

Legal aid in Belgium: the absence of a tradition?

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Introduction

In Belgium, legal aid was and still is mainly the responsibility of the legal profession. It is up to this group to provide legal advice and to represent citizens seeking justice before the court. History has shown that advocates regard themselves as the experts in this particular line of jurisdiction, citing their law degrees combined with a vocational training and the disciplinary rules installed by the Bars as evidence of their suitability. For decades the legal profession would not tolerate any interference in their practices, nor in the organisation of the means of access to justice by the poor. They regarded themselves as the only professional group equipped to handle the legal problems of the poorest rung in society. Such a belief was perhaps understandable in the nineteenth century when social problems were solved by charity. At that time, citizens were favoured by legal aid. There were no formal rights and the organisation of legal aid differed from local bar to local bar. After two world wars, politicians directed liberal society towards a social democracy and as the social security system expanded, more people became entitled to enjoy the advantages of the system. Social problems could be solved by the social security system. Legal problems, often connected with social problems, remained the jurisdiction of the legal profession and the latter did not want to change the manner in which access to justice was organised. No attempts were made by the legal profession to channel legal aid into welfare state provisions. In spite of the attempts made by progressive lawyers and advocates to change the legal aid system, most notably in the 1970s, and in spite of public approval for these efforts, politicians were not willing to alter the system.

It is only in the last decade that some changes have been made. In 1993 the Belgian constitution recognised legal aid as a fundamental right and in 1998 an act on legal aid was promulgated. Since the implementation in 2000 of the 1998 Legal Aid Act, people on lower incomes have been entitled to an advocate free of charge. This is a formal right and legal criteria are based on equal eligibility (merits and means tests). This change should have been regarded as a mere formal update of a legal aid system that should in fact have existed for many years. The legal aid act

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only refers to the assistance of an advocate. If a person's request for an advocate free of charge is granted, it does not mean that he is entitled to legal costs for free. The Belgian law provides two separate procedures although the means and merit tests are the same in both procedures. The assistance of an advocate is the authority of the bureaus for legal aid. It is up to the judges to decide whether or not a person will be relieved of the legal costs. In this article the focus will be put on the assistance of an advocate.

This article will sketch the evolution of legal aid in Belgium over four periods, but first some general theories on the legal profession and legal aid will place the history of Belgian legal aid in a broader theoretical framework.

Legal aid and the legal profession

(a) The role of the legal profession

The legal profession plays an important role in the history of legal aid in Belgium. The legal profession in Belgium consists of so-called 'advocates'. Anglo-Saxon literature generally uses the term 'lawyers'. When Anglo-Saxon authors write about civil law countries—including Belgium—they must distinguish between two types of lawyers, those having a legal occupation and those who do not. Those having a legal occupation are described by Anglo-Saxon authors as 'private practitioners'. This term has equivalent definitions in all European countries and has sharply defined boundaries. In Belgium as well as in other continental countries, in contrast with the US, the term lawyer does not denote 'a member of the Bar'.¹ In Belgium, only law graduates (those holding a university degree) who have completed a 3-year course may join a local bar. The members of these local bars are called 'advocates'. Advocate is a term legally protected by judicial code. It includes the monopoly of legal representation before the courts.²

The major role of the advocacy in the history of legal aid evokes the theories of professionalism developed by Larson, Abel and Abbott.³ These power theories emphasise the legal profession's ability to exercise autonomy over its work jurisdiction. Market control influences the supply of producers and controls the supply of advocates by the producers. Such theories have led the contemporary legal profession to lose control of the legal services market. External changes, deriving from other legal occupations active in the private market or imposed by increasing interference from government, are weakening the autonomy and the work jurisdiction of the legal profession. Abbott asserts that a profession is an ordered, rational system based on cultural values. These cultural values refer to a historical tradition. In a continental country such as Belgium the legal profession is proud of its history. It considers the monopolisation of the legal services market to be rooted in history and thus claims it as its own. Historical values structure its organisation by emphasising status, autonomy, disciplinary rules, competence and monopoly of representation. This process of professionalism has always been characterised by the conflict with other groups on the legal services market. It is a historical growth process, a genesis that may or may not involve certain rituals and traditions. This means that certain tasks, such as giving

advice or representing clients before courts, likely remain constant, but the category of professional performing these tasks is subject to change. The development of the legal profession is a dynamic and contingent process that—hopefully for advocates—will never end.

