



Independence of the Bar Associations

Edward Janssens*

1. Introduction

This article is based upon a previous article I wrote in 2014¹, entitled ‘The Independence of the advocate in the Netherlands and Belgium and Conflict of Interest’.

It is an advocate’s role to advice, conciliate and represent his client in court and of course to plead. The advocate can only fulfil that role if he is independent. Everyone remembers the images of the Ceausescu trial in Romania where the advocate, in actuality, fulfilled the role of a prosecutor. The advocate is not a civil servant. He has to be free to organise the defence of his clients. He has to act freely and without fear. That independence must be guaranteed by independent bar associations.

2. Independence

The many duties an advocate must fulfil, require his/her absolute independence, free from all other influences, especially from personal interests or external pressure. Such independence is necessary for both the confidence in the judicial process as well as for the impartiality and independence of a judge. An advocate must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standard in order to please the client, the court or third parties. An advocate must show enough independence towards his own client and if necessary, he must give negative advice to this client.

The independence is necessary in non-contentious matters as well as in litigation. Advice given by an advocate to a client has no value if the advocate gives it only to ingratiate him or herself to serve his

¹ E. JANSSENS, “Independence of the lawyer in the Netherlands and Belgium and conflict of interest”, in B. HUBEAU en A. TERLOUW (eds.), *Legal aid in the Low Countries*, Antwerpen, Intersentia, 2014, 269-282.

or her personal interests or in response to outside pressure.² Subject to due observance of all rules of law and professional conduct, an advocate must always act in the best interest of the client and must put those interests above his own and those of fellow members of the legal profession.³

The independence of the advocate must be protected by the Bar Associations. It is therefore necessary that these Bar Associations are independent too.

3. Independence of the advocate

First of all, there should be no interference in the name of the general interest, embodied by either the legislative, the executive or the judicial authorities. This form of independence, free from state interference, should be regarded as a right. Secondly, the advocate should exercise his profession independently and free from influence from other interests.⁴

3.1. Structural and Organisational Independence

The first dimension concerns the organisational and structural independence from state authorities.⁵

3.1.1. Independence from the Legislator

The independence finds expression in self-regulation as well as in the restraint that the legislator imposes upon itself not to intervene where the professional group can do so for itself.

In the past, the Bar Associations were free to impose rules of conduct in an almost uncontrolled manner. This is no longer the case; the Bar Association cannot ordain *ad libitum*. The European judicial rules apply with regard to advocates in the same way as they do with other liberal professions or entrepreneurs.⁶ Professional rules must be necessary and proportional.

This means that the rules of conduct of the Bar Associations that impinge upon economic affairs and (may possibly) have consequences that limit competition are not forbidden provided that they do not go any further than is necessary to ensure the correct execution of the profession of advocate.⁷ Where in the past the Bar Association issued rules in connection, for instance, with publicity and/or fees, this is now possible only insofar as absolutely necessary to exercise the profession of advocate.

However, this carries the risk that the legislator may, through excessive involvement, meddle with the defence and intervene in the advocate -client relationship. An advocate cannot properly defend the interests and rights of his client when the government, an authority or a judge tells him what he may or may not do.

² Article 440 of the Belgian Judicial Code; see also Rule 2 section 1 of the Code of Conduct of the Nederlandse Orde van Advocaten (Dutch Bar Association)

³ Charter of core principles of the European legal profession and code of conduct for European lawyers, approved by the CCBE, 2010, www.ccbe.eu.

⁴ B. THEEUWES, 'Openingsrede. De onafhankelijkheid van de advocaat, over het gekwaak van de ganzen van het Capitool', *Het Poelaertplein*, 2006-2007, no. 3, pp. 9-20

⁵ B. THEEUWES, 'Openingsrede. De onafhankelijkheid van de advocaat, over het gekwaak van de ganzen van het Capitool', *Het Poelaertplein*, 2006-2007, no. 3, pp. 9-20

⁶ CJEU c-309/99, J.C. Wouters et al. V. Algemene Raad van de Nederlandse Orde van Advocaten, 2002, www.eur-lex.europa.eu

⁷ D. VANDERMEERSCH, *De Mededingingswet*, Mechelen: Kluwer 2007, p. 92

Every action by the legislator regarding the manner in which the defence is to be conducted is therefore inadmissible, since it detracts from independence.

