



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Access to Justice, Costs and Legal Aid

A.W. Jongbloed*

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1. Sociological Background

1.1. Please describe if access to justice is a social issue in your system. Do newspapers deal with it? Do TV shows? Is it an issue in political campaigns? Is there a different platform for different parties in this matter?

The right of access to justice is important for lawyers and is directly related to Article 6 ECHR. It plays a lesser role for persons seeking justice, nor is it something they are interested in. The reason is that, generally speaking, access to justice can be realised in a relatively simple way. First of all, the geographical distance to the courts is limited, secondly, there are few financial barriers, and lastly, the distance to the judiciary is also limited in the sense that judges also take part in ‘normal’ social life.

When the papers and (national or regional) TV pay attention to litigation and legal decisions, it is often related to criminal cases. However, decisions on civil law or administrative law are sometimes paid attention to as well. As a rule, these are usually decisions that are ‘talked-about’ in the sense that many people, on a national or local level, are interested because it may affect issues such as the construction of a road or the eviction of a building. In short: these are matters that are geared to people’s perception of their environment.

An example of a decision that was extensively dealt with in the media was one in which it was decided that if the tenant of an accommodation leaves the house in a poor condition on the termination of the lease, the landlord is not required to send a notice of default to the tenant involved first (who may have done a moonlight flit whilst being in arrear with his rent). The landlord may immediately proceed to have the repairs carried out at the tenant’s expense and recover these costs from the tenant later. This means that tenants must leave their accommodation in good condition on termination of the lease and, if they fail to do so, the landlord does not have to leave the property vacant in order to track down the tenant (which will usually be a time-consuming affair) to enable him to do the repairs himself (which, as a rule, will be less expensive than employing a third party to do so).

* A.W. Jongbloed is Professor in Civil Procedure at Utrecht University.

Another example is provided by the Dexia cases.¹ Subsidiaries of this group persuaded people to borrow money and subsequently invested these funds in leasing shares. The product was marketed under the name 'profit tripler'. Then the share prices fell and it was no longer a matter of profit, but of loss. Several courts have now decided that the information was inadequate and that married investors would also have needed their spouse's signature under the contract according to Article 1:88 Dutch Civil Code.²

Technical legal matters, however, are seldom or never discussed in the media. When the Supreme Court gave judgement³ late 2004 on the issue of whether the overdraft facility can be subjected to provisional attachment, it did not attract any attention, although this decision had major implications for private citizens as well as companies. Nearly all Dutch people have agreed with their bank that their bank account may have a temporary deficit (up to a certain amount, often €1,000). This enables the bank to process payment orders even when the monthly salary has not been paid yet, which encourages the smooth processing of money transfers. From a legal point of view, this is a loan agreement and if the Supreme Court had ruled that the overdraft facility could be subjected to provisional attachment, the creditor could have demanded payment of the part of the agreed overdraft that had not been used yet.

TV stations do pay attention to tracking down criminals and seek to solve criminal cases but there is no weekly (or monthly) TV programme that discusses the most important decisions of the civil or administrative courts. Access to justice is not, or hardly ever, an issue in election campaigns and there are no voters who think it important enough in a political party's manifesto to let their vote be swayed by it. Other publications, such as websites or free local papers, are not used to inform the public at large. Lawyers can be informed on important rulings through a government website⁴ and specialised websites of legal publishers in particular.⁵

1.2. Is there a stigma in suing in your society? Is there a stigma in being sued? Does the principle that someone is innocent until proven guilty shelter the criminal defendant from the social stigma of prosecution?

Anyone in the Netherlands who brings an action or who is involved in one is not considerably stigmatised. It is not a disgrace to be involved in a legal action, because only when the court has given its ruling is it possible to see who was in the right. Furthermore, as a rule, it is not in the interest of either of the parties to publish the fact that there are proceedings pending, as that would jeopardise any chance of settlement (in a civil procedure). If it would become publicly known that proceedings are pending, it could result in the loss of face of one (or both) parties if their own stakes in the proceedings appear to have been only partly realised.

¹ HR (Supreme Court) 27 November 1998, NJ 1999, 380 (*Van der Meer v Beter Wonen*).

² See for decisions with a different outcome the special issue of NJ Feitenrechtspraak of 14 August 2004, NJF 2004, nos. 400-446.

³ HR 29 October 2004, RvdW 2004, 123, Jurisprudentie Burgerlijk Procesrecht 2004, nr. 68 (*Van den Bergh/Van der Walle and ABN Amro bank*).

⁴ See <<http://www.rechtspraak.nl>>. This site does not only include recent decisions of all courts, it also gives information on case law, the actions brought before the court and additional jobs of judges. There is also an English version of this website: <<http://www.rechtspraak.nl/information+in+english>>. <<http://www.overheid.nl>> gives information on rules.

⁵ See <<http://www.jol.nl>> of publisher Kluwer and <<http://www.jwb.nl>>. These websites weekly publish Supreme Court decisions, including a summary and key words.

Only in special cases is it made public that there is an action pending in civil or administrative cases. Sometimes it is a union that is hoping to persuade the employer to accept certain labour conditions or refrain from an intended dismissal, in which case the proceedings are actually aimed at showing the other party in a bad light. Sometimes a consumer organisation is hoping that others will start to have justified misgivings about a certain course of action (such as the inclusion of certain clauses in general terms and conditions).

Advocates in talked-about criminal cases are the ones that often seek publicity. As a rule, they then state that their client is innocent or that it is the other party who is primarily to blame. It is less common for the public prosecutor to seek publicity, which means, for example, that there are no weekly press releases on who is prosecuted and what for. The public prosecuting service will also exercise restraint in its publications to the press before a hearing. (Complete) names will not be given, and, as a rule, the press will only receive a summary of the charges. Only in very special cases will the prosecuting officer seek publicity in order to create a more balanced picture, often as a response to statements made by the suspect's advocate.

Only in very special cases, the prosecuting officer will take the initiative to seek publicity. Examples of this are cases involving terror suspects, the escape of a detainee under a hospital order who has murdered someone, or other cases that cause upheaval.⁶

It is true that the point of departure in criminal cases is that someone is innocent until he is proven guilty, but there are always people who think that there is no smoke without fire. Sometimes the suspect is acquitted because the facts cannot be proven and the result may be that the impression sticks that the person involved did it anyway. On the other hand, there are media campaigns aimed at protesting someone's innocence. The Schiedam park murder mentioned above, and the so-called Putten murder case are examples of this.⁷

⁶ An example of this is the so-called Schiedam park murder case. On 22 June 2000 a ten-year old girl was raped and murdered in the Beatrix park in Schiedam. Her eleven years' old friend was stabbed with a knife and barely survived an attempt to strangle him. September 2000 saw the apprehension of a 31-year old man from Vlaardingen Kees B. Initially, he confessed, only to withdraw that statement later on. In 2001, the District Court of Rotterdam finds him guilty and sentences him to 18 years' imprisonment and detention under a hospital order, in accordance with the prosecuting officer's demand. This conviction was confirmed in appeal in 2002 and the appeal for cassation before the Supreme Court was dismissed in 2003. In September 2004 the case was reopened as the 25-years' old Wik H., who was apprehended in July 2004 on suspicion of rape, declared to have something to do with the case. DNA results of December 2005 indicate that it is very probably that Wik H. was at the scene of the crime. Kees H's sentence was suspended and he was released. The Rotterdam District Court sentenced Wik H. to the maximum term of imprisonment of 20 years and compulsory treatment in a hospital in April 2005. The Appeal Court of The Hague sentenced Wik H. in November 2005 on appeal to a term of imprisonment of 18 years and compulsory treatment in a hospital. In the action against Wik H. it was the prosecuting officer who sought publicity to make clear what the current state of affairs was, now that this had turned into a case of a miscarriage of justice.