Paterson warns, in contrast to the aforementioned theories, that the legal profession has its own traditional perception or model of professionalism despite the transformations occurring in its work jurisdiction. Paterson's contribution to professionalism and the legal services market is of great value in explaining why legal aid in Belgium remains relatively unchanged. The legal profession expects both the state and the public to reward it with high status, reasonable compensation, limited competition and autonomy. In return the profession provides competence, access to the legal system, a service ethic and public protection.⁴ Paterson states that over the last 50 years the legal profession in England has experienced few changes in its perception of professionalism. During this period the profession has taken great advantage of its privileged position at the expense of the public. The changes that the legal profession is experiencing nowadays, should be regarded as a re-negotiation of an implicit contract between the legal profession and the public/state. Legal aid is part of this 'implicit' contract and it will determine the position of the legal profession towards the public in the future. With regard to legal aid in Belgium, the legal profession has always tried to curb new initiatives vis-à-vis the legal needs of citizens. New initiatives towards the public do not improve access to justice, according to legal professionals. New players on the legal aid market would not be able to equal their competence and their service ethic and would do citizens more harm than good. The legal profession has even striven for better remuneration for the legal aid work performed by their advocates. In the advocates' opinion they are entitled to fair remuneration for their legal aid work, just as the public is entitled to quality and expertise.

(b) Did legal aid in Belgium miss the welfare state boat?

After the Second World War, Belgium installed an extensive welfare system.⁵ Unions and other pressure groups gained more influence in the political and social order, more than they had previously achieved during the interbellum.⁶ Social acts and many regulations that mitigated the excesses of the free market, such as tenant law and consumer law, came into force. The unions even succeeded in breaching the advocates' monopoly of representation in labour courts, proving their strength. In this sense the unions certainly did not 'miss the boat' in terms of welfare state provisions.

During the 1960s and 1970s, legal aid in Belgium and other continental countries came under attack. This period heralded a new era for welfare state provisions. The social security system had been consolidated whilst at the same time there had been an increase in social welfare towards deserving poor that had dropped out of the social security system. In spite of this positive development regarding the poorest people in society, a link to legal aid had still not been established. It was not until 1994 that politicians recognised socio-economic rights as fundamental.

As a consequence the constitution was expanded to include social and economic rights such as the right to employment, social security, health care, decent accommodation, cultural and social fulfilment, and social, medical and legal aid. Although former social rights such as employment, social security, health care and so on were already elaborated in many acts and regulations, a legal aid act had not yet been promulgated. A mere two sections of the Judicial Code (*Gerechdelijk Wetboek*) were related to the organisation of legal aid provided by the private bars. The first section stated that local bars should install Bureaus offering legal advice and representation. The second section dated from 1980 and revised the remuneration of advocates. The working group that prepared the amendment of the constitution in the 1990s, discussed the necessity of making a specific reference to legal aid because many participants interpreted legal aid as a social right which had already been inserted in the amendment to the constitution. Conscious that legal aid in Belgium did not function as it should, the working group decided to insert legal aid verbatim in the constitution.⁷ Legally this meant that the right to legal aid could no longer be ignored. Legal experts did not criticise the way in which the legal profession had organised legal aid since the independence of Belgium in 1830, but were more inclined to think that it was the government's task to set up an elaborated legal aid system and an active legal aid policy in order to improve the mobilisation of law by the citizens. It was not until 1998 that the Belgian Parliament voted to support a legal aid act. Although members of parliament viewed this act as a radical change, it was more or less the continuation of the former legal aid system. Legal aid had been transformed from a charity system to a *judicare* scheme.⁸

What Regan once described as the paradox of the welfare state, also exists in Belgium. The legal profession has ignored most legal problems except for serious court cases. The legal profession wished to expand 'inside litigation services' and succeeded. A *judicare* scheme perfectly suits the policy goals of the legal profession. It is geared to the remuneration of advocates for the representation of clients before courts. The system focuses predominantly on the poorest citizens, which in Belgium comprise only 11% of the total population.⁹ For other clients, advocates are not bound to a system of legal aid that generates less income. The strength of the welfare state, the centralisation and the structuring of welfare services under which legal services must also be classified, changed the use of 'the outside litigation services'.¹⁰ Taking into account that Belgium is a federal state, legal advice and minor legal assistance are also provided by welfare organisations that are subsidised by the regional governments. A monopoly of the legal profession on legal advice does not exist in Belgium. The organisation and remuneration of legal aid provided by advocates falls to federal authorities and the 1998 Legal Aid Act predominantly emphasises inside litigation services such as legal assistance and court representation. There is little doubt that the legal profession has a large forum in which to defend its traditional perception of professionalism, especially in legal aid matters. A connection has never been made between legal aid provided by advocates on the one hand and welfare provisions on the other. Although Belgian politicians were concerned about the development of welfare state provisions, they were not preoccupied with justice. The main point of justice was the formal organisation of the judiciary and

the penitentiary. The judiciary regarded itself as independent and could not accept that the justice administration would set up a policy that might interfere with their routine. The absence of political commitment and the hostility of the judiciary towards policy making by the justice administration paralysed justice. The relationship between the judiciary and the administration (and in a broader sense the executive power) could be described as a ‘non-aggression pact’. Under the shadow of the magistrates—mostly former advocates—the legal profession regrouped and tried to resist any attack on their work jurisdiction from outside, even from the Department of Justice. As a consequence the justice administration was not empowered to set up a policy on legal aid or, within a broader framework, on an access to justice plan.¹¹

