Orde en discipline

_Een onderzoek naar de ontwikkeling en reikwijdte van het advocatentuchtrecht_

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Summary

Order and Discipline

This study aims to obtain a better insight into the relationship between all interests involved in the disciplinary system for lawyers [advocaten] in the Netherlands. Within the Dutch legal system disciplinary law raises questions regarding the actual purpose of this specific area of law. Do disciplinary law and disciplinary procedures regarding lawyers largely serve the public interest of proper professional conduct and a high level of professional practice, or can disciplinary procedures serve other interests, like satisfying complaining clients? And what is the nature of the disciplinary procedure?

In order to trace the origins of the current system, this particular field of disciplinary law has been examined in its historical context. The starting point of this study is the introduction of an entirely new disciplinary system in the Netherlands, at the start of the nineteenth century. Chapter 2 contains a historical overview of its further development. Following the French annexation of the Netherlands in 1810, the Napoleonic legal framework was introduced into Dutch legal practice. The part of this framework concerning lawyers had personally been conceived and decreed by the French emperor Napoleon Bonaparte, who saw regulation of the legal profession as a necessary condition for the return of lawyers to the administration of justice. In the emperor’s view a strong disciplinary system should inevitably be an integral part of this regulation. His main concern was to establish a system which emphasized maintaining public order and protection of the interests of the Empire. The disciplinary system did recognize the principle of having lawyers’ conduct judged by their local bar council, while at the same time demanding strong involvement and supervision from the judiciary and from the public prosecutor.

After the Kingdom of the Netherlands gained its independence, the core elements of the Napoleonic system were maintained and later on adopted in Dutch national legislation. Large parts of these core elements survived after the Second World War by returning in the Act on Advocates [Advocatenwet], which to this day regulates the Dutch legal profession, including its disciplinary system.

The history of the Dutch disciplinary system for lawyers shows an ongoing emancipation of the legal profession. From serving the interest of public order and state security under scrutiny of the public prosecutor and the judiciary, the disciplinary system increasingly acquired more elements of independent proceedings. At the same time this development has been closely related to the attitude of the government about self-regulation of the legal profession. A more critical attitude has resulted in the most recent and far-reaching amendment of the Act on Advocates in 2015. This amendment has created a new and revised supervisory system, resulting in a pronounced distinction between supervision on lawyers and disciplinary proceedings.
The specific development of the deontological norms and rules within the disciplinary system are examined in Chapter 3. Originally, the main task of the disciplinary bodies was to maintain the so-called ‘honor of the legal profession’. In the second part of the twentieth century, this criterion started to attract criticism, as it was considered being old fashioned, self-centered and not supporting the interest of the lawyers’ actual clients. As a result, protection of the client’s interest gained ground in the efforts to reform the legal framework, guarding also the quality of the provided legal services and making the care of lawyers for their client’s interest more important. This development not only occurred in formal law-making, but also in the system of self-regulation, as the legal profession adopted its own code(s) of conduct and the applicable rules in the bye-laws of the Dutch Bar [Nederlandse orde van advocaten].

Chapter 3 also covers the subject of disciplinary proceedings. Historically this subject has been – and still is – the individual lawyer, as the disciplinary system struggles with handling complaints against law firms. Being a member of the bar establishes jurisdiction of the disciplinary body. Jurisdiction stretching from scrutiny of professional conduct, to other business activities and even proper conduct in private life. This way, disciplinary bodies have been shaping the extent of actual legal practice, of which the Dutch legislator never has provided a material description.

The aspect of public responsibility of an individual lawyer has been part of public debate from the start of this century, resulting in the codification of five core values. Their observance serves as a justification of the relatively privileged position of lawyers in the Dutch legal system, aiming at a more principle-based approach of proper professional conduct. This also leads to the duty of a lawyer towards his profession, as he should refrain from damaging his own reputation as well as (public) confidence in the legal profession as a whole. These core values not only serve as guidance for proper conduct by individual lawyers, but are also the guiding principles for the disciplinary bodies and for the Dutch Bar when adopting binding rules for professional conduct.

The fabric of professional rules and standards has served various interests. In the Napoleonic period and later parts of the nineteenth century the purpose was predominantly the protection of the interest of state security and the order of civil and criminal court procedures. While professional conduct in court should still meet the demands of being ‘discreet, honest and dignified’, lawyers also hold a position in society that requires independence, firstly from the state powers and secondly from the cases they handle and their clients.

Disciplinary law also became an instrument for maintaining order within the legal professional community, by charging lawyers with the deontological duty to respect the corporate spirit of their profession and engaging their peers with trust and respect. As the legal profession (or at least certain segments) nowadays has turned to more commercial practice, this shared responsibility may be under pressure. The disciplinary system furthermore played a role in keeping lawyers at proper arm’s length of their client’s opponents. That is to say: according to disciplinary case law a lawyer
should have reasonable freedom to defend his client’s interests (as a consequence of the core value of partiality). This freedom is not without boundaries; certain attention should be given to the justified interests of the client’s opponent. Especially when it comes to avoiding unnecessary legal costs, abusive language or presenting facts in court.

Finally, the disciplinary system should protect the interest of the lawyer’s own client, who is sometimes completely dependent on the efforts and commitment of his or her lawyer. When it comes to safeguarding clients from excessive billing, deontological rules and the disciplinary bodies traditionally tried to provide a certain amount of protection to the client. After 1980 more client-centered norms have been included in the national code of conduct. Very recently, the Dutch Court of Discipline, the highest disciplinary tribunal, has taken a different approach when it comes to the quality of practice. New case law takes into account that a lawyer is also a contractor in the context of civil law. This means that the content of the assignment agreement with the client may influence the freedom the lawyer has in choosing the ways and means for defending the client’s interest. This implies a more technical approach by the disciplinary body in examining the way a lawyer has performed.

