

PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/151754>

Please be advised that this information was generated on 2018-02-21 and may be subject to change.

Responsibilities of the state and legal professions

Mies Westerveld & Ashley Terlouw

1 Introduction

This contribution deals with the responsibilities of the State and legal professions in ensuring access to justice (access). Under the concept of ‘State’, we deal with two functions: first, legislator and policymaker and second, implementer of rules and policy. The judiciary will be covered in a separate section (Section 3) due to its position as an independent state authority. In reference to the legal professions or ‘intermediaries to access’ (Section 4), we will limit our discussion to lawyers, in view of the special statutory role assigned to them in safeguarding access, not only for litigants seeking a solution to their problems but also for citizens who are at variance with the government, perhaps because of a criminal prosecution or a dispute concerning asylum or social security. The distinctive aspect of these disputes is that the interested party has few choices, and is dependent on the government’s stance on whether ‘the problem’ has to be channelled through litigation or can be resolved in another way.

As such, the focus of this contribution shifts from the earlier contributions in which the focus was more upon information and working towards good solutions. Although these functions are part of the responsibilities of judges and lawyers, and are therefore raised in this contribution, they occupy a less prominent position than in the third part of this special issue, for example. We will however end the section on intermediaries with some analysis of an institution for which finding a ‘good solution’ is part of its core business: the legal aid insurer (LAI). Spending cuts in subsidized legal aid mean that the LAI is playing an increasing role in the domain of access.¹ Legal aid lawyers and legal aid insurers are thus two key players in relation to access.

This contribution is based on the Dutch legal system as that is the system which we (the authors) are most familiar with. However, we will do our utmost to write from a perspective that can also be recognized outside the Dutch context. Although we have not conducted field research ourselves for this contribution, we will refer to empirical research by others.

1 A little more than 40% of all households in the Netherlands currently hold legal aid insurance. Source: Monitor (2012) with reference to data of the Union of Insurance Companies. This is incidentally far less than in Sweden where there is almost full coverage (97%). Source: Van Zeeland & Barendrecht 2003.

2 The state: legislation and implementation

2.1 *The responsibility of the legislature in relation to access to justice*

The legislature's first responsibility in relation to access to justice can be summed up as ensuring that there is 'proper legislation'. What actually constitutes proper legislation is rather vague.² In this regard, Cappelletti notes that "the system must be equally accessible to all, and that it must lead to results that are individually and socially just".³ It should be clear that this is also a rather subjective criterion from which not much more than an overall instruction can be derived. More specific – yet still very basic – are the aforementioned characteristics of the democratic state under the rule of law: due process, fair hearing, equal protection of the laws, etc.⁴ At this juncture, we would like to focus on the criterion 'accessibility' as the current theme, in respect of which we make a distinction between accessibility *to* the law and accessibility *of* the law.

The theme of accessibility to the law relates to problems of legal outsiders. Even if it is accepted that a legal system is fair, if litigants are unable to use instruments from this system then justice is not guaranteed. This was at issue in the *H.N. v. Legal Aid Board* case.⁵ The complainant, who resided in Sarajevo, was a surviving relative of the bloodbath in Srebrenica – an event for which he believed the Dutch government bears a special responsibility – who wished to bring a compensation claim before the International Court of Justice in The Hague. The Legal Aid Board (LAB) rejected the request for legal aid prior to those proceedings due to a lack of a connection with the Dutch legal system. Comparative examples exist in asylum law, in which asylum seekers trying to reach the EU will usually not have any access to legal aid if they are stopped before the border.⁶

Accessibility *of* the law implies that rules may not be unnecessarily complex and may not put barriers in the way of achieving 'justice'. Accessibility of the law is thus also part of the key to preventive law. The legislature has the power, through the way in which it formulates legislation, to both create and avoid the creation of conflicts and is responsible, where possible, for doing the latter. A poor example in this regard is a tax cut that can be obtained for the lowest paid through a refund of the income tax levied on them, *which they must apply for themselves*. We will return to this topic under financing. From the perspective of cost savings, avoiding conflict is namely a public interest.

2 This has been considered and written about from different perspectives, as articulately described in the study of academic works through the centuries by Witteveen 2015.

3 Cappelletti 1978, p. 6; Hubeau para 1.5.

4 Hubeau, with reference to Johnson Jr. 2000, para 2.7, footnote 67.

5 This ruling was confirmed up to the highest instance. *H.N. resident in Sarajevo v. Legal Aid Board*, Dutch Supreme Court, 9 August 2014, *Case 12/3747* annotated by L. Zegveld. See <http://kenniswijzer.rvr.org/jurisprudentie/2014/07/geen-rechtsbijstand-voor-rechtsbelangen-die-niet-in-de-nederlandse-rechtsfeer-liggen.html>.

6 However, Article 3 of the Recast Asylum Procedures Directive 2013/32/EU stipulates: "This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection". Article 20 meanwhile gives the right to free legal assistance and representation in appeals procedures.

The legislature's second responsibility is to safeguard the separation of powers, both as regards the judiciary and the legal profession. Both ought to be able to do their work independently and without government intervention, and it is up to the legislature to create enabling conditions for this purpose. Following on somewhat naturally from this responsibility is the loyal observance of the fair trial principle, even if this occasionally comes with an unforeseen price tag.⁷

Apart from the public dispensation of justice, the legislature also bears co-responsibility for the quality of alternative forms of dispute resolution (ADR). As this route to justice gains in popularity and the government increasingly encourages it,⁸ it is the government's responsibility to see that these routes also comply with the basic conditions of a fair trial.

