

28^{ème} Colloquy on European Law

The independence of lawyers

in co-operation with
the University of Pau and the Adour region

Bayonne, 25-26 February 2002

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The independence of the Bars and their relationship with the public authorities

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Introduction

The role of legal professionals is getting more and more attention as a subject of interest and research of scholars from the field of law and social sciences.¹⁵⁷ However, this interest is not only of an academic nature. Some apparently academic distinctions may have a significant impact on social perception, legal status and – last but not least – financial welfare of particular groups within the legal profession. Moreover, such impact is not limited to lawyers: namely, the role that legal professionals play in various legal proceedings could affect the community at large by influencing the overall quality, transparency, duration, complexity and costs of the legal process. Therefore, both lawyers and their professional organisations, the public authorities and the public at large have a legitimate interest to participate in discussions and decision-making related to the definition of professional rights and duties of the members of legal profession.

The Aim and Purpose of the Independence of Legal Profession – A Historic Background

The issue of professional and personal “independence” of lawyers is a peculiar one. The main debate during the long centuries since the emergence of the profession of lawyers in the Xth century was not about *whether* lawyers should be independent or not, but *to whom* should they be dependent (loyal). The twofold position of the legal professionals¹⁵⁸ was characterised in the well-known split within the profession – the split to the separate professions of

¹⁵⁶ Associate Professor, Faculty of Law, Zagreb University, Croatia. This text was written upon invitation of the organizers to present the issue of the independence of the Bar(s) from the perspective of public interests and public authorities. However, all statements made in this text are to be attributed exclusively to the author (unless otherwise expressly noted) and do not necessarily represent the opinion of any other individual, authority or organisation.

¹⁵⁷ For some recent accounts, see e.g. Rueschemeyer, Dietrich, *Lawyers and their society: a comparative study of the legal profession in Germany and in the United States*, Cambridge, 1973; Glendon, Mary Ann, *A nation under lawyers: how the crisis in the legal profession is transforming American society*, Cambridge, 1996; Halliday/Karpik (eds.), *Lawyers and the rise of western political liberalism: Europe and North America from the eighteenth to twentieth centuries*, Oxford, 1997; Gilles, Peter (ed.), *Anwaltsberuf und Richterberuf in der heutigen Gesellschaft [Role and Organisation of Lawyers and Judges in Contemporary Societies]*, Baden-Baden, 1991; Walter, Gerhard (ed.), *Professional Ethics and Procedural Fairness – Anwaltliche Ethik und Fairness im Prozess*, Bern/Stuttgart, 1991; Glandon/Gordon/Osakwe, *Comparative legal traditions in a nutshell*, St. Paul (Minn.), 2nd ed., 1999.

¹⁵⁸ Cf. Walter, *Professional Ethics and Procedural Fairness – General report*, in Walter (ed.), *id.* at 15 (referring even today to theories about the “Doppelnatur” or “Doppelfunktion” of the lawyers in the modern states).

advocatus and *procurator*. Such a split, that existed in some countries until recently (or – to a greater or lesser extent – still today) was apparent especially in Romanic countries (France: *avocat/avoue*, Italy: *avvocato/procuratore*) and in some Common law countries (England, Commonwealth countries: *solicitor/barrister*).¹⁵⁹ But, even though this institutional separation tends to be softened and/or removed in the recent history, the question remained – are lawyers (only) the representatives of the parties (proponents of individual interests) or are they (also) “officers of the court” (i.e. a part of the system of justice to whom they also owe their loyalty, sometimes even against the interest of their clients). This dualism is continuing to haunt the legal profession – although not as a question of exclusivity (party representative *or* officer of the system of justice) but as a question of proper balance between the two parts. In the search for the right measure, even the countries of the same legal culture and historic background (e.g. Germany and Austria) have struck such balance differently.¹⁶⁰ However, the general question within this debate was never related to “independence”, because dependence (on individual and/or common interests) was viewed as the very core of the legal profession.

The issue of “independence” was only raised in the very recent history, as a possible reply to extreme situations of political manipulation and misuses of the legal system. Various examples of totalitarian and authoritarian regimes proved that not only institutions of representative democracy (parliaments, assemblies) and its executive power (central and local governments), but also the judiciary (including all sectors of legal profession – judges, public prosecutors and lawyers) can be put to use as the long arm of a twisted system of government that uses all means against its political enemies. Such totalitarian regimes, be it Nazi Germany¹⁶¹ or Stalin’s Soviet Union¹⁶², *inter alia*

¹⁵⁹ Cf. Clark, David S., *The Organisation and Social Status of Lawyers, Role and Organisation of Judges and Lawyers in Contemporary Societies (IXth World Conference on Procedural Law, Coimbra-Lisabon – General Reports)*, 1991, at 265-271 (referring to various types of lawyers, their origin from the Roman distinction between advocate and procurator, and its contemporary relevance for both civil and common-law tradition).

¹⁶⁰ The German Law on Attorneys (BRAO) establishes strict standards according to which the position of lawyer is more closely linked to the interests of justice than in Austria. In §§ 1 -2 the notion of a “lawyer” (*Rechtsanwalt*) is defined as “an independent organ of the system of justice” (*ein unabhängiges Organ der Rechtspflege*) who “does not perform commercial activity” (*.. der keine gewerbliche Tätigkeit ausübt*). This approach is also maintained in the system of legal fees and tariffs, in the principle of localization (now softened under the influence of the EU integration processes) and other features, not present in Austrian concept of lawyerhood. See Ahrens, Hans-Jürgen, *Die Stellung des Rechtsanwaltes – Berufspflichten und prozessuale Fairness, Anwaltsberuf und Richterberuf in der heutigen Gesellschaft*, *cit.* (note 2), at 21, 37 (also emphasizing the development in the understanding of the legal definition of lawyers).

