

Legal access for minors?

M.J. Steketee, A.M. Overgaag, K.D. Lünemann

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Summary

The aim of this research was to look at the question whether current possibilities for legal access for minors in the Netherlands are adequate, also considering international treaties. The following questions formed the basis of this research:

- What is the state of affairs concerning formal and informal legal access in the Netherlands?
- To what extent and under what circumstances has Article 1:250 CC been used in previous years?
- How do professionals and minors assess the functioning of the existing possibilities for minors to have access to the law? What bottlenecks are signalled, and what arguments plead for either maintenance or alteration of the existing situation?
- Is there an obligation considering international treaties? What regulations can be found in other countries?
- To what recommendations do the answers to these questions lead, and what would a legal facility for minors look like in our country?

The research is divided into four parts. Each part has its own research method and contributes to the formation of an answer to the questions stated above.

Formal and informal legal access in the Netherlands: The state of affairs.

Minors in the Netherlands have no generally applying independent legal access, except into administrative law. According to Dutch family law, parents are the legal representatives of their children (Art. 1:245 CC). A similar arrangement applies to minors who are placed under supervision (Art. 1:337 p. 1 CC). If the interests of both parents or one of the parents clash with the interests of the minor, the cantonal judge – if he considers it to be in the interest of the minor in question – can appoint a guardian ad litem (**1**) to represent the minor (Art. 1:250 CC). For a number of specific subjects Dutch law provides formal legal access for minors of twelve years of age onwards. This is for instance the case for minors who have been placed under supervision. They have legal access in case they want to submit a request for abolition of their placement under supervision (Art. 1:256 p. 4 CC), for abolition of the written allocation (Art. 1:260 p. 1 CC) or for termination of a court custody (Art. 1:263 p. 2 CC). Minors cannot request child care measurements themselves, nor can they lodge an appeal against an authorization for court custody that is the result of their placement under supervision.

Furthermore, a minor of twelve years of age onwards has the possibility of informing the court that he wants the arrangements concerning parental access to be determined, altered or terminated (Art. 1:377g and 1:251a CC). This regulation is considered to be the informal legal access for minors. The regulation is informal because the assignment of a solicitor is not necessary, and the minor cannot lay any claim on the judgement. Furthermore, the minor cannot appeal to a higher court.

From the studied case law it becomes apparent that in urgent cases the minor can be declared admissible as a legal party. In most cases, the presiding judge of a court of law does not find it problematic if one of the parties is a minor. Considerations on which a case is heard, despite one of the parties being a minor, are among others: the legal representative resides in another country, the minor acts upon judgement of discernment, the case is so urgent that the designation of a guardian ad litem cannot be awaited, or the minor is almost a major. In the case of immigration laws, minors who start proceedings against the state in order to evade possible deportation are generally declared admissible.

To what extent and under what circumstances has Article 1:250 been used in previous years?

When a minor's interests clash with the interests of his legal representatives in questions concerning upbringing, care and property, the cantonal court can designate a guardian ad litem in the interest of the child (Art. 1:250 CC). However, it turns out that this possibility is hardly ever used. File studies in the four districts show that in the years 1999, 2000 and 2001 an appeal for the designation of a guardian ad litem was made only twenty times. Half of these cases dealt with the division of an inheritance, where the minor was one of the heirs. Other cases concerned appeals to a higher court against an authorization for court custody in a closed setting, conflicts about

the place of residence of a minor, and appeals for alteration of authority. Often a lawyer is designated as the guardian ad litem, which implies that no change occurs compared to the situation where a lawyer would have been assigned to the case. In cases that concern the administration and execution of an inheritance involving a minor, a notary is often designated as guardian ad litem.

The reason why guardians ad litem are hardly ever assigned in legal practice is partly due to the fact that the regulation is reasonably unknown. Furthermore, a guardian ad litem can be assigned only when proceedings have already started. At that point, a solicitor is usually already involved in the case. Appointing a guardian ad litem would therefore be unnecessary. Finally, experts find it time-consuming that in the current procedure only a cantonal judge is entitled to assign a guardian ad litem.

What is the verdict of experts and minors?

All experts who were interviewed for this study are of the opinion that current possibilities for minors to have access to the law are insufficient. It is desirable and advisable for minors to have independent legal access. The young people who were interviewed for this study also plead for independent legal access. Even though arguments differ, nobody, so neither the respondents, nor the participants of the expert meeting, plead for maintenance of the current legal situation. There are various arguments against the current situation.

One important argument is derived from the UN Convention of the Rights of the Child (CRC). Since material rights can be assigned to children, they should also have the possibility to put these rights into practice. In case of violation of these rights, they should be able to take legal action. This point will be discussed more elaborately later on.

Furthermore, having autonomous legal access is in keeping with the independent and mature position of young people in today's society. Minors are capable of performing legal acts insofar this is common in society. However, this legal capacity does not go hand in hand with the actual possibility and authority to take legal action. The legal capacity of minors is an argument in favour of giving minors legal access.

