

## National Report : BELGIUM

### 1. Introduction

In 1998, the federal parliament voted to pass the Legal Aid Act. It was, in the members of parliament's view, a radical change to the former legal aid system which was known as arbitrary and unfeasible. I would like to give a short overview of the present legal aid system in Belgium.

### 2. Short history

Since the independency of Belgium, the local bars installed Bureaus for Advice and Defence (Bureau voor Consultatie en Verdediging, further BCV)<sup>1</sup>. These bureaus were led by the Council of the local bars. Those persons seeking justice who had a low income obtained a free private lawyer<sup>2</sup> for their defence. No income criteria was provided by law and it was the president of the bureau who appointed a free lawyer. There was no right to a free lawyer or to free advice, it was considered a favour, depending on the personal opinion of the president of the bureau. These lawyers were not remunerated by the government. The free representation in court of the poor people was part of the vocational training. Once this training ended, the lawyers were no longer obliged to assist poor people in court for free. During several decades, only lawyers connected to the bar provided legal aid. It was a charitable system, and the legal profession provided the subsidy by taking on cases without a fee. It relied on citizen initiative to mobilize the law<sup>3</sup>.

At the beginning of the 20<sup>th</sup> century, the union also gave legal advice to their members. It was an important attempt to breach the monopoly of lawyers. Lawyers were prohibited by the local bars to cooperate with these unions in providing legal advice<sup>4</sup>.

<sup>1</sup> See for the history D. DOBBELSTEIN en J. PINILLA, *L' accès aux droits et à la Justice. De La citoyenneté à l'accès à la justice, une proposition réversible ?* Brussel, La Charte, 1999, 151 e.v.

<sup>2</sup> in the text the term lawyer means private lawyer (in Dutch : advocaat)

<sup>3</sup> B. GARTH, *Neighborhood Law Firms for the Poor*, Alphen ad Rijn, Rockville Marryland, Sijthof & Noordhoff, 1980, 3 -4.

<sup>4</sup> R. VICTOR "De crisis aan de balie", *R.W.*, 1939, 1571-1614. Since 1967 the representatives of the Unions are even entitled to represent their members before the labour court.

At the end of the sixties and at the beginning of the seventies, legal clinics were set up by law students. Also, other social organisations started free legal advice, for example, consumer organisations and tenant organisations. These organisations criticised the way the bar had taken care of the weakest groups in society that were looking for justice. Instead of incorporating these critics, the bar defended itself by denying these protests and stating that it was, by tradition, well placed to provide free legal aid. In the beginning, local bars did not allow their members to take part in the legal clinics or other progressive organisations. The free legal aid market was altered by the institutionalisation of these alternative legal aid organisations. These organisations claimed the free legal advice market while progressive law offices filled up the gap by providing accessible legal assistance. It was accepted and contacts between the bar and social welfare organisations were set up<sup>5</sup>.

The main part of the legal aid provisions still remained in the hands of the legal profession, especially that of the trainees. In 1980, the charitable system ended and “a judicare” system was created. This system was based on the principle that the state pays the subsidy by compensating private lawyers. This remained until 1984 before the Ministry of Justice reserved a first budget of 75 million old Belgian Francs (€1 859201,40) for the trainees for their work<sup>6</sup>. An act extended the remuneration to all private lawyers willing to provide free legal aid to the poorest people seeking justice. However, the budget the Ministry of Justice allocated remained inadequate. In the same period, the coordinating National Belgium Bar Association promulgated a directive to all local bars in which the minimum income criteria for the appropriate people were determined. These criteria remained rather insufficient.

These legal initiatives were not convincing, certainly not, as in 1994, the constitution introduced an article 23 that enacted that everyone has a right to legal aid.

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<sup>5</sup> B.HUBEAU en S. PARMENTIER, «Sociale Rechtshulp; algemene ontwikkelingen» in *Welzijnsgids*, II.A.1.7.1-21. zie P. GEERTS “De Rechtshulp in België-I”, *Recht en Kritiek*, 1977, 308-366 en “De Rechtshulp in België-II”, *Recht en Kritiek*, 1977, 413-428.

