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A Learning Legislator?

Dutch attempts to prevent brain drains in the legislative process

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Abstract

The quality of legislation is largely dependent on adequate, precise and tailored information. Gathering the right information is easier said than done. The legislative process can benefit from empirical knowledge and insights into the effects of legislation. Nevertheless, in the Netherlands an increasing loss of knowledge seems to occur in legislative processes, both in terms of substance and in terms of staffing. The legislative authorities and bodies have not shown great capacity to learn until now. This contribution examines the learning capacity of legislative bodies and processes and its effects. It will also look into the possibilities of the concept of – so-called - knowledge management – a discipline that studies the management of knowledge sources, knowledge building and knowledge sharing in organisations– to improve the learning capacity of legislative processes.

1. The Results of the Legislative Quality Policy

Is the quality of Dutch legislation up to standards? Recently, after more than fifteen years of rigorous quality enhancing legislative policies in the

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Netherlands, this intriguing question has been raised more and more frequently.¹ What have we learnt from experiences of and new insights into legislation? What is the overall effect of the quality of legislation policy? A simple question, but no simple answers here. Various causes make it very difficult to assess the net-result of legislative policies. First of all this is complicated because it is so difficult to define, in essence, what 'quality' of legislation is, in a positive sense. It is relatively easy to detect legislative defects, but it is much harder to outline and frame 'good' legislation.

In its opinion on a year 2000 policy memorandum on the Quality of Legislation Policy, the Dutch Council of State puts it pungently. The concept of quality of legislation as such lacks independent significance, the Council holds. It is not as much a yard stick, but rather more a 'balance concept'.² Findings and results of legislation are compared with requirements and expectations placed thereon. This is – according to the Dutch Council of State - why the concept of 'quality of legislation' will always remain an elusive concept. Undoubtedly, there is such a thing as good legislation; we realise this immediately when such legislation is absent. But if the quality of legislation is to be improved or assessed, it is necessary to shed light on the functions (legal, political, societal, economical, etc.) and values of legislation (symbolic, instrumental, providing legal protection, etc.) in a particular context, given a particular/relevant perspectives. Quality can be determined and assessed against this background. The Dutch Council of State observes – and rightly so - that simple criteria cannot be found due to the versatility of legislation and its many different functions.

There is, however, a second and more down-to-earth cause of the lack of insight into the net results of more than 15 years of Dutch legislative quality policies: the results or effects of this policy are not systematically monitored or evaluated. The Dutch policies on legislative quality, initiated by the 1990-White Paper entitled Legislation in Perspective³ (*Zicht op wetgeving*) have – as of yet - not been assessed in terms of their effects on overall legislative quality. Did it yield results in terms of better administration, 'customer satisfaction', less red tape, less court cases, etc? These questions were

¹ See also the opinion of the Dutch Council of State of 30 June 2000 on the Policy Document on Quality of Legislation Policy of the Ministry of Justice, in which this question is put in a very pressing manner in response to the policy document's approach to improvement and assurance of the quality of legislation. In short it was too instrumentalist, according to the Council.

² See *Kamerstukken II* (Dutch Parliamentary Papers) 2000/01, 27 475, A.

³ (*Legislation in Perspective*) *Zicht op wetgeving*, a policy plan for the further development and implementation of the general legislative policy, aimed at improving the constitutional and administrative quality of government policies, The Hague 1991; it was also published as a parliamentary document, see (Parliamentary Papers) *Kamerstukken II*, 1990/91, 22 008, no. 2.

simply never put. We in the Netherlands proceed on the ‘common sense’ assumption that these measures and quality enhancing strategies will – at least in the long run - have a beneficial effect, but we are not certain about it. Accordingly, the learning capacity of the policy on legislative quality is not all that great: the effectiveness and efficiency of this policy remain unclear.

1.1. The work of the Dutch Grosheide Review Committee

One of the first initiatives to seriously study some of the effects Dutch legislative quality policies was establishment of the so-called Legislative Review Committee (the Grosheide Review Committee) by the end of 1999.⁴ It was the Committee’s task to review the process of legislation, in particular, the preparation of legislation, at the ministries. Although it was not the effect of the quality policies itself that was in focus in this study, the commission however did touch upon some closely related topics. The results of this study, which were laid down in the report entitled *Rules and Risks (Regels en risico’s)*⁵, are remarkable, even though these concern only the process of preparation of legislation within ministries rather than the quality of legislation as such. In the report, the Committee refers to the absence of learning capacity during the preparatory and drafting stages of the legislative process as one of the most important risks threatening the quality of legislative processes. In addition time constraints and pressure of politics constantly strain the legal and technical dimension of the legislative process, and sometimes marginalize them. The Grosheide Committee wrote the following:

