PUBLIC AND PRIVATE JUSTICE: DISPUTE RESOLUTION IN MODERN SOCIETIES

Landscape of European Legal Profession(s): Has Unity Been Lost?

Summaries

***

May 24 – May 28, 2010
Inter-University Centre
Dubrovnik, Croatia

Public and Private Justice:
Dispute Resolution in Modern Societies

Inter University Centre Dubrovnik — An independent, international centre for advanced studies — IUC

European Landscape of Legal Profession(s): Has Unity Been Lost?

Draft Programme – Public and Private Justice 2010

Sunday, May 23	***Meeting of participants*** *(Stradun, Gradska kavana, 19,30-20,00)* ***Informal joint dinner***
Monday, May 24 **General Topics: unity/disunity, professional standards** **Book promotion** "Enforcement and Enforceability" Fourth IUC/PPJ book **Status of Legal Professions in the UK and the US**	**Registration** (9,00 - 9,30) **Opening Addresses, Morning Session:** (9,30 – 13,00) *Alan Uzelac (*Zagreb*):* Landscape of European legal profession(s) – Developments in West and East *Floris Bannier (*Amsterdam*):* Do the traditional rules of conduct still fit the modern lawyer? *Book Presentation* ***van Rhee/Uzelac (eds.), Enforcement and Enforceability: Tradition and Reform*** *Marcel Storme* (Gent): Reflections on the basis of the new PPJ book Editors' remarks & general discussion **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00 – 18,00) *John Westwood* (London): Seismic effects of the UK Legal Services Act 2007 *Richard Marcus (Hastings):* Balkanization of the American legal profession *Serban Vacarelu* (Maastricht): Legal profession in the United States and Louisiana
Tuesday, May 25 **Quo vadis, legal profession – formation and teaching** **New professions: mediators** **Status of Legal Profession in Southern and Northern Europe: Italy, Norway**	**Morning Session:** (9,30 – 13,00) *Janet Walker* (Toronto): *Quo vadis*: the teaching of procedure and the future of the profession *Annie de Roo & Rob Jagtenberg* (Rotterdam): Professional(s as) mediators: Emerging markets and the quality of legal protection *Francesca Ferrari* (Insubria-Varese): The Italian court expert in civil proceedings: its role in the light of the new technologies and the development of legal professions General discussion **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00-18,00) *Elisabetta Silvestri* (Pavia): The legal profession in Italy: regulation vs competition? *Giuseppe Finocchiaro* (Brescia): Legal profession fees and competition *Jon T. Johnsen* (Oslo): Lawyers' monopolies on legal services in Finland and Norway and their impact on legal aid delivery
Wednesday, May 26 **The Profession Notary: Status and Perspectives** **Remuneration of legal professionals and procedural styles**	**Morning session** (9,30 – 13,00) *C.M. Cappon* (Amsterdam): Public notaries today: situation in Europe and in the Netherlands *Christian Koller* (Zürich): Competition in legal services: future perspectives on the notary monopoly in Europe *Zvonimir Jelinić* (Osijek): Do various methods of charging lawyers' fees influence the speed and the style of civil proceedings? Examples from Croatian and comparative law and practice

Study Trip to Slano	General discussion **Lunch break** (13,00 – 14,00) **Excursion to the Borders of the Old Republic (14,00-23,30)** **Arboretum of Trsteno** **Visit to the Salt Plant and the Walls of Ston** **Ston Oysters' Degustation and Mediterranean Dinner** (19,00 – 23,30)
Thursday, May 27 **The judges and their functions: new developments and new challenges** **Judicial Officers -** *Rechtspfleger* **Legal Profession(s) in the Post-Socialist Countries**	**Morning Session** (10,30-13,00) *Nina Betteto* (Ljubljana): The changing role of a trial judge in the civil procedure *Asink/Dekkers/Pepels/de Keppenne/Fernhout (*Maastricht): Judges' behavior in court sessions *Aleksandra Maganić* (Zagreb): Reception of *Rechtspflegers* in Eastern Europe: prospects and difficulties General discussion **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00-18,00) *Vladimir Yarkov & Igor Tarasov* (Ekaterinburg): Evolution of principal legal professions in Russia in the period after the dissolution of the USSR period: main tendencies *Sebastian Spinei* (Sibiu): The Romanian legal profession system *Sladjana Aras (*Zagreb): The State Attorney – Attorney of the State?
Friday, May 28 **Legal Education Today** **The History of Legal Profession(s)**	**Morning Session** (9,30 – 13,00) *Peter Gilles* (Frankfurt): Theory vs. Practice – the role of legal academia today *Marko Petrak* (Zagreb): Legal professions in medieval Dubrovnik *Ivan Milotić* (Zagreb): Roman foundations of the arbitrator's profession *Tomisav Karlović* (Zagreb): The role of legal professions in bypassing the law: the example of *fiducia* **Lunch break** (13,00 – 14,00) **Open Panels** (14,00 – 15,30) **Wrap-up and departure** (15,30 – 17,00)

Summary

Landscape of European legal profession(s)
Developments in West and East

Prof. Dr. Alan Uzelac

Ever since the united European legal profession, which emerged in the Gregorian revolution in 11th century [Berman], started to separate into a series of distinct and partly concurrent occupations, there was a dilemma: what is prevailing – the drastic contrast in particulars, or the still relatively homogeneous professional foundations. In the late 1980's, some authors, concentrated on cross-national comparisons of legal occupations, argued that similarities of purpose reveal deeper structures which connect what is initially experienced as strange and alien. There is, so says the thesis, a greater underlying unity, because the different forms of legal work respond to at least a core of universal problems found in all complex societies [Rueschemeyer].

Today, this submission deserves a closer look, from at least two perspectives.

As first, it seems that the diversification has gone further, this time less in a cross-national, but more in a cross-professional context. On the one side, the classical and "universal" legal professions – judges, lawyers, prosecutors, law professors – are being joined by new, emerging legal professions, such as mediators, arbitrators, legal consultants etc. More professions mean more competition, and consequently less unity. On the other side, even the formally identical professions (e.g. the practising lawyers) tend to split into at least two groups, which have increasingly little in common (e.g. the multinational commercial lawyers and the conventional solo-practitioners) – [Mullerat].

