



Support for Improvement in Governance and Management
A joint initiative of the OECD and the EU, principally financed by the EU

WORKSHOP “DIFFERENT APPROACHES TO LEGISLATIVE DRAFTING IN EU MEMBER STATES”

Legislative Drafting in the Netherlands and in civil law countries

Workshop 9 May

Professor dr. Wim Voermans¹

A. Legislative quality: a relative concept

1. At the outset: improving the Quality of legislation. But what is quality?

The concern for legislative quality has grown and Better regulation has become popular in a lot of EU countries over the last decade. What a lot of these policies in civil law countries share, as indeed the EU policy on better law making itself, is the ambition to improve the overall quality of legislation. Training and awareness of the quality dimension are the methods of choice to improve the overall quality of legislation. Improving legislative quality, it is believed, improves the overall accessibility of the law, but also competitiveness and by it economic growth of democracies. But what do we mean by legislative ‘quality’? It is a very elusive buzzword by all means. According to a common definition quality is the extent to which goods or services meet requirements or standards. Hence legislative quality is the degree to which legislative instruments and procedures live up to the legislative standards. But then a new question emerges: what are the relevant or proper standards for EU legislation?

2. Legislative functions as the source for legislative quality standards

¹ Prof. dr. Wim Voermans is professor of Constitutional Law and Administrative Law at Leiden University. He is the Dean of the European Academy for Law and Legislation and the vice-president of the European Association for Legislation. e-mail: w.j.m.voermans@law.leidenuniv.nl Professional website: http://www.law.leidenuniv.nl/org/publiekrecht/sbrecht/wim_voermans.jsp personal website: <http://wimvoermans.nl> and <http://wimvoermans.web-log.nl>

Legislation is primarily a medium through which law is expressed. As such it performs important functions in constitutional states. In the political systems of welfare states, governed by the rule of law, legislation provides both the basis and the framework for government action (constitutional function). At the same time law expressed by legislation serves both as an instrument to further policies (instrumental function), acts as a trade off mechanism for interests (political function), a channel for popular participation in the enactment of law (democratic function) and offers the basic framework for the operation of a bureaucracy (bureaucratic function). Aside from these more or less instrumental functions legislation performs less well-known but important non-instrumental expressive and symbolic functions structuring the legislative debate and providing the authoritative aura for and legitimacy of legislation (symbolic function).

2. Quality standards? Legislative quality and regulatory quality

In order to be able to perform most the functions mentioned before, legislation must meet some basic requirements. Subject to the rule of law, as any other institution or agent in a constitutional state, the activity of legislating is subject to the law itself. This means that in order to legislate, a constitutional power to legislate is a prerequisite and legislative processes as well as legislative discretion are confined by law (preparation and enactment according to the due procedure, no acting contrary to higher ranking laws and - some form of - attunement with existing law). Aside from this 'principle of legality' the rule of law also imposes a duty on the legislator to consider – in some way or some respect - the implementation and enforcement of legislation to be enacted ('principle of effectiveness'). The last demand the rule of law sets upon a legislative act results from the principle of legal certainty, and is – what we can call – the 'principle of intelligibility' i.e. the principle that holds that legislative acts need - to some extent – to be readable and intelligible to its addressees. Most constitutional states are not only governed by the rule of law but are in effect democratic states too. This latter feature results in separate, additional requirements for legislatures connected to the democratic and political function of legislation. Legislative authorities are subject to the 'duty to give reasons', the 'duty to consult or involve interested parties', be it directly or indirectly, and the 'duty to inform' (transparency and accessibility), during the course of legislative processes resulting in primary legislation.

For some it will be obvious that legislative quality standards can only emanate from constitutional principles (e.g. constitutional lawyers), others may take different views to the matter. The Organization for Economic Co-operation and Development, for instance, approaches the idea of – what they call – regulatory quality from a rather more economic angle. The overall OECD perception of regulatory activity – often taking the form of legislation - is largely instrumental. The OECD and a large part of the regulatory governance community understand legislation primarily as a regulatory instrument, i.e. as a means to attain public goods, providing prerequisites for stable institutions, fair market conditions, citizen's satisfaction, and economic growth and welfare. Taken from this perspective legislation performs well if it maximizes the net benefits of regulatory measures and maximizes citizen's wealth. Legislative quality, according this view, is not in the first place the extent to which legislation complies with constitutional principles or conveys symbolic notions, but rather more the way legislation rates in terms of enhancing economic performance, or the dynamics of trade offs of interests. Over the last decade a lot of effort has been invested in defining (a wide range of) regulatory quality indicators, in order to make regulatory quality measurable. Performance on indicators like these gives an idea of the ability of a government to formulate and implement sound policies and regulations that permit and promote private sector development.