“(…) in the course of legislative processes, much work is left to professionals; there is little control in a procedural sense. There are insufficient systematic efforts to establish a *learning* [italics by WV] organisation. There are hardly any systematic working procedures, meaning procedures that are laid down as such; there are no process evaluations; no collective memory is built up. This is all the more risky where there are regular staff changes, which are sometimes motivated by career policy considerations. “

Various parties from quarters of the Dutch administration, expressed to the Committee that the increasing complexity of law, jeopardizes the availability of

⁴ Recently (2005) a new Committee reviewed the legal function of the administration and legislation. The Hoekstra Review committee had a wider scope of scrutiny, but a less detailed analysis as regards the effects and success of the Dutch legislative policies. This is the reason why we do not deal with this report in detail. See the final report of the committee which was published 27 March 2007.

⁵ Legislative Review Committee (Grosheide Committee), (Rules and Risks) *Regels en risico's*, The Hague, January 2000. The report will be published, along with the Policy Document on Quality of Legislation Policy, before long.

legal expertise in ministries.’⁶ There are simply not enough lawyers to cope with the challenges at hand, and on top of that their numbers are decreasing.

Partly following the tracks of the Grosheide Committee’s analysis, this contribution will examine whether and where legislative processes lack learning capacity and look into the ensuing effects of that. On the basis of this analysis we will focus on the possibilities of so-called ‘knowledge management’, as a method to improve the learning capacity in legislative processes.

2. 'Brain Drain' Legislative Processes: Disuse and Leakage of Legislative Knowledge

The importance of ‘knowledge’⁷ (i.e. something more than mere information) within legislative processes seems almost self-evident. Legislation is the result of a decision making process in which various interests and aspects (legal, political, policy-related, financial, economic, etc.) are weighed and balanced. Combining these interests and aspects requires communication, information, and especially a great deal of knowledge that allows relevant information to be used, linked, considered and weighed. Even though legislative processes are very ‘knowledge-intensive’, legislative projects – in a lot of countries - deal with knowledge management in a relatively casual manner. Experiences gained in former or similar legislative projects are rarely assessed, re-used or systematically recorded.⁸ Besides, there is hardly any true ‘legislative’ evaluation. When legislation is evaluated in the Netherlands, it is mostly the success or failure of the policies enshrined in legislation that are being studied, not the effect of legislation (as opposed to other instruments of governance) itself. Evaluation results are as a rule used on a once-only basis for policy adjustments of the project evaluated itself. Re-use of evaluation results for other projects or syntheses of various evaluation studies hardly ever occurs.

⁶ See the Legislative Review Committee, *op. cit.* 2000, p. 7.

⁷ In this context understood as: ‘the capacity that allows information to be gathered from data and to be used for solving problems.’

⁸ This also holds true for the re-use of policy experiences and evaluation results too. Only under the impetus of the call for ‘evidence based’ decision making the focus in the evaluation community sharpened on the (re)utilization of evaluation results. See Ian Sanderson, ‘Evaluation in Complex Policy Systems’, in: *Evaluation*, Vol 6(4): 433–454 and F. Leeuw, ‘Policy Theories, Knowledge Utilization and Evaluation’, in R. C. Rist (ed.) *Policy Evaluation: Linking Theory to Practice*. Aldershot: Edward Elgar, 1995.

On top of that, there are hardly any assessments of legislative *processes* themselves. On the occasion of a legislative evaluation, the product of the process, the legislation itself (or more precisely the policies it expresses) is studied mostly, only very rarely the process itself. There is hardly any systematic long-term control of legislative processes, which, for example, could contribute to improving the use of empirical knowledge gained from other legislative projects.

This lack of attention for the ‘knowledge’ factor in legislation and the associated risks (‘brain of knowledge drain’) is characteristic for all stages of legislative processes in the Netherlands, both during the ministerial preparatory phase (including the Council of State consultation procedure) and the adoption stage and the subsequent enactment, implementation, and enforcement stages of a statutory regulation and the potential evaluation and feedback of the evaluation results.

2.1. Drafting stage: Ministerial Preparatory Stage

The knowledge centre of legislative projects is – in the Netherlands - usually located at the ministerial departments (the ministries). The legislative experts operate at the level of individual (policy-making) civil servants (furthermore referred to as policy-making officials) and civil servants who draft legislative proposals (furthermore referred to as drafters). Although the civil service sometimes establishes project teams⁹ or task forces¹⁰ for the purpose of cooperating on the preparation of more extensive legislative projects, as a rule departments work by themselves. When it comes down to drafting it is common procedure that an individual policy departments within a ministry prepares a first policy outline, and then requests the assistance of a legislative department to actually draft a legislative proposal, or comment on or review in case a draft proposal already exists.

