Six suggestions for improving access to justice

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Introduction

In this report we will outline, in a personal capacity, several opportunities for improving access to justice. We will be dealing with more than access to the justice system or to a court of justice. We focus on fair and impartial solutions to conflicts between people, especially when they are less equipped to handle such conflicts. Access to justice is also about establishing an adequate framework for interpersonal and business relationships, an ordering that prevents conflict wherever possible. Therefore our primary concern is with the social impact of services related to justice.

One reason for report is the ongoing discussion on subsidized legal aid. This has traditionally been the medium through which access to justice has been administered to every sector of society. However, this method is currently under discussion as a result of it being both costly and potentially ineffective. There are indications that obstacles to finding adequate access to justice in the modern day cannot be overcome by the traditional method of subsidised legal assistance. There are also indications that improvements in the accessibility of justice can be achieved in ways other than through subsidised legal assistance.

Furthermore, innovation in the legal sector has been minimal at best. Lawyers face difficulties convincing society of the value they add. Rarely has the pubic witnessed an ambitious and appealing new legal process that systematically addresses the problems of citizens in an efficient and effortless manner. Rather, citizens have a lingering impression of endless, ongoing procedures (about defective financial products, Srebrenica, high-conflict divorces, medical injury). The profession offers expensive "paper-based" services, that could easily be standardised and improved through IT (wills, incorporations, solutions to complaints about products). In the long run this lack of innovation is a threat to the legitimacy of the legal order and of the professionals that are responsible for maintaining it. It is our belief that the following six suggestions can vastly improve outcomes for litigants, while simultaneously reducing the reliance on subsidised legal aid. We recommend to explicitly include these suggestions in the discussion on the future of legal aid and thereby achieve a coherent set of initiatives to improve the administration of justice in the Netherlands.

Core issues

What is not going well at the moment? Our analysis is that most complaints concerning the administration of justice can be traced back to the following causes:

- **Rules are not connected with problems and solutions**. Many people in need of justice have no idea what their position is. They recognize their problem no longer after lawyers provided them with a legal diagnosis. The legal profession has a strong tendency to tailor specific solutions for everyone in every situation. But this makes rules so specific and so variable, that people are unable to find out where they stand. Examples include complicated rules for alimony, unclear rules for settling disputes about defective financial products, new rules on dismissal from employment as well as the complexity of rules for succession that even well-established specialists have difficulty to grasp. Many problems people encounter, moreover, exist either within an intersection of criminal and administrative law (withdrawal of driving licenses, etc.) or at the interface between public and private law. Disputes about a dormer or the shadow caused by a tree can lead to unconnected civil and administrative procedures. Where access to justice is so complex, people easily become victims of their own misgivings or other people's bluffs. The so-called 'shadow of the law' could have a much stronger effect when rules for the most common problems would be easier to apply.[1]

- **Opacity of the market** A person in need of legal assistance will find that it is no easy task to buy an appropriate solution process. Neither quality nor specializations in legal services are easily determined by a customer. Moreover, people find it difficult to clearly formulate their own legal issues.

- **The tournament format**. Whether legal service providers like it or not, their work in the courtroom and outside it blends naturally into the so-called 'Tournament form' that is the foundation for our litigation process: claim against defence, position against position, argument against argument. The tournament format is costly and often not the most successful approach for remedying a conflict or a situation that needs correction.

- **High prices for individual services and lack of standardization**. Legal assistance in the form of individual advice, guidance and legal representation is expensive for individuals and for small businesses alike. The question is whether this individual advice is always necessary. The current system provides little incentive for standardization. Treatments of legal problems according to universally accepted methods can lead to a reduction in costs, increase quality and boost transparency.

[1] With the "shadow of the law" means that the parties in their actions the intention of the legislator internalize without first having to go to court.

- **Stagnation**. The discussion on the functioning and accessibility of the legal system always gets into the groove of cost-cutting against minimal protection of constitutional rights. The system itself is completely stuck and is no longer able to generate routes towards outcomes which add more social value. There are many good ideas for innovation around, but they do not grow into full blown solutions beyond an initial pilot phase. It also seems that many law firms are too small to invest in innovation and standardisation (as previously mentioned). In this way we will never get into a mode of continuous and gradual improvement.

