

## **Access to justice (art. 6 and 13 ECHR, art 47 EU charter of fundamental rights) and the right on legal aid.**

In short.

- 1) The right for everyone to have a claim relating to civil rights and obligations or impose prosecution to the court or tribunal. (Golder v UK , Pobielski and PPU v Poland)
- 2) Each individual has the right to equal and fair treatment ("equality of arms"). The parties should be able to perform this procedure on the same conditions not substantially unequal disadvantage one party compared to the other party (Sardon Alveira v Spain)
- 3) The State is in certain cases obliged to take the legal costs of a litigant to his account, as without this government intervention there would be open no effective remedy for litigants (Airey v Ireland).
- 4) An attorney should be assigned to a litigant if necessary. In other words, there must be not only a system for publicly funded legal aid, but there must also be available enough lawyers to litigants to grant the (funded) legal assistance. The government can not simply rely on the fact that no lawyer would assist a person seeking assistance ( Bertuzzi v France). See letter College van de Rechten van de Mens 14/02/2014 to the justice commission of the Dutch parliament).

The right of access to justice must actually be effective; it should not be illusory. Measures providing legal aid must not lead to a situation that not enough lawyers remain available for the legal aid.

States have however considerable freedom how to organise effective access to justice. The right to legal aid and of access to court is not absolute and may be subject to legitimate and proportional limitations. The ECtHR only assesses whether there has been an effective and practical right of access to court. This means that countries have broad discretion to set income levels, the level of individual contributions and eligibility requirements. There is no maximum limit to the own contribution of legal aid applicants, but it must not be arbitrary or unreasonable, and it must pursue a legitimate aim and be proportional to that aim. (Podbielski v Poland).

*Restrictions may not in essence harm the access to justice.*

Under the case law which viewpoints can be involved in an examination in an individual case. These restrictions may include, for instance:

- The ability of a litigant to finance the necessary legal assistance itself; (Steel and Morris v UK)
- The interest of the litigant (Steel and Morris v UK and Airey v Ireland)
- The success rate of the procedure (Del Sol v France)
- The ratio between the cost of the proceeding and to obtain compensation on the other hand (Nicholas v Cyprus)
- The degree of complexity of the applicable laws and regulations and the procedure (Airey v Ireland)
- The extent to which the litigant is able to defend itself effectively. (Steel and Morris v UK)

Exclusion of certain types of problems from the scope of legal aid is allowed, in particular if the procedure is simple. Depending on the interests at stake, the complexity of the procedure, complicated issues of law and fact, and the emotional involvement of the applicant, self-representation is allowed. The limited access to legal assistance must not lead to an inequality of arms between the parties.

The ECtHR is open to alternatives, such as simplification of procedures. Determining factors are the interests at stake, the complexity of the procedures, complicated issues of law and fact, and the emotional involvement of the applicant. Categorical exclusion of civil justice problems is allowed, if self-representation is a realistic option. Legal aid has to be provided when a defendant faces incarceration.

### **Situation in the Netherlands.**

Plans of budget cuts of 85 million Euro on legal Aid after earlier budget cuts by almost tripling the contributions, lowering the fee's paid to lawyers, possibly exempting certain areas of law (housing, consumer law and parts of family law), changing the financial criteria for obtaining legal aid (sufficient means criteria) and the merits criteria (no financed legal aid if the financial interest is below € 1000,=). Furthermore there are plans to restrict the access to legal aid by lawyers by changing the criteria for a right on financed legal aid from "yes except" (when there is an exception) into "no unless" (a lawyer is really necessary) and enlarge possibilities of so called zero line legal aid (information through the internet) and first line legal aid, i.e. legal aid by (para) legals in the form of giving information about and inventarisation of the problems and second line legal aid in the form of actual advise, legal negotiations and representation during procedures.

The government has plans to broaden the possibilities of legal aid in the zero and first line by information through the internet and with help from paralegals and to diminish the possibilities on first aid legal assistance by a lawyer. Those plans give rise to questions about the quality and effectiveness of this form of legal aid.

More than 6 million Dutch are potentially affected by the budget cuts on legal aid. In 2012 36% of the Dutch population fell within range of the system of legal aid.

On the other hand. The measures and laws in Holland have a tendency to get more repressive and more complicated. As a result of austerity measures a growing part of the population is confronted with measures that take away or diminish certain rights (on benefits for example). For them access to justice and proper legal aid is essential. It is clear that there is a tension between the aims of cutting the costs of legal aid and the principle of access to justice. According to an eminent jurist, Alex Brenninkmeijer, former ombudsman in Holland, Holland would fail for a "stress test" (as proposed by him) on human rights in several domains (see: NJB 24 April 2015, pg 1046 ff.). He is not the only jurist who is worried about this problem. Concerns are also mentioned by the Dutch College on Human Rights in the mentioned letter and many others.