State intervention in the advocate-client relationship must be exceptional. The European Court of Human Rights has likewise ruled that the right to involvement (in the communication) between advocate and client is possible only by way of exception, where the safety of others is threatened (as was apparent from the correspondence).⁸

Central to this debate is the issue of confidentiality. The client does not have to fear that what he has confided to the advocate during a consultation and the advice received from an advocate will be made public. The basis of this right of non-disclosure must be sought in a principle of law. Therefore trust is essential in the relation client-advocate.⁹

More than in Belgium the Netherlands emphasize that the advocate serves the general interest. In the Netherlands it is stressed that the advocate serves his client. Not blindly, but critically. Partiality, confidentiality and independence are one of the key rules value and form the essence of his profession. The 'good advocate' thereby contributes to the general interest of a good administration of law and, to that extent, serves the general interest.¹⁰

The right to a fair trial, as expressed in Article 6 of the European Convention of Human Rights, implies the essential right of parties to freely organise their defence.¹¹

Article 6 of the European Convention of Human Rights guarantees an appeal to an independent judge. This also implies that an advocate has to be independent. This contributes to the principle of equality of arms, so that the defending party is not in a harmful position towards the Public Prosecutor and the opposite party.¹² The defence has to be effective. The European Court of Human Rights judged that the European Convention of Human Rights.

*'is intended to guarantee no rights that are theoretical or illusory but rights that are practical and effective; this is particularly so for the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.'*¹³

To ensure the independence of the advocate, it is necessary that the Bar Associations are also independent. The United Nations Basic Principles on the Role of the advocates emphasize that advocates shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuous education and training and protect their professional integrity.

The executive body of the professional association shall be elected by its members and shall exercise its functions 'without external interference'.¹⁴

The Committee of Ministers of the Council of Europe recommended that:

⁸ ECtHR, *Campbell v. the United Kingdom*, 1992, Series A, 47-48.

⁹ Supreme Court, 1 March 1985, NJ 1986, 173.

¹⁰ Annex of the Algemene Raad van de Nederlandse Orde van Advocaten to the draft bill: 'Aanpassing van de Advocatenwet en enkele andere wetten i.v. m. de positie van de advocaat in de rechtsstaat' (Annex to the letter from the Bar Association to the Secretary of State for Justice dated 27 May 2008)

¹¹ J. VANDE LANOTTE & HAECK, *Handboek EVRM, deel I, Algemene Beginselen*, Antwerp/Oxford: Intersentia 2008, p. 2009.

¹² ECtHR, *X v. Germany*, 7 May 1994, 10098/82.

¹³ ECtHR, *Artico v. Italy*, 13 May 1980, 6694/74

¹⁴ United Nations Basic Principles on the Role of Lawyers, Article 24 – not binding rules.

Associations

1. Advocates should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.
2. Bar associations or other professional advocate's associations should be self-governing bodies, independent of the authorities and the public.
3. The role of Bar associations or other professional advocate's associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.
4. Bar associations or other professional advocate's associations should be encouraged to ensure the independence of advocates and, *inter alia*, to:
 - a. promote and uphold the cause of justice, without fear;
 - b. defend the role of advocates in society and, in particular, to maintain their honour, dignity and integrity;
 - c. promote the participation by advocates in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;
 - d. promote and support law reform and discussion on existing and proposed legislation;
 - e. promote the welfare of members of the profession and assist them or their families if circumstances so require;
 - f. co-operate with advocates of other countries in order to promote the role of advocates, in particular by considering the work of international organisations of advocates and international intergovernmental and non-governmental organisations;
 - g. promote the highest possible standards of competence of advocates and maintain respect by advocates for the standards of conduct and discipline
5. Bar associations or other professional advocate's associations should take any necessary action, including defending advocate's interests with the appropriate body, in case of:
 - a. arrest or detention of an advocate;
 - b. any decision to take proceedings calling into question the integrity of an advocate;
 - c. any search of advocates themselves or their property
 - d. any seizure of documents or materials in an advocate's possession;
 - e. publication of press reports which require action on behalf of advocates¹⁵

The United Nations Basic Principles on the Role of the advocates provide that professional associations of advocates shall cooperate with governments to ensure that everyone has effective and equal access to legal services and that advocates are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.¹⁶

¹⁵ Recommendation 5.2 (2000) 2.1 of the Committee of Ministers of the Council of Europe (Recommendation No R 2000 21 of the Committee of Ministers of the Member States on the freedom of exercise of the profession of lawyer).