<sup>6</sup> Reglement betreffende de vergoeding van advocaten-stagiairs vastgesteld door de Algemene Raad van de Belgische Nationale Orde van Advocaten op 12 juni 1987, gewijzigd bij de reglementen van 1 december 1988, 17 mei 1990, 20 februari 1992 en 24 juni 1993. KB 23 mei 1997 tot vaststelling van de voorwaarden voor de toekenning, het tarief en de wijze van uitbetaling van de vergoeding verleend aan de advocaten ter uitvoering van de artikelen 455 en 455bis van het Gerechtelijk Wetboek, *B.S.* 2 september 1997, 22385-22387 alsook MB tot uitvoering van het koninklijk besluit vaststelling van de voorwaarden voor de toekenning, het tarief en de wijze van uitbetaling van de vergoeding verleend aan de advocaten ter uitvoering van de artikelen 455 en 455bis van het Gerechtelijk Wetboek, *B.S.* 2 september 1997, 22388-22393 + bijlage.

In the meantime, a new bill was put forward in the federal parliament. This was the beginning of a new debate that led to the act of 1998<sup>7</sup>.

### 3. The 1998 Act

Two important bills were introduced into the federal parliament. One bill was inspired by the social welfare approach to legal aid like the Canadian model of Quebec. Since the coordinating National Belgium Bar Association was frightened to lose its monopoly and because it was convinced its special skill would give a public service quality, the Belgian Parliament agreed on this view and introduced a new bill. This bill became the cornerstone of the 1998 act<sup>8</sup>.

The 1998 act replaced the former BCV and two new bodies were installed on the district level: the Commission for Legal Aid, and the Bureau for Legal Aid.

#### *3.1. Legal advice: The Commission for Legal Aid*

##### *Composition of the Commission*

The Commission is composed of members of the local bar (half of the representatives of the commission), members of the local social welfare organisation (25 per cent) and members of organisations providing legal aid, for example, consumer organisations, tenant organisations (the remaining 25 per cent).

The Commission is obliged to meet 4 times a year and is led by a president, who is always a private lawyer. The act does not explicitly mention where these meetings should be held. In another act, it is stated that the House of Justice (containing probation officers, restorative justice officers, etc.) has to place conference rooms at the Commission's disposal. But a place

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<sup>7</sup> Wet 23 november 1998 betreffende de juridische bijstand, B.S. 22 december 1998, 40.568.

<sup>8</sup> zie S. GIBENS, "De wet op de juridische bijstand" in *De Stand van de Rechtsbijstand*, B.HUBEAU en C. CUYPERS (ed.), Brugge, die Keure, 2002, 84-86. S. GIBENS en A. DE BEL, "Rechtshulp en advocatuur", *Panopticon* 2000, 444-452.

for a permanent secretariat was not provided. In many, districts the permanent secretariat is housed in the offices of the local bars.

### *Tasks*

In every district (there are 27 districts in Belgium) the Commission has the duty to organise the consultations of private lawyers giving legal advice. It is the decision of the Commission where these free consultations will take place. In most cases it is in the Houses of Justices or in courts of the Judges of the Peace. 90% of the budget accredited by the Ministry of Justice has to be spent on these consultations and paying the private lawyers. This leads to the conclusion that these Commissions were set up to admit the private lawyers to compete with the other organisations providing legal advice on the market of legal service.

Due to the fragmentation of the legal advice market and the lack of insight to what these actors are dealing with<sup>9</sup>, every Commission supports the coordination and collaboration between the different legal aid centres. The 1998 act even allows the possibility to make arrangements on the way these centres would like to co-operate.

A third task includes the distribution of information about legal aid to the citizens, especially appealing to the weakest groups in society.

Last, but not least, the Commission observes its own annual report and that of the Bureau for Legal Aid. The Commission is entitled to advise the Minister of Justice on legal aid matters. Its advice does not bind the Minister.

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<sup>9</sup> J. VAN HOUTTE, W. VAN WAMBEKE, en E. DELANOEIJE, *Rechtshulp en rechtsinformatie*, Brussel, FDWTC, 1995, 60 alsook specifiek J. VAN HOUTTE, A. VETS, E. DELANOEIJE, K. DE VALCK, en K. VAN DEN BRANDE *Sociale Rechtshulp in Antwerpen*, FDWTC, 1996, 136p. + bijlagen.

### *Some remarks*

Every Commission works on its own. There is no legal coordinating body. Every Commission has to send its annual report to the Ministry of Justice but this Ministry apparently does not pay attention to these reports. The Commissions presume that the Ministry collects these reports and classifies them. Until now no remarks have been made by the administration, except on budget spending. Although every Commission has its own customs with regard to the district it is working in, a real danger appears when it comes to unification and to covering up the legal advice market organised by these Commissions since there are no common trade markets or common policy oriented meetings.

