

Legal Aid in The Netherlands

With some comparisons to the German Legal Aid System

by

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The idea that legal aid for the poor should be a necessary pre-condition inherent in the guarantee of equality before the law has since more than a hundred years been claimed in Europe .

The right to counsel (*poor man's right*) has a long tradition in civil procedural codes of Continental Europe, it was already granted iunder enlightened absolutism of the 18th century the Austrian Justizgesetzsammlung JGS 1781 and JGS 161, Hofdekret of 24.1.1791, in the 19th century in the Spanish Reglamento por l'Administracion de la Justicia of 1835, the French Code procedurale of 1851, the German Zivilprozeßordnung 1877, etc.

At the end of the 19th century it was mainly seen as a right to criminal defence, but already in the '20ies of the 20th century this was extended to at least waiving court fees and subsidizing lawyer fees in civil and other courts, too . But so far legal aid only referred to cases where the procedural codes declare **mandatory** representation by an advocate.

The European Court on Human Rights calls this the *fair hearing principle*. It restricts the *right to counsel* to lawyers in court in so far as representation by an attorney is mandatory. It guarantees legal aid only where representation by a lawyer is required by law, but in simplified procedures it remains satisfied without representation by lawyers¹.

¹ European Court on Human Rights, *Airey v. Ireland*, Judgment of 9 Oct. 1979, series A,32

It took until the 1970s and 1980s that the idea took hold that legal consultation and assistance should also be granted in earlier stages before a problem has escalated into a court conflict. The legal aid movement at that time discovered that consultation and advice out-of-court could even be instrumental for people to avoid litigation and to help themselves.

The German system rests on a modernized form of this century long tradition of waiving lawyer fees for poor people. It rests entirely on reimbursement of lawyer fees in matters before civil, administrative as well as criminal courts. Statutory law in 1980 regulated subsidy also for legal information and consultation for problems out of court. Law demands that any such service is rendered by registered advocates. And – according to the tradition of tight budgetary control among German public authorities, the system is administered by the courts of justice.

The Dutch system of legal aid is much more encompassing. It reaches far into the lower middle classes by granting at least some legal aid to about 45 % of the entire population, while the German system barely reaches 15 % of the population.

Greater range of eligibility and improved access account for the differences in costs of both systems: while the German taxpayer has to contribute about €5.- per year per head of the population, Dutch pay up to €16.- per head in the year 2001. (And this is still half of the costs of legal aid in England/ Wales).

The Dutch system of legal aid developed from its enthusiastic beginnings into an efficient encompassing and strictly controlled system of encompassing legal aid. When *legal aid movement* in the years 1975 to 1990 evolved among young lawyers in universities and in the advocacy, they had argued that legal aid should be seen as an evident part of a welfare state. The Bar Association (*Orde van Advocaten*) supported the movement after

short hesitation and has kept doing so until today.

Legal aid has in 1983 become a right guaranteed by the Dutch constitution. The system originated as an enthusiastic movement among university graduates and young lawyers in the 1970s and developed on the basis of negotiated agreement between reform groups, the Association of Advocates and the Ministry of Justice. It was regulated by statutory law in 1993. It guarantees three kinds of legal aid for poor people and those of modest means to be paid by the budget of the Ministry of Justice:

- fully staffed legal aid offices in all major Dutch cities providing legal information and consultation and first help on all matters of civil and administrative law,
- subsidies to be paid for legal advice and court representation of advocates according to statutorily set fee scheme,
- criminal defence for anybody who is arrested or otherwise deprived of their personal freedom as well as all those charged before court for committing crime.

Management and accounting control are delegated to a quasi-independent professional *Council of Legal Aid*.

Legal aid principle

Legal aid for the poor is **constitutionally** guaranteed (art. 18,2 Gw) for all those (legal as well as natural persons) who are subjected to Dutch authorities or otherwise affected by Dutch law. Legal aid is based on statutory law (*Wet op de rechtsbijstand, short WRB of Dec.13, 1993, amended 1999*). It is financed out of the public budget of the Ministry of Justice. Implementation (including a fee scheme of advocates, which is adapted to monetary development on yearly basis) is regulated by administrative decree.

