

pro facto

Summary

The charging of a court fee for complaints filed during detention

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Summary

Background

The Council for the Administration of Criminal Justice and Protection of Juveniles, Advisory Division (RSJ) notes in its advisory report 'Spanning in detentie' (tensions in detention) that the number of complaints and appeals being lodged by detainees is steadily increasing.¹ This increase puts more pressure on the complaints and appeals committees, and causes bottlenecks in the legal deadlines of the supervisory committees and the target standards of the appeals committee. According to the RSJ, this is to a large extent to a 'culture of complaining for the sake of complaining', as a result of which a large number of so-called 'futile complaints' are filed. As a result, it is claimed, the complaints and appeals system is becoming gridlocked. This overloading of the system as observed by the RSJ can be viewed as a reason for the present research.

The RSJ has recommended that a pilot project be carried during which court fees will be charged for the filing of complaints while in detention.² In the policy reaction to the RSJ's recommendation, the Minister for Legal Protection indicated that he wanted to investigate whether the levying of a court fee could be of added value 'to reduce the influx of (futile) cases into the bogged down complaints and appeals system'.³ This research investigates whether the levying of a court fee is possible and what the expected positive and/or negative effects of the introduction of this financial incentive are. This report describes the findings of our investigation.

Research question and sub-studies

The key question in this research was:

To what extent and under what (legal and practical) conditions can the introduction of a financial incentive reduce the number of complaints lodged by detainees and to what extent can side effects of the levying of a court fee be expected, and if so, which?

The research consisted of three sub-studies:

¹ Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ) 2019.

² In view of the limited income of detainees, the RSJ proposes a court fee of €1.50. The recommendation only relates to the prison system and not to secure psychiatric clinics or juvenile correctional facilities. See RSJ, *Spanning in detentie*, 2019, p. 64.

³ *Kamerstukken II*, 2019/20, 24587, no. 757, p. 5.

I. A study of the literature on court fees payable for complaint procedures while in detention

In the first sub-study, we consulted literature to find out whether there are any references in Dutch and international literature to complaint procedures filed by detainees in correctional institutions, for which a court fee has to be paid. As we could find few examples in the literature, we enquired in interviews whether respondents were familiar with foreign complaint procedures where a court fee had been introduced. We have also described a number of non-Dutch complaint procedures where court fees are not levied, but where the detainees can refer to the regular judicial system, where the general rules for court fees apply.

II. A comparison with court fees charged for complaint procedures in other fields

In the second sub-study, we examined the arguments for introducing a court fee for disciplinary complaints in the legal profession, the notarial profession, for bailiffs and medical disciplinary law. On the basis of annual reports and interviews with the disciplinary bodies, we also examined the effects of the introduction of court fees in these sectors.

III. The legal and practical feasibility of introducing a court fee charged during detention in the Netherlands

In the third sub-study, we investigated whether the introduction of a court fee for lodging complaints during detention is legally admissible. In addition, we conducted interviews to find out whether the introduction of a court fee is practically possible, what the reasons are behind the increasing number of complaints, what the advantages and disadvantages are and what the possible (side) effects of the introduction of a court fee are, and which alternatives are conceivable.

Method

Study of literature and documents

The research started with a study of literature and documents. We studied the relevant complaints regulations set out in the Custodial Institutions (Framework) Act (Pbw), the Hospital Orders (Framework) Act (Bvt) and the Young Offenders Institutions (Framework) Act (Bjj), as well as the relevant parliamentary documents, in order to determine the basic principles for the introduction of a complaints regulation. We also examined the trend in the number of complaints. The financial resources of detainees were also examined with reference to literature and legal provisions. In addition, we studied international literature on the introduction of court fees charged for lodging complaints during detention in other countries. We examined whether similar complaint procedures exist abroad, whether a court fee has been introduced there and what the effects of that fee are. The annual reports of disciplinary bodies where a court fee has been introduced for filing disciplinary complaints in recent years were also reviewed. These include the legal profession, the notarial profession, bailiffs and medical disciplinary law. We examined the arguments for introducing a court fee in those areas and the effects of introducing a court fee.