The second perspective is the one that questions the common functions of the various legal professions. Once upon a time, the jurists were capable of happily reconciling the benefits of their professions with the benefits of the society. However, it is getting increasingly difficult, as we are witnessing the two parallel, but mutually contradicting trends. The one (mainly in the West and North) puts the pressure on legal professions by the new policies that understands lawyers as public servants and litigation as a public service for the enforcement of civil rights [Zuckerman]. This new understanding calls for more responsibility, more user-friendliness and higher cost-awareness. The other trend (more prominent in the South and East) is, on the contrary, further developing the barriers between the legal professions and the rest of the society. This trend contributes to the separation of the professional and public agenda, and therefore puts into question the social function and the role of the profession. This submission will be illustrated on several issues, which will be presented on the basis of the new statistics on the judicial structures in Europe, and on the comparative information collected on the judicial reforms in Western countries (the "old" democracies) and Eastern (transition) countries. The questions to be discussed are, *inter alia*:

- Do lawyers enhance or destruct the efficiency of justice?
- Should judicial independence embrace separation of powers, but reject checks and balances?
- Is service-based understanding of the justice system compatible with the re-feudalization of the legal profession(s)?
- Will marginalization of the codificatory role of the law professors undermine the ability to undertake sensible law reforms?

DUBROVNIK CONFERENCE
24-28 MAY 2010

Outline of the contribution of Floris A.W.Bannier
Professor of law, University of Amsterdam.

Do the traditional rules of conduct still fit the modern lawyer?

The legal profession boasts a history that goes back till Roman times and possibly even longer back. During that long history, lawyers have always been subjected to certain rules in respect of their conduct, their professional behaviour.
These rules of conduct have developed through the ages along with the legal profession itself, but some of them have never changed. They are often based on ethical principles but there are also more practical ones.
In recent days, however, the developments in the profession have taken a turn which cannot be compared to anything before. Whereas the lawyer considered himself as exercising a *nobile officium* for most of the history, he is now more often than not a business man. Whereas the lawyer exercised his profession alone in history, he is now organized in sophisticated business associations, counting literally thousands of professionals.
Have rules of professional ethics developed to keep up with these new forms of professional service organizations? Can rules as to independence, partiality, professional secrecy, conflicts of interests, to give but a few examples, still be applied or should they be revised to accommodate the commercial developments, for instance. Are there overriding ethical principles which apply independent of the sort of practice or lawyers organization?

Legal Services in the UK – the New Dawn

John P Westwood

Director of International Programmes

The Institute of Legal Executives

The Legal Services Act 2007 in the United Kingdom seeks to liberalise and regulate the market for legal services in England and Wales, to encourage more competition and to provide a new route for customer complaints.

Underpinning the above are eight regulatory objectives which aim to:

- Protect and promote the public interest
- Support the constitutional principles of law
- Improve access to justice
- Protect and promote the interests of consumers of legal services
- Promote competition in the provision of legal services
- Encourage an independent, strong, diverse and effective legal profession
- Increase public understanding of the citizens legal rights and duties
- Promote and maintain adherence to the professional principles

With a duty to promote these regulatory objectives, the Legal Services Board was created and became fully operational on 1st January 2010.
The Act also

Requires professional bodies to separate their regulatory and representative functions

Creates statutory objectives and duties for all regulatory bodies

Creates a single point of entry for consumer complaints about legal services

Creates legal disciplinary practices (LDPs) where up to 25 per cent of partners are non-lawyers

Creates alternative business structures (ABSs) with non-lawyers in professional management or ownership roles.

THE BALKANIZED AMERICAN LEGAL PROFESSION

Richard L Marcus, University of California

The United States has had a continent-wide legal profession for two hundred years, and recently has had an integrated legal profession throughout significant parts of the country. It offers a possible parallel to the emerging situation in Europe, where there are continent-wide legal connections of increasing importance and depth. This paper examines the American experience as a possible model for the European future.

But the U.S. has long embraced a peculiarly balkanized governmental structure, with a weak central government. American law has almost entirely been state law. Each state has its own judiciary, with elected judges who tend to be much more independent and unbureaucratic than those in most other countries. These circumstances created centrifugal pressures on the legal profession.

As a result, the American legal profession has for most of its existence been very balkanized. Until the mid 20th century, communication throughout the country was difficult, and lawyers in one state would be unlikely to have access to the laws of another. Law firms were usually limited to one city, and almost never had offices in more than one state. Lawyers were admitted to practice in one state and not permitted to practice in another unless they qualified separately to practice there.

In the last few decades, however, rapid change in the American legal profession -- often referred to as the emergence of Big Law firms with multiple offices around the country and around the world -- has supplanted the formerly balkanized situation in significant ways. Nationwide practice has resulted from the increased integration of nationwide businesses. It has also received a boost from technology, which makes it easy to obtain access to the laws of other states and other countries, and facilitates operation of law firms with multiple locations. National unity in the profession also builds on the longstanding reality that legal education in the U.S. is relatively uniform coast to coast and produces law graduates who are familiar with the same doctrines in every state.

Although the American example suggests the possibilities of a Europe-wide legal profession, there are substantial questions about whether it is a suitable analogy. American unity has emerged from a 200-year national history that included a Civil War and still involves strong sentiment favoring localism in important matters. The growing importance of federal law also fosters national practice. Whether Europe will soon have similar conditions is uncertain.

Name& Affiliation: **Serban S. Vacarelu, Maastricht University**

Title: *Legal profession in United States and Louisiana*

Summary:

The lecture will involve a general presentation of the legal profession and the structure of the judiciary in the United States, focusing on certain aspects that are peculiar to the American system and perhaps unknown to most European jurisdictions. The court system in the United States is organized distinctively at the federal and state level, and the legal profession is regulated differently by each individual state. Therefore, for practical reasons, the presentation will refer primarily to Louisiana as an illustrative state system with regard to regulations of the legal profession and the structure of the state judiciary, while noting some important differences that are characteristic of other states.

The first part of the presentation will focus on the legal profession and will include an analysis of the legal education, licensing requirements for attorneys and various forms of practice. Of particular interest for the audience is perhaps the case of foreign educated attorneys with regard to their eligibility to practice in the United States. In addition, the presentation will describe the structure of a law firm and the traditional business model, with some observations regarding recent trends in law firm practice generated by the current economic crisis.

The second part of the presentation will be devoted to the judiciary. In the addition to a general overview of the court system, the presentation will focus on the status of judges in the legal profession and in the society in general, by examining the way judges are selected (i.e. popular election, merit-based appointments, political nomination), their required qualification and the professional training provided. An interesting characteristic of the American system is the extent of judicial powers vested in courts, which include a wide range of non-adjudicatory powers, derived as a corollary to the principle of separation of powers.