2.2 *The responsibility of the executive in relation to access to justice*

The executive must ensure that justice is done and seen to be done to and by citizens during enforcement. Dealing adequately with the awareness-raising function of complaints is also part of this responsibility. The executive may use citizens' complaints or praise about its service to improve these services, or it can treat both as an incident and let the opportunity for improvement go by. It goes without saying that its responsibility is to do the former wherever possible and sensible. This implies, for example, that communications from the legally established public Ombudsman must really not be taken lightly.

Another aspect of 'proper implementation' is communicating with and informing citizens. Many public executive agencies have user-friendly websites that provide answers to frequently asked questions. These instruments increase access to justice and the self-reliance of citizens.⁹ Provided that this is not linked to unrealistic expectations and that not too much is demanded of people, such aids can contribute towards increasing access. If the first does happen, though, there is a risk of reduced access because people are steered away, because of presumed self-reliance, from opportunities to have erroneous government decisions rectified.

2.3 *Government responsibility to finance access to justice*

The last theme relating to the government responsibility concerns the financing. This aspect entails two responsibilities: financing as such and making decisions on the pertinent questions (as formulated earlier by Rhode).¹⁰ The importance of this topic for access cannot be underestimated. In the absence of adequate resources, judges will deliver 'poor-quality justice'¹¹ and lawyers will be loath to provide

7 For example, as a result of the *Salduz* case, which made it necessary for a lawyer to be present during police questioning (ECtHR 27.11.08, no. 36391/02). The deficit as a result of this verdict was estimated at € 15 million. A comparable effect was notable in Belgium. Source: Combrinck, Peters & Gibens 2014.

8 This policy is a corollary of the recommendation of the Committee of Ministers of the Council of Europe (Rec. No. R [86] 12), which was drafted with a view to reducing the excessive workload in the courts.

9 For more on this see Cohen & Clarke, 4 *supra*.

10 Rhode 2004, p. 6.

11 For this purpose, see Klaassen 2015.

legal aid for those unable to pay a price in line with the market. In order to prevent the latter situation, a subsidy system was created in the 1950s from which legal aid lawyers are paid.¹² The financing of both the dispensation of justice and subsidized legal aid are under pressure and the government is continually looking for ways to keep ‘the systems’ affordable without compromising on quality. The promotion of ADR for the public dispensation of justice has already been raised. This method – which was already mentioned by the ‘godfathers’ of the access-to-justice movement in the 1970s¹³ – has also been promoted from Europe since the 1980s.¹⁴ The ECtHR very recently confirmed that the obligation to first try the settlement route before approaching the court is a legitimate means, even in such a serious case as the one at issue.¹⁵ Even setting a financial threshold to prevent people from going to court for frivolous matters is legally permitted, provided that this threshold is not so high as to cut off the route to the court, or that the costs of the legal aid needed for this route become unbearably high.¹⁶

Yet the most classic form of cost control is to establish a supervisory authority to oversee the organization of the dispensation of justice and provision of subsidies to lawyers. However, supervising the work of judges and lawyers is a sensitive matter. Both must be able to do their work freely and independently, and the moment the word ‘supervision’ is mentioned, both quickly state that the independence that is so crucial to the profession, because of its link with the rule of law. And with that finding, we now turn to the responsibility of judges.

3 Judges and the judiciary

The realization that the judiciary also needs some supervision or control to ensure that funds intended for Justice are spent properly in the Netherlands led to the creation of a ‘collegiate administrative body’ in 2002. This Council for the Judiciary is entrusted, *inter alia*, with drawing up a budget for the dispensation of justice, dividing the resources made available for the dispensation of justice among the courts, and supervising court operations. Its tasks also include promoting the quality of the dispensation of justice and the uniform application of the law. To this end, the Council has some sway in how judges must do their work. For this reason – and because this body is less detached from the Ministry of Security and Justice than the bodies entrusted with the dispensation of justice – various authors have made critical comments about the position of this Council within the Dutch legal system.¹⁷

12 For more detail in this regard, see Hubeau & Terlouw 2014, Chapters 3 and 4.

13 Cappelletti 1978 puts the discovery of this form of dispute resolution in the ‘third wave’. See Chapter II.

14 Recommendation of the Committee of Ministers of the Council of Europe (Rec. No. R [86] 12)

15 *Momčilović v. Croatia*, ECtHR 26.3.2015, no. 11239/11. The complainants, as surviving dependants of a woman who was shot and killed by a soldier, are claiming compensation from the government.

16 *Kreuz v. Poland*, ECtHR 19.6.01, no. 2824/95; *Marina v. Latvia*, ECtHR 26.10.2010, no. 4604/07.

17 In this regard, see Bovend’Eerd 2008, Bauw 2011 and Brenninkmeijer 2015.

3.1 *Responsibilities of judges and of the judiciary in relation to access to justice*

The responsibility of judges in relation to access to justice can be subdivided into legal and social responsibilities, although that dividing line is sometimes blurred. Legal responsibilities are often established social responsibilities and the reverse also applies, as social responsibilities often arise from legal responsibilities. Our comments in relation to the legal responsibility of judges will be brief. Judges ensure that the law is observed and – more specifically – that the government abides by its own laws and that the aforementioned rules of a democratic state under rule of law are safeguarded.¹⁸ They are responsible for interpreting the law, for legal uniformity, the development of the law, and for justice in individual cases. Judges are further responsible for ensuring that the dispute is settled in a manner that is in keeping with at least the intention of positive law. Lastly, judges are responsible for ensuring that the basic principle of a fair trial remains alive as a principle within the national rule of law. The legal responsibility of judges ceases as soon as judgement is delivered. They bear no formal responsibility for the observance or acceptance of their judgement. However, social responsibilities arise from their legal responsibilities. Even if there is no direct legal basis for attributing them, judges generally feel these social responsibilities, although they do sometimes cause debate or dilemmas.

