Mending the Legislative Process – The Preliminaries

Ittai Bar-Siman-Tov
MENDING THE LEGISLATIVE PROCESS – THE PRELIMINARIES

Ittai Bar-Siman-Tov*

[Note: This is the pre-peer reviewed version of the article. The final version is forthcoming at 3(3) THE THEORY AND PRACTICE OF LEGISLATION _ (forthcoming, Dec. 2015)]

‘The paradox of our times is that we hail the victory of democracy while lamenting the fact that in many countries parliament - the central institution of democracy - is facing a crisis of legitimacy.’¹

Abstract

This essay offers a substantive introduction to the special issue on mending the legislative process. Discontent with the legislative process seems to be pervasive. But how could we move from the widely-shared lament that the lawmaking process is broken to thinking on ways to mend it? This essay sketches the requisite preliminaries for answering this question. It outlines ways to approach the problems with the contemporary legislative process and to think about solutions in a systematic way, and introduces the contributions in this issue.

Keywords

Legislative process, broken process, pathologies in the legislative process, due process of lawmaking, legislative due process, parliamentary reform, congressional reform, legisprudence

A. INTRODUCTION

Discontent with parliaments’ legislative process seems to be pervasive. The perception that there is something seriously broken in the contemporary legislative process is shared by legislative scholars,² by the public,³ and by legislators

---

² e.g John W Dean, Broken Government (2007); Thomas E Mann and Norman J Ornstein, The Broken Branch: How Congress Is Failing America and How to Get It Back on Track (Oxford University Press
themselves. This view is shared, moreover, across a wide range of legal systems—from the U.S. Congress, to ‘the mother of Parliaments’ in England, to China, with many stops in between. Indeed, even long-time defender of legislatures Jeremy Waldron conceded that the legislative process in his native New Zealand ‘flouts the notion of legislative due process’ and ‘makes a mockery of the procedural principles I have been emphasizing.’

Recurring criticisms, across jurisdictions, include inadequate preparation of bills; poor drafting; insufficient time for proper consideration of bills and inadequate parliamentary deliberation and scrutiny; and, more generally, hasty and reckless lawmaking. Common criticisms also include the decline of regular order and
frequent deviations from the rules governing the legislative process, and excessive use of unorthodox legislative procedures that short-cut the normal legislative process, such as fast-track and omnibus legislation. Additional criticisms include the demise of deliberation and deliberative norms; exclusion of minority or opposition parties from the process; and insufficient public participation and inadequate engagement with the public. In many parliaments there are also concerns about excessive lawmaking and hyper legislating, whereas in others, a main concern is obstructionism and gridlock. Interestingly, however, with both hyperactive and gridlocked legislatures, there seems to be agreement that the dysfunctional process significantly impairs the quality of laws produced. There seems to be agreement, moreover, that the need for mending the situation is ‘compelling and urgent.’


19 Karpen, ‘On the State of Legislation Studies in Europe’ (n 17) 59, 66; Barbara Sinclair, ‘Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates’ in Pietro S Nivola and David W Brady (eds), Red and Blue Nation?: Consequences and Correction of America’s Polarized Politics (Brookings Institution Press 2008). See also House of Commons Quality of Legislation Report (n 6) 15, 7 (Observing that ‘[t]hroughout our inquiry witnesses have provided examples to explain how the procedural and parliamentary problems they identify can create bad quality legislation’).

20 Mann and Ornstein (n 2) 13. See also, eg Edward R Becker, ‘Of Laws and Sausages: There is a Crying Need for a Better Process in the Way Congress Makes Laws’ (2003) 87 Judicature 7; House of Commons Quality of Legislation Report (n 6) 15, 7 (‘Witnesses submitting evidence to us were unanimous in calling for improved legislative standards.’).
But how should we go about mending the pathologies plaguing so many contemporary legislatures? Rather than offering ready-made solutions, this brief essay takes a more modest and preliminary (but I believe, essential) approach: it tries to outline ways to approach the problems and to think about the solutions in a more systematic way. It sketches the preliminary questions that should be considered before jumping to practical solutions. It seems that too often we skip this fundamental stage of considering the basic underlying questions, and jump to suggesting solutions. The aim of this essay, therefore, is to provide a preface to mending the legislative process.

In particular, this essay argues that discussions on remedying the legislative process could benefit from a consideration of three fundamental preliminary questions: what is the normative benchmark we should use in assessing the state of the legislative process and in offering reforms; what are the problems in the legislative process and their causes; and who are the actors that may help to improve the legislative process. The essay introduces the articles in this special issue on ‘Mending the Legislative Process,’ and tries to place these contributions within the three fundamental questions discussed and within the broader scholarship.