Four important periods in Belgian legal aid history

(a) 1830–1970: legal aid at a standstill

Some academics describe this first period as ‘monolithic’.¹² Since the confraternities of St. Ivo in 1677—the predecessors of the local bars—and Napoleon’s imperial decree of 14 December 1810 which made provision for legal advice bureaus, the administration and organisation of legal aid has not been changed up until recently. Advocates presided over these bureaus for legal advice and divided cases among their colleagues.¹³ Although the local bars already dominated the legal services market in the nineteenth century, at the beginning of the twentieth century charity organisations and especially unions made further attempts to infiltrate the rather comfortable position of the legal profession. The bars tried to claim and even to expand their jurisdiction, but did not always succeed. A statement by a spokesman of the time Sir (*Ridder*) Victor revealed the mentality of the leading councils of the local bar associations.¹⁴ Victor encouraged his colleagues to become more interested in other fields of law such as public law, rather than confine themselves to traditional fields such as civil law, criminal law and commercial law. He also approved the decision of a local bar (*Kortrijk*) that had forbidden its members to join or assist other occupational groups such as unions and employers’ organisations. At the end of the nineteenth century these organisations had been the first to attempt to offer people legal advice, information and minor assistance. As Regan stated, the legal profession was reluctant to incorporate these outside litigation services and tried to restrict the action radius of these upcoming services which aimed at improving access to legal advice and assistance to their members, mostly people on lower incomes.¹⁵ The legal profession, however, was driven by charity and by idealistic but naïve advocates acting unselfishly for the needy. Victor judged the administration of legal aid to be a heavy burden on the shoulders of advocates, but was careful to reassure that these private practitioners performed their duty with love and dedication. It was a typical example of the way the legal profession emphasised its autonomy and high status as a part of its competence and service to the public, especially the poor. The rhetoric of the private bars did not match reality and it is not surprising that in Belgium the legal profession was unable to foil the unions’ attempts to

breach the monopoly of representation in the labour courts, especially following the Second World War when social and labour acts became law and the social welfare state was founded. The 'new' judicial act of 1967 confirmed, however, the advocates' 'monopoly of representation' but it also entitled union representatives to defend their members before the labour courts. The unions' breach of the monopoly of representation stems from the time that representatives of these unions could represent their members at special commissions known as '*werkrechtersraden*' (councils of lay judges). These commissions were not courts in the real sense of the word. Following the promulgation of the Judicial Code in 1967, these commissions were replaced by labour courts presided over by a profession judge and two lay judges. The unions were permitted to represent their members in labour disputes and social security issues before the labour courts.¹⁶ The unions did not and do not provide general legal advice and are not willing to do so because of their specific area of action. The lack of politicians' interest in legal aid matters also diminished union participation in this debate. As regards a legal framework, the judicial act did not alter the way a citizen could obtain an advocate free of charge for legal problems in general. Every bar administered legal aid in the correct manner. Legal aid was focused on internal litigation services such as assistance and court representation. The eligibility criteria differed from local bar to local bar and the advocates were not remunerated by the state for their performances.¹⁷

At the end of the 1960s it was not only the public that was criticising the effects of the legal aid system in general. The supply of legal services to poor people came under pressure as a result of the decreasing number of advocates. During the 1950s and 1960s the private bar feared that the increasing number of young law graduates entering the legal profession would overcrowd the bar, but in fact the opposite took place. Many young advocates left the bar early and as a result of the 'new' 1967 Judicial Act elderly advocates joined the judiciary. Those advocates that remained thus lacked the time to fulfil their noble task of defending the poorest people. The limited supply of advocates led to a decrease in the number of legal aid cases while the needs and demands of citizens remained the same, or even increased. It is not surprising that people began to criticise advocates who were reluctant to deal with their cases.¹⁸

(b) Second period: law 'shops' and law reform

The socio-political climate of the 1960s and 1970s questioned the existing order and there was rising opposition to legal aid supplied by the private bars. This gave law students and progressive advocates leverage to contest the way private bars provided access to legal services. In other countries, such as the Netherlands, law shops/clinics and social movements placed the needs and demands of accessible legal services first and foremost. Citizens were not to be labelled as legal objects, but accepted as real participants in a social welfare system. The law shops and the social movements recognised citizens seeking justice as full members of society, with not only financial, but also cultural, social and psychological thresholds.¹⁹ Contrary to the expanding organised movements of law students and social advocates in the Netherlands, in Belgium similar movements never succeeded in coordinating their social and legal

actions. The law shops were divided into two categories. Some focused their actions on legal advice in specific areas inhabited by the poor whilst others wished to influence political behaviour through law reform actions. Many of these law reforms were ideologically inspired by activists to the left of the political spectrum.²⁰ Even if the different groups of law students and advocates had met each other at meetings, they never became institutionalised. For a decade many debates took place, but the results were never translated into a policy capable of guiding politicians towards a decent and modern legal aid system.²¹ Hubeau and Parmentier appropriately describe this group of progressive law students and young law graduates as “autonomous non-institutionalized legal services activists”. Another important factor remains the absence of Belgian politicians in the debate on legal aid and access to justice, both in parliament as well as within the executive power. As previously mentioned, there existed a ‘non-aggression pact’ between the judiciary and the executive and the legislative power. The politicians’ only concern was to propose that their candidates be appointed as magistrates. It was not until the end of the 1980s that politicians started to formulate a policy relating to matters of justice and even then this was not always transparent or well prepared or evaluated. In the Netherlands, on the contrary, the judiciary had always formed part of the administration of justice and its policy. This commitment by the judiciary has always been accompanied by planning and evaluation of new policy lines, including those related to legal aid.²²