Thereby, the act states that every person has to pay a fee of 500 BEF (€12.39) for the given advice. If a person's earnings do not allow them to pay for this advice, they can obtain it for free. In this case, the person seeking justice has to prove that his income does not exceed certain income criteria provided by law (see below). The coordinating Flemish Bar (the Flemish successor of the National Belgian Bar Association) has advised the Commissions not to execute this regulation because it regarded this rule as a serious barrier to the access of justice.

Until now, no valuable data is available on the Commissions and the way they are fulfilling their duties.

### *3.2. Legal Assistance: The Bureau for Legal Aid<sup>10</sup>*

#### *Introduction*

The Bureau for Legal Aid is embedded within the local bars. The bar itself is obliged to organise the working of the bureau. The bureau will appoint a lawyer to a person who is not able to hire a lawyer. The act provides this assignment when a person wishes to get more elaborated advice, the assistance of a lawyer, or would like to be represented in court.

The introduction of the bureau is not so innovative at first sight. The Bureau is more or less the continuation of the former Bureaus for the Consultation and Advice (BCV's). The act now prescribes more exhaustively rules to obtain and to appoint a free lawyer. It is the formalisation of customs that existed in the earlier days.

The 1998 act introduced the following items in favour of the customer: a) they are entitled to a lawyer of their choice; b) they have the possibility to appeal if the bureau refuses free legal assistance (the appeal will be handled by the labour courts); c) a quality control by the local bar authorities is accepted.

There are three ways to obtain the assistance of a free lawyer. In an urgent case, the lawyer who is giving legal advice, can accept the defence but has to inform the bureau immediately and needs the permission of the bureau. Every lawyer who is willing to participate in the system of free legal aid will be listed according to his specialisation. A person has the right to choose a lawyer from these lists and contact them. In that case, the lawyer will turn a request to handle his case for free. And last but not least some acts provide the obligatory assistance of a lawyer, like prisoners, mentally ill persons, juveniles, etc.

*Who is entitled to obtain a free lawyer?*

The 1998 act provides minimum income criteria. Summarised :

- a. A single may not earn more than €666,00 to be entirely entitled to a free lawyer. A single person whose monthly income lies between € 666,00 and € 857 can obtain the assistance of a lawyer after paying a small amount of their fee. The amount is not prescribed by law and can be freely determined by the president of the bureau. Depending on the income, the contribution is situated between €50 and €125.
- b. If the income of a married person, cohabitant or a single person with depending persons exceeds €857 net a month raised by €78 for every depending person (for example, children, housewife (man)), they are not entitled to obtain completely free assistance. An income between €857 and €1 011,00 net per month raised by €78 for every depending

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<sup>10</sup> For further Dutch literature P. SCHOLLEN, en B. VANGEEBERGEN, (onder de wetenschappelijke leiding van Prof. Dr. P. Van Orshoven), "Juridische Bijstand", *Jur. Fal.*, 2000-2001, nr. 3, 373.

person, gives right to partly free assistance. Like a single person, the president of the bureau will determine the fee the citizen has to pay.

c. The president can also take into account the debts of a person or his family, only if these debts are not due to the person seeking justice. It is due to a sudden unexpected situation that the person is not able to fulfil their obligations.

d. If a person can prove in every possible way that they

- Are living off a social benefit (OCMW)
- Are a handicapped person
- are an aged person living off a social benefit
- live in social housing
- are a juvenile
- are a foreigner (asking for asylum)

the president of the bureau will immediately appoint a lawyer.

Detainees and mentally-ill persons will obtain a free lawyer until the lawyer who is sought to defend the person can prove that the person does earn sufficient money to pay the lawyer.

#### *Decision of the President of the bureau and possibility to appeal*

Only the president of the bureau has the authority to allow free legal assistance. The president can refuse legal assistance or withdraw his decision to free legal aid if the person is not willing to cooperate or if their case is seemingly not justified.

A person who is dismissed by the president of the bureau, and is convinced of their right to a free lawyer, can appeal to the labour district court within one month after the decision. The president of the bureau is obliged to inform the dismissed persons of their possibilities to take their case to a higher court. If the decision of the labour court is upheld, they can appeal to the Labour Court of Appeal.

In case of appeal, the Labour Court/ Labour Court of Appeal will decide whether or not the person is entitled to obtain completely or partly free legal assistance.