3.2 *Responsibilities of the judiciary in relation to access to justice in individual cases*

When we consider the responsibility of the judiciary in relation to access to justice, we think primarily of the responsibility of the individual judge (or of the full bench division) to settle a dispute in such a way that justice is done, so that the parties have their day in court, and to also manage everything in a correct, expert, and constitutional fashion. A responsibility to ensure procedural justice can also be inferred from this legal responsibility to ensure a fair trial. The first to call attention to this was Niklas Luhmann.¹⁹ According to him, procedural justice increases the chance of social acceptance and, in doing so, the chance that the proceedings before the court will lead to at least a feeling of justice. Since then, other authors have elaborated on aspects of procedural justice.²⁰ Managing a dispute also means that judges decide – to a certain degree²¹ – what role they are going to play in that regard: active or passive? Like a qadi or a sphinx?²² They also rule on what seem on the face of it to be all types of unimportant practical issues that may still be essential for access to justice.

For example: a litigant puts forward a witness and the judge rules that the application is out of time and refuses to hear the witness. Another example from immigration law proceedings: the interpreter does not turn up for the

18 Cf. WRR 2002, p. 18-19.

19 Luhmann 2001.

20 Ippel & Heeger-Hertter 2006; Bauw, Böhler & Westerveld 2013, p. 85-88; Terlouw 2015, p. 275-290.

21 How active an approach a judge may adopt is also partly prescribed by the legislature.

22 Bruinsma 1995.

hearing. The judge rules that the hearing must continue. The consequences of the interpreter's absence are borne by the party who needs the interpreter.

Although these examples are legally 'impeccable' decisions, it may still be asked whether the judge's responsibility in relation to providing access to justice extends or should extend further.

The same question applies to the judges' responsibilities once they have delivered judgement. The judgement must comply with the requirements laid down by law: it must be a legally sound ruling, it must be delivered within the stipulated period for that purpose, and it must be motivated. Strictly speaking, the judge has no further responsibilities once judgement has been delivered, but increasing attention is being paid to the question of whether or not judges have further responsibilities in relation to the acceptance of their judgements or the observance thereof.²³ Research shows that legal rulings are not well observed and it is questionable what the successful party actually gains from one.²⁴ Injustice often cannot be reversed, but a proper interpretation of the law that is understandable by an outsider may possibly eradicate feelings of injustice. We will revert to this point later.

The next question relates to the exclusivity of the public court as an adjudicator. As argued elsewhere in this volume, there are many routes besides the route to the court that can lead to justice. A court judgement is moreover restricted in the sense that it only settles the dispute submitted to the court, as a result of which the entire underlying conflict remains unresolved in many cases.²⁵ This brings us to the question of whether the court has a responsibility in individual cases to point out alternative options for the dispensation of justice, such as mediation, arbitration, and e-justice? There are different opinions in this regard. Proponents of mediation, for example, point out the aforementioned restrictions of dispute resolution by the court. Opponents point to the fact that alternative routes offer fewer safeguards and offer fewer guarantees in terms of independence, impartiality, the creation of precedent, and public access. The first point in particular prompted the Dutch Member of Parliament Van der Steur (now Minister of Security and Justice) to submit a legislative bill for mediation to be given more legal safeguards. However, this led to criticism that such juridification would undermine the advantages of mediation.²⁶ A compromise would be to make the judiciary more accessible through a lower threshold. In this respect, judge Rullmann's idea, to allow some judges to work like a type of family doctor with consultation hours, is an interesting proposal.²⁷

23 Marseille 2012.

24 See different contributions in this regard in Hertogh & De Groot-van Leeuwen 2000.

25 Allewijn 2007.

26 Ingelse 2014.

27 Interview with Rullmann, in the *NRC* of 10 October 2013, p. 8.

3.3 *Responsibilities of the judiciary in relation to access to justice as a public interest*

A theme that is also attracting increasingly more interest is the trust of citizens in courts and in the dispensation of justice. This trust was self-evident in the past.²⁸ Reference was made in the second half of the last century to a 'revolution of rising expectations' and a 'juridification of society'. "All kinds of groups that feel disadvantaged formulate their claims in the form of rights and approach the court", said Huls.²⁹ But there has been a turnaround in this trust in the courts. Huls attributes this to five factors: the growing idea that the judge is assuming the role of the legislature too often, ineffective management by the judiciary, criticism of judgements, criticism by legal psychologists of judicial assessments and expertise, and dissatisfied citizens. A lack of confidence in the courts is undoubtedly an obstruction for access to justice. However, it is not easy to determine what contributes and does not contribute towards trust in the courts.³⁰ For example, does a solemn court building with tight security at the entrance, where the judge presides over a hearing, dressed in a toga from a raised bench with a portrait of the King behind him inspire confidence or act as an inhibitor? Or is it both, depending on the person involved?³¹ Does it inspire confidence if legal cases can be followed in their entirety on television, or does it then become all too evident that judges are only people and also make mistakes? Does complicated legal jargon inspire confidence or is simple motivation without the jargon more trustworthy? And what effect does the composition of the judiciary have on the trust of citizens?³²

A related question is whether judges should play a more active role in explaining their judgements.³³ This would perhaps contribute to a general feeling of justice among the population.

