

Editors:
A. Uzelac
C.H. van Rhee

The Landscape of the Legal Professions in Europe and the USA: Continuity and Change



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The Landscape of the Legal Professions in Europe and the USA:
Continuity and Change

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LIST OF ABBREVIATIONS

ABGB	Algemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
ACAS	Advisory Conciliation and Arbitration Service
AD	Anno Domini
ADR	Alternative Dispute Resolution
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
ALI	American Law Institute
A&M	Arbitration and Mediation
APMF	Association pour la Médiation Familiale (French Family Mediation Institute)
Art.	Article
BAFM	Bundes-Arbeitsgemeinschaft für Familien-Mediation (German Family Mediation Institute)
BBMC	Brussels Business Mediation Centre
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBI	Bundesgesetzblatt (German Official Journal)
B-VG	Bundes-Verfassungsgesetz (Austrian Constitution)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Case law of the German Constitutional Court)
CCBE	Council of Bars and Law Societies of Europe
CEDR	Centre for Effective Dispute Resolution
CEPEJ	European Commission for the Efficiency of Justice of the Council of Europe
CMAP	Centre de Médiation et d'Arbitrage de Paris (Mediation and Arbitration Institute of Paris)
CNUE	Council of the Notariats of the European Union
CPR	Centre for Public Resources

List of Abbreviations

D66	Democraten 66 (Dutch liberal democrat party)
DRiG	Deutsches Richtergesetz (German Law on Judges)
dRPfIG	Deutsches Rechtspflegergesetz (German Law on Rechtspfleger)
EC	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EEA	European Economic Area
EUR	European Union of Rechtspfleger
FLAA	Finnish Legal Aid Act
FMCS	Federal Mediation and Conciliation Service
FPRY	Federal People's Republic of Yugoslavia
GEMME	Groupement Européen des Magistrats pour la Médiation (European Association of Mediation Magistrates)
GG	Grundgesetz für die Bundesrepublik Deutschland (German Basic Law)
GUO	Government Urgency Ordinance
GWMK	Gesellschaft für Wirtschaftsmediation und Konfliktmanagement (Austrian Association for Business Mediation and Conflict Management)
HMO	Health Maintenance Organization
IBA	International Bar Association
ICC	International Chamber of Commerce
ISTAT	Italian National Institute of Statistics
JAMS	Judicial Arbitration, Mediation and ADR Services
KNB	Koninklijke Notariële Broederschap/Beroepsorganisatie (Royal Dutch Notarial Society)
LAA	Legal Aid Act
LLR BiH	Law on the Land Register in Bosnia and Herzegovina
MK	Magyar Közlöny (official Journal of Hungary)
MP	Member of Parliament
MU	međunarodni ugovor (international agreement)
NFL	National Football League
NGO	Non-Governmental Organisation
NLAA	Norwegian Legal Aid Act

NMI	Netherlands Mediation Institute
NMI	National Magistracy Institute
No.	Number
NOU	Norges offentlige utredninger
öRPfIG	Österreichisches Rechtspflegergesetz (Austrian Law on Rechtspfleger)
PE	Permanent Education
PPOA	Public Prosecutor's Office Act
Preuß.JMBL.	Preußisches Justizministerialblatt (Prussian Journal of the Ministry of Justice)
PvdA	Partij van de Arbeid (Dutch Labour Party)
RGBl.	Reichsgesetzblatt (Official Journal of the German Empire)
RPF	Reformatorsche Politieke Federatie (Dutch protestant party)
SAOA	State Attorney's Office Act
Sb.	Sbirka Zakonu CR (Official Journal of the Czech Republik)
SDOA	State Defender's Office Act
SFRY	Socialist Federal Republic of Yugoslavia
SMC	Superior Magistracy Council
SPIDR	Society of Professionals in Dispute Resolution
TAR	Tribunale amministrativo regionale (Italian Regional Administrative Court)
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
T.L.L.	Thesaurus Linguae Latinae
UK	United Kingdom
UN	United Nations
URH	Ustav Republike Hrvatske (Constitution of the Republic of Croatia)
U.S.	United States (of America)
UWV	Uitvoeringsinstituut Werknemersverzekeringen (Dutch Social Security Board)
vFAS	Association of Family Law Lawyers Divorce Mediators
VNG	Vereniging Nederlandse Gemeenten (Dutch Association of Municipalities)
VVD	Volkspartij voor Vrijheid en Democratie (Dutch conservative liberal party)