Proper conduct and quality of legal services not only must be sculpted, but also have to be enforced. A fundamental aspect of disciplinary practice has always been that improper conduct, once established, may be punished. Chapter 4 looks into the nature and content of the possible sanctions that can be imposed on a lawyer. First, disciplinary sanctions have to be separated from criminal sanctions, as disciplinary sanctions (nowadays called ‘measures’) aim to correct and to educate a lawyer. This goes in particular for the moral disciplinary sanctions like the warning and the reprimand. Typical for the Dutch disciplinary system is that the available sanctions are limited in the law. However, the Dutch disciplinary bodies have always been free in their choice of a proper sanction once misconduct has been established.

The sanction of suspension from practice has been helpful in establishing the boundaries of actual practice by a lawyer. It is the most far-reaching sanction in its effect, by temporarily and completely disabling the lawyer to provide legal services (including representing clients, giving legal advice or using his professional title). Disbarment as a disciplinary sanction is different to the extent that it goes beyond the aim of correcting a lawyer or trying to improve his professional conduct.

Recently, two sanctions have been added to the list of disciplinary sanctions. Sanctions which both serve different purposes. The introduction of a disciplinary fine, which traditionally is foreign to the Dutch disciplinary system, aims at providing the disciplinary body with an instrument to actually punish a lawyer for misconduct, although retribution has never been a particular goal of disciplinary procedure. Next to the fine, the possibility of publication of a sanction has been broadened, in order to add more transparency to disciplinary proceedings (and their outcome). One of the points of criticism had been that disciplinary practice mostly took place in the privacy
of the legal profession. Providing more information to the public about imposed sanctions on lawyers could, according to the legislator, also add to the insight of the quality of individual lawyers.

Adjusting the outcome of disciplinary proceedings to the client-perspective has resulted in attempts to repair the harm done to clients. In the 1986 reform of the Act on Advocates, the government stressed that disciplinary law could not replace the proceedings offered by a civil court. Nonetheless, the disciplinary bodies were granted the power to impose compensation as an additional and special condition to the sanction of provisional suspension. The most recent legal reform of 2015 also included a very modest compensation of the costs a complainant has to make when lodging a complaint.

In Chapter 5 access to the disciplinary process and the concept of fair trial is set out. The system of enforcing applicable norms and standards by means of effective sanctions, can only function if alleged misconduct can be reported and scrutinized. At the same time the procedural protection of the lawyer, who stands trial, should be guaranteed.

From their introduction under French rule until the last quarter of the twentieth century, disciplinary proceedings were performed by the same bodies that supervised lawyers. After the role of the judiciary as a supplementary disciplinary body had been terminated during the Interbellum, the disciplinary tribunals of the legal profession kept performing both tasks. This implied that the local bar could actively enforce applicable rules and actively address any form of misconduct by its members. The 1986 legal reform introduced the detachment of the administrative duties of the local bar council and its disciplinary tasks, while at the same time establishing independent disciplinary councils. Consequently, these newly created councils became largely dependent on the influx of complaints from (for instance) clients and from the president of the local bar guarding the general interest in his capacity of supervisor. The president of the disciplinary council, who is always a member of the judiciary, has been granted the role of ‘gatekeeper’, as he can dismiss inadmissible or ill-founded complaints or (after 2015) guide a complaint to an alternative dispute resolution instance. Next to this institutional development, the role of the complainant has evolved considerably. Although the right to lodge a complaint had been recognized as early as the nineteenth century, substantial powers of the complainant in the disciplinary procedure have developed very slowly and gradually. Most prominent of these being the right to appeal the decision of the disciplinary council, which eventually (and somewhat reluctantly) was granted to complainants after the 1986 legal reform. And only very recently the complainant has been recognized as a proper party in the disciplinary procedure, shifting the nature of proceedings from inquisitorial to more accusatorial. Surprisingly, even in the autocratic police state under emperor Napoleon, lawyers were granted a number of procedural safeguards. These safeguards have been firmly anchored by the case law of the European Court of Human Rights (e.g. the case of Albert and Le Compte), in which the protection laid down in Article 6 of the European
Convention for the Protection of Human Rights and Fundamental Freedoms has been declared applicable on disciplinary proceedings. Accordingly, the Dutch disciplinary case law has also established that lawyers are protected by Article 6 under its civil limb (i.e. the determination of the lawyer’s civil rights and obligations, as opposed to a criminal charge). This protection does not set aside the traditional duty of a lawyer toward his profession: as a member of this profession a lawyer is expected to cooperate in the case of a disciplinary complaint, as this co-operation serves the interest of the public’s confidence in the legal profession.

The conclusion drawn in Chapter 6 is that the Dutch lawyers’ disciplinary landscape in the last two centuries has developed a kind of two-track system. It still holds the elements of its Napoleonic predecessor, containing the aim of protecting public interests like the order in court next to the confidence of the general public in the legal profession. This is predominantly the responsibility of the legal profession, represented by the local bar president as the appointed supervisor. On the other side a procedure of a more accusatorial nature has emerged. On this second track complainants can choose to lodge their briefs against a lawyer’s conduct. These complainants are vested with procedural powers. At the same time (and on both tracks) the lawyer may seek protection under the principle of ‘fair trial’. The last observation is that, considering the changes in case law toward a more ‘technical’ approach and assessment of a lawyer’s conduct regarding his client, the nature of disciplinary proceedings may change further toward definitive dispute resolution by a disciplinary tribunal.