Workshop Different Approaches to Legislative Drafting

Tbilisi, 14 December 2009

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

Drafting: legislative quality

Legislative responsibilities of modern democracies have increased
• Large volume, legisferitis?,
• Effectiveness, consistency, accessibility compromised
Legislative Quality challenged

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
Legislative quality

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

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)

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

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
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

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

Dutch Drafting Directives

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

Dutch instruments

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

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.

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.)

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.)
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)

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

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

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
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

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

Further efforts
Information technology
- Leda
- Legis (new IT-supported architecture legislative procedure)
- Electronic promulgation & codification
Learning from experience
- Monitoring and evaluation

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’