List of Abbreviations

ZS	Zakon o sudovima (Law on Courts)
ZZK	Zakon o zemljišnim knjigama (Land Register Code)

INTRODUCTION

A. Uzelac
C.H. van Rhee

THE LANDSCAPE OF THE LEGAL PROFESSIONS IN EUROPE AND THE USA: CONTINUITY AND CHANGE

1. Introduction

A profession may be defined in a variety of ways. Obviously, specialised skills are involved, many of which are acquired through intellectual training. Also, the members of a profession enjoy a certain degree of freedom in the performance of their tasks, usually without being subject to strict hierarchical structures. They are often bound by strict ethical regulation, in view of the personal and confidential nature of many of the professional services they offer.¹ Consequently, it is not a very bold statement if one claims that lawyers firmly belong to a profession, in this case the legal profession, which forms the subject of the present volume. However, at the same time this claim may be a bit misleading due to the use of 'profession' in the singular. This is not so much the case for the United States of America,² but for Europe it certainly is. In the U.S. the legal profession is rather uniform in character, in the sense that a lawyer, although operating in a market that is relatively divided across geographical lines, may perform a large number of tasks that on the European Continent are performed by different, highly specialised legal professionals.³ In Europe, these professionals belong to various distinct legal professions with distinct professional training programmes, different career paths, different professional organisations and different Codes of Conduct. Professionals such as judges, notaries, advocates and state attorneys do not view themselves in the first place as a 'lawyer', as may be the case outside of Europe, but foremost as a member of the particular legal profession they belong to. This is due to the fact that at an early stage in their careers, often directly after leaving university, lawyers opt for a specific career path within one of these professions, joining specialised training programmes (the exception being Germany, where post-university training

¹ De Roo & Jagtenberg. References to an author or authors without a further indication, both in the footnotes and in the main text, are to the various contributions to the present volume.

² Marcus.

³ Marcus.

organised by the State still aims at producing all-round lawyers). This choice is usually final because changing career paths from one legal profession to another is in many European jurisdictions hard if not impossible to achieve.

The difficulty of changing career paths is enhanced by the fact that even at university level there is a certain degree of specialisation. Although it cannot be denied that European law faculties still aim at providing law students with an overall view of the law, focusing on the grand concepts, classifications, distinctions and principles, at the same time various rather specialised legal educational tracks have become available. The introduction of the Bachelor-Master structure in many European countries following the so-called Bologna Declaration on the European Space for Higher Education⁴ has only enhanced this tendency with the introduction of some very specialised legal Master's programmes.

The present volume does not deal exhaustively with all legal professions. Enforcement officers such as court bailiffs and *huissiers de justice* are, for example, excluded from this volume since they were focused on in a previous publication.⁵ The main aim of the present volume is to focus on professions which have not been discussed in the previous book, which are interesting from a comparative perspective and which have been subject to considerable change in the last few decades. This has resulted in two contributions on the legal professions in general in the United States and in Romania written by Richard Marcus and Sebastian Spinei, respectively, followed by contributions focusing on the judge (Patrick Keppenne, Niels Pepels, Bob Assink, Marc Dekkers & Fokke Fernhout), the Latin Notary (Kees Cappon and Christian Koller), Advocates (Giuseppe Finocchiaro, Elisabetta Silvestri, Jon T. Johnsen and Floris Bannier), the *Rechtspfleger* (Aleksandra Maganić), the State Attorney (Slađana Aras), the court expert (Francesca Ferrari, who claims that the court expert should indeed be viewed as a legal professional), and the mediator and the arbitrator (Rob Jagtenberg & Annie de Roo, and Ivan Milotić). The volume concludes with a contribution by Tomislav Karlović on the collaboration of various legal professions in providing for the needs of legal practice by way of the introduction of *Sicherungsübereignung* in Croatian private law, following the nineteenth-century German example.