Although, as the Grosheide Review Committee notes, policy-making officials and drafters generally know where to find each other and although they cooperate closely and well,¹¹ drafters complain that they are often engaged

⁹ Ideally, such project groups are composed of policy-making officials or technical experts, civil servants engaged in drafting legislation and persons who are well-informed about implementation and the implementation field. On this subject, see also P. Eijlander, W. Voermans, (Legislative Drafting) *Wetgevingsleer*, The Hague 2000, pp. 313-314.

¹⁰ In the policy document called (‘Effective Legislation’), *Voortvarend wetgeven* the term ‘task force’ is used for interdepartmental teams of experienced civil servants engaged in legislation who work on complex and priority legislation projects (Dutch Parliamentary Papers) *Kamerstukken II*, 1993/94, 23 462, no. I, p. 10).

¹¹ As far as this aspect is concerned, things have improved a lot since the days Nick Huls took up his job as project manager of the interdepartmental Consumer Credit Act project in 1984, which involved

at too late a stage. At that stage the crucial choices have already been made and the specific legislative input and expertise often comes too late in the day. The fact of life that the legislative angle or legal input – which sometimes slows down a legislative process – is generally not very popular within the ministerial working processes, makes matters for timely legal and legislative input even worse. As a result of mounting pressure to achieve policies within short periods of time, a focus on legal or specific legislation issues is usually perceived as an inconvenient barrier in policy processes.¹² This lack of popularity has effects on several fronts. For example, the mass of legal experts has declined at the Dutch ministries.¹³ Also the number of lawyers in executive positions at the ministries has dropped. This might explain why the legislative function is not strongly embedded in the most ministerial organisations, especially if we compare it to the way policy responsible directorates are engrained.¹⁴ And, last but not least, the career perspectives of legislative staff within the ministries are less favourable than those of their colleagues in the policy directorates: the position of ‘legislative officer’ (*wetgevingsambtenaar*) (i.e. ‘civil servant charged with drafting legislation’) does not hold promising career opportunities. In most cases it is a ‘final’ post or position. It is difficult to become a manager or a director on the mere basis of drafting experience.

The relatively weak embedment of the legal and legislative function in an environment that is becoming increasingly complex in the legal and legislative field in particular – mainly because of the increasingly important role of international and, especially, Community law – poses a threat to the quality of legislation in two ways. Where preparation of legislation requires increased expertise and attention because of the increased complexity and the role of international law, such attention is in fact flagging.

policy-making officials and legislation lawyers at the Ministry of Finance and the Ministry of Economic Affairs. For his very funny ‘experience report’ on Legislation, persons, chance and bureau politics, see *RegelMaat* 1994, p. 155 et seq.

¹² See the Legislative Review Committee, *op. cit.* 2000, pp. 25-26.

¹³ This was the conclusion drawn in a research report by a Tilburg-based Institute for Social Research; see IVA, (Masterly Work – Dutch academic lawyers bear the title ‘master’) *Meesterwerk*, Tilburg 1999, Chapter 3.

¹⁴ There is no fixed manner in which the legislative function is organized in ministries. Some ministries have a strongly decentralized structure of the legislative function (for example, the Ministry of the Interior and Kingdom Relations); others have a centralized legislation directorate (for example, the Ministry of Economic Affairs). In addition, there are various hybrid forms. For example, even though the Ministry of Health, Spatial Planning and the Environment has a central legislation directorate, a proportion of the legislative work is carried out within the policy directorates. For their part, the central legislation departments may have different positions within the organisation of a ministry; it may be a directorate that is part of the central staffs headed by the secretary general or the latter’s deputy; it may also be a ‘facet directorate’, for which a director-general is responsible. See the Legislative Review Committee, *op. cit.* 2000, p. 25.

These developments make so-called knowledge management within the legislative process extremely vulnerable, all the more so because it is often just one or a few policy-making officers or drafters that possess the detailed knowledge of and about important legislative files. This individual knowledge of legislative projects is recorded or used rarely as such and is enshrined in the individual civil servants' experience. When they leave office, the knowledge and experience they gained may be lost at once. Legislative departments and ministries are facing this problem more and more as a result of the increasing labour market mobility. Experience gained by individual civil servants may occasionally be passed on if a senior legislation officer is entrusted with the task of training a new colleague (patronage), but this is not a systematic practice in the Netherlands anymore.

