The Role of Courts in Improving the Legislative Process

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[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)]

Abstract

In recent years, there has been growing and widespread discontent with the state of the legislative process in many legislatures. At the same time, there is an emerging trend of courts exercising judicial review of the legislative process. Against this backdrop, this article explores the question of what can be the role of courts in efforts to improve the legislative process. The article offers a fresh perspective on the problems in the legislative process and their causes. It then develops a novel argument – that does not rest upon a cynical view of legislatures, nor on a rosy picture of courts – to support the view that judicial review of the legislative process can contribute to improving the legislative process.

Keywords

Legislative process, legislative procedure, judicial review of the legislative process, due process of lawmaking, judicial review, courts, impact of judicial review

A. INTRODUCTION

In recent years, there has been much criticism of the state of the lawmaking process in many legislatures.¹ Common criticisms include the decline of regular order (that is, frequent deviations from the regular rules governing the legislative process);² hasty and reckless lawmaking;³ the demise of deliberation and deliberative norms;⁴ and exclusion of minority or

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¹ This article’s main argument is mostly theoretical and I believe that much of its claims will hold true for many legislatures around the world. However, when examples will be required for the purpose of illustration, I shall use the U.S. federal system as my main example. For scholarship from various other countries criticising the state of the lawmaking process see Ittai Bar-Siman-Tov, ‘Mending the Legislative Process – The Preliminaries’ (2015) 3 Theory and Practice of Legislation _.
³ Jeremy Waldron, Parliamentary Recklessness: Why We Need to Legislate More Carefully (Maxim Institute 2008).

* Assistant Professor, Bar-Ilan University Faculty of Law. © 2015, Ittai Bar-Siman-Tov. An earlier version of this article was presented at an international conference on ‘Legisprudence and the Legislative Process: From Theory to Practice,’ held at Bar-Ilan University and the Israeli Parliament (the Knesset) on December 2014. I thank the participants of this conference for their helpful comments. I am also indebted to Ronan Cormacain and Mauro Zamboni for valuable feedback on previous drafts and to Gal Ben Haim for meticulous research assistance. This research was supported by the Israel Science Foundation (grant No. 1436/15).
opposition parties from the process. The widespread discontent with legislatures and their legislative process has led to a plethora of reform solutions. By-and-large, these reform proposals tend to focus on two main types of solutions: electoral reform and changing parliamentary procedure. Very few reform advocates consider the possibility of complementing their suggested reforms with judicial review. Against this backdrop, this article explores the question of what can be the role of courts in efforts to improve the legislative process.

This question is particularly timely, because as a different body of recent scholarship argues, courts are increasingly turning their attention to reviewing the legislature’s enactment process, in what has already been described as “a global ‘procedural trend’… in the case law of several national and international courts.” Much of the existing scholarship on judicial review of the legislative process focuses on the normative question of whether this is a legitimate development. Notwithstanding the importance of such arguments, this article focuses on a different, under-explored aspect of this debate: whether and how judicial review of the legislative process can serve as a solution to problems in legislative process. This aspect is important, because it appears that in turning to judicial review of the legislative process, judges indeed “aim to improve the way in which the political institutions… adopt their decisions.”

Section B provides a fresh perspective on the problems in the legislative process and their causes. Section C develops a novel argument to support the view that judicial review of the legislative process can contribute to improving the legislative process. Particular emphasis is placed on developing an argument that does not rest upon a cynical view of judicial review.

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6 For an argument that these are the two types of solutions proposed and for a critical review of these proposals see Barbara Sinclair, ‘Is Congress Now the Broken Branch’ (2014) 2014 Utah Law Review 703, 720-24.

7 Cf Patricia Popelier, ‘The Role of Courts in Legislative Policy Diffusion and Divergence’ (2015) 3 Theory and Practice of Legislation _ (making a similar point that the scholarship dedicated to the factors impacting legislative policy diffusion and policy convergence tends to neglect the role of courts).

8 To clarify, the article does not argue that judicial review is the only or even main solution to problems in the legislative process. Rather, since other solutions have been extensively discussed, it focuses on one, largely undisputed solution, which will ideally supplement rather than supplant other reform efforts.


12 See, e.g., Koen Lenaerts, ‘The European Court of Justice and Process-Oriented Review’ (2012) 31 Yearbook of European Law 3 (“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”).
legislatures, nor on a rosy picture of courts. Section D considers (and replies to) challenges to the judicial solution to legislative pathologies. Section E concludes.