2. The Latin Notary

The Latin notary finds his origins in Lombardy⁶ and was further developed in France at the time of King Louis IX (thirteenth century). In France litigation came to be the domain of the King's Council, whereas non-litigious matters were handled by the clerks of the court. These clerks were charged with drafting instruments containing the terms of the agreement reached by the parties, and these instruments derived their authority from the fact that they were sealed on behalf of the King, evidencing the King's authority attached to the document. Napoleonic legislation

⁴ See <<http://ec.europa.eu/education/policies/educ/bologna/bologna.pdf>> (last consulted on 7 March 2011).

⁵ Rhee & Uzelac 2010.

⁶ Cappon.

from the start of the nineteenth century (the Ventôse Law of 1803) formed another milestone in the development of the modern Latin notary in large parts of Europe, but certainly not the origin as is sometimes claimed.⁷

At the outset it should be underlined that the Latin notary has little in common with the traditional Anglo-American notary public.⁸ What sets the Latin notary apart is that he enjoys *publica fides*, guards the legality of the transactions performed in his presence, and keeps a record of these transactions. As both Kees Cappon and Christian Koller state in their contributions to this volume, the documents drafted by him (or her; for reasons of convenience, *he* forms will be used throughout this introduction) and issued to the parties provide *prima facie* proof in court. This evidential power not only concerns the identification of the parties and whether they themselves have signed the document, but also all of the other facts mentioned in the document. Additionally, these notarial documents may be enforced in the same manner as judgments of a court of law.

Due to his consequential tasks, in continental European jurisdictions the notary needs a university degree in law, usually obtained after having studied notarial law for a number of years. These consequential tasks have also resulted in his title being protected in large parts of Europe. This is obviously different in Common Law jurisdictions, where the notary public enjoys a considerably lesser status and where the documents produced by him have traditionally not enjoyed specific evidentiary status in court (although in England & Wales this changed in 2005).⁹

In his contribution to the present volume, Kees Cappon shows that Dutch notaries are experiencing difficult times. Apart from the current financial crisis, this is due to the fact that market forces were introduced into the profession in the 1990s. This changed the outlook of the profession considerably, since for a long time it was protected from competition by fixed tariffs and fixed places of establishment. However, although their work has changed dramatically, also due to developments in communications and information technology, according to Kees Cappon this does not mean that the Latin notary has changed beyond recognition. The author holds that fixed prices and fixed places of establishment cannot be regarded as essential characteristics of the Latin notariat, but that these features only date from the nineteenth century. The central feature of the Latin notariat consists, in his opinion, 'solely in the power to issue self-authenticating documents'.

Christian Koller subsequently focuses on the future of the notarial profession in Europe, and especially on the future of the Latin notariat given the fact that it has come under attack by the European Commission and national competition authorities. The attack is aimed at the various national regulations the Latin notary is subject to, among them the nationality requirement. The author holds that notaries should not be treated in the same manner as other professional service

⁷ This is emphasised by Cappon.

⁸ See also Koller.

⁹ See *The Organisation and Function of the Notarial Professions in the United Kingdom and Ireland*, p. 3, available at: <http://www.scrivener-notaries.org.uk/docs/Organisation_and_Function.pdf> (last consulted on 12 April 2011).

providers due to *inter alia* their important role as state officials in non-contentious matters ('preventive administration of justice', issuing self-authenticating documents). However, according to the European Commission the nationality requirement for notaries is in contravention of Article 49 Treaty on the Functioning of the European Union (TFEU) (prohibition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State), whereas the exception to the freedom of establishment in Article 51 TFEU (esp. the 'official authority' exception) does not, in the opinion of the Commission, apply to the activities of notaries. In his contribution, Christian Koller provides a thorough analysis of Article 51 TFEU and discusses the consequences of its applicability or non-applicability to the Latin notary for the future of the Latin notarial profession in Europe.

