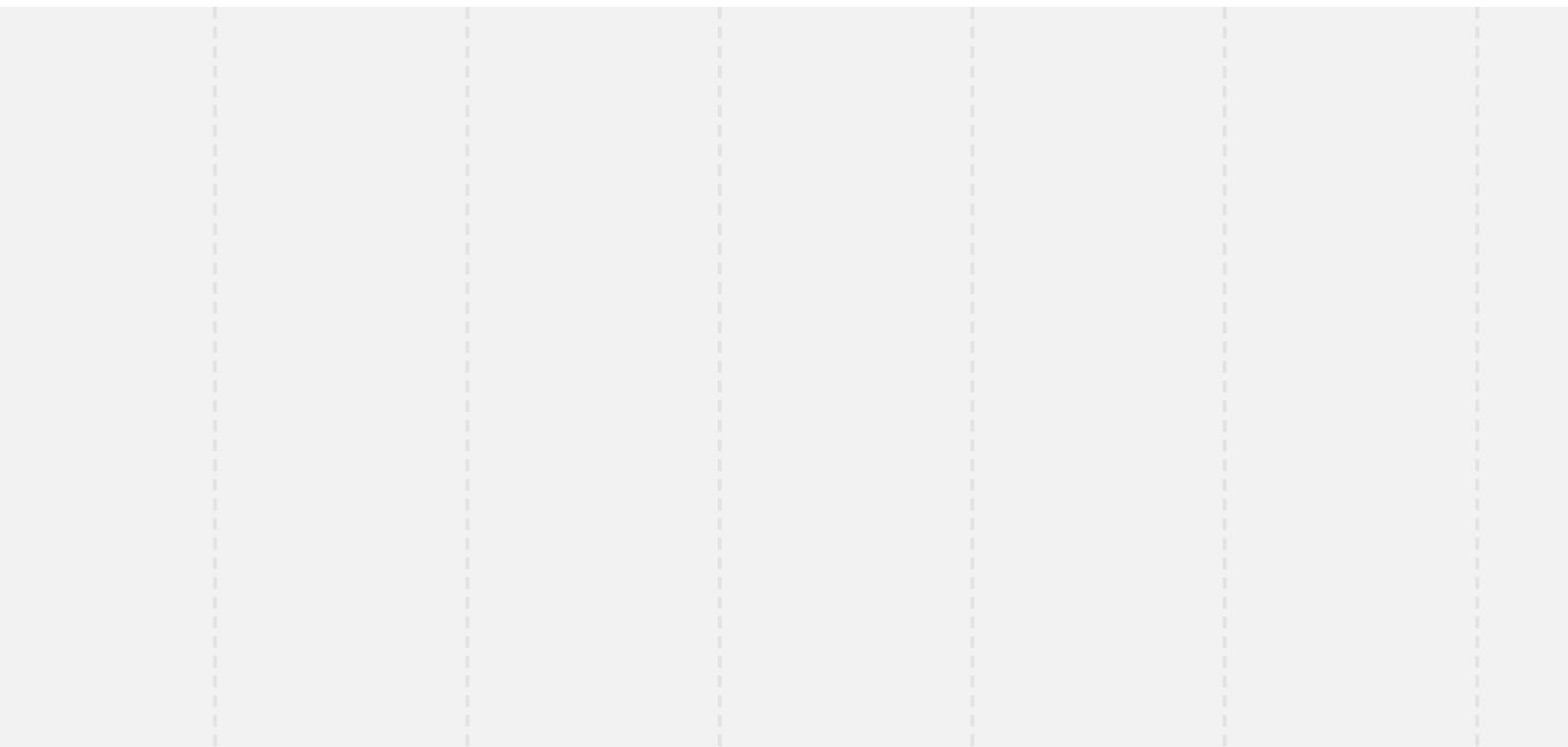
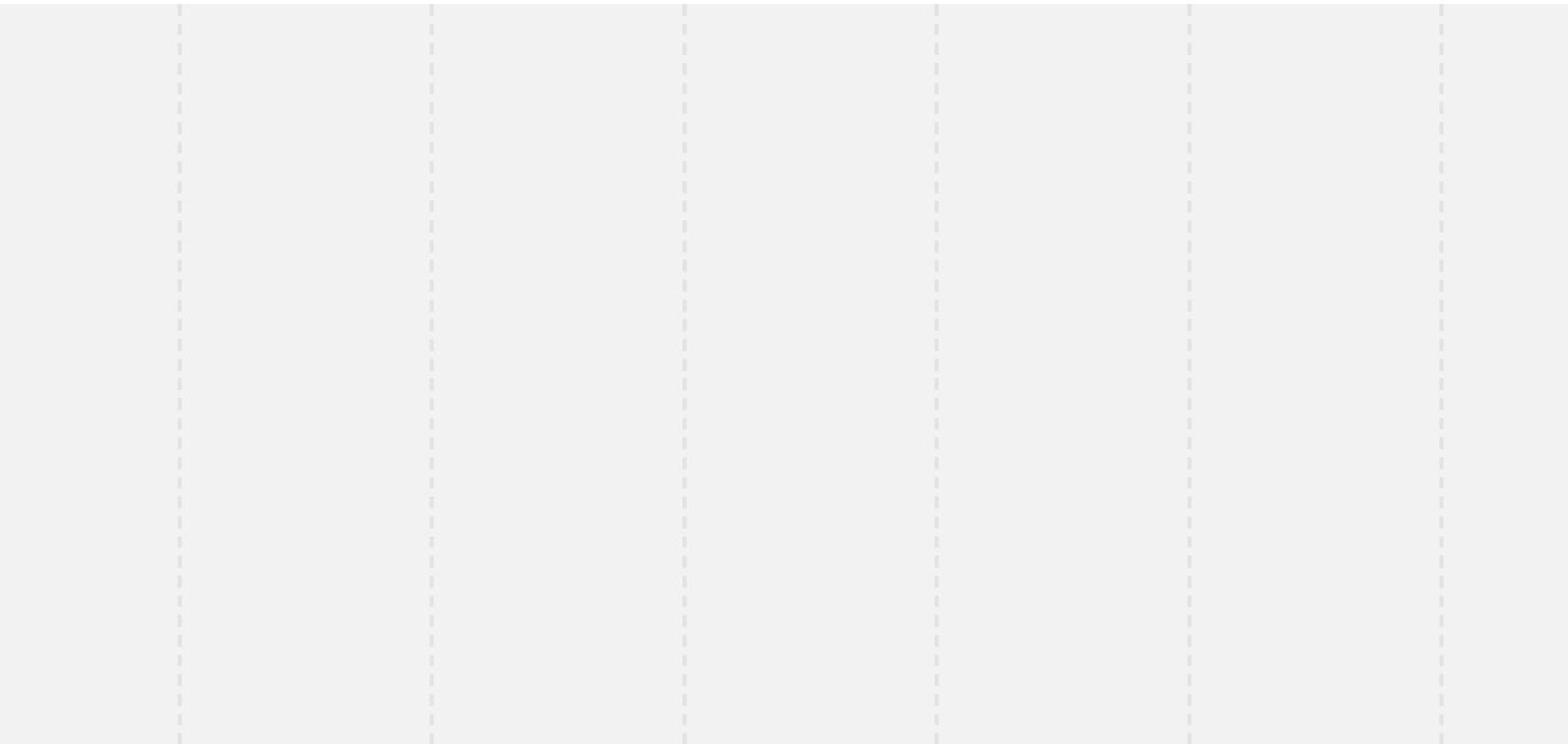