Exploratory interviews

At the start of the research, as an orientation on the subject, interviews were held with five experts on complaints procedures for detainees. We discussed with interviewees what the terms 'futile complaints', 'multiple complainants', and a culture of 'complaining for the sake of

complaining' mean in a detention context, the possibilities of introducing a court fee, the expected effects of doing so, and possible alternatives.

Interviews with disciplinary bodies

After studying the annual reports of the disciplinary bodies, we spoke to a chairperson of each body and, in the case of three bodies, also to the secretary of a Disciplinary Board (for the legal profession), the Bailiffs' Chamber, the Notarial Chamber and a Regional Disciplinary Tribunal for Health Care. In the interviews, attention was paid to the effects of the introduction of a court fee on the number and nature of complaints after the court fee was introduced. A dean of a local Association of Lawyers was also interviewed.

More in-depth interviews

After reviewing the collected literature, legislation and case law on the legal and practical feasibility of introducing a court fee for detainees, we conducted ten in-depth interviews with academic and practice experts in the field. We spoke with members of the detainees committee of two penitentiary institutions, directors of two penitentiary institutions, the National Sounding Board Group for Supervisory Committees, the RSJ (advisory department), an organisation that represents the interests of detainees, and a lecturer in access to law and vice-chairman of the Human Rights Institute.

Expert meeting

The empirical research was concluded with an expert meeting in which we presented our preliminary findings to experts and examined what support there would be for the introduction of a court fee for complaints procedures filed during detention, what the possible effects would be and what preconditions should be considered.

Sub-study I: a study of the literature on court fees charged for complaint procedures during detention

In the course of the research, it emerged that almost no examples are known at home or abroad of the levying of a court fee for complaint procedures during detention. In the literature only one example is known of the introduction of a court fee for detainees. This is not a court fee for complaint procedures, but a court fee for private actions in the United States. In 1996, the Prison Litigation Reform Act (PLRA) was introduced because it was thought that the pressure on the federal courts was being caused by detainees litigating cases too easily. The PLRA restricts access to justice in three ways, including reforming the court fee system. The influence of the court fee on the behaviour of US detainees is difficult to ascertain. Firstly, because the PLRA also introduced two other measures; the effect of one measure is difficult to isolate from the effects of the other two measures. However, neither do the effects of the various measures combined provide a clear picture of the impact these measures have had. It is not clear from the American literature whether the introduction of these (financial) thresholds has led to changes in the behaviour of detainees and, in particular, whether they are inclined to file claims less easily. However, there has been a significant decrease in the number of federal court cases involving detainees following the introduction of the PLRA. Nevertheless, the fact that the number of complaints filed has decreased does not mean that the objective of the measures - i.e. to prevent detainees from litigating too light-heartedly - has been achieved.

In the Netherlands, both as a result of parliamentary questions and on the initiative of the Minister, the introduction of a court fee for detainees has been discussed several times. An increasing number of complaints, many of which were suspected to be futile, and cost-cutting measures prompted these discussions. The conclusion was always that a court fee would not be introduced. The arguments for this were that certain issues may seem futile, but can be of great importance to the detainee, that the majority of detainees have little money and in detention only modest remuneration can be obtained for work done and finally that the right of complaint can give people the feeling that they are being listened to, which can be a good way to 'take the heat off'. It was also pointed out at the time that the court fee would lead to high administrative costs.

During the interviews and in the literature, various alternatives to the introduction of a court fee emerged. A first alternative is that the Supervisory Committee (CvT) and the RSJ could pay closer attention to the admissibility threshold. Secondly, it is suggested that mediation and a motivational approach by the penitentiary institution (PI) could help to reduce the number of complaints at the front end. A third is that in the interviews it was mentioned, among other things, that the increasing number of complaints may also be caused by the hardened culture in penitentiary institutions. The relationship between correctional officers and detainees was highlighted as an important factor that can lead to more complaints (when contact is poor) or fewer complaints (when contact is good). This also raises the question of whether the introduction of a court fee will not have the serious side-effect of preventing frustration from being vented. Literature and interviews have therefore also pointed out that it is important to use these alternatives.