Finally, the presentation will include a description of ethical standards and the rules of professional conduct for both attorneys and judges. Using Louisiana as a model system, the presentation will examine the disciplinary process of attorneys and judges.

Quo Vadis: The Teaching of Procedure and the Future of the Legal Profession

Janet Walker

What difference does it make how we teach and learn procedure? How does it influence the other subjects taught in law schools and our understanding of the role of legal education and the best way to pursue it? How does it shape legal scholarship and the community of academics specializing in the area? What impact does it have on the practice of law and the approach to dispute resolution taken by members of the profession? And what role does it play in civil justice reform?

These questions are being considered in the Project on Teaching Procedure, an innovative collaboration among common lawyers specializing in dispute resolution. And they are questions that I look forward to raising for discussion in the Program on Public and Private Justice: Dispute Resolution in Modern Societies. The following is an agenda for a brief introduction to this large topic, an introduction that must necessarily be selective and incomplete:

- An outline of some of the key factors shaping legal education and the profession in Canada over the last half century—and the significant contrasts between this experience and that in other common law systems
- Four different models of civil justice reform:
    - England – Commission of Inquiry
    - Australia – Law Commission
    - Canada – Rules Committee
    - US – American Law Institute
- Reflections on the implications for the study and practice of law in a globalized world – and the emerging issues for the profession and for legal education

I look forward to a stimulating discussion in which I hope to learn more about connections between legal education and civil justice reform in the countries of the participants!

IUC Dubrovnik 2010, Outline paper Annie de Roo & Rob Jagtenberg:

Professional(s as) mediators:
Emerging markets and the quality of legal protection

Understanding professions.
Professionals as opposed to e.g. artists, craftsmen.
Professionals navigate on a body of expert knowledge.
Professionals operate fairly independently.
Inroads on independence; managerialism; ownership
How 'old' professions have protected themselves against competition.
State monopolies under pressure; from 'Tesco law' to the 'E-court'
How 'new' professions seek to enter the market and secure a place.
Branding, certification et al.
The forces at work behind it all
The overall drive for economizing and productive efficiency; over-supplied and under-supplied services

Can mediators be professionals in their own right?
A. What is the mediator's body of expert knowledge?
Knowledge 'borrowed' from psychology, law, management studies, accountancy et al.
Who imparts the body of knowledge?
Universities (law schools) versus providers of specialist training
a survey amongst university law schools, and private providers
Who supervises the mediators?
Intermediate conclusion: are mediators professionals?
B. Can mediators survive as professionals in their own right?
Where does the mediator get his/her cases from?
Some quantitative data

The empire strikes back: how old professions incorporate mediation
Defensive marketing for lawyers
Judges making a conflict diagnose?
Mediation for counsel in a transnational corporate environment
The family mediation success story
Conclusion: who is best equipped to 'claim' mediation?

The upshot for (legal) research
Mapping out the hinterland of law
2nd generation research: When negotiate, when litigate/adjudicate?
Customer satisfaction and law's added value

Concluding observations
The '4th wave' in the 'access to justice' movement: who benefits from diversification and increased competition on the legal & dispute resolution services market?

Elisabetta Silvestri

University of Pavia, Italy

The Legal Profession in Italy: Regulation vs Competition?

Summary

In Italy the number of lawyers is very high. Several attempts have been made with the view to contain the constant increase in the number of professionals admitted to the Bar.

The huge number of lawyers does not mean that the Italian market of legal services is a competitive one. On the contrary, many characteristics of the Italian legal profession make it a true archetype of regulated professions. Regulation (meaning both state regulation and self-regulation by the National Bar Association) implies a wide range of restrictions affecting the access to the profession, the ability of lawyers both to fix the price for the services they offer and to advertise them, and the freedom to establish partnerships or companies with the participation of professionals other than fellow lawyers.

Some of the above-mentioned restrictions have been softened in recent times due to the pressure of the EU and its attempts at fostering competition in the sector of professional services. The presentation sketches an outline of the EU Commission's initiatives in the relevant field, mentioning also the ECJ caselaw that has a bearing on the issue of identifying to what extent competition law is applicable to professional service.

As far as the specific features of the Italian legal profession are concerned, the presentation describes the main findings of an investigation carried out by the Italian antitrust authority in 2009, after the coming into force in 2006 of a statute promoting liberalization in professional services.

This glance at the Italian landscape continues with some comments on the most recent bill for the reform of the legal profession, underlining its aspects that appear to be a return to a tight regulatory rein.

Some final remarks are offered on the issue whether reforming the legal profession could have a decisive impact on the crisis currently affecting the administration of justice in Italy.

FRANCESCA FERRARI

The Italian court expert in civil proceedings: Its role in the light of the new technologies and the development of legal professions

ABSTRACT

The role of the technical expert and of his/her activity has certainly increased in the Italian civil proceedings in recent years.

In the past Italian scholars and Courts used to picture the technical expert as mere consultants of the Judge whose participation in the proceedings was to be considered not only occasional, but also well limited in its significance.

Actually, the technical expert can be qualified as a legal professional based on the Italian rules governing his/her appointment and activity.

In this context the recent law of reform of Italian Civil Procedure Code, adopted through law no.69 of June 2009, amended some of the rules devoted to the technical expert and to his/her activity.

Although an enhancement of the adversary nature of such activity as evidence taking sub-proceedings may be inferred from the amended rules, the scholars should keep in mind that cautions should be adopted in order to regulate the technical debate with appropriate guarantees and that it is strictly necessary to identify the boundaries of the expert's activity maintaining it as much as possible within the so called *quaestio facti*; however it is to be recognised that, in certain fields of law, the expert is also involved in the evaluating phase that has to be carried out by the Court.

Moreover a major issue remains outstanding, namely the issue defined in common law systems as the paradox of non scientist judges and jurors deciding disputes about science.

As regards this issue, which in the past in Italian system was resolved with the *peritus peritorum* formula, it has to be verified whether – to a certain extent - the criteria inferred from US Courts may be adopted in the civil law systems and specifically in the Italian one.

Finally, considering the expert as a legal professional, some consideration of comparative law are due in order to understand as much as possible how workable is the harmonization in this context.