3. The Advocate

The most diverse group of lawyers in Europe is what in U.S. legal parlance is called attorneys at law. In Europe, attorneys at law are usually known as advocates, but in the present volume we also find them referred to as 'lawyers' *tout court*.¹⁰ Advocates offer their clients legal advice and also represent them in court. In most continental European jurisdictions, these advocates used to be complemented by procurators, who were involved in handling the administrative matters of court cases and who were usually admitted to practice in a particular court district only. However, during the last few decades many countries have opted for abolishing the procurator, allowing the advocate to handle the whole lawsuit himself. This is also due to the fact that many local court practices have disappeared with the introduction of more national uniformity, which has made knowledge of local court practices superfluous. Although a division of the legal profession along the lines of advocates and procurators has never existed in the U.S., the introduction of more national uniformity in the law has also had considerable influence in this country during the twentieth century. As Richard Marcus shows in his contribution, the introduction of the Federal Rules of Civil Procedure in 1938, uniform law and the various restatements of the law of the American Law Institute have allowed legal practitioners to provide their services nation-wide, making it possible for them to leave the confines of their own state. Currently, the availability of legal information on the Internet has opened even wider avenues to them.

Advocates offer their services within a variety of settings. According to Floris Bannier, advocates have changed from gentlemen exercising a noble profession into businessmen providing legal services to those who are prepared to pay. In many countries, the single practitioner or small law firm has disappeared, at least to a certain extent, and has been replaced by what Professor Marcus describes as Big Law: extremely large law firms in which many of the lawyers have changed from an independent practitioner into often nothing more than an ordinary employee

¹⁰ E.g. Spinei.

working for a salary.¹¹ This has resulted in skyrocketing prices for legal services and often a less personal approach towards the client. Interestingly enough, the author discerns a movement in the direction of smaller law firms in the U.S. as a result of specific demands in the legal services market and especially the fact that due to technological developments smaller law firms are now able to offer similar or even better services at lower prices than the big law firms.

Advocates, whether they work as a single practitioner or in a (big) law firm, are in many countries viewed as public citizens. Just as notaries, they need to observe some core values and duties.¹² The main core value is, according to Professor Bannier, 'Integrity', from which all other values and duties can be deduced. One of these duties is that advocates carry certain responsibilities regarding the quality of the administration of justice. This results in a prohibition to demand excessive fees, although the qualification of 'excessive' may be subject to discussion. The prohibition is important since the bargaining powers of the advocate and his client shift dramatically at the expense of the client when litigation has been started. In various States, therefore, fees are officially regulated. However, such regulation is currently thought to be problematic when viewed from the perspective of sound competition. According to some authors, advocates are offering an ordinary service and should not be dealt with differently from other service providers. Different points of view on this matter are noticeable in the Italian political and legislative debate, as is shown by Elisabetta Silvestri. This author discusses the Italian Bersani Decree, which was introduced in 2006 and which aimed at the deregulation of – among other things – the fee system for advocates. On the basis of statistical information, her colleague, Giuseppe Finocchiaro, shows that concerns about the deregulation of the Italian fee system are unwarranted, even though currently attempts are being made to reintroduce minimum fees for advocates. Such attempts are surprising since they may be in contravention to European and global measures aimed at sound competition, as may also be the case with the present methods of licensing lawyers in the United States. According to Richard Marcus, the World Trade Organization is currently investigating to what extent U.S. licensing methods disturb fair trade.

The responsibility for the quality of the administration of justice also includes providing legal services to litigants who cannot afford such services. Here we are obviously referring to the *pro bono* system, although this is not the only, and in Europe not even the preferred manner, for providing legal services for those in need. Jon T. Johnsen discusses in his contribution two other popular legal aid systems: the provision of legal services for a (fixed) fee paid by the State (*judicare*

¹¹ On lawyers working for a salary, see also Finocchiaro.