### *Remarks*

Only very poor people seem to be entitled to free legal assistance. People who are living off a small income, but not falling within above-mentioned criteria, and who are seeking justice, cannot benefit from the provisions of the 1998 act. To provide legal aid for the middle class, the federal government has recently introduced a new bill in the federal parliament, but to date has not become law. The bill wishes to introduce the obligation of every citizen to take a legal expenses insurance incorporated in the present liability insurance. The parliament has asked the advice of the High Counsel of Justice who has comments on this, especially since there has never been an evaluation of the 1998 act. Thereby, the insurance companies are not willing to participate. The obligated insurance will treble the amount that everybody is paying today for their liability insurance.

### *Remuneration*

Every year the Ministry of Justice determines the budget it wishes to spend on the remuneration of the lawyers providing legal assistance. The Ministry has set up a list of legal affairs and accredits these cases by points. For instance, a criminal case counts for 15 points. Every year, depending on the budget, the amount for every point will differ. The more cases being handled, the lesser will be the remuneration of the lawyers, because the budget does not change or does not increase in proportion with the amount of cases. It is not an open-ended system.

Since 1984, the budget for the legal assistance has increased but the amount of cases being handled has also increased, resulting in the remuneration of the lawyers being stagnated or decreased.



*Data of the legal aid system of the last 4 years.*

The control of the legal aid budget and system remains in the hands of the lawyers associations. The Flemish Bar controls the French speaking Bar and vice versa. The government does not interfere and is dependent on the figures the two bars publish. There is no data of the nature of the cases being handled. This data is interesting and important to evaluate the attribution of the points per case and to create a legal aid policy in the long term.

Table 1 shows that the amount of lawyers who are participating in the legal aid system has increased. The amount of cases handled by these lawyers has risen from less than 60 000 cases in 1998 to more than 80 000 cases in 2001.

Table 1

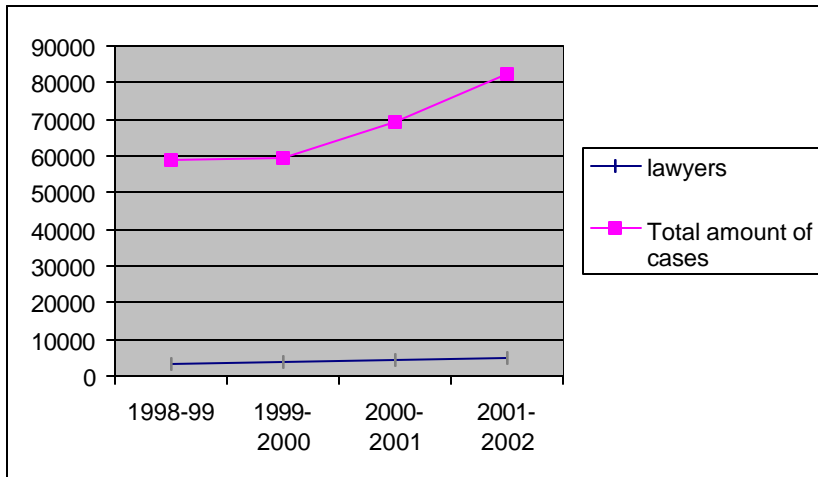
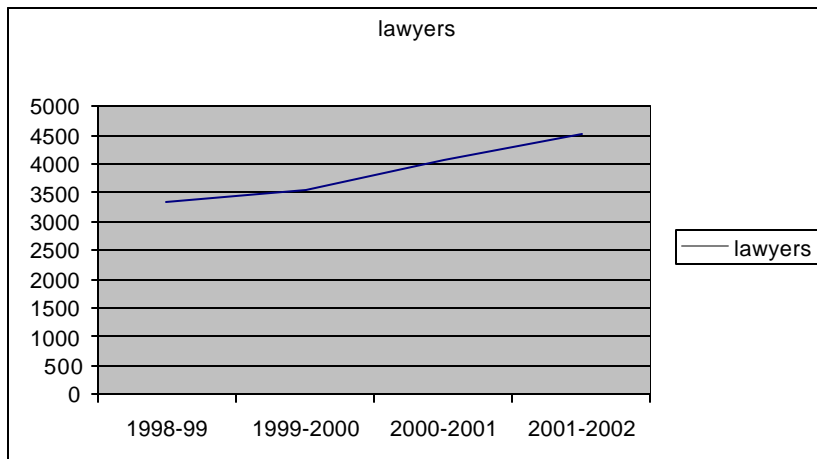
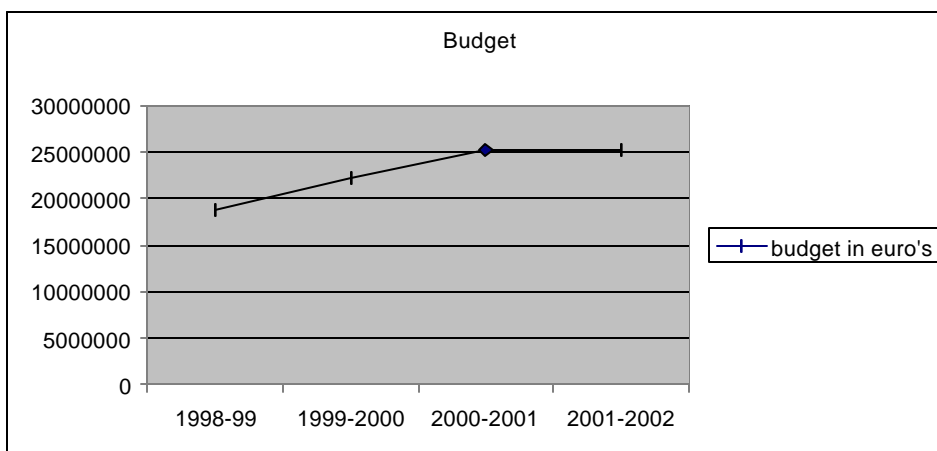