¹⁶¹ See e.g. Kirchheimer, Otto, *Die Rechtsordnung des Nationalsozialismus*, in: Dubiel/Söllner (eds.), *Wirtschaft, Recht und Staat im Nationalsozialismus*, Frankfurt, 1981, at 315. See also Stolleis, Michael, *The Law under the Swastika*, Chicago-London, 1998.

¹⁶² There are various critical accounts on the position of lawyers and the legal system under Communism, but perhaps the most illuminative presentation of the understanding of the role of legal process and the role of lawyers within it was given by notorious Stalin’s State Prosecutor Andrey Yanuaryevich Vishinsky, in his treatise on the theory of legal proof in Soviet law (*Teoriia sudebnykh dokazatel'stv v sovetskom prave*),

introduced another dependency of the legal profession: instead of the loyalty towards clients or towards the aims of justice, the exclusive loyalty imposed on all sectors of legal profession was the one towards the political elite and its political “truth”.¹⁶³ Examples of attorneys who plead guilty, admit high treason and request death penalty for their “clients” are the worst examples of such systems of (in)justice. Only after such misuses of the legal profession, it became meaningful to speak about the “independence” of the legal profession. The notion of independence here denoted the lack of pressure from the executive branch of government to participate in pursuing its political goals – or, in the language of the Council of Europe Recommendation, “freedom from improper interference from the authorities or the public”. Gradually, it also started to denote the organisational setting that could possibly prevent such pressure (e.g. the autonomy of establishing professional associations or the guarantees of the free exercise of the profession of lawyer). In any case, the term “independence of lawyers” should be understood in its proper sense – and this proper sense is adequately determined in the Rec(2000)21 as “freedom of exercise of the profession *without improper interference*.”

Independence of Judiciary v. Independence of Legal Profession

The very notion of the “independence of lawyers” is often viewed as a correlate (or an extension) of another, much older concept of independence – the “independence of judiciary” or “judicial independence”. But, the notion of judicial independence has a different history and a different background.¹⁶⁴ Viewed from the perspective of the right to a fair trial, the judicial independence is inherent in the requirement that those who have powers to be final adjudicators about legal rights and duties and responsibilities of the individuals and legal entities be *independent* and *impartial*. Independence and impartiality relate primarily to the parties in dispute – precisely in the sense in which representatives of the parties *cannot* be independent. Gradually, the concepts of the independence of judiciary evolved from the original, limited concept of *functional* or *substantive* independence (independence in the decision-making) and were broadened to the concepts of *organisational* or *collective* independence (independence of the judiciary as the whole *vis-à-vis* the other branches of government), and finally even *internal* independence

published in 1941 and widely translated and reprinted in Socialist Countries. According to Vishinsky, the purpose of the Socialist process is to educate the citizens by discovery of enemies of Bolshevik state; it could be best achieved by a pseudo-adversarial process in which the “traitors” first fight and rage, but finally surrender and admit guilt. Naturally, the lawyers of the “traitors” had to play along these lines.

¹⁶³ For theory of “material truth” in Socialist law and its critique see Uzelac, Alan, *Istina u sudskom postupku* [The Concept of Truth in Legal Proceedings], Zagreb, 1997, at 108-128.

¹⁶⁴ For a comprehensive discussion on the notion of judicial independence see Shetreet/Dechenes (eds.), *Judicial independence: the contemporary debate*, Dordrecht; Boston, 1985. The independence of judges is also subject-matter of various international instruments. For a list of some UN documents and other relevant projects, see Brody (ed.), *The independence of Judges and Lawyers: A Compilation of International Standards*, *CIJL Bulletin 25-26* (April-October 1990). For the efforts of the Council of Europe in this field see the publication of the Directorate General of Legal Affairs of the COE *Working together to build the Europe on the Rule of Law*, Strasbourg, 2002, and the documents at <http://www.legal.coe.int>.

(independence of individual judges and courts *vis-à-vis* other judges and courts).¹⁶⁵ However, even those elements that might possess a certain amount of parallelism between the position of the judiciary (courts) and the Bar (e.g. certain autonomy with regard to the possibility of the intervention of the executive branches of government) have certainly a different function. In the case of judiciary, the relative organisational autonomy and the guarantees of independence in (some) personal and administrative matters are all motivated by the intention to ensure conditions for free and impartial decision-making in individual cases; in the case of the lawyers' organisations, this purpose is not applicable, at least not directly.

Therefore, the analogy between the independence of judiciary and the independence of the Bar might be seductive and misleading. It is typical that in debates about the independence of the Bar the organisational elements are in the foreground (e.g. independence from the normative or administrative intervention of the public authorities), while all other aspects that characterise the independence of justice tend to be forgotten. Furthermore, it is questionable to which extent this analogy might be applicable, because the institutional position of the judiciary and the institutional position of the Bar are rather different: while the system of public courts is effectively a part of the "public authorities" (as another, though independent, branch of the government), the legal profession is generally viewed as a private profession, and the various kinds of associations of lawyers (such as various Bars) are generally viewed (mostly, or at least in certain aspects) as the entities of private law.¹⁶⁶ Since the possibility of public influence and control is built into the definition of public authority, those who start with the assumption that the independence of the Bars should be shaped according to the principles applicable to the independence of justice, might end with less independence than they had in the beginning.