The current National Ombudsman, former President of the Trade and Industry Appeals Tribunal and Chairman of the Netherlands Association for the Judiciary, has the following to say in this regard: "The judge does not spend much time in the public eye. That has traditionally been the case. Until recently, the ivory tower was a comfortable bastion in which judges could entrench themselves. And that was also accepted. The accompanying authority was accepted. We have seen a turnaround in this regard. On the one hand, we would want to maintain that distance, but on the other hand, we know that distance alone does not suffice. Society must actively accept our work and the manner in which we do it. We can function only by the grace of broad support and that requires far more interaction than before. We must thus demonstrate how we do our work and why we do it that way. Explaining, talking, and showing that we also know the social context in which we work. That

28 Friedman 2008, Chapter 9.

29 Huls 2008. Also see Bruinsma 1999 and, on the criticism of the expertise of judges, Crombag, Van Koppen & Wagenaar 1992 and Wagenaar, Israëls & Van Koppen 2009.

30 Croes 2011.

31 Cf. Malsch, Lavender & Nijboer 2006.

32 Böcker & De Groot van Leeuwen 2005; Sloot 2004.

33 Cf. Terlouw 2015.

is currently requested more expressly than before. Partly as a result of an enormous increase in media attention. And so we climb out of that ivory tower.³⁴

However, the express view of the Dutch Supreme Court (*Hoge Raad*) is that judges should speak only through their judgments and be silent otherwise.

In 2013, for instance, the Supreme Court held that it was ‘undesirable for a judge presiding over a personal appearance hearing to make comments outside a witness examination after the end of that hearing, at the request of one of the parties, about the meaning that should be attached to an agreement entered into in his presence.’ It was also held that “it is not appropriate for the judge to comment on or explain his ruling once this has been given and published, or to answer questions about the meaning of the ruling or parts of the underlying motivation.”³⁵

Notwithstanding these judgements cited above, judges also seem to be considerate of this appeal to their responsibility to provide more transparency. The ‘*Agenda voor de Rechtspraak voor 2008-2011*’ (Agenda for the Judiciary, 2008-2011) notes that it is important for the Judiciary to be firmly rooted in society in order to enter into dialogue with its environment, be visible in the media, act on critical signals, and be fully transparent.³⁶ All judicial bodies also have trained judges responsible for briefing the press and it is becoming increasingly more common for judges to speak about their work or that of their colleagues in the media. The recently appointed President of the Dutch Supreme Court also stated that he approves of the judiciary interacting with the media from time to time.

I plan to give regular lectures, to make it clear to society what the Supreme Court is, why we exist, and what we do. TV, now and again. And (in response to a question about his predecessor who sent a text message to the Prime Minister): “If I were to feel an overwhelming urge to send out a message, I’d find a good way to do it at that time.”³⁷

Both ‘messages’ show just how much the theme of judicial responsibility and openness is in flux.

A further responsibility of judges relates to how the other players involved in access to justice perform their duties. Is it up to judges to sound the alarm if these parties do not take responsibility or do so differently from what judges deem desirable or necessary? Does the judge have any duty in this regard and, if so,

34 Interview with Reinier van Zutphen in: Van Kleef & van Kleef 2001, p. 166.

35 HR 6 March 2013, ECLI:NL:HR:2013:B23458, *RvdW* 2013, 601; HR 6 March 2013, ECLI:NL:HR:2013:BZ3450, *RvdW* 2013, 600. For a comprehensive discussion, see Den Tonkelaar 2013.

36 *Agenda voor de Rechtspraak* 2008.

37 Huls 2015.

which? The first party that comes into the picture is the state: the legislator, the government, and the Minister of Security and Justice. As a basic principle, the responsibility for organizational aspects and the financing and sustainability of the dispensation of justice lies with the responsible Minister. Even so, no-one will deny that the judiciary also has a certain shared responsibility in this regard. To some degree, that responsibility can also be viewed as part of the right to a fair trial that judges must guarantee.³⁸ Judges also actually claim responsibility, for example, when they get involved in a discussion about the amount payable for court registry fees, stating that it jeopardizes access to the courts.³⁹ Over the past few years, judges have expressly drawn attention to their high workload and the fear that this could compromise quality. A number of Dutch judges have even gone as far as to put this to the public, in what is known as the Leeuwarder Manifest.⁴⁰ The fact that judges feel jointly responsible for containing the costs involved in the dispensation of justice is clear from the judiciary's active involvement in the KEI project (Quality and innovation of the judiciary aimed at simplified, digital, accessible, and efficient processes within the main areas of law).⁴¹ The second player that judges deal with on account of their position is the legal profession. An underperforming lawyer can present a serious obstacle to access to justice. But is it up to the judge to report or make it known that a lawyer does not understand his/her subject?⁴² May – or must – judges make it known at a hearing if they find that the lawyer has failed through his/her manner of representation to provide a proper service or to raise essential points of defence? May or must judges supplement legal grounds at their own motion? How active or passive may or must judges be in the interests of access to justice? Comparable questions may be asked about the good or substandard performance of the other players that judges deal with on account of their position, such as social service providers (Youth Care Office) and the Public Prosecution Service. Although these questions go beyond the scope of this discussion, they are questions that affect the responsibility of judges in relation to access to justice.

