POOR QUALITY OF LEGISLATIVE DRAFTING IN THE GOVERNMENT’S TOP PROJECTS

Background and Purpose of the Research

Focus on law drafting of projects in the legislative plan by the government

This research has focused on law drafting in eight legislative projects that have belonged to the legislative plan of the Government Programme of Prime Minister Vanhanen’s second Cabinet of April 2007. In total, the legislative plan consisted of 22 legislative projects that were considered relevant by the government, and general measures through which the government and ministries were meant to improve the quality of legislation. The eight cases were chosen for this research on the basis that the legislation at issue was national and that the government proposal was completed by the summer of 2010.

The purpose of the research: the implementation of legislative principles

The drafting processes were examined in relation the following measures, highlighted in the legislative plan: 1) increased transparency and stakeholder participation in law drafting, 2) increased assessment of alternatives, 3) more intensive assessment of the impacts of legislation. In addition, the research focused on the general documentation and transparency of the processes and on the ways in which implementation and follow up of the reform were taken into consideration in the preparation of the bill.

The purpose of this research was to provide information on how structural and political mechanisms and every day practices in the ministries affect the implementation of legislative principles. More precisely, the aim was to see not only how the Better Regulation principles
have been followed but also reasons explaining the outcome. Accordingly, one additional question in this research project has been whether the principles as such are appropriate in all their aspects.

**The data: interviews, law drafting documents and public documentation**

The most important piece of data in this research consisted of interviews conducted with the law drafters of the eight cases. That is, from each project one or a few civil servants who were actively involved in the processes were interviewed. Also a coordinator of the Better Regulation Programme was interviewed. The most relevant law drafting documents that were utilised were government proposals. Internet based documentation was also analysed; it was located at the Government Project Register and at specific web pages of the projects. Questionnaires for the law drafters, previously made by the Ministry of Justice, have also been utilised.

**Main Results**

**Contradictions in the Government Programme**

In many cases, the direction of policy of the legislative projects was rather precisely described in the Government Programme. This setting constrains the possibilities of following the Better Regulation principles. The government is thus contradictory in the sense that it committed itself to improving the quality of legislation but simultaneously, it offered little room for choices to a number of legislative projects. In this situation, it is difficult, for example, to increase the influence of stakeholder participation, or to assess alternatives for legislation or impacts of the proposal in a meaningful way. That is, there remains little potential for transforming the main direction of the law reform, and that makes profound considerations useless in practice. In addition, the Government Programme was formed in a closed process that leaves open the ways in which the goals were formulated to begin with.
**Strong political or ministerial influence constrain available options**

Political and ministerial interests typically influence legislative drafting in a structural frame that is defined by the constitution. However, a very strong influence of either agency diminishes room for the consideration of alternative measures and for the views of stakeholders unless they comply with the intentions of the steering. Observations of this kind were found among some of the cases. It was also noticed that strong political steering that took place in some law reforms studied in this context, has had a negative effect on the quality of impact assessments.

**Ministerial practices affect law drafting, often negatively**

Ministries organize legislative drafting differently, and orientations vary even within the same ministries. Attention paid to the requirements of preparing legislation of good quality was in general insufficient. In a few projects the law drafters expressed strong criticism towards the support structures of their ministries, saying that the directors did not understand well enough the nature of legislative drafting. Accordingly, the implementation of legislative principles has suffered from poor political commitment. One concrete problem emerging from this background is a tight schedule combined with scarce resources of the personnel drafting proposals. In some cases, this has had concrete effects on the procedures of consulting stakeholders and on the documentation of the process, for example. In a few cases, there was more than one working group responsible for the drafting, which has caused confusion regarding accountability. Legislative projects also differ not only in terms of their contents but also in terms of their legal nature and economic significance, both of which place constraints on the ways in which legislative principles can be applied.

**Impact analyses are not planned early enough**

There were good examples of logical reasoning and the use of information in the impact assessments but generally, the projects lacked sufficient planning in the early phases. Impact assessments were typically conducted not earlier than at the end of the process, and justifications were not always provided for numerical estimates. With the exception of a few cases,
knowledge based on research was used very little. Neither did public statistics always meet the needs. Most problems in the quality of impact assessments took place in projects with strong political steering.

Law drafters are often incapable of knowing in advance how intensively the law will be applied, which is due to structural differences between central target groups, for example. This increases the difficulties of impact assessment. Preparing for the implementation in law drafting is nonetheless important. It was mostly accomplished by providing information but one useful procedure was also to invite agencies responsible for the implementation to take part in the preparatory working group. Practical guidelines were also given to central target groups. The projects were poorly prepared for follow-ups of the reform in question although in some ministries follow-up is a routine procedure whether or not it has been mentioned in the government bill.

**Target groups are expected to provide justifications**

There was considerable variation in the formal consultation procedures of stakeholders. In many projects central agencies were consulted informally but the processes lacked documentation. On a large scale, strong political or administrative influence has weakened the possibilities of effective participation. The possibilities of stakeholder groups to have an effect in the early phases of preparation remained unclear.

On the other hand, some of the interviewed laws drafters saw the participation of strong interest groups in preparatory working groups as challenging. The law drafters worried about the lack of expertise of several stakeholders and that the participation of strong interest groups slows down the preparation due to “endless discussions”. Generally, according to the analyses, stakeholders are expected to improve in careful argumentation and justification of views.

In many governmental projects, citizens are encouraged to take part in the discussions on policy initiatives on specific web pages (otakantaa.fi). According to the experiences of some interviewed law drafters, those pages are poorly suited to projects that are politically controversial or that require special expertise. Namely, allowing for anonymous commenting increases the risk that representatives of interest groups with strong opinions may start to dominate and manipulate the discussion.

In a few projects, disputes between stakeholders and law drafters emerged only after the completion of the draft for the government bill. The
disputes concerned very specific issues and transformed into complicated negotiations, where support was searched for and received from politicians.

**Variety in public documentation**

There was huge variation in the documentation procedures of the projects, both regarding the Government Project Register, the use of which is mandatory, and project specific web pages which were voluntary. Not all projects had a web page. Basic legal requirements in terms of documenting were not fulfilled in all cases. In some projects, the ministry had provided no assistance for communications (for updating the Government Project Register or web pages), although it would be an important resource. The nature and influence of political steering was poorly explicated in the documentations. Altogether, actual decision making processes were introduced in one case only. There was also variation in the ways in which statements made by stakeholders were reported in the government bill and whether individual statements or summaries of them were publicly displayed. The inadequacies mentioned above are serious in terms the overall transparency and legitimacy of law drafting in such highly valued projects.