

SOME HISTORICAL COMPARATIVE REMARKS ON THE
PROFESSIONAL PERFORMANCE OF MEDICAL
PRACTITIONERS, LAWYERS AND NOTARIES IN THE
NETHERLANDS

*Fecha de recepción: 26 de junio de 2018 / Fecha de aceptación: 10 de julio de
2018*

Emanuel van Dongen*
Utrecht University
E.G.D.vanDongen@uu.nl

Abstract: Disciplinary measures and, more broadly, the pursuit of upholding the quality of professional performance are not new but have a long history. Although the disciplinary processes, disciplinary law and the disciplinary measures imposed in the past were, in principle, intended to ensure a certain degree of decency (cf. the honour of the rank), the centre of attention seems to have now shifted to ensuring a high degree of professional expertise, including non-ethical regulation and enforcement. This contribution addresses the evolution and development of the way one attempted to guarantee the professional standards of medical practitioners, lawyers and notaries in legal history. Disciplinary law is one of the roads pursued for this purpose. In discussing these professions, their origins, their (legal) development throughout history (with an emphasis on the Modern Age) and the current state of affairs will be dealt with. Some comparative remarks then follow concerning the differences and similarities in the way these professionals sought to monitor the quality of their professional performance.

Keywords: disciplinary procedures; professional performance; medical practitioners; lawyers; notaries.

Resumen: procesos disciplinarios y, en términos más generales, la búsqueda de mantener la calidad del desempeño profesional, no es una cuestión reciente, sino tiene una larga trayectoria. A pesar de que los procesos disciplinarios, derecho disciplinario y las medidas disciplinarias impuestos en el pasado eran, en principio, destinados a garantizar un cierto grado de decencia (cf. el honor del rango), el centro

* Dr. E.G.D. van Dongen is Assistant Professor at the Molengraaff Institute for Private Law, Utrecht University, the Netherlands, and a Research Fellow at the Utrecht Centre for Accountability and Liability Law (UCALL) and the Montaigne Centre for Rule of Law and Administration of Justice. This contribution is based on a main lecture delivered by the author at the III International Conference Cátedra Inocencio III (Justice and Judicial Process. Evolution and Development in the History of Law), in Murcia, Spain, on 1 December 2017.

de atención parece haberse desplazado para garantizar experiencia profesional, incluyendo la aplicación y regulación non-ética. Esta contribución aborda la evolución y desarrollo de cómo trataban de garantizar los estándares profesionales de los médicos, abogados y notarios en la historia del derecho. Derecho disciplinario es uno de los senderos que se recorría para este propósito. Al discutir estas profesiones, trataremos sus orígenes, su desarrollo (legal) a lo largo de la historia (con énfasis en la edad moderna) y el estado actual. Después de comentar cada una de estas profesiones, seguiremos con unas observaciones comparativas acerca de las diferencias y similitudes de cómo en estas profesiones se trataba de monitorizar la calidad del rendimiento profesional.

Palabras claves: procedimientos disciplinarios; rendimiento profesional; médicos; jueces; notarios.

1. INTRODUCTION

Lawyers, medical practitioners and notaries are professionals and as such belong to a specified group, a so-called ‘profession’. By applying their knowledge and their professional skills, using creativity where needed, they solve their clients’ problems¹. In order to be called a profession, the group must work according to systematic and validated knowledge, there must be autonomy in professional practice and independence from any interests other than their clients’ interests, there must be an identification with the occupational group and the profession’s rules of conduct, including disciplinary rules, must be adhered to and, finally, a successful domain claim *i.e.* a successful disqualification from practising the profession must apply to persons who have not been formally admitted to the profession². Disciplinary rules, and more broadly, efforts to monitor the quality of professional practice³ are not a new phenomenon, but have a long history. Disciplinary rules, *tucht* in Dutch, derive from the Dutch word *tucht*, which stems from the Old German word *tocht*, which meant ‘decency, civility, morality’. It originally had a

¹ VAN AKEN, J.E., «De Body of Knowledge van de organisatieadviseur. Mogelijkheid tot profilering van een prille en lichte professie», in *M&O* 54 (2000), p. 238.

² *Ibid.*; MILLENAAR, J.L., «Professionalisering van het adviesvak. Een vergelijking met de groei en bloei van drie andere professies», in *M&O* 65 (2011), p. 20.

³ The existence of disciplinary proceedings consists of quality promotion in professional practice. See DEN TONKELAAR, H., «Terugkerende vragen in het tuchtrecht», in *AA* (2016), p. 565.

religious and moral content⁴. Although, in the past, the disciplinary rules and disciplinary measures imposed had the purpose of ensuring a certain degree of respectability (cf. the honour of the rank), now the current emphasis seems to have shifted to ensuring a high degree of professional expertise, including non-ethical regulation and enforcement⁵. Disciplinary measures are meant to promote good practice in the public interest as well as in the interest of the professional group itself⁶.

In this article the development of the ways, amongst which are disciplinary rules, in which medical practitioners, lawyers and notaries tried to ensure a high degree of their professional standards will be examined⁷. For these professions, their origins, their history, their development and current state of affairs will be discussed. The emphasis will be neither on the completeness nor on the perfect comparability of the same periods of time, but rather on the importance of certain periods for the profession in question. After separate discussions on the quality of professional practices in each of these professions, a brief conclusion will follow, focusing on some striking similarities between the developments of the quality monitoring of professional practice.

2. MEDICAL PRACTITIONERS

2.1. THE ORIGIN OF THE MEDICAL PROFESSION

⁴ PHILIPPA, M., et al., *Etymologisch woordenboek van het Nederlands*, Amsterdam 2003-2009, s.v. 'tucht'.

⁵ ARNOUITS, C.J.J.C., MOOIBROEK, M.F. & GEERTSMA, J.G., «Het primaat van het tuchtrecht», in *WPNR* 2016/7119.

⁶ BITTER, J.B., «Het advocatentuchtrecht», in NEDERLANDSE VERENIGING VOOR PROCESRECHT, *Tuchtrecht en Fair Play*, Zwolle 1984, p. 116; COMMISSIE ADVOCATUUR, *Een maatschappelijke Orde*, 2006, p. 61.

⁷ If primary sources in (old) Dutch or French are referred to, a translation is added primarily as an aid for the English-speaking reader who is not acquainted with these sources.

Already in prehistorical times some form of medical aid was known - it was believed that diseases were caused by demons, and shamans, a combination of priest and doctor, were turned to for help. More than 2000 years BC, an individual medical class already existed in Babylonia⁸. The cradle of Western medicine, however, can be found in the ancient Greek city-states, starting with the Greek physician Hippocrates of Kos (460-377 BC)⁹. He and his followers freed medicine from mysticism and irrational superstition¹⁰. Hippocrates' advice in his work *De medico* about a doctor's way of life, his way of behaving towards the sick and the establishment of investigation rooms was focused on his disciples in order to make them fully aware and dignified doctors¹¹. His advice was imbued with a highly moral conception of the medical profession. Other important contributions to the professionalization of the medical profession are the enduring principles of medical ethics found in the document called the oath (*ius iurandum*) by, or at least attributed to, Hippocrates¹² – it is however unlikely that this oath already constituted a standard for the decent behaviour of physicians in Antiquity¹³.

In early Rome there were no formally trained physicians. Although Pliny the Elder (23-79 AD)¹⁴ stated that the city had no physicians for over 600 years, this did not mean that there were no healers at all¹⁵. With Rome's foreign conquests, and the importation of slaves from these lands, the skills and experience of the *servus medicus* in medical issues were utilized. However, these slaves were not physicians as such, but were rather healers using folk knowledge and older slaves' experience (using medicinal herbs and setting broken limbs). In the second century

⁸ ROODBOL, P., *Dwaallichten, struikeltochten en zangsporen: Onderzoek naar taakherschikking tussen verpleging en artsen*, Groningen 2005, p. 33.

⁹ See elaborately on Hippocrates, e.g., LINDEBOOM, G.A., *Hippocrates*, Antwerp/Amsterdam 1948.

¹⁰ LINDEBOOM, G.A., *Geschiedenis van de medische wetenschap in Nederland*, Haarlem 1981², p. 11. In the centuries after Hippocrates the scientific practice of medicine flourished in Alexandria.

¹¹ KNMG, *Nederlandse artseneed*, ed. Utrecht 2004, p. 5.

¹² LINDEBOOM, G.A., *Inleiding tot de geschiedenis der geneeskunde*, ed. M.J. VAN LIEBURG, Rotterdam 1993⁷, p. 53.

¹³ KNMG, *Nederlandse artseneed*, cit., p. 6.

¹⁴ PLINIUS, *Naturalis historia*, XXIX, v, 11.

¹⁵ PRIORESCHI, P., *A History of Medicine: Roman Medicine*, III, Omaha 1998, pp. 573-574.

AD this changed with the arrival in Rome of the Greek physician Galen of Pergamum (129-203 AD), who introduced the scientific study and practice of medicine¹⁶. After the fall of the Western Roman Empire which gave rise to the Middle Ages, for centuries no fundamental practice of medical science existed until the creation and rise of universities¹⁷. In the Middle Ages, Galen's works, focusing on the structure and function of the human body, became the principal authority in medicine and were adopted by scholastics and taught as a dogma¹⁸. The Galenic image of the doctor as a man of reason, experience and erudition became dominant¹⁹. However, in the (Late) Middle Ages a very large part of healthcare in the Low Countries was provided by surgeons – mostly simple, illiterate people, also known as shamans, often also practising as barbers²⁰. For the common people and the bourgeoisie no doctors with a university degree were available. Medical practitioners at university level (*doctores*) in the Low Countries were still rare in that period. Although *doctores* gave advice and provided medicines and herbs, they did not perform surgery or bloodletting (specific tasks of the surgeon)²¹.

During the Renaissance, the Hippocratic Oath was rediscovered, while the theories of Galen went into decline. In pursuit of Hippocrates' teachings, all-embracing incorruptibility was strived for. After 1500, at many European universities the swearing of an oath, somewhat adapted to the Christian faith, was introduced.²² The rise of the deliberate practice of sciences in the Netherlands, including medicine, was linked to the occurrence of a number of factors directly associated with the formation of the Dutch Republic²³. In the seventeenth century medical teaching started to be based on real patients²⁴. This

¹⁶ LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 11.

¹⁷ *Ibid.*, p. 12-13.

¹⁸ SIMMONS, J. G., *Doctors and Discoveries: Lives that Created Today's Medicine*, Boston 2002, p. 34.

¹⁹ KNMG, *Nederlandse artseneed*, cit., p. 7.

²⁰ LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., pp. 16-17.

²¹ *Ibid.*, pp. 17-18.

²² KNMG, *Nederlandse artseneed*, cit., p. 7.

²³ LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 29.