INCOMPREHENSIBLE GOVERNMENT & LEGAL CERTAINTY

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PREFACE

We live in complex times and this complicates the task of government. As National Ombudsman, I see this complexity as a factor in many of the cases that people bring to my attention. It means that individual citizens often find themselves facing a government machine that baffles them. This has prompted me to choose the incomprehensible nature of government as the theme for my 2012 annual report. This booklet contains a summary of my views in English.

There are many symptoms of the problem: politicians who no longer grasp the implications of legislation, citizens who experience constant problems with complex bureaucratic procedures, officials in executive agencies who fail to implement new legislation correctly, and a continuous stream of new rules and regulations. This diagnosis is based on discussion with numerous organizations in the field.

Rapid changes in legislation are the subject of the second part of this booklet, in which I present a translation of an article on lack of legal certainty that was originally published in a Dutch legal journal in 2012. The piece was prompted by the Dutch government's intention to convert student grants into a system of student loans. The government wanted to introduce the new system very quickly. As a result, thousands of students faced substantial financial losses due to the lack of any reasonable opportunity to take account of the change when planning their studies. Fortunately, following lengthy discussions, the government eventually reversed its decision. In the meantime, however, the situation created great legal uncertainty.

As National Ombudsman, I strive to foster good government-citizen relations. Trust is an important factor in this respect. When legislation is impossible to understand and can change without warning from one day to the next, citizens lose their sense of trust in government. I hope that this summary of my 2012 annual report (entitled 'My incomprehensible government') and the accompanying article on legal certainty will provoke reflection on the proper way for government to act in the complex society of today.

Alex Brenninkmeijer
National Ombudsman of the Netherlands

INCOMPREHENSIBLE GOVERNMENT

SUMMARY 2012 ANNUAL REPORT

The National Ombudsman is keen to suggest ways to relieve the current tension between government and individual citizens in the Netherlands. Government needs to create a better interface between the system-based world of public administration and the everyday world of the individual citizen. To discover how it can do this, we need first of all to ask what problems citizens actually encounter in their transactions with government. The National Ombudsman has asked a wide range of intermediaries on the ground: people like lawyers, welfare officers, tax advisers, staff of the Humanitas social support organization, and people working in free legal advice services. These people are constantly dealing with such problems and they express considerable indignation about the situation. "Legislation is just unintelligible these days; entrepreneurs can't understand it and ordinary citizens certainly don't". "The whole legislative framework needs a thorough clean-up." In the view of the National Ombudsman, these are not just casual remarks provoked by a one-off survey: they underline the general tenor of the complaints received throughout the year. The work of the National Ombudsman's Office has already achieved a great deal but, alas, it is still urgently needed – a realization that creates "mixed feelings but makes us all the more ready to stand up for the citizens of the Netherlands".

CITIZEN AND GOVERNMENT

There is constant tension between the Dutch public administration system and the country's citizens, but the importance of this often goes unrecognized by government. The tension is caused by the fundamental disparity between many of the core values that underlie the operations of government and those of citizens. For government, 'system values' take priority, whereas citizens often feel that humanity is more important.