Contrasting with these imperfections is a multitude of new opportunities for addressing exactly these issues. There are many kinds of new technology and our knowledge about conflict resolution, victimization and coping with losses is ever increasing. In addition, there is a wide range of professionals with skills and knowledge to exploit these opportunities. Moreover, there is significant enthusiasm among legal professionals to provide better services. The public looking for legal services is in many (sometimes very different) ways more self-reliant. Added to that, there are indeed all kinds of innovations from a variety of formal and informal providers, many of whom are successful in their own eco-system**.** However, these innovations seem to struggle to develop enough scale and sustainability.

An underlying problem is that of vested interests and revenue models. Clever innovations aim to offer better solutions through shorter and faster procedures that offer more sophisticated services. But it is precisely these procedures that are the basis for the work and the income for the profession. This provides a perverse incentive that in one way or another must be tackled or compensated by incentives in the right direction.

Finally, we have the impression that the "market" for dispute resolution and organization of human relationships is potentially much larger than that which is now served. Cuts in government funding is shrinking the market, however. This also reduces the space for innovation.

Suggestions

To improve access to justice in the Netherlands, we provide the following suggestions (followed by a brief outline of the reasons):

1. **Explicitly professed morality of legal expertise at the service of society**

At least part of the training of legal professionals should be dedicated to the ethical values associated with the exercise and organization of the profession. This also applies to continuing training in later

stages of legal careers. The core of this should be: 'what was the reason this, is my client being helped by this in a sustainable way?".

What should bind lawyers are values: hearing views from both sides, respect for people with their varying idiosyncrasies, recognition of a problem that grew too big for them, fair and workable solutions, and transparent criteria in order to promote equal treatment of like cases. The exercise of legal work is associated with fundamental dilemmas, such as the one between commercial and client interests. The social value of legal activities will increase if professionals regularly reflect on these dilemmas. This creates a better balance between the technical-legal perspective and the social and interpersonal importance of legal professional activities. In this way, the gap between the legal reality and the real world can be narrowed.

2. **An IKEA-test helps make the rules more practical**

When push comes to shove, can you do it yourself? This question is called the IKEA test, named after the simplicity of the flat-pack furniture and accompanying manuals found in the Swedish furniture store. It costs some sweat, or you may have to ask your neighbour for a little help, but in a few hours you have it up and running. New regulations relevant for many citizens should comply with the IKEA test. As a rolling program, existing legislation would also have be raised to this level. The same should apply to rules set by regulators and courts. The IKEA test also requires that legislation and procedures used by a large group of citizens come with an accessible manual.

The IKEA test aims for structural change in the ever more complex legal environment. If the rules are clearer, people will more easily use them and act accordingly. This increases access to justice, whilst decreasing the number of judicial interventions needed. Also, people would be more easily find the correct route or can be referred to it.

3. Incentives to encourage solutions instead of procedures

Reward solutions instead of procedures. This sounds easier than it can be in practice. Nevertheless, we should replace or supplement perverse incentives with incentives "in the right direction." Some options to achieve this are:

a. Make judges responsible for the best possible solution to the conflict as a whole (instead of just for dealing with the present claim). This implies, for example, that problems of a mixed private law / public law or of mixed private law / criminal nature will be brought under a single arbiter.

b. For multi-problem cases, social counsellors may be endowed with some authority to impose solutions, overseen by a judge ensuring protection of individual rights and impartiality. The counsellors can be rewarded for sustainable solutions to the situation, even (or additionally) when they solve a conflict without needing a more expensive intervention**.**

c. Legal aid providers (or courts) are not adequately challenged to develop more effective and standardised treatments and thereby offer better solutions for frequent problems. Fees for subsidised legal aid could be replaced by maximum fees. This may be a fee per hour or also per casetype. In order to be effective, a rate would have to be linked to proportional own contributions. Another option is a fixed amount per case (and not per procedure in a case)which creates incentives to find a fair and sustainable solution. Lawyers, courts and others should have the financial ability to develop innovative proposals with an appropriate business model for the subsidized sector (for example for casetypes in which they have extensive experience).

d. Creating a number of awards annually (with an 'Oscar' ceremony) that reach out to the most innovative and successful settlements of conflict - in different categories. At least some of these should be reserved for the best type of reward-system for a solution for clients.

e. For areas with mandatory legal representation, a (voluntary) contribution can be requested on behalf of a pro bono fund.