²⁴ Clinical education in Leiden dates from 1637.

form of educational training contributed to the improvement of medical skills. Previously, medical teaching at universities was purely theoretical – practical experience had to be gained after the completion of one's education by closely observing an already practising physician for some time²⁵. The training of surgeons merely consisted of some years of practice as a servant, then as a pupil at a surgeon's home. Personal experience in dealing with extensive and serious injuries and bone fractures often had to be gained in private practice (for example, at sea on a Dutch East India Company ship)²⁶. This lack of competence was improved as textbooks became more and more available in the national language and also because readers/lecturers on the art of surgery, serving the surgeons' guild, were appointed in various cities²⁷.

From 1750 onwards, Hippocratic Ethics moved in a new direction towards a humanistic concept of the medical profession. The emphasis was now on compassion, patience, discretion and secrecy, honour, sobriety and, in particular, on sympathy with the patient. In addition, the (Hippocratic) oath served as a starting point for the formulation of a correct interpretation of the medical profession as a public task²⁸.

2.2 MEDICAL PRACTITIONERS AND 'QUACK' DOCTORS IN THE NINETEENTH CENTURY

By a decree of 5 October 1798 all of the guilds which still existed, including the old surgeons' guilds and the younger associations of doctors (the *collegia medica*), were abolished²⁹, as well as all training for non-academic physicians. The beginning of the nineteenth century

²⁵ LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 81.

²⁶ *Ibid.*, p. 111.

²⁷ Since the end of the Middle Ages surgeons were united in this guild. The guilds were also responsible for the examinations needed for admission to the guild, and slowly they increased the examination requirements. See LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 114.

²⁸ KNMG, *Nederlandse artseneed*, cit., p. 7. The oath was given a place in the Act of 1st June 1865, *Stb.* 60, regulating the Practice of Medicine.

²⁹ LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 145.

was, moreover, characterized by a breakdown in medical science³⁰. Although the Dutch government tried to improve medical education by means of a decree of 2 July 1806, announcing the establishment of medical schools, no new schools were in fact established and only a few existing schools were designated as medical schools. After the Restoration, a decision to create schools for the training of surgeons and midwives (and pharmacists) was issued in 1823³¹. In subsequent years, various (clinical) schools were founded. The multiplicity of various degrees for various competences, also varying between urban or rural areas, was only brought back in 1865, when Thorbecke introduced one degree, namely the doctor qualification, including general competence³².

During the first half of the nineteenth century the classical ‘quack’ doctor market gradually disappeared³³. The Dutch were often devoid of expert medical care and resorted to quackery. Between 1818 and 1865, Committees for Medical Investigation and Supervision existed, supervising and admonishing their counterparts, also issuing reprimands and encouragement³⁴. From the fact that membership of these committees was honorary, conducted next to one’s (daily) profession and tasks, it may be presumed that this had no priority and these committees were therefore of little use. Johan Thorbecke (1798-1872) wrote the following on this matter on 26th July 1864:

*“De zorg voor de volksgezondheid eischt, zoo zij iets wezenlijks worden zal, meer studie, meer arbeid dan onbezoldigde personen, die hunne betrekking als bijzaak of eerepost beschouwen, daaraan kunnen wijden”*³⁵.

³⁰ This can be placed in the context of the influence of the emerging philosophical idealism. See LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., pp. 145-146.

³¹ BIERMAN, A.I., *Van artsennijmengkunde tot artsennijbereidkunde. Ontwikkelingen van de Nederlandse farmacie in de negentiende eeuw*, Amsterdam 1988, pp. 171-172.

³² LINDEBOOM, *Geschiedenis van de medische wetenschap in Nederland*, cit., p. 147.

³³ RENCKENS, C.N.M., *De geschiedenis van de Vereniging tegen de Kwakzalverij*, 2001, available online at www.kwakzalverij.nl.

³⁴ MUNTENDAM, P., *Woord vooraf*, in: *25 jaar medisch tuchtrecht*, The Hague 1955, p. 5.

³⁵ Parliamentary Proceedings of the Lower House (*Handelingen II*) 1863-1864 (MvA), p. 1819; *“Public health care requires, if it is to become essential, more study and work than can possibly be*

Shortly after Thorbecke's ideas were introduced in the Medical Practitioners Act (*Wet op de uitoefening der geneeskunst*) of 1865, an Act countersigned by the same Thorbecke, the Minister of Internal Affairs at that time³⁶. According to Article 1 of that Act, medical practice as a profession, including providing medical advice, was exclusively authorised if granted to a person by law. The aim was to put an end to 'rampant quackery'³⁷. The competence to practice medicine was reserved for doctors with a university degree in medicine (and partially for midwives). This recognition was one of the main objectives of the (Royal) Dutch Society for the Promotion of Medicine, founded in 1849³⁸.

Unfortunately, the Medical Practitioners Act of 1865 was often breached and it transpired that the public prosecutors were unable (or did not find it opportune) to act against unauthorized persons³⁹. The resulting outcry led to a pamphlet written by Vitus and Gerardus Bruinsma in 1878⁴⁰ and to the Dutch Society against Quackery which was founded by them in 1881⁴¹. In those rare instances when prosecutions did take place, the defence was usually raised that the accused did not engage in medical acts as described by law as they had not received any academic training. Such a defence was finally rejected by the Dutch Supreme Court (*Hoge Raad*) in 1911⁴², arguing that medical aid meant all acts giving the impression that they have a healing effect⁴³. In prosecutions of persons not authorised to practice

devoted by unpaid persons, who consider their position to be secondary or honorary" [my translation, EvD].

³⁶ Law of 1st June 1865, *Stb.* 60, regulating the Practice of Medicine. This law was supplemented and amended on several occasions at a later date. See LEIJDESDORFF, L., *Wetten betreffende Uitoefening der geneeskunst*, ed. SCHUURMAN, L.N. & JORDENS, P.H., Zwolle 1948¹⁷, pp. 9ff.

³⁷ BIESAART, *Voorgeschiedenis en uitgangspunten van de Wet BIG*, cit., p. 20

³⁸ QUERIDO, A., *Een eeuw Staatstoezicht op de Volksgezondheid*, The Hague 1965, p. 8.

³⁹ The (K)NMG, in its fight against quackery, repeatedly turned to the government with a request to issue rules to ensure good health by having a good medical profession and knowledgeable, powerful and centrally directed state supervision. See RENCKENS, *De geschiedenis van de Vereniging tegen de Kwakzalverij*, cit.

⁴⁰ BRUINSMA, V. & BRUINSMA, G.W., *De kwakzalverij met geneesmiddelen en de middelen om haar te bestrijden*, Leeuwarden 1878.

⁴¹ RENCKENS, *De geschiedenis van de Vereniging tegen de Kwakzalverij*, cit.

⁴² *Hoge Raad* (hereinafter: HR) 20 November 1911, W. 9240. See also HR 15 November 1937, *NJ* 1938, 346.

⁴³ SANDERS, D., *De praktijk van het medisch tuchtrecht*, Deventer 1967, p. 209.

medicine when they had acted without necessity, the argument of the accused was usually that their assistance was necessary because patients had unsuccessfully sought help from professional doctors. This defence was also rejected by the Supreme Court in 1957, interpreting necessity as being ‘urgent and required medical assistance not immediately available from a competent person’⁴⁴. In conclusion, if prosecution took place at all, the penalty was generally light. Only in cases of serious fraud and serious injuries, especially when a physician had failed to treat a patient, was he criminally prosecuted (and possibly subjected to disciplinary measures)⁴⁵.

In 1916, the Dutch government sent the issue of practice by unauthorized persons to the Central Health Council (*Centrale Gezondheidsraad*), founded in 1902. This advisory board decided that the exercise of health care by unauthorized persons was apparently unavoidable and that there had been a change of legal beliefs among broad sections of the Dutch population. Two state committees followed which reached different conclusions regarding the question of whether unauthorized practitioners had to be allowed some degree of freedom and whether the law had to be accordingly amended⁴⁶. No further action was taken by the government at that time.

2.3. SETTLEMENT OF DISPUTES BY THE ROYAL DUTCH SOCIETY FOR THE PROMOTION OF MEDICINE

Since the reorganisation of the Royal Dutch Society for the Promotion of Medicine (*Koninklijke Nederlandse Maatschappij tot bevordering der Geneeskunst*, hereafter: KNMG) in 1903, a new institution to resolve disputes replaced the Disciplinary Council (*Raad van Discipline*). With the introduction of this institution, a form of disciplinary adjudication was introduced in the Netherlands for the first time.⁴⁷ Nevertheless, the authority of the KNMG, a private

⁴⁴ HR 26 March 1957, *NJ* 1957, 473.

⁴⁵ BIESAART, *Voorgeschiedenis en uitgangspunten van de Wet BIG*, cit., p. 20.

⁴⁶ *Ibid.*

⁴⁷ HENDRIKS, A.C., *Tuchtrecht – meer tucht dan recht. Voorzittersrede VGR 2015*, in *TvG* 39 (2015), 5, p. 322.

organization, was deemed insufficient in the long term and also insufficient in maintaining the interests of the State (the physical and moral strength of the medical profession). Another problem was that membership of the KNMG was not compulsory and thus not all physicians were members.

Already before 1928, when the Act on Medical Disciplinary Rules (*Medische Tuchtwet*) was created⁴⁸, the KNMG's case law had an important ordering function⁴⁹. But there was an inherent deficiency in this KNMG case law, *i.e.* members could terminate their membership as they wished, thus escaping from the internal legal rules. Furthermore, the possibility of temporarily or permanently depriving physicians of competence was created. According to Article 1 of the Act on Medical Disciplinary Rules a complainant could file a complaint if a physician⁵⁰ a) had carried out an operation that undermined confidence in the class to which he belonged; b) had been negligent and his negligence had caused serious damage to a person he was advising or treating; c) had demonstrated gross ignorance in the exercise of his profession^{51,52}. Complaints could be filed at the Medical Disciplinary Courts at first instance, appeals were sent to the Central Medical Disciplinary Court of Appeal, while, finally, an appeal in cassation was possible before the Supreme Court⁵³.

The case law on actions that undermine confidence in the medical profession can be divided into thirteen categories, including a physician's

⁴⁸ Law of 2 July 1928, *Stb.* 222, containing Further Regulations regarding the Practice of Medicine. See elaborately on the Act on Medical Disciplinary Rules, SANDERS, *De praktijk van het medisch tuchtrecht*, cit.

⁴⁹ [MINISTRY OF SOCIAL AFFAIRS AND HEALTH], *Volksgezondheidsnota 1966*, The Hague 1966, p. 28. Also Minister Aalberse praised this internal case law; see WESTERBEEK VAN EERTEN, B.J., *De verhouding van de medische tot de interne medische rechtspraak*, in *25 jaar medisch tuchtrecht*, cit., p. 61.

⁵⁰ Or dentists, midwives and pharmacists.

⁵¹ The last two grounds were either rarely or never relied upon at all in practice. See DE GAAY FORTMAN, B., *Medisch tuchtrecht voor geneeskundigen, tandartsen en vroedvrouwen (en oplossing van geschillen)*, Zwolle 1947, p. 35; SANDERS, *De praktijk van het medisch tuchtrecht*, cit., pp. 103-104.

