

Rule of Law report 2024

Contribution of the Netherlands Bar

General remarks

According to the Rule of Law Index of the World Justice Project, the Netherlands ranked 7th out of 31 countries in the European Union, European Free Trade Association, and North America in 2023. Compared to 2022, this is a drop of two places in rank. A substantial drop is shown in the areas of order and safety.¹

A rule of law balance between professional cooperation of the state powers and sufficient distance from each other, as well as an improvement of access to and accessibility of the state powers - and in particular access to justice - align with the statutory task of the Netherlands Bar, which involves promoting, in the interest of a proper administration of justice, a proper practice of the legal profession (article 10a, paragraph 2 of the Act on Advocates). The Netherlands Bar considers it essential that future-proof measures are taken to strengthen the rule of law in the Netherlands, including: i) implementing a politically neutral budget and necessary recalibration and investments in the compensation of the system of funded legal aid; ii) carefully restoring injustice in the childcare allowance affair and the damage as result of the gas extraction in Groningen, using overarching legislation for legal redress for unlawful government action against large groups of citizens; and iii) continuing to respond to undermining activities in a rule of law manner.

Confidentiality

Confidentiality of the contact between lawyer and client is one of the legally entrenched core values of the lawyer. The Netherlands Bar stresses the importance of confidentiality between lawyers and clients, which is necessary for proper legal assistance and good administration of justice. The lawyer's confidentiality obligation and his legal professional privilege should be handled prudently, and ultimately determined by the judge in concrete cases while taking into account the importance of confidentiality in the context of the good administration of justice.

The confidentiality of the contact between lawyer and client has been under pressure for several years now and in many ways. An example of this is the working method used by the Public Prosecution Service when it comes across potentially confidential information during an investigation. The screening, assessment and destruction of that information takes place in a manner that does not do sufficient justice to the principle of confidentiality. In many cases there is no judicial review. In September 2023 preliminary questions were submitted to the Supreme Court regarding the handling of confidential information and the distinction in roles between the judiciary and the prosecution in this regard. The Netherlands Bar gave its view on the way the preliminary questions should be answered. According to the Advocate General of the Supreme Court, the Supreme Court must determine that, due to insufficient guarantees in legislation with regard to legal professional privilege, the supervisory judge has a role to play in more cases than prescribed by law. Another development in which the confidentiality of contact between lawyer and client has been increasingly under pressure is the approach to (continued) criminal conduct in detention (as put forward in the proposal to amend the Penitentiary Principles Act). There is rightly a lot of attention paid to this problem. However, restricting the free and confidential communication between detainees and their lawyers – by visual supervision during the visit of a lawyer to high-security prisons and restricting the number of lawyers for detainees who stay in high-security facilities to two – is not the right route to address this problem. The responses to activities that

¹ [WJP Rule of Law Index | Netherlands Insights \(worldjusticeproject.org\)](https://worldjusticeproject.org/en/insights/netherlands-2023-rule-of-law-index)

undermine the rule of law must remain the rule of law. The Prevention of Money Laundering Act² has also been putting pressure on lawyers' professional secrecy. The proposed legislation includes an obligation to exchange data between lawyers (and law firms) serving the same client in the event of certain indications of a high risk of money laundering or terrorist financing.

Lawyers from whom information is requested on the basis of the obligation to inquire are obliged to provide information to the lawyer who requests it, provided that risks have given rise to taking measures, including refusing or terminating the provision of services. The same may apply to proposals regarding the renewal of sanctions legislation, where confidentiality may also come under pressure. In the coming years, efforts will also have to be made to tackle subversive activities. The Netherlands Bar believes that a new government must at the same time guard against further deterioration of the lawyer's duty of professional secrecy. That legal professional privilege is respected, even (or better: especially) when the pressure is high, is not an interest of the legal profession alone, but of the rule of law as a whole.

Resilience/protection of lawyers

In the context of the proper administration of justice, lawyers must be able to do their work in a safe environment and without fear. In recent years, there have been several situations in which the safety of lawyers has been seriously compromised. The report "Surveillance and protection. Lessons from three security situations"³ that was published by the Dutch Safety Board in March 2023, showed that the government – given the position of the lawyer within the rule of law – has a special responsibility when it comes to protecting the lawyer. If a lawyer cannot take a client for reasons of security, or has to give up the client's defence, this does not only affect the specific case but also the interests of litigants and the rule of law in a broader sense.