The local private bars responded to the law shops’ critics in a traditional manner, through the National Bar Association, at that time the coordinating national bar. In 1970 the Dean of the National Bar, Gilson de Rouvreux, incited its members to protect their prerogatives and emphasised the old values of the legal profession, such as autonomy and status.²³ Some private bars forbade their members to take part in the socio-legal movements or to give advice to any of their organisations. Notwithstanding the defensive position of the legal profession, the bars in the 1970s began *prima facie* to acknowledge that some changes should be imposed on the legal aid system. The president of the Association of Belgian Advocates, J. Van den Heuvel, suggested that the remuneration of trainees could lead to the improvement of legal aid.²⁴ Secondly legal aid should not only be provided by trainees, but also by full members of the bar, taking into account every advocate’s specialisation. Thirdly the introduction of legal expenses insurances²⁵ should be considered. It seemed obvious to the legal profession that the legal aid crises could only be solved by providing advocates with more legal tools and by improving the legal aid administration of the local bars. It was not only inside litigation services which attracted the legal profession however. At the same time Pierson, a member of parliament, submitted a bill to parliament that struck at the heart of progressive law shops and law centres and their sympathisers and caused public protest.²⁶ The bill aimed at an advocates’ monopoly of legal advice as was the case in Germany.²⁷ In the first place it seemed that all leading political parties supported this bill, but afterwards it rather emanated the ideas of some members of parliaments who were also advocates. Why was this rather provocative action necessary? It seems probable that the increasing numbers of law graduates entering the bar at that time,²⁸ compelled the legal profession to act vigorously. Internal problems forced the legal profession to expand its

jurisdiction. The remuneration of trainees for their legal aid work might lead to compensation for the low fees they obtained from their patrons. At that time the legal profession no longer consisted of 'bourgeoisie'. Thanks to the democratisation of education, young law graduates also wished to make a living from it. The actions of the legal profession were in no way inspired by the desire to offer better access to legal services for the citizen.²⁹

In 1976 the Belgian Association of Advocates held a congress in Ghent. The theme was legal assistance for people on low or zero incomes. The former head of the local Ghent Bar, Van Mallegheem, later to become the Vice Dean of the National Bar Association, gave a lecture in which he compared the legal aid systems of the Netherlands with those of England and Wales.³⁰ He concluded that legal aid in Belgium was not well organised and that a new legal aid system should be installed. One of the priorities was the remuneration of advocates. How this remuneration was organised was of no importance. State funding or special legal expenses insurances were amongst the possibilities. He offered no objection to direct state funding to local bars or to a special legal aid commission, run by the state. It was likely that the last option would reduce the large and expensive legal aid administration, up to then supported and financed by the local bars. He admitted that their demands did not impress political leaders and that remuneration for their legal performances would not immediately be forthcoming. He believed, however, that some changes had to be made. In the first place the Consultation and Advice Bureaus predominantly situated in the court houses could be decentralised to those areas populated by people most in need of them. Clear and uniform eligibility rules should also be prepared. Thirdly he removed the obstacle that advocates were prohibited to work together with other law centres and legal services, such as consumer organisations, unions and legal clinics. He was later to renounce the Pierson Bill and state that the public should be better informed of legal aid and about how to obtain free legal advice and assistance. This speech must be considered as a positive development in the debate on legal aid. In the same year the legal clinics and the law centres held a conference organised by the law centre of Louvain.³¹ Their criticism remained the same. The private bars still denied the needs of the public for legal aid. Advocates focused on inside litigation services, ignoring external litigation services or alternative ways of solving legal problems. Despite this debate between private bar and progressive law graduates, it became more evident that political parties made no real issue of legal aid.

Nevertheless, in 1975 Vanderpoorten, the former Minister of Justice, installed a special Commission named after the Attorney-General of the Supreme Court (*Hof van Cassatie*), honorable Justice Krings.³² This commission was the result of a bill prepared by the National Bar Association that was submitted to the Minister of Justice.³³ It took more than 5 years however before the Commission's report was discussed in parliament.³⁴ The bill became law on 9 April 1980³⁵ and promulgated the remuneration of trainees. For full advocates no budget was available. If they wanted to assist a client free of charge, then it really did mean free of charge. The act confirmed that Bureaus for Consultation and Advice were authorised to appoint advocates. A citizen's right to engage an advocate of his choice was denied. The government

forecast this first revision of the judicial code, namely two sections (see above) as the beginning of a profound and fundamental amendment to the legal aid act. It took over 3 years before the first trainees were remunerated and until 1998 before a more or less deeply profound revision of legal aid occurred. At the beginning of the 1980s the legal profession had already achieved one goal: namely the remuneration of trainees.