⁵² SANDERS, *De praktijk van het medisch tuchtrecht*, cit., p. 26, who also cites d) an inability to act due to a mental or physical illness or due to old age or a physical disability; e) alcohol or drug abuse.

⁵³ SANDERS, *De praktijk van het medisch tuchtrecht*, cit., pp. 26-27.

inadequate care for a patient, inadequately preparing a patient before surgery and a breach of confidentiality⁵⁴. Some, like Bernard Röling (1906-1985), regretted the fact that the concept of honour was not made applicable to the medical profession. He stated:

“Zoolang het de trots is van den kruidenier zijn klanten voortreffelijk te bedienen en het zijn eer te na zijn zou het volle gewicht niet te geven, zoolang kan de gemeenschap op de groep der kruideniers vertrouwen: zij zal haar functie goed vervullen. En zoo met de anderen”⁵⁵.

Also the organisation itself made use of disciplinary measures. This led to two types of disciplinary proceedings: the medical disciplinary courts and the disciplinary proceedings of the organizations themselves⁵⁶. The KNMG could impose disciplinary measures in the case of acts contrary to the dignity of the medical profession, undermining confidence in the medical profession, behaving contrary to the interests of the medical profession or those of the KNMG, disloyal acts (towards colleagues), or failing to comply with a decision after a dispute, as well as failing to fulfil any obligation imposed by the regulations determined by the association⁵⁷.

2.4. (MORE) RECENT DEVELOPMENTS IN THE FIELD OF DISCIPLINARY PROCEEDINGS

In the 1970s, the prohibition on practising medicine in the Medical Practitioners Act (an occupational protection) was being violated on a large scale, but prosecutions and convictions hardly ever occurred. Judges were increasingly convinced that applying the law would deprive people of valuable alternative treatment methods. In 1993, the Individual Healthcare Professions Act (*Wet Beroepen in de Individuele Gezondheidszorg*) - a law that had taken 36 years

⁵⁴ See for all categories, SANDERS, *De praktijk van het medisch tuchtrecht*, cit., pp. 82ff.

⁵⁵ RÖLING, B.V.A., report (*praeadvies*), in *Handelingen NJV 1936*, I, p. 39; ‘as long as it is the pride of the grocery trade to serve its customers with excellence and it would be contrary to its honour to deliver underweight products, the community can trust the grocery industry: it will perform its function well’ [my translation, EvD].

⁵⁶ SANDERS, *De praktijk van het medisch tuchtrecht*, cit., p. 202.

⁵⁷ This should have been stated in Art. 653 of the internal regulations of the KNMG. Unfortunately, it was not possible to consult these internal regulations.

to prepare⁵⁸ - replaced the Medical Practitioners Act⁵⁹. A general prohibition on practising medicine by persons other than those who have the authority to do so was no longer considered to comply with the prevailing views of the general public.⁶⁰ The new legislation established a system of title protection for some occupations (so-called reserved procedures⁶¹). Only entitled persons are allowed to perform these procedures. Any action contrary to this rule is punishable. Also with regard to disciplinary proceedings, a new regime was created. The disciplinary standard changed from guiltiness for acts that undermine confidence in the medical profession to a failure to provide care for the patient⁶².

Today the field of mainstream medicine is covered by the group protected by the Individual Healthcare Professions Act – *i.e.* a particular group governed by professional standards, usually based on scientific research. Alternative medicine⁶³ falls outside this group. However, in 1997, with the (end of the phased) implementation of the Individual Healthcare Professions Act⁶⁴, medicine practice is released to everyone; thus integral professional protection was exchanged for partial occupational protection. The Act endeavoured to promote the quality of the profession and to protect patients in healthcare against illicit and negligent handling. The Act provides for conditions aimed at ‘the promotion of professional performance in individual healthcare which meets the demands of quality, as expected in today's society’⁶⁵. The Act lays down educational requirements, the titles of qualified professionals are protected and there are (renewed) disciplinary proceedings for registered professions.

⁵⁸ BIESAART, *Voorgeschiedenis en uitgangspunten van de Wet BIG*, cit., pp. 19-20. Its history even began in 1913. See elaborately Parliamentary Papers (*Kamerstukken*) 1985-1986, 19522, n. 3, pp. 4-6.

⁵⁹ RENCKENS, ‘De geschiedenis van de Vereniging tegen de Kwakzalverij’, cit.

⁶⁰ Parliamentary Papers (*Kamerstukken*) 1985-1986, 19522, n. 3, p. 2.

⁶¹ See on these reserved procedures elaborately DE BIE, J., *Reserved Procedures in Dutch Health Care: Practice, Policies and Perspectives of Physicians, Nurses and Management*, Amsterdam 2006.

⁶² Parliamentary Papers (*Kamerstukken*) 1985-1986, 19522, n. 3, p. 3.

⁶³ SLUIJTERS, B., *Koren en kaf, Over alternatieve geneeswijzen*, in *TvG 5-2006*, p. 351.

⁶⁴ Except for the reserved procedures.

⁶⁵ Parliamentary Papers (*Kamerstukken*) 1985-1986, 19522, n. 3, p. 6.

Disciplinary proceedings are overseen by regional disciplinary courts and, on appeal, by the Central Disciplinary Board. According to Article 47 of the Individual Healthcare Professions Act, the central concern is whether an act or omission is contrary to the care that should be provided. However, corrective mechanisms by fellow peers (comments, recommendations to undergo additional training, etc.), inspections by professional quality associations, periodic re-registration in the so-called BIG register, internal assessments etc. are considerably more important than disciplinary proceedings, considering the annual tens of millions of contacts between patients and registered medical practitioners and the relatively small number of complaints received by the regional disciplinary courts⁶⁶. In addition to the statutory disciplinary proceedings, members of the Royal Dutch Society for the Promotion of Medicine also have their own disciplinary proceedings⁶⁷. The Council for disciplinary proceedings assesses the alleged unprofessional behaviour of a member towards another member of the Royal Dutch Society for the Promotion of Medicine. It is then, according to (Article 2 of the) Regulation and/or disciplinary proceedings, ‘to resist and curb the mistakes of a member which undermine the confidence of the medical profession or behaviour contrary to the dignity or the interests of the profession or acts of engagement in disloyal performance, amongst others as described in the Code of Conduct for medical practitioners or further Guidelines of the Royal Dutch Society for the Promotion of Medicine’ [my translation, EvD]⁶⁸.

3. THE LEGAL PROFESSION

3.1 ORIGIN OF THE LEGAL PROFESSION

⁶⁶ RENCKENS, C.N.M., VAN DAM, F.S.A.M., KOENE, R.A.P., «Strenge tuchtrechtelijke maatregelen in de zaak-Millecam: belangrijke jurisprudentie voor het aanscherpen van de gedragsregels door de wetenschappelijke verenigingen en de KNMG», in *NTvG* 2006, p. 1849.

⁶⁷ KLEIBOER, M.A. & HULS, N.J., *Tuchtrecht op de terugtocht? Wettelijk, niet hiërarchisch tuchtrecht: een vergelijkende analyse*, Utrecht 2001, pp. 106-107.

⁶⁸ See www.knmg.nl.

The legal profession has its roots in Roman Antiquity.⁶⁹ The legal profession in the Dutch region originated in the late Middle Ages and early modern times by the reception of learned law which extends from northern Italy to France and also to the Netherlands.⁷⁰ The term *advocatus* is of Latin origin and is derived from a past participle which formed only part of multiple words in the original context. It was a non-technical term used to identify a person who says something to someone else in court.⁷¹ In the beginning, the activities of lawyers went unpaid. From Emperor Claudius (41-54 AD) onwards, charging a fee was permitted, but subject to a legal maximum.⁷² A constitution from the fourth century AD shows that lawyers had to strive to increase their praiseworthiness. C. 2.6.6.5 reads as follows:

“Apud urbem autem Romam etiam honoratis, qui hoc putaverint eligendum, eo usque liceat orare, quousque maluerint, videlicet ut non ad turpe compendium stipemque deformem haec adripiatur occasio, sed laudis per eam augmenta quaerantur. Nam si lucro pecuniaque capiantur, veluti abiecti atque degeneres inter vilissimos numerabuntur”⁷³.

This text shows that if lawyers simply allowed themselves to be led by financial gain, they were considered abject and degenerate and to belong to the very lowest sort of people.⁷⁴ From the fifth century onwards, anyone who was admitted to the legal profession had to be Catholic, had to have completed the necessary learning period and had to have acquired the *legum eruditio*. Parties and lawyers, at the request of the other party (and during the Emperor Justinian (527-

⁶⁹ See also BANNIER, F.A.W., *Zoals een behoorlijk advocaat betaamt. Advocatengedragrecht*, Apeldoorn/Antwerpen 2010, p. 14.

⁷⁰ MARTYN, G., «De advocatuur in het oude graafschap Vlaanderen», in *Pro Memorie* 11 (2009), p. 13.

⁷¹ VANDER FEEN, T., *The Bar Association; their Origin, History, Appearance and Decay*, The Hague/Amsterdam 1841, pp. 39-40 describes the role of lawyers as assistance providers in domestic homes, but even strolling along the forum to speak to citizens who had questions, mainly based on several passages from the works of Cicero; see also MARTYN, *De advocatuur in het oude graafschap Vlaanderen*, cit., p. 16.

⁷² See also CROOK, J.A., *Law and Life in Ancient Rome*, London/Southampton 1967, p. 90.

⁷³ Ed. KRÜGER, P., *Corpus iuris civilis, II. Codex Iustinianus*, Dublin/Zürich 1967, p. 98.

⁷⁴ See also JANSEN, C., *De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw*, in *Pro memorie* 2009, p. 159.

565) even *ipso iure*), had to swear the oath of *calumni* at the start of the process.⁷⁵ This was a certain guarantee that no one would procrastinate or sue recklessly. In the Byzantine Empire the legal profession became rapidly institutionalized. In the sixth century, a four-year legal study became a precondition for being admitted to the legal profession.⁷⁶ After the fall of the Western Roman Empire the legal profession disappeared,⁷⁷ only to reappear once again in the Romano-canonical procedural law arising from the ecclesiastical courts, but now as a mediator between God and man.⁷⁸

Around 1400 Jan Matthijssen, a clerk from Briel, wrote in *Het rechtsboek van Briel*⁷⁹ about the *taelman*, i.e. someone who speaks on behalf of a client:

“[...] dat die taelman sal wesen habel van sinne ende begripelic om te dencken ende te vinden, als trecht ende reden heyschen, listicheden, dair hy denghenen mede helpen mach dair hy voir sprekt, dat hij niet met recht onredeliken belast en worde, als eens een wijs taelman dede”⁸⁰.