4 Lawyers and the bar association

4.1 *Lawyers and the state: a complex relationship*

Attributing social responsibilities to lawyers is not self-evident. Lawyers are private parties and, as such, are not necessarily oriented towards serving the public interest. Even so, they do have a certain public responsibility. As Granfield and Mathers put it, lawyers have a special relationship with the State. "The State grants the legal profession the autonomy to regulate itself in exchange for the

38 Zückerman 1999; Esthuis 2005.

39 Corstens & Kuiper 2014.

40 Leeuwarder manifest 2012, <http://www.nrc.nl/nieuws/2012/12/15/rechters-in-manifest-wenkunnen-werk-niet-meer-goed-doen/>

41 For detailed information on the KEI project, see Klaassen 2015.

42 Cf. Butter, Laemers & Terlouw 2014.

profession's commitment to serve the public interest."⁴³ In the Netherlands, the autonomy to regulate is mainly linked to the special position of lawyers in a state under rule of law. In the parliamentary debate on the Dutch Counsel Act 1952, this was described as 'a continuous area of tension between the lawyer's obligations towards the objective legal system on the one hand, and, on the other hand, the no-less-urgent obligations towards his/her client who is pursuing subjective interests'.⁴⁴ There has thus been much debate in the recent past about the formulation of this commitment to serve the public interest. The legislature wanted to include this as a core value of the profession⁴⁵ in the law itself, but faced opposition in this regard from the Bar Association – the professional group of lawyers, hereinafter BA – which found this to be at odds with what it regarded as the two foremost responsibilities of the legal profession: partiality, the lawyer acts for the client and only for the client; and confidentiality, the client must be able to trust that the information shared with his/her lawyer will not be disclosed to an outside party.

The BA's objections mainly related to the explanatory notes in this regard. These read that 'the lawyer is not just a business owner who practises a profession, but is also a professional who *serves* the dispensation of justice...'.⁴⁶ Criminal lawyers, in particular, had grave difficulties with this phrasing because they foresaw problems between the responsibility that could arise from the subordination suggested in it and what they regard as the foremost responsibility of the criminal lawyer: organising an optimal defence for a client accused of a crime.⁴⁷ Although the commitment was ultimately not included as a responsibility in the Act, it was established that this would be a guiding principle for the lawyer's acts and omissions. As rule 1 of the rules of conduct states,⁴⁸ lawyers must act such that trust in the legal profession, or in their own professional practice, is not damaged. Böhler phrases the duality that arises from both elements as follows: that the lawyer is responsible at a macro level for proper dispensation of justice, and serves the public interest best on an individual level through his or her partiality.⁴⁹ A telling example of the commitment that the legislature requires of lawyers, and which lawyers find controversial, is the obligation to report 'unusual' financial transactions that the lawyer becomes aware of by virtue of his/her profession.⁵⁰

43 Granfield & Mathers 2009.

44 Observation by Wttewaal van Stoetwegen during the debate on the Counsel Act in 1951.

45 The Counsel Act distinguishes among five core values for the profession: independence, partiality, confidentiality, integrity and expertise.

46 Explanatory Memorandum to the Consultation Document for the amendment of the Counsel Act, November 2008, italics MW, AT.

47 Also see Janssens 2014, p. 269: 'The lawyer is not a civil servant.'

48 The aforementioned Bar Association has the authority to draw up and enforce rules of conduct, which are binding on every lawyer who is registered as a member.

49 Böhler 2013.

50 Disclosure of Unusual Transactions (Financial Services) Act (2001), included in the Money Laundering and Terrorist Financing (Prevention) Act in 2008.

4.2 *Responsibilities of legal aid lawyers*

The legal and institutional framework within which Dutch legal aid lawyers operate rests on two pillars. The legal profession as a whole is bound by the Counsel Act, while legal aid lawyers are also subject to the provisions of the Legal Aid Act. Each has their own supervisory authority. For the legal profession, this is the Bar Association (BA), while the executive and regulatory institution for the legal aid system is the Legal Aid Board (LAB). Both set rules that give rise to responsibilities. Those of the BA are geared towards being a lawyer. The title 'lawyer' is socially regarded as A-grade and it is up to lawyers to ensure that the associated trust is not damaged. They may not, for example, abuse the privileges awarded to them by virtue of their profession⁵¹ to conceal evidence or frustrate the progress of criminal proceedings.

The LAB rules and the ensuing responsibilities for legal aid lawyers are oriented towards good faith in the performance of the subsidy agreement. Legal aid lawyers are expected to be aware of the scarcity of public resources and to deal with them responsibly. They therefore must not make a frivolous application for a subsidy and must not damage the trust placed in them as subsidy scheme participants. Legal Aid's subsidy system is organized in accordance with the principle known as High Trust (HT). Lawyers wishing to participate in this do so under a HT contract, whose general terms and conditions state that 'the contract is entered into on the basis of trust of each other's professionalism, integrity and meticulousness, in respect of which each party warrants their own proper organization and administration'.⁵²

A responsibility that features in both systems is de-escalation. Legal aid and other lawyers, must bear in mind, and convey to the litigant in their contact, that a settlement is often preferable to legal proceedings. Another responsibility in both systems is expertise. Lawyers are obliged, statutorily and contractually, legally and morally, to keep their professional knowledge up to date and regularly attend continuous professional development courses. This is the only way in which lawyers can live up to the claims attached to their A-grade title and the LAB is able to continue guaranteeing access to justice for poor litigants. At a more detailed level, the rules of conduct stipulate the responsibilities, such as the duty to provide information to the litigant and the obligation to involve the litigant in all stages of the representation of his/her interests when the case is being handled.

An important responsibility of a fee-charging practice is the billing practice of lawyers. Lawyers must discuss the financial consequences of their instructions with their clients in advance and inform them about how and how often they will be billed. Billing must be transparent and not be excessive. Unnecessary costs for both the client and opposing party must be avoided.

51 Lawyers must be able to communicate with their detained clients confidentially and their discussions with them may not be monitored. Although this right is referred to as the lawyer's privilege, it is actually the client's privilege and for the purpose of his/her defense. There have been several clashes with the authorities that have placed telephone taps without a lawyer's knowledge.