Independence of the Bar(s) v. Independence of the Lawyers

If we find it useful and meaningful to speak about the independence in the field of legal profession, the next question would be about the entity entitled to such independence (i.e. *who* or *what* should be "independent"). Once again, we may refer to the similar concept with respect to the judiciary. Namely, the

¹⁶⁵ For a typology of "independences" with respect to judiciary *cf.* Sheetret, Shimon, Judicial independence: new conceptual dimensions and contemporary challenges, in: Sheetret/Dechenes, *cit.* (note 9) at 598-599. *See also* Dieng, Adama, The rule of Law and the Independence of Judiciary: An Overview of Principles, 1992 *CJIL Yearbook: Constitutional Guarantees for the Independence of the Judiciary*, 21, at 24-31.

¹⁶⁶ No matter how extensive are the powers given to the judges, or to which extent are they "sufficiently insulated from the other governmental influences to operate within its own sphere under the rule of law" (to borrow an expression by Martin Shapiro), judges are effectively a part of the government – and it would be inconceivable for them to escape fully from the public system of checks and balances. On judicial accountability *see* Capeletti, Mauro, "Who watches the watchman?" A comparative study on judicial responsibility, in: Sheetret/Dechenes, *cit.* (note 9), at 550. *See also* Shapiro, Martin, *Courts. A Comparative and Political Analysis*, Chicago-London, 1981, at 32. On the other hand, it is a general opinion today that government of the rule of law requires that Bars should be primarily non-governmental organisations, though endowed with more or less significant public authorities (*see infra* at V.).

traditional model of judicial independence considers *individual judges* to be those primarily entitled to their (substantive) independence – freedom of external interference in the process of adjudication, in which judges have to apply the law impartially, professionally and in accordance with their own consciousness (*intime conviction*). *Internal* independence once again emphasises the independence of individual judges from the “peer pressure” that could come from their own colleagues (from the same or higher courts) – naturally, unless such “pressure” is profiled within the institutions of the system (e.g. in the shape of precedents that are in some systems recognized as legally binding). The aspect of *collective* independence is the only one that designates *judicial power* to be a collective entity entitled to a certain level of self-regulation – but even in such cases, self-regulation is in principle granted to all of the members of the judicial profession as the abstract whole, not to particular professional organisations (e.g. associations of judges etc.).

In the context of the legal profession, in addition to “independence of lawyers”, the emerging expression tends to be the “independence of the Bar(s)”¹⁶⁷. At the first sight, this might indicate that – in this context – a collective (organisational) aspect prevails over the individual ones. But, the very expression of “the Bar” is not entirely transparent. In most jurisdictions, the very notion of “the Bar” is ambiguous, since in its use it sometimes denotes the total of all lawyers, and sometimes only their professional organisation or organisations (e.g. the Bar Association). This ambiguity is growing if we take into account the rather different forms of organizing the legal profession in different countries. While some countries tend to have a unique Bar – the one that includes virtually all those who practice law in whatever capacity (lawyers, judges, public prosecutors), other countries limit the Bar to the practicing non-governmental lawyers, sometimes even excluding from this definition the corporate lawyers (and thereby treating the Bar only as an organisation of the private attorneys). Moreover, in some countries there is a legal monopoly of only one such organisation, whereas in the other there may be more Bars (sometimes related, sometimes unrelated to the federal and territorial structure of the state).¹⁶⁸ If the Bar as an organisation should be independent, which

¹⁶⁷ It seems that this term has particularly found its place in the lingo of the multilateral meetings organized by the Council of Europe in cooperation with various Bar Associations and the CCBE. See various reports from the bar association meetings in Budapest (1997), Prague (1999), Reykjavik (2000) and Dubrovnik (2001) in which this term was used. Finally, the meeting in Bayonne within its main topic related to independence of lawyers also provided for the subtopic “The Independence of the Bars and their Relationship with the Public Authorities” that gave title to this text. However, the relevant COE Recommendation Rec(2001)21 is – unlike the parallel recommendation applicable to judges Rec(1994)12 – does not speak of the “independence” but of the “freedom of exercise of the profession”. In Principle V(2), however, it is stated that “...Bar associations or other professional lawyers’ associations should be self-governing bodies, *independent* of the authorities and the public.” But, the explanatory memorandum at 57. emphasizes also the duty of the Bar to cooperate with the public authorities: “...Bar associations and other lawyers’ professional associations should endeavour to co-operate with governments...”.

¹⁶⁸ The reports on the various organisational settings may be found in some of the reports, but it is difficult to find any comprehensive publication on the exact number and nature of various Bar Associations and Law Societies in Europe, conditions and requirements for membership in such associations and the structure of their functions

“Bar” or “Bars” should it be? It does not suffice to answer “all of them”, since a plurality of Bars often raises the issue of competing claims, or even claims for (normative, organisational, financial etc.) supremacy.¹⁶⁹

Finally, the independence of the Bar as an organisation may, to a greater or lesser extent, go against the independence of lawyers (at least against those who are members of the Bar). Namely, the regulatory and normative powers of the Bar to decide on the rights and duties of its members are, in most jurisdictions, quite considerable. Therefore, independence of the Bar may, at least in certain instances, be viewed as a possible danger of uncontrolled and illegitimate decisions that might limit or violate rights and freedoms of its members; in all instances, even legitimate and rightful decisions of an independent Bar are, in fact, limitation of lawyers’ independence – their behaviour, their personal and professional position *depend* on the decisions of a professional organisation.¹⁷⁰

Public and Private Law Model of the Bar Associations and its Relation to the Concept of Independence

In discussions about the role (“independence”) of the Bar, one should be reminded of the famous remark of Lord Acton: “Power tends to corrupt, and absolute power corrupts absolutely.” While arguing this, we have in mind the possible correlation between the powers entrusted to particular organisations of lawyers (“Bars”) and the need for public control over them.