Step-by-step, this proposal aims to create a new type of cost-awareness: there are enough parties offering innovative approaches with suitable solutions, however, the winds of renumeration constantly blows in a different direction. The example of the ever-lingering usury-policy ("woekerpolis") affair regarding hidden and unfair cost elements in financial products illustrates this phenomenon: although each individual procedure cannot be disqualified as unnecessary, the overall set of procedures has its own unique dynamics and this system is not delivering final solutions within a reasonable timeframe.

The transfer of responsibility of a conflict in its entirety to one court or arbiter is more effective than the separate harmonisation of administrative and civil proceedings (3a).

The contribution to the pro bono fund (3e) leads to a certain redistribution of income from lawyers (offices) that do little legal aid to lawyers (offices) which do many legal aid cases. The contribution is

linked to mandatory legal representation because that leads to benefits from a monopoly. This proposal will contribute simultaneously to the effectiveness of suggestion number 1: promoting explicitly professed morality of the profession at the service of society.

4. **A right to challenge gives new entrants a chance**

There could be a wide and generally applicable right to challenge. Innovators can use this to replace existing procedures by better ones. Courts, legal expenses insurers or innovative IT and law firms that develop a better or more cost-effective way of treating, for example, disputes between tenants and landlords, must be able to challenge the existing procedures. After a successful pilot, they should have the opportunity for national implementation, enabled by quickly modified regulations and (where still needed) subsidies.

Such a right to challenge opens the door for a variety of small and larger structural innovations that could penetrate the legal field from other fields of knowledge. It sets in motion a process of evolution: gradually the system becomes more transparent, more accessible and more practical, without revolutionary system changes. This also enables courts, law firms and other traditional players the opportunity to embrace innovation and themselves be players in progressive improvements and delivery of more valuable services to a broader public.

Many professionals seem to fear a shrinking market, while the social need for effective legal services continues to grow. Neighbourhood mediation, restorative justice and online dispute resolution lend themselves to exploration by entrepreneurial private parties. The government could encourage this development and thus increase the supply of equitable solutions, thereby also creating more space for innovation and improvement. When this trajectory is followed, there should be independent (judicial) oversight in order to determine whether adjudicators are impartial and are not harming the interests of (some) people seeking assistance.

The legislation around procedures and legal services would have to be rearranged in such a way that a challenge can be exercised quickly and effectively. Examples can be drawn from the medical sector and the sector of correctional interventions, where new treatments are continuously developed and systematically tested.

5. 'Social Goals' for a better functioning of our legal system

A broad authoritative group appoints the eight most pressing social problems in the operation of law. The group creates some fanfare to stimulate the legal sector to solve these eight issues over the next

decade. The group also identifies indicators to track progress and has the means to measure progress and to report annually.

By analogy with the operation of the Millennium Goals of the United Nations; or at the time, the goal to reduce the number of fatalities from traffic accidents, this proposal will tempt all kinds of actors to focus on solving the eight problems. Solutions can come from unexpected sources**.** Who would have thought in the 70s that an airbag and the roundabout would be among the lifesavers on the road? The challenge is to select and pinpoint the key social problems related to the operation of the law. For example, children may no longer be the victim of a divorce. Or, mass tort cases must achieve a structural solution within a year. The experience of the Millennium Development Goals shows that well-formulated social objectives - in terms of problems facing citizens – which are consistently monitored, can have a major impact on the orientation of an entire sector. A further consequence would be that step by step improvements in the legal system would attract the attention of a broader public. The composition of the working group should be broader than the legal world. There is a Canadian example: *reaching equal justice: an invitation to envision and act:* http://www.cba.org/CBA/equaljustice/main/

6. A Tripadvisor for the legal system makes the market more transparent

Clients rarely need legal services, so they gain no experience with using these services. To create a Tripadvisor or an IENS (a Duch rating site for restaurants) for legal services and support existing players in this field, the **Ministry of Justice** could issue a challenge - and reward the best candidate with some funding. This challenge can also extend to transparency and comparability of open source contracts and other digital legal products that can be found on the internet.