52 General terms and conditions of High Trust 2012.

These rules cannot prevent lawyers' billing practices from being what is probably the most sensitive sticking point for fee-charging practices. Most complaints against lawyers relate to the amount of their bill. And with this finding, we arrive at another large player in the area of legal counsel/representation that has chosen another earnings model, the legal aid insurer that sells the insurance of both elements as a product.

4.3 *Lawyers versus legal aid insurers*

Legal aid insurers (LAIs) do not have the authority to set their own rules. However, insurers did indicate some time ago that they wish to assume a certain social responsibility. To this end, they have established an industry organization – the Confederation of Insurers (CoI) – which is authorized to set rules and supervise compliance with these rules. Due to the high membership of the sector (around 85%), the rules of this Confederation have widespread general applicability. An important instruction standard for the clients of LAIs is the rule that each LAI must draw up an internal complaints procedure and announce it clearly on their own website.

A comparison between the 'product' legal aid by a legal aid lawyer and legal counsel/representation by a LAI is complicated due to the diversity of the second type of product. While those allocated a lawyer basically know, or are able to ascertain, what to expect, that question cannot be answered in advance by a LAI client. There are namely so many different types of LAIs – with very different policy conditions, insurance cover, and pricing – that this can only be discussed at an individual level.

However, it is possible to speak in general terms about 'responsibilities', both of the company that sells the product and those who actually provide the assistance. The first responsibility arises from the principle of good faith in the performance of an agreement, including in the pre-contractual phase. The insurer should not palm off products that potential clients do not need or that do not provide the security that they expect to be purchasing. This also means that clients must be given clear information in due time about what to expect in return for their investment (periodic premium payments) in the long-term relationship. Good faith also implies dealing carefully with those who have already been insured for some time. Insurers may reserve the right – and regularly do – to amend the policy conditions or cancel the insurance, for example, if an insured party relies or has relied too often on the insurance. Insurers must also provide maximum transparency in these cases, preferably in the phase when the client can still decide to dispense with the insurance or place it with another insurer. Transparency, particularly in the purchasing stage, is therefore an important responsibility of 'good' LAIs.

For the rest, the CoI sets rules that largely correspond to the rules of conduct for lawyers. If we place both elements – the institutional framework and the rules of conduct for handling cases – of both types of service providers alongside each other, it produces the following picture.

Legal Aid Lawyers: Characteristics	Legal Aid Insurers: Characteristics
– Bar Association as public supervisory authority and regulator	– Self-regulation: Col as self-appointed supervisory authority and regulator
– High Trust relationship with government	– Insurance relationship with citizen (client)
– Many problematic clients	– Mostly mid-income groups
– Much real-life client contact	– Contact mostly by telephone or e-mail
– Counterweight to the government	– Absent
– Guardian of a fair trial	– Absent
– Aimed at a ‘good solution’	– More solution than process-oriented
– De-escalating representation of interests	– Idem
– Guardian of own appropriate fees and government budget control	– Guardian of own budget (policy conditions, exclusions)
Legal Aid Lawyers: Duties and Responsibilities	
– Work within the scope of responsibility for proper dispensation of justice: not to damage trust in the legal profession	– Work within the scope of own policy conditions and good faith under civil law: act like a ‘good insurer’
– Not to damage trust in HT	– Absent; not applicable
– Partial representation of interests	– Putting the client’s interests first
– Absent	– Respect free choice of lawyer
– Reaching a settlement above litigation	– Appropriate legal aid: settlement first
– Guarding confidentiality, integrity	– Idem
– Counterweight also to the judge	– Absent
– Expertise and professionalism	– Idem
– Proper information: also inform clients of their own failings	– Idem
Legal Aid Insurers: Duties and Responsibilities	

The preceding table lists the responsibilities of legal professionals as these appear in the rules of conduct of the BA and LAB versus the CoI codes.

The similarities seem greater than the differences on paper, but this is just an illusion. The agreements are namely only relevant if one disregards the element of client groups and fields of law. If one takes this aspect into account, it becomes clear that the role of LAIs in safeguarding access to justice for the poor is limited. Besides the fact that legal aid is given only to the lowest paid, while LAI is more for the middle-income groups, LAI is not suitable for the fields of law in which many, if not most, legal aid cases occur. Criminal law, asylum law, and most disputes in the area of family law (divorces) are not covered by LAI. The insurance industry also recognizes this aspect. Several years ago, the CoI, in a friendly but firm fashion, rejected the increase in fields of law that would occur if the system of subsidized legal aid were to be replaced by an obligation for all citizens to be insured for legal aid. The accompanying increase would be uninsurable.

If one were to sum up the differences between both in one sentence – and thus somewhat distortedly – it would read as follows: Due to their position in the state under rule of law, legal aid lawyers are more focussed on being a counterweight in situations that are characterized by inequality of power. Through their focus on client groups and fields of law, legal aid insurers are more focussed on finding solutions for situations from which both parties ‘want a positive outcome’. Both have their merits and limitations, both are complementary rather than competitive in relation to facilitating access to justice.

5 Conclusion: similarities and differences in responsibilities relating to access to justice

This contribution deals with the responsibilities of the four main players involved in bringing justice to the citizen. The choice of these four players means that the role of others – who are involved just as much or even more in the theme – are not being considered. This applies, for example, to paralegals who act as an intermediary between the citizen and the law, as well as the National Ombudsman that repeatedly emphasizes the importance of proper and fair solutions and draws attention to all those moments when the ‘the law’ or the government, as legislator or executive power, has failed. Leaving these parties out of consideration in no way implies that we do not recognize them or wish to downplay their importance. However, the limited size of this section requires choices, which we have made because we believe that even with these limitations, we are able to paint a reasonable picture of the responsibilities and dilemmas relating to access to justice. If we try to make a number of common threads clear, we arrive at the following sometimes-shared responsibilities.