Giuseppe Finocchiaro

Legal profession fees and competition

Traditionally in Italy lawyers were to charge fees within ranges (tariffs) whose minimum and maximum were set by law. The subject-matter of legal fees underwent a profound reform in 2006: on the one hand, the reform allowed lawyers to charge fees less than the minimum amount provided by the law; on the other hand it abolished the prohibition of the contingent fees agreements (quota litis).

The purpose of the 2006 law was that of increasing competition in the legal system. However, the law encountered harsh criticism in that it was feared that it would fuel litigation. The paper aims at verifying this two major contentions.

First, the two contentions are tested against statistical evidence provided by the Italian National Office of Statistics (ISTAT) and the Italian Lawyers' Social Security Institution (Cassa Forense).

In order to check whether it holds true that litigation increased significantly after the reform, the paper analyses the data provided by ISTAT in regards to the number of proceedings instituted before and after the reform.

In order to check whether and, if so, to what extent the reform had an impact on the level of income the paper examined the data provided by Cassa Forense with regard to the average income of lawyers before and after the reform.

Second, the paper considers the impact of the reform on consumers' behaviour. This part of the work takes a theoretical approach in view of the lack of statistical data. In particular, it questions the assumption that consumers may choose the lawyer who charges the smallest fee.

The conclusions of the paper address the question whether market rules are suitable to legal services.

Jon T. Johnsen, Faculty of Law, University of Oslo

Lawyers' monopolies on legal services in Finland and Norway and their impact on legal aid delivery

My presentation starts with some general remarks the structure of the legal professions in the Nordic countries. Norway will be the model example.

I will then compare the private professions in Finland and Norway and show that they are very differently regulated. I will discuss how the differences influence the size of the profession, competition and people's access to legal service.

My presentation will then compare the legal aid schemes and discuss how the differences in the structure of the private professions and their market control impact on how legal aid is delivered in the two countries.

A main part of legal aid delivery in Finland is done by publicly employed and salaried lawyers while Norway almost solely buys the necessary service from private practitioners on a case to case basis. From comparisons I will discuss the meaning of a "public sector" on the private profession's ideology and attitudes toward serving the poorer part of the population.

The last part analyses how the differences between the professions in the two countries influence geographic distribution, quality, capacity, professional independence and administration of legal aid schemes.

Notaries Public Today. The Situation in the Netherlands in a European Historical Perspective

Kees Cappon (Amsterdam)

Right now notaries public in the Netherlands go through hard times. The consequences of the introduction of the Anglo-American corporate culture; a new act on notaries public (1999) which provides for freedom of establishment and a free market-system (no longer fixed fees); and the economic downturn caused by the credit crunch, have hit the Dutch notaries hard. In the literature one reads about a crisis in the profession. The vice-chairman of the Council of State (Raad van State) wrote in his last annual report that the independence and impartiality of the notaries public is at stake. Prominent members of the profession express their doubts about the independent survival of the notaries public in the Netherlands.

In the vein of the statement of the English historian E.H. Carr (1892-1982) that 'it is at once the justification and the explanation of history that the past throws light on the future, and the future throws light on the past' (*What is History?*, ed. 2001, p. 117) I will argue in my paper that although it cannot be denied that the notaries public in the Nether lands go through hard times, history shows that there is no reason to fear the future. The history of the notaries public is a story of great continuity with ups and downs. The notaries public – also known as Latin notary – have their origins in the 11th and 12th centuries in Northern Italy. From the date of their birth the essence of these notaries, especially in the civil law-countries, lies in the civil procedure and especially the role of evidence therein. As long as the civil law countries hold to the fundamentals of this civil law procedure public notaries do have a future.

***

Competition in legal services: future perspectives on the notary monopoly in Europe

Abstract: Many EU Member States, such as Spain, Portugal, France, Italy, Belgium, Germany, Poland, Slovenia and Austria, have adopted the so called Latin notary system according to which notaries enjoy a monopoly over important legal services. The services provided by Latin notaries can mainly be divided in two categories: (a) legal services involving the performance of a public function and (b) legal services in a broad sense. By contrast, in Scandinavian countries and England the profession of notaries in the sense of "Latin notaries" does not exist. In these countries notaries have never been charged with major legal functions, such as the production of authentic acts. Many of the functions performed by notaries in civil law countries are in the hands of solicitors or allied professions in England. Considering the major differences between notarial systems in Europe the question arises whether European law requires the Member States to open up their (national) notarial markets for international competition. Most recently, the European Commission initiated infringement proceedings against several Member States arguing that domestic provisions enshrining a nationality requirement for the profession of notary would violate EC law. Additionally, the European Parliament's Recommendation regarding the creation of a European Authentic Act has trigged a "notaries vs lawyers" conflict. In general, it revives the discussion on liberalizing the market for legal services in Europe. The first part of the presentation provides a brief comparative overview over different notarial systems and existing monopolies. The second part focuses on the competition, if any, between notaries from different Member States. Finally, the third part deals with the competition between different legal service providers, including a discussion of the Latin notary's future role within civil law systems.

Speaker: Dr. Christian Koller is a Post-Doctoral Researcher and Erwin-Schrödinger-Fellow at the University of Zurich.

Zvonimir Jelinić (Osijek): Do various methods of charging lawyers' fees influence the speed and the style of civil proceedings? Examples from Croatian and comparative law and practice
Wednesday, May, 26.

Presentation outline

Croatian lawyers charge their fees according to the Tariff for Lawyers fees and cost compensation. Tariff is established by the Bar, however, the whole year 2009. was burdened by the process of adopting a new Tariff for Lawyers fees. Namely, until recently, Croatian Bar Association was solely empowered to adopt Tariff for Lawyers fees and cost compensation. Pursuant to the amendments of the Act on Legal Profession, new rule was introduced, so Tariff must be given consent of the Minister Justice who also has to seek the opinion of Economic and Social Council. Although Tariff was initially denied by the Minister and then after the corrections done by the Bar adopted, Tariff has changed only slightly. For certain procedures (such as tenancy disputes, divorce or annulment of the matrimony, labour relations as well some other), no matter how many services has been rendered, one-time price for 1st instance proceedings is set. Since Tariff established by the Bar also serves as the method of calculation of the lawyers fees for the purposes of allocation of the costs of proceedings, Minister considered that the latter change will contribute to the further shortening of proceedings.
As to the all other services, price and method of calculation *per* single service maintained. Present Tariff system is very flexible and it accepts freedom of contract principle. For instance, no obstacles exist that lawyer and client can agree on the fees, thus departing from indexed calculation established by the Tariff. Contingency fees are allowed also. However, even if special agreement on fee is reached, court will still calculate costs according to the indexes provided in the Tariff. Since these (indexed) prices for most of the procedures are set very high, question is whether such a method of charging lawyers fees affects the speed and the style of civil proceedings conducted in front of the Croatian courts. In order to come up with some precise answers it will be necessary to address some solutions from comparative law as well.