B. SETTING THE NORMATIVE BENCHMARK

Efforts to identify the pathologies in the current legislative process – and even more so, efforts to rectify them – require consideration of a fundamental preliminary question: What goals should the legislative process serve and what should an optimal legislative process look like? That is, we need a normative benchmark for evaluating how well the legislative process operates and for developing ideas for improvement.21

Notwithstanding the recent flourishing of legisprudence scholarship, insufficient attention has been given to this basic question of what constitutes a proper legislative process. To be sure, from Bentham to Fuller, there is a distinguished history of theoretical work on the substantive and formal principles of legislation.22 Contemporary legisprudence scholars have made additional important contributions in the areas of quality of legislation,23 and the formal principles of proper lawmaking.24 Yet, there has been relatively little sustained theoretical work on the procedural

principles of a proper legislative process.\textsuperscript{25} This is an area in the legisprudence scholarship where there is great potential for valuable and much-needed contributions.

Of course, I do not suggest that until such comprehensive theoretical work will be completed, no efforts can be done to improve the legislative process. My point rather is that discussions about reforming legislative processes require a theoretically-informed normative benchmark. Until this benchmark will be fully theorized and fully developed, we need, at the very least, to dedicate some thought to what we are aiming for and why.

The lack of sufficient theoretical work is of course only part of the problem. The more fundamental problem is that any effort to develop a normative account of the legislative process faces the challenge of rival perspectives and potentially-contradicting demands of the legislative process.\textsuperscript{26} There is tension, for example, between a consequentialist output-oriented perspective and a process-oriented perspective of the legislative process.\textsuperscript{27} The former might define a good legislative process as the process that produces optimal quality legislation.\textsuperscript{28} The latter might define a good legislative process as the process that properly embodies procedural ideals, which themselves have both intrinsic and instrumental justifications, independent of their impact on the outputs of the process.\textsuperscript{29} Even within each of these perspectives, moreover, there are different views on how to define ‘quality of legislation,’\textsuperscript{30} and different views on which procedural ideals should guide the legislative process.\textsuperscript{31}

\textsuperscript{25} Jeremy Waldron, ‘Principles of Legislation’ in Richard W Baumand and Tsvi Kahana (eds), \textit{The Least Examined Branch: The Role of Legislatures in the Constitutional State} (Cambridge University Press 2006). Cf Helen Xanthaki, ‘Quality of Legislation Post-Lisbon and the Role of Parliaments’ in \textit{Drafting Legislation: Art and Technology of Rules for Regulation} (Hart Publishing 2014) 351 (observing that although the striving of governments for legislative quality has been the subject of much debate in the last two decades, there has been little analysis about legislative quality in the legislative process).


\textsuperscript{27} Muylle (n 7) 169, 170.


Furthermore, an optimal enactment process needs to balance between multiple potentially-opposing goals. Hence, for example, the legislative process needs to balance between majority rule and the need to allow the majority to work its will, on the one hand, and the need to protect the rights of the parliamentary minority and individual legislators from all parties, on the other. The legislative process needs to balance, moreover, between stability and predictability on the one hand, and flexibility on the other. We also want ‘a legislative process that is deliberative and inclusive on the one hand and expeditious and decisive on the other.’ We want an efficient legislative process that will enable the legislature to be an effective governmental body, embodying the view that ‘democracy is not served by a weak or ineffective legislature.’ Yet, we also want a legislative process with procedural safeguards against ill-advised, hasty, arbitrary decisions, embodying the view that legislative power should be checked against ‘sudden and violent fits of despotism, injustice, and cruelty.’ More generally, the legislative process needs to balance between the costs of legislative action and the costs of inaction.

Likewise, following the ‘procedural rationality’ approach, we want a legislative process that will encourage rational well-informed, evidence-based decision-making, but also a legislative process that accommodates (and enables) bargaining, compromises and political realities. We want an open, transparent, accountable and accessible legislative process, yet in a way that will promote, rather than undermine, well-functioning deliberation and responsible decision-making. We want a legislative process that will engender legitimacy and public trust in parliament.

