colleagues from different Member States about such an important subject as the “self-regulation of bars”.

I would briefly like to explain the following:

- the Dutch situation since 1952, the time at which the Counsel Act came into force.
- Opinions regarding the place of the Dutch legal profession in the legal system and under the rule of law, as expressed in 2006 in an excellent report.
- The current ominous developments and, finally, the opinions of the Netherlands Bar Association and myself as Dean of the Bar Association in The Hague and since 1991 member of the lawyers' parliament in the Netherlands, the Board of Representatives.

In doing so, I will of course turn to the issues being dealt with in this debate concerning “Regulation and Independency”.

What is the ideal situation and what is reality.

As the great Flemish writer Willem Elsschot wrote in 1910 in a rather sombre poem:

“Between dreams and deeds, laws and practical objections remain”. And I'm inclined to say that this applies particularly to politicians who have lost sight of the *Trias Politica*.

THE DUTCH COUNSEL ACT (1952)

After the Second World War, the legal profession – the bar – was diminished. Its skills and character had deteriorated and the *corps d'esprit* had waned (quote from *Twee eeuwen advocatuur* by Emile Hensen, page 181).

Dutch lawyers wanted a stronger organisation than an association and a national bar with powers to prescribe rules relating to, for instance, training and effective disciplinary proceedings. Moreover, there was a desire for a council to represent the Netherlands Bar Association.

Government control should be kept to a minimum: the government should have only one opportunity to interfere, that is to say in the drafting of the law, and there should be repressive supervision only if the regulations of the bar conflicted with the public interest of an effective legal system.

In 1952, the statutory arrangement of the legal profession in a public-law professional organisation gave the legal profession a solid basis in which it was its own boss without government interference, while retaining the possibility of imposing rules and binding all its members.

Given the huge importance of the legal profession under the rule of law and the privileges of the bar, such as the exclusive right to plead in court and the lawyer-client privilege (confidentiality), repressive supervision by the Crown is required on the basis of Section 154 of the Dutch Constitution. That power has been used only twice in 60 years.

The Netherlands Bar Association has a public responsibility for the effective administration of justice.

In addition to a General Council, the Netherlands Bar Association consists of 19 local organisations (shortly to be reduced to 10 or 11), districts and a Board of Representatives, which can be considered a lawyers' parliament as referred to earlier, a general dean and 10 local deans chosen by the parliament at the annual meeting.

VAN WIJNEN COMMITTEE 2000

In 2006, at the request of the Minister of Justice, a committee of expert researchers and lawyers reported to the Dutch parliament on the exceptional position of lawyers under the rule of law and their privileges.

The reason for this report was the huge changes that were taking place within the legal profession (greater commercialisation, globalisation, specialisation, etc.).

Access to legal aid for private parties and the quality, structure and organisation of the bar were also scrutinised by the committee. The current general dean, Jan Loorbach, was one of the lawyer members of the committee.

The centuries-old core values of the legal profession were reconfirmed:

1. Partiality (the most distinctive value in my opinion)
2. Independence
3. Integrity
4. Confidentiality
5. Expertise

The committee defined a sixth core value: "public responsibility for an effective administration of justice".

Following debate, this final value was eventually omitted from the new draft counsel act.

For individual lawyers, this value is at odds with the "independence" from government and is part of professional integrity.

In my opinion, however, this value is the *raison d'être* and the mission of the Netherlands Bar Association.

In the Netherlands, these values have been incorporated since the Middle Ages in the oath that must be taken by lawyers.

I have an antique copy of the “Statutes of the City of Leiden” dating from 1657, in which the lawyer’s oath applicable since 1545 is laid down. The values I just mentioned are stated in full.

This was used in the explanatory memorandum to the draft of a new counsel act in order to provide an historical basis for this value.