¹⁶ United Nations Basic Principles on the Role of Lawyers, Article 25.

The President of the Court of Discipline (Hof van Discipline) in the Netherlands believe that the independence of the advocate is important and has to be respected.

‘An advocate has another role than a Public Notary or a bailiff. He has the obligation to fight for his client. This must be kept in mind by the judgement of his behaviour, as well by disciplinary courts as by the Supervision Board. The State Authority has to be kept far away.’¹⁷

3.1.2. Independence of the Executive

The executive and the administration must also refrain from any control and supervision of the advocate’s profession. The Bar Association is therefore also the guarantee of the Constitutional State. The independent court of law is conceivable only in and through the judicial dialogue with an independent body of advocates.¹⁸

Legal circles in the Netherlands were troubled a few years ago by the bill of the Secretary of State for Security and Justice, Mr Teeven.¹⁹ True to the motto ‘the butcher may not be allowed to approve his own meat’, the latter aimed to create an independent Supervisory Board that would form part of the Dutch Bar Association (*Nederlandse Orde van Advocaten*).²¹

The Secretary of State, Mr Teeven, had initially provided that no advocates would sit in this supervisory board. This proposal entailed that the government would sit in this supervisory board and that the government would appoint and give discharge to the members of the supervisory board. The government would also approve or reject the board budget and be able to annul its decisions. Furthermore, the supervisory board would be given powers to inspect client data and would not be bound by the obligation of confidentiality that applies in respect of advocates. In a latter version the Secretary of State proposed to bind the members of the supervisory board by the obligation of confidentiality and he agreed that an advocate should serve on the board (albeit without a vote).²²

The Dutch Bar Association did not agree with the bill and even took a number of measures to standardise the supervision of advocates. A financial supervision unit was set up to join the deans (Presidents of the Bar Associations in the Netherlands) in conducting investigation of advocate’s offices. An advocate’s office may therefore be inspected once a year.

The Dutch Bar Association took the view that the supervision bill causes tension for the legal profession with Articles 6, 8 and 13 of the European Convention on Human Rights. The Dutch Bar Association agreed that the government does of course have a margin of appreciation when limiting rights. A violation of these principles cannot be justified in simple terms. The main objection also concerned the supervisory board itself, on which the Secretary of State for Security and Justice, Mr Teeven, could indirectly use his influence.

¹⁷ J. VAN DIJK, ‘De ontkeningsfase is voorbij’, *Advocatenblad*, August 2013, p.40.

¹⁸ J. STEVENS, ‘Een uniek beroep’, *Ad Rem*, 2008, p.7

¹⁹ H. KAPITEIN, ‘Advocaten zeggen weinig verstandig over ethiek’ (interview), *Advocatenblad*, 2013, p. 17; J. VAN DIJK, ‘De ontkeningsfase is voorbij’, *Advocatenblad*, August 2013, p. 38.

²⁰ ‘Aanpassing van de Advocatenwet en enige andere wetten in verband met de positie van de advocatuur in de rechtsorde en herziening van het toezicht op de advocaten (Wet positie toezicht advocaten)’, 32.382 [Adaptation of the Lawyers Act and some other laws connected with the position of the Legal profession in the Legal order and revision of the supervision on lawyers (Legal position supervision of lawyers)].

²¹ <http://nos.nl/artikel/512852-advocaten-teeven-op-ramkoers.html> (title of Bill)

²² www.advocatenorde.nl/9666/11 June 2013.