Because in Holland we had a good working system of legal aid, we have around 9000 lawyers of the 17.500 Lawyers that are subscribed at the legal aid board. Recently there has been a research by a bureau (Ipsos) in Holland on request of the Dutch bar association by means of a questionnaire by the internet among 1600 lawyers that take active part in the legal aid system by subscription at the legal board. According to that research about half of the Dutch lawyers that are subscribed at the legal aid board responded that they expect to leave the system within two years. 90 % of the requested lawyers fears for a loss of quality of the legal aid.

The cuts go hand in hand with other austerity measures, This is not only the case in the Netherlands, but also elsewhere in Europe. The reforms lead to more problems in the society and thus more need of legal aid.

In Holland there is at this moment a considerable group of persons that is forced to live in poverty. It covered to the estimate the Social and Cultural Planning Office (SCP) in 2013, over 10% of households. In 2013, the number of persons that are members of such households increased to over 1.4 million people. Nearly one in three was a minor. In single-parent families and single people under 65 years of age the risk of long-term poverty is greatest. This is worrying because these groups are the most effected by the latest budget cuts on social security. The number of registered homeless has increased in 2013 compared to 2012 from 24,000 to 27,000. Moreover, there is a large group of undocumented migrants (estimations: about 100.000 people) living in the Netherlands that are excluded from benefits, social programmes or community services for basic needs. Under pressure from the European Committee of Social Right and the Central Appeals Tribunal, the Dutch Cabinet recently with utmost reluctantly decided to contribute financially to that popularly called "bed bath and bread" arrangement as a safety net for anyone who is staying in the Netherlands.

This indicates that the safety net is still further reduced. That we now have food banks in the Netherlands is not surprising under the circumstances.

In Amsterdam, the term social service has already been abolished for years. Recently, this service has been renamed in "result responsible unit". It is clear that the needs of citizens who are forced by circumstances to live in poverty have become more and more out of sight and that other "results" seem more important.

*In a situation like this access to justice is more essential than before in order to keep up the rule of law and decent living and human rights standards.*

At this moment there are two commissions at work to investigate the effects of the budget cuts on access to justice. They are just installed and are now busy to investigate in the first place the causes of the rise of the costs of legal aid and the number of cases for which legal aid has been granted. In the end they will come with suggestions to create a system in which legal aid and access to justice will be guaranteed at exceptional costs.

Access to justice must not only be seen within the perspective of legal aid but also from the perspective of other cost especially the cost of access to the court (the fees of the court/griffierecht). Furthermore to my opinion there are other elements which should be considered in the light of equality of arms that is the

possibility of subsidizing costs for the use of experts during in procedures if the other party has assistance of them.

### **Acces to justice. Should Holland consider an “EVRM plus” standard?**

In Holland it has been suggested by prof. T. Barkhuysen to look into the possibility to develop a national standard that is higher than the ECHR standard. This also in view of a recent proposal for a change in the Dutch Constitution concerning the right to a “fair trial before an independent and impartial tribunal”. The current article 17 from the Constitution, in which the right on access to court is formulated knows a “ius de non evocando”, a negative formulated right that is: “not to be withheld from the right of a trial before a judge according to the law”.

Article 18 of the Dutch Constitution contains guarantees in respect of Appeal justice and legal aid. Under the first paragraph of this provision anyone has a right on assistance in legal and administrative proceedings.

Article 18 does not specify by whom one may have assistance. According the the second paragraph of Article 18, the law gives rules regarding legal assistance to the less fortunate. It holds therefore an obligation for the legislator, to make a law concerning legal assistance. This right has been worked out in the in the Law on legal aid (Wet op de Rechtsbijstand). The provision in the Dutch constitution however provides no protection against reductions in the level of provisions on under the Law on Legal Aid. For this we are still depending on international minimum standards, especially art. 6 ECHR and art. 47 Charter of Fundamental Rights of the European Union.

The idea of a higher national standard than the international standard is that Holland is a rich nation compared to other countries in the world and also within Europe and as such should have good standards as far as human rights are concerned. Better standards than the minimum international standards which are in general not very high.

In Holland the Dutch authorities did some research to systems in different countries within the EU. See: *WODC report “Legal aid in Europe” nine different ways to grant access to justice”*.

According to his report the following nine variables may have a (major) positive impact on costs and/or quality: 1) Reducing complexity of procedural routings for problem categories; 2) Further developing specialised procedures for frequent and urgent problems; 3) Services integrating legal analysis with other disciplines; 4) Reducing the services that are a monopoly of the legal profession; 5) Improving legal information/advice; 6) Fixed fees instead of hourly fees for legal aid lawyers; 7) Fixed fees on the market for legal services; 8) Closed budget; 9) Rates paid to lawyers.

Five variables seem to have little impact on budgets, and varying impacts on quality: 1) Availability of legal expenses insurance; 2) Preventing justiciable problems; 3) Mediation; 4) Raising own contributions and income level for eligibility; 5) Recovering legal aid money from applicants, defendants or other funding sources.