¹² See e.g. *the Charter of Core Principles of the European Legal Profession* at: <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1_249308118.pdf> (last consulted in April 2011); *the Code of Conduct for European Lawyers* at: <http://www.lff.lu/fileadmin/redaction/documents/Legal_texts/Code_Lawyers_EU_ENG.pdf> (last consulted in April 2011), and *the United Nations Basic Principles on the Role of Lawyers* at: <<http://www2.ohchr.org/english/law/lawyers.htm>> (last consulted in April 2011).

schemes), and the provision of such services by public legal aid offices employing salaried staff. The author shows that the way legal aid is organised has a considerable impact on its costs, coverage and quality. In Finland, where public legal aid offices are in charge of providing legal services to those who cannot pay an advocate, the costs of the system are lower, whereas coverage is better than in Norway, where the State relies on a *judicare* system. The Norwegian preferences therefore seem unjustified, but according to Professor Johnsen they are explained by the success of the Norwegian legal profession in protecting their interests. Such success is especially likely where the number of lawyers in Parliament and in the Government is high, as is highlighted by the difficulties in respect of the application of the 2006 Bersani Decree in Italy.¹³

Apart from duties in respect of the quality of the administration of justice, advocates also have the duty to avoid conflicts of interest, as is stated by Floris Bannier in this volume. Traditionally this was held to mean that advocates should not have a personal interest in the cases litigated by them. From this perspective, contingency fees as well as conditional fees and multi-disciplinary partnerships were – and in many jurisdictions still are – viewed as problematic.¹⁴ However, from several papers in this volume it appears that ideas in this area are subject to change.¹⁵ As regards fees, this is obviously the result of the fact that the system of state paid legal aid in many countries has been stretched to its limits.

Finally, we would like to mention the advocate's duty to act in a dignified manner. It is of course hard to explain exactly what this duty entails, but in many countries it has resulted in the advocate being prohibited to advertise for his services. As some papers in this volume will show, rules in this respect are currently becoming more relaxed, even though professional bodies in some countries are still fighting against these innovations which are specifically allowed by modern legislation in, for example, Italy.¹⁶

Although advocates were for a long time not allowed to offer their services outside their country of origin, this has changed as a result of European regulations in this field. As is, for example, discussed in the contribution by Sebastian Spinei, currently lawyers from one EU Member State are allowed to practise in other EU Member States, although certain restrictions and special requirements continue to exist.

Here, some remarks need to be made in respect of the specific problems that are encountered as regards lawyers like advocates and notaries, who offer their services to the public within a liberal market, before continuing with a discussion of lawyers, such as judges and state attorneys, who work outside this market. As referred to above, this market is often not as liberal as the market in which other service providers operate. This is due to the fact that the market for lawyers lacks the necessary transparency. Often those in need of legal services have considerable difficulties in evaluating the quality of these services. There is the proverbial

¹³ Silvestri; Finocchiaro.

¹⁴ On the prohibition of *quota pars litis* agreements, see Bannier.

¹⁵ Finocchiaro; Silvestri.

¹⁶ Finocchiaro. See also Silvestri.

‘information asymmetry’ between the buyer and the provider of the legal services. These services may have so-called credence qualities only or at best experience qualities. The quality of credence goods cannot be assessed either before or after their use, whereas the quality of experience goods can only be appreciated *ex post*. This may result in a so-called ‘market for lemons’ in which buyers are not willing to pay for quality since quality cannot be assessed by them. As a result, quality providers are forced to leave the market.

In the market for legal services, we also find what is termed the problem of ‘moral hazard’. This means that the objectives of the provider of legal services may differ from the objectives of the buyer. However, because the buyer is ignorant about the price-quality relationship he is aiming for, the legal services provider may have an incentive to supply quality to a larger extent than the buyer would wish if he could determine the price-quality relationship himself. After all, as a result of this, the provider can charge a higher fee or supply services that the buyer does not want.

