Training legislative drafting – successes and failures

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A. Courses provided by the Academy for Legislation

The Academy for Legislation (The Hague, NL) has provided courses on legislative technique for more than 15 years. Originally they were only for trainee civil servants, who wanted to become legislative drafters for the Dutch central government. After some years they were also organised for others. Those courses have been given by experienced civil servants, including myself.
More recently the Academy has provided training in legislative technique for Dutch local governments, for the Caribbean parts of the Kingdom of the Netherlands and for a number of participants from other, non-European countries.

The kinds of training can be grouped in three types:
1. Basic training: teaching the do's and don'ts of legislative technique as laid down in the Dutch Regulatory Guidelines (first version in 1992, since then regularly updated)
2. Advanced training: teaching how to spot problems with legislative texts and come up with improvements
3. Experimental training: training how to improve comprehensibility by simplifying or clarifying legislative texts

These types of training show clear successes and failures:
1. Basic training: successful.
   This training is given three to six times per year. The training comes in different forms, depending on the audience. Participants are always very satisfied with this training, as it gives a good overview of all relevant aspects of legislative technique and employs a large number of examples of do's and don'ts. The participants have also to put the Dutch Regulatory Guidelines in practice in a number of short exercises.
2. Advanced training: mixed results.
   I have given this kind of training myself a number of times. Every time I noticed that participants find it hard to spot problems with legislative texts, whether they are legal errors, textual errors, unnecessary, vague or overly complicated rules, or rules which are impractical or unenforceable. However, after some time most participants start noticing those problems. When they do, they can often also come up with relevant improvements.

3. Experimental training: failure.
   In the past the Academy for Legislation tried three times to design a Plain Language Drafting training, to be given by highly qualified trainers. The results were disappointing, the courses got low evaluation marks and most participating drafters left with the impression that it's impossible to draft in plain Dutch.

B. Reasons for successes and failures

The success of the basic training courses is directly linked to the failure of the experimental courses.

- The basic courses proceed from the idea that drafters who follow the Regulatory Guidelines as well as possible, will write comprehensible legislative texts. That's understandable: the guidelines regarding legislative technique explicitly stress the need for simplicity, uniformity and clarity and provide a large number of model rules, distilled from best practices in drafting. So new legislative drafters are happy to learn these Guidelines and apply them rigorously, like all their more experienced colleagues. However, the idea that following the guidelines leads to comprehensibility is mistaken. There is more to comprehensibility than mechanically following rules and examples, and the Regulatory Guidelines don't cover all areas of legislative technique. They are especially silent when it comes to giving advice about the structure and wording of complicated rules. The guidelines give some hints and suggestions, but leave it up to the drafter to see what should be done in a certain situation. Experienced drafters know this and may be able to come up with something clearer and more accurate. But less experienced ones may be at a loss if they have to grapple with issues like delegated powers, complex legal instruments, transitional provisions or enforcement.
- In the experimental courses inexperienced drafters were asked not to rely on the sense of security which the Regulatory Guidelines give, but apply their own skills to write legislative texts which may be understandable to non-lawyers. However, some were unable to see why the accepted legislative style is abnormal and difficult to understand, or they may even have been unwilling to see its flaws. People who just got their law degree seem to assume that laws can never be easy to read: they needed four years of training themselves to make sense of legislation, so it is impossible that the law will ever be written in such a way that an uninformed person will understand it immediately. Others felt that the trainers – linguists without legal training - didn't understand the difference between technical legal terms and phrases on the one hand, and outdated or overly complicated jargon on the other. According to them, the simplified legislative texts they were supposed to draft were simply bad law: imprecise and probably rather ridiculous to other legal professionals.

One can also consider other explanations.