In this respect the Dutch Legislative Review Committee in 2000 observed serious defects with respect to the learning capacity¹⁵ of the ministerial legislative processes. The Committee even observed a certain degree of passiveness in the field of training and the permanent education of legislation professionals. To a great extent, it is left to legislation lawyers themselves to determine what further training courses they will attend. Even though training courses are on offer, these are not very well attended.¹⁶ The ministries themselves actively offer training courses only occasionally.¹⁷ More in general, the Review Committee is of the opinion that the ministries were, at the time, not very active in pursuing a policy aimed at guaranteeing the drafters professionalism. Even though these professionals bear responsibility for the preparation of legislation to a considerable degree. This was all the more evidently showing, *inter alia*, from the absence of a broader policy vision on recruiting and selecting drafters and lawyers. For this reason too, it sometimes turns out that it is difficult to fill vacancies for senior legislation 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.

¹⁵ By this the Committee means a number of aspects of the building and maintenance of collective memory (method and substantive aspects) and expertise (knowledge management and staff policy).

¹⁶ Legislative Review Committee, *op. cit.* 2000, p. 34.

¹⁷ Examples include the in-company training courses on legislative drafting and legislative method and the legislation seminars that are organised, for example, by means of the external education bureaux within the Ministry of Transport, Public Works and Water Management and the Ministry of Social Affairs and Employment.

In the Review Committee's words:

'(.) there is no institutionalised instrument to improve processes, if necessary. This is because individuals may learn from their actions, but in an organisation 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.'¹⁸

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. And most ministerial departments elaborated and enacted protocols on legislative routines ever since 2001.

2.2. The Council of State Consultation Procedure

The problems established by the Review Committee are not found only in the ministerial drafting process. A similar type of problem with respect to knowledge sharing and the lack of systematic memory building characterizes the Council of State consultation procedure. The Dutch Constitution obliges the government to consult the Council of State on legislative proposals. The Dutch Council of State scrutinizes legislative proposals on the basis of a list of points, which were known only to the Council itself until recently. Even though the Council of State has been trying to render opinions in a more systematic and transparent way for years now, a straightforward and systematic insight into the assessment framework or an overview of the Council's knowledge input in the context of legislation consultation is not available. Even though the Dutch Council endeavours to work as consistently as possible, there is still no such thing as real 'legisprudence' with respect to the Council's opinions, where new opinions are based on earlier opinions and where there is an overview of the opinions rendered in the past. This means that, to a great extent, the government's most important advisory body in legislative matters renders opinions on individual projects and that knowledge and insights gained from earlier projects may be easily diluted.¹⁹ In Belgium, this situation was one of the reasons for initiating a systematic investigation into the legisprudence of the Belgian Council of State for the purpose of gaining a deeper insight into the quality criteria used by the Belgian Council of State and

¹⁸ Legislative Review Committee, *op. cit.* 2000, p. 36.

¹⁹ Despite the attempts made in the *Legisprudence* section in the journal *RegelMaat* to present a systematic survey of the opinions rendered by the Council of State with respect to specific legislation topics.

drawing lessons from earlier experiences.²⁰

2.3. Debating the proposal in parliament: the enacting stage

During parliamentary debates, and particularly during the discussion of bills in the House of Representatives (de Tweede Kamer or the Lower House), there is hardly any knowledge sharing or knowledge management as regards legislative projects. This appears to be almost unavoidable considering the relatively short sessions in the House of Representatives and the mainly politically orientated input from the various political groups, but even so, it seems that opportunities for optimal use of legislative knowledge and legislative experience are missed. Knowledge about specific legislative projects that have involved significant parliamentary input is not systematically managed in any manner. There is, however, indirect building of collective memory through the representation in the Senate. Senators in particular are experienced politicians and as such they have an input concerning, for example, the quality of legislation, based on their long experience in politics or public service. This is not a systematic practice, however, and there is hardly any systematic storage or control of such knowledge, let alone, any building of collective legislation memory, even though a relatively large proportion of the 'quality questions' about proposed legislation have originated from the Senate in recent years. Knowledge and expertise built up within the Senate equally suffers from the defect that it is productive only for one session, as it is lost when the members who have not been re-elected leave. The example of the Belgian Senate proves that a '*chambre de reflexion*' may indeed play a role in the building of legislation knowledge: a 'Legislation Cell' has been established within the Senate, which will deal with the evaluation of statutory regulations.²¹

As we already noted: the cause for re-use of knowledge and knowledge management of Parliament is not lost to begin with. There are already examples of practices where knowledge is actually being shared between Parliament and the other legislative actors (Council of State, Government,

²⁰ See J. Velaers, (The Constitution and the Council of State) *De grondwet en de Raad van State, afdeling Wetgeving – vijftig jaar adviezen aan wetgevende vergaderingen in het licht van de rechtspraak van het Arbitragehof*, Antwerp 1999 and J. Velaers, (Preliminary Constitutional Review by the Council of State within the framework of guarding legislative quality) '*Het preventieve grondwettigheidscontrole van de Raad van State in het raam van de kwaliteitszorg voor wetgeving*', in P. Popelier and M. Adams (ed.), (Who guards the Quality of Legislation?) *Wie waakt er over de kwaliteit van de wet?*, Antwerp/Groningen 2000, p. 227 et seq.