More players and more momentum can be channelled only if accompanied with sufficient visibility of aquality and effectiveness. Publicized customer reviews are essential for this - the trick is to strengthen this mechanism and to supplement it with, for example, elements of peer review. There are already initiatives in the market that go in this direction and deserve scaling up.

Background

These six suggestions are the fruit of two brainstorming sessions organized in May 2015 at HIIL Innovating Justice in The Hague, facilitated by Krijn van Beek. They are not the result of a thorough research project, but do come from a very targeted pooling of knowledge and experience. Some of the signatories participated in the brainstorms, others have contributed their ideas in writing.

The idea is that the six suggestions together will change the dynamics of the playing field in a structural and positive way. They are not heroic interventions that will settle things once and for all, but they shift the focus and adjust the course of the system. On balance, they will strengthen the functioning of the law and reduce the need for judicial intervention and the reliance on subsidized legal aid.

The following literature served as inspiration for participants and supports the recommendations.[2]

In early 2015, Ecorys published research on legal services commissioned by the Ministry of Economic Affairs. The starting point is that regulation of legal services is required because of the public good character of access to justice. Legal certainty and a good ordering of legal relations are goals for regulation of notary services. The transparency of services for clients (who often purchase them only once) is also an issue. Ecorys notes that the legal services sector has a traditional culture and is staying behind in terms of the deployment of IT and innovation, while there is much to gain from innovation (see also the column by Nora Oostrom, Good intentions). Ecorys recommends to increase the entrepreneurial freedom and cooperation opportunities by recalibrating the rules about process monopolies, about cooperation options for lawyers and about who can invest in law firms. Qualification requirements are often outdated and incompatible with the kind of expertise and solutions that citizens need. Promoting good comparison sites can enhance transparency of quality and price of services.

The managing partners of a number of leading Dutch law firms argued in NRC that the education for lawyers should be broadened. For them, it is an obstacle that they can only deploy lawyers trained in Dutch law. People with other skills (IT, business administration, social sciences, finance, science) are indispensable to deliver sophisticated legal services to businesses. For consumers, it is important that the established structures of the legal profession are reviewed, and where necessary to be broken down.

The boundaries between legal professions are also a barrier to innovation. In her aforementioned column Nora van Oostrom shows how useful hybrids of the traditional roles of notary and lawyer can be.

These perspectives are in line with a US debate on the effects of regulation on legal innovation. A leading author is Professor Gillian Hadfield, who shows how the legal profession is constrained by regulations that force it to work in an inefficient way. As a result, scaling up and standardization of services for ordinary citizens is barely possible. The citizen has the choice between hiring an overpriced

[2] All studies can be found at: http://nl.padlet.com/wall/fxsls6oaeho0

professional or self-help (because of the extensive monopoly on legal advice in the US). The result is that the vast majority of citizens gets lost in judicial proceedings designed for professionals without any assistance at all. In the Netherlands the ways of providing legal services are restricted in a similar ways.

