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CONTRIBUTION

by

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to the General Debate on

"Methods for ensuring parliamentary oversight over the quality of legislation"

The case of the Netherlands: scrutiny by the Senate

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1. The legislative process

New laws are sometimes needed to ensure that society keeps running smoothly and needs and desires of citizens are met. In the Netherlands it is one of the major duties of the Houses of Parliament (House of Representatives - *Tweede Kamer der Staten-Generaal* - and Senate - *Eerste Kamer der Staten-Generaal*) to make new laws, in cooperation with the Government.

Ususally the legislative process starts with a draft bill conceived by the Government. If the ministers agree on the draft bill, it is submitted for advice to the *Council of State*, the major advisory body to the Government. The Council of State checks the draft bill against contravention of other laws or treaties and examines its impact on the citizens. The advice from the Council of State includes comments and proposals for amendments to the bill and the explanatory memorandum.

Members of Parliament may request the Government to draft a bill, but sometimes MPs themselves take the initiative to draft a bill. This is called an initiative bill. Only the House of Representatives has the right of iniative – not the Senate. Assistance in drafting the bill is provided by the Legislation Office of the House of Representatives or by officials from the Government department in question.

A Government bill is conveyed to the King together with the advice of the Council of State. The so-called Royal Message is appended, i.e. the official text by which the King presents a bill to the House of Representatives. The bill is now made public.

The bill and the accompanying advice from the Council of State are first examined by a Standing Committee of the House of Representatives. The committee issues a report, to which the Government responds in a memorandum. The committee then has the option of issuing a second report, to which the Minister would respond with a second memorandum.

All political groups can propose changes to the bill, make remarks and pose questions.

After consideration by a Standing Committee the bill is defended in a plenary meeting of the House by those who proposed it: usually the member(s) of the Cabinet in charge, but sometimes one or more MPs (initiative bill). In the debate about the bill, the various parties try to convince one another of their respective views.

After a bill has been adopted by the House of Representatives it is submitted to the Senate. The Senate examines and discusses the bill in great detail and may only adopt or reject it. The Senate does not have the right to make changes to a bill by proposing amendments.

When a bill has also been adopted by the Senate, the King will sign it and the Minister in charge will countersign it. The bill has now become a law[1].

Putting legislation into action: Implementation regulations

Acts of Parliament often only address the main aspects of a topic. They provide for more detailed legislation in the form of implementation regulations, which - like Acts - contain generally binding regulations. They are not subject to approval by parliament. There are many kinds of implementation regulations. Some are required by law to be enacted by the government. These are called orders in council and take the form of Royal Decrees that must be signed by the King and one or more members of government. In other cases, a minister may be designated in an Act to enact more detailed rules. These take the form of a ministerial order. Finally, implementation regulations may be drawn up by officials, if the Act in question allows for it.

These regulations may provide for all sorts of powers, for example the power to issue licences or award grants. Often, there is some latitude as to how they will be put into practice. Ministers may lay down written rules about how to apply certain regulations. Sometimes these rules (contained in guidelines or circulars) are intended purely as instructions for civil servants, but in other cases they are published in order to keep the public informed.

2. Instructions for Regulation

An important trend in the parliamentary process in the Netherlands in the last 25 years has been the theme quality of legislation. The first initiatives came fom the Government which in 1992 published the "*Instructions for Regulation*". These instructions can be seen as a handbook for good legislative practice, to be followed by ministers, secretaries of state and – particularly – by civil servants involved in the drafting of bills and other legislative proposals.

Some core elements of the Instructions are the following:

A government regulation shall only be introduced, when the necessity has clearly been established.

Before deciding to adopt a regulatory scheme knowledge (facts and circumstances) have to be gathered concerning the subject item. This must be used to formulate the objectives. The analysis must make it clear to what extent a legislative intervention is necessary and what sorts of legislative intervention should be considered. Usually data collection takes place in stages. For each step in the decision making process new (more detailed) data are required.

The objectives pursued are formulated as concretely and precisely as possible. A concrete and accurate fixing of objectives implies that different objectives will be

[1] Unless there is a valid call for a consultative referendum.

clearly distinguished. Quantitative and financial goals should be clearly set. It is important that a timetable is set to make clear when the targets will be reached.

It is investigated whether the chosen objectives cannot be reached better by self regulatory initiatives within the sector(s) involved. Only when the self regulatory capacity of society fails, government intervention is considered.

When a government intervention is considered inevitable, it is investigated whether the chosen objectives cannot be reached by a better use of legislative instruments already in existence. In investigating the possibilities the government has available, the different thinkable alternatives are reviewed to reach a certain goal.

Both instruments which are created through legislation, such as commandments and prohibitions, a licensing or a charging system, and other means, such as concrete government action and funding, are taken into consideration. Moreover the principle of the rule of law with regard to these other resources in connection with the provision of legal safeguards, often requires that additional legal arrangements must be made.