- Protection against criminal subversion task force

Together with the Ministry of Justice and Security and the National Coordinator for Counterterrorism and Security (NCTV), the Netherlands Bar is enhancing the security and resilience of the legal profession. The Netherlands Bar has developed an approach that focuses on increasing resilience and awareness of potential risks. The Netherlands Bar founded the 'protection against criminal subversion task force' at the end of 2021. With this task force, the Netherlands Bar aims to strengthen the rule of law. Also, the Netherlands Bar wants to increase the awareness of the possible vulnerability of lawyers, just as their resilience and safety. The following initiatives are part of the task force, were promoted in 2023 and will be continued in 2024:

i) research into the safety of lawyers; The Netherlands Bar has commissioned a survey in 2022 on aggression, threats and harassment among lawyers in the Netherlands. The insights obtained are confronting: 50% of all lawyers (more than 18.000) have faced aggression, threatening behaviour or harassment at least once in the past year. Four in ten experienced multiple incidents. 37% rated the incident they experienced as serious or very serious. This survey will be repeated early in 2024 to see the developments.

ii) the emergency telephone of the Netherlands Bar; Lawyers who want to report a threat or are feeling threatened can call the NOvA emergency telephone 7 days a week, 24 hours a day. In response to a call, the Netherlands Bar can immediately alarm the NCTV to request them to take measures to mitigate the threat.

²This Act still needs to be discussed.

³ [Surveillance and protection. Lessons from three security situations - Onderzoeksraad](#)

- iii) the confidant for lawyers. This person, who is a lawyer as well, can be consulted in absolute confidentiality and separate from the supervisor. With this confidant, lawyers could exchange views on threats and matters that deal with (attempts to) criminal subversion.
- iv) a free safety scan through which lawyers can have their own law firm or private house checked for vulnerabilities; A specialised and certified company investigates physical vulnerabilities such as locks, windows, access control and cameras in the building. If needed, the lawyer will be advised about the security measures to take.
- v) trainings to increase resilience; In 2023 the Netherlands Bar offered 600 spots free of charge. Hundreds of lawyers in the Netherlands have already participated in a resilience training. At the beginning of 2023, the Netherlands Bar started to offer the training to starting lawyers and trainee lawyers so that they could learn how to deal with threats and which preventive measures could be taken.
- vi) digital resilience to increase the awareness of the risks of internet communication; The Netherlands Bar listed tips for confidential internet communication.
- vii) blocking the home address in the trade register; since 1 January 2023, the Chamber of Commerce in the Netherlands blocks the home address in the trade register of owners from sole proprietors⁴, partners of general partnerships⁵, limited partnerships⁶ and professional partnerships⁷. The blocked home addresses are only visible for government organisations like the Tax and Customs Administration or for authorised professional groups such as lawyers and bailiffs. As of 15 December 2022, blocking is also possible without demonstrable threat towards the lawyer. The Netherlands Bar and the Chamber of Commerce in the Netherlands have concluded a covenant that provides for blocking based on the mere demonstrability of being a lawyer. A very similar covenant will be concluded early 2024 between the Netherlands Bar and The Netherlands' Cadastre, Land Registry and Mapping Agency.
- viii) findability of information in public registers; The Netherlands Bar intends to make a tool available in 2024 to lawyers to check in which public registers their (private) address details appear and to request the relevant register(s) to protect the lawyer's data.

- Regulation on collaborators of justice

From 1 October 2022 to 16 October 2023, Leiden University conducted a research commissioned by the Netherlands Bar concerning the risks for lawyers that are accompanied by the expansion of the regulation on collaborators of justice⁸. Its conclusion is that the impact of the regulation on the safety and the practice of the (legal) profession could be significant, now and in future security situations. Due to the murders of Reduan B., Derk Wiersum and Peter R. de Vries, the security aspect is strongly felt by lawyers and other people who have a role in the trial with a collaborator of justice. Even after these violent crimes, lawyers who defend collaborators of justice and their immediate environment were confronted with a persistently threatening situation, resulting in drastic security measures. This security impact also means that in 2023, few lawyers appeared to be willing to defend collaborators of justice. Lawyers in general also seem more hesitant to take part in major organised crime cases such as Marengo, even when they are not defending the collaborator of justice. The general council of the Netherlands Bar embraces the recommendation of the researchers that safety should be a guiding principle when a collaborator of justice is used. In line with this, the regulation on collaborators of justice should not be expanded as long as the safety of all people concerned including lawyers and their relatives is not yet in order. The general

