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# Workshop Different Approaches to Legislative Drafting

Tbilisi, 14 December 2009

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## 1. Drafting: civil law tradition

**Civil law countries: legislation primary source of law**  
 In democracies peoples representatives partake in legislation (parliaments)  
 Legislature

- **Representative assembly**
- **Power to create, amend and ratify law**

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## Drafting: legislative quality

Legislative responsibilities of modern democracies have increased


- **Large volume, legisferitis?**
- **Effectiveness, consistency, accessibility compromised**

Legislative Quality challenged

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## Safeguarding quality

Procedures

- **Review by (semi-) independent authorities** (judges, councils of state, etc.)
- **Ex ante controls** (RIA, etc.)
- **Review of delegated legislation** (call back, preliminary scrutiny)

Content: legislative quality

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## Legislative quality

Legislative quality is a relative concept: depends on the functions you attribute to legislation

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## Functions of legislation

- ▢ **Constitutional** (basis and framework for government action – rule of law)
- ▢ **Instrumental** (instrument to achieve goals)
- ▢ **Political** (trade off mechanism interests)
- ▢ **Bureaucratic** (framework operation bureaucracy)
- ▢ **Democratic** (a channel for public participation)
- ▢ **Symbolic** (authoritative aura – legitimacy)

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## Quality & Quality criteria in the Netherlands

- ▢ **The Dutch approach: quality criteria as a basis for an overall legislative policy**
- ▢ **1990 *Legislation in Perspective* (Dutch policy on the lasting improvement of legislative quality)**
- ▢ **6 sets of quality criteria**

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## Dutch Quality criteria

- A. Legality (intra vires & no conflicts) & realization of fundamental principles of justice
- B. Effectiveness & efficiency
- C. Subsidiarity & proportionality
- D. Feasibility & enforceability
- E. Coordination
- F. Simplicity, lucidness & accessibility

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## Dutch Drafting Directives

- Part of an overall legislative quality policy
- Dutch Drafting Directives 1992
  - 'Recommendations for regulations'
  - 347 Guidelines (actually some 50 more)
    - Implementation of the quality criteria of Legislation in perspective
    - Lots of model clauses, examples, illustrations
  - Dynamic and evolving document October 2004 – 6th revision
    - Experiences and best practices incorporated
- Binding upon civil servants working in ministerial departments, not on parliament

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## Dutch Drafting Directives

- Chapter 1: Scope
- Chapter 2: General topics of legislation
  - (use of legislation, alternatives, co-regulation, self-regulation, enforceability, impact assessment, cost-benefit assessment, decentralisation, avoid conflicts, constitutional issues, delegation, etc.
- Chapter 3: General aspects of drafting (techniques & technical considerations)
- Chapter 4: Elements of a draft
  - Definitions.....explanatory memoranda

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## Dutch Drafting Directives

- Chapter 5: Amending legislation
- Chapter 6: Procedures
- Chapter 7: Treaties
- Chapter 8: Negotiating and implementing EC/EU legislation

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## Dutch instruments

- Quality policies – projects (simplification, quality enhancement, compliance)
- Drafting manuals
- Protocols
- Tests (ex ante)
- Central review – Ministry of Justice
- Techniques (IT) and training

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## 2. Organization of the Dutch Legislative Process

- ▢ **Legislation in the Netherlands: instruments**
  - **Parliamentary Act (on a draft by the government or a parliamentary initiative)**
  - **Statutory instruments (delegated legislation)**
    - Orders in Council
    - Ministerial regulations (or orders), etc.
- ▢ **99% of legislation in the Netherlands (on the level of central government) prepared by the government (ministerial departments)**

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## Organization

- ▢ **Legislative drafting by specialists – professional legislative drafters - in ministerial departments**
- ▢ **Policy makers hand over their ideas/policies to professional draftsmen**
- ▢ **Most departments have centralized drafting units**
  - Home office, Department of Housing, Planning & Environmental affairs, Dept of Social Affairs & Employment, Dept of Transport & Water management, etc.)

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## Preparation of a bill

**Most departments have protocols (checklists used for drafting) – steps**



### Checking relevant aspects

- Is legislation strictly necessary
- Alternatives?
- Level of legislation (primacy of the parliamentary legislature)
- Ex ante assessment of effects (financial, administrative, environmental, etc.)

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## Preparation of a bill

- **Assessment of compliance and enforceability (Table of 11 – ex ante compliance check)**
- **Assessment of implementation**
- **Check on effects (financial, economical, societal, business-effects, etc.)**

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## Preparation of a bill

Portal phase – after a draft has been prepared by a minister it must be cleared before it can be tabled in the Council of Ministers



### Portal reviews

The Netherlands: big on ex ante legislative review (no constitutional review)

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## Portal reviews

- ▢ Legislative quality review
  - Ministry of Justice: check on compliance with Drafting Guidelines
- ▢ Business effect test
  - Ministry of Economic Affairs
- ▢ Administrative burden/red tape-test
  - Commission for review of administrative burdens ACTAL (comparable to BRT UK)
  - Selective

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## Portal reviews

- ▢ Environmental effects test
  - Ministry for Housing, Planning and Environmental affairs
- ▢ Decentralization review
  - Ministry of the Interior and Kingdom relations (Home Office)
- ▢ Implementation and enforcement feasibility test
- ▢ **Central authority** (check-in-point for draft legislation) channels bills through these tests

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## Council of Ministers

- ▢ After the portal phase – Council of Ministers
- ▢ Draft becomes a bill
- ▢ Sent to the Council of State for consultation
- ▢ Together with the opinion of the Council of State the bill is sent to Parliament
- ▢ Parliamentary treatment (two houses) – 12-16 months

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## 3. Learning how to draft?

- **Until recent (NL) Legislative drafting is**
  - A talent and skill
  - Skills can only be acquired in practice
  - Taught by experience and patronage
  - This attitude has changed over the Last decade
- **Review Committee 2000**
- **Legislative science/studies as an inspiration for legislative drafting**

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## Training and disciplining

- **Academy for Legislation – European Academy for Law and Legislation**
  - **Recruitment and training**
  - **Inspired by Academic courses in legislative drafting**
- **Knowledge centers and departmental protocols**
- **Dutch Drafting directives**

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## Further efforts

### Information technology

- Leda
- Legis (new IT-supported architecture legislative procedure)
- Electronic promulgation & codification

### Learning from experience

- Monitoring and evaluation

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## Dutch Drafting courses

- Training on the job still the main method of transfer of knowledge and experience
- Encouraging exchange & 'Esprit de corps'
  - **750 draftsmen**
  - **Journal for Legislative Issues (1987)**
  - **Dutch Association of Legislation and Legislative Policies (1992)**
  - **Bi-annual 'Day of legislation'**
  - **2006: Host of the EAL-conference 'The learning legislator'**

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