The advantages of a court fee that were referred to in the interviews and also appear from the example of the PLRA in the United States is that the court fee will lead to a reduction in the number of complaints. The effect of this is to reduce the burden on the system and to reduce the need for legal staff, thus saving costs. Some interviewees also believe that this would prevent abuse of the right to complain. Other interviewees point out that abuse of the right to complain is mainly done by a number of 'frequent complainants' and not by all detainees who file a complaint; they feel that a court fee would affect everyone, while abuse of the right is mainly done by these 'frequent complainants'.

Sub-study II: A comparison with court fees charged for complaint procedures in other fields

The annual reports of the disciplinary bodies show that the introduction of a court fee in all sectors (the legal profession, the notarial profession, bailiffs and medical disciplinary law) has led to a reduction in the number of complaints. However, the nature of the complaints lodged seems to be largely unchanged. Neither the annual reports of the disciplinary bodies nor the interviews with chairpersons and secretaries show that the number of bagatelle cases (or 'trivial cases') filed after the introduction of a court fee has decreased. Indeed, the annual report of the Disciplinary Body for the legal profession states that the number of bagatelle cases has increased slightly.⁴ Exactly what is meant by bagatelle cases is not explained. When a court fee was introduced in medical disciplinary law however, there was some guidance, as it was said that a court fee should lead to a lower percentage of inadmissibles and declarations of non-foundedness. There is something wrong with that; a complaint that is unfounded is not

⁴ Annual report of the Hof van Discipline en Raden van Discipline, 2020.

necessarily futile or trivial. Moreover, neither is this effect noticeable; in both the disciplinary law for the legal profession and the medical disciplinary law, the percentage of inadmissible and unfounded cases has remained almost the same.⁵

The court fee has been incorporated into the law in the various sectors and a sum of €50 has been chosen in all cases. The reasoning behind this was that a relatively low amount should be set so that the financial threshold would not be too high. Furthermore, when this threshold in the form of a court fee was raised, it was considered important that it would not be the only method of dispute resolution.

Both basic principles (not a too high amount and not being the only way to settle a dispute) can be seen as important preconditions for the introduction of a court fee. It should be noted that the complaint procedure for detainees is a different type of procedure from the disciplinary procedures mentioned above. Detainees are in a situation of dependency, so the right to complain also has the function of providing protection against abuse of government power. It is therefore even more important not to create too high a threshold. There is no alternative judicial route for the detainees; although the detainee can go to the civil court, the ECHR and the National Ombudsman, all these procedures can only be used after a complaint and an appeal have been heard.

Sub-study III: the legal and practical feasibility of introducing a court fee during detention in the Netherlands

International and European conventions and international recommendations relating to the legal position of detainees do not as such prevent the introduction of a court fee. However, where a court fee would be too high, thereby restricting access to justice, the ECHR rules that a court fee is not permissible. For example, the ECHR ruled that the levying of a court fee is justified in order to keep justice affordable, but that a court fee amounting to four times the applicant's monthly salary is disproportionate to that aim. The Human Rights Committee also states that a court fee is possible, provided it is a relatively low amount and when the aim is to ensure the efficiency of justice. Moreover, it should not restrict access to justice too much. In addition, the special position of detainees deserves attention. Detention and the restrictions it entails increase the risk of detainees' fundamental rights being violated. In view of this vulnerability, a significant restriction of access to the complaints procedure for detainees is not desirable.

A number of preconditions emerge from this study that should be taken into account when a court fee is introduced. First there is the amount of money. The literature shows that when introducing forms of court fees in other sectors, care was taken not to set the court fee so high that many complainants would be unable to pay it. Another precondition, according to interviewees, is that when the court fee is introduced, certain categories of complaints should be exempted from it. These are complaints about restrictions on human rights (for example: complaints against aggression and violence, solitary confinement, supervision measures to prevent the risk of escape, freedom of expression, good care and physical integrity) and cases in which an order has been issued (for example, an order for disciplinary punishment or order, an order for promotion and demotion, or an order for leave of absence). Furthermore, examples in other sectors show that it is important to consider who collects the court fee and how this is

⁵ We have no figures for the other two sectors.

registered. During the interviews and the expert meeting, attention was also drawn to the feasibility of levying a court fee.