(c) Third period: from 1980 to 1990: the demise of 'legal activists'

In the 1980s the controversy between private practitioners and legal activists faded. The law shops were confronted with many problems; problems with respect to the content of their actions, organisational problems, shortage of staff and disagreement over corporate planning.³⁶ The need for legal aid was no longer a point of discussion, but the remedies could not be left to the private bars alone. How to respond to the private bars' interpretation of accessible need remained a subject of discussion. It was beyond dispute that legal advice and legal assistance should be easily accessible to everyone, but special attention should be paid to the poorest people. Some participants of the law shops felt unable to share the opinion that further law reform actions were necessary. Others warned their colleagues against reducing legal aid to charity and emphasised the multi-disciplinary approach as the surplus value of their organisations. Alongside law shops, other social welfare organisations began to provide legal advice, but often more specialised and in accordance with their organisational objectives. This legal advice included youth centres, adoption organisations and welfare organisations amongst others.

As mentioned previously, law students and progressive advocates lacked the capacity to coordinate their actions although some attempts were made to centralise these actions, such as the establishment of the Association for Legal Help (*Vereniging van Rechtshulp*), Flemish Law Centres Club (*Vlaams Overleg Wetswinkels*) and the National Federation of Law Centres (*Nationale Federatie van Wetswinkels*). It was often individual action which prompted such attempts. It seemed that the majority of law students and progressive law graduates did not support the idea of centralising efforts to improve legal aid or were not interested in a global strategy for an alternative legal aid system. They adhered largely to granting legal advice where and when it was requested. In addition many law shops, in spite of their criticism of private bars, estimated that only a small number of poor people appealed to their organisations. This discouraged many legal activists.

On 26 February 1982, the law shops and their activists held a conference in Antwerp on the organisation and functioning of legal aid. The following day, progressive advocates criticised the way in which private bars had protected their prerogatives at the expense of the weakest citizens seeking justice. In 1983, 'the *Vereniging voor Rechtshulp*' disappeared along with its journal. In that year a new review on legal aid was edited only once. Thereafter the law shops began to fade from the social and political forum.

Were the goals of the law shops achieved? This was certainly not the case. Their influence on private practitioners cannot be denied however. In some judicial districts social welfare organisations and private practitioners set up in partnerships.³⁷

The private bars were less closed to other forms of legal advice and dispute resolution.³⁸ More attention was paid to information and legal advice, although the hardcore of legal aid remained legal assistance and court representation. Private practitioners were applying themselves more to less traditional fields of law such as consumer law, social law, welfare law and rental law.³⁹ Geerts, one of the pioneers of the legal shops, concludes that legal aid did not become a 'social' issue and according to Huyse the lack of political commitment in the legal aid debate was obvious.⁴⁰ Criticism by the law shops brought about an adjustment in the organisation of the bureaus of consultation and advice and the remuneration of private practitioners. The law shops tried without success to include other themes in the legal aid debate such as multi-disciplinary cooperation.⁴¹

The 1980s did not only mark the demise of the legal shops, but also the establishment of a federal state. This meant that the legislative and executive powers were spread across federal, regional and local levels. At the federal level, the legislative power was placed in the hands of Parliament, consisting of the Chamber of Representatives and the Senate. The federal executive power was exercised by the monarch—whose role was restricted to several political powers such as the designation of a political leader when forming a new federal government—and the prime minister and his cabinet. At the regional level, a further distinction was made between communities and regions. The Flemish parliament was to deal with community and regional matters. The Walloons divided the regional and community power between a Walloon Regional Council and the Francophone Community Council. The German-speaking part of Belgium—an inheritance of the First World War—had its own Community Council. For the capital—consisting of Flemish and French speaking citizens—there was to be the Brussels Regional Council. Every council or parliament had an executive body. Judicial power was still to remain a federal authority. The Belgian Constitution was promulgated in 1830 after Belgian independence provided the legal basis for this form of government. Since 1970 the Constitution has been revised four times (1970, 1980, 1988 and 1993) in order to obtain the contemporary federal structure. What is the connection with legal aid in Belgium? The organisation of the judiciary is the responsibility of the federal authority, while 'personal matters' are the responsibility of the communities. Welfare organisations deal with matters that are related to individuals and are therefore considered a regional authority. It means that social welfare organisations providing legal advice and minor assistance fall under a different authority to legal aid supplied by the private bars which is a federal authority. The expansion of authorities also complicated further actions to improve or even change the Belgian legal aid system. Every authority is subsidising its own organisations. Different policies may prevent supply and demand for legal aid from interacting with each other.