SELF-REGULATION

For the purposes of debate, I would like to share several comments included in the 2006 report:

“The legal profession functions within the social context of society, the economic context of power and the normative context of the rule of law”

“An essential characteristic of the rule of law is that the citizen, the litigant, not only has rights, but must also be able to enforce them”

“Unobstructed access to the administration of justice and the courts is vital”

That access cannot be achieved without proper legal assistance, with the citizen having the possibility of opting for a lawyer as legal assistance provider, in view of the lawyer’s exceptional position (confidentiality obligation, entitled to lawyer-client privilege and subject to rules of conduct and disciplinary law).

CURRENT DEVELOPMENTS

Whereas the three most important core values of “partiality, independence and confidentiality” were more or less undisputed in 2006, these are at risk in 2012.

- Partiality is at risk because the austerity-minded Dutch government wishes to continue to impede access to law via lawyers.
- Funded legal aid is continuing to be dismantled, court registry fees are still increasing and a lawyer’s exclusive right to plead in court is being continually eroded.
- Under the pretext of the threat of terrorism, the government is increasing its power by imposing excessive supervision.

Paradoxically, the government and we lawyers are increasing the quality demands made on the legal profession and are therefore prejudicing the position of lawyers, while simultaneously our protected position and privileges are being increasingly eroded.

The independence of lawyers is also under strain. This is because the Minister and State Secretary of Justice, whose department is now known in the Netherlands as the Ministry of Security and Justice, wish to incorporate the supervision of lawyers into a central body, without lawyers, the members of which are to be appointed by the minister and for which the costs are also budgeted by the minister. That is a serious threat to our independence. At a time when the government is increasing its powers with respect to the individual, an independent legal profession is required as a counterbalance.

Independence is also at risk in the proposal for a new counsel act.

The Netherlands Bar Association and the deans are putting up fierce resistance and are lobbying relevant members of parliament. Up until now, their efforts have had little effect on the government but they are having more success among various sections of parliament.

As a result of the pressures being exerted, our own supervision by the local bar associations and deans has become even more professional, coordinated and unified thanks to national consultations held monthly by the deans.

The supervision is focusing on more preventative action, on pro-activity by deans or members of the supervisory councils visiting law firms, and by intervening directly rather than waiting for signals.

In this way, the Netherlands Bar Association hopes to deflect the influence of government.

For the individual litigant, i.e. the citizen, a lawyer must be able to act against the government fiercely and efficiently and without government interference.

The government has no business in the work of lawyers as long as we organise our supervision effectively and in the interest of the proper administration of justice.

MY OPINION AND CONCLUSION

After the ideals that followed the Second World War, we have now experienced a 25-year period of utilitarianism.

Since the mid-1980s, the focus has been entirely on money, markets and efficiency. Immanuel Kant has never been sidelined more than when Michael Douglas, who was portraying Gordon Gekko in the film Wall Street, proclaimed that "Greed is good".

According to the Dutch philosopher Ad Verbrugge, we are returning to our values, and utilitarianism and respect for values alternate in periods of approximately 25 years.

If we – as a modern guild of quality legal assistance providers – embrace the centuries-old global values of our profession, and train young lawyers in and focus our supervision on those values, we will occupy a unique position in the market.

Those values unite us and apply to those working independently as well as to those working in large commercial firms.

That modern guild must be open to everyone willing to embrace our values and this should be clearly communicated to society.

Supervision is a matter for us and not the government and our independence must be protected at all times. If not, the rule of law – of which we are an integral part – will deteriorate.

In a marvellous book about the Dutch legal profession in the Second World War, Joggli Meihuizen describes how the lawyers' associations – the predecessors of the bar – failed, but individual lawyers often succeeded in protecting the interests of citizens.

European human rights impose more obligations on us than just earning money.

The poem by Willem Elsschot I quoted earlier continues as follows: “Between dreams and deeds, laws and practical objections remain and melancholy, which none can explain and which comes in the evening when one goes to sleep”.

Let’s not become melancholic and let’s not go to sleep. Instead, let’s pursue our profession on the basis of our values and use them to regulate our profession, our independence from government and excessive commercialisation.

Perhaps I’m just a romantic dreamer, but as you know: “If everyone thought the same, no one would be thinking”.

Ernst van Win

Dean of the Bar Association in The Hague