First, all players are responsible for proper information and transparency. Government institutions must ensure clear rules that are easy to explain and provide interpretation where this is difficult. Judges inform individual citizens during the hearing and through their judgements. Society must also mainly rely on these

judgements for information about the work of judges. This makes it especially important that judgements are written in understandable language and well-motivated. There are different schools of thought on whether it is desirable or necessary for judges to explain judgements. Lastly, intermediaries also bear significant responsibility for the information they give to their clients as well as for providing a proper explanation to the opposing party or other legal players. Legal aid insurers are, in turn, responsible for keeping the products that they market as clear as possible and to ensure that citizens who purchase often long-term and thus expensive products are not buying a pig in a poke.

Second, a shared responsibility of the government, judiciary, and legal profession is safeguarding the rule of law with all of its accompanying constitutional values. Although we refer to this as a shared responsibility, there is in fact a *trias*, in which different parties (judges, Ombudsman, and lawyers) monitor and keep the government and each other on their toes. Keeping each other on their toes can also be regarded as a responsibility.

Third, the next responsibility implies a curtailment of the second, which belongs to some extent in an adversarial model. Traditional legal practitioners must be particularly aware of the restrictions of the customary routes to justice via the judicial system and public dispute resolution. While development of the law and legal uniformity may be interesting themes, citizens who come into contact with the legal sector usually prefer a good solution to the underlying issue rather than the resolution of the legal dispute, and it is the responsibility of both judges and intermediaries to be legally alert to this. On the other hand, it is up to the government to recognize that the need for dispute resolution may be real and that not all citizens are waiting for 'good solutions' that are either self-conceived or promoted by mediation. For some, the situation in which a judge ends proceedings by saying this is 'his'/'her' ruling, which must be upheld, is already an outcome. At the same time, there is still a world to be won in relation to the theme of preventive law, which we accordingly would also like to include under the responsibilities of the government.

As a final responsibility, we refer to the financing and sustainability of the systems of dispensation of justice and legal aid. In relation to financing, the ball is in the government's court. It will have to make a political assessment of what minimum resources are needed to safeguard access to justice and, once this is made, ensure that those resources are made available. Once the choice has been made, care of or responsibility for sustainability enters the picture. That is to say, it is the responsibility of all players involved in the legal sector to ensure access to justice as economically as possible without overly affecting the quality thereof. We wholeheartedly concur with the judiciary's statement that the dispensation of justice is not a product. However, it is also an undeniable fact that a price tag is attached to any form of dispute or conflict resolution and that a sensible balance between the costs and benefits of the various paths to justice is, or should be, a responsibility of those who can be regarded as 'hands-on' experts in this field. There is also a connection between the last and penultimate responsibility. If judges and lawyers fear that the rule of law is being threatened when their role in safeguarding access to justice is curbed, leading to more challenges being aban-

done, perhaps it is possible to conceive more and new creative opportunities to achieve justice than are currently the focal point of the discussion.

References

- Agenda voor de Rechtspraak 2008-2011 (Agenda for the Judiciary 2008-2011), The Hague: Council for the Judiciary 2008.
- Allewijn, D., *Met de overheid om tafel. Vertrouwen in de overheid als centraal thema in mediation* (Sitting around the table with the government. Trust in the government as a central theme in mediation), Mediation series, part 6, The Hague: Sdu uitgevers 2007.
- Bauw, E., 'De keuze voor arbitrage of bindend advies en de "vermarkting" van de civiele geschillenbeslechting', *Tijdschrift voor Consumentenrecht en Handelspraktijk*, 2011-5, p. 192-196.
- Bauw, E., B.B.B. Böhler & M. Westerveld, *Togadragers in de rechtsstaat. De juridische professies en toegang tot het recht*, Den Haag: Boom Juridische uitgevers 2013.
- Böcker A.G.M. & L. de Groot van Leeuwen, *Meer van minder in de rechtspraak. Over toetreding van etnische minderheden*, The Hague: Council for the Judiciary 2005.
- Böhler, B.B.B., 'Juridische Togadragers: de advocaat', in: E. Bauw, B.B.B. Böhler & M. Westerveld (ed.), *Togadragers in de rechtsstaat. De juridische professies en toegang tot het recht*, Den Haag: Boom Juridische uitgevers 2013, p. 85-88.
- Bovend'Eerd, P.P.T., *Rechterlijke Organisatie, rechters en rechtspraak*, Deventer: Kluwer 2013.
- Brenninkmeijer, A., 'Stresstest rechtstaat Nederland', *NJB*, 2015-16, p. 1046-1047.
- Bruinsma, F., *Korte gedingen, een rechtssociologisch verslag* (Preliminary relief proceedings, a legal-sociological report), Zwolle: Tjeenk Willink 1995.
- Bruinsma, F., *De Hoge Raad van anderen*, Deventer: Wolters Kluwer, 1999.
- Butter, T., M. Laemers & A. Terlouw, *Kwaliteit van de rechtsbijstand door advocaten in vreemdelingenzaken: Een pilotonderzoek*, Nijmegen: Radboud Universiteit 2014.
- Cappelletti, M., *Access to Justice*, Milano/Alphen aan den Rijn: Giuffrè Editore/Sijthoff-Noordhoff 1978, [European University Institute]. The Florence Access-to-Justice Project.
- Combrinck L., S. Peters & S. Gibens, 'Threats to legal aid and legal assistance in the Netherlands and in Belgium', in: B. Hubeau & A. Terlouw (ed.), *Legal aid in the low countries*, Cambridge-Antwerp: Intersentia 2014.
- Corstens, G. & R. Kuiper, 'De toegang tot de rechter in een moderne rechtsstaat, IJk-punten voor een concrete vormgeving', *Justitiële verkenningen*, 2014-1.
- Croes, M. 'Heeft de burger vertrouwen in de rechter?', in: M.L.M. Hertogh & H.A.M. Weyers (ed.), *Recht van onderop, Antwoorden uit de rechtssociologie*, Nijmegen: Ars Aequi Libri 2011, p. 301ff.
- Crombag, H.F.M., P.J. van Koppen & W.A. Wagenaar, *Dubieuze zaken*, Amsterdam: Contact 1992.
- Esthuis, R.J.J., 'Versnellingsbeleid in de rechtspraak. Resultaten en reflecties' (Acceleration policy in the judiciary. Results and reflections), *Rechtstreeks*, 2005-2.
- Friedman, L.M., *Total Justice*, discussed by Huls, *Actie is reactie, Een inleiding in de rechtssociologie*, Den Haag: Boom Juridische uitgevers 2008, p. 194.
- Granfield, R. & L. Mathers, 'Pro Bono, the public good and the legal profession', in: R. Granfield & L. Mathers (ed.), *Private lawyers and the public interest. The evolving role of Pro Bono in the legal profession*, Oxford: Oxford University Press 2009, p. 32-33.