After the demise of the law shops, poverty movements joined the legal aid debate at the end of the 1980s and 1990s. These movements included access to legal aid in general in their programmes, but this hardly affected the political agenda of the different authorities because no concrete proposal to alter legal aid in Belgium was given.⁴² Hubeau,⁴³ an academic and today Flanders' ombudsman, concludes that the actions undertaken by the law shops did not end in welfare state provision. The 1980s also

saw the beginning of cutbacks in welfare state provisions, yet legal aid has not even been considered as a welfare provision. Hubeau⁴⁴ correctly stated that many fields of law were set up or changed to the advantage of society's poor. An instrumental vision of the use of law—the idea that it would be sufficient to improve the lives of the poor by changing acts—dominated society's governors⁴⁵ yet, on the contrary, there existed no tools or organisations to enforce these acts. In the social welfare state legal aid was viewed from a liberal point of view with the establishment of universal criteria for equal provision.⁴⁶ This vision matched the traditional model of professionalism sustained by the Belgian legal profession.

(d) The 1990s: a fresh start for a new era?

The prevalence of the private bars could no longer be ignored, although the 1990s marked a new transformation within their jurisdiction. A crisis in the economy and a high rate of unemployment, even amongst young graduates, forced law graduates to enter the bar. It was better to gain experience than to be unemployed.⁴⁷ The low wages and the negligible remuneration for legal aid the trainees received for their performances, led to complaints and even protests. Since the end of the 1980s and the beginning of the 1990s there has been a growing interest in matters related to justice; some serious incidents such as the supermarket massacres of the 1980s carried out by the Belgian terrorist group known as the *Bende van Nijvel* and the inability to solve these crimes satisfactorily, has put justice firmly back on the political agenda. Some politicians were willing to address the problems mentioned previously and several bills were submitted to parliament. One of these members of parliament, the present Minister of Justice, Laurette Onckelinx, proposed a more radical amendment to the legal aid system. The private bars would be relieved of administration. A mixed board, comprising advocates, members of social welfare organisations and client representatives, would be installed and would become responsible for legal aid policy.⁴⁸

These bills never became law however. Only one of the sections of the judicial code was amended in 1995. From then on full advocates were entitled to participate in the legal aid system and were to be remunerated. The implementation of this revised act lasted until 1997.⁴⁹ The National Bar Association regarded these bills as an attempt to weaken their position and drew up a new and more elaborate version of a legal aid directive. A few members of parliament transformed this directive into a bill and submitted it to parliament in 1996.⁵⁰ At the same time other members of parliament reintroduced the Onckelinx bill.⁵¹ The different bills emphasised the contrasts in parliament between the protagonists of the welfare approach to legal aid and the traditional point of view of the legal profession. Despite the reintroduction of the Onckelinx bill, another bill, inspired by the National Bar Association, became the point of departure for parliamentary discussion.

During parliamentary discussion the testimony of the aforementioned former Vice-Dean of the National Bar Association, Van Malleghem, reflected the view of private practitioners. He stated that the Onckelinx bill could not be accepted because it was an infringement of an advocate's independence, of the free choice to

engage an advocate and of professional secrecy. In addition, the Onckelinx bill would suppress the role of the legal profession in terms of legal aid, would make legal aid more formal and would entail a heavy administration. An independent organisation would certainly not improve the administration of legal aid and would decrease the freedom of choice of citizens seeking justice. The opinion of the former Dean contrasts with his 1976 study where he appeared more in favour of a special administration of legal aid run by the state. It seemed as though the ideas of the law shops had totally disappeared. The bill introduced by the supporters of the private bars was also to become the cornerstone of the 1998 Legal Aid Act.

The discussion of legal aid has been heightened by the Dutroux affair (1996). The affair—in which Dutroux, a paedophile, abducted and murdered his victims—caused outrage in Belgium. Almost 300,000 people lined the streets of Brussels in protest at the plight of the victims, largely neglected during the handling of the case. These protests put the Minister of Justice under pressure to improve access to justice. As a consequence the 1998 Legal Aid Act replaced the former sections of the Judicial Code. The former Bureaus for Consultation and Advice were removed and two new bodies set up at district level: the Commission for Legal Aid and the Bureau for Legal Aid. The first body was not mentioned in the bill, but was inserted by the Minister of Justice who had been inspired by the French code on legal aid. The role of the Commission, which is composed of members of local bars, members of social welfare organisations, and members of organisations providing legal aid such as consumer organisations and tenant organisations, is to organise consultations of private practitioners giving legal advice, especially in the Houses of Justice. These Houses of Justice have been installed to make justice more accessible to the public. They contain a department for legal advice, staffed by advocates who are remunerated by the Commission. Although the Commission's task is to support coordination and collaboration between different legal aid centres and organisations, 90% of its budget is allocated to legal advice given by advocates.

The Bureau is an extension of the former Bureaus for Consultation and Advice but with two differences: first, citizens can appeal to the labour courts when a demand for legal aid is refused, and second, clear eligibility rules are implemented. Remuneration for advocates is still negligible although the budget has been increased since 1998.