The changing role of a trial judge in the civil procedure

Nina Betetto

External factors that influence the changing role of the judiciary

- **Changing character of the activities of the legislative and executive branches of power**
  - ever more entangled and intertwined (duas politica)
  - less codification, rather more policy than law oriented
  - law the instrument of choice to achieve policy goals
  - more state intervention

External factors that influence the changing role of the judiciary

- **Consequences in the judiciary**
  - it becomes more than before a corrective power
  - it adopts an increased role in law-making
  - judicial activism

External factors that influence the changing role of the judiciary

- **Information society**
  - information technology
  - role of the media
  - changing attitude as regards transparency, accountability, freedom and accessibility of information

Internal factors that influence the changing role of the judiciary

- **Changing demands on the judiciary in a modern society**
  - legal demands (e.g. ECHR case law)
  - democratic demands (e.g. openness, accountability, transparency)
  - service related demands (e.g. efficiency, quality)
- **Internationalization of judiciary (e.g. IAJ, CCJE)**

Accountability and judiciary

- **Traditional "hard accountability"**
  - judiciary held accountable by institutions like the appeal system, professional requirements and standards, recruitment, appointment, promotion, disciplinary
- **"Soft (social) accountability"**
  - openness, dialogue, sensitivity to the values and needs of the community

The function of a judge in the civil procedure

- Ude: The function of a judge in a civil procedure is to establish facts, find and apply the appropriate norms of substantive law, make a conclusion whether the factual situation corresponds to the abstract factual situation contained in the norm of the substantive law and to determine a sanction foreseen by the law.

The function of a judge in the civil procedure

- Deciding the case
- Law-making
- Ensuring fundamental procedural guarantees
- Case management
- Duties regarding a consensual resolution of a dispute
- Control function of a court

Deciding the case

- **The influence of information technology**
  - the increased role of a case law
  - a case law is gaining a similar position as it has in precedential systems
- **Legal demands**
  - the influence of precedents, e.g. of the ECHR and Constitutional Court case law

Corrective function of appeal courts (final decision upon the claim)

Ensuring fundamental procedural guarantees

- **Legal demands**
  - the influence of precedents (e.g. of the ECHR and Constitutional Court case law)

  on the understanding of basic principles of civil procedure, e.g. orality, right to be heard, right to a public trial…

Case management

- "The judge must ask questions and shall in other appropriate manner see that all ultimate facts be stated during the hearing and that all necessary explanations be given."
- The judge is bound by the factual assertions and evidence, offered by the parties, **but** has a right and a duty to stimulate the parties to amend and clarify the assertions of facts.

The role of an active case management has been increased

- **The amendment CPA-A (2002)**
  - settlement conference
- **The amendment CPA-D (2008)**
  - the court has a duty to give the plaintiff an opportunity to remedy the action by supplementing the factual assertions
  - case management also in the preparatory stage of litigation: a judge can pose written questions and demand written clarifications
  - case management in the apellate proceedings

A changing role of a judge managing the case

- Law the instrument of choice to achieve policy goals
- A judge adopts an increased role in law-making
- Changing demands on the judiciary: when deciding the case a judge has a duty to "serve" parties (service related demand)

Duties of a judge regarding a consensual resolution of a dispute

- A judge has a duty - throughout the whole course of proceedings – to be active at the encouraging of settlements
- A judge may refer parties to ADR

Duties of a judge regarding a consensual resolution of a dispute

- Changing demands on the judiciary: a judge has to be sensitive to the needs of the parties
- "Soft (social) accountability"

How far can a judge go when he tries to stimulate the parties to reach a settlement?

- Method of work based on active case management
- A judge may comment on legal issues and drive attention to legal grounds
- Can a judge use mediation techniques?

Maastricht University Leading in Learning!

PPJ Dubrovnik 2010

European landscape of legal professions

Judiciary in courtroom between prosecutor and defence: equal to its task?

An empirical survey

B. Assink, M. Dekkers, P. Keppenne, N. Pepels

Maastricht University Leading in Learning!

Judiciary in courtroom between prosecutor and defence: equal to its task?

An empirical survey

B. Assink, M. Dekkers, P. Keppenne, N. Pepels

Bachelor students
Faculty of Law, Maastricht University,
The Netherlands

Maastricht University Leading in Learning!

Outline

- Research theme
- Research hypothesis
- Remarks regarding Dutch criminal procedure
- Research design
- Data collection
- Provisional results
- Conclusions

Maastricht University Leading in Learning!

Research theme

- Consistency of judicial behavior and judicial decisions in court room
- Judge in a sandwich position between prosecutor and defence: vulnerable to repeated strain injuries?

Maastricht University Leading in Learning!

Research hypothesis

- Court behavior and court decisions are influenced by the length of a court session because of
  - the elapse of time;
  - the repeated confrontations with prosecution and defence.
- Operationalization:
  - Comparing court decisions with the opinion of the Public Prosecutor (PP);
  - Number of interventions and interruptions by members of the court;

  as a function of time elapsed in court.

Maastricht University Leading in Learning!

Perfect laboratory: Dutch criminal procedure for minor cases

- *Unus iudex* (police court judge)
- Oral proceedings
- Simple cases (theft, burglary, assault and battery, traffic crime)
- One session
- Step by step:
  1. Indictment by public prosecutor (PP)
  2. Defendant's statement
  3. If necessary: hearing witnesses and experts (rare)
  4. Opinion of PP
  5. Plea of the defence
  6. Oral judgment

Maastricht University Leading in Learning!

Police court sessions

- Morning or afternoon
- Appr. 15-20 cases
- Same public prosecutor
- Same judge
- No breaks
- Oral judgment immediately after closure of the court investigation
- Public hearings

Maastricht University Leading in Learning!

Research design

- Attending court sessions
- Observation of incidents
- Registration of observable, non-subjective facts on calibrated forms
- Coding to data files
- Analyzing data

Maastricht University Leading in Learning!