²¹ See the Legislative Proposal on the establishment of a procedure for the evaluation of legislation, Belgian Senate, 1998-1999 session, 1-955/5. See also my contribution called 'Legislative Policy in Belgium', *RegelMaat* 2000, pp. 140-144.

administrative bodies). For example, opinions rendered by the Council of State may in some respects be regarded as a preliminary report to Parliament in the field of legislative quality.²² Knowledge sharing also exists in the form of administrative assistance that Members of Parliament or parliamentary committees may receive from ministerial legislative drafters in editing amendments or private members' bills. Further, the Legislative Bureau of the House of Representatives is active in collecting and distributing specific legislative knowledge and expertise for Members of Parliament, *inter alia*, by applying new forms of information and communication technology.²³ In the past, even legislative training courses were elaborated for Members of Parliament and their staff.²⁴ In addition, there are, of course, many more informal forms of knowledge sharing. Even though, as matters stand at present, Parliament shares knowledge with other legislative actors, it does not make a systematic contribution to the building of legislative knowledge or the innovation of such knowledge, apart from the cases where process or legislative evaluations are expressly requested.

2.4. *The implementation and enforcement stages*

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'²⁵; other ministries, such as the tax section of the Ministry of Finances, have a detailed system for consulting administrative

²² In other respects, too, but this contribution confines itself to the aspect of legislative quality.

²³ The application of information and communication technology within and for the purpose of Parliament may – along with other trends – be highly relevant to the functions Parliament performs within the legislative process and within the constitutional system. At this juncture, a relatively large number of studies are being conducted into the potential consequences of ICT for Parliament. For one of the early examples, see G.J. Leenknecht, (The virtual Legislator) *De virtuele wetgever*, *RegelMaat* 1998, p. 189 et seq. and Stephan Coleman, et al. (eds.), *Parliament in the Age of the Internet*, Oxford University Press 1999. Recently, the annual conference of the European Group of Public Administration was devoted to the subject *Managing Parliament in the 21st Century* (August 30th-September 2nd 2000, Glasgow, Scotland), which also addressed the shifting functions of the parliamentary work.

²⁴ The name of this course, which was organised in the early 1990s, was '*De kunst van het mede-wetgeven*' ('The Art of Co-Legislation'). The Tilburg Research School for Legislative Studies and Leiden University – much on the same footing - organised a course on co-legislation for the European Parliament in 2001-2005. This course – 'The Art of Co-Legislation' – was meant primarily for the administrative staff of the European Parliament.

²⁵ See, *inter alia*, E R C. van Rossum, '*De ketenbenadering – een praktisch beleidsconcept*', *RegelMaat* 1994, p. 189 et seq.

authorities and harvesting feedback of experiences gained by such authorities. A special form of informed preparation of legislation concerns impact assessment,²⁶ 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.²⁷ Obviously, the quality of legislation will benefit from such knowledge in a number of ways.

2.5. Evaluation and feedback

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.²⁸ 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.

2.6. Provisional conclusion about the knowledge situation

In summary, we can conclude at this point that the legislative process leaves much to be desired in the field of knowledge sharing, knowledge organisation and knowledge management, even if that is so for good reasons. There is (or – this would be more accurate – *was* by the end of 2000) hardly any targeted control and management in terms of the – shared – use of knowledge of those involved in Dutch legislative processes. The actors at the various stages of the legislative process share knowledge only occasionally; usually the relevant actors work alongside each other as far as knowledge building is concerned.

²⁶ See for the different meanings and connotations of impact assessment A.M. Meuwese, *Impact Assessment in EU Law making*, phd-thesis Leiden University. The Hague 2008.

²⁷ See, *inter alia*, D P. van den Bosch, (Legislative Simulation) '*Simulatie van wetgeving*', *RegelMaat* 1995, p. 202 et seq.

²⁸ See W. Voermans, 'Evaluation of legislation in the Netherlands?' *Legislacão*, January/June 2003, pp. 33-61.

Naturally, this is due to everybody's particular role and responsibility within that process, but even more so, to the trend to work from project to project only, without any targeted attention for experiences gained earlier.