Although legal aid has never been regarded as a hot political issue, it did cause the division of the National Bar Association in 2000. From that time on two separate bars came into existence as promulgated by law: the Flemish Bar (*Orde van Vlaamse Balies*) and its Walloon counterpart (*Ordre des barreaux francophone et germanophone*). The Flemish Bars accused the Walloon Bars of taking too much advantage of the accredited legal aid budget. Although the Walloons form a third of the Belgian population, they consume about half of the total legal aid budget. The issue of the legal aid budget and the division of the National Bar Association is a sensitive issue in Belgian politics.⁵² Nowadays the two bars have different opinions about a policy on legal aid. The Walloon Bar prefers a system of public funding and public organisation of legal aid. It supports open-ended funding and refers to the organisation of the social security system in Belgium. The Flemish Bar, on the other hand, defends the

present legal aid system and likes to emphasise the independence of the advocacy, rejecting any political influence.

The present legal aid system is only eligible to the lowest income classes and not middle to low income groups. Recently the Minister of Justice, Laurette Onckelinx, suggested introducing general legal expenses insurance for those people who are not eligible to make use of the present legal aid scheme.⁵³ This proposal did not seem realistic, however, and Onckelinx thus decided to extend the eligibility criteria and increase the allocated budget. This indicates that she is in favour of a status quo in the discussion on legal aid and that new developments in legal aid should no longer be expected. To date the administration of justice does not follow a strict policy line as regards legal aid matters. The Minister of Justice has decided to extend the eligibility criteria without knowing what effect this will have on demand and supply. She increased the budget allocated for advocates providing legal aid without any notion as to whether this budget will prove sufficient. The same can be said of the welfare organisations providing legal advice which are subsidised by the regions. There exists no general data regarding the budget spent on these organisations nor is there general data available about the numbers of people that have consulted these organisations. Some organisations publish annual reports of their activities, but legal advice is usually only a small part of the social tasks they have to deal with. The data is too general and cannot be used for comparisons.

Conclusion

What can be learnt from the history of legal aid in Belgium? The 1998 Legal Aid Act proved nothing more than an elaborated *judicare* scheme, tailored to the legal profession. The welfare approach stood little chance of making an impact, certainly not after the demise of the law shops. Whether recent developments are to the advantage of the legal profession, only the future will tell. Some conclusions may nevertheless be drawn. Firstly, the traditional model of professionalism has dominated the history of legal aid in Belgium right to the present day. Private practitioners are—in common with other fields of jurisdiction—attempting to claim and expand legal aid provisions. The underlying motive is not accessible provision, but the protection of their own jurisdiction, especially the monopoly of representation. This monopoly still exists. Advice and minor assistance for day-to-day legal problems do not form the core business of the legal profession. The *judicare* system does not cater to this kind of legal problem. The system is thereby only eligible to the lowest income classes and not to middle to low income groups. Secondly the successors of the law shops lacked co-ordination and had no specific line of policy. To date no significant data are available on their activities. Thirdly the policy makers who made statements contrary to or differing from the mainstream, have withdrawn or keep silent even if they are in a position to speak and act. Van Malleghem, who in 1976 referred to the systems employed in the Netherlands and England as possible alternatives to the legal aid system in Belgium, claimed his study useless during the parliamentary hearing of the new legal aid bill. Laurette Onckelinx submitted a bill in favour of the welfare approach in 1991. When she later became Minister of Justice she was

reluctant to revive her earlier proposals. She has instead corroborated Belgium's present legal aid system by expanding the eligibility criteria—albeit without studying the effects—and has tried to make legal aid provided by advocates accessible to a larger group of people by proposing legal expenses insurance.

It is clear that a transparent legal aid policy in Belgium does not exist. Indeed, it has never existed. Legal aid in Belgium is almost exclusively connected with the tradition of the legal profession.

Further reading

S. Gibens, *Belgium*, Harvard Law School ILAG Conference 2003, 11 pp., available at: www.ilagnet.org/conference/general2003/papers/belgium.pdf.

Notes

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- [2] J. Stevens, *Regels en gebruiken van de advocatuur te Antwerpen* (Antwerpen, Kluwer rechtswetenschappen, 1997), pp. 469–470. He also stated that legal advice should be part of the monopoly, which is not the case; see J. Stuyck & K. Geens, Vrij verkeer van advocaten in de E.E.G. (1993) 111 *S.E.W.* 47–56.
- [3] M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley, CA, University of California Press, 1977), 309 pp.; R. Abel, In turmoil, the legal profession in turmoil (1989) 52 *Modern Law Review* 285–325; A. Abbott, *The Systems of Professions* (Chicago, IL The University of Chicago Press, 1988), 435 pp.
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- [10] F. Regan, Why do legal aid services vary between societies, in: F. Regan, A. Paterson, T. Goriely & D. Fleming (Eds) *The Transformation of Legal Aid. Comparative and Historical Studies* (Oxford, Oxford University Press, 1999), pp. 190–193.
- [11] L. Huyse & A. Verdoodt, Dertig jaar Justitiebeleid. Kroniek van een aangekondigde crisis (1999) *Panopticon* 3–19. According to the political editor of a leading Belgian newspaper (*De Standaard*) Guy Tegenbosch, an implicit pact existed between politicians and the judiciary not to interfere in each other's business. At the end of the 1980s and 1990s politicians blew up this pact. The judiciary replied by starting investigations toward some politicians. There is still an inconvenient relationship between both powers; see G. Tegenbosch, Oorlog tussen gerecht en politiek (1999) *Panopticon* 86–102.
- [12] B. Hubeau & S. Parmentier, Sociale rechtshulp: algemene ontwikkelingen, in *Welzijnsgids*, II.A.1.7.1–21.