⁷ In January 1994, a young woman was raped and murdered, resulting in the apprehension of four suspects in February 2004. Two of them were convicted by the court in January 1995, after which they were convicted to a ten year term of imprisonment in appeal. In March 1999, a former chief superintendent of police levelled eight points of criticism against the policy inquiry and wrote a book about the case. When the persons involved served 2/3 of their sentence, they were released in September 2000. In June 2001, the Supreme Court granted the request for a review of the case and the case was reopened. This course of action resulted in their acquittal in April 2002 and the award of compensation totalling €1,800,000, which is five times the usual amount for the time someone spent in detention.

This adage of being innocent until the contrary has been proven does not apply in civil or administrative cases, as they concern an action that is brought (with the onus of the proof on the claimant) or the application of a permit.

1.3. *Do you have data showing what percentage of people sue or is sued in your society?*

The Netherlands have a population of about 16,300,000.⁸ In 2004, there were about 130,000 convictions in criminal cases by courts in first instance. These included 90,640 convictions in defended cases and 42,580 judgements by default.

The figures for the same year in civil cases are as follows: The canton department of courts⁹ heard 460,000 actions starting with a summons and 218,100 cases starting with a petition, whereas 382,300 judgments and 215,000 decisions (*beschikkingen*) were given. The civil law departments of the courts that hear the other actions in first instance¹⁰ heard 50,700 cases that started with a summons and 150,200 cases starting with a petition. The courts gave 53,700 judgements and 135,200 decisions (*beschikkingen*). The administrative law sections of the courts issued a total of 22,184 rulings in 2003 by virtue of the General Administrative Law Act.

There are no data available on the number of persons involved in a criminal procedure (some have multiple convictions) or the number of plaintiffs or defendants (debt collecting agencies and mail order companies conduct quite a number of procedures, while some people just leave their bills unpaid as a result of which they have to face several creditors).

1.4. *Is there a 'litigation explosion' issue in your system? Is the state of civil and/or criminal justice considered efficient? Is there an issue of delays in justice? Can you quantify the delay?*

When looking at the number of civil cases that is brought before the court there does not seem to be a major increase in the number of court cases that could be qualified as an explosion. The conclusion must be that in 2004 a total of nearly 770,000 civil cases were processed and that there was a particular increase in the number of rulings in canton department cases (+20% compared to 2003).

	2001	2002	2003	2004
Court, canton department				
Summons cases	316,100	311,900	386,000	460,000
Petition cases	156,900	191,500	211,100	218,100
Court, civil department				
Summons cases	49,300	44,800	46,600	50,700
Petition cases	137,600	133,800	140,900	150,200

⁸ These data come from the Central Statistical Office; see <<http://www.cbs.nl>>.

⁹ These single member courts hear, summarily speaking, actions with respect to claims not exceeding €5.000 lease and employment cases and procedures explicitly laid down by the legislator.

¹⁰ The competence of this court includes actions with an indefinite value and financial claims exceeding €5000 (not relating to being labour or lease), divorce, the placing under supervision/authority of minors, insolvency and the hospitalization or extension (these orders are given, in principle, for two years) of the placing under supervision of psychiatric patients.

The increase can be primarily explained by the growth of debt collection,¹¹ labour law (due to the deteriorated economic situation), family law cases in the canton department, a rise in the insolvency cases (due to the deteriorated economic situation) and the number of orders for the placing under supervision of psychiatric patients. The number of default cases in the canton department rose, e.g., by more than 100,000 during this period. Since 1980, the number of rulings in civil law cases has nearly quadrupled. In comparison to 2003, the increase is more than 12%. However, the number of advocates rose from 3,726 in 1980 to 13,500¹² now and that growth is nearly comparable. The figures for criminal cases are as follows:

Recorded criminal cases		concluded by the public prosecutor ¹³	by the court
Canton department			
2001	179,200	94,700	90,500
2002	219,400	89,300	109,100
2003	273,500	130,100	136,200
2004	300,900	140,100	174,800
Court cases			
2001	236,000	115,500	112,000
2002	251,300	120,700	116,800
2003	270,300	128,700	134,600
2004	274,000	127,70	133,200

Here too, the fact that there has been a major increase in the number of advocates applies. Furthermore, investigation methods have improved. There has been a substantive increase in the number of speeding incidents that are detected due to the introduction of speed zone devices¹⁴ and there are more speed controls. Anyone who does not pay in time will eventually be convicted by the court, while any objectors will also have to appear in court. The result is that if the number of offences rises, so will the number of cases brought before the court.

¹¹ By debt collecting agencies, housing associations, telecom companies, mail order companies and insurance companies.

¹² The situation on 1 January was as follows: 1980: 3,726; 1985: 4,975; 1990: 6,381; 1995: 8,264; 2000: 11,033; 2001: 11,807; 2002: 12,290; 2003: 12,691 and 2004: 13,111.

¹³ These include dismissal and transactions. The police may also give transaction orders for traffic offences in particular.

¹⁴ At two places it is assessed what cars are driving there. Subsequently, the speed is calculated by looking at the difference in time. If it is too high, (e.g. 110 km per hour instead of the permitted 100 km) a payment slip will follow soon. In 1995 the result was 3,263,800 cases, which increased in 2000 to 7,794,000; 2001: 9,203,000; 2002: 9,537,100; 2003: 10,570, 000 up to a number of 10,372,700 in 2004.

Decisions in administrative cases can be categorised as follows:¹⁵

	Court ¹⁶	CRvB ¹⁷	Appeal courts ¹⁸	CBB ¹⁹
2000	28,600	4,700	7,900	800
2001	29,300	5,100	8,400	900
2002	29,600	5,500	10,600	1,000
2003	32,600	5,300	12,100	1,100

Apart from the rise in the number of advocates, the economic situation deteriorated. An effort was made to decrease the number of people who are unable to work by re-evaluating them²⁰ and a commendable number of citizens refused to accept the assessment notice imposed on them.

2. Costs of Justice

2.1. *Please describe the structure of legal fees in your system. Is contingency fee available? Is advertising of legal services available? Is there a loser-pays-all system? Are there discretionary limits to the loser-pays all-system? Are advances usually required by advocates?*

Anyone who wants to bring an action before the court must pay the so-called court fee. The amount to be paid depends on the nature of the case but may not lead to stopping anyone bringing an action because of financial considerations. That is why anyone whose income is below a certain level will pay only half or a quarter of that amount.²¹ According to Article 8.41 General Administrative Law Act, a comparable arrangement applies to administrative law cases.²² Anyone involved in a criminal procedure does not have to pay the court fee.

¹⁵ The 2004 figures were not known yet.

¹⁶ Administrative department. As a rule, this is the court of first instance. The court's competence includes cases involving civil servants, social security issues and welfare and construction cases, but also cases with respect to the admittance of foreigners to and staying in the Netherlands.

¹⁷ Law court in first (and sometimes final) instance, but also an appeal court for cases from the administrative law department, that decides on social security and civil servants cases in particular.

¹⁸ Tax courts. These were the courts in first instance until 1 January 2005 for disputes with respect to taxes, income tax, corporate income tax, road tax, property tax, customs matters etc.

¹⁹ The Appeal Court for the Industry usually decides disputes in first instance with respect to economic administrative law and appeal cases on decisions or acts of a public business body.

²⁰ Previously, someone could be declared unfit to work because it resulted in entitlement to a benefit until reaching retirement, whereas the employment benefit would only apply for a certain period of time after which it was assessed whether someone's assets were sufficient, and if not, he would be eligible for a follow-up benefit.

²¹ See Article 17 paragraph 1 Act on Rates in Civil Cases. From 1 January 2006 the following income limits apply: ¼ of the court fee must be paid by anyone who makes less than €1,477 and ½ by people who are entitled to legal aid, but whose income is nonetheless higher. If the court fee exceeds €436, it will be deducted in the cases mentioned here, apart from an amount of €110 and €221 respectively.