B. The Devaluation of Procedural Considerations in the Legislative Process

Testifying in a Senate committee hearing on congressional reform, Don Wolfensberger, who has been involved in congressional reform efforts for nearly a half-century, offered the following “seasoned perspective:”

I don’t come before you today with any silver bullets because I don’t think there are such things that can magically transform such a human institution as Congress, with all its faults and foibles. There are, however, some small, incremental things that can be done... First and foremost, restore the regular order. You don’t need a whole new set of rules; you just need to better adhere to existing rules governing the legislative process in committees and in floor debates with the overarching goals of openness, fairness and deliberation.\(^{13}\)

Indeed, as noted in the introduction, significant descriptive scholarship has already observed that procedural norms and values, such as regular order, deliberation, participation and fairness are regularly flouted in the legislative process.\(^{14}\) And it may well be that the key to mending the legislative process lies less in grand electoral reforms or adopting new procedural rules, and more in promoting better adherence to procedural norms and values in the legislative process. In order to understand how legislators can be prompted to give greater weight to such procedural considerations in the legislative process, we must first understand the reasons for the current state-of-affairs.

The problem, I believe, lays in the interaction between individual legislators’ incentives and legislative procedure. The problem is that legislative procedure and procedural considerations such as deliberation, participation, fairness etc. tend to serve long term, dispersed interests, but at the same time often hinder the more immediate and concentrated interests of legislative leaders and individual legislators.

Legislative procedure and a proper legislative process are important for the legislature as an institution and for its proper functioning.\(^{15}\) Procedural norms in the legislative process can also serve wider legislative and societal interests, such as enhancing trust in government and in the law and contributing to the willingness to obey the law;\(^{16}\) and can serve normative

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\(^{13}\) Statement of Donald R Wolfensberger before the Senate Committee on Homeland Security and Governmental Affairs, Hearing on “Raising the Bar for Congress: Reform Proposals for the 21st Century” (March 14, 2012) [http://www.wilsoncenter.org/article/congress-low-point-time-for-reform-now].

\(^{14}\) See n 1-6.


ideals such as the rule of law and fundamental democratic values.\textsuperscript{17} Hence, one might expect that legislators will have a strong motivation to adhere to procedural norms in the legislative process.\textsuperscript{18} However, individual legislators—and even more than them, legislative leaders—will often have stronger and seemingly more pressing incentives to deviate from regular order and skirt procedural ideals such as deliberation, participation and fairness.

Legislative procedure, and particularly the rules and norms designed to enable careful consideration of legislation, deliberation, participation and fairness, have an inherent (and often quite-by-design) effect: they make passing legislation an arduous task and provide ample opportunities for blocking legislation.\textsuperscript{19} Consequently, regular order and deliberative procedural norms, while serving important purposes and values, inevitably carry the risk of hindering, and sometimes frustrating, legislators’ ability to enact legislation and to translate their policy agenda into legislative action.\textsuperscript{20}

Legislators, however, have very strong personal motivations to successfully pass legislation. To be sure, legislative behaviour is influenced by a complex set of incentives:\textsuperscript{21} legislators are motivated by a combination of self-interest and public-regarding motivations,\textsuperscript{22} and simultaneously pursue multiple goals, such as re-election, power and prestige, and ideology and desire to make good public policy.\textsuperscript{23} Yet, successfully passing legislation is important for all these multiple goals: furthering one’s ideology and a desire to make good public policy; the desire to be an influential policymaker, to exhibit institutional power and

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\textsuperscript{20} Bar-Siman-Tov, ‘lawmakers as lawbreakers’ (n 2) 815-16.


\textsuperscript{22} See Colin Jennings and Iain McLean, ‘Political Economics and Normative Analysis’ (2008) 13 New Political Economy 61, 66, 69-71 (noting that even political economists are increasingly acknowledging that politicians are not purely self-interested, and demonstrating greater willingness to include public-regarding motivations in political economics models).

increase one’s prestige, to claim credit and satisfy constituents, and to attract financial support from interest groups.²⁴

The pressure to pass legislation is even stronger in the case of legislative leaders—committee chairs and party leaders, especially from coalition parties.²⁵ To be sure, legislative leaders generally pursue the same set of personal goals as other Parliament members. However, the goal of power and prestige tends to be particularly pronounced in their case, and their personal prestige is much more dependent on winning legislative victories than in the case of rank-and-file members.²⁶ Moreover, legislative leaders have stronger incentives than rank-and-file legislators to internalize the collective goals of the party, and these party goals create an additional layer of pressure to pass legislation.²⁷ Indeed, many of the collective goals of parties—such as furthering the party’s agenda; achieving and maintaining majority status; furthering its members’ collective re-election goal; fostering a distinct “party label” and enhancing the party’s image—depend on the party’s success in enacting its legislative program.²⁸ There is evidence, moreover, that legislative leaders are keenly aware that legislative procedure determines the odds of passing legislation (and influences the content of the legislation passed), and therefore manipulate legislative procedure to ensure the passage of their legislative agenda.²⁹