The simple equation that we would like to submit is the following: the more “private” a Bar is, the higher are its chances to be “independent”; the more prerogatives and power it has, the stronger is the need to impose certain

and prerogatives. Some data on the Bars in the countries in transition can be found in the COE publication from the Budapest meeting *The role and responsibilities of the lawyer in a society in transition*, Strasbourg 1999, at 171 -204. A cursory overview of the web-sites of some national bar associations in Europe (see e.g. <http://www.cbbe.org/UK/liens.htm>) could discover a whole world of differences. One could only mention the fact that, whereas in some countries (like Croatia) the Bar is highly centralized at national level, in others (like France) one can find many particular national Bars (see for a list of about 40 web-sites of principal bars in France <http://www.dbfbruxelles.com/DBF/sitesbarreauxfrance.htm>).

¹⁶⁹ There could be many possible illustration of such conflicts. The legal monopoly of one or more Bar(s) could affect the independence of the others; the bar associations of commercial lawyers may claim to have more right to decide the issues of joint interest than the associations of civil and criminal lawyers and *vice versa*; finally, the very fact that some laws provide compulsory membership (and, partly, mandatory rules on organisation and functioning) of the particular Bar(s) may be viewed as limitation on the independence that could both affect independence of lawyers (to freely establish their organisations and associate in them) and of the Bar (because it is limited by mandatory rules).

¹⁷⁰ For example, the rules of an independent Bar could contain provisions that could impede the free choice of the profession of lawyer for a large number of qualified individuals. In our opinion, the internal regulations of the Bar should also be subject to scrutiny with respect to their constitutionality and legality. If decisions of the Bar encroach the freedom of its members, the limitations should be appropriate and proportionate. Invoking the “*independence of the Bar*” cannot grant immunity to the Bar for violation of the legal rights of its members and third persons.

external mechanisms of control (i.e. the supervision by the public authorities – the courts, the legislators and/or Ministries of Justice). The following table could serve as a simplified model¹⁷¹ of two types of the Bar (naturally, the Bars that actually exist could be a combination of the two models):

Bar without public prerogatives	Bar with public prerogatives
no monopoly; freedom of establishment; limited to discussion on professional standards; no (quasi) legislative, executive or judicial powers.	exclusivity; established by law; compulsory membership; power to enact mandatory rules; power delegated from public authorities (leg., executive, judicial).
<i>No need for public control.</i>	<i>Public control may be required.</i>

In the perfect, idealised model, a Bar Association that would be limited in its activities solely to discussions about the current state of affairs of the legal profession, debates about planned legal reforms, and recommendations with respect to professional standards that relate to its members, would have the best chance to be perfectly “independent” in all professional matters. Such an ideal case could be compared to the position of a church that does not have any pretensions to interfere in anything that relates to the terrestrial matters, but confines its actions to purely spiritual matters.

However, the Bar Associations seldom deal only with abstract doctrinal and ethical dilemmas (one could say that this happens even more rarely than the case of churches that strictly avoid anything that might impact the earthly matters). In most countries, the public authorities have delegated to Bar Associations quite significant powers. Most of these powers relate to the members of the Bar, but some of them bind third parties, sometimes even the public authorities. The Bar Associations may control the access to the profession (e.g. by conditioning such access with the membership of the organisation, and by imposing requirements for such membership and controlling their implementation). They may also have quasi-judicial powers – e.g. in the case of disciplinary proceedings against their members. And, last but not least, they make rules (e.g. the rules of ethical conduct or the schedules of attorney’s fees) and, by imposing such rules, they sometimes produce general norms that have to be applied not only by a closed circle of members, but that have to be followed by courts and the public. Thus, to a certain extent, the Bars may have legislative, executive and judicial prerogatives – and the more they have them, the more they have to be responsible to the public for the proper use of such prerogatives.

Legality and Legitimacy – the Democratic Structure or the Privilege of the Learned Ones?

But, ultimately, one may ask - why not? Why would it *not* be acceptable to have the Bars rule as the final, exclusive and uncontrolled (“independent”) instance

¹⁷¹ This model is based on the previous writings of the author of this text. See Uzelac, *Obvezatno odvetničko zastupanje? [Compulsory representation by lawyers?]*, 37 *Pravo u gospodarstvu* (2/1998) 149, at 176.

in a certain number of matters related to legal profession? After all, the Bar(s) might be the most knowing and specialized places to regulate, decide upon and enforce certain issues that relate to their members.

However, there may be another problem with this concept. In the contemporary democratic state based on the rule of law, the bodies entrusted with public authority have to be either elected in a democratic way, or they have to be controlled and ultimately liable to the bodies that have such a democratic legitimacy. The judicial profession may again be an exception – because judges are, mostly, neither elected in a democratic way, nor they are politically accountable. Their role is limited to adjudication of concrete cases, and they are bound by laws enacted by democratic representative bodies. Finally, the courts *are* public authorities. Could the Bars invoke the same privileges and plead not to be accountable to other bodies (particularly to public authorities)? It could hardly be the case, especially in the European context, since the right to a fair trial *by an independent and impartial judicial body* is viewed as a fundamental human right – and one could suspect whether, in principle, adjudicative bodies of the Bar(s) could fulfill such a requirement.¹⁷² Therefore, even as a part of international standards, it is provided that the Bars *may not* be the final instance in e.g. disciplinary matters of their members, but that all decisions concerning the authorisation to practice as a lawyer (including those relating to disciplinary sanctions) have to “be subject to a review by an independent and impartial judicial authority”¹⁷³. In any case, the problem of democratic legitimacy of corporate bodies of professional associations remains as a potential obstacle to claims for perfect “independence” and “autonomy”. Namely, the legal professionals perform important duties that are of interest for the entire community. Therefore, it could very hardly be argued that there are valid reasons to exclude every accountability of the Bar(s) to democratically elected representatives of the people.