Research form

Judge	PublicPro	Date	Court	Nature	Name Judge →
m/f	m/f			PCR/EPCR	Name Public Prosecutor →

09:05 H	09:30 H		M1990	FM92	M1970	FM68	Y/N		SVEDP	SVEDP	Y/N	
Beginning	**End**	**Sort**	**Suspect**	**Victim**	**Witness**	**Experts**	**Heist, Re**	**Incident**	**Int**	**Cut**	**S. Appeal**	**Comments**
		Staged☐	Suspect☐	Victim☐				Silent☐				
		Default☐	Barrister☐	Barrister☐				Inadmiss.☐				
		New☐	Authorized☐	Authorized☐				LastWord☐				
								Library☐				

Indictment	1	**Denies Y/N**
	2	**Denies Y/N**
	3	**Denies Y/N**
	4	**Denies Y/N**
Claim		
Decision		

Maastricht University Leading in Learning!

Data collection

- Data from 54 court sessions, 466 cases
- 8 different courts in the South, Centre and West of the Netherlands
- In 43 out of 54 sessions reality was not in accordance with art. 6 ECHR
- Judges and Public Prosecutors suspicious: researcher asked to leave the courtroom
- Request to leave default proceedings because the attendance of public would lead to more work
- Unwillingness to submit names of judges and public prosecutors

Maastricht University Leading in Learning!

Coding the data

- Problem: how to compare the PP's opinion with the court's decision?
- Example:
  - PP: 3 months imprisonment of which 1 month should be suspended
  - Court: 50 hours of community service and a € 3.000,- fine

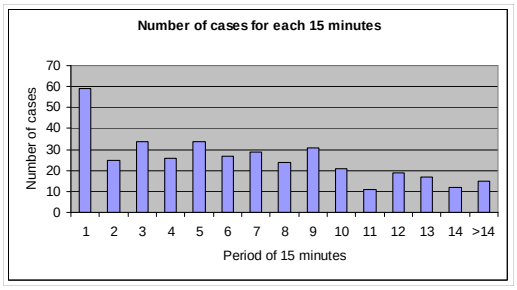
Maastricht University Leading in Learning!

Index to score complex punishments

Punishment ⇨ Modality⇩	Imprisonment	Fine	Community service	Distraint (estimated value)/ disqualification from driving (€ 400/month)
Not suspended	10 pts/day	1 pt /€ 25	1 pts/h	1 pts/€ 25
Suspended (1/3)	3.33 pts/day	0.33 pts/ € 25	0.33 pts/h	0.33 pts/€ 25

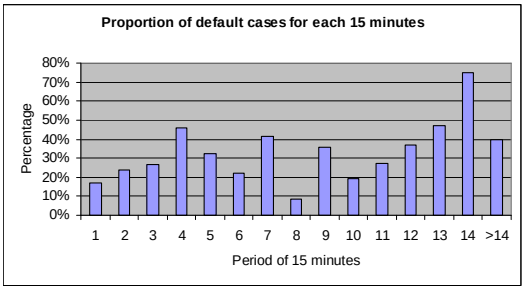
Maastricht University Leading in Learning!

Provisional results



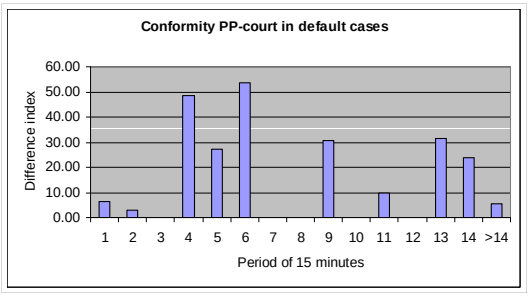
Maastricht University Leading in Learning!

Provisional results



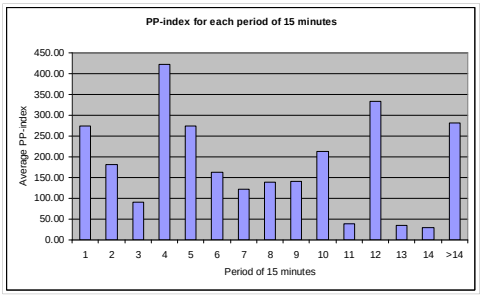
Maastricht University Leading in Learning!

Provisional results



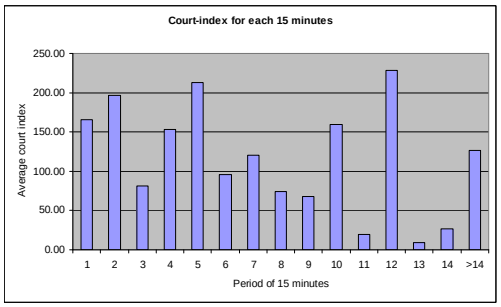
Maastricht University Leading in Learning!

Provisional results



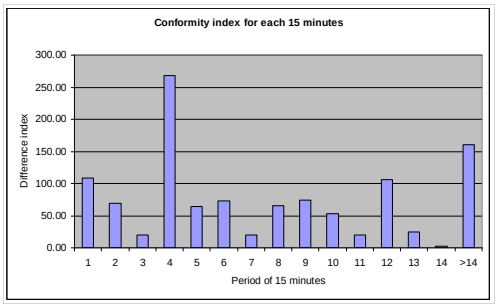
Maastricht University Leading in Learning!

Provisional results



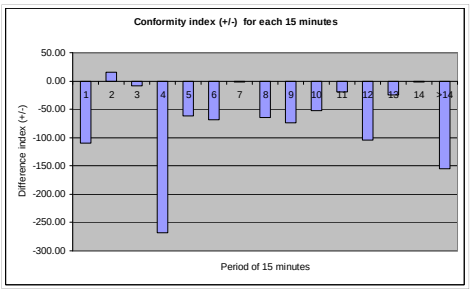
Maastricht University Leading in Learning!

Provisional results



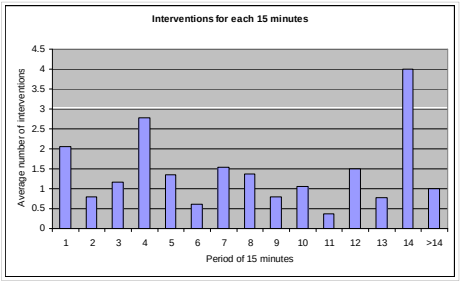
Maastricht University Leading in Learning!