- To do its job, government needs the cooperation of individual citizens, but citizens do not understand why; this often makes it difficult to get along together;
- The paper reality of statutory rules and regulations is hard to translate into the real world of implementation;
- Government uses standardized systems which ignore the huge diversity of individual citizens.

DIPLOMACY BUREAUCRACY

Well-educated people find it easier to understand this tension between the system-based world of public administration and the everyday world of the individual citizen and may be able to see things in perspective when they themselves experience bureaucratic delays or breakdowns in communication within the government machine (however frustrating these may be). It seems to me that we have not only a 'diploma democracy', but also a 'diploma bureaucracy' in the sense that government in the Netherlands is so complex that citizens need to have a fairly high level of education to understand and interact with our bureaucracy. People who don't have this are often unable to analyse the problems they are experiencing in their transactions with government and identify what has gone wrong or what mistake they have made. Unfortunately, they then tend to give up and resign themselves to the situation.

In this sense, less well-educated people have more trouble with the public administration system in all its branches. This is a problem, because they are precisely the people who are most heavily dependent on government. However, everyone depends on public services to some degree and even graduates find it hard to deal with their complexity.

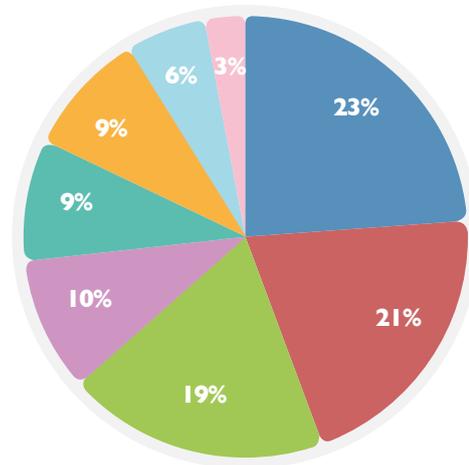
ECONOMIC CRISES

The economic crisis is producing cuts not only in public services, but also in the manner of their delivery. This means that government in all its branches can devote still less time to its interactions with individual citizens and that such interactions have to take place largely digitally, via government portals. It is clear from the routine casework of the National Ombudsman that less well-educated people are less persistent in defending their rights and interests and that any complaints from them tend to be lodged via intermediaries such as welfare officers, lawyers and social workers.

WHAT PROBLEMS DO CITIZENS ENCOUNTER

Both the pattern of complaints to the National Ombudsman and the results of the survey of intermediaries show that the majority (67%) of citizens' problems occur in the area of work and income and that 82% of intermediaries believe that such problems have increased over the last two years. This is hardly surprising, in view of the current economic crisis. The top three causes of the problems in this area are bureaucracy, complexity and lack of empathy (in that order).

Top 8 causes 2012



- Bureaucracy 23%
- Complexity of legislation 21%
- Lack of empathy 19%
- Bother about allowances 10%
- Cuts 9%
- Poor communication 9%
- Careless management of information 6%
- Digitalisation 3%

Percentage in the survey 2012

BUREAUCRACY

The main causes of the problems that citizens experience in their transactions with the various branches of the public administration system are bureaucracy, official incompetence and poor contactability. The over-bureaucratic government machine is not service-minded (or not sufficiently so). It is primarily inward-looking and has difficulty both in seeing citizens as individual human beings and in showing its own human face. This lack of service-mindedness is the main cause of tension between the government system and the everyday world of the individual citizen. It is, almost entirely, government that dictates the means of communication and that organizes it through measures like the training and instructions given to staff manning virtual or physical contact points. However, it is crucial that government in all its branches should be sufficiently responsive.

COMPLEXITY OF LEGISLATION AND SYSTEMS

The word bureaucracy means something to most people, but this is far less true of the words 'complex' and 'complexity'. The idea of complexity can therefore be used to compel people to accept things uncritically: "yes but, you know, things are really more complicated than that." The following are some typical comments made by people working in the field. "There are too many rules and regulations and they change all the time. Elderly people don't know where to go for which form of help. There's no transparency concerning payments and allowances. The Social Support Act is supposed to make it easier to get information or apply for help, but it seems to have done just the opposite."

LACK OF EMPATHY

The third most common accusation made against government and public officials is that of lack of empathy, failure to customise services and lack of personal contact. People in debt feel that it is important that – despite their financial problems – they should be dealt with as human beings. Anyone who is old, in need of help or coloured may find themselves stigmatised in their dealings with government.

Public officials have been trained to use a particular vocabulary and people who have more difficulty in using that jargon are taken less seriously. Many people lack the requisite skills to deal with public services. Moreover, many barriers are created – intentionally or otherwise – that discourage people from seeking access to benefits and services. Government decides how to interact with citizens and this can make it hard to achieve normal human contact.

TRUST

The key focus of the National Ombudsman's annual report for 2011 was the citizen's trust in government and this remains a highly relevant subject. Such trust depends partly on the reliability of government systems like DigiD, the Tax Department's digital application system for allowances, and the UWV's digital service for jobseekers. Government is increasingly turning to digital service delivery and seeking to cut costs by communicating with citizens via call centres and imposing strict rules for personal contact.