- It is important to note that in the Netherlands the language of legislative texts has changed: it has been constantly modernised and standardised. Nowadays It is supposed to be neutral, impersonal and objective, and as a consequence has been 'flattened': it doesn't try to engage the readers or appeal to their emotions. Legislative language has also become highly technical and self-referential. Political, moral or religious terms and phrases don't have a place in it, and literary, journalistic or informal styles of writing are out of the question. However, this formal and impersonal style is clearly at odds with ordinary discourse and even with discourse in political arenas.
  Thus, the language of legislative texts doesn't express what people or politicians think. Instead, it has become a rather smooth bureaucratic vehicle. It describes and regulates truly complicated situations, hopefully accurately. The beginning legislative drafter learns this code or style, and mastering the language of legislation is a sign of their professionalism. It is also the style which their colleagues – fellow bureaucrats – use and understand.
  So asking them to ignore this code or style and write 'plainly' or engagingly, sounds like telling them to be unprofessional, maybe even anti-bureaucratic. It isn't astonishing that some participants to the experimental courses didn't like this at all. They considered the approach an insult to their professionalism and maybe even their intelligence.
- I should also note that in The Netherlands we hardly ever had a strong proponent for Plain Language Drafting. The former Ombudsman, Alex Brenninkmeyer, was one of the few influential officials who urged to draft simplified legislative texts as one of the means to improve communication between authorities and citizens. Plain Language Drafting hasn't been championed by the Ministry of Security and Justice or the Council of State, however. All in all it seems that most legal professionals – drafters, attorneys and judges – are quite comfortable with the Dutch legislative style and consider it unnecessary and undesirable to change it, even when it results in overly complicated legislative texts.

C. Responsive legislation

The formal and bureaucratic style of legislative drafting isn't only at odds with the style of political discourse, it actually also doesn't fit well with the approach to legislation we favour in the Netherlands in recent years. This approach has been formulated in various ways, but is probably captured best by the term 'responsive legislation'.
Responsive legislation basically means legislation which takes its users and their concerns seriously. When drafting legislation its future users should be consulted and their input used. Legislation should always be written with *all* its users in mind – not only the politicians who are going to debate the bills and decide about them, not only the lawyers and judges who will interpret and apply the law, and not only the organisations which will execute and enforce the new legal norms.

The Government and the legislative drafter should be curious in the points of view and the interests of citizens, who are going to be confronted with the new law. The Government should engage its citizens and listen to their ideas, concerns and opinions. In other words, the Government should practice empathy and be a great communicator if it wants to be a legitimate rule maker.

Responsive legislation requires legislative language which is understandable and engaging, if the Government is seriously interested in the points of view of its citizens. As said before, bills and explanatory memoranda aren't really structured and formulated like that: they don't engage and are only understandable by legal professionals. So responsive legislation requires novel ways to communicate, which civil servants and legislative drafters have to learn.
For that reason the Academy for Legislation has started to organise new courses, with names like Legal Visuals, Framing for Lawyers and Text with Effect. They all have a similar aim: to improve the effectiveness and efficiency of communication about legal matters by applying creative or innovative methods. The first results are promising; at least, the participants enjoyed the training, especially the one about 'legal visuals' (that is, visualisation of legal information). However, these alternative methods of presenting legal information aren't supposed to change legislative technique or the style of legislative texts. They are meant for communication alongside legislative texts, not instead of those texts.

Thus the question may be whether it is possible to develop an innovative legislative technique in the Netherlands. Maybe some Act of Parliament exists which really has been drafted 'responsively'. However, there are many Acts of Parliament which will give you a very clear idea about 'How To Draft Incomprehensibly' and very few pieces of legislation which may teach you how you can actually write understandably. But I'm happy to say there is a very new example of a Dutch Act of Parliament which was indeed drafted with a conscious focus on responsiveness and improving comprehensibility: the Environment Act (in Dutch: Omgevingswet). Whether this Act will be a success and other people than lawyers really can understand and work with it, still needs to be seen, as it hasn't come into force yet. But the way the legislative drafters worked on this bill certainly deserves attention. I will do that now and hopefully we can learn something from it.

D. Drafting the Environment Act

There was a very clear need for the Environment Act. Over the years the laws with regard to the physical environment, in a broad sense, had become so incoherent and complicated, that neither civil servants, nor citizens and businesses could use them anymore. This complexity has a number of causes. Especially important was the fact that a variety of

European directives, which aren't internally coherent either, had been implemented in an ever growing number of Acts of Parliament for various aspects of the physical environment.

The policy makers and legislative drafters had four goals with their project for the Environment Act. Their first goal was to make environmental law more comprehensible, more predictable and easier to use or work with. Their main approach was to create a comprehensive system of rules in one Act of Parliament. The system creates unity in the approach to environmental issues, but leaves room for diversity, because every aspect of the physical environment, like water, air or soil, has specific characteristics.
When drafting the bill for the Environment Act the drafters stuck to the idea of responsive legislation. The rules were drafted in a rather open process in which the drafters actively asked for input and opinions from a large number of Government agencies, organisations and interested parties. They also adopted a responsive approach to communication by informing and engaging people through a specific website, filled with documents, newsletters, infographics, webinars and possibilities for feedback and discussion.