33 ibid 7-8.
34 Sinclair ‘Is Congress Now the Broken Branch’ (n 2) 704.
35 Beetham (n10) 115–116.
38 On procedural rationality in the legislative process see Giovanni Sartor, ‘A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review’ in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), Reasonableness and Law (2009) 17, 47 (‘We can distinguish the substantive and the procedural rationality of legislative procedure, where substantive rationality relates to a decision’s effective capacity to achieve the goals that legislators aimed at, and procedural rationality has to do with following a procedure that reliably tends to provide substantially rational decisions’); Patricia Popelier and Catherine Van De Heyning, ‘Procedural Rationality: Giving Teeth to the Proportionality Analysis’ (2013) 9 European Constitutional Law Review 230; A Daniel Oliver-Lalana, ‘Rational Lawmaking and Legislative Reasoning in Parliamentary Debates’ in Luc J Wintgens and A Daniel Oliver-Lalana (eds), The Rationality and Justification of Legislation (2013).
40 Beetham (n 10) 43-114.
41 Vermeule, Mechanisms of Democracy (n 21) 177-217.

In short, developing the benchmark for a proper legislative process requires an exercise in complex balancing, with difficult trade-offs. My view is that we should not try to escape this challenge by a-priori choosing one overriding goal (such as improving the substantive quality of legislation or improving the efficiency of the legislative process) at the expense of all others. Instead, we should adopt a pluralistic multi-goal approach, which combines both output-oriented and a process-oriented considerations, focusing on developing ways to reach an optimal balance between the different goals. \footnote{See, for example, Mcleay, Geiringer and Higbee (n 13) 13-14.} While challenging, this approach is feasible, in part due to the possibility of what Adrian Vermeule calls ‘operating-level convergence.’ That is, even competing perspectives and ‘[r]ival conceptions of democracy can and do converge on particulars at the operating level, in a type of overlapping consensus.’ \footnote{Vermeule, Mechanisms of Democracy (n 21) 13. See also Archon Fung, ‘Practical Reasoning About Institutions: Governance Innovations in the Development of Democratic Theories’ (2006) http://www.archonfung.net/papers/FungPracticalReasonFeb2006.pdf.}

The contribution of Hans-Martien ten Napel, Reijer Passchier and Wim Voermans to this special issue is an excellent example. The authors chart the ways to balance between calls for a more efficient and expeditious legislative process and the potentially-clashing calls for a more transparent, participatory and inclusive legislative process. They base their theoretical arguments on a comparative study that shows how different jurisdictions in Europe have managed to combine, or at least balance, these potentially-contradictory demands. They highlight some ‘best practices’ that show how legislative processes can (and cannot) adapt to such demands. Indeed, comparative studies of ‘best practices’ from various parliaments are a promising means for complementing the much-needed theoretical legisprudential work in this area. \footnote{On the use of comparative studies in efforts to improve the legislative process see Ulrich Karpen, ‘Comparative Law: Perspectives of Legislation’ (2012) 6 Legisprudence 149.} Such studies can provide encouraging evidence that the challenge
of balancing between the ever-growing potentially-conflicting demands of the legislative process is surmountable.50

These comparative studies of ‘best practices’ are not only an academic pursuit. Patricia Popelier’s contribution to this special issue deals with a fascinating process of ‘policy diffusion’ in which political systems tend to copy regulatory reform programs developed in other policy systems.51 Indeed, she observes that throughout the EU, both at the EU level and in EU member states, legislative policy programs are adopted to promote the use of instruments and procedures to produce high-quality legislation and regulation. Interestingly, these programs present similar key tools, such as: *ex ante* impact assessment, consultations, transparency, an examination of regulatory alternatives, evidence-based law-making, and *ex post* evaluation.

Popelier observes, however, that the process of policy diffusion does not seem to result in policy convergence in practice, and that differences occur both with respect to the type of instruments that are established and the level of implementation. The article explores causes for policy diffusion and for the presence or absence of policy convergence, as well as the factors and actors that can impact policy diffusion and policy convergence.

C. DIAGNOSING THE PROBLEMS AND THEIR CAUSES

Another crucial preliminary question we must consider before jumping to prescriptions is careful consideration of what are the problems in the modern legislative process and what are the roots of these problems. Indeed, in remedying the pathologies in the legislative process, “[a]ccurate diagnosis is essential to the prescription of effective remedies.”52

William Robinson’s contribution to this special issue provides an excellent example of scholarship dedicated to this agenda of diagnosing problems in the legislative process and their causes.53 His article reveals a fundamental problem in the EU system for making laws. It draws attention to the problem of the proliferation and fragmentation of the rules on EU regulation applying in the course of the process involving three independent institutions. Robinson demonstrates that lawmaking in the EU is currently governed by a complex, confused (and confusing) patchwork of rules, principles, agreements, declarations, guidance and conventions. He argues that this problem undermines the ability of EU regulation and legislation to meet the requirements of quality and transparency.