Trust is necessary, because it simplifies complex decisions on whether or not to do things and whether or not to enter into commitments. In effect, it reduces complexity. Two kinds of trust are important: personal trust and the confidence people feel in systems.

In my view as National Ombudsman, public trust and confidence in government can be strengthened by developing effective interfaces between the government machine and the individual citizen. Such interfaces will entail a mixture of personal contact, taking people seriously and showing them respect, and treating citizens as equal partners (as detailed in the general standards of proper conduct applied by the National Ombudsman). Government should adopt a basic attitude of trust towards citizens. After all, the vast majority of people are good citizens who are prepared to cooperate with the authorities.

SOLUTIONS

It is often hard to reconcile the system-based world of public administration and the everyday world of the individual citizen, particularly where weaker members of society are concerned. Three factors exacerbate the problems experienced by such citizens: inefficient bureaucracy; the complexity of organizations and their rules and procedures; and lack of empathy on the part of government.

The solution to these problems is to establish an effective interface between government and citizen, taking account of the differences between individual people.

Although many government-citizen transactions can be computerised, the National Ombudsman advocates personal contact whenever necessary. This means a telephone call, a face-to-face meeting at a physical contact point or surgery, or – in the last resort – a home visit.

Government should show that it takes citizens seriously by applying the general proper conduct and by treating people with respect even if they do not speak the language of public administration. It should also treat citizens as equal partners: the roles of government and citizen differ but government should guard against paternalism and be alert to what citizens feel is important in the government-citizen relationship.

Experience shows that a positive approach to citizens produces better results than coercion. Excessive compulsion and coercion damages government-citizen relations but, in many areas of government activity in the Netherlands, this kind of approach is now gaining the upper hand. It is not only government-citizen relations that suffer. So does the role of professionals working in the public sector, since compulsion and coercion can prohibit all flexibility in implementation, forcing officials simply to execute the letter of the law. The application of legislative provisions should always be subject to common sense. The management approach that is now steadily gaining ground in the government sector is too heavily focused on strict compliance with the letter of the law and on mechanisms of accountability. Too often, people forget to ask themselves “what are we actually doing it all for?”

At the heart of the problem is the major tension between policy and implementation. A great deal of government policy is devised by politicians without sufficient consideration of how it can be implemented in practice. Moreover, policy implementation is split between a multitude of national and decentralised bodies, each with its own specific tasks, competences and budgets.

RECOMMENDATIONS

1. Assume that most people are good citizens.
2. In the case of financial claims and obligations, give priority to ensuring legal certainty for the citizen.
3. Give priority to the practical feasibility of implementation and therefore to simplicity.
4. When legislating, create scope for exceptions to be made in exceptional circumstances.
5. Give the public access to sets of criteria established by executive agencies for the implementation of policy and legislation.
6. Adopt a general attitude of trust. Legislation should not be made on the basis of distrust.
7. Every administrative authority with responsibility for implementation should have an 'X-team' to help resolve citizens' problems when they involve more than one government agency.
8. A review and improved harmonisation of financial penalties and penalty systems are necessary to prevent citizens getting trapped in a spiral of debt from which they can never escape.
9. In view of the present financial situation, authorities should preserve citizens' protected earnings level and government bodies should harmonise their debt collection activities.
10. The House of Representatives should pay greater attention to coordinating the policies of the various departments of central government.

The policy of the present coalition government is to reduce the size of central government while increasing efficiency and eliminating excessive bureaucracy. Efforts in this direction are to be coordinated by the Ministry of the Interior and Kingdom Relations. This policy is in line with the recommendations of the National Ombudsman. It is important that in all such plans the point of view of the individual citizen should be translated into proper action by government bodies on the ground.

LEGAL CERTAINTY

By Alex Brenninkmeijer:

In this article I use my experience as National Ombudsman of the Netherlands to explore the significance of legal certainty in the Dutch system of government. The presence or absence of legal certainty can make a serious difference to people's lives. The Netherlands has good legislation, which is generally well-implemented, and a fair judicial system. This may seem to offer citizens legal certainty. In practice, however, it can take too long for them to obtain it. Are there ways of providing legal certainty more rapidly? Trust is a major factor. My experience shows that round-table discussions are a good way of generating trust and hence promoting legal certainty.

LEGAL CERTAINTY FOR STUDENTS

Some time ago, the Dutch government decided to impose supplementary tuition fees on students taking more than an extra year to complete their BA or MA degree courses. This has proved a political bone of contention. The over-hasty introduction of the law (Wet verhogen collegegeld langstudeerders) has meant that students have suddenly found themselves facing penalties of 3,000 for irrevocable choices made earlier in their academic careers. Seldom has the legislature so clearly flouted the principle of legal certainty. Moreover, the penalty is disproportionate.

In the context of the 2012 general election, parties that had voted in favour of the new legislation hastened – with the support of opposition parties – to talk up the idea of abolishing the penalty. In August, however, when it was time to take action, the political will to do so proved to be lacking. Although all the political parties had spoken out against the penalty in their election campaigns, it proved impossible to reach agreement on a way to compensate the exchequer for the few million Euros that the measure was expected to raise. The state secretary was visibly angry. There was deep embarrassment in every part of the House of Representatives and many elected representatives condemned what had happened as a political charade. The partners in the VVD-PvdA (liberal-social democrat) coalition government are now prepared to withdraw the measure with retrospective effect.