Table 2



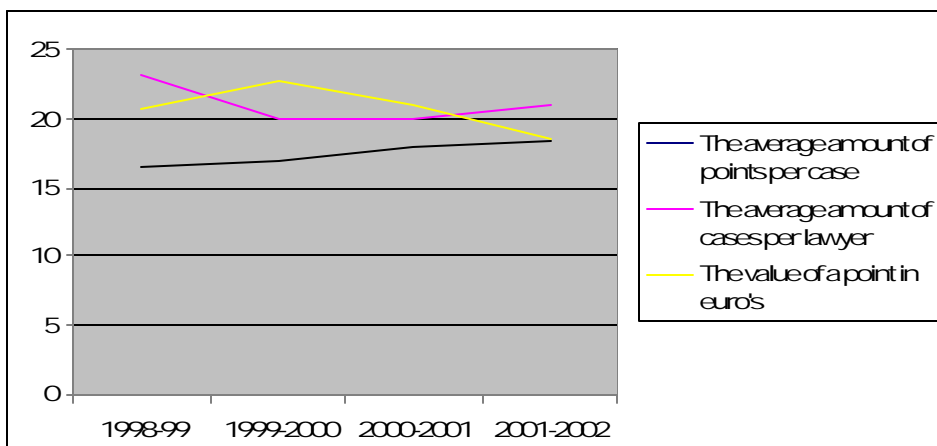
The entire population of lawyers who are participating in the legal aid system has also increased (see table 2). This rise can be attributed to the entry of experienced lawyers in the system since 1997 and the rise of allocated budget. Whether or not this will be the case for the years to follow, one cannot predict. The stagnation of the budget and the increase of the lawyers participating, linked with the rise of the total amount of cases being handled, will probably lead to lawyers dropping out due to the decrease of the remuneration, as you can see in table 4.

Table 3



As I have already mentioned, one can recognise an abrupt rise of the budget up to 2001. From then onwards, it has remained almost the same.

Table 4



#### 4. Conclusions

The 1998 act on legal aid has introduced a new Commission for Legal Aid. The Bureau for Legal Aid can be regarded as the successor of the former Bureau for Consultation and Advice. The present legal aid scheme in Belgium is a more or less a legally elaborated judicare scheme, directed towards the poorest people<sup>11</sup>. An attempt has been made to introduce a legal expenses insurance especially oriented toward the middle class, but at the moment no further steps have been taken.

The government does not consider legal aid a priority issue. The Commissions and the Bureaus are not supported by the government. There is a total lack of policy although the accredited budget has increased abruptly over the last four years. No legal evaluation has been set up. Let us hope that Belgium is standing at the beginning of a progressive evolution to a valuable legal aid system.

Antwerp, May 2<sup>nd</sup> 2003

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<sup>11</sup> S. GIBENS, 'Rechtshulp in België; eindelijk uit de startblokken?' in K. VAN AEKEN en F. VAN LOON (ed.) *De toekomst van de rechtssociologie in het justitieel beleid. Bijdragen voor de jaarvergadering van de Vereniging voor de Sociaal-Wetenschappelijke bestudering van het Recht. 13 en 14 december 2001*, Antwerpen, UFSIA-FWO, 2002, 210.