A final problem in the legal services market we would like to mention here is the problem of ‘externalities’. Externalities occur when the service provided also affects third parties even though this is not reflected by the price the buyer is willing to pay for the service. This is of course also due to problems in the area of competition, since in a situation where such problems are absent all externalities are reflected in the price of the product. The result is that services of a lower quality will be offered, something that may be harmful for both the buyer and the third parties involved.

In order to counter the above problems, many jurisdictions have opted for strictly regulating the legal services market. As already referred to above when, for example, discussing fee regulations and methods of licensing lawyers, these regulations can often be qualified as anti-competitive measures, and consequently they are being scrutinised by, for example, the World Trade Organization, the European Competition Authority, and the European Commission and its Directorate-General Competition. In the Wouters case,¹⁷ discussed by Elisabetta Silvestri, it was decided within the EU context (the predecessor of Article 101 of the Treaty on the Functioning of the European Union) that certain anti-competitive types of regulation are allowed when this is necessary for the proper functioning of the market for certain professional services. However, the author also stresses that professional legal services should be governed by ordinary competition rules as much as possible since competition increases the efficiency of the legal services market, improving the quality of the services and reducing their price.

4. The Judge

When leaving the liberal market for legal services, paying attention to those legal professionals who function outside the market place, we first encounter the judge.

¹⁷ C-309/99, J.C.J. Wouters, J.W. Savelbergh, *Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002].

In the mosaic of legal professions, the judge is traditionally considered to be particularly important. The central role of the judicial profession is so indisputable that the other professions sometimes seem to be in its shadow. For the present volume, we have therefore selected papers which mainly focus on other legal professions, and not on the judge in particular, although in the future we may produce a separate volume devoted specifically to judges. Still, discussing the judge at least to a limited extent in some of the contributions to this volume was unavoidable, as appears for example in the papers by Sebastian Spinei and Richard Marcus. Significant divergences come to the surface among the judges in the various jurisdictions – and sometimes even in the same jurisdiction. As J.H. Merryman argued in 1985, in the United States a judge is regarded as a part of *the* legal profession, i.e. he is just another lawyer.¹⁸ Judges in the United States are very different from their European counterparts. Just as in other Common Law countries they are often lawyers in a late stage of their legal career, professionals that became members of the bench on the basis of success and reputation in their previous legal jobs in the public or private sector. There are, however, other features that make American judges dramatically different from judges in continental Europe. The practice of selecting judges in the process of periodic elections is still widespread among the state Judiciaries in the United States. Such a practice raises eyebrows in Europe, where it is generally held to be inappropriate. Yet, it may be the product of the different status and function of European judges when compared to their American counterparts.

The presentation of the legal profession in Romania in this volume may serve as an example of a European model. As is shown by Sebastian Spinei, the Romanian judiciary as it was reformed in post-Communist times, has come close to the French model of career magistrates. The only way to become a magistrate – judge or prosecutor – is by passing, soon after graduation, a special admissions exam, followed by two additional years of legal education. The result of this process is appointment for life; lateral entry into the judiciary is virtually impossible.

Alternative routes are available in other European jurisdictions. In the Netherlands, for example, 6 years of relevant professional experience as a lawyer (e.g. as an advocate) allows the would-be judge to be admitted for a position at the first-instance court (district court) if he is considered to be a suitable candidate by the responsible selection committee. If accepted, there is a probationary period of 12 months, with practical training at the district court and courses to enable him to function fully in his role.

Judges in Europe often regard themselves as civil servants and not as the representatives of local interests, such as happens in the United States according to the contribution of Richard Marcus in this volume. Therefore, situations in which ‘clients may sensibly feel it is urgently important to have a lawyer intimately familiar with the judge before whom the case is pending’¹⁹ do not easily arise. This

¹⁸ ‘To Americans a lawyer, no matter what kind of legal work he happens to be doing at the moment, is still a lawyer.’ See Merryman 1985, p. 101.