Here the slightest appearance of the lack of independence that is of essential importance for the profession of advocate would be placed under pressure. Furthermore, the bill was regarded as a violation of the right of non-disclosure.²³

The position of the Dutch Bar Association was also that government ought to refrain from any involvement in the practice of the advocate's profession. Advocates are not uncontrolled service-providers. On the contrary, the judge, the client, the opposing party, the deans and the Court of Discipline all play a role in correction advocates.²⁴

Finally in 2014 the Secretary of State and the Dutch Bar agreed on a balanced and modern surveillance system. This was put in a law²⁵ A supervisory board will consist of three members: the president of the Dutch Bar and two members who are not advocate, magistrates or civil servants. They will be appointed by the Bar Association.

The supervisory board will be independent, transparent and more uniform. This new board will provide supervision policies, requirements for the supervision and can make recommendations to the local bars and the deans and annually reports the results to the public.

Also new is that the college may propose to dismiss the local dean if he does not execute the supervision properly.

In Belgium the past Minister of Justice, Mrs Turtelboom, intended to introduce rules in connection with free legal aid that advocates will be expected to observe. Among other proposals (which are practically all withdrawn at this moment) the trainee advocates would be obliged to handle at least five *pro deo* cases for free.

AVOCATS.BE and the Flemish Bar Association opposed that measure is an intolerable intervention by the state.²⁶ This state intervention is inspired by financial reasons and not by the aim of obtaining better justice.

Concerning legal aid, control of conditions, organisation in Belgium remains in the hands of the legal profession and there has been -up to now- limited state control.

It is obvious that advocates active in the legal aid department of the Bars must themselves be able to respect the necessary independence, firstly to organise and secondly to control legal assistance. However, this obligation has not as yet been settled in any legal text or regulation, but belongs to the essence of ethics. It is therefore recommended that advocates who belong to the legal aid office, and even the president of the local Bars and members of the councils of the Bar responsible for legal aid do not themselves participate – or only do so to a very limited degree – in free legal aid, this for the sake of the necessary independence. The same rule of independence must apply for all members of the Bar Councils and Presidents of Bar Associations.

²³ Barkhuysen, Advice to the Nederlandse Orde van Advocaten concerning 'Wetsvoorstel Tweede Nota van wijziging bij de Wet tot aanpassing van de Advocatenwet, de Wet op de rechtsbijstand en de Wet tarieven in burgerlijke zaken in verband met de positie van de advocatuur in de rechtsorde' ('het wetsvoorstel herziening toezicht advocatuur'), November 2012, www.advocatenblad.nl/app/export/MkIVEgbk/20164825/51e35a807a8345801270e29db2309d8b/Advies%20prof.%20mr.%20T.%20Barkhuysen.pdf

²⁴ Annex from the Algemene Raad van de Nederlandse Orde van Advocaten to the draft bill: 'Aanpassing van de advocatenwet en enkele andere wetten i.v.m. de positie van de advocaat in de rechtsstaat' (Annex to the letter from the Bar Association tot he Secretary of State for Justice dated 27 May 2008).

²⁵ This law was adopted in 2014, Nederlands Stb, 2014, 354.

²⁶ Label of the Ordre des Barreaux Francophones et Germanophone (Belgium)

The actual Belgian Minister of Justice, Mr. Koen Geens, proposed several amendments in the law in order to modernize the profession. He clearly stated that it was not the intention to impose anything against the wish of the Bar Association. Recently the Flemish Bar adapted regulation for a Supervision Board, that is similar to the Supervision Board of the Netherlands. This regulation was not put in a law.

3.1.3. Independent from the Judicial Power

The advocate is further also independent of judicial power. The courts do not judge how the advocate exercises his profession; it is the professional group itself that judges in the matter.

In Belgium only advocates are member of the disciplinary courts in first degree. A magistrate of the Court of Appeal and four advocates sits in appeal. The Court of Cassation (High Court in Belgium) exercises final supervision.

