10. LEGISLATION PROCEDURE AND TECHNIQUE

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I. Legislative procedure in the Netherlands

Legislator is not one single concept; according to the sort of legislative measure in question different organisms are involved in the procedure of bringing about legislation. As to national legislation a ministry is almost always involved. Other organisms that can play a role: the Crown, the Council of State, the States-General.

A typical characteristic of the Netherlands organization is that there is not a ministry that has an exclusive responsibility for legislation. Each ministry is responsible for legislation on its own field; accordingly each ministry has its legislation department. As an example: organization scheme of the Ministry of Justice.

Legislation is creation of written law: generally binding rules for an indefinite number of cases (law in a material sense). In this sense written law can take different forms:

- statue
- general administrative order ("algemene maatregel van bestuur")
- ministerial ordinance
- ordinance issued by other officials
- disguised legislation ("pseudo-wetgeving")

Law in a formal sense only: in some cases individual decrees have to take the form of a statute, e.g. naturalization by statute.

As to statutes rules on procedure are laid down in the Constitution (articles 119–131) and the standing orders ("Reglement van orde") of the Second and the First Chamber of the States-General.
In the procedure different phases can be distinguished:

- preparatory phase
- drafting
- advice
- parliamentary discussion
- Royal assent
- promulgation

Details are laid down in an annexed scheme.
Statutory instruments: for the procedure see the annexed scheme.

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Questions in connection with the procedure of legislation:

- Can the Royal assent to a bill passed by the States-General be withheld?
- Is it permitted not to promulgate a statute?
- Does the provision in a statute that it will enter into force on a moment to be fixed by Royal decree imply the obligation for the Crown to fix that moment?
- Can a court examine whether the procedural rules for legislation have been duly observed?
- Is publication of a statute in the State Gazette a formal condition only, or does this have a material significance?

The principle task in the legislative process lies with the legislation departmens of the ministries.

Formally Parliament plays no role in the field of statutory instruments, although it has a certain influence from the general responsibility of the Government to the States-General.

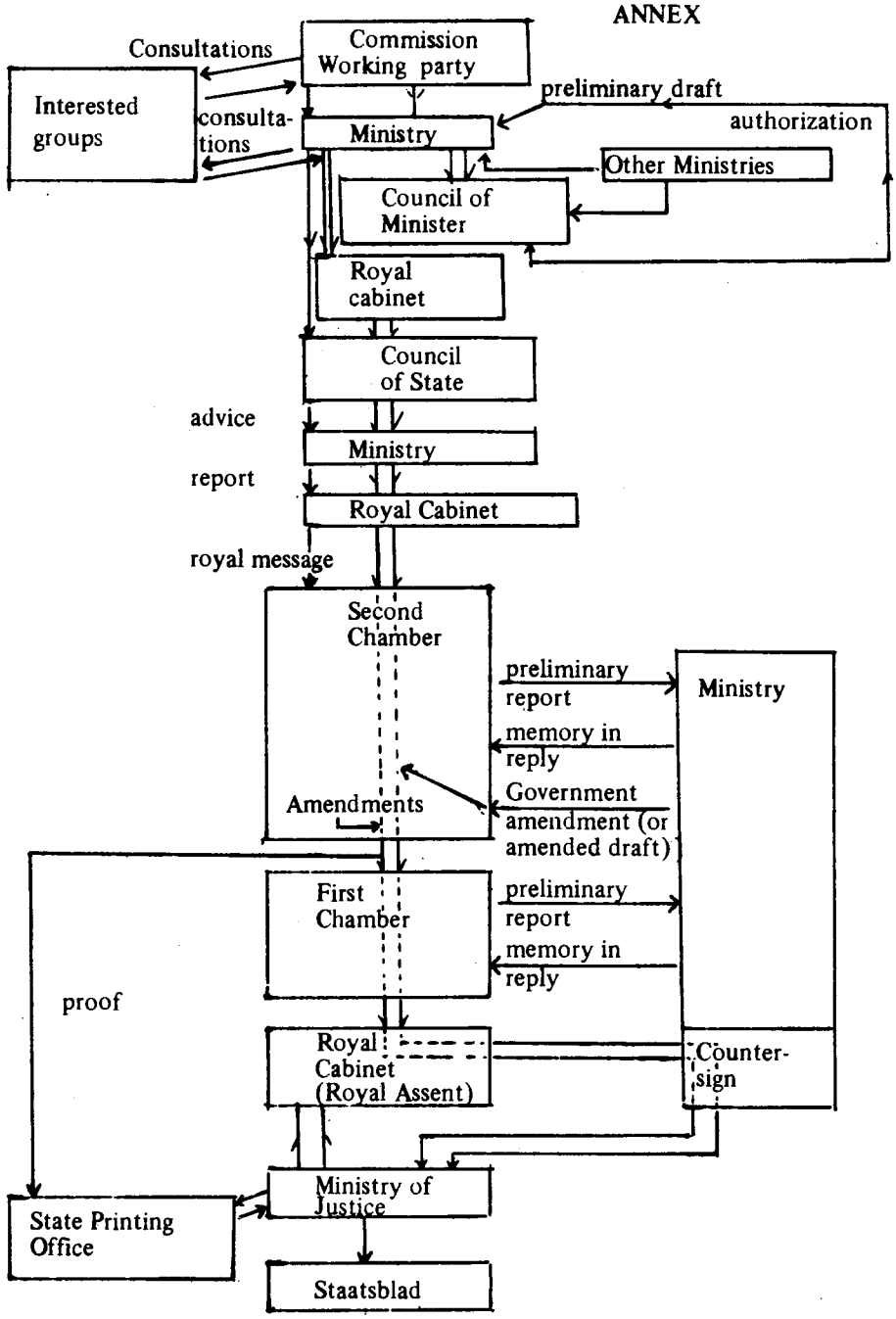
In some cases explicit provisions have been made to guarantee a greater influence of Parliament in this field.