One might wonder whether this is a bad thing. After all, the rationale of the legislative process is to reach unique legislative solutions for unique sets of problems and circumstances through a properly functioning, democratically legitimized debate, and, as far as the content of the solution selected is concerned, drawing lessons for new projects from earlier experience may be difficult to imagine. It is possible, however, we would argue to draw lessons from past and present (parallel) legislative projects by way of building a common knowledgebase and sharing knowledge. This may, for instance be feasible, in terms of learning from different outlines of policy approaches opted for, learning from how and why a particular instrument was chosen, sharing technical (in particular legal) knowledge needed for drafting legislation, and - finally – managing, planning and controlling the legislative process as such.

3. Knowledge Management: Suitable for the Legislative Process, too?

3.1. The three steps of knowledge management

According to the 'knowledge gurus' Nonaka and Takeuchi, knowledge is no longer one of the production factors – alongside labour, capital and space – in our modern knowledge society, but the *primary* production factor.²⁹ As a result, the 'knowledge' factor has been receiving more and more attention within the business sector in the past 10 years. In recent years, the critical importance of knowledge in organizations has induced many enterprises and institutions to develop methods and systems that are geared towards managing as efficiently as possible the knowledge they require, generate and possess. These efforts are known under the collective name of 'knowledge management' and even though there is a conceptual lack of clarity in the field of knowledge management, knowledge management is generally defined more accurately as follows: the management process aimed at increasing the yield of the production factor knowledge by: (a) organising knowledge sharing processes, (b) encouraging an open culture of collaboration geared towards knowledge exchange, and (c) supplying the

²⁹ See I. Nonaka and H. Takeuchi, *The Knowledge Creating Company: How Japanese Companies Create the Dynamics of Innovation*, New York 1995, pp. 226-227.

infrastructure and instruments to facilitate these processes.³⁰ These three kinds of effort – which are invariably mentioned in the literature about knowledge management – are closely related and, for this reason too, we will refer to them as the *three steps of knowledge management* below.

3.2 Knowledge management in the public sector

Knowledge management as a mental and organisation process is not only important to the private sector but also to the public sector.³¹ The knowledge factor is becoming increasingly important for this sector, too, and those active in it take an ever keener interest in the concept of knowledge management, even if within the public sector, this interest is not fuelled by competition considerations but by considerations relating to the effectiveness and quality of services. In this area in particular, studies into the possibilities and modalities of knowledge management are now beginning to be published.³² These show that systematic attention for knowledge management and organisation within government organizations is equally indispensable to the public sector as to the private sector. The public sector is facing challenges in the field of adequate and efficient public services, new legal, administrative and political requirements, which can be met only by means of a well-considered and efficient knowledge management policy. As is shown by its analyses, the Dutch Grosheide Review Committee is keenly aware of this.

This is because the improved use of existing knowledge in an organization or process has a number of significant advantages. It is cost-saving because the wheel does not have to be re-invented for the same or a similar problem; it is effective because mistakes made in the past can be prevented. The question arises, however, of how to make the knowledge available in an organisation or a process, such as the legislative process, explicit and how to share, apply and build on it in an effective manner. In many cases, this requires not only targeted efforts but also another structure of working processes. For example, De Vuijst points out that knowledge sharing is in fact an unnatural activity in many organizations and processes.³³ In many

³⁰ See Hein of Duivenboden, Miriam Lips and Paul Frissen (ed.), (Knowledge Management in the Public Sector) *Kennismanagement in de publieke sector*, The Hague 1999, p. 12.

³¹ See David E. McNabb, *Knowledge Management in the Public Sector; a blue print for innovation in Government*. M.E. Sharpe; Armonk New York/London, 2007.

³² An interesting example is the book by H. van Duivenboven, M. Lips and P. Frissen (ed), (Knowledge Management in the Public Sector) *Kennismanagement in de publieke sector*, The Hague 1999, a compilation of essays in which 'hands-on' experts, academics and management consultants reflect on the theory and practice of knowledge management in the public sector

³³ See Jan de Vuijst, (Knowledge management requires external pull) '*Kennismanagement vergt*