An investigation on a conceivable way of government intervention may also lead to the conclusion that the government will not be able to reach the objectives formulated. In that case the government must waive intervention.

An investigation on the variants of legal provisions both involve the set up of the regulatory scheme as a whole and the different parts of the regulations (such as the system of legal protection which is chosen).

In determining the choice for an option to government intervention to achieve a certain goal connection is sought to the self-regulating ability of the concerned sectors of industry.

It can be considered for instance to make use of systems of normalization, certification, or chain warranty. Direct government intervention is only appropriate, when no results can be expected from the self regulatory capacity of society, even if they are supported by government measures.

In considering the different possibilities of government intervention to achieve an objective at least the following aspects will be taken into consideration.

Effectiveness and enforcebility

Effectiveness implies the extent to which it can be expected that a regulation will achieve its aims. In this context the feasibility and the expected level of compliance deserve attention. The more in a legal arrangement set standards and management tools for individuals are less obvious, the more the compliance and enforcement will be problematic.

Whether enforcement is sufficiently possible, should be considered before deciding to adopt the scheme. In particular, this applies if the scheme contains commandments and prohibitions, but in other cases it is important too - for example with regard to rules to be attached to the granting of a license.

Research should demonstrate what efforts are considered necessary for preventive and repressive enforcement. For bills that entail significant changes in terms of implementation and enforcement, these findings are laid down in enforceability and feasibility reports. On the enforcement capabilities consultation between the designers of the proposed scheme and the bodies that will be responsible for the implementation and enforcement of the scheme is necessary at an early stage.

When assessing the enforceability at least the following aspects are important:

• a rule should leave minimal room for interpretation disputes;

• exceptions to the general rule should be kept to a minimum;

• rules should as much as possible be focused on visible or objectively ascertainable facts.

• rules should be workable for those to whom the rules are addressed and for the people in charge of enforcement.

In this context it is important to look at the various enforcement methods, such as means of administrative, civil and criminal law, disciplinary law, and preventive means like public information. For each of the repressive enforcement methods attention should be paid to the possible sanctions. In certain cases it is appropriate not to select one maintenance method, but a combination of different methods. Moreover, care should be taken that an undue cumulation of sanctions for the enforcement of a certain obligation is avoided.

The Instructions for Regulation deeply go into paying attention to the implementation costs of regulations for citizens, enterprises, institutions and the government itself. They further deal with conflictgenerating factors of a regulation and the need to conflict reduction. They warn that unintended side effects must be taken into account.

Executive powers

In the granting of executive powers to authorities the exercise thereof is standardized as much as possible.

Discretionary powers and competences that imply the application of vague criteria should be avoided, unless there are good reasons.

In order to provide the public with adequate legal safeguards, the execution of management powers should be framed by law as accurately as possible.

In view of the desirability to provide safeguards in respect to any power it should be considered to what extent legal protection is necessary.

The Instructions for Regulation are aimed at properly carrying out the conceiving and drafting of new legislation. They remain an important assessment framework in every stage of the legislative process: from the phase of advice by the Council of State to the handling of a bill by the House of representatives and the final scrutiny by the Senate.

3. The scrutinizing function of the Senate in the legislative process

Directly after a bill has been passed by the House of Representatives it is sent to the Senate. Here the bill is submitted to a parliamentary committee. The committee decides whether the bill can be immediately put on the agenda of the full chamber or whether there should first be preparatory study of the bill. If a bill is immediately put on the agenda of the full chamber, it will be passed as a formality without a debate.

The preparatory study of a bill consists mainly in written correspondence and the exchange of documents. The members of the committee present the views of their parliamentary party in writing and put questions to the Government. The Government replies in a note or memorandum of reply. Sometimes, there may be several rounds of correspondence, but one is generally considered sufficient.

After the written preparations have been completed, the Senate is notified that the bill is ready for debate by the full chamber. In due course the bill is then put on the plenary agenda.

To scrutinize and revise a bill effectively Senators read the official papers and reports as well as letters and articles from newspapers and periodicals. The members sometimes receive hundreds of letters before a bill is dealt with.

Members of the Senate also confer internally and externally. Internal consultations are held for the most part within the parliamentary party or committee concerned. The procedure to be adopted is one of the matters discussed in the committee meetings.

External consultations are held with organisations and citizens. Sometimes members receive visitors or delegations. And in special circumstances a committee may decide to hold a hearing. In recent years we have seen a rise in expert meetings and seminars as part of the scrutiny of a legislative proposal by the Senate

Role of the Senate

The principal function of the Senate is to give an overall opinion on a bill at the end of the legislative process. The Senate does not have the power to amend a bill. It may, however, reject a bill and to this extent it therefore has the last word.