As to statutes on the other hand the influence of Parliament varies according to the subject of the bill and to the gree in which the interested social groups approve the contents.

In general Parliament is handicapped by the fact that it has insufficient facilities in comparasion with the Government. Mostly questions of juridical-technical nature are left to the ministries for decision.

I A. Legislation procedure in the Netherlands

ANNEX



II. Legislative procedure in some other countries

1. France

A typical characteristic of the French system is that there is according to the Constitution of 1958, a strict separation between statutes (voted by Parliament) and regulations (made by executive authorities). The constitution contains a limitative list of subjects that have to be regulated by statute. Consequences of this system :

- a statute that regulates a subject not mentioned in the list is inconstitutional;
- a regulation on a subject mentioned in the list will not be applied if it is contrary to on existing statute.

The exact demarcation between these two fields has given rise to many difficulties. In practice simple rules, even on the territory reserved for statutes may be made by regalation. Delegated legislation is also possible on certain conditions.

For statutes the right of iniative is lodged with the Government or with a member of Parliament. In the former case the draft is worked out in a Ministry, often with a consultative commission of interested parties ("umbrella-commission"). The draft may be submitted to special advisory boards.

The next step is the advice by the Council of State, which is generally followed.

Government drafts may be put before either house (Assemblée nationale or Sénat) of Parliament. There the draft will be examined by a special or permanent commission and after that discussed in the full house. Within certain limits amendments can be proposed. In principle the amendments are voted on separately, but the Government can demand an overall vote on the text with only the amendments acceptable for the government.

When a bill has been adopted by one assembly it is transmitted to the other. There the procedure is identical; if as a result of amendments the final text is different from the text adopted in the first assembly, the bill is sent back. In theory the bill can go back and forth infinitely, but the Government can intervene. On demand of the Government a mixed commission is charged with sorting out the difficulties. If this commission reaches no result, the Aseemblee nationale, after a new reading in both houses, has the last word.

A bill adopted by Parliament can be submitted to a constitutional council for a control of constitutionality (for organic laws this control is obligatory).

Promulgation takes place by *presidental decree.* Then the statute is published in the "Journal official"; this is a condition for its entry in force.

2. Germany (F.R.)

As Western Germany is a federal state, a distinction has to be made between the legislation for which the federation ("Bund"), and the legislation for which the states ("Länder") are competent.

The Constitution lays down the principle that the States are competent, insofar as the Constitution itself does not provided otherwise. In practice, however, the federal legislation is the more important;

three categories can be distinguished:

– Legislation for which the federation has an *exclusive* competence (e.g. national defence, immigration, railway – and airlaw, etc.).
– Legislation for which the federation and the states have a *competing* competence. In principle the federation has a primary competence, but this competence may be exercised on certain conditions only.

(Examples of this category: economic law, labour law, civil law, criminal law, etc).

– "Framework-legislation": the federation is competent to lay down the general framework, that has to be completed by state-legislation (e.g. press-law).