50 See also Beetham (n 10); Ruth Fox, ‘Parliaments and Public Engagement: Innovation and Good Practice from Around the World’ (Hansard Society 2011).
52 Sinclair, ‘Is Congress Now the Broken Branch’ (n 2) 719. It is interesting to see that the terminology of ‘pathologies,’ ‘sickness,’ ‘diagnosis’ and ‘remedies’ is a recurring theme in recent scholarship on the legislative process – from the U.S., to Israel to Australia. Ibid and sources cited in n 7.
Robinson uses this diagnosis not only to criticise the existing state in the EU, but also to criticise the European Commission’s recent proposal for a new agreement on Better Regulation and its ‘Better Regulation for Better Results’ agenda. He criticises this proposal for leaving the outdated and incoherent patchwork in place. Hence, he makes a compelling case for a ‘radical rethink’ that should lead to developing a new comprehensive Interinstitutional Agreement with a single coherent set of rules that should cover all aspects of EU regulation, including the approach to regulation and the preparation, drafting, publication and interpretation of legislation.

My article in this issue provides another example of scholarship seeking to provide a fresh perspective on the problems in the legislative process and their causes. It begins with the observation that procedural norms and values, such as regular order, deliberation, participation and procedural fairness are often flouted in the legislative process, and tries to uncover the underlying causes for this phenomenon. The problem, it argues, lies in the interaction between legislative procedure and legislators’ incentives. The argument is that there is inherent tension between procedural norms (especially those designed to foster procedural democratic ideals) on the one hand, and individual and party motivations of legislators and legislative leaders, on the other. This, in turn, leads to a legislative process in which procedural considerations tend to be undervalued and deemphasized, and often scarified, in favor of competing considerations.

The article argues that this tension between legislators’ incentives and legislative procedure is a built-in, systematic feature of many democratic legislatures, but that the degree of tension will vary across legislatures. It argues that there may be variations across legislatures in the balance between the various individual-partisan-institutional incentives working on legislators and in the way these multiple incentives interact with procedural ideals, contingent upon several factors discussed in the article.

The contribution by Yaniv Roznai and Nadiv Mordechay to this special issue is another good example of scholarship identifying a specific, yet crucial, problem in lawmaking, and proposing solutions to this problem. Roznai and Mordechay focus on a major problem: how to improve the accessibility of legislation? Indeed, the ‘all too grotesque inaccessibility’ of legislation is a common criticism. Roznai and Mordechay show that while this is an important problem for the legislative process, the solution should not be limited to the processes of creating and drafting legislation. Drawing from global experiences, their article brings together three arenas in which actions are taken for the realization of access to legislation: electronic legislative databases, plain language drafting and legal literacy. The article presents a broad and

coherent conception of access to legislation. It makes a powerful case for establishing a new and high standard of state obligation to enable and facilitate the ability of people to access and understand the content of laws which govern their lives.

D. IDENTIFYING THE ACTORS AND DRIVING FORCES NEEDED FOR REFORM

The responsibility for mending the legislative process lays first and foremost on legislatures themselves. And indeed, legislatures do initiate reforms to improve the legislative process and the quality of legislation from time to time. The problem, however, is that legislatures often lack the political will or political capacity to pass meaningful reforms. In practice, some of the underlying reasons for the deterioration of the legislative process (such as legislators’ increasing emphasis on partisan and individual considerations at the expense of institutional considerations; hyper-partisanship and ideological polarization; and the lack of electoral incentives to improve the legislative process) are also obstacles for legislative reform.

Hence, the driving forces for improving the legislative process are sometimes external actors. At times, these external reformers completely bypass legislatures by using the popular initiative power to improve the legislative process. More often, however, legislative reforms are a result of a combination of external forces and broad-based coalitions inside and outside of the legislature. Indeed, in recent years we see multiple external actors involved in efforts to improve the legislative process. These actors can be national non-governmental organizations (such as the English Hansard Society; the Parliamentary Centre in Canada; the Centre for Legislative Development in the Philippines; or the Israel Democracy Institute) or international organizations (such as the OECD, the Inter-Parliamentary Union; UNESCO; the United Nations Development Programme; the Association of Secretaries General of Parliament).