During the interviews conducted within the framework of this study, but also during the expert meeting, it came to light that the increase in the number of complaints in detention is not necessarily related to 'futile complaints' and the assumed 'complain for the sake of complaining culture'. The interviewees believe in particular that the complaints are related to other developments, such as the introduction of new legislation like the 'Sweeping Act' (Clarification Act) and a tougher culture within the institutions.

The interviewees do believe that the introduction of a court fee will have the effect of reducing the number of complaints filed, but the majority of them wonder whether this is the right direction to take. There is talk, for example, of 'symptom control'. Moreover, a court fee affects all detainees, not just those who are misusing their rights. A possible (side) effect may be that detainees' frustrations remain unresolved, which could lead to aggression.

From this research, it appears that there is hardly any support for the introduction of a court fee. One reason for this is that a court fee does not remove the causes behind the number of complaints and consequently denies the right of complaint an important function.

Conclusion

It is not the first time that the proposal to introduce a court fee for detainees has been made. Previous discussions on this subject have always led to a court fee not being introduced. In this research, too, the disadvantages of a court fee that have been pointed out came to the fore once again. One of the issues at stake is the restriction of legal protection for a vulnerable group, namely a group in a dependent position and predominantly on a low income. Because of this low income, a specific group of prisoners will be hit particularly hard by a court fee.

The first question that should be answered when considering the introduction of court fees is to what extent the problem can be solved by a court fee. Since 2013, there has been an increase in the average number of complaints per detainee, but the cause of this increase in complaints is open to debate. The idea that there is a 'culture of complaining for the sake of complaining' and that more and more detainees submit 'futile complaints' cannot be substantiated with figures. The interviewees also mentioned other causes of the increase in complaints, such as the introduction of the system of promotion and demotion, the amendment of the law on punishment and protection and the culture in the institutions, including the relationship with penitentiary institution workers. Interviewees point out that a small group of 'frequent complainants' in particular have an impact on the system, including on the workload and handling times.

The second question that should be answered is whether the assumptions underlying a court fee, namely that a financial incentive can reduce the number of complaints from detainees, are correct. Experiences from other sectors show that the number of complaints does indeed decrease after the introduction of a court fee, but caution should be exercised in drawing the conclusion that this decrease is actually due to the court fee as other measures were also introduced at the same time. Neither is it demonstrable that a court fee leads to the filing of fewer 'futile complaints'.

The analysis of the legal possibilities shows that the introduction of a court fee is possible. If there is a legitimate aim - in this case to discourage complaints about trivialities so that serious complaints can be handled more expeditiously - it is legally possible to introduce a court fee. Nevertheless, the extent to which a court fee in this case leads to a disproportionate threshold or not must be considered. That depends, among other things, on the amount of the sum and on the other possibilities for getting justice. It should not be so restrictive that certain groups of detainees (e.g. those on low incomes) are no longer able to file a complaint at all. This concern - that a certain group of detainees will no longer be able to file complaints - was expressed during the interviews. Another factor is that detainees are in a position of dependence. This applies all the more to categories that involve the protection of human rights, such as the right to complain against confinement and the right to good care. Complaints of this kind cannot be brought before any other body, so it must be possible to file them in court.

Finally, when considering the introduction of a court fee, other problems and possible alternatives also play a role. Examples include investing in the relationship between penitentiary institution workers and detainees through motivational interviewing, but also by informing penitentiary institution workers about the workload that complaints entail, as well as mediation by a complaints officer. Finally, the Supervisory Committees and the RSJ have also mentioned raising procedural requirements and stricter admissibility requirements as alternatives to reduce the number of complaints. These alternatives could be considered in addition to or instead of a court fee.

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