In the legislative procedure the most prominent part is played by the Government and the Bundestag (more or less the House of representatives) The right of initiative lies with the Government, the Bundesrat (representatives of the states), or one or more members of the Bundestag.
A Government bill, before being introduced in the Bundestag, has to be submitted first to the Bundesrat, that can make its views known within six weeks. Irrespective of the outcome the bill can be laid before the Bundestag. If, however, the Bundesrat deem certain amendments necessary, both versions are laid before the Bundestag.

If the Bundesrat takes the Initiative, it has to submit the bill to the Government, before it can be introduced in the Bundestag.

In all cases the text as determined by the Bundestag will be definitive. For the entry in force, however, cooperation of the Bundesrat and promulgation by the president are necessary.

The cooperation of the Bundesrat can take two forms:

– In some cases it has to consent.
– In other cases it can only object to the bill, but only after a mixed commission has tried to reconcile the conflicting views of both houses. The objection can be overruled by a new decision of the Bundestag.

A statute is *promulgated and published* by the *prsident.* It enters in force after 14 days insofar as the statute itself does not fix another moment.

A particular aspect of German Constitutional law is that Germany has a constitutional court. This court has to decide on conflicts between federal authorities, between federal and state authorities, etc, and also on *violations of the constitution.* In case of violation of fundamental rights even private persons can lay their case before the constitutional court.

3. Sweden

A typical characteristic of the Sweden system is that most legislation is prepared and drafted by special independent Royal commissions (in recent

times, however, there seems to be a tendency that more bills are drafted by a working party within a ministry). In a normal case, when ministry deems a certain piece of legislation necessary, it appoints with the consent of the Government a commission. As these commissions have a independent position, it is of vital importance that their terms of reference are clearly defined: the terms of reference (directives) can leave more or less freedom. In some cases one or more alternatives that have to be examined are laid down. This implies that the appointment of a commission is preceded by a more or less extensive preliminary study;

A commission consists of a president and a secretary (both in most cases are judges), and a number of ordinary members (experts, members of parliament representatives of interested parties).

The work of the commission result in a draft with a very extensive commentary. This is submitted for advice to a great number of public and private authorities (the commission itself can already in the course of its work seek the advice of these authorities).

After receipt of all advisory comments the legislation department of the ministry concerned prepares the definite text of the bill.

If the draft concerns a fundamental part of the law it can be submitted to the "Law Council", consisting of judges of the Supreme Court and the supreme Administrative Court, for a review of the legal and technical aspects. The next step is that the bill is submitted to Parliament ("Riksdag"), that consist of only chamber. There it is examined by a commission and then debated in a planery session. If the bill is adopted by the Riksdag, it is promulgated and published by the Goverment.

The extensive way of preparing bills has in practice the consequence that the parliamentary procedure can be very short, and that bills are rarely amended by parliament. It is contended, however, that the system described has also a serious disadvantage: as the intentions and implications of the statute are laid down in the extensive commentaries which normally are published, less attention is given to a precise drafting of the text itself.

4. Switzerland

Switzerland is, like Germany, a federal state. This implies a demarcation between federal legislation and state legislation, and a bicameral Parliament: "Nationalrat" (representatives of the people) and "Ständerat" (representatives of the cantons).

The right of initiative is lodged – with some differences in procedure – with the cantons, (individual members of) either chamber of Parliament, and the federal Government.

In the Swist legislative procedure the "preparliamentary" phase is of the utmost importance. In general a preliminary draft is worked out by a department of a ministry, a specially appointed studygroup, or, for a number of subjects, a permanent commission. The preliminary draft is then examined by the ministry itself, or by a special committee of experts under presidency of the minister himself or a high official, consisting, as the case may be, of members of Parliament and/or interested parties. This latter procedure is

usual in the case of important legislation. The task of such a committee is mainly the selection of the best possible alternative solution, but not the drafting of the precise legal wording.

Then follows a consultation in the broadest possible circle: beside the cantons organizations of interested parties. When this consultation leads to a negative result, the draft will be reexamined by the ministry or the committee of experts.

The bill is introduced in Parliament, with a detailed commentary. The parliamentary procedure, which is identical for both chambers, may start in either chamber. The bill is first examined by a special commission and by the members of the political parties. After that the bill is discussed in the full house.

Both chambers discuss and vote separately, but for adoption or the bill a unanimous standpoint is necessary. This can involve that the bill has to go back and forth between the two chambers until a final unamity is reached.