Mies Westerveld & Ashley Terlouw

- Hertogh, M. & L. de Groot-van Leeuwen (ed.), *Na de uitspraak. Gevolgen van geschillenbeslechting*, Den Haag: Elsevier bedrijfsinformatie bv 2000.
- Hubeau, B. & A.B. Terlouw (ed.), *Legal Aid in the Lowlands*, Cambridge-Antwerp: Intersentia 2014.
- Huls, N.J.H., *Actie en reactie. Een inleiding in de rechtssociologie*. Den Haag: Boom Juridische uitgevers 2008.
- Huls, N.J.H., 'Interview met Maarten Feteris', *NJB*, 2015-(8), p. 404.
- Ingelse, P., 'De rechter en de mediator', *NJB*, 2014-40(2058).
- Ippel, P. & S. Heeger-Hertter, *Sprekend de rechtbank. Alledaagse communicatie in de Utrechtse zittingszaal*, Nijmegen: Wolf Legal Publishers 2006.
- Janssens, E., 'Independence of the Lawyer in the Netherlands and Belgium', in: B. Hubeau & A.B. Terlouw (ed.), *Legal aid in the lowlands*, Cambridge-Antwerp: Intersentia 2014, p. 269-282.
- Johnson Jr., E., 'Equal access to justice: comparing access to justice in the United States and other industrial democracies', *Fordham International Law Journal*, 2000-24(6), p. 83-110.
- Klaassen, C., 'Kroniek van de civiele rechtspleging', *NJB*, 2015-15, p. 1027-1042.
- Kleef, M. van & S. van Kleef, *Rechtspraak is mensenwerk. Zestien rechters over de dilemma's van hun vak*, Amsterdam: Athenaeum, Polak & Van Gennep 2001.
- Luhmann, K., *Legitimation durch Verfahren*, 6. Auflage, Frankfurt am Main: Suhrkamp 2001.
- Malsch, M., T.J. Lavender & J.F. Nijboer, 'Van kop tot staart. Helpt motivering bij het begrijpen van schriftelijke vonnissen?', *NJB*, 2006-7, p. 365-366.
- Marseille, A.T., *Voor- en nazorg door de bestuursrechter* (inaugural lecture Tilburg), Groningen: University of Groningen 2012.
- Raad voor Maatschappelijke Ontwikkeling (RMO), *De toegang tot recht*, Den Haag: RMO 2004.
- Rhode, D.L., *Access to Justice 3*, Oxford: Oxford University Press 2004.
- Sloot, B. 'Moeten rechters lijken op de Nederlandse bevolking? Over de wenselijkheid van descriptieve representatie door de rechterlijke macht', *Trema*, 2004-2, p. 49-63.
- Terlouw, A., 'Stilte in de rechtspraak', in: R. Baas, T. Havinga, M. Laemers & H. den Tonkelaar (ed.), *Rechtspleging en rechtsbescherming, Liber Amicorum voor prof. dr. L.E. de Groot-van Leeuwen*, SteR-reeks nr. 24, Deventer: Wolters Kluwer 2015, p. 275-290.
- Tonkelaar, H. den, 'De rechter spreekt door zijn vonnis – daar moeten we het mee doen', *Trema*, 2013, p. 259-265.
- Wagenaar, W.A., H. Israël's & P.J. van Koppen, *De slapende rechter*, Amsterdam: Bert Bakker 2009.
- Witteveen, W., *De wet als kunstwerk*, Amsterdam: Boom Filosofie 2015.
- Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *De toekomst van de nationale rechtsstaat*, Den Haag: WRR 2002.
- Zeeland, C.M.C. van & J.M. Barendrecht, *Gefinancierde rechtsbijstand vergeleken* (Comparison of financed legal aid), Den Haag: WODC 2003.
- Zückerman, A.A.S. (ed.), *Civil Justice in Crisis, Comparative Perspectives of Civil Procedure*, Oxford: Oxford University Press 1999.