The different functions of legislation translate into different views on legislation. When one adopts an instrumental or political view to legislation the conceptual lens to problems of and the proper

standards for legislation will be a different one than according to a more constitutional or symbolic perspective. That is why we will distinguish between the concept of 'legislative quality' and the concept 'regulatory quality'. From a constitutional point of view (and the symbolic function which is closely related to it) the only right measure for the quality of legislation is its ability express law. Quality of legislation is the extent to which the criteria, emanating from constitutional principles, are met. Regulatory quality on the other hand is the extent to which legislation, as a means to express public policies, is successful in implementing policies to permit and promote private sector development, fair market conditions, stable institutions, citizen's satisfaction, etc. The different notions are not mutually exclusive, in fact they coincide in some respects. One might, for instance, argue that the regulatory quality of legislation is a part of overall notion of legislative quality, since it deals with effectiveness and efficiency of it. This would however not do justice to the very different perspectives on the function of legislation in the two different notions.

3. Quality standards

Different countries have different quality standards. In the Netherlands, for instance, six sets of quality pairs were elaborated in the beginning of the 1990's. This was the onset of the quality policy that has been there for almost two decades now. Quality of legislation in the Netherlands is perceived as the degree to which a regulation complies with the requirements (so-called 'quality pairs') of: a. legality and lawfulness, b. aptitude for implementation and enforcement, c. effectiveness and efficiency, d. subsidiarity and proportionality, e. harmonization and coordination and f. simplicity, readability and accessibility. These requirements are elaborated in policies and dedicated instruments, like reviews, manuals and (voluminous) drafting directives.

The EU itself uses an implicit set of quality criteria. The are enshrined in the Better Law making policy and Better Regulation strategy and the Interinstitutional agreements on the drafting quality of community legislation (1998) and the one on Better Law Making (2003). The criteria are somewhat different from the Dutch ones, not surprisingly of course, in view of the different constitutional setting and context in which EU legislation performs its functions. The quality of EU legislation can be measured by the extent to which it meets the following criteria: a. Legality b. due procedure and consultation, ((multi)annual programming of legislative activity, wide consultation, evidence-based and duly motivated decisions, transparency throughout the legislative process enabling maximum accessibility, etc.) c. due regard to subsidiarity, proportionality (including overall effectiveness and efficiency of an act and lawmaking) d. choice of right instrument , e. due regard to implementation and transposition, e. enforceability and f. technical quality (including accessibility, readability).

List like these always differ – of course – according to the context, but in a lot of civil law countries they share common features as well, especially the focus on legality and lawfulness, focus on due procedure (constitutional procedure, consultation, inclusiveness), attention to proportionality, effectiveness and efficiency, due regard for aspects of implementation and compliance, and technical quality (with an eye to readability and accessibility).

B. Improving the quality of legislation in the Netherlands

1. A policy on legislative quality

During the end of the 1980s the Dutch government became increasingly concerned with the quality of legislation due to serious problems regarding the quality and effectiveness of legislation. To

improve the overall legislative quality, different policies were pursued and enacted.² One of the main results of these governmental efforts and policies was the adoption of a general legislative policy, which consists of a set of measures aimed at the lasting improvement of legislative quality by setting quality criteria. A substantial part of these measures concerns the fundamental drafting stage.

A lot of the quality standards were enshrined in a drafting manual the so-called Dutch Drafting Directives (originally 1992)³

These Dutch Directives are quite elaborate. They are a comprehensive legislative-technique handbook, but also contain substantial legal and policy-related legislative issues. As a result the Directives are a voluminous set of drafting guidelines, accompanied by a lot of secondary information (examples, explanations, illustrations, model clauses, etc.) which are to be observed by all government officials and public servants when drafting bills. Deviation from the Directives is allowed only if application of the Directives would lead to 'unacceptable results' (Directive no. 5). The Directives constitute a voluminous Draftsman's handbook dealing with every important activity within the drafting process. They concern methodological and substantive legislative issues e.g. how to prepare a draft, how to adopt elements of public policy into proposed legislation, how to implement European legislation, what kind of legislative instruments to use, how to delegate legislative powers, how to attribute administrative authority, what kind of quality considerations are to be made, etc., etc.