After adoption in both chambers the bill is put into the hands of a redaction committee, that has to fix the text definitively in the three languages; it can also make formal amendments. After a new and final vote in both chambers the statute is published.

On petition of 30.000 inhabitants who have voting rights, it can be submitted to a referandum.

5. United Kingdom

Apart from the legislation emanating from the work of the Law Commission, that has a task in consolidation and revision of statutes, the major part of legislation results from the Government's legislative programme; initiative of members of Parliament (private Members Bill) is possible, but in practice this leads to results only if the Government agrees with the proposals.

In the preparation of legislation an important role is played by the Parliamentary Counsel Office. The duty of this office is to draft bills, on instruction of the Minister in charge of the bill. Obviously this has an advantage: bills are drafted by experts in legislation.

The bill, together with an explanatory memorandum which only contains a forecast of changes in public sector manpower requirements, and may not have an argumentative character, may be introduced in either house of Parliament (House of Commons or House of Lords). Finance Bills and most bills of a controversial character are introduced in the House of Commons.

The procedure in the House of Commons consists consecutively of:

- First reading (formal only), followed by an order that the bill will be printed.
- Second reading: general debate on the merits of the bill.
- Commettee-stage (standing Committee, or for important legislation, "committee of the Whole House", i.e. the House as a whole, sitting as a Committee) for detailed discussion and amendments.

- Report stage: reconsideration by the House and debate of amendments made by the Committee.
  Where necessary the bill may be returned to the Committee for further consideration.
- Third reading: only minor verbal amendments may be made. Debates in third reading are becoming rare.

In the other House the procedure is identical. If the other House amends the bill, it is returned to the first House.

Formely the House of Lords could reject a bill adopted by the House of Commons and thus prevent a bill becoming law. Now the House of Commons has a preponderant position:

- Money bills (i.e. a bill proposing financial measures) must be passed by the House of Lords within one month and without amendment. Failing this the bill may nevertheless receive the Royal Assent.
- Other bills: if a bill is passed by the Commons in two successive sessions, and is rejected twice by the House of Lords, Royal Assent may nevertheless be given. Thus the House of Lords can only delay the passage of a bill.

After the parliamentary procedure the Royal Assent is necessary. In practice this is never refused.

Statutes are kept in the Register Office of House of Lords, where they may be inspected and Copies can be obtained from the Stationary Office. Besides statutes are published in annual volumes.

III. The competence of the legislature

Reverence is made to the categories of legislative measures distinguished above:

- statutes; competent power: Crown and States General.
- general administrative order; competent power: Crown.
- ministerial ordinances; competent power: minister.
- other ordinances.
- disguised legislation.

The question to be considered is whether generally binding rules can freely be put in any of these forms. The Constitution contains some rules only for statutes and general administrative orders. General restrictions:

- for a number of subjects the Constitution provides that regulation by statute is obligatory.
- if a certain subject has been covered by a statute, regulation of the same subject by another sort of regulation is excluded.

– article 57 Grw.: a general administrative order that contains provisions to be enforced by a penalty can be given only by virtue of a statute.

The Constitution contains no rules for other regulations; therefore the competence of the organism from which such rules should emanate has to be created by statute.

As to general administrative orders some categories can be distinguished according to the constitutional system:

– "independent" general administrative orders (those not made by authorization of a statute).

– general administrative orders as *delegated legislation.*

Delegation of legislation has become a practical necessity in a modern and complex society. Issues have become more and more complicated, on the other hand the States-general are less and less equiped to fulfil their role in the legislative procedure.Other advantages of delegated legislation are:

– easier adjustment to changing circumstances

– possibility of "experiments".

It is generally held that delegation of legislation to general administrative orders is legally permitted, although difference of opinion is possible when the Constitution provides that a certain subject has to be regulated by statute. Restrictions originate from practical arguments: the tendency that delegated legislation covers a greater field than necessary, and in connection therewith the lack of public control.

In some cases an even prompter implementation and easier adjustment are thought necessary. Then other organisms may be authorised to give further rules. This authorization can be given either directly (in the Statute itself) or indirectly (in a general administrative order). In the latter case it is doubtful whether the statute must authorize this subdelegation.

The Constitution and the different categories of legislative measures stand in a hierarchical relation to each other. This implies that a rule of lower order may not conflict with a rule of higher order except insofar as the latter so provides. The obligation to prevent this conflict lies in the first place with the authority drawing up the rule.