Transition and Tradition: Is Everybody Ready For Maturity?

One of the possible arguments in favour of professional autonomy and independence is the one drawn from history and tradition (as opposed to doctrinal arguments drawn from legal and political theory). It could be argued that, admittedly, there are good reasons for public supervision and control, but that, in practice, over an extended period of time, the corporate structures of the legal profession did show a sufficient amount of self-restraint and self-control, while, at the same time, demonstrating a high level of prudence and reasonableness in governance of its affairs. Thus, although there might be good

¹⁷² It is not *prima facie* clear whether disciplinary bodies of the Bar could be *independent tribunals*. One argument in favour of positive answer would be that the Bars do know most about the ethical standards they make. On the other hand, there is a universal principle *nemo iudex in causa sua*, connected to the problem posed by the fact that the same organisation performs legislative powers (rule-making) and judicial powers (disciplinary adjudication). Furthermore, the lawyers who act as disciplinary judges are themselves subject to disciplinary sanctions of the Bar. Thus, it is much safer to combine disciplinary tribunals of various profession and ensure participation of fully independent individuals (current or former judges, law professors etc.).

¹⁷³ Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer (hereinafter: Rec(2000)21), Principle I(2).

and valid arguments in favour of interference of public authorities, over an extended period of time such interference proved (more or less) to be unnecessary – and therefore we should hope that it will also not be necessary in the foreseeable future.

This kind of argument may be accepted, provided that it is subject to permanent scrutiny and revision. Moreover, such a doctrine of “subsidiarity” assumes the fulfilment of several requirements: there should be a certain tradition; its appropriateness should be evaluated on case-by-case basis (i.e. from one jurisdiction to the other, from one country to another); there should be a general approval and public consciousness about the activities and functions of the professional organisations; and, finally, such organisations should in fact demonstrate high awareness of the public functions that they are entrusted with, and they should continually show high standards in the fulfilment of their tasks. Namely, to legitimize the traditional setting that gives them a surplus of rights, the quality of the results that such Bars achieve in their day-to-day functioning should be constantly the same as or above the standards that would presumably be achieved if such functions were performed by public officials. Needless to say, this also requires on behalf of the Bars a very high level of engagement, self-reflection and self-criticism – a permanent re-evaluation of its own position in society and a continuing discussion about its own responsibilities and functions.

If we follow this line of argument, there might be situations in which historical circumstances led to a considerably high level of professional autonomy, achieving good results in practice and therefore being considered as sound and desirable. However, at the same time, such a traditional system could be entirely unacceptable for other environments and may, if implemented (*imported*), lead to disastrous consequences. The faces of justice are different – and not even the traditional divisions on common and civil law countries, or developed and developing countries, or “established democracies” and “countries in transition” may provide guidance sufficient for successful “transplantation” of other nations’ rules and customs.¹⁷⁴

Who is the Principal Beneficiary of the Professional “Independence” – Bars, Lawyers, Legal System or Community at Large?

The expressions used in this text – “independence of lawyers” and “independence of the Bar” – could *prima facie* indicate that those who are primarily entitled to “independence” are either private attorneys or their associations. In such a sense, professional independence was often invoked, *as if* it were a professional *privilege*, an unquestionable gift that was given *ad aeternitatem* to its holder or holders. However, as in the case of judicial independence, the very reason for the existence of such a “privilege” is the fulfilment of a particular function. In the case of judicial independence, such a function is providing conditions for free, reasonable and just adjudication of concrete cases. In the case of the independence of legal profession, the aim would be to provide environment in which everyone would be entitled to best legal representation in every type of legal proceedings. In both cases, the

¹⁷⁴ For a comparative model of legal systems see Damaška, Mirjan, *Faces of Justice and State Authority*, New Haven, 1986.

ultimate goal is to achieve a system of justice that would appropriately promote and protect the legal rights of every citizen. Therefore, the principal beneficiary of any professional “independence” is each and every individual citizen, because such “independencies” are established and promoted in order to guarantee to everyone in the society impartial, speedy and affordable legal protection of the highest possible quality.¹⁷⁵ Only against such a background individual situations of “dependent” or “independent” Bars could be evaluated, and only against such a background would changes in the current setting make sense.

Some Cases in Which Mutual Cooperation Between Bar(s) and Public Authorities Might be Necessary

In contemporary geopolitics, the word “independence” is rapidly becoming out of use. While until a few decades ago it was customary, even fashionable, to emphasize *independence* and *sovereignty* of nation-states, it is a part of general knowledge today that perfect independence and perfect sovereignty are no longer feasible. The modern world is characterised by a situation in which almost every state is mutually dependent on other states, international organisations and its own obligations to respect certain minimum of standards (e.g. of human rights). Therefore, it is interesting to note that the very word “independence” is being used more and more in the context of legal profession. Namely, in a very similar fashion it could be argued that in the area of legal services (as in every other profession) there aren't and cannot be any areas of autarchy – the isolated islands of uncontrolled discretionary powers. As in the area of political government, the true guarantee of responsible and accountable use of entrusted authorities is contained in the doctrine of *checks and balances*.¹⁷⁶