Earlier in 2012, the legislation concerned was the subject of a civil case brought by students in the district court of The Hague. However, the court found – as in the past in relation to the ‘Harmonisation Act’ (Harmonisatiewet)¹ – that it was impossible to test whether the new legislation infringed the principle of legal certainty. It is interesting in this respect that, while the principle of a right of legal certainty is recognized in legal doctrine, there is apparently no possibility of codifying that principle in legislation such as the General Administrative Law Act (Algemene wet bestuursrecht or Awb). This is a curious phenomenon. An important legal principle like that of legal certainty is apparently impossible to pin down in legal wording. Yet the principle of legal certainty is so deeply engrained in our sense of justice that it is understandable – and indeed right – that the imposition of the penalty on students not completing their courses on time and the way in which political parties decided on this has provoked such a public furore. An important aspect of the principle of legal certainty is that legislation should not have retroactive effect, especially in terms of curtailing or cancelling rights – or (as in this case) imposing penalties. This is actually specified in the Instructions for Legislation in the Netherlands, where Instruction 167(3) states that provisions of this kind should not have retroactive effect “except in exceptional cases”.³ It is not at all clear to me what “exceptional cases” may have existed in this instance. The decision seems to have been dictated purely by political opportunism.

WHAT DOES LEGAL CERTAINTY MEAN?

This brings me to the broader significance of legal certainty within our system of government. As part of its definition of the ‘rechtsstaat’ (state subject to the rule of law), the Dutch version of Wikipedia says: ‘De rechtsstaatgedachte wil willekeur voorkomen en rechtszekerheid en rechtsgelijkheid bevorderen.’⁴ (‘The concept of the state subject to the rule of law is intended to prevent arbitrariness and promote equality before the law.’) My choice of Wikipedia as a source is well-considered: I believe the definition it offers accurately reflects the general feeling within Dutch society. However, Article 43(1) of the Charter (Statuut) of the Kingdom of the Netherlands also mentions legal certainty: ‘Each of the Countries* shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.’

* I.e. the four different countries which form the Kingdom of the Netherlands: the Netherlands itself and Aruba, Curaçao and Sint Maarten in the Caribbean.

Legal certainty is the result of a careful democratic process of legislation. The presence of an independent judicial system ensures compliance with that legislation and helps to protect citizens against arbitrary action on the part of government. When I lectured on constitutional law in China, students there talked about the distinctions between ‘rule by men’, ‘rule by law’ and ‘the rule of law’. In China, there is as yet no concept of the state subject to the rule of law. According to the students, citizens are lucky if things are done in accordance with the letter of the law – ‘rule by law’ – rather than at the whim of some party leader. In the heat of the subsequent discussion, a student illustrated the point by instancing the execution of a fellow-villager by a party official; nobody was able to intervene to prevent it or to obtain any retrospective sanction on the act: this was rule by men. Modern Western society is deeply imbued with the notion of individual rights: rights which protect the physical integrity of the citizen and which can be enforced. That is legal certainty.

In this article, however, I want to focus on the problems surrounding legal certainty. I will begin by discussing legal certainty in the context of the implementation of legislation and come back later to the issue of legal certainty in the context of the drafting of legislation and the particular instance of the penalties imposed on Dutch students. What strikes me in my day-to-day work as National Ombudsman is the gulf that often exists between theoretical rights and their recognition in practice. That divide is less common in the routine work of administrative authorities: decisions by the Dutch Social Insurance Bank, Tax Administration and Employee Insurance Agency are lawful in at least 99% of cases (or as much as 99.9% in the case of the Social Insurance Bank).⁵ Occasionally, however, mistakes are made and then the citizen living in a state subject to the rule of law can compel recognition of his rights via judicial objection and review procedures. But this takes time. And, as we all know, time is money. Now that the economic crisis is reducing many people’s spending power, the duration of legal procedures is a growing problem. From the beginning of 2013, the number of cases submitted to the National Ombudsman has increased considerably and most of these complaints concern financial issues between the public administration and citizens.

EX ANTE AND EX POST LEGAL CERTAINTY

Legal procedures may be reliable but their protracted nature reduces the effectiveness of the legal certainty principle in day-to-day practice. To clarify this point, I would draw a distinction between ex ante and ex post legal certainty; in other words, legal certainty here and now versus legal certainty following legal procedures.⁶ The Dutch legal system is almost entirely fixated on ex post legal certainty: that is, legal certainty at the point when a legal decision becomes final and unappealable.

We seem to find it normal that it can take months or years for a final decision to be reached on rights and duties. But if you are faced with this fact in your own life, it seems anything but normal. In fact, it is incomprehensible that we pay so little regard to the importance of ex ante legal certainty (legal certainty here and now) in the Dutch legal system.