People of modest income have a right to legal aid, but they are charged a contribution of their own according to the level of their income. The limit of the net monthly income is set at € 1424.- for a single person and € 2 000.- for a family. Reaching into the lower middle

classes, this gives a right to legal aid to about 45% of those who live in the Netherlands (including aliens). It guarantees initial legal consultation at a *bureau for legal aid* free of charge, and further legal advice and representation by the bureau or an advocate for which clients have to pay a modest contribution according to their income.

Also legal persons (associations, foundations) have a right to legal aid if they cannot “on equity grounds (*redelijkerwijs*)” be expected to pay for their legal costs (WRB art 36).

Legal aid is provided for

- **legal information, consultation and advice in all fields of law,**
- **representation in court.** It also entails a reduction of court fees (*art. 17 of the Statute on court fees WTBZ*).

Special guarantees apply to criminal defence. While for regular criminal charges the rules of legal aid apply, legal aid is not granted for trivial cases (such as when only a minor fine is at stake, art. 12c WRB).

A **duty defence** is **free of charge** when the representation by an advocate is mandatory.

This is the case (WRB art. 43)

- under arrest when preliminary detention is at stake
- in criminal cases where the maximum penalty might entail detention or treatment
- for persons threatened by extradition,
- people in prison
- people in mental treatment of a closed institution
- youth under guardianship,
- aliens in detention.

No court fees are charged in these cases.

Legal aid providers

The service to clients is performed by a mixed system with **legal aid bureaux** providing information and first consultation, as well as practicing **advocates** taking on cases which might require court action .

1. Fully subsidized **legal aid bureaux** are situated in each city with a district court (19 in the Netherlands). They are organized as non-profit foundations accountable to the Minister of Justice and regional *Councils for legal aid*. They provide legal advice and consultation as well as representation in out-of-court dealings

Legal aid bureaux deliver the first **half-hour of general information free of charge**, for more engaged taking up of a case they charge a statutorily fixed contribution from the client. The staff of the bureaux can also represent clients vis-à-vis the opponent party as well as before local courts where an advocate is not mandatory.

The contribution varies according to the income level from € 61 for the lowest income group at social security level up to €532 at middle class income levels.

Bureaux are established in form of a **foundation** (which entails non-profit and non-taxable operation. The Minister of Justice determines the size of their professional staff according to the workload to be done; it should not count more than 10% of the private practice advocates on the legal aid list (WRB art.21). The advising staff of the bureaux are legally trained (with a university degree in law as well as three years in-practice training), but need not be registered as advocates (in the sense of being admitted to represent in court and being a member of the Association of Advocates). They must have demonstrated specialist capability in those fields of law which are relevant for the legal aid clientele, and they should regularly follow further training courses.

2. Three legal aid foundations are **specialized on immigration** law, catering particularly to asylum seekers who are awaiting their permit to enter the country. They represent clients in camps of asylum seekers, at airports and in asylum homes. Their agenda is partly co-ordinated with the immigration authorities as a matter of working routine but on the other hand admitted as advocates to the courts.

3. About 70 % of all **advocates** working as private practitioners are inscribed on a list of those willing to serve legal aid clients, but most of them only occasionally do so. Some 10% of the 11.000 Dutch advocates work for legal aid clients on a regular basis (with more than 100 clients per year). Some are specialized on a specific clientele (like women, children, neighbourhoods or immigrant groups). Nevertheless, also some of the big law firms keep a specialized section for legal aid clients. Notaries can also ask for legal aid for their clients. Nevertheless, clients cannot be induced to consult such specialized law firms. On request, clients can choose advocates of their own choice (*WRB art. 16*).

Traditionally, many legal aid advocates worked in team-like law firms of 3 to 10 lawyers, sometimes including social workers on their staff. In recent years, however, many such *law shops* were looking for a better paying clientele, some closed altogether. Therefore the *Legal Aid Boards* had to look for a new generation of law firms willing to specialize on such service. The *Boards* encourage specialist capability by co-operation agreements, further training, etc. Also improving quality has been made subject to evaluation by a *Foundation for quality initiative in legal aid* (short *Skir*). Those who successfully pass such programs are allowed increased hourly fees (in 2002 this was set at € 87.- for those who meet specialized quality criteria).