The doctrine of checks and balances presupposes the existence of *mutual dependency* or *interdependency*. It does not leave the dominant, let alone exclusive right to decide certain essential issues with only one of the agents, but provides a network of mutual cooperation – and mutual control. Applied to the relations between the public authorities (e.g. Ministries of Justice, legislators or

¹⁷⁵ As stated for the judges in Conclusions of the Multilateral meeting on 'judicial public policies' of the COE, Strasbourg, 2000, “independence must not be considered as a privilege given to the judges, but as a guarantee for citizens; independence and responsibility of the judges are, therefore, not contrary to each other”. See (Council of Europe document ADACS/DAJ Strasbourg mult.Concl. (2000), p. 4, §5)

¹⁷⁶ The principle of checks and balances is essential for the tripartite government in which separate branches are empowered to prevent actions by other branches and are induced to share power. Checks and balances are one of the basic component of constitutional governments. As John Adams stated, leaning on Montesquieu's ideas on the division between judicial, executive and legislative powers : "It is by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution". Judicial review --the power of the courts to examine the actions of the legislative and the executive and administrative arms of government to ensure that they are constitutional--is one of the important principles of many contemporary governments; however, the judicial branch should under this system also be subject to checks and balancing – an aspect frequently overseen by emphatic proponents of “independence” of legal professionals.

courts) and the Bars, this would mean that at least certain decisive issues should be determined jointly, or be subject to mechanisms of legal and – sometimes – political (democratic) control. Without the ambition to provide an exclusive list, we would like to point to some of the areas in which cooperation, comprehensive discussions among all those interested, (mutual) control and – finally – a consensual decision might be needed.

Admission to the Bar

The decision-making about the authorisation to practice law is very essential for the notion of the free exercise of the profession of lawyer. It would be natural that a system of recruitment of legal professionals is based upon – primarily – professional elements (success in education and training, objective criteria of professional excellence, proven adherence to ethical values). Therefore, it would not be proper to base the system exclusively on the discretionary decision of the executive power. But, a system that would give too much uncontrolled power to the professional organisations may also be defective. Such professional organisations may – for whatever reasons – introduce as principal or additional criteria the requirements that are not compatible with the duty to “respect, protect and promote the freedom of exercise... without discrimination and improper interference”. E.g., the Bar can – as much as the government – introduce requirements of sex, race, ethnic origin or nationality; the Bar can require extremely high entry fees for admission, thereby closing the profession to a large class of citizens; it can also favour the recruitment of certain candidates (e.g. candidates who had worked as law clerks with other lawyers), while introducing disproportionately high requirements on the others (e.g. corporate lawyers or the others who want to make use of the abilities of collateral recruitment). It is entirely irrelevant who is the source of discriminatory and improper requirements – it is essential to have the possibility to remove every illegitimate obstacle to the free exercise of the profession. Therefore, it is usual in most countries that the requirements to practice law are generally prescribed by law; that both public authorities and professional organisations participate in their enforcement; and that additional mechanisms of control are put in place in order to guarantee the integrity and objectivity of the process. No “independent” (i.e. autocratic) decision-making in such matters is either desirable or appropriate.

Disciplinary Proceedings

The disciplinary proceedings conducted by the Bar(s) for the breach of professional standards can have far-reaching consequences for the lawyers charged with misconduct. The disciplinary proceedings are essentially a sort of criminal proceedings – such a process essentially decides on “any criminal changes” in the sense of Art. 6 of the European Human Rights Convention. Therefore, these proceedings are subject to “full respect of the principles and rules laid down in the European Convention”¹⁷⁷, including the “right to apply for judicial review of the decision”. In the same sense, the UN Basic Principles provide that disciplinary proceedings have to be conducted by “an impartial disciplinary committee established by the legal profession, before an

¹⁷⁷ Rec(2000)21, Principle VI/3.

independent statutory authority or before a court, and shall be subject to an independent judicial review.”¹⁷⁸ Although it is in principle not impossible for a disciplinary committee composed exclusively by the members of the Bar to fulfil requirements of “an independent and impartial tribunal established by law” from Art. 6/1 EC, this might be in practice difficult to achieve – and therefore a combination of “internal” and “external” elements (at least in the appellate stage) could be the only full guarantee of the fairness of the proceedings.

Setting Up Professional Standards

If anything is regarded to be within the exclusive competence of the Bar Associations – it is the definition of professional standards. The Recommendations state that professional associations “should draw up professional standards and codes of conduct”¹⁷⁹; they “have the task of strengthening professional standards”¹⁸⁰; they should “promote the highest possible standards of competence of lawyers”¹⁸¹. Indeed, it would be unthinkable for a state governed by the rule of law to have professional standards imposed by elements that do not belong to the legal profession. However, in this context the question may be asked from the other side – is it fully appropriate for *all professional standards* to be defined solely and exclusively by “insiders”, i.e. by the bodies of the Bar(s). Here, we would intentionally disregard the problem of proper representation of lawyers in the competent bodies of the Bar Association(s) and assume that these bodies are fully representative and competent. Even then, we would like to submit that at least in certain areas such standards should be subject to scrutiny. For instance, a professional code of conduct may be regarded as the substantive law of disciplinary proceedings – since the violations of such a code may be prosecuted. Therefore, for these rules all of the requirements applicable to the rules of criminal law should be applicable, *inter alia* the requirements of certainty, proportionality and non-retroactivity. Furthermore, many rules applicable for legal professionals effectively limit the freedom and “independence” of individual lawyers, providing for additional restrictions on certain types of behaviour (even if such behaviour would otherwise be legally permitted)¹⁸². Finally, some of the limitations built into particular type of professional standards may even be interpreted as restrictions on human rights and freedoms of individual lawyers. Certain rules on the prohibition of advertising may run against the lawyer’s right to the freedom of expression (e.g. the prohibition of public appearances, the ban of the use of modern technologies), as well as against the right of the public to be well-informed in order to make a rational choice of legal professionals to represent them in individual cases. Some of such restrictions may be viewed as legitimate, but only provided that they meet the test of proportionality. In any case, each

¹⁷⁸ Basic Principles on the role of Lawyers, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, Principle 27.