¹⁹ Marcus.

is underlined by the contribution of Patrick Keppenne, Niels Pepels, Bob Assink, Marc Dekkers and Fokke Fernhout to the present volume, in which on the basis of empirical research it is argued that in deciding cases Dutch judges are not prone to the influence of factors that should not influence their decision, such as the gender of the suspect, the length of the court session and the chemistry between judge and suspect. Although these findings are the result of research in criminal proceedings before the police court, it is not unlikely that they are also true for other types of litigation.

The self-image of judges mentioned above is influenced by the role of case law in a particular legal system. Case law in the United States of America plays a different role than case law in many European jurisdictions. Although references to previous judicial decisions are numerous in the case law from most European jurisdictions, this does not result in judges being viewed as lawmakers in the American sense. Creativity in the adjudication process is even controversial in some European countries, and for many (if not most) European judges it is true that ‘the picture of the judicial process ... is one of fairly routine activity’, undertaken by a judge who acts as an ‘expert clerk’.²⁰

5. The *Rechtspfleger* and the State Attorney

The present volume also discusses two other legal professionals next to the judge who function outside the liberal legal services market: the *Rechtspfleger* and the State Attorney.

Aleksandra Maganić pays attention to the introduction of the *Rechtspfleger* in Eastern Europe as a means to reduce the excessive workload of the judges. She distinguishes two models of *Rechtspfleger*, the German model characterised by a strong role of substantive independence and autonomy, and the Austrian model, in which the *Rechtspfleger* enjoy a slightly less autonomous role, but are, on the other hand, constitutionally recognised. In various forms, these models were followed in several post-Socialist countries, such as the Czech Republic, Hungary, Estonia, Poland, Bosnia and Herzegovina, and Croatia. The tasks of the *Rechtspfleger* in these jurisdictions differ, but the most typical use of them includes land register matters, ruling on payment orders, some tasks in the insolvency proceedings, enforcement of judicial decisions and decision-making regarding some non-contentious matters, such as probate proceedings. The Croatian situation is analysed in more detail, and the *Rechtspfleger* are contrasted with some other similar legal professions, such as judicial advisers and notaries public. The conclusion is that the insufficiencies of judicial reforms leave relatively ample space for further strengthening the role of *Rechtspfleger* and for increasing their number.

The State Attorney is a member of what in jurisdictions following the French model is classified as the *Ministère Public*. The members of the *Ministère Public* may, among other things, act both as public prosecutors and as advisors of the court. Representation of the State in litigation is often not part of their task. As appears

²⁰ Merryman 1985, p. 36.

from the contribution by Slađana Aras, this is however different in Croatia. There the State Attorney is both active as public prosecutor and as an attorney of the State. This causes problems as regards the measure of independence that is enjoyed by this official, who often claims to be as independent in representing the State as in cases in which he acts as a public prosecutor. As Slađana Aras shows, these problems are caused by the historical development of institutions representing the State in civil and criminal proceedings, and by the attempts to change the name and title of the prosecutors' office after the break up of Yugoslavia. A shift in terminology also caused institutional changes, and finally two principally different branches of the legal profession were brought under the same roof, forming temporarily a single but not a very harmonious legal profession of the State Attorney.

6. Other Legal Professionals

The professionals discussed last in the present volume are problematic, in the sense that it is a matter of debate whether they can be viewed as legal professionals (the court expert) and, if so, whether they can be viewed as a distinct legal profession (the mediator and the arbitrator).