Legal access is particularly important in case of a clash of interests between the legal representatives and the minor. In case the situation concerns the upbringing, care or property of the minor, the cantonal judge can assign a guardian ad litem. In practice, it turns out that this arrangement is hardly ever used. The reason for this is not that the minor has no legal questions he would like to put to a court, but that the regulation does not seem to offer a solution to the problematic situation. What happens is that minors, assisted by a lawyer, turn to a court to request (summary) proceedings. The court declares the minor admissible if two conditions are fulfilled. First of all, the requested legal provision must be of immediate and urgent interest. Secondly, the minor must have at his disposal such an amount of insight into the interests involved in the lawsuit, that he is considered to be able to independently evaluate the consequences of the proceedings.

Particularly in case of an appeal to a higher court against the authorization of court custody to a closed institution, it is often considered unnecessary to assign a guardian ad litem. After all, in these cases the minor already has a solicitor when he enters the lawsuit. The assignment of a guardian ad litem is of no extra value. Taking into consideration that the guardian ad litem is in most cases the solicitor in question or a colleague, it would be a superfluous step to take. Independent legal access for minors would be in better concordance with this legal practice.

Another argument pleading in favour of independent legal access for minors is that current legislation shows gaps, and is complex and obscure. Take for example the fact that different rules and regulations apply to placement under supervision, court custody cases, arrangements concerning parental access and medical treatment.

The respondents do not share the fear that the assignment of separate legal access for minors leads to minors turning family affairs into lawsuits and to the escalation of family relations. After all, when somebody starts legal proceedings, the situation has already escalated.

It is also feared that legal access for minors would put too much strain on the courts. Again, respondents expect that this will turn out to be less than anticipated. After all, hardly any use is made of the possibility to have a guardian ad litem and informal legal access now. This will most likely not increase if minors have a separate entrance to the law. Even if elaborate information and education on the subject is given, no significant increase in the use of formal legal access is expected.

Is there an obligation considering international treaties?

An important argument pleading in favour of formal legal access for minors is derived from international treaties. The UN Convention of the Rights of the Child (CRC) and the European Convention on the exercise of Children's Rights (ECCR) state that court access for minors is obligatory. This can be realised by providing the minor with direct access to the court, but also through representation by parents or other adults. The treaties do not state that member countries are obliged to procure general separate legal access for minors. However, it is clear that with regard to family cases all people involved should have the possibility to take part in the proceedings and to state their point of view. The CRC obliges a general hearing right for minors who are capable of forming their own opinion. The ECCR pleads in favour of legal access in cases dealing with family law, and cites measurements to strengthen the legal position of minors. However, different interpretations are possible about the extent to which minors require separate legal access on the basis of articles 9 and 12 from the CRC, article 6 from the European Convention of Human Rights (ECHR) and the ECCR. All in all, from the tenor of the CRC and the ECCR it can be deduced that they do plead in favour of separate legal access for minors.

What regulations can be found in other countries?

Belgium is a good example of a country that, stimulated by the CRC, proposes enactments to enforce the legal position of minors, both by increasing court access, extending the amount of legal support to minors, and introducing a general hearing right for minors. In Great Britain, minors who are considered to be able to make a reasonable assessment of their interests can request to participate in proceedings that are of interest to them. Furthermore, there is a system of support for the minor, in which a specialised welfare worker stands up for a minor's welfare interests and a specialised lawyer defends his legal interests. This system only applies to family law proceedings. Initiatives in Canada and the United States demonstrate that the legal position of minors can be strengthened by better legal support.

These examples show that not only court access should be available, but also specialised support. Both social assistance and legal support are of importance in this respect. Research into the effects of specialised support shows that this makes a valuable contribution to the proceedings. The forthcoming amendments of the Belgian law should be taken as an example for the Netherlands.

What would a legal facility for minors look like in our country?

Both respondents and participants of the expert meeting conclude that minors should have an independent formal legal entrance at their disposal. The guardian ad litem will have to be maintained as a legal person only for inheritance cases (Art. 1:250 CC) and ancestry cases (Art. 1:212 CC). Based on research material and the expert meeting, a model for independent legal access has been developed, consisting of independent court access and the support of a specialised lawyer. The model is built around three conditions. First of all, legal access has to be easily accessible, meaning that the access has to be clear and unambiguous, and must have a large scope. A minor should be able to turn directly to the magistrate of a juvenile court or a specialised juvenile lawyer. Secondly, the minor has to be supported by specialised lawyers. Finally, there should not be an age limit.

To improve court access there should be special institutions young people can turn to when they have questions about their rights, or when their rights are violated. These institutions, such as the Ombudsman, the Bureau for Legal Aid and the Youth Law Centre, can give young people legal advice, and, if necessary, refer them to a juvenile lawyer or support the minors in the procedure to a court for juvenile law. Young people emphasise that support by telephone should be widely available and accessible. This enables them to ask for advice about their legal possibilities and the feasibility of their case, at the same time remaining anonymous.

Young people can only make use of independent legal access when they know that it exists. Because young people are poorly acquainted with their rights, education and information are of the utmost importance.

(1) The Dutch term is 'bijzondere curator'.