So, a *taelman* is set properly and had sufficient knowledge to assist people, by way of his cleverness, in such a way that he was not considered to be an unreasonable person and acted as a wise *taelman* should act.⁸¹ From the sixteenth century, the *taelman* disappeared, and a clear picture of the role of a lawyer (and also the role of the local counsel) existed in the Netherlands, as evidenced by several ordonnances⁸². From the end of that century onwards,

⁷⁵ MARTYN, *De advocatuur in het oude graafschap Vlaanderen*, cit., pp. 17-18.

⁷⁶ MILLENAAR, *Professionalisering van het adviesvak*, cit., p. 23; see also, e.g., STEVANS, J.A.S., *The Emperor Justinian and the Byzantine Empire*, Connecticut/London 2005, p. 22.

⁷⁷ BRUNDAGE, J.A., *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts*, Chicago/London 2008, pp. 59-61.

⁷⁸ MILLENAAR, *Professionalisering van het adviesvak*, cit., p. 24.

⁷⁹ See on Matthijssen and the *Rechtsboek van den Briel*, HERMESDORFF, B.H.D., *Licht en schaduw in de advocatuur der lage landen*, Leiden 1951, pp. 16-18.

⁸⁰ MATTHIJSSSEN, J., *Het rechtsboek van den Briel beschreven in vijf tractaten*, ed. FRUIN, J.A. & POLS, M.S., The Hague 1880, p. 101; ‘[...] that the taelman is a man of decency and has sufficient understanding in order to think and decide the strategy to, as law and reason require, help those on whose behalf he speaks, not to be rightfully considered unreasonable and to act as a wise taelman should’ [my translation, EvD].

⁸¹ BANNIER, *Zoals een behoorlijk advocaat betaamt*, cit., p. 15.

⁸² MARTYN, *De advocatuur in het oude graafschap Vlaanderen*, cit., p. 25.

universities were created in the Netherlands. At that time there was a massive increase in the number of lawyers and prosecutors in the Netherlands. These lawyers had to repeat an oath every year⁸³. In those days lawyers were jurists with a university degree.⁸⁴ They gave party advice and pleaded the case.⁸⁵ At this time, lawyers totally displaced the *taelmannen* from the market. Critics commented, however, that lawyers were willing to represent any paying client. One example is the medieaval canon lawyer Nicholaus de Tudeschis (Panormitanus, 1386-1453):

*“Nam audiui a ualentissimis aduocatis, quod saepe per importunes preces amicorum assumunt causas iniustas scienter, et crederem ipsos teneri in foro animae ad interesse; quia per iniustas et falsas allegationes obtinent sententias pro eorum clientulo”*⁸⁶.

Before 1800, the legal profession was not generally regulated.⁸⁷ There were several regional procedural rules (*instructies*) of the provinces and regulations on how to instigate proceedings, e.g. from the Court of Utrecht,⁸⁸ which inter alia stated that lawyers had to behave in an appropriate manner. Attorneys had to express themselves in a civilized manner, thereby respecting civil procedure – they could not interrupt or offend – otherwise they had to pay a fine of one Carolus guilder.⁸⁹ The following is an example: in 1567, a certain Thomas Uyttenbroek had spoken irreverently (*irreverentelijk*) in his plea, and the Court suspended him for

⁸³ See also BANNIER, *Zoals een behoorlijk advocaat betaamt*, cit., pp. 16-17.

⁸⁴ See AHSMANN, M., «Teaching the ius hodiernum: Legal Education of Advocates in the Northern Netherlands (1575-1800)», in *Tijdschrift voor Rechtsgeschiedenis* 1997, esp. p. 453.

⁸⁵ The need for a study of litigation was justified by Elias Wigeri by stating that the novice counsellor otherwise harmed his clients by serious errors and learnt his trade at the expense of his clients. See VEEN, T., «Elias Wigeri over het procesrecht als deel van de academische rechtenstudie (1772)», in *Pro Memorie* 2002, p. 97.

⁸⁶ PANORMITANUS (NICOLAUS DE TUDESCHIS), *Commentaria ad X 2.7.1 §5*, ed. Venice 1571, II, fol. 155vb; see also BRUNDAGE, J.A., «Vultures, Whores and Hypocrites: Images of Lawyers in Medieval Literature», in *Roman legal tradition* 1 (2002), p. 71.

⁸⁷ See on lawyers in the Dutch Republic also VAN KUYK, J., «De advocaten in den tijd onzer Republiek (enkele historische gegevens)», in *Advocatenblad* 1920, pp. 176-184.

⁸⁸ See elaborately on the Court of Utrecht, MILO, J.M. & VAN DONGEN, E.G.D., *Procesgids Hof van Utrecht. Hoofdlijnen van het procederen in civiele zaken*, Hilversum 2018.

⁸⁹ *Instructie 4.3* (ed. VAN DE WATER, J., *Groot placaatboek, vervattende alle placaten, ordonnantien en edicten der... heeren 's Lands van Utrecht ...*, II, Utrecht 1729).

a month⁹⁰. From this case it is also obvious that facts should have been clarified, lawyers had to formulate concisely in their written pleadings, abstaining from any impertinent means. If the facts were distorted, heavy fines were the consequence; a third violation resulted in suspension while a fourth violation would lead to removal from office⁹¹.

The salary of lawyers was laid down by law, but only as a minimum fee⁹². As for admission to the Court of Holland, the court itself decided: applicants had to adhere to the Christian faith, to have obtained their doctorate and to take the oath⁹³. Lawyers were subject to the disciplinary jurisdiction of the court to which they were admitted, as the Court of Holland supervised the lawyers admitted to the Bar. In the case of a violation of instructions the court could reprimand, could impose monetary fines, and could suspend or even cancel the lawyer's registration in the admissions register⁹⁴. The annual oath for attorneys endorsed supervision and regulation by the Court of Holland⁹⁵.

From the sixteenth century onwards, various ordonnances regulated various aspects of the rights and duties of the attendants of the Council of Flanders. On several occasions admonitions were issued (with regard to brevity). From the preserved archives of the Council of Flanders, few sanctions appear to have been imposed on provocative and reckless lawyers, but rather against other more specific forms of negligence such as a case of non-appearance when the cause list was proclaimed⁹⁶. From the corps of local counsels and lawyers of the Council of

⁹⁰ See VAN DER MEULEN, W., *Ordonnantie ende instructie op de Stijl ende maniere van procederen voor den Hove van Utrecht zoo in Civile als Crimineele zaken*, Utrecht 1706, p. 280.

⁹¹ *Instructie* 4.4-4.6.

⁹² See LE BAILLY, M.-C., BROOD, P., «Advocatuur in de Noordelijke Nederlanden tot 1838. Verkenning van een weinig betreden onderzoeksterrein», in *Pro Memorie* 2009, p. 67.

⁹³ *Ibid.*, p. 71.

⁹⁴ *Ibid.*, p. 72. Lawyers who started their career were supervised by more experienced lawyers or local counsels (*procureurs*) – in *Friesland* this was even required. See on the disciplinary proceedings in the Dutch Republic also BEEKHUIS, C.H., *Het voor advocaten en procureurs tijdens de Republiek geldende tuchtrecht*, in *Advocatenblad* 1968, pp. 589-596, 628-634, 685-689.

⁹⁵ VERKIJK, R., *De advocaat in het burgerlijk proces*, The Hague 2010, p. 62.

⁹⁶ MARTYN, *De advocatuur in het oude graafschap Vlaanderen*, cit., pp. 29-30.

Flanders a board was formed. This was not a disciplinary board; disciplinary (and civilian) sanctions could only be imposed upon lawyers by the judicial institution to which they belonged⁹⁷.

At the end of the *ancien regime*, lawyers belonged to the upper classes, the cultural and intellectual elite⁹⁸. Doctrinal legal commentaries propagated the noble characteristics of a good lawyer (righteousness, the first judge in one's own case, moderate in the calculation of his *honorarium* etc.)⁹⁹. Ordinances also insisted on a respectable way of life. Unfortunately, the social image of the lawyer was not always so saintly and greed by lawyers was regularly mentioned¹⁰⁰. Hugo de Groot (Grotius, 1583-1645) was of the opinion that in order to acquire a good reputation as a practising lawyer, it was especially important to learn the profession in practice. Dealing with experienced colleagues was deemed to be crucial for a successful practice¹⁰¹. Joannes van der Linden (1756-1835), in his book *De ware pleiter* (1827), described the knowledge and skills that a lawyer had to possess: goodness and honesty, possessing the necessary skills and an accuracy of judgment and not being devoid of eloquence¹⁰². In civil cases the principle of *suum cuique tribuere* has to be a sacred and inviolable precept¹⁰³.

3.2. LAWYERS IN THE NINETEENTH CENTURY

The lawyer's image as a greedy person still lived on, however. The French revolutionaries (the *Assemblée nationale*) even decided to abolish (the order) of

⁹⁷ Ivi., p. 31.

⁹⁸ Ibid., pp. 33, 35.

⁹⁹ See, e.g., WIELANT, Ph., *Practijke civile*, Antwerp 1573 (reprint Amsterdam 1968), tit. 5 kap. 10; DE DAMHOUDER, J., *Practycke in civile saecken*, The Hague 1626, kap. 129.

¹⁰⁰ MARTYN, *De advocatuur in het oude graafschap Vlaanderen*, cit., p. 35. They even were compared to vultures and prostitutes, see BRUNDAGE, *Vultures, Whores and Hypocrites*, cit., pp. 56-103.

¹⁰¹ LE BAILLY & BROOD, *Advocatuur in de Noordelijke Nederlanden tot 1838*, cit., p. 72; ROELOFSEN, C.G., *Hugo de Groot (1583-1645)*, in VEEN, T.J. & KOP, P.C., *Zestig juristen. Bijdragen tot een beeld van de geschiedenis der Nederlandse rechtswetenschap*, with the cooperation of C.H.N. KWANTEN, Zwolle 1987, p. 114.

¹⁰² LE BAILLY & BROOD, *Advocatuur in de Noordelijke Nederlanden tot 1838*, cit., pp. 65-66.

¹⁰³ VAN DER LINDEN, J., *De ware pleiter*, Amsterdam 1827 (reprint The Hague 1989), p. 27.

lawyers in 1790¹⁰⁴ and to establish people's courts – they believed that lawyers were deceiving and ruining litigants¹⁰⁵. The legal profession was re-established by the Law of 22 *Ventôse an XII* (13 March 1804), which, inter alia, promised an official directory of lawyers and a disciplinary regulation for lawyers, which was eventually achieved by the Decree of 14 December 1810¹⁰⁶. The legislator also introduced some political control over the acts of lawyers and those who represented litigants in procedural matters (*avoué*) by prescribing that they had to take an oath¹⁰⁷. The Decree of 1810 was strongly influenced by the French Emperor Napoleon, who was afraid of too much autonomy and boldness by the Bar¹⁰⁸. In the Netherlands, with the French annexation in 1810, French law also became applicable and thus also the French (imperial) Decree of 14 December 1810 on the practice of lawyers¹⁰⁹, which was an implementation of the Law of 22 *Ventôse an XII* (1804) – which continued in effect until 1838. With Napoleon's imperial decree a general and uniform ruling became applicable in the Netherlands in 1811, including a *tableau* of lawyers, on which lawyers were mentioned according to their seniority after they had taken the oath and had finished their three-year traineeship¹¹⁰. Each bar with more than 20 members had its own disciplinary council¹¹¹. The Netherlands Bar nominated the members and the chairman, the Procurator General at the Court appointed the

¹⁰⁴ See also SANDERS, R., *Orde en discipline. Een onderzoek naar de ontwikkeling en reikwijdte van het advocatentuchtrecht*, The Hague 2017, p. 10.