3.2. Independence of the advocate Himself

The second dimension concerns the independence of the advocate himself. Can the advocate who is related to family, friends, other occupations and other clients and who works in an association with other advocates who all have clients, accept the defence or give advice to his client without any interference of these relations on his activities as an advocate? Here the advocate will have to examine his own independence and must also pause and consider whether, when defending the interests of his client, his role might not in fact be influenced by any other interest. It is the advocate's duty not to allow himself to be influenced by others.²⁷ 'Others' has to be interpreted broadly and involves other clients, former clients and third parties. There is a conflict of interests where interests other than those of the client actually induce the advocate, or could induce the advocate, to pursue another defence strategy, adduce other arguments and apply another finality or give other advice than if such interests were not present. The question arises as to whether the advocate is independent in the exercise of his professional activities. The advocate – who may not allow himself to be guided by self-interest – 'may not be dependent on his client, not be dependent on the other party and not be dependent on any third party'.²⁸

However, the advocate must not only take into account possible external influences; internal motives may equally well be involved. Self-interest, secondary functions and side activities, as well as the manner in which the advocate exercises his profession (whether or not in association with others). However, this aspect, which is closely related to incompatibilities with the profession of advocate, shall not be discussed further in this article.

4. Conclusions

To assure the independence of the advocate and to protect the individual advocate it is necessary that Bar associations can act independently from all State interference or other influences

²⁷ ECJ, 12 December 1996, Reisbüro Broede, Concluant-3/95.

²⁸ B. THEEUWES, 'Openingsrede. De onafhankelijkheid van de advocaat, over het gekwaak van de ganzen van het Capitool', *Het Poelaertplein*, 2006-2007, p. 14.

The independence of the advocate remains at risk. Permanently in different states the independence is put at danger. More and more legislators and governments wants to intervene in the advocates activities ,(fiscal matters, legal aid, money laundering, etc..) They want to obtain information from the clients. The relation client-attorney is based upon a confidence and this confidence has to be respected. This was stressed in a recommendation adopted in 2018 by the European Council on the 24th of January:

« L'Assemblée parlementaire appelle le Comité des Ministres:

7.1. à élaborer et adopter une convention sur la profession d'avocat à partir des normes énoncées dans la Recommandation no R (2000) 21, et, ce faisant:

7.1.1. à tenir compte également des autres instruments pertinents, notamment la Charte des principes essentiels de l'avocat européen du Conseil des barreaux européens, la Charte de Turin sur l'exercice de la Profession d'avocat au XXIème siècle de l'Union internationale des Avocats, ainsi que des Normes applicables à l'indépendance de la profession d'avocat, des Principes internationaux de déontologie de la profession juridique et du Guide pour l'établissement et le maintien des procédures de plainte et procédures disciplinaires de l'Association internationale du barreau;

7.1.2. de veiller à ce que les garanties relatives à des questions aussi fondamentales que l'accès à un avocat et l'accès des avocats à leurs clients, le secret professionnel de l'avocat, la jouissance d'une immunité civile et pénale pour ses déclarations faites dans le cadre de ses activités professionnelles et la confidentialité des communications entre un avocat et son client soient renforcées, si besoin est, de manière à faire face à l'évolution du contexte légal et réglementaire actuel, y compris des mesures mises en place pour lutter contre la corruption, le blanchiment de capitaux et le terrorisme;

7.1.3. de prévoir un mécanisme de contrôle effectif, en prenant tout particulièrement en considération l'option d'un comité d'experts chargé d'examiner des rapports périodiques présentés par les États parties, assorti de la possibilité pour les organisations de la société civile, et notamment les associations d'avocats, de lui adresser des observations;

7.1.4. de réfléchir à ouvrir la convention à l'adhésion des États non membres;

7.2. à établir un mécanisme d'alerte précoce pour réagir aux menaces immédiates qui pèsent sur la sécurité et l'indépendance des avocats, ainsi que sur leur capacité à exercer de manière effective leurs activités professionnelles, modelé sur la Plateforme pour renforcer la protection du journalisme et la sécurité des journalistes. À ce propos, l'Assemblée réitère l'appel lancé dans sa Recommandation 2085 (2016) «Renforcer la protection et le rôle des défenseurs des droits de l'homme dans les Etats membres du Conseil de l'Europe» en faveur de la mise en place d'une plateforme de protection des défenseurs des droits de l'homme, qui englobe les avocats;

7.3. à mettre en place des activités, y compris des activités de coopération bilatérale, en vue d'améliorer la mise en œuvre de la Recommandation no R (2000) 21, en attendant la ratification d'une nouvelle convention par les États membres »

Furthermore it seems necessary –regarding the numerous attacks on the independency of the advocate to protect this independence in the constitution of the States.

Edward Janssens, 10 September 2019
President of the Flemish Bar Association