4. **Criminal defence** is usually provided by **specialized advocates**. Those who participate in immediate help to people under arrest (*piket dienst*) inscribe in local lists obliging them to be available at declared times (very often the weekends). Local advocates organize the agenda with prisons and police.
- Criminal suspects, people in detention or prison are offered a defence lawyer who is inscribed on the list of those committed to legal aid. The same holds true for people detained in psychiatric treatment.

Legal aid fees

Advocates in legal aid cases are paid according a fee scheme which is negotiated by the Ministry of Justice with the advocacy. The very elaborate and detailed scheme has been set by decree (*besluit vergoedingen rechtsbijstand*) of the Ministry of Justice and is published as a matter of law. It is composed of two elements:

- a point scheme determining the time needed for different activities which legal aid advocates need for services to their clients,
- and an hourly fee which is upgraded every year according to the monetary development.

Contribution charges

Art. 35 WRB regulates in detail the income brackets and corresponding contribution charges which are to be paid. In order to give the range the minimum and maximum examples might suffice:

- € 15.- for a simple advice by the bureaux of more than half an hour (is due to be changed in the near future into a free advice during up to 1 hour),

- € 61.- for people who live on social security, criminal defence is free for this category of poor people,
 - € 99.- for people with a monthly income of around € 1100.-
 - and so on by progressive scale,
 - up to € 532.- for people with a monthly income of around € 2000 (families)
- A contribution for criminal defence is paid back when no penalty is imposed.

Administration and Accountability of Legal Aid

WRB art. 2 – 11 regulates in detail the tasks of Councils of legal aid (*Raden voor Rechtsbijstand*) in managing and accounting for the provision of legal aid. There is Councils of legal aid in each of the five appeal court districts in the Netherlands, headed by nine members who are nominated by The Minister of Justice. Four of them may be legal aid advisors; the others are nominated from among advocates and people of political and administrative prominence. The Councils work as a board determining the management policy, they may – together with the local bureaux for legal aid – set priorities as to the social situation and legal needs of the region where they are operating. Once a year they report to the Minister of Justice on the performance of legal aid in their region and their policy priorities for the coming period.

They run an office (*bureau rechtsbijstand voorziening WRB art.10-11*) for administering

- lists of advocates who are willing and capable of rendering legal aid services, including setting the volume (number of cases) which each legal aid advocate may take up
- accounting for the eligibility and the amount of subsidy in legal aid cases
- controlling the way means and merits test are implemented by advocates as well as by the bureaux for legal aid.

Means and merits test (WRB art.24 –33)

The initial half hour of information and consultation can be given by

- the bureau for legal aid
- any advocate (or notary) who has inscribed on the list of legal aid providers .

if more than the initial consultation is needed, they have to direct a request to subsidize the case (*toevoeging*) to the *legal aid office* on behalf of their client.

It includes a description of the case sufficient to judge whether

- it is a case which **merits** legal handling, that is to say that is not frivolous nor petty so that it could not be treated within mere half-hour consultation,
- and in how far client is a person of poor or moderate **means** (income and eventually property determine eligibility as well the possible amount of their own contribution to be paid). Proof for the income and property situation is to be delivered by the client by documents of their tax declaration as well as their social security receipts.

In case of doubt, the office of the Council can check the evidence with the people living in the household (family) of the client as well as with tax and local authorities.

Budgets and cases of legal aid in the year 2001

The number of legal aid cases – both with legal aid bureaux as with private practitioners - has been rather stable for the last five years. However, due to increasing lawyer fees and slightly higher management costs, the legal aid budget has been increasing by 80%. In the year 2001 it summed up to € 269.2 million, that amounts to € 16.8 per head of the population.

It is also remarkable how much the distribution over fields of law has changed in the past years. On the one hand the traditional Dutch households became more wealthy, so that fewer middle class people fall into the category which would be eligible for legal aid. Thus,

family law, tenants' and social law cases have decreased. On the other hand, a growing immigrant population is confronted with great social problems. Thus, immigration law and – unfortunately not unrelated - criminal law cases have been on the increase.