¹⁰⁵ JANSEN, C., «De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw», in *Pro memorie* 2009, p. 159; QUINTELIER, B., «Opkomst en ondergang van de Nationale Orde van Advocaten in België», in *Pro Memorie* 2009, pp. 342-344. See elaborately on the establishment of the modern legal profession in the Netherlands in the period 1795-1838, HENSSEN, E.W.A., *Twee eeuwen advocatuur in Nederland 1798-1998*, with introduction by WACKIE EYSTEN, P.A., Deventer 1998, pp. 1-27.

¹⁰⁶ QUINTELIER, *Opkomst en ondergang van de Nationale Orde van Advocaten in België*, cit., p. 344. See also elaborately on the Law of 14 December 1810, SANDERS, *Orde en discipline*, cit., pp. 10ff.

¹⁰⁷ Art. 31 on the Law of 22 *Ventôse an XII*; see Sanders, *Orde en discipline*, cit., pp. 11f. In 1809, a uniform regulation on the legal profession came into being, the so-called *Wetboek op de regelijke instellingen en regtspleging in het Koninkrijk Holland*. However, this law was never introduced due to the annexation by France in 1810.

¹⁰⁸ RUTGERS, *Reglement III*, cit., pp. 172-173, 187.

¹⁰⁹ *Décret imperial du 14 décembre 1810 contenant règlement sur l'exercice de la profession d'avocat et la discipline du barreau.*, BdL 332 (hereafter: *Décret imperial du 14 décembre 1810*).

¹¹⁰ LE BAILLY & BROOD, *Advocatuur in de Noordelijke Nederlanden tot 1838*, cit., p. 76.

¹¹¹ Art. 2 of the *Décret imperial du 14 décembre 1810*.

members¹¹². The Bar had to oversee the honour of the legal profession, albeit under the control of the judiciary. Lawyers were not accountable to the courts, but the legal profession became a free profession where, through disciplinary rules, lawyers were able to check for themselves whether or not the rules set by the Bar had been complied with¹¹³. The disciplinary norm was included in Art. 23 of the Imperial Decree, stating that the *Conseil de discipline* (or the judge in the smaller jurisdictions) had to supervise and ensure the honour of the Netherlands Bar¹¹⁴:

*“Le conseil de discipline sera chargé, de veiller à la conservation de l’honneur de l’ordre des avocats; de maintenir les principes de probité et de délicatesse qui font la base de leur profession ; de réprimer ou faire punir, par voie de discipline, les infractions et les fautes, sans préjudice de l’action des tribunaux s’il y a lieu [...]”*¹¹⁵.

This provision dealt with the supervisory as well as the disciplinary competences of the *Conseil de discipline*¹¹⁶. The Public Prosecution Service, amongst others, had a supervisory task in the process of becoming a lawyer, in the taking of the oath, in disciplinary punishment if lawyers, when proceeding, had acted contrary to the principles of the monarchy, the constitutions of the empire or its laws¹¹⁷.

Regulation III of the Bar and Discipline for Lawyers and Local Counsels (*Reglement III van de Orde en Discipline voor de Advocaten en Procureurs*) from 1838¹¹⁸, developed by the Dutch Supreme Court, constituted the

¹¹² See Art. 19 of the *Décret imperial du 14 décembre 1810*.

¹¹³ LE BAILLY & BROOD, *Advocatuur in de Noordelijke Nederlanden tot 1838*, cit., p. 76.

¹¹⁴ Art. 23 of the *Décret imperial du 14 décembre 1810*. See also SANDERS, *Orde en discipline*, cit., p. 14.

¹¹⁵ “The Disciplinary Board will be charged with supervising the honour of the Bar, upholding the basic principles of their profession, i.e. integrity and thoughtfulness, repressing or punishing any infringement or mistake by disciplinary action, without prejudice to the actions in court whenever deemed appropriate [...]” [my translation, EvD].

¹¹⁶ SANDERS, *Orde en discipline*, cit., p. 68.

¹¹⁷ Arts. 13, 14 and 39 of the *Décret imperial du 14 décembre 1810*; SANDERS, *Orde en discipline*, cit., p. 15.

¹¹⁸ Royal Decree (KB) of 14 September 1838, *Stb.* 36. See elaborately on *Reglement III*, RUTGERS, G.R., «Reglement III. Een onderzoek naar het ontstaan van het Reglement van orde en discipline voor de advocaten en procureurs in Nederland rond 1838», in *Advocatenblad* 1977, pp. 171-188; SANDERS, *Orde en discipline*, cit., pp. 16ff.

basis for disciplinary sanctions and the supervision of lawyers in the Netherlands¹¹⁹. Its content had its origins in Napoleon's decree from 1810, but it could also be traced even further back to d'Aguesseau's speech on the honour of the legal profession and the independence of lawyers (from financial profits¹²⁰ and their clients) in 1693¹²¹. To a large extent, the French organizational structure of the bar was adopted. Supervision was entrusted to supervisory and disciplinary boards, consisting of lawyers who, after a double nomination by the Order, had been appointed by a judge¹²². According to Article 1, a doctorate or licentiate in Law (or, according to Article 2, a, equivalent foreign degree) was required in order to be admitted to the legal profession. Supervisory and disciplinary boards focused on the honour of the legal profession, on supervising the actions of lawyers and on repelling and curbing infringements and mistakes¹²³. Art. 11 of Regulation III mentions the disciplinary norm:

*“De raad van toezigt en discipline is belast met de zorg voor de eer van de stand der advocaten. Hij houdt toezigt over derzelver handelingen als zoodanigen. Hij weert en beteugelt de inbreuken en misslagen, en zal tot dat einde, naar gelang der omstandigheden, kunnen opleggen de straffen van enkele waarschuwing, berisping, schorsing in de uitoefening van de praktijk, ten hoogste gedurende een jaar [...]”*¹²⁴.

The term ‘honour of the legal profession’ was unknown in the Dutch Republic, because no Bar or legal class of lawyers or an organized group of professionals existed – it was the result of a translation of a legal provision from

¹¹⁹ See also HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., pp. 29ff.

¹²⁰ In Art. 43 of the *Décret imperial du 14 décembre* 1810 powers of mitigation are given to the Conseil de discipline if the declaration exceeded the boundaries of *juste modération*; in 1838 the fees were determined by a Royal Decree. See also SANDERS, *Orde en discipline*, cit., pp. 23-24.

¹²¹ VERKIJK, R., «De eer van de stand», in *Pro Memorie* 2009, pp. 173-174.

¹²² *Ibid.*, p. 177.

¹²³ Art. 11 Reglement III; RUTGERS, *Reglement III*, p. 183; VERKIJK, *De eer van de stand*, cit., p. 177. After various amendments (in 1844, 1920 and 1929) the Regulation did not expire with the introduction of the *Advocatenwet* in 1952.

¹²⁴ See also SANDERS, *Orde en discipline*, cit., p. 69; “*The Supervisory and Disciplinary Board is charged with upholding the honour of the Bar. It supervises its actions in that capacity. It averts and limits infringements and mistakes and, to that end, will be able to impose punishment according to the circumstances, i.e. single warnings, reprimands, suspension from the profession for a maximum period of one year [...]*” [my translation, EvD].

Napoleon's decree, but not concerning the disciplinary jurisdiction of the Disciplinary Council. Nevertheless, this term came into being via the rules of conduct, being part of the contemporary Act on the Legal Profession¹²⁵. Except for the oath, no legal standard regarding disciplinary standards can be directly found in Regulations III – only prohibitions, punishment and threats¹²⁶.

The strict separation between the function of the local counsel (*procureur*) – in fact a continuation of the tasks of the French *avoué* – and the advocate/lawyer in French times and under Regulation III ended at the end of the 19th century. With the elimination of the dual legal assistance with the implementation of the *Procureurswet* in 1879¹²⁷, every lawyer was also a local counsel and each lawyer was subject to strict (double) disciplinary supervision¹²⁸. At the end of the nineteenth century, complaints from citizens, victims of the ignorance of young lawyers, were being increasingly heard. With this the separation of theory (university education) and practical skills (practice) came under pressure. From the 1880s onwards, lectures and practical exercises came into being under the responsibility of professors of civil procedure and criminal procedure¹²⁹.

3.3 THE LEGAL PROFESSION IN THE 20TH CENTURY AND THE NETHERLANDS BAR

With the increase in the number of lawyers and the need for revenue among young people at the end of the First World War, a change in attitude can be observed among lawyers, which meant that the traditional *mores* were no longer necessarily present in every young lawyer¹³⁰. In 1913, a lawyer from The Hague, and a former dean of the Bar, J.M. Stipriaan Luïscius (1859-1936), wrote the first real guide for young lawyers. This work was widely distributed in the Netherlands.

¹²⁵ VERKIJK, *De eer van de stand*, cit., p. 178.

¹²⁶ SANDERS, *Orde en discipline*, cit., p. 19.

¹²⁷ See on the *Procureurswet* also HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., pp. 36ff, 47ff.

¹²⁸ JANSEN, *De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw*, cit., p. 162.

¹²⁹ *Ibid.*, p. 164.

¹³⁰ *Ibid.*, p. 165.

The first duty of the lawyer, he wrote, was to treat indigent clients in the same way as wealthy clients. New lawyers also had to undergo an apprenticeship with an older lawyer. A lawyer could not advertise, could not visit clients at their home (subject to certain exceptions), had to be moderate in his declarations, and could not instigate legal proceedings just to pursue financial gain. A lawyer had to be reliable, could not extend procedures unnecessarily, could not insult the other party or the judges, could not harass, had to be honest towards clients, had to observe confidentiality towards third parties and could not attract disreputable cases¹³¹.

In 1915 the Dutch Lawyers Association (*Nederlandsche Advocaten-Vereeniging*, hereafter: NAV) was founded – a private institution, membership was not obligatory – replacing the locally organised bar associations. In 1918 the NAV published its own law review, the Dutch Bar Journal. In 1920 the divided supervision of lawyers and local counsel (*procureurs*) came to an end – ¹³² the Supervision and Disciplinary Council was charged with upholding the honour of local counsel¹³³. In 1921, a commission consisting of members of the association was created, establishing the criterion of the honour of the profession in detailed rules and assembling a Collection of Rules of Conduct¹³⁴ (more concise and less idealistic than those of Luiscius). This collection, among other things, provided rules of conduct for lawyers in relation to the public, when performing in public and for their relationship with their clients, colleagues and the judiciary. In 1936, at the annual NAV meeting, a famous lawyer, De Brauw, stated that in his opinion there was a lack of unity and clear rules on the rights and obligations of lawyers in the area of the honour of the profession¹³⁵. Additionally, the Code of Conduct of 1921, in his view, lacked a convincing explanation that would lead to internal acceptance by members. Also Van

¹³¹ STIPRIAAN LUÏSCIUS, J.M., *De advocaat*, in *Themis* 1913, pp. 79-100.