In the case of financial provisions, the Dutch legislature increasingly accepts that final decisions on the entitlements and obligations of citizens will be reached only after much delay (sometimes amounting to years). Income tax is based on a system of provisional and final tax demands. The same is true of tax allowances for home rental, childcare and health care. And then there are other provisions where the citizen's entitlements or obligations are based on the determination of income by the Tax Administration, sometimes even taking the previous year as the starting point. One example of this is the cost to the individual of domiciliary care provided under the Exceptional Medical Expenses Act (AWBZ) and decided by the Central Administrative Office for Exceptional Medical Insurance (CAK). The advantage of this legislative approach is that financial entitlements or obligations are calculated with great precision; the disadvantage, however, is that it takes a long time to reach a final decision on them. Imagine the quandary that faces a person with disabilities who urgently needs domiciliary care, but has to wait two years to be certain how much money s/he will have to pay for it. And this is quite apart from the fact that mistakes can be made, which then have to be corrected via the courts.

COMPLEXITY OF THE LAW

However, the distinction between ex ante and ex post legal certainty is of even more fundamental importance. When I consider major areas of policy like health care, youth care, education, debt counselling or local government finance, I am struck by the fact that experts in these fields admit that ‘the system’ is so complicated that hardly anybody really understands how it works and exactly where the legal liabilities lie.

Take the case of a woman who was unexpectedly forced to pay a large amount towards the cost of elective medical treatment she had received in a hospital. She had not been given any advance warning of this. As National Ombudsman, I decided that it was not proper that the hospital had failed to inform her of the costs of the treatment in advance.⁷ The parliamentary party of the VVD had no hesitation in supporting my view. Within two weeks, however, I was besieged by a host of experts (from hospitals, insurance companies and government bodies) telling me that the action I had advocated in my role as National Ombudsman was completely impossible in practice. They said there was no provision for it in the statutory ‘Diagnosis Treatment Combination’ system. Moreover, a new system was about to be introduced which would actually prohibit doctors from telling patients what a course of treatment would cost. Incredibly, this new system was called ‘Diagnosis Treatment Combination – Moving toward Transparency’! The experts readily admitted that health care funding is a matter for hyper-specialists and that any transparency that exists in the field is for insiders and certainly not for patients. In the case of all the issues I have mentioned above, the complexity of Dutch legal (and financial) systems is part of the problem.

Another example is the approach to problem families, it is clear that acting in accordance with ‘the system’ – or rather ‘the systems’ – makes it virtually impossible to make any impact on their situation. The combined efforts of ten or even twenty professionals – no exception! – produce no improvement in the position of such a family, despite the (vast) amount of money involved. Protocols are followed, points are ticked off, but very little actually happens on the ground. There are professionals who sincerely look for effective ways to make a difference and sometimes manage to find them. But look closely and you see that such solutions are often found in spite of the relevant legislation, not because of it. Legislation is not the solution; it is actually part of the problem. The distinguishing mark of highly motivated professionals is that they don’t always keep strictly to the rules, and I am very glad they don’t. But where does that leave legal certainty?

I would argue that the Dutch system of government under the law is so complex that the negative side-effects of legislation often outweigh the positive intended outcomes.⁸ The desire of parliament to pin everything down in legislation has the effect of depriving the professionals charged with implementation of virtually all elbowroom and of tying their hands with rigid procedural constraints.

Recently, entrepreneurs in the leisure sector complained to me that it tends to take eight to ten years to obtain planning permission for changes in recreational amenities such as campsites or farm-based holiday accommodation. This makes it virtually impossible for businesses to grow, since investment depends on legal certainty. My office is about to investigate a number of concrete cases in order to identify the causes of these bureaucratic

delays. Procedures under the General Administrative Law Act are clearly a factor, but the main reason seems to be the fear of making legal errors that often paralyzes local government officials and elected representatives. The desire to avoid making mistakes leads to procrastination and ends up undermining ex ante legal certainty.

An additional factor is the complex relationship between central and local government. A complicated decentralization of responsibilities is currently under way in the Netherlands, with municipalities becoming increasingly responsible for social policy (youth matters, domiciliary care and national assistance). A number of central government departments are drafting the legislation required to establish the legal and financial framework for this. Meanwhile, the municipalities are expected to go ahead and shoulder their new responsibilities, even though – partly because of the present political instability of national government – the legislative process is proceeding only in fits and starts and the political goalposts are being moved on an almost monthly basis. As a result, even those municipalities willing to take on new responsibilities in this time of economic crisis have very little certainty regarding the legality of doing so. During its spring 2012 annual conference, the Dutch association of directors of municipal social service departments (Divosa) advised local authorities to plot their own course.⁹ Speaking as National Ombudsman at the same event, I criticised central government's distrust, paternalism, fragmentation and fixation on bureaucratic control. I suggested, moreover, that the responsibility/initiative for this particular legislation should lie much more with the Dutch municipalities as a body, rather than with multiple departments of central government. In short, I recommended a bottom-up rather than top-down legislative process.

A good example is the very strict – and ever more stringent – sanctions policy imposed by central government in the field of national assistance benefits. This may be politically opportune, but recent studies by the Netherlands Institute for Social Research (SCP) show that it is ineffective. Municipalities often succeed in taking sensible measures to get people off benefit, but they don't do it via statutory sanctions. When such sanctions are applied, those who suffer are frequently not benefit claimants but, for example, children in problem families.¹⁰ And sometimes sanctions misfire completely because the family concerned is already so deeply in debt.