Provisional results



Maastricht University Leading in Learning!

Provisional results



Maastricht University Leading in Learning!

Conclusions

- Judges tend to favor defendants in the course of court sessions
- Judges are consistent in their behavior towards defendants during court sessions

Considerations on the Romanian legal profession system

Sebastian Spinei
Senior lecturer, PhD
Sibiu Law Faculty

Summary

Modern legal profession system in Romania was configured in the early XIX-th century, in the context of the foundation of the new State .

The socialist regime and the “transition” period marked the course of legal profession in Romania .

The presentation approaches some features of each (main) legal profession .

The status of independent professions during socialist period is brought up first, to indicate the starting point of existent regulations .

Some mentions and observations are made on the lawyers : the activities assigned to the profession, its position in judicial proceedings, the admission methodologies, trends in recent years regarding the policy towards foreigners practicing the profession, etc .

There are also a few remarks regarding the notaries and bailiffs (relation with the State and some debatable consequences, other recent developments) .

The prosecutor’s position in the system is presented in the two moments that impressed Romanian modern history – the socialist age and recent years .

Judge’s statute is analyzed on two components : profession’s recently achieved self-determination (and its down side) and recruiting personnel policy .

A final issue deals with the isolation of legal professions in Romania . If this is a fact, and the system does not provide complete satisfaction and trust, a higher degree of solidarity wouldn’t be a possible solution ?

LEGAL PROFESSIONS ROMANIA

Sebastian Spinei, Senior lecturer, PhD
Sibiu Law Faculty

Main legal professions

- **judges**
- **prosecutors**
- **lawyers & legal counsels**
- **bailiffs**
- **notaries**

Socialist period

- no independent/liberal professions

- part of the State Justice System

- lawyers :
  - Collective Bureaux of Legal Assistance
  - Justice Minister :
    - general command over profession
    - obligatory orders, instructions
  - reorganised 1995

- notaries, bailiffs - Justice Ministry employees
  - reorganised 1995, 2000

Present .

Lawyers - Activities :

- assisting, representing any person or corporate entity before any person or entity
- legal advice, legal document drafting
- mediation activity
- preserving, managing assets
- legal (judicial) aid services, etc.

Admission :

- no exam for graduates (1995-2000)
- no exam for 10 year career in other legal profession & PhD
- non-uniform exam procedures
- national exam for everybody (2008)
  (Government ordinance)
- back before 2008
  - Constitutional Court 2010 : *ordinance - unconstitutional*
- Government bill (proposed law) - *in process*
  - exam for everybody

Personal observation : lawyers - judicial system & legislator relation

"Distrust" :

- In civil process :
  - parties not bound to designate (be assisted by) lawyer in any case or jurisdiction level
  - service/document notification :
    - usually not valid if made directly between lawyers
    - no obligation for courts to notify lawyers
    - measures in Civil Procedure modification project
  - procedure of evidence administration by lawyers : optional, seldom (if ever) used

Trends in recent years

- Opening the profession to foreign lawyers

- Non EU, EEA countries :
  - for legal advice on Romanian law - exam required (Romanian law, language)
  - no pleading in Courts, except international arbitration

- EU, EEA lawyers :

- may permanently practice in Romania as a foreign lawyer (no activity restriction; registration formalities required)
- may practice as Romanian Bar Association member (exam or 3 years work experience)
- may occasionally practice profession

max. 7 years restriction on free movement of lawyers (reciprocity principle)

Bailiffs, notaries

Relative autonomy - some State control :

Justice Minister
- controls and coordinates activity and admission
- approves number of profession members and available places for annual admission exams
- formally appoints to office and dismisses
- approves the limits of fees
- can take disciplinary action

Successful and desired professions

Criticism :

- Closed professions - not transparent enough or not trustworthy enough admission procedures
- Romanian Competition (Antitrust) Council **Report** (Oct.2009) :
  - **fact :** notary fee amount in Romania - amongst highest in EU, related to average income
  - **proposals :**
    - remove restrictions regarding number of profession members
    - remove minimum fee, reduce amounts

- Romanian Notaries Association (press release, Nov. 2009) :

  - nothing is wrong
  - nothing has to be done

Positive developments :

Bailiffs - better educational background, professional training

- 2000 - first bailiffs in office not required law degree
- mandatory afterwards for admission
- mandatory training courses

Prosecutors - position in the system

- preeminent role in Socialist period
  - State representative in Courts
  - Civil cases - Attorney (Prosecutor) General:
    - right of supervision over the activity of the Courts
    - right to control any file
    - could order the stay of execution of a judgment he would appeal
  - Criminal Cases : prosecutor issues perquisition and arrest warrant

Today:

- step by step, back to traditional balanced position in proceedings

- still searching for identity: independent magistrate or executive agent ?

Judges statute regulations - key for reforming justice

Independence :

- accomplishment - Superior Magistracy Council (SMC)

- SMC took up from Justice Ministry (2003) all prerogatives concerning magistrates career and legal responsibility (disciplinary Court for magistrates)

Solution - questionable :

- politicization issue solved
- corporatization established :

SMC composition : - 9 judges, 5 prosecutors
- 2 non-magistrates

Election process - arguable :

controversial figures among members

SMC today :

- rather inert institution
- most visible actions - "protecting profession's independence"
- any criticism - rejected as pressure and attack on independence
- lesser preoccupation for reforming magistracy (eliminating inadequately prepared and corruption susceptible magistrates)

Recruiting personnel policy

Accomplishment - hard admission exam for National Magistracy Institute (2 years) : relatively well trained graduates (theoretical level)

Down-side : not enough life and professional experience ?

Ideas (lawyers) :

- introducing same admission methodology for all professions
- National Magistracy Institute standards followed

Only magistracy and Bar Association exams requires all main Law disciplines (Criminal, Civil, Procedures)

Isolation of legal professions

- rather difficult cross-over
- no mixed composition in admission commissions (exception - university professors, Justice Ministry representatives)
- no other legal profession in Superior Magistracy Council

Non-transparency of procedures

Solidarity principle / "checks and balances"

Solution ?

Public and Private Justice Course - Dispute Resolution in Modern Societies

PPJ 2010: European Landscape of Legal Profession(s): Has Unity Been Lost?
IUC Dubrovnik, May 24 – May 28, 2010

THE STATE ATTORNEY – ATTORNEY OF THE STATE?