All bills must be approved by the Senate before they can become law. The key function of the Senate is to test the quality of legislation in terms of its legitimacy, feasibility and enforceability. Such review or scrutiny by the Senate has proved

valuable in practice. For example, although the practical consequences of a bill are weighed by the drafters in an early stage, some real consequences are often not faced until the law really is close to becoming a reality. Situations may also occur in which a bill has been altered in the course of the parliamentary procedure, to such an extent, that it has lost some of its coherance, and further interpretation is needed in order to establish what the legislator precisely intends.

Judiciary

It is important to note here that the deliberations in the Senate play a far from negligible role in the interpretation of legislation, for example by the judiciary. For although the text can no longer be amended, its meaning can be clarified. In some court judgments reference is therefore made to the reports of the Senate on the debates on draft legislation.

Sword of Damocles

The idea that many people have of the Senate as a body that ultimately rubberstamps almost all bills (97% on average) needs to be put in perspective. This is because until the Senate actually says 'yes' to a bill, the threat of a 'no' hangs like a Sword of Damocles over the head of the Government. This has in terms of quality a disciplinary effect on the legislative process as a whole. The Senate has the following ways of making its influence felt.

'Novelle' - proposal to supplement a bill

Although the Senate unlike the House of Representatives does not have the right of amendment, it may put such pressure on a government minister by cogent arguments and reasoned criticism that he or she chooses to present a supplementary bill (known as a 'novelle'). The Goverment takes account of the criticism of the Senate in the supplementary bill. The supplementary bill goes through the same procedure as every other bill, i.e. it is submitted to the Council of State for its opinion and is then debated and passed by the House of Representatives and the Senate.

Motion

While discussing a bill the Senate can also pass a motion to induce the Government to do something. If more modes of implementing a law are available, the Senate through a motion can give directions on the most wanted way of implementation.

Pledges

In the knowledge that the bill could be rejected if it does not adequately meet substantial objections of the Senate, the Government can try to find some other solution. One solution which is used much more often than the offer of a 'novelle' is a pledge given by the Government during the passage of a bill through the Senate, as a result of which the Senate ultimately passes the bill. Such pledges may relate to technical implementation or to the organisational or financial aspects or may amount

to a promise to evaluate the operation of the legislation after a given period. These pledges are in many cases of direct importance to citizens, civic organisations and institutions charged with implementing and/or enforcing the legislation.

Focal points for the quality of legislation

The Senate as an aid in the assessment of legislation has compiled a list of focal points to quality of legislation. MPs and staff use this list when scrutinizing a draft proposal of legislation. The list contains points and questions concerning the legal and technical aspects of the draft law and the implementation and enforcement of the proposal. The list is annexed to this communication.

4. Final word

Decisionmaking on legislation is a political process. Ultimately the vote of an MP or a Senator in favour of or against a draft law is a political vote. Nevertheless lawmaking is a profession and the quality, effectiveness and efficiency of a law need an approach that goes beyong a political appreciation of intentions and goals. The Senate of the Netherlands, although divided into twelve political groups, has a culture of methodically approaching legislative proposals and examining these along the criteria quality, feasibility and enforceability.

The Senate is not always satisfied with the way legislative proposals are designed by the Governement. Complaints often relate to:

- Abundant use of implementation regulations; key norms should be in the law itself and not in a Royal decree or ministerial regulation which is derived from the law;
- Inconsistency in the use of criminal and administrative sanctions;
- Lack of clarity in the use of language;
- Unnecessary complexity in the legal constructions;
- Too little attention paid to laws already in existence;
- Too little coherence between proposals pending at the same time;
- Non related issues dealt with in one legislative proposal;
- Unnecessary additional policy items added to EU implementation law;
- Different legislative approaches between ministries.

It is the task of the parliamentary staff to constantly being alert to (structural and incidental) deficiencies in legislative proposals and to help MP's in keeping up a high level of lawmaking to the benefit of the citizens.

Sources:

- The Senate of the States General (brochure), 2016
- Aanwijzingen voor de regelgeving (http://wetten.overheid.nl/BWBR0005730/2011-05-11)
- Aandachtspunten voor wetgevingskwaliteit

(https://www.eerstekamer.nl/trefwoord/aanwijzingen_voor_de_regelgeving)

- Veelzijdig in deeltijd, 200 jaar Eerste Kamer der Staten-Generaal, de laatste 25 jaar in het vizier, Eerste Kamer/Boom, Den Haag, 2015

Annex

Focal points for the quality of legislation

List for the benefit of the Members of the Senate

I General

Questions/criteria for the evaluation of a legislative proposal

1. **Analysis of the problem**
   - On what issue the bill provides an answer?
   - Is there clarity on the causes, the nature and the extent of the problem?
   - Is solving the problem a (permanent) task of the government?
   - Why there was previously no relevant legislation?
   - Why is earlier legislation on the issue no longer adequate?