²² The court fee is €37 according to Article 8:41 paragraph 3 under a, if a natural person appeals against a decision, e.g. with respect to a benefit because of his permanent inability to work. This is due to a statutory provision by virtue of which a natural person is insured for his incapacity to work by the State Pension for Invalids or a decision taken by virtue of the Act on Rent Subsidy. The Article further states under b that the fee amounts to €136 if a natural person appeals against a decision other than the ones referred to under a, unless statutorily provided otherwise. Furthermore the article under c. appoints a fee of €273 if the appeal is not initiated by a natural

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Anyone whose income remains below a certain limit, which is €2,071 per month will be eligible for so-called assignments: legal aid paid for by virtue of the Legal Aid Act. It means that in such a case the Dutch state pays a substantial part of the expenses incurred with litigation. The person involved must, however, pay a contribution of his own, which is means-tested. This is the built-in guarantee that people must question themselves on whether it is wise to bring action, while at the same time access to justice is, in principle,²³ open to everyone.

Anyone who does not qualify for legal aid because his income or assets are too high must pay the advocate's fee himself. Until 1997, the Dutch Bar Association recommended a rate that differentiated between the experience of the advocate; trainees (up to three years of experience), those with four to five years of experience and, the basis, advocates with long-term experience. There was a different hourly rate for each category. The amount of the hourly rate depended (also) on the urgency of the matter, the required expertise, the nature of the case and its interest. The basic rate was €115 at the time. Now, these rates are no longer published as it was considered to be adverse to competition, but there are still many law firms who use them. At most law firms, the rates fluctuate between €150 and €200 as a basic rate, but will be higher for the big, commercial firms.²⁴ Furthermore, it is sometimes possible to negotiate the rates. If you have many cases to be conducted, you can insist on a rebate.²⁵ Nor is it uncommon to arrange for a fixed rate or that the advocate agrees with his client to have two different rates: a lower rate when the goal is not met and the higher rate when it is. Debt collection is usually subjected to a certain percentage that decreases if the amount of the debt increases.²⁶ Basically, it means that any rate is possible as long as it is not 'no cure, no pay' and that debt collection cases may only be rewarded with a percentage of the proceeds by way of a fee. The Dutch Bar Association wanted to experiment with no cure, no pay, but they were stopped from

person. See also Articles 80 Act Council of State, 22 Appeals Act and 24 Act Administrative Courts Public Business Bodies.

²³ See Article 12 paragraph 2 Act on Legal Aid. Legal aid will not be granted if the chance of winning the litigation seems to be nil, the cost incurred with the proceedings are not reasonable compared to the interest at stake in the case, or if the mandatory counsel is not required and the appellant can reasonably be held to represent himself. See also Article 3 Decision Legal Aid and Assignment Criteria. Furthermore, Article 4 Decision lays down that the interest must be at least 20% of the net monthly income of the appellant with a minimum of €180.

²⁴ An example by way of explanation. Suppose the hourly basic rate is €185 exclusive of VAT. If the advocate in charge of the case has three years or less practical experience, the basic rate will be subjected to a factor, which will be 0.7 for the first year, 0.8 for the second year and 0.9 for the third year. If the advocate in charge of the case has more than 10 years of experience, the basic rate will be multiplied by no more than 1.1 and for 20 years no more than 1.2. Furthermore there may be a factor related to the interest of the case.

- | | |
|------------------------------------------------------------------------------------------|------|
| a. an interest less than €5,000 the factor will be | 0,8 |
| b. an interest between €5,000 and €100,000 the factor will be | 1 |
| c. an interest between €100,000 and €250,000 the factor will be | 1,25 |
| d. an interest between €250,000 and €500,000 the factor will be | 1,5 |
| e. an interest between €500,000 and €5,000,000 the factor will be | 2 |
| f. if the amount exceeds €5,000,000 the factor will be | 2,5 |
| g. if the value involved in the case cannot be assessed, the factor will be furthermore, | 1 |
| h. cases of great urgency may be subjected to a factor of | 1,5 |

²⁵ An example is provided by insurance companies that employ a law firm to take on 100 cases annually.

²⁶ The first €3,250 is subjected to 15%, the remainder up to €6,500 to 10%, the entire surplus up to €16,250 8%, and any amount exceeding that 3%.

doing so by the Minister of Justice in March 2005. The Minister felt that a proper lawyer's practice cannot go together with the method of 'no cure, no pay', as it would mean that advocates would have a financial interest in the cases they worked on and that there would be a risk that advocates would only take on cases with a high success rate or cases with a substantial financial interest. According to the Minister, this conflict of interest must be avoided at all cost in a proper lawyer's practice. Initiatives taken by an advocate must always be in his client's interest. Furthermore, the 'no cure, no pay' method is counteractive to the government's policy to prevent a claim culture from developing and the policy to encourage dealing with bodily injuries in a faster, less expensive, and less aggravating way.

The Minister's statement met some criticism, with the argument that advocates may have an interest in a case.²⁷ Who checks whether an advocate has spent 9 or 11 hours on a case? Moreover, the prohibition does not apply to other providers of legal aid such as personal injury firms that assist people who suffered, e.g., a traffic accident.

Law firms may advertise, and do so on a regular basis. It depends on the target group in which magazines the adverts are placed. Some law firms mainly aim at medium and small sized businesses, and advertise in magazines for entrepreneurs. Other firms try to attract customers by adverts in e.g. magazines of sports clubs. Some bigger firms also have ads in national magazines. Furthermore, large firms often act as sponsors, not only for legal activities, but in other fields too (such as sports clubs, museums etc), in order to enhance familiarity with their name.²⁸

There is no rule in civil law that states that the party who has lost a case must pay all expenses of the other party. Although Article 237 paragraph 1 Code on Civil Procedures lays down that the costs of a party against whom the court has rendered judgment for the payment, can be entirely or partly compensated between spouses, registered partners, other life companions, blood relatives in a direct line of descent, brothers and sisters, or in-laws in the same remove, and also if the court ruled against both parties on some issues. The court can also decide to make the party who made unnecessary expenses or caused them pay. In practice, however, the so-called Liquidation rate applies: an arrangement between the Dutch Bar Association and the judiciary based on fixed rates subject to, on the one hand, the interest involved in the case and, on the other hand, the number and nature of activities. This means that the costs cannot become too high if a party employs an extensive advocate or a not very experienced one who charges many hours.

Moreover, according to Article 240 Code on Civil Procedures, the costs for official acts performed by bailiffs will be charged according to the Decision on Rates for Official Acts, and the court has the discretion to moderate claims for the payment of costs by virtue of Article 242 paragraph 1 Code on Civil Procedures. According to Article 242 paragraph 2, this moderation principle does not apply to agreements aimed at the settlement of a dispute that already exists. In its judgement of 22 January 1993 (*NJ* 1993, 597 (*WIB v Jongsma*)), the Supreme Court assumed that parties may conclude an agreement with respect to the compensation of all legal costs, but courts have exercised restraint. In practice, it often happens that the party who has won the

²⁷ Bodifée 2003, p. 622-623; Van der Goen 2003, p. 433-434; De Jong 2005, p. 631-633 and Peters 2004, p. 158-164.

²⁸ An example of this is the sponsorship offered by the Amsterdam law firm Stibbe – aimed at the commercial market – for a special edition on the occasion of the 400th anniversary of the birth of the painter Rembrandt van Rijn.

case in all respects has yet to bear part of his legal costs because the order to pay costs is based on the Liquidation Rate. However, his advocate will send a bill based on the number of hours spent on the case at the fee agreed.

