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Evaluatie in het wetgevingsforum: een onderzoek naar de relatie tussen evaluatie en kwaliteit van wetgeving

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Summary

Evaluation in the legislative forum

In recent years, in literature as well as in policy-making, much attention is being given to the quality of legislation. The general feeling is that the quality of legislation is on the decline. As to the origins of this problem and the possible solutions, views diverge. One suggested solution is the establishment of evaluation-research specifically aimed at monitoring the performance of laws. In The Netherlands, evaluation of legislation emerged in the eighties, when both government and parliament felt that the performance of many newly enacted laws should be scrutinized more closely.

In a previous study the significance of evaluation of legislation was demonstrated. The phenomenon was delineated and data were presented about the utilization of the findings of evaluations. But that study did not answer the crucial question: does this kind of evaluation eventually lead to better laws? This is a central question in this thesis: in which way and to what extent does evaluation of legislation contribute to the quality of legislation.

Firstly, in order to be able to handle this question one needs a definition of quality of legislation. In *chapter two* of this book, quality of legislation is specified as instrumental quality. Over the years, laws have acquired a more modifying quality. That is, at present more than ever, laws are meant to generate change in society. At the same time, society is growing more and more complex while modern government is supposed to be actively engaged in solving societal problems. Combined, these phenomena can explain the difficult position of the legislator nowadays. Instrumental quality of legislation consists of two dimensions: textual aspects (accessibility, clarity and simplicity of the legal text) and practical aspects (the prospective feasibility, enforceability and effectiveness of the law). In this thesis an assessment is made of the quality of three evaluated and modified laws in terms of these six aspects. By comparing the quality of a law before and after an evaluation and by tracing the origins of

origins of the changes introduced in the law, judgements can be made on the potential of evaluation-research.

In *chapter three*, systematic evaluation is distinguished from other forms of law evaluation. Evaluation of legislation is defined as the assessment of the implementation and effects of a law against a number of predetermined criteria. Possible research designs range from descriptive to explanatory designs. Besides evaluation based on empirical research one can distinguish forms of evaluation which are predominantly based on the subjective observations of informed insiders. Dutch examples of this last category are a series of evaluations commissioned in relation with an protracted budget reduction drive, and evaluation projects related to deregulation initiatives.

The theoretical framework for this study is set out in *chapter four*. In this chapter, the legislative process is described as a policy-making process. Over the years, different conceptual frameworks have been designed for a description of such processes. These models vary according to the chosen level of description and analysis. The most basic approach is the individual, singular perspective. In the literature one finds a number of this kind of actor models, aimed at understanding processes of decision-making. For a description and analysis of processes of drafting and evaluating laws, however, this perspective is too limited. The legislative process is an exceptionally complex process in which many actors, within and outside government, participate. Besides, a government cannot very well be conceived of as an individual actor with one clear set of goals and one unambiguous plan for attaining those goals. For the purpose of this study, only interaction-models operating on an interorganizational level and on the level of the political system as a whole are useful. A number of those models has been taken into consideration.

The first model to be discussed is the *barrier model*, in which power seems to be the predominant factor in determining the outcome of a policy process. This model divides a policy process in sections between which barriers can prevent an issue from getting agenda-status. To start a policy process, a societal need should be translated in a demand to the political system. This demand should reach the political agenda, after that a decision should be taken, and finally, implementation should start. Predominant beliefs, values and coalitions can hinder an issue in getting over the barriers.

A second interaction-model focuses on the unpredictable aspects of policy-making processes. In an application of the Cohen, March and Olson cabbage can model of organized anarchies, Kingdon depicts the policy-making process

as a coupling of streams. The policy stream, the political stream and the problem stream get together whenever a policy-window opens up. These windows can open as a consequence of political developments or whenever a serious problem arises. The central premise of this model concerns the predominant role of chance in policy-making processes.