⁴ 'Eenmanszaak' in Dutch

⁵ 'Vennoten van VOF's' in Dutch

⁶ 'Vennoten van CV's' in Dutch

⁷ 'Maten van maatschappen' in Dutch

⁸ 'Kroongetuigenregeling' in Dutch

council of the Netherlands Bar underlines the importance of adequate and high-quality legal aid. Moreover, it is up to the individual lawyer to consider whether or not to defend a collaborator of justice.

Supervision of the legal profession

The general council of the Netherlands Bar supports the plan of the Minister for Legal Protection in which supervision is exercised both at national level and within the profession, the Netherlands Bar. Supervision within the profession is necessary for the independent position of lawyers and the litigants. The national supervisor (OTA⁹) will be responsible for national supervision especially on AML, sanction regulation etc. National supervision leads to the pooling of knowledge and experience and to harmonisation of supervision. The local embedding should be secured by (specialised) supervisors. A good exchange of information between the local bar president and supervisors is required. Dialogues about this are taking place with the local bar presidents. Members of the OTA shall not be a member of other bodies within the Netherlands Bar and the local bars. They will also be exempted from lawyer's activities. In appointing members of the OTA, independence is strengthened by using an outward-looking approach. Besides, the OTA appoints its own personnel and personnel is exclusively accountable to the OTA. Financial independence is ensured, as the OTA has its own autonomous budget, which it determines in consultation with the general council and with the 'view from outside'. The general council will consult the (outgoing) Minister to further discuss this. With the introduction of the OTA, there will be no longer be any role for the supervisory board. The general council will address the new supervision model to the members of the bar. On 29 June 2023, the Minister announced his position on supervision, as described above. The general council discusses this position with its stakeholders, before it gives its opinion on this matter. The plan of the (outgoing) Minister for Legal Protection will be discussed in the (new) Dutch parliament, most likely in the first quarter of 2024 in the (new) Dutch parliament.

Rule of law in Dutch parliamentary election programs

In September 2023, the Netherlands Bar established a committee to assess the adherence to the rule of law for the Dutch parliamentary elections on 22 November 2023 in the parliamentary election programs. The rule of law is an important topic for the Netherlands Bar. After all, it is the lawyer who plays a crucial role in the legal protection of the rights and freedoms of citizens in a democratic society. The committee considered it important that voters can be informed about the views of political parties that can strengthen the rule of law or pose a risk to it. Although the committee gave positive evaluations for most of the plans of the political parties, proposals that do not meet the minimum standards of the rule of law were found in ten out of the eighteen programs examined. The analysis of the election programs shows a mixed picture. The committee noted that many parties reflect on the risks of a business-like and anonymous government, in light of the childcare allowance affair and the earthquake damage due to gas extraction in the province of Groningen. This leads to a lot of attention for the individual, customisation, and, for instance, the desire for a human face of the government in the programs. The committee sees citizen participation as a trend. Numerous proposals were made to strengthen the citizen's involvement in legislation and administration. However, according to the committee these proposals were insufficiently elaborated in the election programs. Yet, the committee is positive about the attention many parties give to the Constitution, but it raises various questions about how testing should take place. The committee's picture became more worrying when it comes to guaranteeing fundamental rights and freedoms for all citizens. This also applies to the certainty of a fair trial and effective access to justice for everyone. These are often proposals in the field of major social and political

⁹ Onafhankelijke Toezichthouder Advocatuur

issues such as immigration and (organised) crime. It is these issues that showed that the rule of law, also internationally, comes under pressure first. In these real challenges faced by politics, solutions must be chosen that do not undermine the rule of law itself. Proposals that want to limit access to justice for certain groups do violence to the rule of law itself. Still, the analysis of the committee of most of the examined political party election programs' plans is positive, no matter how diverse and sometimes rudimentary those proposals are.