Table 1		Budget as of year 2001	
Institutional subsidy : to legal aid councils			€18,2 mio
	to legal aid bureaux		€19,8 mio
	for innovation projects		€11,3 mio
Case related subsidy: to private practitioners			€205, 2 mio
	others		€14, 7 mio
		Sum	€ 269, 2 mio

Institutional subsidies for the legal aid bureaux make up only a small fraction of this budget, only slightly higher than the management and accountancy costs of the system. Nevertheless, as table 2 below shows, the number of clients which are given short advice and consultation is remarkable. Their are concerned with all fields of civil law, employment problems, social and immigration law.

Clients who look for advice in family matters and divorce as well as criminal defence are referred to private practitioners. They receive most of the case related subsidy which accounts for 76% of the budget. As can be seen from table 3 below, a major part is paid for family law and other civil law, most of these cases related to divorce and its aftermath. Criminal defence and service for people in custody demand the second highest budget. Both of these areas of law are hardly served by the bureaux for legal aid, while immigration and representing asylum seekers make up for a remarkable third category.

Table 2 Legal aid cases in the year 2001	Bureaux for legal aid	Private practitioners	Table 3	
Criminal law	18.275	102.264	Budget for case related subsidies to private practitioners:	
Family law	7.987	61.837	Family law, civil law	€92.3 mio
Social security	38.145	23.697	Asylum	€32.8 mio
Employment law	59.407	15.261	Criminal law: general duty cases in custody sum	€ 17.2 mio € 51.1 mio €11.8 mio €80.1 mio
Tenant/ landlords	24.576	6.779	Total	€205.2 mio
Other civil law	16.238	23.702		
Immigration	47.600	65.601		
Total	212.228	299.141		

Complaint institutions

Legal aid in the Netherlands is embedded in a set of complaint institutions of public administration and of business which caters to the general public. Complaint boards against public authorities range from the National ombudsman, to city ombudsmen and police complaint boards. These institutions cannot treat legal claims, but they deal with complaints on a friendly advice basis, often finding a compromise between public administration and citizens.

Other providers of legal consultation

- **Membership organisations** such as trade unions, automobile clubs, renters' or house owners' associations are free to give legal advice and consultation to their members. Some provide **arbitration and mediation services as well**.
- **Legal cost insurance** companies cover about 15% of Dutch households against legal risks. In contrast to countries with a monopoly of the advocacy for providing any kind of legal services, Dutch insurance companies are free to establish their own legal service providers – as long as they avoid a conflict of interest of the legal staff with the insurance company. They satisfy this condition by establishing foundations with a legal staff which handles the bulk of cases for their clients; only if this does not lead to satisfactory results clients the insurance will pay of the client's own choice. As a matter of fact, staff services manage to resolve 95% of all in-house, and most of these without litigation. Thus, they can claim **preventing litigation as much as they provide access to law**.

Concluding remark:

Due to the emphasis on information and consultation of improving access to law in the Netherlands by both: subsidized legal aid as well as legal cost insurance, there is **little triggering effect of increasing litigation**

This contrasts sharply with the conditions in Germany where legal cost insurance is blamed for causing a litigation explosion. Even though research shows this to be largely a prejudice, such a triggering chain can be demonstrated in one very frequent type of private legal troubles: traffic tort

Chain of consequences:

- As advocates have a monopoly privilege of rendering legal services.
- And as insurance coverage of their clients gives them free hand to litigate ,
- they routinely file tort claims after any traffic accident,
- So that litigation risk of other party invoking court gets higher for anybody involved in an accident,
- which renders it rational to cover themselves by legal cost insurance (especially for car owners –60% of all German households with a car hold legal cost insurance)

Look at the result: where Netherlands ranks high on subsidizing legal aid for poor / lower middle classes

the German system promotes legal services for middle classes covered by insurance.

Table 4 **Money flow from insurance /legal aid subsidy to attorneys (1989)**

	West-Germany	Netherlands
insurance -----> attorneys	850 million ECU	22 million ECU
rate per practising attorney	22,000 ECU	4,000 ECU
legal aid -----> attorneys	147 million ECU	100 million ECU
rate per practising attorney	7,660 ECU	24,574 ECU

Source: Own budget analysis, somewhat dated, growth rates in both sectors are stable – far lower than in corporate lawyer market