Directive 7 offers a good example of a methodological Directive. It states:

Directive 7

Before deciding to introduce a regulation, the following steps shall be taken:

- a. knowledge of the relevant facts and circumstances shall be acquired;
- b. the objectives being aimed at shall be defined in the most specific, accurate terms possible;
- c. it shall be investigated whether the objectives selected can be achieved using the capacity for self-regulation in the sector or sectors concerned or whether government intervention is required;
- d. if government intervention is necessary, it shall be investigated whether the objectives in view could be achieved by amending or making better use of existing instruments, or, if this proves to be impossible, what other options are available.
- e. the various options shall be compared and considered with care.

This perpetual quality programme is accompanied by various projects, processes and institutions. The first we saw already above: embedded in the Dutch legislative process are all kinds of tests and reviews to make sure some possible (negative) effects are overlooked. The Dutch were among the first to do impact assessments on proposed legislation. The harmonized method to calculate/estimate administrative burdens as a result of legislation (the standard cost model) is of Dutch origin.

² See the policy memorandum *Legislation in perspective*; a policy plan for the further development of the general legislative policy, aimed at improving the constitutional and administrative quality of government policy, policy memorandum by the Dutch Ministry of Justice (The Hague 1991).

³ Called *Aanwijzingen voor de regelgeving*.

Two other features of the Dutch quality system are watchdogs and training. Ever since 2001 the Dutch government committed itself to an ambitious training programme of civil servants responsible for legislation. The creation of the Dutch Academy of Legislation is the tangible result of this commitment.

Last but not least there have been a lot of projects over the last decades to get to grips with legislative proliferation and quality.

2. Relief projects

After the economic crisis at the beginning of the 1980s the first Lubbers administration (1982-1986) pursued a rigorous regulatory simplification policy. In 1994-1998 the social-liberal coalition under Prime Minister Kok – inspired by the need for economic growth – conducted an elaborate multi-annual simplification programme more or less on the same footing (deregulation). This programme – aiming to support entrepreneurship, to create level playing fields in hitherto uncompetitive markets and to raise the overall quality of legislation – combined better regulation elements in an integrated approach. The programme – labeled the MDW17 programme – was continued under the second term of the purple coalition (1998-2002). It met with some success: some 70 simplification projects were concluded resulting in a € 470 million red-tape relief. The programme was also interesting because it showed first attempts to quantify and reduce the administrative burden as a consequence of legislation, although still in a rudimentary form. The Balkenende II and III administrations (2003-2006) also put better regulation, simplification, and red-tape relief high on the agenda. However, they did – in comparison to the former programmes – narrow the better regulation focus down to specific red-tape relief. By specifically targeting the administrative burden for companies as a consequence of legislation the Balkenende cabinets tried to kill two birds with one stone: to meet the increasing complaints about bureaucracy in general and the costs of administration, information obligations and red tape in particular and to foster economic growth at the same time. Although it is difficult to estimate, because no zero base measure is available, especially in the period of 2001-2003 the administrative burden seems to have rocketed in the aftermath of some large-scale incidents and misfortunes (a major firework explosion in Enschede, a fire in a bar in Volendam, fraud in the construction industry, veterinary epidemics, etc.). The programme aiming for a structural 25% reduction of regulatory induced red tape (€ 4.1 billion), using pre-fixed targets and a sound quantification of burdens yielded significant results.¹⁹ The Dutch General Audit Chamber, in its 2006 audit,²⁰ acknowledged the progress which the programme had made (20% of the originally targeted 25%). The Audit Chamber did however note that in the perception of businesses the programme had not as yet resulted in significant or tangible relief. Various reasons may account for this contradictory outcome. For instance, some of the eliminated information obligations in legislation were not complied with anyway, business did not adapt their administrative procedures to the new, less burdensome, regimes – they kept on reporting and registering even when this was no longer obligatory. The programme seems also to have raised the red-tape awareness of businesses. By 2006 they voiced that they felt that the scope of the ongoing programme was too limited and too (central) government-centered. Especially the compliance costs, i.e. the costs for business involved in reporting to inspectors and enforcement authorities, were felt as the single most excessive burden. It was not as much the initial burden caused by direct information obligations in legislation that weighed upon businesses, but the indirect, secondary information obligations as a result of compliance issues. Many of these burdens are – according to Dutch businesses – caused by the poor level of service, coordination and performance of controllers, inspectors and enforcement agencies at all levels – central and decentralized. This is one of the reasons why the current Balkenende