In order to make clear that litigation is a serious affair, it often happens that the advocate demands an advance. This means that the advocate does not have to bear the costs incurred for starting a legal action; the cost for the summons and the court fee. An advocate may have up to 200 civil cases which means that he would be advancing a very big amount indeed. The advance also reduces the risk of having to collect the debt from clients. During the proceedings there will be interim invoices; sometimes monthly, sometimes after an activity related to the litigation. This promotes the client's insight into the development of the costs and, moreover, it is more convenient to make partial payments, than having to pay the entire amount at once.

According to Article 38 Code of Criminal Procedure, the principle of a free choice of counsel applies in criminal procedures. Anyone who remains under the income limit described above, however, will be entitled to the assignment of a lawyer. The Act on Legal Aid is generally applicable and is not restricted to civil and administrative law cases. Article 43 Act on Legal Aid states when the assignment of a lawyer in criminal cases is free, while Article 44 states which cases require the payment of a private contribution. The compensation norms laid down in the Decision Compensations Legal Aid: Article 5 et seq. apply to civil and administrative law cases and disciplinary actions, whereas Article 14 et seq. applies to criminal cases.

2.2. Are fees regulated in your system? Can advocates contractually go beyond the maximum or below the minimum?

An advocate can demand the amount agreed from a paying client. During the first interview, arrangements are made on the fee to be paid. It may be that the advocate has an hourly rate of €150, but if it is a matter of great urgency with a large interest, the amount may be higher. According to reports, the rate can be up to €500 per hour for urgent intellectual property cases. An advocate can also charge a lower fee than he would usually do. There can be several reasons for this. The client may not be very well-off, it can be a case that generates a great deal of publicity (which means new clients) or the advocate likes the case and thinks it merits being conducted in the interest of society. Several large firms have a 'pro bono' policy.²⁹ Of course the advocate must pay attention to whether the costs of his own office can be paid from the proceeds of the other cases that are conducted. If the client qualifies for paid legal aid according to the Act on Legal Aid, the compensation paid by the state is fixed and it is not possible to declare any more. Claims for a smaller amount may be submitted and according to reports there are advocates who do not collect the amount that must be paid³⁰ by their client.

2.3. Could you quantify the costs of litigation? Use whatever method you prefer to indicate how expensive it is to litigate in your system e.g. comparing the cost of advocates to that of other professionals (doctors, accountants, notaries etc.)

The point of assumption for the remuneration of advocates and civil notaries is that their standard income is a net income comparable to that of a judge in Haarlem, which

²⁹ See <<http://www.stibbe.com/about/view.do?pid=probono>>.

³⁰ This amount must be paid to the advocate directly and will be deducted from the compensation granted by the state.

means that their annual income will amount to approximately €86,000. This does not take into account the extra costs for the exercise of the practice, commercial risk, saving for retirement etc.³¹

It is difficult to compare their situation to other professional groups. The point of assumption for medical consultants is 1,476 billable hours. This should lead to a standard income of approximately €118,000, and includes the costs for the practice and a compensation for irregular hours to a turnover to be achieved from €190,000 (with a 6% bonus for unsocial hours) to €200,000 (with 14%). This means an hourly rate relevant to their income of approximately €90. The hourly rate for GP's is lower; their working weeks are longer and more numerous, which results in an income that is between 65% and 70% of that.³² The total costs for the judiciary in the Netherlands will be around €770 million in 2006 according to the budget of the Ministry of Justice. We now spend about 42 billion on health care, which is about 10% of the Gross National Product.

2.4. How much does a very simple law-suit cost for a plaintiff? How much would a non contested car accident cost? How much for a non contested divorce? How much does it cost to evict a tenant? How much to sue a manufacturer for a non working dishwasher?

1. The costs for a non-contested car accident are as follows:
 - Court fee €244.
 - Service of the summons (approximately) €85.
 - Discussion of the case(introduction) 1 – 2 hours x €180 (in these examples the point of assumption is an hourly rate of €180).
 - Reading the file, making the summons, preparing the memorandum of pleading 8 hours x €180.
 - Hearing (travelling time, completion of the case) 2 hours x €180 Total (rounded off) €2,250.

2. The costs for a non-contested divorce are as follows:
 - Court fee €192.
 - Discussion of the case (introduction) 1 – 2 hours x €180.
 - Reading the file, drafting the petition and preparing the memorandum of pleading 6 hours x €180 Hearing (travelling time, completion of the case) 2 hours x €180.Total: €1,800.

3. The costs for the eviction of a tenant are
 - Court fee (depending whether the landlord is a private person or not) €103 / €276.
 - Discussion of the case (introduction) 2-3 hours x €180.
 - Reading file, drafting the petition and preparing the memorandum of pleading 10 hours x €180.
 - Hearing (travelling time, completion of the case) 2 hours x €180.

³¹ According to a publication of the Ministry of Home affairs, it appears that the income level is more or less comparable to that of the level of scale 15 (there are 18 state salary scales), for example that of an army colonel. Elsevier Carrière of June 2005 gives an overview of the income of 257 professions, but is restricted to employees.

³² This explains why GP's went on strike late 2005; they think their income is too low compared to consultants.

Total: €2,300.

4. The costs for summoning a manufacturer for a defective dishwasher
 - Court fee €244.
 - Service of the writ (approximately) €85.
 - Discussion of the case (introduction) 1 – 2 hours x €180.
 - Reading file, drafting the summons, preparing the memorandum of pleading 10 hours x €180.
 - Hearing (travelling time, completing the case) 3 hours x €180.Total (rounded off): €3,000.

2.5. *How much is the fact of being sued a burden on the defendant? Are there insurance schemes available? Are they commonly used? How expensive are they if compared, for example, to basic car accident insurance?*

Those who are involved in litigation, may invoke the Act on Legal Aid if necessary. Moreover, it is possible to take out a legal expenses insurance. The cost for a private person (with a family) are between €100 (standard) and €200 (extended) per year. Legal expenses insurers point out in their advertisements that a regular court case may set you back around €3,600 and that the premium is comparable to the hourly rate of an advocate. There are around 1.3 million people in the Netherlands who have taken out such an insurance.

The premium for a car insurance is based on age, number of years of driving experience, number of years of driving without an accident, place of residence, man or woman, the annual number of kilometres that is driven, the type of fuel, the car's security system, the car's replacement value and current value and whether it is a third party insurance only (compulsory) or a comprehensive car insurance policy. I pay a premium (for third party insurance only) between €356 and €503 and (comprehensive) with a policy excess of €150 between €828 and €1,286 for my Chrysler Voyager.

2.6. *Is pro-bono legal practice used in your system? Is it encouraged by tax deduction schemes? Are there public interest law firms? How are these firms funded? Are trade unions involved in offering subsidized legal services to their members? Do law schools offer legal clinics open to the public? Are consumers groups, environmental groups and other organizations providing legal services? Are religious groups, churches or organizations involved in offering subsidized legal services?*

The pro-bono system is rare in the Netherlands, as about 50% of the population can benefit from the Act on Legal Aid. Those who exceed the income limit are deemed to be able to pay an advocate's fee and additional cost. Only in rare cases will the pro-bono system come up. Some of the criteria are:

- the case must have a certain social relevance or precedent value. These are cases of which the (financial) interest is relatively modest, but that do represent a social issue or a precedent of some importance. Furthermore, it must be impossible for the party involved to have the case handled on a commercial basis by a law firm.
- the case cannot be adequately handled on the basis of an assignment, as the existing legal aid system does not enable social legal aid service centres to provide any services in this case.

- the law firm concerned is able to create an added value due to its specialist expertise and experience. Examples of this are complex cases in the field of civil or administrative law or human rights.
- there is no issue of conflict of interests with the existing clients of the law firm or groups of clients.

There are no tax facilities that enable law firms to take on pro-bono cases with a profit.