Both these models turned out to be unsuitable for the theoretical conception of the legislative process that was needed for this study. The purpose of this study is to understand the relation between evaluation of legislation on the one hand and quality of legislation on the other. The legislator receives information on the functioning of law in practice. On the strength of this information, he may contemplate a revision of the law. The resulting decision cannot just be explained as the outcome of a power game or the consequence of mere chance. In the legislative process arguments seem to carry a great deal of weight. Besides, for the process of changing a law in the wake of an evaluation, outside initiatives such as in the barrier model stipulates, are hardly relevant. There is no unpredictability there: the timing of the evaluation is known, the problems are described and solutions are formulated. The availability of the collected information creates possibilities for a public debate. Ideally, a law is the result of such a debate, based on arguments related to the situation as determined in the evaluation. On these premises, the forum-model of the legislative process is established in chapter four. This model is the conceptual framework, within which three cases of more or less drastic alterations of a law are studied.

There is another point that needs clarification before we can deal with the matter of the effects of evaluation on the quality of laws. It is necessary to explore the significance of evaluation-research in terms of the utilization of this research. In *chapter five* a definition of utilization is given. The utilization of research findings is defined as the specific use in the case of the evaluated law itself. This utilization consists of three sections: cognizance, realization of shifts of position, and change in rules and policy. Drawing on a survey of a sample of 35 evaluations, commissioned during 1983 - 1987, it is shown in *chapter five* that evaluation of legislation results in many changes in both the text, the instruments and the implementation of the law. But, one can ask, are these changes to be considered improvements? In order to answer this question, three cases of the modification of a law were studied. In two cases, the alterations of the law were based on a systematic evaluation. In the third case, the evaluation did not have a systematic character. The three cases are: the freedom of information act (*chapter six*), the noise control act (*chapter seven*) and the housing act (*chapter eight*). The three evaluations were carried out during the eighties.

In all three cases the modified law was published in the State's Register during the beginning of the nineties.

In all three cases, the utilization of the evaluation results turned out to be relatively high. However, this high utilization rate did not lead to a remarkable improvements in each of the three laws concerned, as is shown in *chapter nine*. The freedom of information act and the noise control act were improved as a consequence of the evaluations that were carried out. But the evaluation of the housing act did not lead to an improvement of the quality of this law. How should these research-findings be understood? The forum-model of the legislative process assumes that the quality of the laws produced by the legislative process increases when more and better verifiable information is available on the circumstances under which the modified law has to function. According to this assumption, the quality of the evaluation must be an important factor influencing the quality of legislation. Comparing the three cases, a remarkable fact is that two of the three evaluations were carried out in a systematic way. The evaluations of the freedom of information act and the noise control act were based on a large-scale empirical research, executed with different methods of observation. The evaluation of the housing act had an inferior empirical foundation. The basis of this evaluation consisted mostly of subjective observations of involved civil servants and participants in the building trade. The normative framework applied was biased, to say the least.

The results of the three case-studies do underline the formulated assumptions of the forum-model. The two proposals that were formulated as a reaction of the systematic evaluations, led to a serious debate, which contributed clearly to the determined increase of quality of the two laws. The parliamentary debate on the proposal which was founded on the subjective evaluation of the housing act however, was not very substantial but displayed strong strategic overtones. As a consequence, the changes in the housing act did not at all improve the quality of the law.

For the research on the relation between evaluation and improvement of the quality of a law, a necessary condition is that the results of the evaluation are used. Utilization in this study is defined as the use of the results of the evaluation in the case of the evaluated law itself. After all, evaluation is aimed at making decisions. The decision-maker, the legislator, wants to know how his laws function and whether changes need to be considered. Evaluation introduces images of reality in the legislative process that support the debate on legislation. Discussions on legislation can be characterized as a combination of communicative argumentations and strategic argumentations. High quality

evaluation limits the opportunities for strategic argumentations or, to be more exact, evaluation of legislation should be aimed at strengthening the position of communicative argumentations in a debate on the preparation of modification of a law.