The Court Expert

In her contribution on the court expert, Francesca Ferrari claims that, at least in Italy, the court expert should be viewed as a legal professional. Admittedly, Italian court experts also generally do not specialise in law, but in various other fields such as technology, science and accounting. Yet, under the Italian Civil Procedure Code the *consulente tecnico* is identified as a court official practising a legal profession. Since the recent reform of Italian civil procedure, the courts are obliged to appoint experts by allocating assignments equally among those included in the list of experts. This provision, aimed at softening the factual monopoly of assignments by certain experts, is likely to give rise to significant practical difficulties. On the other hand, there is a trend of giving an objective weight to expert evidence, in particular in cases where specific technical knowledge is decisive. The use of expert witnesses in Italy is booming in recent years, and with this process, an evolution in the experts' role is taking place. The court experts are no longer treated solely as evidence providers; more and more they are commenting and evaluating disputed issues, and also ascertaining the relevant facts. Recently, they have also been used for delivering pre-trial expert assessment and advice. At the same time, the intensive use of court experts brings about various challenges, in particular those connected with the delays caused by the production of expert reports, with the selection of authoritative experts who enjoy a high reputation in their science or professional circle, and with limits on the delegation of powers by a judge to a court expert as (another) legal professional.

Mediators & Arbitrators

Annie de Roo and Rob Jagtenberg show in this volume that it is questionable whether mediators can be viewed as a new type of legal professional. And even if this is the case, it is questionable whether they form a separate legal profession. The authors point out that one of the requirements to be classified as a professional is that the candidate disposes of a body of expert knowledge, usually acquired through academic training. Although modern mediation is promoted as a 'structured process whereby a fully qualified mediator using his wealth of professional knowledge assists the parties', De Roo and Jagtenberg state that the actual body of knowledge which is necessary to function as a mediator is often very limited in size. From this perspective it may be questioned whether the mediator is indeed a professional. If, however, one assumes that the body of expert knowledge suffices, one may immediately ask whether mediators should be viewed as a separate legal profession, since all kinds of other legal professionals (the 'old' legal professions) have annexed the provision of mediation services to their domain. Legal practitioners like advocates, for example, also offer various types of mediation services to their clients. According to the authors, 'the overall picture is that mediation has hardly become the exclusive domain of an omnipotent new professional.'

Ivan Milotić takes us back in history when he discusses the origins of arbitration. Especially the Roman foundations of the arbitrator's profession are highlighted. In Antiquity, the arbitrator's profession came into being since for many litigants outside Rome the State Judiciary was out of reach, as it was based in Rome only. It is argued that Roman Law not only furnished the terminology used in modern arbitration, but also the procedure. However, at the same time the *arbiter* of Roman times cannot be equaled completely to a modern arbitrator, since the Roman *arbiter's* powers not only encompassed those of the modern arbitrator, but also those of a modern mediator, conciliator and even a court expert.

7. Cooperation between Legal Professionals in the Shaping of the Law

The present volume concludes with a contribution which does not discuss a specific legal profession, but addresses the cooperation of legal professions in shaping the law. Tomislav Karlović highlights the role of academia and legal practice in bypassing the legislature's prohibition of *hypothec* on movables in various nineteenth-century German territories and later in the whole of Germany due to the coming into force of the 1861 Commercial Code. The prohibition ignored the economic needs in a society in which movables were an ever more important source of wealth. In Germany, the introduction of *Kauf auf Wiederkauf* accompanied by *constitutum possessorium* was a creation of legal practice to avoid the various problems that were created by this situation. However, not everyone agreed as to its legality. Most of the doubts were taken away when in 1890 the highest German court, the *Reichsgericht*, ruled that *Kauf auf Wiederkauf* accompanied by *constitutum possessorium* was not against the law. The German Civil Code (BGB) of 1900, remained however silent on what came to be called *Sicherungsübereignung*.

According to Tomislav Karlović the Code neither regulated nor forbade this legal figure, and left it for legal practice and the judiciary to further develop it. In modern-day Croatia, the situation was different, although also in this jurisdiction *Sicherheitsübereignung* was introduced for economic reasons. This time the existence of inefficient mechanisms of debt recovery enforcement triggered the development. *Sicherheitsübereignung* was thought to solve this problem since enforcement is not needed in the event the debtor defaults in performing because the creditor is allowed to keep the object transferred for reasons of security when the debtor does not pay. Also in Croatia, the various legal professions played an important role in making this legal development a reality.

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