2. **Advice by the Council of State; given follow up by Government**
   - What parts of the advice given by the Council of State did the Government follow, which parts not?

3. **Check on the accountability by the Government in the Explanatory Memorandum**
   Did the Government examine the proposal against the criteria it set out?

4. **Relevant advice by the Court of Auditors**
   Did the Court of Auditors give advice on the proposal?
   - Which parts of the advice given by the Court of Auditors did the Government follow, which parts not?

5. **Relevant advices by other advisory bodies**
   – Did other advisory bodies (like the College on Administrative Burdens, the Social Economic Council, Planningbureaus etc.) bring out advice on the proposal? Which parts of the advices given by these bodies did the Government follow, which parts not?

6. **Handling by the House of Representatives**
   - Which amendments have been adopted/rejected?
   - What impact does the amending by the House of Representatives have on the consistency of the proposal (both internally and externally – towards other legislation)?

II Legality: Legal and legislative aspects

Focus on realization of principles of law

7. **Check on constitutionality**
   - Is not the proposal contrary to the Constitution?

8. Check on conformity with international regulations

- International Treaties

- European Treaty on Human Rights

- Law of the European Union; both primary law (treaties) and law created by institutions (directives, decrees, etc)
Check on subsidiarity and proportionality
If the proposal is aimed at implementing European law, does it go beyond the limits of implementation?
- Non binding international agreements (For instance Charter on Local Autonomy of the Council of Europe; Universal Declaration on Human Rights (UN)

9. Aspects concerning the Kingdom[2]

- Check on the conformity with the Statute of the Kingdom the Netherlands
- Relevance to the countries Aruba, Curacao and St. Maarten

10. Consistency with related legislation:

Integration into existing body of laws; tuning with other related arrangements. (For example, in case of shifting responsibilities on local authorities; exposition on this in response in the explanatory memorandum)

11. Check on conformity with legal principles

- Legal certainty (Recognizability, proportionality, permissibility of delegation, transitional provisions)
- Delayed effect/retroactivity: reasons strictly motivated; groundrule: no retroactivity to onerous measures, unless special circumstances warrant it.

12. Legislative Technical key

- Legislative Technical Requirements
- No concerns regarding implementation regulatation?
- No breach to legal systematics?
- Look at technical examination by Council of State
- Congruence to Instructions for Regulation

13. Simplicity, clarity and accessibility of language

14. Specific criteria

- Protection rights of citizens: legal protection of parties in legal transactions; 'honest' power relations
- Access to the Courts
- No suspicion of opportunity legislation; symbolic legislation?

[2] I.e the Kingdom of the Netherlands as a unity of the European part and the Caribean parts.

- [Demands to be made to] experimental legislation
- Need to regulate; overregulation; deregulation
- Finances: financial foundation, administrative burden and burden for government

III Effectiveness and efficiency[3]

Focus on optimal goal achievement

15. Check on effectiveness and efficiency of the policy design

Questions/criteria

- Is the policy theory adequate: can the goals be achieved by the indicated means?

- Are there any ex ante assessments of the effectiveness / efficiency available; validity?
  In particular: is there a view on non-intended negative effects of the legislation?
- -What are the outcomes of the ex ante Quick Scan (by the Ministry on the effects
  a) for business
  b) for the environment
  c) for the judiciary

16. Check on feasibility and enforceability [4]

Questions / Assessment:

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[3] Definitions:
* Effectiveness: Assessment on (presumed) validity of the 'policy theory'presented in the bill (functional, conditional or causal relation between the proposed measures and the granted social effects in the light of the objectives to be realized).
Distinction between achievements (output) and thus realized effects (outcome).
Distinguish between wanted and unwanted (side) effects.
* Efficiency: assessment on the optimality of the contribution of measures to formulated goals (ie: cost-benefit relation)

[4] Definitions: Definition Feasibility / Enforceability:
The actual possibility for effective deployment of policies
Further to be indicated as:
- Quality human, financial, organizational, procedural and legal provisions with the implementing agencies;
- In case of cooperation with local authorities, civil society organizations, individuals etc.: clear powers and responsibilities,
- Quality supervision and control (questions on excessive control and monitoring / control towers, etc.)
- Adequate support from the "norm addressees"

- Was there a check ex ante on enforceability: did Government make it clear in the Explanatory Memorandum how experience expertise (implementation agencies; inspectorates) were involved in the policy design;

- Is an ex post evaluation of the relationship between implementation ('s practice) and actual effects of policy (desired and potentially unwanted) foreseen ('social effectiveness').

- Were sunset clauses provided or are they still required?