administration has widened the scope of its red tape reduction programme. The updated regulatory reform policy – launched by a letter to Parliament on 17 July 2007²¹ – adopts a more integrated approach to the reduction of the administrative burden, by aiming for:

- a further reduction of 25% of the administrative burden for companies;
- a reduction of substantive compliance costs in areas where they are considered disproportionate;
- a 25% reduction of the costs of inspectorates, by improving the quality of enforcement and inspections in a number of specific sectors;
- improving the procedures for licensing, among other things by expanding the application of the so-called ‘lex silencio positivo’ (meaning: no news on an application for a license is good news – the license is then deemed to be issued automatically) and by a further bundling of licensing;
- less burdensome subsidy and grant requirements;
- improving the quality of service provided by governments, municipalities, inspectorates and enforcement agencies to companies;
- improving the information provided to companies, among other things by strengthening the Internet portal and the implementation of so-called ‘common commencement dates’²² or ‘fixed change dates’.

The differences between the current approach and earlier programmes and projects are considerable. Whereas the initiatives launched in the 1980s and 1990s invariably concerned specific projects carried out on the basis of political (and not very precisely defined) estimations and assessments of the burden of regulation, the current policy is much more systematic, based on an objective and accurate calculation of administrative burdens and direct compliance costs for businesses. Where administrative burdens used to be estimated ‘on the edge of the newspaper’ as it were, present-day calculations are based on very carefully defined concepts and collectively agreed and endorsed parameters. The business sector is also involved as a partner in the efforts to come up with mutually accepted and practicable arrangements.

3. Training civil servants in the Netherlands

a. The raising of the alarm in 2000

The Legislative Review Committee (Grosheide-committee 2000), we discussed in the previous paragraph, not only noticed flaws in EU expertise in the Dutch civil service but serious defects with respect to the learning capacity of the ministerial legislative processes as well. The Committee even observed – what they called – a certain degree of passiveness in the field of training and the permanent education of legislative professionals. To a great extent, up until that moment, it was left to legislative drafters (i.e. a civil servant with responsibilities in the field of legislative drafting) themselves to determine whether or what training courses they took. No programmes for vocational or permanent training existed. Even though training courses were on offer, these are not very well attended.

Although the ministries themselves did actively offer training courses, the only occasionally did so. More in general, the Review Committee was of the opinion that the ministries were, at the time, not very active in pursuing a policy aimed at guaranteeing the drafters professionalism. This was all the more evidently showing, inter alia, from the absence of a broader policy vision on recruiting and selecting drafters and lawyers. Not only the personnel but the internal routines were lacking too in the eyes of the Commission. There were in 2000 hardly any protocols on the actions to be taken in various legislative processes and there was no systematic reflection on formulas or ‘best practice’

scenarios for such processes on the basis of experiences gained or knowledge gathered from process evaluations.

In the Review Committee's words:

'(...) there is no institutionalized instrument to improve processes, if necessary. This is because individuals may learn from their actions, but in an organization actions are improved only if a procedure for improvement has been laid down and is communicated. Further, the possibilities offered by information and communication technology in the field of knowledge collection and exchange are used only to minimum degree. This is true of knowledge collection and exchange within ministries, and definitely between the ministries.'

b. Additional training efforts: the advent of the Dutch Academy for Legislation

The alarm raised here did not go unnoticed. It was the Review Commission's report that spurred the establishment of the Academy for Legislation in 2001 as a vocational training school for legislative drafters, with responsibilities in the field of recruitment. Once a year 20 graduated lawyers can apply to the Academy to enter the bi-annual training programme. On admissions a candidate is assigned to one of the ministerial departments and linked up with a supervisor. Two days a week the recruits are trained in the Academy, the rest of the training is 'on the job.' After two years they take a final exam and on graduation receive a position in a department. The Academy offers post initial training too. There is a host of courses on offer supervised by one of four academic directors. The Academy has its own housing (a 17th Century building on the Lange Voorhout) in the Hague and uses state of the art teaching methods, techniques and materials. It is funded by the Dutch government. The Dutch Academy for Legislation was evaluated in 2007 and duly accredited afterward. It proved a success. In 2008 the European Academy for Law and Legislation followed suit.