respects, knowledge represents power and knowledge sharing automatically means giving up influence, personal or otherwise. Certainly government organizations, where important tasks are entrusted to professionals, such as legislation lawyers, tend to be cautious about knowledge sharing, which is quite understandable; and a second large problem relating to knowledge sharing concerns the institutionalisation of the knowledge present in an organisation; knowledge usually belong to or forms part of the services provided or the contribution made by a service or department, which legitimizes its own share in the processes of the organisation in this way. As a result, knowledge sharing may impair the *raison d'être* of specific parts of an organization. Accordingly, knowledge management, a process that always begins with knowledge sharing, usually requires another kind of cooperation than was customary in the past, as the process is supposed to be geared towards making the knowledge available explicit and sharing it, which is not easy for organisations employing fairly autonomously operating professionals.³⁴ Another aspect of responsible knowledge management concerns the necessity for continued reflection and expansion of the knowledge available within an organisation. Innovation is crucially important in knowledge management.³⁵ This may seem strange to most of us, because, if knowledge management means anything to us in the first place, we tend to have a relatively static idea of it: our first association is with the storage and management of knowledge in an orderly documentation or library system, which allows others to consult it, if necessary. There is more to knowledge management than that, however. It comprises not only actively retrieving knowledge within a process but also sharing that knowledge and establishing forms of cooperation for this special purpose, and continuously expanding and innovating this knowledge. As for the legislative process, this would necessitate continued monitoring of legislation experiences and functions of legislation, which is to be translated into training courses and points for attention in the application of legislative instruments. In addition, evaluation of legislation should not be a one-off operation within specific legislative projects but a fixed part (in some way or another) of a cyclic – learning – legislative process. We will also deal with this point in the next section.

externe trekken', in Van Duivenboven et al. (ed.), *op. cit.* pp. 86-88.

³⁴ The judiciary, for example, is facing the same problem. The judiciary is considering the solution of integral management, which involves different, more coordinated cooperation between judges and support staff. See, *inter alia*, W. Voermans (Improving the quality of adjudication by way of the establishment of a Council for the Judiciary) 'Kwaliteitsbevordering van rechtspleging via een Raad voor de Rechtspraak', *Nederlands Juristenblad* 2000, pp. 641-649.

³⁵ See De Vuijst, *op cit.* 1999, p 91 et seq.

4. Towards a Learning Legislative Process

Various passages from the report by the Dutch Grosheide Review Committee suggest that this Committee was aware of the ideas associated with the concept of knowledge management. Nearly all of the Committee's recommendations are geared towards better and more efficient forms of knowledge management and sharing at the stage of the ministerial preparation of legislation.

The Committee's first cluster of recommendations relates to points for improvement in the organisational field. The Committee advises, *inter alia*, increasing the status of legislative input by ensuring that directors of legislative sections or directorates should be q.q. members of the highest policy staff boards. The Committee expresses a preference for centralized legislative departments within ministries. In any case, attention for legislation should be properly embedded within the organisation of the ministries, as a result of which the legislation perspective comes to the fore at an early stage. The Review Committee's second and third cluster of recommendations are more related to the area of responsible knowledge management. According to the Committee, a number of infrastructural and organisational measures should be taken immediately for the purpose of countering, in any case, the further leakage of legislative knowledge and preserving and sharing this knowledge. For example, the Committee recommends establishing protocols for ministerial legislative processes for the purpose of building collective memory and achieving more systematic forms of planning and programming, which are badly needed in particular in the context of the supervision of legislation within ministries. More intensive ICT application for the purpose of knowledge building and knowledge sharing between the actors in the legislative process is necessary. Further, the expertise in the field of legislative quality aspects should be enhanced by means of structuring permanent quality assurance systems, more attention for training and permanent education of staff and establishing joint centres for legislative issues and European/international law. The Committee also emphasizes the importance of a system of evaluation of legislative processes and the use of its results for creating a 'bench-marking' system. The Committee's final cluster of recommendations are geared mainly towards effective utilisation and deployment of legislative knowledge by staff. A better policy should be pursued in the field of staff acquisition, careers policy and remuneration of civil servants.

The Grosheide Review Committee's analyses and recommendations have been influential in the Netherlands. Legislative routines have been modified ensuing. The Committee revealed a new outlook on the relationship between legislation, legislative quality and legislative knowledge. That is not a linear relationship but a cyclic one. If, however, we compare the three steps of knowledge management (see section 3.1) to the Committee's analyses and recommendations, we find that the Committee's recommendations relate mainly to the first step of knowledge management, the element of *knowledge sharing*. However, *knowledge sharing* is only a first step within knowledge management processes. There is still a long way to go to achieve that – especially if we share the Committee's view that the legislative process is an integrated process. The Review Committee does not address the third step of knowledge management either: supplying the infrastructure and the instruments to facilitate open cooperation processes; the Committee's terms of reference were far too limited for that.

Many of the Grosheide Committee's recommendations have the character of emergency measures in the field of knowledge management. The Committee rightly sounds the alarm over the leakage of legislative knowledge – and the loss of collective legislative memory, partly in connection with the relatively low status of the subject of legislation. This is an insidious process, which involves both direct and indirect loss of quality but also direct financial losses.³⁶ That is why it was encouraging to observe that many of the Committee's recommendations quite promptly were incorporated into policy measures laid down in the Policy Document on Legislative quality Policy, which the Minister of Justice presented to the House of Representatives on 13 October 2000.³⁷

In the broader context of responsible knowledge management, the Committee's systematic organisational recommendations are not quite 'finished'. What would be needed to establish a knowledge management cycle that performs as a permanent quality assurance system?