Unions, too, provide legal aid with an emphasis on labour and rent cases, not in the least because these cases are brought before the canton department of the court, which means that the mandatory representation by an advocate does not apply. The ANWB (Royal Dutch Touring Club), which has 3.9 million members, is another organisation that provides legal aid to its members. It sells car and travel insurances in addition to legal aid insurances. There are also consumer organisations that offer legal aid, among which the best known and biggest is the *Consumentenbond*. This organisation offers help to its members, in particular with respect to defective products.

Law Faculties of universities hardly display any activities in the provision of structural legal advice in the way of legal first aid posts. The university in Maastricht has the *Advocatenpraktijk* University Maastricht, where students work who are in the last phase of their studies. Most universities award credit points to students who work in so-called 'wetswinkels' (law centres).³³ This construction provides many advantages for universities: there is no need to create traineeships and the administrative fuss is limited.

Church organisations as such do not provide legal advice or assistance in legal procedures.

2.7. Where would someone of the lower or lower-middle class who is sued go as a first reaction to get advice?

As a rule, the advice will be to look into the possibility of obtaining legal aid from a union, consumer organisation, legal centre or the Act on Legal Aid and to see whether the interest of the case warrants litigation. Would it not be less straining upon a person to buy a new TV set after it breaks down? This would prevent someone from being annoyed, he/she could enjoy the product again and would not run the risk of having to pay (part of) the other parties' cost if he/she were to lose.

2.8. Can someone who is prosecuted and turns out to be innocent recover his costs, fees and expenses? Can he/she sue to be compensated for his/her losses?

The point of assumption is that not all costs are compensated. According to Article 237 Code on Civil Procedures, the other party will be ordered to pay the costs of

³³ These are organisations that are staffed by students who deal with often occurring and relatively simple legal problems or who refer people to the proper body that can provide assistance. As a rule, the students are supported by a few advocates. The problems and/or questions are often related to:

- labour law,
- social security,
- accomodations and rent law,
- consumer law,
- family law and,
- criminal law.

litigation, but in practice the actual costs appear to be much higher, as a result of which the party involved has to accept some financial losses. This issue is often debated and several writers think that such a person should be compensated fully, such that he/she reaches the same position as if there has been no legal dispute. According to case law, however, involving someone in a legal procedure cannot be, in principle, qualified as tort, unless there are additional circumstances such as the knowledge that litigating is completely unnecessary or without a chance of success.³⁴

3. Institutions

3.1. What percentage of the GDP is spent on justice in your system? Has it increased or decreased in the last twenty years?

The government has spent about €5.5 billion annually on legal protection and safety over the last years.³⁵ The GDP rose between 2001 and 2004 from €447.7 billion in 2001, €462.2 billion in 2002, €476.3 billion in 2003 to €488.6 billion in 2004. It is expected to rise with 1.3% in 2005 to about €494 billion. Taking everything together, it means that around 1% of the GDP is spent on law in the broad sense of the word. When we single out the administration of justice, we see that €770 million or €47 per head of the population is paid for the administration of justice. The expenditure for the administration of justice has gone up slightly in comparison to the Gross Domestic Product. In 2004, of every €100 earned, nearly €0.17 were spent on the administration of justice, while this was €0.14 in 2000. The part of the expenditure for the administration of justice that is directly paid through court fees has also risen, from 17% in 2000 to 19% in 2004. These two rises are related to rate increases in 1992 and 2002.

3.2. How much does it cost to initiate a litigation in a standard general jurisdiction costs? How much for using a court of general jurisdiction for each step of litigation? Is it subsidized or is it paid by the users? Is it more or less expensive in terms of costs than going to a public hospital for a general check up?

A standard court case will easily set you back €1,000. If the claim amounts to €2,000, the court fee is €192. Add at least 4 hours billed by the advocate for a total of €700 and other costs (such as the service of the summons) of €100. If the financial interest of the case is €10,000, the court fee will be €291. If the conduct of the proceedings involves the hearing of witnesses, the advocate will have to draw up an additional statement, which will result in an extra 10 to 15 hours being spent or €1,750 to €2,625. This means that the costs will easily exceed €3,000.

The court's internal costs are compensated on the basis of the so-called Lamicie-norms. Every activity that is undertaken in the judiciary organisation is awarded with a number of (hours and) minutes. This enables an overview of what a court can or must do and the funds available to it.

As mentioned before, part of the expenditure for the administration of justice is paid through court fees by the persons seeking justice, which was 17% in 2000 and 19% in 2004. Once the case is pending and the court fee is paid, there are no extra charges for any subsequent steps (hearing of witnesses, one or more statements). If a third party is employed in the course of the proceedings, such as an expert, the parties

³⁴ Hendrikse & De Groot 2005 and Jongbloed 2005.

³⁵ In 2001: €4,975,000; in 2002: €5,239,000 in 2003: €5,757,000 in 2004: €5,543,000 and in 2005 about €5,334,000.

or party doing so must pay for the expenses incurred with it. Eventually, this amount is considered as part of the final sentence and it is decided whether it will be included in the order to pay costs. The same applies to the costs incurred by witnesses who have to make a statement; in first instance the party who has called them has to pay, but if the court finds in favour of this party, the costs will (within reasonable boundaries) be included in the order to the other party. All and all, it may be concluded that an annual check-up by a GP is much cheaper (and takes considerably less time): for an orientating general physical examination you would be charged € 74.50 in 2005, while a more extensive periodical examination would have cost you € 111.50.³⁶

3.3. *Are small claims courts available in your system? How much does it cost to litigate there? Is the presence of an advocate required? If not, do you have data on the percentage of individuals choosing to be represented by one?*

There is no special procedure for small claims in the Netherlands. When civil procedures were reformed on 1 January 2002, the choice was made to retain as few specific procedures with different rules in the Code of Civil Procedures as possible. However, there are the summary proceedings for the collection of debts: an action can be brought before the president of the court, who can give interim orders, and, if no defence is put forward, the court renders judgement within 14 days (often sooner).³⁷ Bodies such as telecom companies, mail order companies and public utilities, summon dozens of debtors who have not paid their bill(s) simultaneously on a date and time agreed with the president of the court. In practice, only some (two or three debtors) will attend the hearing. If possible, the court considers whether the defence is well-founded. This would mean that the case will be heard on the merits as any disputed case. If the defendant does not attend the hearing, the case is considered as a default procedure. This means that the court has to test whether the claim is evidently unlawful or unfounded. In practice, these cases are not heard by the court, but (under the court's responsibility) they are dealt with by a staff member of the court's office.

Today, data such as the name, address and residence of the defendant and the nature of the claim are electronically exchanged, leading to a substantial reduction of the likelihood of errors being made. The costs charged for a default procedure are the same as those for summary proceedings, such as the court fee of €527. In addition, since representation by counsel is mandatory, the costs for an advocate must be paid. As these are often standard cases that are prepared by the company, there are often special tariff arrangements.

3.4. *What percentage of decisions is appealed? What percentage of filed civil cases is settled?*

The courts of appeal received in 2001 5,281, in 2002 6,494, in 2003 7,373 and in 2004 7,588 cases that started with a summons and 4,057, 3,961, 4,566 and 5,283 cases that started with a petition, respectively. When we compare that with the number of rulings given by district courts in these years, it appears that about 2% of the final sentences and 3% of the final decisions (*beschikkingen*) were appealed against. Over the period 2001-2004, 29,200, 30,400, 32,000, 34,600, respectively, final sentences

³⁶ This amount may go up if there are blood tests and the like.

³⁷ This has been the fixed case law since HR 29 March 1985, *NJ* 1986, 84 (*M'Barek v Van der Vloodt*).

were given and 121,200, 123,100, 126,400 and 135,200, respectively, final decisions (*beschikkingen*) were given.³⁸

According to reports, about one third of the summonses serviced by bailiffs do not result in a procedure before the court because the parties come to a payment arrangement. The defendant meets his obligations, or the plaintiff recognises that bringing the action would be unjustified as the defendant has met all his obligations already. It is a bit different with petitions, since, once the petitioner has started the litigation by submission of the petition, it can no longer be withdrawn when the defendant is willing to come to an amicable settlement.