c. Programmes of the Academy for Legislation

The Dutch Academy for Legislation (AL) aims to provide courses that will increase the knowledge and skills of the participants, both in a theoretical and a practical sense. That is why the courses do not stop at legislation proper but also comprise tuition in public administration, constitutional law, European and international law, administrative law and political sciences. There are different programmes, but the most important are 1. the Master's programme for legislative lawyers trainees, 2. the course for professionals and draftsmen already employed in the civil service, 3. and courses in legal counseling for professionals.

The students for the two year master 'trainee' programme are carefully selected. These trainees (20 selected each year) enroll in the on-the-job training programme. As indicated above, they work three days a week as draftsmen or lawyers within one of the ministerial departments, the Dutch Council of State, or one of the houses of Parliament as the case may be. The programme places much value in the interplay between theory and practice.

The selection procedure for the 20 positions starts in February of each year. The seventh cycle is currently (2010) under way. From the applications received (this year some 450) a specialized bureau selects the candidates who then will enter a two stage concours (with tests in knowledge, writing and a psychological review). After the initial rounds the remaining candidates are interviewed by senior officials and the dean of the Academy. By June the final selection is made.

In the two year programme aside from the courses all kinds of skills are trained, among them communicative, writing and negotiation skills as well as skills in presentation. The programme is

also rich in field trips to Brussels and Strassbourg (EU institutions, Council of Europe, European courts, etc.) and other national and international institutions. The students take exams in all the classes and are graded. At the end of the two year-programme they do a 'live' project. They look into a actual policy problem and see whether action is needed and a draft needs to be made. They present their analysis and plan in an hour long session to a specialist panel.

If the trainees finish the programme successfully they get a diploma and there is a graduation session in Parliament.

The trainee programme, as well as the other programmes, have proved to be a success. The departments and other institutions are satisfied and report that it is worth while the effort and investment. Before 2002 they had to invest quite substantial funds in permanent education of their staff. The academy pays of in this respect: on the whole it is cheaper than all of these individual courses from the past. The trainee programme (and other programmes) are run very professionally. The teachers and academic staff are specialist in the field, most of them leading academics as well. The programme directors (4) are all leading university professors. The programme itself was reviewed by the Dutch and Flemish Academic Accreditation Authority in 2005 and accredited as a sound academic body. In 2006 the Academy won the national prize for best trainee institution.

d. Departmental efforts: knowledge centre, protocols

Besides training and recruitment efforts most ministerial departments have elaborated and enacted protocols on legislative routines ever since 2001. A lot of them are around. There is a tendency to make them electronically available. The Knowledge Centre on Legislation – another outcome of the recommendations of the Grosheide-committee – runs a website offering access to all of these protocols. There is the problem of proliferation of these manuals and protocols. The forest tends to become invisible for the trees. An integration and accessibility project is currently underway to solve these problems.

e. Academic input

Academic curricula in Tilburg, Amsterdam and Leiden also provide courses in Legislative Studies and Drafting in their regular curricula and post-academic courses as well. They offer their post-academic courses via the Academy.

f. Drafting directives

As we have seen above pursuant to the Dutch Legislative quality policy of the 1990's a voluminous set of drafting directives was enacted: the Dutch drafting directives. We have had drafting directives – a sort of a manual on best legislative practice – ever since the 1950's in the Netherlands, but 1992 brought a major revision and elaboration. At present – after six major revisions since 1992 – there are 347 Directives. The Dutch directives for the major part deal with drafting-technique issues (65% of the content) but also contain provisions on proper procedure and formats, and tackle methodical issues (proper preparation of a bill, regard for proportionality and alternative solutions, self regulation, ex ante evaluation, compliance issues, implementation, sanctioning, etc.) and policy-related legislative issues as well. The directives are accompanied by a lot of secondary information (examples, explanations, illustrations, model clauses, etc.) All government officials and public servants are obliged to observe the Directives when drafting bills. Derogation from the Directives is allowed only if application of the Directives would lead to unacceptable results (Directive no. 5). The

manual is not binding on the Council of State, parliament or decentralized bodies, but these authorities use the Directives anyways because it is an authoritative Code of Good Practice.

f. Information technology

Information technology is used throughout the legislative process in the Netherlands, especially by the government. In the 1990's experiments into computer based legislative drafting were conducted, resulting in the Dutch Leda system, a system which offers support for drafting by offering easy and context sensitive access to the Dutch Drafting directives.