Legal aid

In 2023 the Netherlands Bar continued to work hard for litigants and their lawyers within the system of government funded legal aid. Legal aid and the judiciary depend on the departmental budget of the Ministry of Justice and Security. This means that there is an annual political discussion on the budgets for the judiciary and funded legal aid. According to the Netherlands Bar, such political discussions can lead to an increased risk of violations of access to justice. This is an undesirable situation. The Netherlands Bar is seriously concerned about the future supply of legal aid lawyers if no long-term policy is developed to reverse the downward trend. According to the Netherlands Bar, legal aid for specific groups of litigants, such as the citizens who have fallen victim to the childcare allowance affair and the habitants of the earthquake zone in Groningen, must remain priority of the Dutch government.

After fees for legal aid lawyers were raised to more realistic levels in 2021, this positive change was virtually offset by high inflation rates in 2022. The Netherlands Bar has therefore proposed to the (outgoing) Minister for Legal Protection and several political parties that those fees should be adjusted to reflect actual inflation rates. The Netherlands Bar also requested a permanent adjustment of the lagging travel expense allowance for legal aid lawyers.

In December 2023 legal aid lawyers will receive a one-time compensation of 4.62 percent from the Legal Aid Board. This results from the motion of Mr. Sneller (a Dutch social liberal politician), urging the government to make an emergency investment in funded legal aid. This one-time measure aims to partially offset the cost increases for legal aid providers due to the high inflation of recent years. The amount to be received is determined based on the number of granted legal aid assignments, emergency duty reports, and additional hours allocated between 1 October 2022 and 1 October 2023. This calculation considers a rate of 4.62 percent, which represents the difference between the indexing rates as of 1 January 2023 (0.67%) and 1 January 2024 (5.29%).

The Netherlands Bar regards this one-time compensation as a first necessary step and is cautiously positive about the supplementary remuneration. However, the compensation is not enough to relieve the pressure on the government funded legal aid system and to guarantee legal aid for everyone. In the near future, the financing of the legal aid system must therefore be fundamentally improved. A politically neutral budget for the system of funded legal aid, which is separate from the legislative and executive branches, is an important precondition for this.

Another motion of Mr. Sneller was adopted in October 2023 which calls on the government to make an emergency investment. According to the Netherlands Bar it is important that the compensation moves with the ever-changing work activities. This avoids the need to negotiate an emergency investment every year.

- Access to information

The Netherlands Bar notes that the government often approaches information provision with regard to people's rights and obligations with the aim of preventing procedures. This is a cause for concern. Information provision on legal rights should aim at ensuring that litigants are aware of their rights and can exercise them effectively. It is crucial that this information is provided by independent authorities and that litigants are not forced to settle for ready-made solutions or

information packages offered by the government, which often serves as the potential opposing party. In short, promoting the right to information is undoubtedly good, but it should not replace the right to (independent) legal advice and legal assistance.

- Improving low-threshold access to justice

The Netherlands Bar recognises the importance of improving low-threshold access to justice, one of the objectives of the renewal program concerning the legal aid system of the Ministry of Justice and Security. The experience shows that litigants do not always know how to find their way to legal assistance. Good cooperation between legal aid providers reduces barriers. First-line legal aid, such as provided by the Legal Service Counter, also makes a necessary contribution to finding the best solution for litigants. Where necessary, they advise or refer to other entities or the lawyer. In recent years, these entities have been overloaded with tasks and the necessary funding is lacking. However, for a sustainable system of funded legal aid, entities such as the Legal Service Counter must be able to continue to do their work well. Finally, this also applies to cooperation with the so-called 'second line', such as the legal profession. Initiatives to strengthen this cooperation show that investing in closer cooperation between the first and second line leads to better service to litigants and to finding a speedier solution to their problem. This cooperation must also be continued in the future.