If there is nevertheless a conflict :

– *general rule:* a court has to declare a law that is incompatible with the Constitution or with a law of higher order to be not-binding and may not apply it. (In case of provincial or municipal legislation there is also the possibility of annulment by the Crown).

– *exception* to the general rule: a court may not declare a *statute* inapplicable on account of it being incompatible with the constitution (article 131 Grw.). As there is neither a constitutional court the sole responsibility for the constitutionality of statutes lies with the Crown and the States-General.

- exception to this exception: any legislative measure is inapplicable insofar as it is incompatible with the provisions of a directly binding treaty (article 66 Grw.).

If a court has competency to test the constitutionality of a legislative measure another remedy can be liability in tort: damages and/or declaratory judgment.

In the classical theory of separation of powers ("Trias politica") the judiciary and the legislature have entirely different functions: in that theory the function of the judiciary is strictly limited to applying the law the to a given case. In practice the activities of the courts have a much wider scope:

- As statutes are mostly formulated in categories the courts have to decide whether in a given case a certain concept belongs to a statutorial category.
- Statutes may contain vague concepts which are meant to be "filled in" by the courts. From the point of view of the legislator the question is when these vague concepts may be used.
- Courts have to decide cases brought before them, even if statute does not contain an adequate solution for that case.

In a general sense the creation of law is the task of both the legislature and the judiciary, to a great extent they are interchangeable.

Although creation of law by the judiciary has drawn the greatest attention in legal theory, it can be contended that for the practice of every day life creation of law by the legislature is the more important.

As creation of law by the judiciary has certain disadvantages, there have to be good reasons for the legislator to leave the field to the judiciary.

The international harmonization of law is formally a part of the activities of the Ministry of Foreign Affaires. In the material preparation (the legislation section of) the Ministry concerned plays the most important rule.

In the preparation of international legislation (treaties etc.) the discussions have a particular aspect, viz. whether the proposed solutions would fit in the national legislation. The difficulties encountered on this point can explain at least partly that an extensive international harmonization of law is still a faraway ideal.

Once a treaty has been ratified, the national legislator is obliged to adopt the national law.

Gradually the role of the legislature has shown a certain development: from laying down rules that were already generally accepted in society to an instrument for actively steering society. This development is especially to be seen in social-economic legislation. This implies that legislation is only one of the instruments, beside others. The function of legislation is then above all to authorize the use of other specific instruments. This has consequences for the contents of statutes, for the manner in which statutes are brought about, and for the possibility of judicial control.

IV. Methodical and technical aspects.

In a theoretical model the impulse for creating new law is simple: it has somehow become evident that an existing situation is not in conformity with a desiret situation. Two possibilities can be distinguished (in some cases they play a role jointly):

- in society a new factual phenomenon presents itself.
- the opinions about what the desired situation should be show a certain evolution.

In which way do these circumstances come to the attention of the legislator? Some possibilities:

- program of a political party (if in government).
- reports or commentaries in newspapers.
- questions in Parliament.
- address by a professional organization, pressure group, action group or private person.
- court decisions.
- articles in juridical periodicals (especially for technical matters).

only in some cases – for instance technical adaptation – the legislator acts on his own instigation.

The "signal" to act can have a different force. In most cases the signal needs verification:

- what exactly is the existing situation?
- which views are held concerning the desired situation?

This can imply an extensive (e.g. sociological) survey. The problem can then be defined in broad terms.

When considering possible solutions it must be kept in mind that doing nothing might be an adequate solution. Apart from the situation that all other solutions are impractible for technical or political reasons, a reason for doing nothing can be that the existing law already contains a remedy. Then mere publicity might be sufficient:

Doing nothing might also be indicated in the situation that the problem will be covered in a future more extensive legislative project.

In other cases, when legislative action proves necessary, all conceivable solutions could be listed and checked against a list of criteria, such as:

- the chances of political acceptance.
- the effectiveness.
- the possibility of putting the solution in word.
- whether the solution fits in the existing law.
- the legislative effort involved.

In practice however it will easily become evident that most solutions need no further consideration. A much followed line of conduct is that one

alternative, which is intuitively thought to fulfil the requirements, is worked out (in an outline text).
on a solution that the existing law gives for an analogous problem: it may also be inspired on foreign law. This draft will then be tested and discussed; when weak points are discovered, alternatives are put up for discussion.