Variables with uncertain impact on costs and quality that deserve further study are: 1) Products and incentives for negotiation and settlement; 2) Reducing the types of problems for which legal aid is available.

In conclusion (see page 6 summery)the *procedural setting and the availability of legal services on the market are among the main variables that policy makers can influence in order to guarantee access to justice.*

As I said before access to justice is essential in a democratic nation to keep up the rule of law and decent living and human rights standards.

If we consider the importance of the rule of law as basic value of the nation we live in, we could maybe also consider a constitutional or legal binding guarantee in the form of a minimum percentage of the GDP that the state is obliged to reserve to cover the costs of access to justice. As legal aid is an essential part of access to justice there should also be a guaranteed percentage of the GDP for the costs of legal aid. The advantage is that there is less discussion about reducing the costs and the price which we ought to pay in order to guarantee access to justice. The disadvantage however is that in a period of crisis the GDP can diminish in that case the minimum amount of money that the state is obliged to reserve for access to justice and legal aid diminishes as well. On the other hand especially in times of crisis the civilians need protection against losing their rights or to enable them to keep up their rights. So in fact in times of crises the request/demand for legal advice, assistance and proceedings normally will rise and with it the costs of access to justice.

If I consider the situation in Holland concerning the GDP and budget cuts on legal Aid I notice the following. The GDP in the period from 2008 until 2014 has fallen with more than 8 % (with ups-and-downs). In the period from 2008 until 2014 the spending on subsidized legal assistance has grown from € 340 million in 2008 (monitor Rvr 2008) to € 484,7 million in 2013. (WODC report Legal Aid in Europe, p.49). That is considerable, more precisely 43.4%. (47% if a take in account the year 2014).

If I look at the figures in the earlier mentioned WODC report concerning expenditure on legal aid as % of GDP in several countries in Europe; The Netherlands is number 3 on the list of expenditure as % of GDP. The percentage is by the way very small (0,08% ). If we compare this to the expenditure of other sectors and the value of the rule of law.

**Total expenditure as % of GDP<sub>60</sub>**

1. England & Wales 0.13%
2. Scotland 0.13%
3. Netherlands 0.08%
4. Ireland 0.06%
5. Finland 0.03%
6. Germany 0.02%
7. Belgium 0.02%
8. France 0.02%
9. Poland 0.01%

In Holland the idea of a minimum percentage of the GDP was mentioned by the Dean of the national Bar association, but has not been picked up ever since. And maybe...rightly so!

The VSAN however proposed other idea's to keep up a decent system of legal aid. I mention the following idea's .

The main idea is that the polluter of the system tributes more in the costs of access to justice. Costs of legal aid and proceedings must be related according to the cause. If legislation is expected to lead to more legal disputes an extra budget must be reserved by the department responsible in order to cover extra costs of legal aid/access to justice. This contribution has to be transferred to budget of the justice department.

Furthermore. .

- Introduction of a legal aid funds in employment law and tenancy law and / or adapted operational contributions within these jurisdictions.
- Introduction of a quality mark and contribution for companies with regard to the legal costs of consumers in consumer disputes.
- Governing bodies will contribute to the legal costs of paying stakeholders who rely on legal aid. Through cost-recovery process expenses and a contribution which depends on the number of submitted objections and appeals in the previous year.
- Introduction of a "pro-bono contribution" for the commercial law firms.
- Limited hourly rate for lawyers acting for the government.
- Decrease in the number of administrative procedures by more comprehensible legislation, less instrumentalist legislation and adequate budget for its implementation.

#### **Findings in brief.**

There is discussion in Holland about further reforms, read: "budget cuts" on legal aid. The Dutch authorities have for the moment (on request of the parliament (first chamber) frozen future plans for further budget cuts awaiting the result of a governmental commission. There are two commissions working out idea's to come. The idea of a fixed minimum percentage of the GDP for legal aid does not seem realistic.

If the Dutch government continues with the current plans this will be detrimental to the access on justice and legal aid. Even in the current situation the Dutch state, according to several eminent jurists, would fail for a "stress test on human rights". There are alternatives however to keep up a decent system of legal aid and access to justice. Certainly there is enough money considering the essential issues at stake. For a lot of countries in Europe it might be interesting to compare the percentage of the GDP per country for countries that spend very little money on legal aid as we had a good system in the Netherlands with modest costs as percentage of GDP. In those countries it might be argued to rise the percentage of the GDP in respect of the rule of law for which access to justice and decent legal aid is essential.

It could be an idea that the EU committee makes recommendations in view of the rule of law and a minimum percentage of the GDP in combination with minimum standards. Problem however is that there are many different systems and causes for costs in Europe, that countries have a broad discretion to arrange their national system and that decisions on access to justice may never be taken mainly on financial grounds. Furthermore a European minimum standard as percentage of the GDP reserved for access to justice and legal aid would probably lead to a lower standard for countries like Holland, the UK or Scotland. It could be interesting to do further scientific research on this subject.

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