Of course, one should remain realistic on the possibilities of evaluation. Many participants with often very different interests take part in the passing of a law (as well as in all policy development). Results of evaluation-research cannot replace the considerations made by these participants in view of their respective interests. But, on the other hand, it is not necessary to be very modest about the role evaluation results do play in the legislative process. The results of an evaluation can — and in fact will — inspire the deliberations of the participants in the legislative process. At least the results of an evaluation set boundaries to the possible positions which the participants in a debate can choose. Evaluations supply information on the effects of a certain law and on the state of affairs on a certain field of government action. The possible options the legislator has to his disposal are influenced by this information.

People sometimes like to suggest that the results of evaluations, and research in general, are not or not very relevant to the political debate. According to these people, research findings can, in a sense, be found on the street; qualified civil servants, administrators and politicians know which way to go without research. Exactly this view was found to be the opinion of the lawyers of the ministries of the Dutch central government, according to study conducted by the Dutch General Accounting Office (cited in chapter five). The data of the three cases studied in this research contradict these views. It is remarkable that the results of the evaluation of both the freedom of information act and the noise control act diverge strongly from the expectations many had formulated on the functioning of these laws, sometimes before, sometimes after the coming into force of the evaluated law. The evaluation of the freedom of information act demonstrates that this law did not have the destructive effect on the functioning of the civil service and government authorities that was feared beforehand. Because of this fear, parliament accepted the law reluctantly and only after a sharp debate. The evaluation proves that the law did not lead to an abundant amount of requests for information. For the noise control act a similar discrepancy between the original expectations and the outcomes of the evaluation was noticed. It is remarkable that in the case of the noise control act, even after the coming into force of this law, complaints were raised on a large scale and on the highest administrative levels. The evaluation shows that actually things were not as bad as they initially looked. After some time bottlenecks

in the implementation were solved — also thanks to the support the ministry gave to the local governments.

The case of the housing act also shows that data concerning the implementation of the law can lead to new views. Research findings on the functioning of the housing act 1991 indicate that assumptions on which the change of the law was based in 1991, were partly incorrect. In fact, some of the conclusions of the evaluation that was undertaken as part of the deregulation operation, proved to be wrong. The introduction of sharp decision-making terms did contribute only in a very limited way to accelerating procedures. In fact, applicants and government officials circumvented the time limitations the law imposed, by intensifying preliminary consultations. In the same way the introduction of a new procedure for a specific category of building constructions did not speed up the permit process. The greater part of the constructions concerned did already get a building-permit on a short notice — a fact that was completely ignored in the deregulation report. Neither did the freedom of the building-participants increase. The evaluation showed that applications for these constructions tend to be tested in the same way as applications for constructions that need a full fledged building permit. Also, the goal of a simple and uniform construction assessment through unification of the building rules did not materialize, simply because the municipalities all implemented the rules in very different ways. Besides, the unification attempt resulted in a great number of references in the building rules and consequently in a deterioration of the accessibility of the legislation.

Evaluations, one can conclude after the foregoing, can have a sobering and demystifying effect. Evaluation has added value for the legislative process because it tests the assumptions on which a law is based. Evaluation supplies the legislator with information on the functioning of a law and on the circumstances that influence the function the law's performance. This information enlightens the legislative process and contributes to the quality of the debate on legislation. That information appears to be valuable since utilization in the legislative process is relatively high. One of the consequences of the increased complexity and changeable nature of society is that individual experiences, cannot serve as a solid ground for adjusting legislation — if ever that was the case. Neither can random observations of departmental lawyers or implementation officials constitute a solid foundation upon which the legislator can build a case for change. The legislative process seems receptive for the reports of evaluations if these reports come up with reliable information on the functioning of the law. This receptivity can be explained by modelling the legislative process as a forum event. Laws are created within the bounds of strictly regu-

lated procedures, by participants that are known beforehand and through a discussion which takes several rounds. This legislative process serves at least two purposes. Firstly, the legislative process is a democratic process. The rules of the process are set up with this intention. For example, the rules according to which selection of participants takes place, are set up so as to ensure that legislation will be the embodiment of commonly shared values. Furthermore, democratic legislative procedure is intended to grant legitimacy for the laws of the land.