¹³² Royal Decree of 31 January 1920, *Stb.* 52 (included in *W.* 10518).

¹³³ Art. 27 of Regulation III.

¹³⁴ See also HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., pp. 83-84; SANDERS, *Orde en discipline*, cit., pp. 29ff.

¹³⁵ DE BRAUW, W.M., report (*praeadvies*) with title *De Eer van den Advocatenstand*, in *Advocatenblad* 1936, pp. 115-116; VERKIJK, *De eer van de stand*, cit., p. 181.

Kuyk, the editor-in-chief of the Dutch Bar Journal (*Advocatenblad*), was critical: instead of rules on what lawyers were not allowed to do (for example, not incurring unnecessarily high costs), it would have been better to set ideals that transcended what was decent.¹³⁶ After this criticism, a revised version was published by a committee under the chairmanship of the Rotterdam dean Drost in the Dutch Bar Journal in 1939.¹³⁷ In the following decades, these rules of conduct were applied in practice.¹³⁸ The promotion of internal discipline was increased by the publication of the decisions of the supervisory board and the disciplinary board – since 1952 the court of appeal in all appeal cases – in the Dutch Bar Journal¹³⁹.

With the revised Regulation III of 1929¹⁴⁰ a supervisory board was empowered in all judicial districts to take measures to promote the proper practice of the profession, such as providing proper training and information to (young) lawyers. However, it would take several decades before these ideals were (to some extent) achieved¹⁴¹. In 1952 the Netherlands Bar, a professional organization under public law, was founded. It introduced mandatory training for young lawyers in the so-called Apprenticeship Regulation of 1955¹⁴², which was later amended in 1988. It led to mandatory training for first-year practising lawyers¹⁴³. Later, a trainee programme for second and third-year lawyers was introduced. Professional training for lawyers started at university (four years) and traineeship and (vocational) education through the training of lawyers in practice led to the internalisation of the

¹³⁶ VAN KUYK, J., *Een eere-code voor de advocaten*, in *Advocatenblad* 1921, pp. 58-61.

¹³⁷ «Ontwerp herziene Eere-regelen voor de advocaten», in *Advocatenblad* 1939, pp. 117-128; JANSEN, *De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw*, cit., p. 168.

¹³⁸ See the introduction to the *Ereregelen voor de advocaten 1968*, p. VII.

¹³⁹ The journal attempted, as much as possible, to be a source for the disciplinary jurisdiction of the bar. See HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., p. 85.

¹⁴⁰ See on this revision also SANDERS, *Orde en discipline*, cit., pp. 31ff.

¹⁴¹ JANSEN, *De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw*, cit., pp. 160, 166.

¹⁴² See on mandatory training and the Apprenticeship Regulation, HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., pp. 195ff.

¹⁴³ Regulation (*verordening*) of 9 June 1988, *Stcrt.* 1988, 127 (which came into effect on 1 March 1989).

values of lawyers.¹⁴⁴ The Continuous Education Regulation (*Verordenig Permanente Opleiding*, 1996) provides that lawyers have to learn on a lifelong basis. In practice, this means that they are obliged to obtain a certain number of credits every year.

With the establishment of the Netherlands Bar an enhanced regime of disciplinary rules was introduced. The Drost Commission, the instigator of the Act on the Legal Profession (*Advocatenwet*) of 1952¹⁴⁵, wanted the Bar to retain disciplinary jurisdiction and thus the supervision of the honour of the profession¹⁴⁶. Disciplinary proceedings are also traditionally focused on upholding the honour of the legal profession¹⁴⁷. Disciplinary proceedings at first instance could now be appealed before a central court: the Disciplinary Appeals Tribunal (*Hof van Discipline*). The Act on the Legal Profession was an initiative of the Lawyers Association. From the development of the original formulation of this provision, a notion in the sense of an aspiration is demonstrated concerning the role of the profession in society and relations with clients: the legal profession is involved in the administration of justice, it represents the interests of clients and is aware of serving the public interest¹⁴⁸. Since the new disciplinary rules, introduced in 1986¹⁴⁹, the disciplinary norm has changed and the primary objective of disciplinary proceedings has shifted to guaranteeing the decent exercise of the profession in view of the interests of litigants¹⁵⁰. In a decision by the Dutch Disciplinary Appeals

¹⁴⁴ JANSEN, *De opleiding van de Nederlandse advocaat vanaf het einde van de achttiende eeuw*, cit., pp. 169, 170.

¹⁴⁵ Law of 23 June 1952, *Stb.* 365. See also, elaborately, on the Drost Commission, SANDERS, *Orde en discipline*, cit., pp. 38ff.

¹⁴⁶ HENSSEN, *Twee eeuwen advocatuur in Nederland 1798-1998*, cit., p. 180.

¹⁴⁷ Arts. 9 and 11 of Regulation III; DE BIE, H., *Eenige beschouwingen over tuchtrecht*, Utrecht 1904, pp. 68-69.

¹⁴⁸ VERKUIK, *De advocaat in het burgerlijk proces*, cit., pp. 64-65.

¹⁴⁹ Law of 12 September 1984, *Stb.* 417, which came into effect on 1 February 1986.

¹⁵⁰ VERKUIK, *De advocaat in het burgerlijk proces*, cit., p. 69; BÖCKER, A.G.M. & DE GROOT-VAN LEEUWEN, L.E., *Klachten buiten de orde. De behandeling van klachten over advocaten via de Klachten- en Geschillenregeling Advocatuur*, The Hague 2002, p. 3; DEN TONKELAAR, *Terugkerende vragen in het tuchtrecht*, cit., p. 567. Zie ook KLEIBOER/HULS, *Tuchtrecht op de terugtocht?*, cit., pp. 13-14.

Tribunal, the aim of disciplinary proceedings was clearly laid down as being ‘to safeguard good professional practices by lawyers in the public interest’¹⁵¹.

Thus the aim of disciplinary proceedings is to maintain the quality of professional performance in the sense of trust in the profession: the group itself as well as the individual members¹⁵². Under the current wording of Art. 46 of the Act on the Legal Profession lawyers are subject to disciplinary proceedings in respect of any act or omission contrary to the care that they owe as lawyers compared with those whose interests they represent or should represent, in respect of infringements under this Act and the regulations of the Dutch Bar and in *respect of any act or omission which is unbecoming of a decent lawyer*¹⁵³.

From the brief outline of the history of the legal profession of lawyers a moral/aspiration can be derived, *i.e.* striving to do more justice than just providing a legal service, and to serve justice in their task as mediators between citizens and the law. Rules of conduct should be viewed in this perspective. They were created by the desire to set requirements for themselves¹⁵⁴. Codes of conduct – the current code dates from 1992¹⁵⁵ – are not exhaustive or binding but serve as a guideline for the disciplinary courts¹⁵⁶. For the open standard of Art. 46 of the Act on the Legal Profession, the main source of rules of behaviour has been concretised, by means of the above-mentioned interpretation of rules of behaviour, by the Netherlands Bar. These rules are presented as written forms of conduct, a record of which in a certain period served as rules of conduct.¹⁵⁷ In addition, the disciplinary standards

¹⁵¹ ‘Het waarborgen van het publieke belang van een behoorlijke beroepsuitoefening door advocaten’; Disciplinary Appeals Tribunal, 28 August 1989, n. 1169, *Advocatenblad* 1990, p. 418.

¹⁵² See SANDERS, *Orde en discipline*, cit., p. 2-3.

¹⁵³ Art. 48 of the *Advocatenwet* lists the corrective measures that can be imposed upon a lawyer when a complaint is considered to be well founded.

¹⁵⁴ VERKIJK, *De eer van de stand*, cit., pp. 171-172.

¹⁵⁵ These replaced their 1980 equivalent, which in turn replaced the rules of honour for lawyers from 1968.

¹⁵⁶ DE GROOT-VAN LEEUWEN, L., *Tuchtrecht voor de juridische beroepen: wee en wel*, in AA 2016, pp. 529-530.

¹⁵⁷ VERKIJK, *De advocaat in het burgerlijk proces*, cit., pp. 74-75. See ‘Ten geleide’ attached to *Gedragsregels 1992*, with reference to the writings of the Visser van IJzerdoorn Committee on the rules of conduct of 1968, on www.advocatenorde.nl.

are given a crystallized form by means of disciplinary proceedings: the central public interest occupies centre stage; it is the responsibility of the attorney to (promote) justice that is the guideline¹⁵⁸.

4. NOTARIES

4.1. ORIGIN AND HISTORY OF THE NOTARY

The history of the notary goes back many centuries, even to the Latin office of the notary. The notary was an official, paid for by the client. However, the (public) notary (*notarius publicus*) had its origins in the eleventh or twelfth century trade centres in Northern Italy¹⁵⁹, not in ancient Rome¹⁶⁰. However, it gained *Corpus Iuris* by the work of the glossators (especially the passages that spoke of the Roman *tabelliones*¹⁶¹) which take the form of notarial data¹⁶². The reception of the public notary in the Netherlands took place between 1250 and 1350 as an ecclesiastical institution¹⁶³. Following developments in the episcopal courts of the officiality, the imperial and papal public notaries from the end of 13th century were established in bishoprics. From there it spread even before the middle of the 14th century. At first, public notaries penetrated into various ecclesiastical and secular organisations, and then also into landlordism and urbanism, chancelleries,

¹⁵⁸ VERKIJK, *De advocaat in het burgerlijk proces*, cit., pp. 144-146.

¹⁵⁹ Previously, at the end of the eighth century in Lombardy, there were officials who were both a judge and a notary (*iudex-notarius*). They formulated notarial deeds and judgments. This was crucial for the formation of the *notarius publicus*, see CAPPON, C.M., *Wat er is, was er al lang; wat zal komen, is eerder al geweest. Historische kanttekeningen bij de huidige staat van het Nederlandse notariaat*, Amsterdam 2010, pp. 11-12.

¹⁶⁰ On the notary in Roman Antiquity and in the Middle Ages, see also OOSTERBOSCH, M., et al., «Het notariaat in de Belgische territoria tijdens de Middeleeuwen», in BRUNEEL, CL., GODDING, PH. & STEVENS, F., *Het notariaat in België van de Middeleeuwen tot heden*, Brussels 1998, pp. 11ff.; DUINKERKEN, B., *Gelijkheid bevredigt. Een korte kroniek van het Nederlandse notariaat*, Deventer 2012, esp. pp. 1-113.