- [13] For an elaborated overview of the nineteenth century see D. Dobbstein & J. Pinella, *L'accès aux droits et à la justice. De la citoyenneté à l'accès à la justice, une proposition réversible?* (Brussel, La Chartre, 1999), 151 e.v.
- [14] R. Victor, Crisis aan de balie (1939) *Rechtskundig Weekblad* 1517–1614.
- [15] Regan, *op. cit.*, 191.
- [16] H. Lenaerts, *Sociaal procesrecht* (Gent, Story-Scientia, 1968), pp. 120–124.
- [17] S. Gibens, Rechtshulp in België: eindelijk uit de startblokken, in: K. Van Aeken & F. Van Loon (Eds) *De toekomst van de Rechtsociologie in het justitieel beleid* (Antwerpen, FWO-UFSIA, 2002), p. 205.
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- [20] See, for example, K. Raes, Rechtshulp: de aanhouder wint (1980) *Panopticon* 147–152.
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- [25] R. Van den Heuvel, Recht voor Allen. Preadviezen voor het Congres van Mechelen 1972. Verbond van Belgische Advocaten (1972) *Rechtskundig Weekblad* 385–398.
- [26] *De advocatuur meer stand dan bijstand* (Nieuwjaar, Advocatencollectieven en wetswinkels van België, 1976), 100 pp. According to Geerts, it was a bill prepared by the Brussels private bar and handled in the Commission of Monopoly of the National Association of Advocates. Geerts takes the view that the withdrawal of the bill is due to the pressure of law centres and their sympathisers: Geerts (1997b), *op. cit.*, 423. Political parties showed less interest in legal aid and this is probably the declaration of the withdrawal of Pierson's Bill (see Gibens, 2002, *op. cit.*, 206–207 at footnote 228).
- [27] As M. Killian has shown in his article, the legal advice monopoly of advocates in Germany dates from the pre-war decisions of the Nazi regime to avoid the Jewish lawyers who were obliged to leave the private bars to advise their clients. See M. Killian, Legal aid and access to justice in Germany, in: D. Fleming & A. Paterson (Eds) *Melbourn ILAG Conference Papers* (2001), p. 17.
- [28] Huyse & Sabbe, *op. cit.*, 71.
- [29] P. Van Mallegheem, Rechtshulp voor on- en mindervermogenenden, in: *De toevloed van jonge advocaten. Nieuwe problemen, nieuwe mogelijkheden* (Kongres Gent, Verbond van Belgische Advocaten, 1976), 14 pp.
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- [31] Rechtshulp in België. Verslag van het rechtshulpkongres Leuven 12–13 maart 1976 (1976) *Jura Falconis* 419–531.
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- [39] J. Breda, De toegankelijkheid van de rechtsbedeling, in: *Armoede en estaansonzekerheid* (Koning Boudewijnstichting, 5, 1987), p. 55.
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- [41] Geerts (1997b), *op. cit.*, 413–428.
- [42] Rapport Algemeen verslag over de armoede (1995) *Koning Boudewijnstichting* 432 pp.
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- [44] Hubeau (1992), *op. cit.*, 28–30; J. Laenens, Toegang tot het (ge)recht-rechtshulp in een stroomversnelling (1992) *DCCR* 582–588.
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- [46] R. Moorhead, Legal aid in the eye of a storm: rationing, contracting and a new institutionalism (1998) *Journal of Law and Society* 365–387.
- [47] Huyse & Sabbe, *op. cit.*, 29.
- [48] Wetsvoorstel betreffende de rechtsbijstand (mevr. Onckelinx en dhr. Mayeur), *Parl. St.*, Kamer, gewone zitting, 1990–91, 1588/1, 1–17; wetsvoorstel tot wijziging van het Gerechtelijk Wetboek in verband met de rechtsbijstand aan mindervermogenen (Mevr. Corbissier-Hagon, Dhr. Beaufays, dhr. Lebrun), *Parl. St.*, Kamer, gewone zitting, 1990–91, 1599/1, 1–6.
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- [50] Wetsvoorstel betreffende het kosteloos of gedeeltelijk kosteloos optreden van advocaten (Dhr. J. J. Viseur, J. Van Deurzen, P. Beaufays en mevr. N. de T'Serclaes), *Parl. St.*, Kamer, 1995–96, nr.549/1. M.B. Bertrand, De l'assistance judiciaire à l' aide juridique, in: *Liber Amicorum Jozef Van den Heuvel* (Antwerpen, Kluwer, 1999), pp. 21–36.
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