Secondly, the legislative process aims at establishing good decisions. The rules of the legislative process are designed to provide for careful deliberation. Thus in The Netherlands, the State Council submits a formal advise on all bills pending, a large part of the deliberations is in written form and the debate takes place in several rounds. Through the intermediate substitution of parliamentary participants, a certain degree of reflection is acquired. The open civic nature of the legislative process is an essential prior condition. It enhances outside influence in the process and promotes the quality of the arguments that provide the foundation for it.

Evaluation of legislation affects this last purpose of the legislative process. Evaluation researchers and policy makers, including the legislator, have in common that they have to justify themselves in front of a forum. For the legislator this means decisions have to be taken — and eventually laid down in laws — which can be defended in public. The legislative process is receptive for information from an evaluation because serious argumentations can be founded on it. The better the quality of this information, the more serious the proposed law can be tested. Proposals can be built on a much more solid basis which means a growing chance the proposals will hold in a debate. To its origins, evaluation suits very well with the legislative process. The careful preparation of decisions on legislation is promoted by the supply of information on the functioning of the law. However, the preparation of laws will always be a mixture of communicative and strategic actions. In a democracy the role of (scientific) research is not predominant. Research-findings are always subject to political judgement. But evaluators can certainly contribute to a carefully considered judgement. From this perspective evaluation aims at delivering a positive influence to the debate on legislation. In this respect, the publicity of that debate forms a prior condition. The publicity of the debate makes it verifiable: the results of an evaluation cannot be ignored.

The three studied cases gave different indications for this function of evaluation in the legislative process. In the discussions on the three proposed laws, partici-

pant repeatedly referred to the results of the evaluations. Proposals of ministers were compared with these results. With the freedom of information act and the noise control act, this happened very explicitly on those points the ministers disagreed with the advice of the evaluation committee. Parliament then asked for further justification of the proposal with the results of the evaluation taken into consideration. In this respect it is striking that the change of the housing act led to critical remarks on the soundness of the grounds on which the proposed new law was based. The debate on the new housing act had a strong ideological connotation. Because empirical data were not available, opportunities for strategic action became manifold. Of course strategic actions were also found in the two other cases, but the debates in these cases clearly were less prejudiced.

Perhaps after the foregoing, one should expect a warm plea for systematic evaluation of all legislation. This plea will not be delivered, however, because both the decision to evaluate a law and the use of results of an evaluation have draw-backs. Firstly, law evaluation as a political institution may lead to the neglect of ex ante evaluation; the emphasis in the political debate is on the desirability of an evaluation in the long run, not on the serious testing of the proposed law at hand. Secondly, this study shows that the utilization of evaluations is relatively high. Evaluation, thus, may speed up the revision of recently enacted laws. The stability of the legislation can be threatened by this. Thirdly, evaluations create new policy-making opportunities for the adversaries of the evaluated law. Agenda-status is not obtained because of the results of the evaluation, but because of the simple fact that a momentum is created. When these effects occur, there is no reason to believe evaluation will contribute to the improvement of legislation.

The use of evaluation findings sometimes poses a threat to the quality of the law. In chapter five an analysis of a sample of 35 evaluations was mentioned. This analysis showed that most evaluated laws had been enacted only recently at the time the data were collected. Most evaluations were carried out at a time when the law was still being introduced in the field. In three out of four law evaluations it still was too early to formulate definite answers concerning the effects of the law. Where evaluation reports — as some did — pretended to give more than provisional information on the effects of the law, the evaluation findings were misleading and of no value in improving legislation. The second threat an evaluation can constitute for the quality of laws has to do with the pressure put on evaluators to produce usable recommendations. Politicians sometimes show more interest in simple, straightforward propositions for new legislation than in understanding the current process of law application. In their

search for usable recommendations evaluators may be tempted to violate the 'condition of symmetry' by formulating recommendations that cannot be founded on the research-findings.

The conclusions concerning the supporting role of evaluation research in the legislative process and the above mentioned warnings lead to several usable recommendations in *chapter ten*.