¹⁷⁹ Rec(2000)21, Principle II/1.

¹⁸⁰ Rec(2000)21, Principle V/1.

¹⁸¹ Rec(2000)21, Principle V/4g.

¹⁸² The Codes of Ethics generally attempt to provide “high moral standards” of the members of the Bar; sometimes it also includes details like “decent dressing-code”, good behaviour even when not performing official activities etc.

society should provide some kind of external – impartial and independent – mechanisms to resolve possible doubts. Otherwise, a shadow of doubt would be cast over the whole Bar, and this could adversely affect the confidence of the public in the quality of the legal system and its ability to protect the fundamental rights of the citizens.

An additional problem may arise from the fact that, in certain jurisdictions, the professional standards proclaimed and passed by the Bar bind not only its members, but also other jurists who do not belong to it. A Bar composed of practicing private lawyers could, in certain jurisdictions, enact ethical rules and professional standards that are also applicable to those not eligible for membership (e.g. corporate lawyers)¹⁸³. In such cases, the rules cease to have the character of pure autonomous regulation – they may be viewed as the case of heteronomous provisions imposed by a private lawmaker on whose activities those affected could not exercise any influence.

Today, after all, even among the circle of professional legal associations that make them, professional standards are no longer viewed as an object of exclusive (“independent”) decision making. Various Bars have already come to conclusion that professional standards have to be approximated to the standards that are applicable in other states (or groups of states) – and the supranational (“general”) professional standards have started to evolve at the level of international associations such as the CCBE. Yet, professional standards continue to be different – and there will certainly be a lot to do about it in the future.

Providing Tariffs and Schedules of Fees

A very sensitive issue (and the one regulated rather differently in different jurisdictions) is related to the powers of the Bar(s) to define pricing policies for legal services and/or determine exact tariffs and schedules of fees for lawyers and, as the case may be, other legal professionals. Although it is naturally an area in which the Bar(s) would strive for “independence”, at least from two aspects such “independence” could prove to be problematic. On one hand, the determination of fees (especially if done in a relatively rigid way, in absolute amounts) would run against the principles of the free market, thereby directly violating the freedom of individual lawyers and law firms to set autonomously their fees, taking into account their relatively different abilities and qualities, eventually after a period of negotiations.¹⁸⁴ On the other hand, strict limitation

¹⁸³ One possible example could be the Croatian practice, under which the Bar enacts rules that are also binding for e.g. law professors when they provide legal advice and write legal opinions – in spite of the fact that law professors are not eligible to become members of the Bar, unless they quit teaching and open a private practice. See *Zakon o odvjetništvu* [Law on Attorneys], Art. 5. para. 2 and 5.

¹⁸⁴ In European Union, the issues related to legal profession have already been discussed in connection with the possible obstacle to the principles of free market. Thus, the ECJ found in Case C-309/99 (Price Waterhouse), that the ban of multi-disciplinary partnerships “constitutes an obstacle to freedom to provide services and must be examined in the light of the conditions laid down by Article 59 of the Treaty”. Finally, this obstacle was found to be justified, but as a result of balancing of different values at stake. The non-EU states do not have to deal (yet) with the jurisdiction of the ECJ and

of fees for all legal professionals by the Bar, if connected with the system of the single Bar with the legal monopoly (and, possibly, even with the system of mandatory representation by its members in certain proceedings), could produce suspicions that such an association of legal professionals acts as the only private entity in the society that has both legal monopoly in the market, and uncontrolled freedom to impose the prices of its services. Furthermore, in some jurisdictions, the guidelines (or even the fixed tariffs) enacted by professional organisations are not only mandatory for the members of the Bar (and their clients), but also for the public authorities (e.g. courts) when they decide on reimbursement of the costs of proceedings of the winning party.¹⁸⁵ Thus, the Bar as a private entity effectively assumes legislative powers, since it provides general rules that are directly applicable and binding for the bodies of government. Finally, the type and volume of pricing can have tremendous affect on the overall costs of the system of justice and can pose the question of ability to access the mechanisms of legal protection of individual rights for a large number of people.

Education and Training

The “promotion of highest possible standards of competence of lawyers” is generally included among the tasks of the Bar associations that have to be encouraged and fostered. Certainly, it is desirable that the professional organisations organise and sponsor conferences, seminars, meetings and courses for the exchange of experiences, education and training of its members. But, does it also mean that all such programmes would have to be exclusively organised, performed and evaluated by the members of the professional organisation? Good lawyers may be bad teachers, and the need for “highest possible competence” sometimes implies consultation with a very broad circle of sources – not only the members of your own profession. Therefore, the “independence” in organisation of programmes of professional education and training should not be interpreted as an incentive to limit such activities to facultative, club-like, self-sufficient chat rooms – on the contrary, cooperation with a broad circle of organisations, individuals and experts would be quite desirable. Furthermore, if public authorities view it as necessary to provide an enhanced level of competence of lawyers in certain specialised areas (e.g. in cases related to patents or Internet-law) it might be legitimate to require successful completion of some externally organised training courses. Naturally, it would also be desirable that such specialist programmes be organised in close coordination and cooperation with the Bar(s) – but such programmes and courses should not *per se* be excluded from the circle of generally possible and desirable methods of professional education and training.

the strict scrutiny of some norms of the EU treaty, but on the other side, some of their tariffs and schedules could be criticized for irrationality or the lack of flexibility.

