

Legal Aid Reform in the Netherlands: LASPO 2.0?

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Early November, the Dutch Minister of Legal Protection Sander Dekker presented his plans for the overhaul of the Dutch system for subsidized legal aid. In his letter of 9 November 2018 to Parliament Dekker cites the increasing costs of subsidized legal aid over the past two decades (42% in 17 years) as one of the primary reasons underlying the need for reform.

The proposed intervention in legal aid follows after years of research and debate. Last year, the Van der Meer Committee, the third committee in 10 years, concluded that the legal aid system is functioning well, but that it was suffering from 'overdue maintenance' and that especially the fees for legal aid professionals are no longer up to date. Currently, lawyers miss out on about 28 per cent of the hours they work on legal aid cases. According to said Committee, an additional 127 million euros would be needed annually to compensate for that gap in income. Such an increase in expenditure seems off the table given that the coalition agreement of the current government stipulates that 'the legal aid system will be revised within the current budgetary framework'. A budget that has come under additional pressure due to recent failed attempts at digitizing Dutch procedure under the Quality and Innovation Program (KEI) (see this blogpost).

Strikingly, these reform plans coincide with alarming criticism from the Dutch judiciary as to the current state of affairs in the Dutch justice system. On 8 November, in an unprecedented move, a group of concerned judges and counsellors sent a letter to Parliament expressing their concerns about the conditions under which they have to work and the perceived threat to the future independence of the judiciary and in which they denounce the exclusive focus on finances.

Those with an international outlook will recognise these suggested reforms as part of an international trend in constricting public spending on the civil justice

system in general and subsidized legal aid specifically. Especially the fairly recent reforms in England and Wales following the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) of 2012 may provide a cautioning example for other jurisdictions.

The proposed changes to the Dutch legal aid system, as well as the rhetoric used to justify such reforms, closely resembles developments in the English civil justice system over the past two decades. As Dame Hazel Genn analysed in 2008, looking back at the beginning of transformative changes in England and Wales proposed in the infamous *Wolf report* on Access to Justice in 1995: “On the one hand the report seeks to break down barriers to justice, while on the other it sends a clear message that diversion and settlement is the goal, that courts exist only as a last resort and, perhaps, as a symbol of failure.” Similarly, the current Dutch government has as one of its aims to stimulate out-of-court dispute resolution, and the proposed reforms are geared significantly towards pre-judicial triage, (online) information and advice, and out-of-court settlement.

In many ways the problem analysis presented by the Minister mirrors those made in England at the end of the 20th Century: the ever-increasing cost of legal aid (now over 400 million annually) is seen as unsustainable and perverse incentives in the current system encourage misuse by lawyers. However, the Minister also looks closer to home and concludes that the government is the counterparty in the majority (about 60 percent) of the cases in which subsidized legal aid is used. Most of these cases include criminal law and asylum law, but also (almost 11 percent) other administrative procedures with government bodies and municipalities. This is often based on complex legislation, or legislation in which much of the details are deliberately left to practice, with court proceedings as a result. The implicit call for de-judicialization is therefore accompanied by a call for de-juridification.

If the discussed English reforms are any gauge of what we can expect in the Netherlands, those with their eye on the access to justice ball are paying attention. The reforms in England included drastic cuts to legal aid, which saw entire categories of litigants, especially in family law, suddenly unable to access legal aid. As a result the English system today is filled with litigants without legal representation.

While such a dramatic increase in litigants in person is not likely to present itself

in the Netherlands - the Dutch system has mandatory legal representation for all but sub-district courts - the reforms are bound to leave some portions of potential justice-seekers out in the cold. The Minister's proposal includes the creation of so-called 'legal aid packages' aimed at a more holistic approach to legal issues, and with much more focus on self-reliance of the citizen, seemingly underplaying the fact that those citizens that rely on legal aid are generally less self-reliant.

What may provide a sense of cautious optimism is that the proposal includes a commitment to ongoing and iterative review of the measures and experiments that are part of the overhaul. In that sense, the proposed reforms to the Dutch system, at least as far as legal aid is concerned, do not seem to be destined to make the mistake made in other jurisdictions, where sweeping reforms were implemented in the absence of any research or understanding of the dynamics of civil justice.

Much hinges on the degree to which this commitment finds meaningful and consequential follow-up. The proposed reforms will be discussed in the Dutch Parliament on 19 November 2018

More information on this topic? Don't hesitate to contact us (hoevenaars@law.eur.nl).