- Preventing conflicts of interest

From the perspective of procedural justice and trust in the government as a counterparty, it is important that the separation of powers is explicitly enforced. In 60% of cases in which funded legal aid is provided, the government is the opposing party. In 60% of cases, therefore, the government has direct influence on how the case is initiated and whether a solution (outside of court) is possible. That same government is also responsible for financing the lawyers who assist citizens in funded legal aid cases. In other words, the government organises its own counterforce, but at the same time has its own procedural interest. The appearance of a conflict of interest is lurking. This also applies to the role the government takes in restoring justice in the childcare allowance affair and the damage as result of the gas extraction in Groningen. In both cases, the ministries responsible for violating the rule of law (respectively, the Ministry of Finance and the Ministry of Economic Affairs and Climate), are also responsible for shaping legal redress for the affected people. Furthermore, these restoration operations are carried out under great pressure on an ad hoc basis. No careful standard procedure has been developed, nor is there overarching legislation for legal redress in cases of unlawful government action against large groups of citizens.

- Alternative dispute resolution

The Netherlands Bar agrees that it is good if disputes can be resolved through parties reaching agreement via mediation. However, the Netherlands Bar makes a reservation for the promotion of mediation and other forms of alternative dispute resolution (ADR). These options can be an excellent solution for certain litigants in addition to the route to the court, but from a rule of law perspective, they can never replace it. The way to the court should also not be obscured or discouraged by alternative (digital) dispute resolution, for example by setting up ADR as a mandatory pre-portal, or by providing procedural or economic obstacles to the court process that de facto force ADR. It should not be an end in itself. Furthermore, not every case is suitable for mediation. For this reason, the Netherlands Bar emphasises that the conditions of mediation must be taken into account, in particular voluntariness and autonomy.

Digitisation of justice – update 2023

- Civil and administrative law

In 2023 the Council for the Judiciary has again digitised a number of case flows, see below overview. In the coming years, the Council for the Judiciary will realise simple digital access for all litigants and their defending counsels in civil and administrative law. This project is called Digital Access. Digital litigation is still voluntary, but will be required for lawyers at any time. There is currently a request before the legislator to make the case flow of seizure petitions mandatory.

- Criminal cases

There were no significant developments in 2023 with regard to digital litigation in criminal cases. The Dutch Code of Criminal Procedure is being modernised. One of its objectives is a “technology independent” organisation of criminal procedural law. This will take several years. Lawyers do already receive digital files in almost all criminal cases in first instance and also more and more frequently in appeal cases.

- Online hearings

Digital litigation does not mean that the hearing could also take place online. Due to the absence of legislation, the hearing could only take place online with the permission of the parties at this moment. The Council for the Judiciary is developing a more tailored application to organise online hearings. Legislation for this is under preparation.

- System link

Next to the web portal “Mijn Rechtspraak”, the Council for the Judiciary also developed a system link for lawyers. With this link, which is not free of charge, it is easier to litigate digitally as all relevant documents become directly available in the own working environment of lawyers.

- Secure mailing

Via secure mailing it is possible to send documents to courts using an own selected supplier of secure mailing, but it is also possible to start secure communication by mail via the website of the Council for the Judiciary without subscription and free of charge.

- Council of State

Lawyers can submit documents in immigration cases to the Council of State via the web portal “Mijn Zaak”. In some cases it is also possible to deliver procedural documents via secure mailing. The Council of State is transitioning to a completely new case system for both of its tasks: administrative justice and legislative advice.

- Supreme Court

Lawyers and the Supreme Court exchange digital messages and documents in the web portal “Mijn Zaak Hoge Raad”. This is mandatory for lawyers dealing with civil and criminal cases. Digital litigation is not yet mandatory with regard to tax and administrative cases. This also applies to submitting written comments in criminal cases, tax cases, administrative and civil law cases in the preliminary ruling procedure at the Supreme Court.

- Development digitisation Council for the Judiciary 2023 (project Digital Access)

Civil and administrative law:

- Since 11 April 2022 lawyers can submit a joint application of divorce digitally at the Midden-Nederland district court (location Utrecht) and the Overijssel district court (location Almelo).

Since 15 May 2023, this has also been possible at the Amsterdam district court and since 6 November 2023 at the district courts of Rotterdam, Limburg and Midden-Nederland (location Lelystad).

- Since 27 November 2023 digital proceedings are possible at the Gelderland district court in civil juvenile law (youth protection cases) and in custody and access cases.
- Since 16 October 2023 lawyers can litigate digitally at the Rotterdam district court for interim relief in commercial and family cases. The pilot was successful and will be implemented nationwide.
- Since 4 December 2023, digital litigation is possible in appeal cases for all tax cases. This applies to citizens and to lawyers and other professionals.