SOLUTIONS

Is there any solution to the problem of ex ante versus ex post legal certainty in the areas of implementation illustrated above? And is there any way of reducing excessive complexity? My own experience suggests that there is. The solution is to replace legal procedures and the top-down design of legislation and policy by round-table discussion. The first step in resolving the issues afflicting a problem family is to sit down at the kitchen table to talk things over and make all parties feel genuinely 'involved'. A procession of social workers turning up punctually to perform their statutory duties is not the answer. Nor is a social work department that acts as an automaton in imposing the benefit cuts demanded by the law. Many complex issues do not require complex solutions; they simply require clear decisions and the commitment of everybody involved to act in accordance with them. Legal certainty is not achieved, therefore, via the correct application of statute law; it is achieved via human interaction.

But even when things occasionally go wrong in the decision-making processes of the Social Insurance Bank, the Tax Administration or the Employee Insurance Agency – after all, even 99% correct is less than 100% – round-table discussion is a better solution than the legal procedures prescribed by the General Administrative Law Act. The Ministry of the Interior and Kingdom Relations now encourages administrative authorities to ignore the provision in the General Administrative Law Act that requires them to respond to each and any complaint or objection by sending a written confirmation of receipt and opening a case file; instead, it urges them to get straight in touch with the person concerned, generally by means of a telephone call. Experience shows that issues of legal certainty can usually be cleared up immediately through direct personal contact of this kind. Mistakes can be corrected informally or, where decisions are correct, clearer and more complete explanations can be given to the complainant. In around 60% of cases, the procedure prescribed in the General Administrative Law Act then proves to be unnecessary.¹¹ The complaints that I receive in my role as National Ombudsman could trigger around 7000 statutory complaints procedures a year. However, I find it more effective to issue a report under the Act in only 300 to 400 cases a year. In every other case, my office uses effective communication – such as a round-table discussion – to resolve the complaint. Following intervention of this kind, administrative authorities are often willing to resolve complaints informally (although the current economic crisis is jeopardising this approach in the case of some authorities, such as the allowances section of the Tax Administration).

In many of the areas in which I regularly receive complaints, the starting point of each investigation is a round-table discussion. One such area is the return of missing documents (such as identity papers, marriage certificates, birth certificates and educational diplomas) to foreign nationals holding Dutch residence permits. Bodies involved in collecting and returning such documents include, for example, the Immigration and Naturalisation Service (IND), the aliens police and the border police. The multiplicity of bodies involved was making it virtually impossible for foreign nationals to track down documents that went missing. But once I got all these authorities together for a round-table discussion in my office, a solution was found within just one afternoon and the formal agreement of all the authorities concerned was given soon afterwards.¹² Other areas of work in which I have found the round-table approach effective are compensation for military veterans suffering from post-traumatic stress disorder, improvements in public participation

procedures, environmental law enforcement and the proper treatment of citizens' claims for compensation.¹³

The administrative courts in the Netherlands have also started to hold such meetings, using effective communication to get to the root of the problem and see whether or not a legal procedure is really necessary. Both the use of personal contact by administrative authorities and that of preliminary round-table meetings by the courts rely on an informal approach inspired by the practice of mediation: effective communication concerning the differing interests at play in a conflict situation.¹⁴ Legal certainty here and now is one such interest.

MEDIATION

Mediation involves the use of a neutral third party to help opposing parties to reach a mutually acceptable solution by identifying shared and divergent interests.¹⁵ In many cases, mediation is an effective way of avoiding the need for legal procedures. Delays in achieving legal certainty can be reduced by adopting an informal approach and, where appropriate, using mediation. This may not always be effective, but it often is.

If parties agree a settlement, legal certainty is created on an issue that might otherwise lead to conflict in the courts.¹⁶ This can be very important, for example, in the case of child access following marital breakdown. In cases of international child abduction too, mediation may be preferable to the often complex legal procedures.¹⁷ Unfortunately, while there are good examples, the courts and legal profession frequently fail to consider the advantages of mediation over formal legal procedures. It is a good thing, therefore, that a private member's bill has now been launched to provide a statutory basis for the use of mediation in this context.¹⁸

Round-table discussion has also proved to be a good way of avoiding protracted legal procedures relating to complex issues in the fields of education, health care and youth care, and in other areas of social concern, such as the environment.¹⁹ The Netherlands' Scientific Council for Government Policy (WRR) has recently issued a report suggesting how policy can be developed in consultation with the general public.²⁰ The report – entitled *Vertrouwen in burgers* ('Confidence in citizens') – is a clear call to government to base its thinking more on the individual experience of the ordinary citizen. It suggests that lawmaking can be improved by working hand in hand with those on the ground.

The resulting legislation will then give rise to fewer protracted legal proceedings and be more closely tailored to the problems of everyday life. The WRR regards trust/confidence as the key to such informal cooperation between government and citizen and says that government needs to trust citizens to participate in the processes of government.²¹ I would agree. Moreover, trust/confidence and legal certainty are closely interrelated.²² If trust between government and the citizen is reinforced by the use of effective communication, there is a good chance that legal complications in the relationship can be avoided or resolved, reducing the gap between *ex ante* and *ex post* legal certainty. Legal procedures are an essential part of life in a democratic state subject to the rule of law, but the need for legal certainty requires us to exercise discretion in their use.

