Chapter 9

Assessing the Accuracy of Ex Ante Evaluation through Feedback Research: A Case Study

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I. The Black Box of Ex Ante Assessment of Legislative Drafts

Most legal publications concerning the quality of legislation are focused on the parliamentary phase of the lawmaking process. What happens during the preparatory phase inside and between ministries and government agencies largely takes place in a ‘black box’ although this is in fact the place where the action is. This is remarkable because that is where the policy problem underlying a Bill is first defined, where the data/information is gathered through consultations or otherwise, where alternative regulatory options (non-regulation, self-regulation, co-regulation) are explored, and where trade-offs between those options are discussed etcetera. It is during this pre-parliamentary phase that all kinds of ex ante assessments of the quality of legislative drafts will take place.

But what do we know about the accuracy and reliability of these assessments and their effect on the quality of legislation after enactment? One way of finding out is by conducting so-called ‘feedback research’. This type of research aims

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2 These words are taken from one of the few Dutch scholars who have done research on the pre-Parliamentary phase of the legislative process, L.J.M. d’Anjou, *Actoren en factoren in het wetgevingsproces* (W.E.J. Tjeenk Willink, Zwolle 1986), p. 274 (dissertation with an English summary).

3 Not much has been written on the methodology of feedback research. An exception is: E.H. Mory, ‘Feedback Research Revisited’ in H. Jonassen (eds.), *Handbook of Research on Educational*
to compare the results from *ex ante* evaluations and advisory opinions concerning the quality of legislative drafts with the outcomes of *ex post* evaluations to find out which judgements and predictions were (not) correct in retrospect and which essential flaws were overlooked.

In this chapter, we will focus on the *ex ante* review of legislative drafts by the Dutch Council of State.\(^4\) The reason for this is that the position of the Council of State in the Netherlands is vital when it comes to *ex ante* evaluation. Other than most of the surrounding countries, the Netherlands does not yet have an integrated system of regulatory impact assessment or an impact assessment board. The Council of State, however, does something reasonably similar to *ex ante* evaluation, namely, assess the policy-analytical aspects\(^5\) of legislative drafts before they are sent to parliament. There is no other institution that has the same authority, the same expertise (the House of Representatives is first of all a political arena), or the same strategic position (the Senate is at the far end of the lawmaking process and has little opportunity to demand amendments to legislative proposals) to be successful in scrutinizing the quality of legislative drafts.

Section II is about the Council of State and its exact role in the review of legislative drafts. In section III, the focus of this study will be specified, leading to the research questions in section IV. Our research involves a pilot study of two cases for which we developed an analytical framework (V–VIII). Finally, in sections IX and following, the research questions will be answered: what observations and conclusions can be drawn from the study?

II. *The Council of State as the Principal Advisor on Legislative Quality*

Together with the House of Representatives, the Senate, the National Chamber of Audit and the National Ombudsman, the Council of State belongs to the High Councils of State. These are government agencies of which the independence is regulated by the Constitution because they fulfil an important role in

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\(^4\) A detailed overview of the advisory tasks of the Council of State can be found in T. Borman, *Wetgevingsadviesering door de Raad van State in Nederland* (W.E.J. Tjeenk Willink, Deventer 2000).

\(^5\) See Section II.