¹⁸⁵ For instance, a court in Croatia ruling on compensation of costs of the winning party in civil litigation is generally bound by the tariffs provided independently by the Bar. As an idea, this is appealing, but may lead in practice to awkward results. See Croatian Code of Civil Procedure, Art. 155 para 2 (providing application of relevant lawyers’ tariffs – currently only existent as autonomous regulation).

Arbitration in Professional Disputes and Strategic Issues

Finally, there are situations when the legal profession itself needs a judge, or at least an arbitrator. As already noted, the legal profession – at least in Continental Europe – is not organised as a single and unique “Bar”. The observation made by an outside (although pretty famous) spectator that the legal profession in Continental Europe is “Balkanized”¹⁸⁶ may be slightly exaggerated. However, it is true that some parts of legal profession in Europe tend to behave and act like separate bodies, not as the parts of a single whole. Therefore, especially in the countries in transition, one may find constant tensions among certain types of legal professionals and their professional organisations (e.g. among judges, attorneys, notaries public, corporate lawyers, or members of a legal academy).¹⁸⁷ Sometimes such tensions may evolve to open conflicts about the role, prestige and division of labour (and benefits). Which organisation should be entitled to resolve the conflict if – as the case may be – no final resolution is found in an amicable way, and the conflicts escalate into an open war? *Nemo iudex in causa sua*: therefore, none of the particular individuals, associations or Bar(s) could have the final say and there should again be external mechanisms to settle the conflict.

Some of the conflicts of the said type could almost be trivial (e.g. would attorneys or notaries public be authorised to compose pre-nuptial agreements). Some other types of conflicts and questions may have significant social consequences, and their outcome may affect a very large number of people – not necessarily only lawyers. What type of legal process do we want – less accurate, but faster and affordable, or elaborate, complex and precise, yet costly and long-lasting? Do we want lay participation or a highly professionalised system? When do we feel that the justice is done (or seems to be done)? Who, when and where should have right (or even monopoly) to participate in the legal process?

Such strategic choices about the type, quality and costs of the legal system belong to the issues that, ultimately, deserve intense public debate (both before the professional and general audience) and democratic process of decision-making. Whether we like it or not, contemporary liberal constitutional systems are founded not only upon the idea of the rule of law, but also upon the idea of democracy, even to the extent that sometimes non-lawyers have to ultimately decide the destiny of some issues that are felt by lawyers to be as “theirs”.

¹⁸⁶ Merryman, John Henry, *The civil law tradition: an introduction to the legal systems of Western Europe and Latin America*, Stanford, 1985, at 102.

¹⁸⁷ Some of these problems are reflected in the COE publication *The role and responsibilities of the lawyer in a society in transition*, Strasbourg 1999; however, most of these internal clashes remain hidden, since, at an international stage, there is a tendency to subdue every internal problem related to legal profession as potentially embarrassing and harmful.

Conclusions

In conclusion, several points may be emphasised:

Lawyers and their professional organisations have a special role in a society founded on the respect for the rule of law and as such deserve special attention by everyone interested in the system of justice;

It is important that lawyers and their associations enjoy independence in the sense of freedom from improper influence; however, not every influence and mechanism of public control is improper;

The notion of “independence of the Bar(s)” should not be conceived in the sense of professional autarchy, isolationism, monopoly on decision-making and predetermined privilege for certain organisations and their members;

For proper administration of justice, it is important that professional organisations of lawyers are composed in a proper and representative way, and that they include in a proper way various segments of the legal profession;

The independence of lawyers can also be violated by the actions and activities of their professional organisations; therefore, they have to be careful in exercising their prerogatives, and avoid any infringement of lawyers’ basic rights and freedoms;

The Bar(s) should in particular be concerned about the right of everyone to have access to a qualified lawyer, as an indispensable part of the right to access to court; equally, the Bar(s) should be concerned about the equal rights of everyone to become qualified as a lawyer under just and equitable conditions;

The professional associations of lawyers should not be governed or controlled by the public authorities, especially by the executive branch of government; however, if certain governmental functions (public prerogatives) are delegated to professional associations of lawyers, mechanisms of public control (including, but not limited to judicial control) of their exercise may be desirable;

The different groups of lawyers within the profession should interact; the relations among various organisations of lawyers in society have to be founded on terms of cooperation and mutual respect, and observance of each other’s legitimate tasks and areas of competence; no relations of supremacy or subordination is appropriate between organisations that represent different branches of the legal profession;

Professional organisations of lawyers should communicate with similar organisations in other countries and promote approximation of basic standards and rules;

The communication of professional organisations of lawyers with other segments of society and with the public authorities should be encouraged and promoted; participation of members or other professions and organisations in

the bodies of the Bar(s) to represent public interests and/or some particular interests may be appropriate in some cases;

For certain issues related to the legal profession that affect the whole community, a comprehensive public debate and consensual decisions made both by the members of the legal profession, public authorities and the general public would be desirable;

The best defense of professional independence can be achieved through permanent openness of the Bar(s) to public debate and public criticism, by maintenance and observance of highest possible professional standards, and by constant improvement of its (theirs) functioning, *inter alia* by harmonisation and unification of the rules and principles related to legal profession on an international level.