¹⁶¹ See on the Roman legislation on the *tabelliones* and on the practice of instruments that they made up in Roman law from the third century AD onwards, ANKUM, H.A., *De Romeinse tabelliones, directe voorlopers van de moderne notarissen*, in VAN DER MARCK, E.M., et al., *Atlas van het notariaat*, Deventer 1989, pp. 415-427.

¹⁶² CAPPON, *Wat er is, was er al lang*, cit., p. 11.

¹⁶³ See CAPPON, *Wat er is, was er al lang*, cit., p. 14; OOSTERBOSCH, M., «De regelgeving op het notariaat in de Nederlanden tijdens de late Middeleeuwen», in NÈVE, P.L., KUYS, J.A.E., VERBEEK, J.J. (eds.), *Quod notemus. Zes opstellen over de regelgeving betreffende het notariaat van de middeleeuwen tot vandaag*, Deventer 1993, p. 1.

registries and administrations. From the second half of the 15th century, this development of notarisation was accompanied by the laicisation, secularization and professionalism of the office of a notary¹⁶⁴.

In the Middle Ages abuses of notaries took place caused by negligence and ignorance, incompetence, conflict of interests and forgery. This led to complaints which were almost always associated with a demand to limit excessive fees, with the additional problem that people without a lawful appointment were acting as a public notary. From the studies, however, it appears that this abuse was not frequent in practice¹⁶⁵. Before 1500, there was no legislation in the Netherlands in the strict sense, neither with regard to the organization of notaries, nor in the form of ethical guidelines and rules of practice. Up until that time, the notary as an institution was imbedded in the class system and functioned in a clerical context, – thereby being regulated by rules of canon law. As long as those were not violated, the profession remained fairly immune to the rules imposed by the secular authorities¹⁶⁶. There was an amalgam of fairly basic rules which were available for notaries: synodal and other statutes which were relevant to notaries because of their function as part of the clergy, the oath of allegiance to the appointing authority, the oath regarding the office of a notary, some provisions of the *Corpus Iuris Canonici*¹⁶⁷, more in particular the *Liber Extra* of 1234, specific literature on the notary (treatises on the *ars notariatus*, and books containing forms and collections of model documents)¹⁶⁸. All of these rules were not sufficient to actually prevent abuses and to reprimand malicious violators. However, there were (mainly repressive) decretals by which the ecclesiastical government intervened

¹⁶⁴ OOSTERBOSCH, *De regelgeving op het notariaat in de Nederlanden tijdens de late Middeleeuwen*, cit., p. 1.

¹⁶⁵ *Ibid.*, pp. 2-3.

¹⁶⁶ *Ibid.*, p. 13.

¹⁶⁷ See for a detailed enumeration of the relevant texts in the *Corpus Iuris Civilis* and *Corpus Iuris Canonici*, HERMESDORF, B.H.D., *Het middeleeuwsch notariaat*, reprint of various eds. of WPNR 1942 and 1943, 1943, esp. pp. 35 and 28.

¹⁶⁸ *Ibid.*, pp. 4-5, with references.

(*officialiteitsstatuten*)¹⁶⁹. After the laicisation and the secularization of the notary, the Emperors Maximilian I and Charles V took action to end the abuses surrounding the right to appointments in the 16th century¹⁷⁰. The way in which many notaries generally functioned at the beginning of the sixteenth century was deplorable, and the legal system was far worse compared to what we consider to be normal behaviour today¹⁷¹.

The *Reichsnotariatsordnung*, issued in Cologne in 1512 by Emperor Maximilian, was the first established codification of formal notarial law that applied for the entire Holy Roman Empire. In fact it (only) represented a set of standards, which were not controversial in those days, and that had been followed in late medieval notarial practice for a long time¹⁷². It did not contain rules on the supervision of notaries¹⁷³. The Treaty of Augsburg in 1548 did not formally and legally concern the Netherlands, but in practice it did due to the political context of the Holy Roman Empire¹⁷⁴. In the sixteenth century Charles V permanently made notaries a regional institution in the Netherlands. The notary remained a person who was certified and appointed by the government, and who drew up authentic documents, even after the Reformation¹⁷⁵. In sixteenth century Holland, the urban magistrates supervised the notaries. Later, in the eighteenth century, the urban authorities provided further rules in this regard, as can be seen *e.g.* in the *Instructie* of the States of Holland and West Friesland for the commissioners in charge of this

¹⁶⁹ Ivi., p. 6.

¹⁷⁰ See also OOSTERBOSCH, *De regelgeving op het notariaat in de Nederlanden tijdens de late Middeleeuwen*, cit., pp. 8-13.

¹⁷¹ MELIS, J.C.H., *De Notariswet*, edited by SANTEN, A.H.M. & WAAIJER, B.C.M., Zwolle 1991⁶, p. 23.

¹⁷² GEHLEN, A.FL., «De Reichsnotariatsordnung van 1512», in NÈVE, KUYS, VERBEEK, *Quod notemus*, cit., pp. 15, 24.

¹⁷³ GEHLEN, A.FL., *Het notariaat in tweeherig Maastricht*, Assen 1981, p. 167. See also, elaborately, GEHLEN, *De Reichsnotariatsordnung van 1512*, cit., pp. 15ff.

¹⁷⁴ DE MONTÉ VER LOREN, *Hoofddlijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse omwenteling*, ed. by SPRUIT, J.E., Deventer 2000⁷, p. 239.

¹⁷⁵ CAPPON, *Wat er is, was er al lang*, cit., pp. 14-15.

supervision - endorsed by a *Plakkaat* of the *Staten* of 22 December 1733¹⁷⁶. It largely concerns taxes, but also deals with aspects of notaries' compliance with official regulations. Commissioners had to supervise the actions of notaries. In practice, action was not often taken with regard to supervision, but if it was taken then harsh penalties were imposed. One of those punished was Arie Quikkenberg, a notary in Amsterdam, who was beheaded in 1701 for forging a will¹⁷⁷.

In the period just described, notaries developed and improved their social position. The situation varied in different provinces such as Friesland, Gelderland, Drenthe and Groningen. In Friesland notaries from the sixteenth century continued to have a relatively weak role. They also neglected to act according to legislation. In Gelderland, Drenthe and Groningen the notary had a weak existence. Often, vacant positions were not occupied for decades. Moreover, citizens usually had their last will drawn up by another dignitary, such as a preacher¹⁷⁸.

4.2 NOTARIES IN THE NINETEENTH CENTURY

During the Batavian Republic in 1800, a provisional measure was proclaimed by Parliament, including the supervision and inspection of notarial deeds by the courts or any other authorized person¹⁷⁹. According to a Draft Act (which never entered into force), in the Kingdom of Holland, under Louis Napoléon Bonaparte (1809), disciplinary control was initially assigned to the (local) authorities of the area where the notary was employed. Article 5 read:

"[...] kan en moet de <plaatselijk> autoriteit, welke daar mede door den Koning nader zal worden belast <en waar onder eenig notaris is gedomicilieerd>¹⁸⁰ derzelve op hevig vermoeden van malversatie, pligtverzuim

¹⁷⁶ Included in PITLO, A., *De zeventiende en achttiende eeuwse notarisboeken en wat zij ons omtrent ons oude notariaat leeren*, Haarlem 1948, pp. 319ff.; - DUINKERKEN, B., «"Een waakent oog": een schets van het notarieel tuchtrecht tot de invoering van de Kamers van Toezicht (I)», in *WPNR* 6135 (1994), p. 335.

¹⁷⁷ PITLO, *De zeventiende en achttiende eeuwse notarisboeken*, cit., p. 228; DUINKERKEN, "Een waakent oog" (I), cit., p. 335.

¹⁷⁸ MELIS/SANTEN/WAAIJER, *De Notariswet*, cit., pp. 25-26.

¹⁷⁹ Included in: DUINKERKEN, B., *Notariaat in overgangstijd 1796-1842*, Deventer 1988, p. 206.

¹⁸⁰ The signs <> mean that these words have been deleted.

*of nalatigheid, in deszelfs functies schorsen voor zodanige tijd en tot zodanig einde als nader door den Koning zal worden bepaald*¹⁸¹”.

However, practice remained the same. In 1808, the King ruled that those who were in charge of tax collection were also given jurisdiction to supervise notarial services (merely being a confirmation of the existing rules)¹⁸².

Emanating from French law, a typical characteristic of the notary is that he is not only a (semi-)official, to whom authority is assigned by the government, but is also an entrepreneur¹⁸³. In 1842 the Dutch Act on Notaries (*Wet op het notarisambt*)¹⁸⁴ was promulgated, and it had its roots in the *Loi du 25 Ventôse An XI* (March 16, 1803) *contenant organization du Notariat*¹⁸⁵, which had been introduced in the Netherlands in 1810, after annexation by the imperial French decree of 8 November 1810, for the Southern Netherlands, and in 1811 for the Northern Netherlands¹⁸⁶. The notary (again) became an office, and the office of a notary became socialized with the aim of providing better safeguards for the public. The French legislation included an apprenticeship in order to lift the performance of the notarial profession to a higher level. Notaries gained a higher status (from a merchant to an official), a process of social upliftment that took place in the course of the 19th century¹⁸⁷.

In the French period, the supervision of notaries was the task of the *Chambres des notaires*. This put an end to the mostly locally controlled supervision of notaries up until that time. Art. 50 of the *Ventôse* law prescribed that the Chambers had to

¹⁸¹ DUINKERKEN, *Notariaat in overgangstijd 1796-1842*, cit., p. 215; DUINKERKEN, "Een waakent oog" (I), cit., pp. 335-336; "[...] may and must be the <local> authority, which will be charged with this also by the King <and where domicile is chosen at a notary's office> suspend the same from his function due to a serious suspicion of malversation, neglect of duty or negligence for such a period and until when as determined by the King" [my translation, EvD].

¹⁸² See in detail on the period 1796-1842, DUINKERKEN, *Notariaat in overgangstijd 1796-1842*, cit.

¹⁸³ MELIS, J.C.H., *De Notariswet*, rev. by WAAIJER, B.C.M., Deventer 2012⁸, p. 1.

¹⁸⁴ *Wet op het notarisambt* 9 juli 1842, *Stb.* 20.

¹⁸⁵ *BdL* n. 258.

¹⁸⁶ MELIS/WAAIJER, *De Notariswet*, cit., pp. 1-2.

¹⁸⁷ *Ibid.*, p. 2.

maintain internal discipline, and thus in fact to effectively exercise disciplinary jurisdiction:

*“Les chambres [de discipline, EvD] qui seront établies pour la discipline intérieure des notaires, seront organisées par des réglemens”*¹⁸⁸.

A result of this provision was another provision of the *Arrêté relatif à l'établissement et à l'organisation des Chambres des notaires* of the 2 Nivôse an XII (24 December 1803)¹⁸⁹, which stated:

*“Il sera établi auprès de chaque tribunal civil de première instance et dans son chef-lieu, une chambre des notaires de son ressort, pour leur discipline intérieure”*¹⁹⁰.