In the Netherlands almost all legislation is made available electronically at the moment. This begs the question whether the drafting process itself – still largely paper based – should not be streamlined and digitalized as well. Especially the way we draft amendments is antiquated and prohibitive to laymen understanding and access. At present the 'Legis' project is underway which will result in a new digitalized architecture for the whole of the Dutch legislative drafting and enacting process.

h. Electronic codification

Like other countries the Netherlands have embraced electronic promulgation last year. In a lot of countries electronic promulgation is already a good practice, in other countries, like Belgium, electronic promulgation is required by law. Other countries are considering to take that route as well. Electronic promulgation improves the accessibility and comprehensibility of legislation immensely. Especially the possibility of linking the processes of drafting, enactment, promulgation and consolidation – which is perfectly feasible in an electronic environment – can improve the pace of consolidation, keep the legislative corpus up-to-date, help the legal and authentic effect of consolidated texts, and, moreover, strengthen the accessibility and readability of legislation. The Legis project in the Netherlands is looking into that aspect as well.

i. Learning from experience: monitoring and evaluation

There has been a growing need, particularly in the past 15 years, to know more about the experiences administrative authorities, supervisors and enforcement authorities have gained with respect to effects of legislation. In order to take advantage of the experiences of administrators and law enforcement bodies on the occasion of preparation of (modifications to existing) legislation, systematic consultation of administrative authorities and enforcement bodies is becoming increasingly popular. In some Dutch ministries, this is the result of a dedicated 'chain approach' ; other ministries, such as the tax section of the Ministry of Finances, have a detailed system for consulting administrative authorities and harvesting feedback of experiences gained by such authorities. A special form of informed preparation of legislation concerns impact assessment, which is traditionally well engrained in Dutch Legislative processes. Different impact assessment tests exist to make a preliminary analysis and so predict the administrative, environmental, business, financial, enforcement, compliance – and what have you- effects of proposed legislation. These tests come in different forms and shaped. They may be carried out as a regular paper-based impact assessment but also on the basis of a simulation or field experiment. Obviously, the quality of legislation benefits from such knowledge in a number of ways.

In the Netherlands important Acts of Parliament are being evaluated after some time more and more frequently, even though such evaluation is still not a fixed practice. As we noted earlier on the focus of evaluation is usually on the effectiveness of policies rather than on the effectiveness of the Act of Parliament or regulation examined. Naturally, the experiences revealed by the evaluation are also highly relevant to measuring the effectiveness of the solutions that are enshrined in

legislation. Here, too, the problem is, however, that evaluation experiences gained from systematic statutory evaluation are usually used only once and only within the legislative project that is being evaluated. The results of most legislative evaluations are used to adjust some aspects of statutory regulations. Usually no lessons are drawn for the future or for other projects. Recently a 'Clearing House' was established within the Knowledge Centre for Legislation to improve the situation. The Clearing House tries to re-use insights from evaluations for other projects.

j. European Academy for Law and Legislation

Academic training in legislative drafting in the Netherlands is a recent development as it is in most civil law countries. Legislative drafting was predominantly taught by way of apprenticeship. The arrival of new insights in quality requirements for legislation and quality enhancing policies, the constant time pressure on the drafting process and the good experiences which academic teaching of legislative studies and drafting have spurred on the arrival of dedicated academic master programmes on legislative drafting (e.g. Antwerp, Luiss Rome, University of London) and specialized institutes. One of these institutes saw the light in 2009 and is called the European Academy for Law and Legislation. The Academy – set in the Hague - aims to improve the quality of legislation and legislative procedures at the national level and in European and international institutions. A high level exchange of knowledge and experience between prominent lecturers and ambitious students is instrumental to this aim.