3.5. *Are ADR schemes diffused in your system? Are they voluntary, semi-voluntary or mandatory? Do advocates participate in mediation procedures? Do other professionals? What schooling did they receive?*

ADR can be considered in a broad and a narrow sense. Mediation is qualified as ADR in a narrow sense, dispute resolution without the courts is ADR in a broad sense, which includes binding advice (Art. 7:900 Dutch Civil Code) and arbitration (Art. 1020 et seq. Code on Civil Procedures).

According to Article 17 of the Constitution, no-one can be kept from a state court. There is a constitutional right to bring an action before a (state) court. That does not prevent parties to take their dispute before another court or body, something that happens when the subject matter is specialised.

Since 1949, the Netherlands has known the *Nederlands Arbitrage Instituut* (Netherlands Arbitration Institute),³⁹ an independent foundation that organises arbitration procedures. The NAI board includes members from the bar, the judiciary, science and also Chambers of Commerce. The NAI does not give any rulings itself. It has a panel of about 400 expert arbitrators that are assigned per case. A procedure takes about nine months. Furthermore, there is the *Nederlandse Raad van Arbitrage voor de Bouwbedrijven* (Council of Arbitration for the Building Industry)⁴⁰ and the *Stichting Arbitrage-Instituut Bouwkunst* (AIBk) (Foundation Arbitration Institute Architecture), which deal with disputes between architects and their clients, arising from contracts they have concluded subject to the Standard Conditions Legal relationship Client-Architect 1997.⁴¹ And finally there is the WIPO, which is the arbitration institute for disputes with respect to nl-domain names.

Furthermore, there is the possibility of binding advice,⁴² which has always enjoyed great popularity in consumer cases in the Netherlands. Over 30 years ago, the *Stichting Geschillencommissie voor Consumentenzaken* (SGC, Foundation for

³⁸ Until 1 January 2002, an appeal against a decision from a cantonal court was lodged before the district court. From that date onwards, the cantonal courts have become part of the district courts and an appeal is now lodged before the appeal court. The general limit for appeal is €1,750, claims of a lower amount cannot be appealed against. Sometimes there is a prohibition of appeal as the legislator decided that the court must cut the Gordian knot. An example of this is the compensation awarded by the court on the dissolution of an employment contract by virtue of Article 7:685 Dutch Civil Law Code.

³⁹ See <<http://www.nai-nl.org/english>>.

⁴⁰ See <<http://www.ibr.nl>>.

⁴¹ See <<http://www.arbitrageinstituutbouwkunst.org>>.

⁴² Binding advice is a form of dispute settlement whereby parties agree to accept the decision of a third party. This decision is binding and is considered to be part of their agreement, which means that non-performance of the advice can lead to a claim to observe the contract as opposed to arbitration where the decision results in a writ of execution.

Dispute Committees for Consumer Cases) was founded.⁴³ It aims at providing a cheap, fast and simple way for dispute resolution for businesses and consumers. At the moment, there are 33 committees active in the field of banking affairs, child care, estate agencies, public utilities, mail services, travelling, telecommunication, textile cleaning services, removals and hospitals. Every committee has three members: the chair (a lawyer), a member nominated by the *Consumentenbond* and one by the trade organisation. This composition means that the committee's expertise is very broad. All committees are recognised by the government, which means that a fair procedure and impartial decisions are guaranteed. Trade organisations give a guarantee for the execution of the decision: if the business does not execute the decision, the industry organisation will cover the consumer's expenses. The proceedings last five months on average.

Since 1 April 2005, courts may refer cases to mediation. Referral to mediation is meant as the provision of an extra service by the judiciary to the persons seeking justice. This is done because it is recognised that mediation can offer a decision that is more durable and of higher quality than a court's decision. Referral to mediation may take place in civil law, family law, administrative law and tax law disputes before district courts as well as appeal courts. Referral will only take place in cases that are considered suitable. If parties cannot reach an agreement in the mediation, they can still bring the dispute before the court. The first hours with the mediator are free of charge, the costs of any subsequent meetings must be borne by both parties. Mediation is free of charge for parties that already have an assigned advocate. Parties that do not have an advocate yet but who are entitled to one according to the Act on Legal Aid may qualify for a mediation assignment.

The judiciary has had a few years of experience with referral to and efficiency of mediation. From 2000 until now, there have been 5 courts, namely those of Amsterdam, Arnhem, Assen, Utrecht and Zwolle that refer to mediation. A WODC (Scientific Centre for Research and Documentation) evaluation report states that parties come to a complete solution of their dispute in 61% of the cases. It also appears that parties are satisfied with the duration, course and results of the mediation. Parties and their advocates particularly liked the professional skills of the mediators, even in cases where the mediation did not yield any results. Nearly all parties state, after a successful mediation, that they would opt for mediation again in future.

The referral facility with the courts will be gradually introduced from 1 April 2005. It is expected that all district courts and appeal courts will have an information desk for mediation in 2007. Mediators are often (in more than half of the cases) advocates, but some mediators have a different professional background: tax lawyers, bailiffs and civil law notaries, but also psychologists, educationists and medical doctors act as such.

There are about 4,400 NMI mediators.⁴⁴ The Nederlands Mediation Instituut (NMI, Netherlands Mediation Institute) manages the NMI Register for Mediators. On 10 November 2005 it recorded 1,065 certified mediators (27%) and 2,913 NMI mediators. After taking a 6 days' course with a training institute recognised by the NMI, a person may call himself a mediator. In order to safeguard quality requirements, additional requirements have been set since 1 January 2003 (such as

⁴³ See <<http://www.sgc.nl>>.

⁴⁴ These figures can be found on the website www.nmi-mediation.nl. Others who did not take the NMI course can act as mediator since the title 'mediator' is not protected. The title 'NMI registered mediator' is.

compulsory refresher courses, a compulsory knowledge test and a minimum number of mediations annually). The number of mediators is expected to go down in the future as many of the mediators may have followed the six days' course but have not or hardly worked as such and there are only a few mediators whose turnover is sufficient to enable them to make it their (main) source of income.⁴⁵ So, 343 requests for mediation were submitted to the NMI in 2003 and 305 in 2004. Moreover, only a limited number of mediations that is executed by the NMI is actually recorded. NMI registered mediators did state, however, that they were involved in 3,696 mediations in 2003 and 4,602 in 2004.

The mediations that were conducted can be divided in the following categories: family 57.7%, work 25.9%, business 8%, environment 3.7%, government 1.7%, health 1.4%, education 1.5% and others 0.1%. The duration of the mediations is as follows:

Weeks	%
0 – 5	39.7
5 – 10	24.2
10 – 15	14.2
15 – 20	8.4
20 – 30	7.0
30 – 50	3.8
>50	2.4
Unknown	0.3
Total	100

This means that most mediations are completed within a quarter of a year. Litigation that is not too complicated before a court may take up to 8 months at least.

The number of hours that is spent on the discussions with the parties in a mediation is as follows:⁴⁶

Hours	%
0 – 5	34.9
5 – 10	35.8
10 – 15	12.9
15 – 20	6.7
20 – 30	2.4
30 – 50	2.8
>50	3.4
Unknown	1.1
Total	100

The following table gives an overview of the results of the mediations recorded by the NMI. A mediation that is completed with a written agreement can be qualified as a successful mediation. A mediation can, however, also be a success without such a written completion document. An example of this is a reconciliation, which makes a

⁴⁵ During the period until 10 November 2005 the number went down by 507.

⁴⁶ Other activities that may be undertaken by the mediator, such as the preparation, making reports of the discussions or drafting a contract of settlement, have been left out here.

contract of settlement unnecessary. There are also mediations that lead to a partial agreement and that are, in that sense, a partial success.