In our opinion, this requires that the legislative process knowledge should first and foremost be made *explicit*. This hardly ever happens in practice as yet: within and outside Dutch ministries, there is hardly any explicitly defined knowledge about, for example, the typical effects of various kinds of

³⁶ The recent past has taught us that legislation with serious quality defects may constitute a considerable financial burden on the state budget; reference may be made to the problems in connection with the Widows' and Orphans Pensions Act, the Invalidity Insurance Act, and the so called Securitel-affair. This latter affair even formed the immediate reason for the establishment of the Review Committee.

³⁷ (Dutch Parliamentary Papers) *Kamerstukken II* 2000/01, 27 475.

legislation (Acts of Parliament or statutory instruments), different effects of particular legislative styles, the effects of instruments (regulation, self-regulation subject to conditions etc.), the effects of specific supervisory, enforcement or sanction systems or transitional law systems, etc. No mistakes here: there is no lack of general notions and opinions on these issues. There are even general instructions in a number of cases, but there is hardly any well-documented (experience-based) knowledge on the basis of an investigation within a ministry's own legislative corpus or its own legislative experiences.³⁸

A case in point concerns the general notion that in the Netherlands there exist *legislative families* each with their distinct (ministerial) features, *inter alia* in terms of design and structure. These families, and the characteristic features with respect to the family, have never been actually well researched to see whether 'best practices' may serve as models elsewhere. Making legislative knowledge explicit is also useful at the level of planning, managing and progress monitoring of legislative processes. The evaluation of process experiences gained from the ministry's own legislative projects may constitute the basis for planning and progress monitoring systems that allow even more efficient management of legislation projects. A great deal of explicit knowledge in this area is not available yet, however. Naturally, ex-ante and ex-post evaluations within specific legislative projects, simulations and experiments contribute to the expansion of the knowledge that may be effectively used within the legislative process. This knowledge is all the more valuable if it is not limited to the specific legislative project for which the evaluation, simulation or test is carried out. More knowledge about the value and effect of the administration of evaluations, simulations and tests contributes particularly to enhancing the legislator's learning capacity.³⁹ The same applies to the lessons learnt from the implementation and enforcement of a regulation. In my opinion, making a regulation explicit means not only that lessons are drawn from experiences gained from specific legislative projects that have been evaluated, but also that consideration is given to systems aimed at systematically monitoring and charting the implementation and enforcement practice of regulations. Making legislative knowledge explicit can contribute to the legislator's learning capacity in many more fields, but because of the limited scope of this contribution, I will confine myself to mentioning a few examples at this point.

³⁸ For instance, a form of this documentation may be found in the examples and models included in the Dutch Drafting Directives. These examples are usually relatively general, however, and they are used for illustration purposes primarily.

³⁹ See P. Eijlander, *De verbindende wetgever*, inaugural lecture Tilburg University, The Hague 2000, p 25.

According to the logic of the three steps of knowledge management, a follow-up step that could be taken after the implementation of the Review Committee's measures is to think about the structure of more *open cooperation* and knowledge sharing in the legislative process. Even though the substance of our present legislative process is often based on contrast, the checks and balances in the system of the legislative process turn this process into a process of cooperation. Even so, the cooperation is by no means 'open' and geared towards knowledge sharing. The legislative process as we know it today is fully based on the knowledge sharing model of the 19th century, in which knowledge was shared passively and through 'paper' communication. In the digital era, there are quite different and new forms of information and knowledge sharing. Through a more digitalised legislative process, it may be easier to achieve knowledge sharing and building collective legislative memory than in a non-electronic legislative process, which is drawn out in time and based on a strongly phased approach. As far as the technology is concerned, legislative projects at websites, where those engaged in the preparation and adoption of legislation (politicians and administrators) as well as administration agencies and citizens or institutions that have been addressed continue to exchange views at every stage of the process will not be long coming. The joint use of knowledge systems that are used mainly for the purpose of supporting the preparation of statutory regulations may also serve a useful purpose as a support tool and as a platform for exchanging legislative knowledge. More than any other technique or instrument, cyclic legislative processes characterized by a willingness to draw lessons from experiences gained are the most effective in contributing to the best possible use of legislative knowledge. And once a *truly* cyclic process has been put into place, the recycling of knowledge and experiences gained will follow almost as a matter of course.