Arguments that can be put forward in this discussion:

1. Although the solution under consideration will probably lead to the desired goal, the solution in itself is politically impossible.
2. The solution will not lead to the desired goal, or there is a better way to reach it. In this context the question of the juridical infrastructure will be examined' cost – benefit analysis.
3. Even if the solution will probably have the desired effect, it may have side-effects that have to be weighed against each other. For instance: if a law protects a weaker party in a certain contractual relation, it may cause that such contracts are no longer concluded.
4. The solution is incompatible with the Constitution (or in the case of a statutory instrument with a law of higher order). An objection can also be that the solution does not fit in the framework of the existing law: this argument plays a role especially if the solution makes use of or refers to concepts of a general part of the law.

Apart from these more general questions the juridical technical aspects of the draft are examined:

1. Is the draft formulated in such a way that it can be understood by those who will be affected by it.
   In this connection a distinction can be made between *decision rules*, i.e. rules that are of primary interest for the courts in deciding a case, and *observance rules*, i.e. rules that the public has to observe in order to obtain a wanted result (a further distinction is then whether the addressee is the general public or a restricted, for instance professional, group).
   In any case the formulation should be as understandable as possible without being imprecise.
2. The system of the draft. The draft shall have a logical internal system: general and specific rules, rules and exceptions, chronological order of (possible) events. Furthermore the draft has to be scrutinized on contradictions and flaws.
3. References (internal or external) can be either explicit or implicit and can have a different purport, for instance direct or analogous application.
4. Special attention has to be paid to fictions; in most cases they can be avoided.
5. Definitions and general provisions. In some cases it can be useful to clarify certain concepts by means of a statutory definition, in view of

its purpose a legal definition does not necessarily have to conform to scholarly standards. If analogous rules for different situations are laid down, it could be advantageous to formulate general provisions.

6. The formal provisions: citation title, entry in force of the statute.
7. An thourough examination has to be made of the amendments that have to be made in other statutes as a consequence of the draft. Amendments should be explicit and textual
8. The question should be considered whether transitory provisions are necessary. As there is no complete set of general rules on transitory law, it is in most cases necessary to lay down special transitory clauses.
9. In case of extensive amendments of axisting legislation it could be desirable to order the publication of a consolidated text.

On a number these points the "Aanwijzingen inzake de wetgevingstechniek" give directives to be observed by the drafters.

When a bill has passed the Parliamentary stage and has received the Royal Assent, it is published in the State Gazette. To make it known to the general public press releases are given out; in some cases folders containing the essence of the statute in simple language are put at the disposal of the public.

V. Documentation and automatization.

Legislation: all legislation is published, statutes and general administration orders in the "Staatsblad", orders in the "Staatsblad", other legislation (in a material sense) in the "Staatscourant". The "Staatblad" is indexed according to the subject matter of the statutes. In this way it is possible to find the relevant statutes on a certain subject.

In practice this is a rather cumbersome procedure, with a number of drawbacks:

- It supposes the possession of a complete set of the Staatsblad.
- Consolidated texts of amended statutes are only exeptionally published; it is often very difficult and timeconsuming to reconstruct the text in force.

In most cases it is more practical to make use of collections of statutes, edited by private publishing companies. In these editions the statutes are arranged systematically (according to subject matter). The most well-known are: Fruin, Kluwer (loose-leaf), Cremers (loose-leaf, with abstracts of explanatory materials and court decisions) and Schuurman & Jordens (mostly administrative law).

This means that only in relatively exceptional cases the Staatsblad has to be consulted, for instance: when a statute is not included in one of the private collections; when it is necessary to have the authentic text. Then use can be made of the register on legislation, kept by the Ministry of Justice. In this register, which is also open for the general public, only "external date" are to be found: number of the Staatsblad containing the original text and amending statutes, and also date of entry in force.

Judicial decisions are published only by private publishing companies. Among the many collections (mostly restricted to a certain branch of law, for instance traffic law, shipping law etc.) the most general edition is the "Nederlandse Jurisprudentie".

This edition features an annual index (catchwords) and a card-index (articles of statutes). The card-index has also a literature section, which gives titles only (also arranged according to articles of statutes).

For certain very extensive branches of law, that give rise to a great number of court decisions and commentaries (e.g. tort law) special loose-leaf volumes are published, where all material is presented in a systematical order.

Automatization by means of computer will in the (near) future be of great assistance to the legislator:

- information retrieval: searching a data base for words or concepts.
- text management, editing and printing.
- control of texts for contradictions and flaws.
- stimulation.

In the Netherlands computer systems for legal use are not yet operational.