Results	%
Successful with a written completion document	64.2
Successful without a written completion document	7.9
Partial success with a written completion document	1.2
Not successful	20.9
Unknown	5.7
Total	100

A NMI Mediator is trained in directing and supporting mediation processes. A NMI registration requires, as a rule, that the mediator has successfully completed a mediation training/ study programme recognised by the NMI. It has recognised a number of institutes whose basic training programme includes the required parts for the recognition. This basic programme includes those components that every registered NMI mediator must have taken in any case. Several study programmes take it a step further and are more inclusive. Some also target special professional groups, such as psychologists or lawyers.

3.6. Are ADR clauses included in standard contracts with banks, Insurance Companies, Utilities providers etc? If such clauses are included in standard contracts can consumers sue anyway?

Arbitration and mediation clauses hardly occur in contracts between consumers and banks, insurance companies and public utilities. They do often feature, however, in contracts between companies.

It is important to note that Article 6:236 Dutch Civil Code lists several general conditions which are unreasonably burdensome if used in a contract between a user and a natural person. Article 6:236(n) DCC mentions the clause that dispute settlement should take place before another body than the court of one or more arbitrators, unless the terms and conditions allow the other party a term of at least a month after the user has invoked the provision in a letter to him to opt for the proceedings to be conducted before the statutorily competent court.

3.7. Is arbitration used for the more important civil cases in your system? Is it used also for cases with mediocre importance? How much does it cost to initiate an arbitration procedure before a Chamber of Commerce? Is an arbitration procedure significantly shorter than an ordinary procedure?

Arbitration is used for cases that require specific expertise or when parties desire rather speedy proceedings. An example of this is the arbitration clause that was included in the construction contracts for the construction of a tunnel under the Westerschelde,⁴⁷ which was opened on 14 March 2003. The same applies to the high-

⁴⁷ The Westerscheldetunnel was drilled in order to create a tunnel of 6.6 km-length. Most tunnels in Europe are built in hard, rock-like substance. Never before a tunnel this long and deep going through relatively soft types of soil such as sand and clay was built in Europe. The deepest point is 60 m below sea level.

speed rail-link, which will connect the Netherlands to the European net of high-speed rail-links.

The Dutch Chambers of Commerce do not, unlike e.g. the International Chamber of Commerce in Paris, London or Stockholm, occupy themselves with arbitration. They refer to⁴⁸ the Netherlands Arbitration Institute, in which they participate.

3.8. Are there other informal mechanisms by which disputes are settled? Is there a role for extended family networks, churches or political parties?

The Netherlands is a country very much geared towards harmony and consensus. Mediation, for example, has Dutch roots. This is why there are many organisations that are concerned with dispute resolution; from the Direction Energy Inspection (with respect to the liberalization of the energy market) to the Arbitration Board for the Bulb Trade and the arbitration commission for the *Nederlandse Voetbalbond* (Dutch Football Association).⁴⁹

Ecclesiastical organisations, political parties and unions do not occupy themselves with dispute settlement.

4. Structure of the Procedure

4.1. Who is the main fact-finder in your system? Is it the judge or the advocate?

According to the law (Art. 149 paragraph 1 Code on Civil Procedures), in civil proceedings, the court may only base its decision on the facts or rights it has taken note of or that have been stated and established in accordance with the statutory rules on the submission of evidence in the course of the proceedings. Facts or rights stated by one party, that have not been or not sufficiently been contested, must be accepted by the court as established, subject to its power to demand evidence as often as acceptance of the parties' statements were to lead to a legal consequence parties are not free to determine.

Facts or circumstances that are generally known, including general rules of experience, may underlie a court's ruling, regardless of whether they have been stated and they need not be proven, according to Article 149 paragraph 2 Code on Civil Procedures. Article 150 lays down that the onus of proof of facts and rights is on the party that invokes the legal consequences of those facts or rights, unless there is a special rule of some kind or that reasonableness and fairness require a different onus of proof.

This means that it is up to the advocate to collect the necessary data in a procedure, after which the court will base its decision on the facts and circumstances submitted to it. This can also be concluded from Article 25 Code on Civil Procedure: the court has an ex officio duty to apply the law to the facts presented.

4.2. What are the rights of victims in the criminal process? Is criminal litigation used as a substitute for civil litigation?

Victims of a criminal offence, can be a party in the criminal procedure by virtue of Articles 51a et seq. Code on Criminal Procedure to claim damages as the aggrieved party. It concerns people who have suffered direct damage as a result of a criminal offence and demand compensation, which must be easy to assess. If the assessment of damages is too complicated, the only thing left to do by the victim is taking his action

⁴⁸ See <<http://www.kvk.nl/artikel/artikel.asp?artikelID=39498#arb>>.

⁴⁹ See Van Bladel 2002.

before the civil law courts. The legislator had in mind, in particular, cases such as ones in which the litigant was involved in a fight (against his will) and suffered damages as a result: broken glasses, torn clothes etc., or someone who wants to recover damages from a burglar as a result of a broken lock and a damaged front door. It would not be very realistic to lay down that these cases should be brought before a civil law court. You can also think of someone who claims compensation for his wrecked car from someone who caused the accident under the influence of alcohol. This course of action is not available if the injured party has become disabled as a result of a car accident, because then there may be discussions on the degree of his disability, the possibility that his situation may improve in the future, the amount of the victim's annual income and the possibility to still generate income etc. Sometimes, the prosecuting officer also decides to reduce his claim or demand a conditional sentence if the victim is compensated. In a way, one could say that it is criminal administration of justice instead of civil administration of justice.

4.3. Can victims prosecute crimes?

No, the public prosecution service has the monopoly over prosecution through the prosecuting officer (see Art. 9 Code on Criminal Procedure). He may dismiss cases which means that he does not have the duty to prosecute all criminal cases. A party who is directly interested, however, can complain about the decision not to prosecute before the appeal court by virtue of Articles 12 et seq. Code on Criminal Procedure. If the appeal court thinks that the prosecution must be conducted, it will issue an order to this end.

In practice, anyone who has suffered damage will want to act as a party in the procedure. In that case, the prosecuting officer will make arrangements to enable him to recover the damage. This is also because, according to Article 161 Code on Civil Procedure, a final judgement in a disputed case in which a Dutch court declared it proven that someone has committed an offence is regarded as compelling evidence to conclude that damages have been suffered.

According to Articles 167 and 266 Dutch Code on Criminal Procedure, the aggrieved party must be informed about whether a prosecution is conducted or not. If the offender is not prosecuted, the aggrieved party will have to make his objections known and try to convince the prosecuting officer otherwise.

4.4. Can court fees be waived based on low income? In the affirmative, how low should one's income be?

4.5. Is a procedure in forma pauperis available? What course of action should the plaintiff take in order to get recognized as being poor?

Yes, the procedure laid down in the Act on Legal Aid is available for that. Anyone who wants to bring an action before a civil court or who wants to be involved as a party must pay a so-called court fee. The amount to be paid depends on the nature of the case but it may not prevent someone from instituting an action because of financial considerations. That is why anyone whose income is below a certain level will pay only half or a quarter of the court fee.⁵⁰ According to Article 25 paragraph 1

⁵⁰ See Article 17 paragraph 1 Act on Rates in Civil Cases. From 1 January 2006, the following income limits apply: $\frac{1}{4}$ for anyone who makes less than €1,477 and $\frac{1}{2}$ of anyone who is entitled to legal aid, but whose income is higher. If the court fee exceeds €436 it will be deducted in the cases mentioned here, apart from an amount of €110 and €221, respectively.

Act on Legal Aid, the mayor of the place of residence issues a certificate with respect to the financial resources of the party involved, which may then be subjected to a check by the national tax authorities, the Social Insurance Institute, the Implementation Organisation for Employees' Insurances, the municipal services department and the citizens department of the municipalities.