SLAĐANA ARAS, dipl.iur.
Research Assistant
Chair for Civil Procedural Law
Faculty of Law
University of Zagreb

Short outline

I. The institution of public attorney was established in former Yugoslavia by federal and republic laws in 1952. The public attorney's offices were the bodies of the federation, republics, provinces and administrative – territorial units (the socio – economic communities) for providing legal protection of their property rights and interests, rights and interests of other socialistic legal persons designated by law. Namely every socio - political community had its own organization of public attorney's office. At the level of the federation was established and the military public attorney's office. There were not relations of mutual hierarchical subordination or superiority. The public attorney was administrated by public attorney's office. They could have deputies who replaced them in carrying out their mandate. Also the public attorney could determine a professional associate who was a lawyer of the public attorney's office or another state agency or organization to replace him in a particular case in the representation. Under the Law of Public Attorney's Office there were two grounds on which he could represent the socio – political communities: *ex lege* in case of property rights and interests of relevant socio - political community; or labor organization if it is authorized.

II. On the other hand, the public prosecutor was the State body who exercised the function of criminal prosecution and other law certain rights and duties. In the area of civil litigation jurisdiction the public prosecutor was authorized in the first place to initiate litigation for setting aside the double marriage. Although it was not expressly stipulated, the public prosecutor's office had without a doubt the power to take the action for finding that the marriage does not exist, or that marriage is legal there. Furthermore the public prosecutor could occur as an intervening party *sui generis* and he could take the action for protection of legality.

III. After the independence of Republic of Croatia the public attorney's office became the state attorney's office and his duties were limited to the protection of property of Republic of Croatia; to represent Republic of Croatia in civil and administrative proceedings. In 2001 this institution was integrated into the state attorney's office, which’s previously had the main function of criminal prosecution. Now the same body – the attorney's office of Republic of Croatia – as an autonomous and independent judicial authority has the function of criminal prosecution, takes legal action to protect the property of Croatia and the legal remedies to protect the Constitution and laws.

IV. The aim of this paper is an introduction into the Croatian legal system regarding the development of representing the State. In this contest a short overview of some European comparative systems will discover the main differences regarding the Croatian public attorney's office.

New Legal Education in Germany: Professional Skills and Alternative Dispute Resolution as Obligatory Subjects of University Law Studies

Dubrovnik 2010

Peter Gilles

Free Translation from German to English by Mariette Small (South Africa) LLM- Student at Frankfurt University

Contents:

In this article the recent reform in the German legal education is discussed. The principal purposes thereof to strengthen the 'orientation of attorneys' and the 'orientation in the occupational field' of the university studies, as well as the subsequent legal period of instruction.

In addition to the classic legal education at law faculties, completely new obligatory educational goals were added to the existing subject specific 'foreign languages. Especially the so-called 'key qualifications', like negotiation management, discussion guidance, rhetoric, dispute resolution, mediation, interrogation techniques and communication skills, with which Alternative Dispute Resolution' (ADR) comes into closer focus in the field of attorney-vocational training.

Tomislav Karlović

The role of legal professions in bypassing the law: the example of fiducia

Second life of fiducia cum creditore observed through the role of legal professions which participated in its historical development and today are active in its implementation reveals a complex dynamics interwoven with controversy and competition. The interaction of different players on the general field of law - the legislator, the judicial system, academia, practitioners – is here especially interesting as it differs from the traditional division of powers and currents within the pyramid of legal order. Sources of this development are multiple; varying dependently upon the specific temporal conditions and national legal environment fiducia was introduced into. Two of them, from our standpoint most interesting, are the introduction of Sicherungsübereignung in German law during the second half of 19th Century and fiducia, or judicial and notarized security by the transfer of ownership, as set up in the Croatian Enforcement Act from 1996. Although the spotlight will be on Croatian experience, short overview regarding Sicherungsübereignung is principally deemed valuable as it represents the origin of Croatian fiduciary security. From the path already mapped in practice it was easy to advance to the next stage of legislation.

The primary cause for the introduction of Sicherungsübereignung in Germany arose from the lack of insight and understanding on the side of legislator regarding the rising need for credit and unsuitable security that debtors couldn't afford. The practice tried to circumvent given obstacles, while the judiciary was uncertain which stance to take towards the rising practice. From the initial negative attitude, it changed its position only under the influence of reverses in academia which through theoretical systematization found place for the recognition of this institute. Nevertheless, it still mainly remains an institute of practice and is not regulated within the proper Acts.

In Croatia, a different set of circumstances influenced the introduction of fiduciary security. The main reason that can be singled out would be general insecurity with debt recovery enforcement. Complicated and slow procedure in regard to regular security devices coupled with inefficacy on the side of enforcement organs discouraged any significant investments by banking and business sector. This deficiency in judicial system was compensated with the introduction of fiducia as

scholars duly recognized existing problems and implemented first logical solution in new Enforcement Act. Characterized by regular extra-judicial enforcement, which makes it constantly attractive, it still remains a vivid example of legal professions' interaction as is also visible from some frictions in its later application in practice, primarily on the line academia-judiciary, and the possible misuse of legal gaps by practitioners.

Ivan Milotić: Roman Foundations of the Arbitrator's Profession

The aim of this paper is to analyze the role of arbitrator in Roman private proceedings of dispute resolution. In non-state proceedings arbitrators were empowered not only to adjudicate on contradictory claims of the parties in dispute, as the modern arbitrators are, but could also act as experts, conciliators, estimators etc. with the aim to bring an end to the dispute or just to prevent the dispute arising out of doubtful or uncertain circumstances. Roman arbitrators usually acted in informal and purely private proceedings, but could also be involved in state organized proceedings on the praetor's command due to their specific knowledge or skills necessary for the dispute to be resolved. Arbitrators in Roman law were appointed on *ad hoc* basis, but though, were merely chosen from the group of people who possessed knowledge, skills, experience or certain other qualities suitable to bring the dispute to an end. In the earliest times of Roman law land surveyors were most often appointed as arbitrators in proceedings on determination of boundaries, division of real estates or family property, of recognition of real rights etc. Their continuous role and position in private proceedings resulted with appearance of the group of professionals (which did not achieve the point of formal institutionalization because these groups were not considered to be institutional arbitral tribunals) from where arbitrators in certain kind of disputes were usually appointed. They were the oldest arbitrators of Roman law whose position in society and legal system was similar to legal profession and widely recognized as such.