The Chambers only consisted of notaries and served to maintain internal discipline as well as to deal with complaints against notaries (they also had to subject junior civil-law notaries to examinations)¹⁹¹. This supervision led to abuse and neglect¹⁹². In 1842, the *Chambres des notaires* were dissolved and supervision was taken over by the Public Prosecutor's Office (which also became responsible for the examinations). If there was evidence of acts which were contrary to the dignity of the office, the prosecution had to bring the case before the courts. Soon, there was dissatisfaction among notaries with regard to the Act of 1842. Tideman, notary in Amsterdam, feared unbridled competition, in particular because of the so-called caretakers¹⁹³. In the mid-19th century, complaints were expressed with regard to the

¹⁸⁸ *“The Boards [of Discipline], to be established for the internal discipline of notaries, will be set up by regulations”* [my translation, EvD].

¹⁸⁹ Bull. n. 332.

¹⁹⁰ *“At every civil court of first instance a District Chamber of Notaries will be established in its county town for their internal discipline”* [my translation, EvD].

¹⁹¹ DUINKERKEN, *“Een waakent oog”* (I), cit., p. 336.

¹⁹² DE BIE, *Eenige beschouwingen over tuchtrecht*, cit., p. 84. See also DUINKERKEN, B., «Noviteiten in de notariswet. Het wetsontwerp van 1842 en de kritiek op enige der daarin voorgestelde hervormingen», in *WPNR* 92/6054; - DUINKERKEN, *“Een waakent oog”* (I), cit., p. 336.

¹⁹³ See also HEYMAN, H.W., «Het ontwerp voor een nieuwe notariswet van de Staatscommissie van 1867. Een blik op de problematiek van het notariaat rond het midden van de negentiende eeuw», in NÈVE, KUYNS, VERBEEK, *Quod notemus*, cit., pp. 75-78.

decline of the notary¹⁹⁴. Competition with caretakers led to less income for notaries, and to a (problematic) increase in competition among notaries¹⁹⁵. Tideman established the Brotherhood of Notaries in 1843, as a means to maintain cohesion among notaries¹⁹⁶. This was of great importance for the development of the office of the notary in the Netherlands. In fact it contributed to the formation of an ‘*esprit de corps*’ as a counterbalance against excessive competition and jealousy¹⁹⁷. In 1842, the apprenticeship (up until then for at least for six continuous years) was replaced by a rigorous examination, in spite of adverse reactions from practice to the proposed abolition of the underlying bill for the law of 1842¹⁹⁸. Later, in 1878, the apprenticeship was reintroduced¹⁹⁹. In that year, socialization was further implemented through the creation of better safeguards for the public: the supervision of notaries by the Public Prosecutor, more severe sanctions were introduced, the examination requirements were made more rigorous, and – as just mentioned – an apprenticeship was imposed as a requirement.

4.3. CHANGES TO THE PROFESSION OF A NOTARY IN THE TWENTIETH CENTURY

In 1904, the Supervisory Chambers (*Kamers van Toezicht*) were reintroduced, taking over the role of the Public Prosecutor. Supervision by the prosecution was apparently seen as being too difficult a threshold, since in practice abuses remained unpunished. Now, unlike previously²⁰⁰, a pre-diploma was required as a prerequisite for the notary examination, and the notary candidate was given an official status²⁰¹. The Chambers were not only entitled but were even obliged to issue a warning if the abuse was evident, including the behaviour of notaries in the

¹⁹⁴ See on this problem (the manager of another’s affairs as a parasite), for example DE GELDER, W., *De zaakwaarnemer. Wet en regt*, Utrecht 1853.

¹⁹⁵ HEYMAN, H.W., «Bruno Tideman (1803-1881). De oprichter van de Broederschap en zijn visie op het notariaat», in *WPNR* 93/6094.

¹⁹⁶ MELIS/WAAIJER, *De Notariswet*, cit., p. 3.

¹⁹⁷ HEYMAN, *Bruno Tideman (1803-1881)*, cit.

¹⁹⁸ DUINKERKEN, *Noviteiten in de notariswet*, cit.

¹⁹⁹ MELIS/WAAIJER, *De Notariswet*, cit., p. 3.

²⁰⁰ From 1958 onwards a university plus a university master’s degree in law was required, instead of the state examination which was previously required.

²⁰¹ MELIS/WAAIJER, *De Notariswet*, cit., p. 4.

private sphere²⁰². In 1931, there was a change to the law concerning the supervision of notaries. In 1933, a Central Assistance Bureau was established and it supervised the financial accounts of notaries²⁰³. The Royal Fraternity of Public Notaries (*Koninklijke Notariële Broederschap*, hereafter: KNB) established professional training which was more profound/intense both on a theoretical and on a practical level during the first years of practice of notary candidates²⁰⁴. In 1951, the Society for the Advancement of Notarial Law was established, a foundation which published a series of publications called *Ars Notariatus*.

Since the end of the 19th century, but especially in the second half of the 20th century, various proposals were made to amend the Notaries Act. Eventually, there was an amendment in 1999²⁰⁵ which intended to promote the market, but at the same time it was also motivated by a desire for deregulation²⁰⁶. As a result the Royal Dutch Association of Civil Law Notaries (its name changed in 1997) became an order subject to public law – before it became an association – to which all notaries including notary candidates belonged *ipso iure*. With the law of 1999, new disciplinary proceedings by the association came into existence²⁰⁷. In 2005, the new law was evaluated by a special evaluation committee²⁰⁸, resulting in (new) legislation in 2012. The committee proposed, among other things, to promote the integrity and quality of notaries. The Dutch

²⁰² DUINKERKEN, "Een waakent oog": een schets van het notarieel tuchtrecht tot de invoering van de Kamers van Toezicht (II, slot), p. 352. In the period before 1904 different opinions existed on this topic.

²⁰³ DE JONG, R., *Tussen ambt en vrij beroep. Het notariaat tussen 1842 en 1999*, Amsterdam 2002, pp. 87-89; MELIS/WAAIJER, *De Notariswet*, cit., pp. 4-5.

²⁰⁴ MELIS/WAAIJER, *De Notariswet*, cit., p. 5.

²⁰⁵ *Wet van 3 april 1999, houdende wettelijke regeling van het notarisambt, mede ter vervanging van de Wet van 9 juli 1842, Stb. 20, op het Notarisambt en de Wet van 31 maart 1847, Stb. 12, houdende vaststelling van het tarief betreffende het honorarium der notarissen en verschotten (Wet op het notarisambt)*.

²⁰⁶ See MELIS/WAAIJER, *De Notariswet*, cit., p. 7-8.

²⁰⁷ This was previously included in the statutes of the KNB and the Regulation on Disputes and Complaints. Disputes could be brought before so-called *Scheidsgerechten*. See KLEIBOER/HULS, *Tuchtrecht op de terugtocht?*, cit., p. 38.

²⁰⁸ *Commissie Evaluatie Wet op het notarisambt. Het beste van twee werelden*, The Hague 2005.

legislator chose to implement a strengthened, independent (financial) supervision of notaries by the Authority of Financial Regulation (*Bureau Financieel Toezicht*)²⁰⁹.

Disciplinary proceedings were meant to keep the operative level of notaries up to (the same) standard, and to upgrade it in order to monitor society's interest in a proper (honourable and capable) notarial office²¹⁰. In the course of time, there has been a shift of focus towards the position of complainants, and the protection of their interests is now considered to be an (important) secondary objective of disciplinary proceedings²¹¹. Maintaining the honour of and respect for notaries is not an end in itself, but has to be seen in the perspective of social damage that can be suffered, such as the loss of essential trust in notaries and their credibility²¹².

Notaries are subject to disciplinary proceedings with regard to acts or omissions that are contrary to the provisions of the Notaries Act or the care that notaries ought to take towards recipients and relating to acts or omissions that are not befitting of a proper notary²¹³. From disciplinary proceedings it becomes clear in which way notaries should fulfil their office in specific cases. In order to fulfil their task in a good way, notaries should possess a number of characteristics: knowledge, expertise, impartiality as well as independence, diligence, prudence, organizational ability, an understanding of the notarial function and integrity.²¹⁴ Next to the Notaries Act, rules imposed on notaries can also be found in other regulations, disciplinary jurisprudence and (academic) literature²¹⁵.

²⁰⁹ MELIS/WAAIJER, *De Notariswet*, cit., p. 8.

²¹⁰ *Ibid.*, p. 429; WAAIJER, B.C.M., «Het notariële tuchtrecht als bron van deontologie», in *WPNR* 2008/6778, pp. 957-958.

²¹¹ MELIS/WAAIJER, *De Notariswet*, cit., p. 430. According to the Supreme Court, legal disciplinary action (in this particular case concerning notaries) is generally intended, in the first place, to promote professional practice. Disciplinary proceedings are not however intended to provide complainants with reparation. See HR January 10, 2003, ECLI: NL: HR 2003: AF0690, *NJ* 2003/537.

²¹² MELIS/WAAIJER, *De Notariswet*, cit., p. 430.

²¹³ Art. 103 of the Notaries Act lists the disciplinary measures that can be imposed on a notary when the objection is well grounded.

²¹⁴ MELIS/WAAIJER, *De Notariswet*, cit., pp. 437-440.

²¹⁵ *Ibid.*, pp. 440-441.

5. CONCLUSION

This article has focussed on the history of legal aspects of the professions of medical practitioners, lawyers and notaries in the Netherlands. While the developments in each of these professions were different, it is clear that the phases were similar and occurred more or less during in the same periods. Changing views during the Enlightenment, the impact of the Industrial Revolution, changing scientific ideas etc., have all led to fundamental changes, and thus to a rapid change in the professionalism of these professions. The monitoring of the quality of professional practice through general legislation for all three professions was established in the nineteenth century. After the establishment of the professions as such, the fight against unauthorized or incompetent persons started, and as a result professional associations were established. These sometimes established their own courses and examinations, disciplinary proceedings and rules of conduct. Regulatory frameworks set up by professionals themselves are of great importance for those professions where expertise and reliability are key characteristics and where clients cannot assess these skills by themselves. For such regulation homogeneity within the profession is important²¹⁶.

After the private associations became subjected to public law, disciplinary jurisdiction and proceedings became generally regulated by the government. With this, the aim of disciplinary rules, *i.e.* monitoring the quality of professional practice and upholding the honour of the profession, is still valid. Although in the course of time the focus has shifted towards the position of the complainant, it must be remembered that this is not the (original) aim of disciplinary proceedings. Disciplinary proceedings are normative, they monitor the rules of conduct, and they oversee proper conduct by the practitioner. Moreover, it should be realized that, from a legal history perspective, the aspiration to focus on the quality of the professionals'

²¹⁶ That is exactly what for a long time has been lacking in another profession, *i.e.* accountants. See MILLENAAR, *Professionalisering van het adviesvak*, cit., pp. 30-31. In a later edition, that will be published in Dutch, I will also include this profession.

actions should have priority, not the claims of complainants. The complainant's primary function is to bring any potential lack of professionalism to the attention of the disciplinary courts.