4.6. *Is ADR incorporated in the ordinary procedure? Are there mandatory attempts to conciliation? Are alleged victims of crimes encouraged/ required to mediate with alleged perpetrators?*

From 1 April 2005, mediation has become part of regular court proceedings. The court can order to try and settle the matter by mediation in cases that are obviously suitable for it. For criminal law cases there is the victim-offender mediation. It can be described as bringing together, on a voluntary basis, offender and victim, under the direction of a trained mediator enabling the offender to come to grips with his guilt and the victim to cope with his grief. It is a process that enables an interested victim to engage into a discussion with the offender about the offence in a safe and structured setting under the supervision of a mediator. Studies have shown that victim-offender mediations receive very high ratings from clients who participated in it. Furthermore, in a very large number of cases, the payment for compensation is actually made.

5. Legal Aid Programs

5.1. *Are legal aid schemes available in your system?*

Yes, the Act on Legal Aid was created for this purpose and is based on Article 18 paragraph 2 of the Constitution, which lays down the right of access to justice.⁵¹ Article 34 paragraph 1 of that Act lays down that anyone in a single household whose monthly income is €1,450 or less, or anyone in a joint household with a monthly income of no more than €2,701 is entitled to legal aid. According to the second paragraph, legal aid will not be granted if the assets of the person seeking justice are at least €7,300 if he is single, or €10,500 in all other cases. Paragraph 3 says:

‘The assessment of the income and assets of a person seeking justice will, unless there is a case of conflicting interests, also include the income and assets of:

- a. the spouse or registered partner of the person seeking justice, unless they are separated,
- b. the same sex or different sex person with whom the person seeking justice has a joint household on a permanent basis, unless the relation between this person and the person seeking justice can be qualified as a blood relative in the first or second degree’.

5.2. *Are free advocates provided for poor litigants?*

Those who qualify for the Act on Legal aid may be granted the so-called assignment. This will be granted after their income has been subjected to a means test. The person seeking justice must, however, pay for some of the costs himself. In this respect, the Act on Legal Aid says in Article 35 paragraph 1: ‘The person seeking justice must pay €13.50 when legal aid is granted by virtue of Article 19 first paragraph under b

⁵¹ See also ECHR 9 October 1979, *NJ* 1980, 376, *Airey*.

(which means seeing someone at the legal aid foundation in order to seek advice). Furthermore, paragraph 2 states that the private contribution of a person seeking justice is means-tested and that it must be paid when he is granted an assignment by way of legal aid, which is then succeeded by the amounts laid down in paragraph 3. The private contribution mentioned in paragraph 2 is:

- a. for those whose monthly income does not exceed the social security norm: €90;
- b. for those whose income exceeds the social security norm, but is no more than €1,220, it will be: €142;
- c. for those whose income exceeds €1,220 and is no more than €1,290 it will be: €210;
- d. for those whose income exceeds €1,290 and is no more than €1,345 it will be: €277;
- e. for those whose income exceeds €1,345 and is no more than €1,413 it will be: €343;
- f. for those whose income exceeds €1,413 and is no more than €1,477 it will be: €399;
- g. for those whose income exceeds €1,477 and is no more than €1,535 it will be: €462;
- h. for those whose income exceeds €1,535 and is no more than €1,601 it will be: €520;
- i. for those whose income exceeds €1,601 and is no more than €1,670 it will be: €587;
- j. for those whose income exceeds €1,670 and is no more than €1,733 it will be: €638;
- k. for those whose income exceeds €1,733 and is no more than €1,794 it will be: €709;
- l. for those whose income exceeds €1,794 and is no more than €2,071 it will be: €775.

In addition to that, paragraph 4 states that if the requester is single, the amounts mentioned in the third paragraph will be reduced by 30%.

5.3. Are free advocates provided only for defendants or also for plaintiffs?

Anyone who meets the financial conditions may apply for an assignment and it is irrelevant whether the person involved acts as a plaintiff or a defendant or whether it regards an action that begins with a petition or a summons.

5.4. Are free advocates available also in civil cases or only in criminal cases?

5.5. Are free advocates available in administrative cases?

Yes, the Act on Legal Aid applies to civil as well as administrative law and criminal law proceedings.

5.6. How are advocates compensated in legal aid cases? Are their fees significantly reduced compared to ordinary fees?

The remuneration for advocates is governed by the Decision on Compensation Legal Aid. According to Article 3 paragraph 1 of this Decision, the basic rate is €99.10. This basic rate is multiplied by a factor established by the Ministry of Justice and depends on the nature of the case. This means that, if the basic rate is 8, an advocate

will receive 8 times the basic rate, or $8 \times \text{€}99.10 = \text{€}792.80$. The factors are laid down in an appendix to the Decision on Compensation Legal Aid and they are as follows:

Private law cases

- <i>labour law</i>	
labour law general	11
permit to give notice	7
dissolution employment contact	8
- <i>family law</i>	
Divorce	10
divorce, joint petition	7
Alimony/livelihood	7
Parental authority/arrangements concerning parental access	7
Division of the estate/succession law	12
Others	7
- <i>contract law</i>	11
- <i>rent law</i>	
rent law general	9
Act on Rent of Accommodation	5
maintenance by the landlord	12
- <i>property</i>	12
<i>Other cases civil law</i>	9
Administrative law cases	
- <i>administrative cases general</i>	8
- <i>compensation victims of prosecution</i>	11
- <i>aliens law general</i>	8
- <i>asylum</i>	
Intention	7
Objection	8
Appeal	5
- <i>civil servants law</i>	10
Criminal law cases	
- <i>criminal law suspects</i>	
cases that are heard or would have been heard in first instance by the cantonal department	5
Juvenile cases	6
driving under influence	5
cases with respect to crimes that are heard or would have been heard in first instance by a single judge	6
cases that are heard or would have been heard in first instance by multiple judges	8
- <i>criminal law non-suspects</i>	
Extradition Act	9
Act on the transfer of the Execution of Criminal Convictions	8
Act on Special Admittance to a Psychiatric Hospital	4
custody of aliens	4
detention during the government's pleasure	7
Disputes/complaints detainees	5
Claim from aggrieved party	5

complaint non-prosecution	5
Claim for dispossession	3
execution of conditional sentence	3
<i>other criminal law cases</i>	4

5.7. *In case of reduced compensation, can advocates refuse to serve poor clients?*

An advocate who wants to be eligible for assignments based on the Act of Legal Aid must be registered as such and meet certain conditions (see, for example, Art. 13 et seq. Act on Legal Aid) and he must handle a minimum number of affairs related to the field of law. Moreover, there is a maximum to the number of assignment cases an advocate can take on. In addition to that, the law firm must run its operations and the cases efficiently. That is why an advocate who faces a request for legal aid will not refuse. There are about 6,500 advocates who participate and that is about half of the number of advocates.

5.8. *How much does the government spend on legal aid programs? Has the budget allocated to these programs increased or decreased in recent times?*

The government wants the access to justice to increase or remain the same. The budget for 2006 of the Ministry of Justice tells us that in 2004 €403,970,000 was spent on adequate access to justice and that this amount will rise to €428,623,000 in 2005. In 2006 the amount is estimated at €408,476,000 and for the consecutive years about €408,475,000. This amount has not changed considerably over the last years. Councils for Legal Aid also receive funds for their accommodation, staff expenses etc. That amount has been fluctuating around €377,750,000 in the 2004-2010 period.⁵²

5.9. *Can you briefly describe the way in which such a program, if at all available, works in your system?*

It is about allocating funds that benefit those who are entitled to legal aid by virtue of the Act on Legal Aid and the Councils for Legal Aid (popularly known as: legal aid centres) in order to enable them to continue doing their duties.

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⁵² Report of parliamentary proceedings 30300, Chapter VI, no. 2, p. 41.

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