The legislative technique the drafters adopted can also be considered 'responsive', because everything was done to make the new rules comprehensible, predictable and easy to use. A lot of thought went into the structure of the system: how should the Environment Act be organised, from the most abstract topics till the most detailed? The Act starts by telling explicitly what it is about and which topics it deals with, then indicates the goals it pursues, and immediately gives the most central norms regarding everyone's conduct towards the physical environment. This sounds like a normal thing to do, but I don't know many Dutch laws which do something similar.
What is also interesting for my topic today is that the drafters went explicitly beyond or even against the Regulatory Guidelines. For example, all legal definitions of terms and phrases in the Act are put in an appendix to the Act, while the Guidelines require them to be put at the beginning of an Act. Another example: every article has got a heading, which in the Netherlands is frowned upon. Articles must be as short as possible: not more than five paragraphs per article, preferably less. Standard formulations are used extensively. Old-fashioned or less common words are forbidden and consistently replaced by shorter, easier and more modern ones.
All in all the Environment Act is much easier to read than the large number of laws it replaces.

I am not claiming that this is the perfect piece of legislation. It is, for example, still a very long document: at the moment it stands at 103 pages and more are expected. Also its delegated legislation is going to be very lengthy. The pieces of legislation it replaces were even longer and certainly less well-structured or understandable, however. Another problem may be the structure of the law: the drafters created legislation with quite a number of layers and levels, both within the Environment Act itself as with other pieces of legislation

and European directives. Legal professionals may understand this system quickly enough, but it will bewilder lay people. And finally the technical, legal terms used in the Environment Act may not be to everybody's liking. It hasn't been always possible to come up with terms which are quickly understood, while 'trusted' older terms have been abolished.

E. Training self-criticism as a legislative technique

Let's go back to my topic: my point about the drafting of the Environment Act is that it gives excellent course material for the second kind of training which the Academy for Legislation has been organising, the advanced training in legislative technique.
I have given this advanced training a number of times and found it quite challenging. My approach in those courses is to take a number of older and recent pieces of legislation and subject them to a kind of close reading, asking questions about their contents and style. Maybe I have a bit of a bias, because it is an analytical approach to legislative texts which I learned when I started working with the Dutch Council of State. I practiced this way of close reading legislative texts for some time, so this critical attitude probably became ingrained before I started drafting legislation myself. Other legislative drafters seem to struggle with this kind of exercise and find it difficult to spot mistakes in legislative texts, irrespective whether those mistakes are legal errors, a faulty legislative technique, or an unclear wording or textual structure.

We can learn a lot from the way the drafters of the Environment Act worked. They have carried out a similar way of close reading of existing environmental law, with an eye to rewriting it completely. Before they started drafting, they decided about adopting a specific, responsive legislative technique, which they kept developing, constantly adjusting it to the ultimate goal of making a comprehensible and useful Environment Act. So they were continuously focused on improving their bill and weren't satisfied easily, and by working that way they kept learning about legislative technique.
I should teach other drafters the responsivity which the drafters of the Environment Act displayed. I have to change the attitude which participants to the advanced training may have to legally correct but complicated texts. Their analytical skills must be strengthened, and they must be taught to question their choices continuously. Not only by asking whether they are legally right, but also whether others will understand them. And not only by asking whether the Regulatory Guidelines have been followed, but also by trying to explain, in plain language, what they have actually written down. We have to teach them that drafting is an exercise in empathy, self-criticism and improvement.

In my opinion drafters who are able to reflect on their job and learn from it will be more successful when it comes to draft comprehensibly. They will be better at their job than those who can rattle off the Regulatory Guidelines and stick to them religiously. It should be the

job of the Academy for Legislation, and maybe of other training institutes in Europe, to teach this kind of legislative technique: analysis, reflection and self-criticism in order to improve the comprehensibility of legislation.

Even then, however, we will have to tell them that comprehensibility in legislative texts is worthy, but probably also an elusive ideal. In the end, the formal and technical nature of the language of legislation will be more suited to the needs of the Government and its bureaucracy than to citizens and companies. Legislation will never be an engaging read. And drafters won't be able to make it more fun to read legislation. But they surely could make reading legislation easier.