61 See eg Beetham (n 10) 204-208 (providing a list of non-governmental organisations involved in strengthening parliamentary institutions); see also eg Ruth Fox and Matt Korris, ‘Making Better Law: Reform of the Legislative Process from Policy to Act’ (Hansard Society 2010); Rahat and others (n 7); Nadiv Mordechay, Mordechai Kremnitzer and Amir Fuchs, A Handbook for Israeli Legislators (The Israel Democracy Institute 2015) (in Hebrew).
Parliaments; the Commonwealth Parliamentary Association; the Commonwealth Association of Legislative Counsel; and the International Association of Legislation).  

One of the most fascinating and recent developments is that courts are also beginning to enter this field and to try their hand at improving the legislative process. As observed by Koen Lenaerts, for example: ‘recent case-law reveals that the ECJ has also striven to develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions.’ And the same is true for multiple other national and international courts in recent years. Yet, very little academic attention has been given to the question of whether and how exactly judicial review of the legislative process can serve as a solution to problems in legislative process. This may be the result of the fact that this is a relatively new phenomenon, or because much of the scholarship about parliamentary and regulatory reform is written by scholars from political science and public administration, rather than legal scholars.

Two articles in this special issue fill this gap. My contribution explores the role of courts in improving the legislative process more generally, whereas Popelier’s contribution explores the role of courts in legislative policy diffusion and divergence. My article develops an argument that judicial review can contribute to improving the legislative process, which is not contingent on assuming some supposed superior capacity of judges over legislators. Rather, its argument rests on the nature of the judicial process itself. It argues that the judicial process tends to emphasize (and perhaps even overemphasize) legislative procedural considerations, which, in turn, counterbalances their neglect in the legislative process. It also argues that judicial review can change the incentive structure of legislators in a way that can turn the very incentives that motivate legislators to flout procedural norms into

---

62 See eg Beetham (n 10) 204-208 (providing a list of international organisations involved in strengthening parliamentary institutions); see also eg A Guide to Parliamentary Practice: A handbook (Inter-Parliamentary Union and United Nations Educational, Scientific and Cultural Organization 2003); Ten years of strengthening parliaments in Africa, 1991-2000: Lessons learnt and the way forward (Inter-Parliamentary Union, United Nations Development Programme 2003); OECD ‘Guiding Principles for Regulatory Quality and Performance’ (2005); Ian Harris, ‘Towards the evolution of an effective parliamentary administration in West Africa’ (Association of Secretaries General of Parliaments 2005); Luzius Mader and Marta Tavares de Almeida (eds), Quality of Legislation - Principles and Instruments (Proceedings of the Ninth Congress of the International Association of Legislation 2011).
65 Bar-Siman-Tov, ‘The Role of Courts in Improving the Legislative Process’ (n 54).
66 Popelier, ‘The Role of Courts in Legislative Policy Diffusion and Divergence’ (n 51).
67 Bar-Siman-Tov, ‘The Role of Courts in Improving the Legislative Process’ (n 54).
68 Popelier, ‘The Role of Courts in Legislative Policy Diffusion and Divergence’ (n 51).
incentives to adhere to these norms. It therefore claims that the introduction of judicial review of the legislative process can tilt the overall balance towards more optimal respect to procedural norms vis-à-vis competing considerations in the legislative process.

Popelier argues that courts contribute to policy diffusion of a rational evidence-based model of lawmaking. She also explores the extent to which courts take into account factors that hamper policy convergence. She argues that courts can play a coercive role in the diffusion of a rational lawmaking model, while leaving sufficient room for legislative discretion and hence for policy divergence. She argues that such a judicial approach is normatively desirable. This approach enables legislative discretion, which is necessary given the democratic legitimacy of Parliament, capacity problems, as well as political context and sensitivities; while adding a human rights approach to a predominantly economic model of legislative policy, thereby protecting individuals against unjustified legislative interferences even in domains which are not highly sensitive to rights, given the political context.

Both Popelier and I emphasize, however, that more research is required, including case-studies and empirical studies about the impact of such judicial review on legislative behaviour.

E. CONCLUSION

The task of mending the contemporary legislative process is daunting. In some political systems, the challenge may seem herculean. The problems are many and their roots are varied and deep. Hence, any hope to find a panacea or a ‘magic bullet’ would be foolish. Yet, the quest to improve the legislative process is by no means quixotic, and is too important for us to have the luxury of giving up. There are many promising ideas that can make a real, even if incremental, change. Hopefully, the contributions in this special issue will lead the way.

69 Xanthaki, ‘European Union Legislative Quality after the Lisbon Treaty’ (n 7).