In 'Precarious Professionalism', Professor Richard Moorhead brings together research on the extent to which regulated legal professions live up to the pretence of delivering quality. In four studies, the quality of the work of solicitors for clients of legal aid appeared to be lower rather than higher than that of the work of non-regulated service-providers. In court proceedings, clients benefit more from the services of lawyers if they are specialized and if the procedures are complicated or if the court adopts a passive stance. Many studies indicate that the ethics of legal professionals tend to offer little resistance in the face of high stakes. Moorhead concludes: "We need a significant cultural change. And by cultural change, I do not mean a shift in tone from the top, but a concerted re-engineering of how we think about and manage legal services, legal education and legal regulation. "

In a report on international trends in strengthening access to justice 'Towards Justice Basic Care for Everyone', HiiL Innovating Justice brought together international best practices and literature, and presented them to 100 experts from more than 40 countries. Five trends were expected by experts to improve access to justice most:

(1) legal and practical information targeted to needs of disputants,

(2) facilitators leading parties towards fair solutions,

(3) creating a choice of adjudicators,

(4) sharing best practices and creating evidence-based protocols and

(5) IT platforms supporting negotiation and litigation.

This raises the question whether the regulation of legal markets sufficiently supports these innovation trends. And do subsidies flow in these directions?

In March 2015 a committee headed by "legal services guru" Richard Susskind published a report to the British organization of courts and tribunals (HMCTS). Aware that this may sound paradoxical at a time of austerity, the Committee recommended to extend the reach of the courts in order to improve access to justice. Not only the adjudication of disputes, but also the prevention and management thereof, is the task of the judiciary, according to the commission. Innovative technologies available for this purpose include online facilitation and online evaluation. A report from HiiL Innovating Justice

(Trialogue, Releasing the Value of Courts) demonstrates how innovation in courts is being impeded by rules of procedure and a lack of good financial models.

Signatories

We subscribe to these suggestions, in a personal capacity.

The affiliations below are mentioned in order to give an impression of the knowledge and experience that provided the basis for the six suggestions.

Alex Brenninkmeijer	Member European Court of Audiors and Professor at Utrecht University
Barbara Baarsma	Professor University of Amsterdam, Member Socio-economic Managing Director SEO Economic Research
Casper Schouten	Partner Kennedy van der Laan (earlier Legal aid counter, Lawyers Collective Rotterdam)
Emile de Wijs	General counsel Stichting Achmea Rechtsbijstand
Erna Kortlang	Notary, partners TeekensKarstens Notaries (earlier president KNB, professional organisation of notaries)
Evert van der Molen	President District court North Holland (earlier Rechtskundige dienst FNV, federation of trade unions)
Frans van Dijk	Director Council for the Judiciary (earlier Amnesty International, Ministry of Justice)
Hans Hofhuis	Judge District Court Den Haag (earlier President District Court Den Haag)
Jaap Winter	President Free University Amsterdam (earlier De Brauw Blackstone Westbroek)
Jan Maarten Slagter	Program Director New Board Program Nyenrode (earlier Loeff Claeys Verbeke, Association representing shareholders)
Jan Moerland	Director DAS legal aid, board RIAD, International Association of Legal Protection Insurers
Jos Sewalt	Director Stichting Achmea Rechtsbijstand (earlier Deltalloyd, Interpolis)
Krijn van Beek	Strategy developer (earlier WRR (Scientific council for government policy), Raad voor Maatschappelijke Ontwikkeling (council for social development), Ministry of Security and Justice)
Leendert Verheij	President Court of Appeal Den Haag (earlier Studiecentrum Rechtspleging, SSR)
Martijn Snoep	Managing Partner De Brauw Blackstone Westbroek
Maurits Barendrecht	Tilburg University, HiiL Innovating Justice
Mechteld van den Oord	Co-Founder Advocatenwijzer (earlier Allen & Overy)
Michiel Scheltema	Regeringscommissaris AWB
Nora van Oostrom-Streep	KNB (Professinal organization of notaries), Nauta Dutilh, Executive Director Law Firm School
Onno van Veldhuizen	Mayor city of Hoorn (earlier Loeff Claeys Verbeke)
Pablo van Klinken	CEO Justitia Omnibus (earlier KSU juridische uitgeverij en SDU)
Pauline van der Meer Mohr	President Erasmus University
Sadik Harchaoui	Society Impact (earlier OM (prosecution service), Forum, RMO (council for social development)
Sam Muller	HIIL Innovating Justice (earlier Leiden University, UN, International Criminal Court)