CONCLUSIONS

The commotion about the supplementary tuition fees that I discussed at the beginning of this article reveals the importance of legal certainty in the minds of the public. In that particular case, the principle of legal certainty was flouted by parliament when it chose to impose an extra financial burden on students who had made irrevocable decisions on the basis of the previous law. However, legal certainty is rarely at issue in lawmaking; the issue generally arises in relation to the implementation of the law. It can take a long time for a citizen to obtain legal certainty regarding his entitlements. That is why it is helpful to distinguish between ex ante legal certainty and ex post legal certainty, obtained through the operation of statutory review procedures.

Experience shows that ex ante legal certainty can frequently be obtained via effective communication: getting parties around the table to find a solution to problems that have arisen in practice. It can also be provided by developing legislation and policy interactively with those involved.

The power of the round-table approach in everyday implementation can also be used to develop policy and legislation in partnership with citizens, or even to permit them to develop it independently. Greater consideration should be given to these possibilities. I hope that this article will incite students and academics to conduct further research in this area.

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ANNOTATIONS

- * Dr A.F.M. Brenninkmeijer is the National Ombudsman of the Netherlands. This article was originally published in Dutch in the November 2012 issue of Dutch legal journal *Ars Aequi*. That version can be downloaded from <http://maandblad.arsaequi.nl>
- 1 Supreme Court ruling of 14 April 1989, NJ 1989, 469 (Harmonisatie-wetarrest).
 - 2 District Court of The Hague 11 July 2012, LJN: BX0977. The students based their case on the right to legal certainty laid down in the first Protocol to the ECHR but the court felt that the Protocol was inapplicable, since the supplementary tuition fees do not constitute an infringement of property rights. In the Harmonisation Act case, the students referred to the Charter (Statuut) of the Kingdom of the Netherlands, but came up against the ban on constitutional review of formal laws established in the Dutch Constitution.
 - 3 Aanwijzingen voor de regelgeving. However, the Instructions for Legislation are not binding.
 - 4 <http://nl.wikipedia.org/wiki/Rechtsstaat>, last consulted on 30 August 2012.
 - 5 SVB Jaarverslag (annual report) 2011
 - 6 I have discussed this before in: 'Op de grens van rechtsorde en rechtschaos', AA 2005-7/8, p. 533 et seq. Bijzonder Nummer Krom-Recht (AA20050533).
 - 7 Report of the National Ombudsman of the Netherlands, 11 October 2011, no. 2011/305.
 - 8 For an example, see N. Jungmann, *De WSNP. Bedoelde en onbedoelde effecten op het minnelijke traject* (UL PhD thesis), Leiden: Leiden University Press 2006.
 - 9 <http://www.divosa.nl/actueel/agenda/divosa-voorjaarscongres-2012#anchor1>
 - 10 P. van Echelt & M. Guiaux, 'Verzorgd uit de bijstand' The Hague: Sociaal Cultureel Planbureau 2012, on www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2012/Verzorgd_uit_de_bijstand
 - 11 www.prettigcontactmetdeoverheid.nl
 - 12 Report of the National Ombudsman of the Netherlands, 4 December 2008, no. 2008/290 (Zoekgeraakte documenten, Van het kastje naar de muur).
 - 13 For the various investigations, see www.nationaleombudsman-nieuws.nl/dossiers-archief
 - 14 D.A. Allevijn, *Met de overheid om tafel, Vertrouwen in de overheid als centraal thema in mediation*, The Hague: Sdu Uitgevers 2007. 15 A.F.M. Brenninkmeijer e.a., *Handboek mediation*, The Hague: Sdu Uitgevers 2009.
 - 16 E. Schutte & J. Spierdijk, *Juridische aspecten van mediation*, The Hague: Sdu Uitgevers 2011.
 - 17 See the Hague Conference on International Private Law publication 'Guide to Good Practice Child Abduction Convention – Mediation', www.hcch.net/upload/guide28mediation_en.pdf, last consulted on 31 August 2012.
 - 18 Kamerstukken II 2011/12, 33 122, no. 3.
 - 19 See Ministry of the Interior report 'Publieke beleidsbemiddeling', The Hague: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 2012, available at www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/04/05/onderzoeksrapport-publiekebeleidsbemiddeling.html
 - 20 WRR report 88, *Vertrouwen in burgers*, Amsterdam: Amsterdam University Press 2012.
 - 21 See also the 2011 annual report of the National Ombudsman of the Netherlands 'Een vertrouwde overheid', www.nationaleombudsman.nl/sites/default/files/verslag_website.pdf or the English-language summary of that report, 'Trust in Government', available at <http://jaarverslag.nationaleombudsman.nl/>
 - 22 K. van den Bos, 'Vertrouwen in de overheid, Een essay over de sociaal-psychologische werking van vertrouwen en de mens als informatievergarend individu', The Hague: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 2011, www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/03/01/vertrouwen-in-de-overheid.html, last consulted on 30 August 2012, and K. van den Bos & A.F.M. Brenninkmeijer, 'Vertrouwen in wetgeving, de overheid en de rechtspraak. De mens als informatieverwerkend individu', *NJB* 2012-21, p. 2016 et seq.

‘We live in complex times and this complicates the task of government. As National Ombudsman, I see this complexity as a factor in many of the cases that people bring to my attention. It means that individual citizens often find themselves facing a government machine that baffles them. This has prompted me to choose the incomprehensible nature of government as the theme for my 2012 annual report. This booklet contains a summary of my views in English.’

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