Consequently, there is inherent tension between procedural rules and norms (especially those designed to foster procedural democratic ideals) and legislators’ individual and party motivations. This tension is a built-in, systematic feature of many democratic legislatures, but the degree of tension will vary across legislatures. In some legislatures, the rules governing lawmaking create more veto-gates and are therefore seen as greater impediments to legislators’ legislative goals than in others (think, for example, about bicameral vs. unicameral legislatures, variations in quorum and voting rules, majorities required to end debate, rules enabling or limiting amendments, etc.).³⁰

Additionally, there may be variations across legislatures in the balance between the various individual-partisan-institutional incentives working on legislators and the way they

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²⁵ Bar-Siman-Tov, ‘lawmakers as lawbreakers’ (n 2) 845.

²⁶ ibid; Shaviro, (n 25) 83-84, 102.

²⁷ Bar-Siman-Tov, ‘lawmakers as lawbreakers’ (n 2) 845.


interact with procedural ideals. For example, in legislatures in which parties are particularly dominant over the ability of individual legislators to pursue their goals, this creates an incentive structure in which legislators pay particularly little weight to institutional interests (which may serve as incentives to uphold procedural norms) and systematically prefer individual and party interests (which serve as incentives to violate procedural norms).\footnote{For a much more detailed explanation of this argument see Bar-Siman-Tov, ‘lawmakers as lawbreakers’ (n 2) 843-55. See also, Daryl J Levinson and Richard H Pildes, ‘Separation of Parties, Not Powers’ (2006) 119 Harvard Law Review 2311.} Another important factor may be the degree of partisanship and ideological polarization. Partisanship and polarization worsen the clash between procedural ideals and legislators’ and party interests, because they intensify the pressure on the majority party to manipulate the legislative process in order to push through its legislative agenda in a swift fashion, and the pressure on the minority party to exploit legislative rules to obstruct legislation and score short-term political points.\footnote{Matthew Green and Daniel Burns, ‘What Might Bring Regular Order Back to the House?’ (2010) 43 PS: Political Science & Politics 223.} Additionally, partisanship and polarization act as exacerbating factors, because “[s]harp partisan differences on policy [contribute to] an atmosphere in which the legislative ends could justify any procedural means,”\footnote{Mann and Ornstein (n 2) 7.} and in which procedural values are viewed as “impediments to the larger goal of achieving political and policy success.”\footnote{Ibid 170-71.}

In short, there is inherent tension between procedural norms and legislators’ and legislative leaders’ individual and party motivations. This leads to a legislative process in which procedural considerations tend to be systematically undervalued and deemphasized, and often ultimately scarified in favor of competing considerations.

\section*{C. How Courts Can Improve the Legislative Process}

John Hart Ely famously argued that courts’ expertise in process and their external institutional position make them particularly suitable to act as referees that enforce the rules of the political process.\footnote{John H Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980). For a different, critical view of court’s ability to review the political process see David Howarth, ‘Lawyers in the House of Commons’, in David Feldman (ed) Law in Politics, Politics in Law (Hart 2014).} While I believe that this argument is particularly applicable in justifying judicial review of the legislative process,\footnote{See Bar-Siman-Tov, ‘The Puzzling Resistance to Judicial Review of the Legislative Process’ (n 12) 1958-62} this article introduces an additional, novel argument, which does not depend on arguments about judges’ institutional competence, but rather on a feature of the judicial process itself.

My argument, in brief, is that while the legislative process tends to systematically undervalue and deemphasize procedural considerations, the judicial process provides a forum in which the procedural norms governing lawmaking come to the centre of the stage. Hence, the judicial process’s tendency to systematically emphasize (and perhaps even overemphasize) legislative procedural considerations, counterbalances their neglect in the legislative process. Thus, the combination of the legislative process and the judicial process...
can potentially create an overall proper balance between procedural values and norms and competing considerations in the lawmaking process.

I first develop the argument that the judicial process tends to emphasize procedural norms (section C1). I then describe two ways in which judicial review of the legislative process can tilt the overall balance towards more respect to procedural norms in the legislative process: through ex-post judicial review, correcting procedural defects and vindicating procedural norms that were violated (section C2); and through the anticipatory (or deterrent) impact of judicial review, which can potentially incentivize legislators to give greater weight to procedural considerations (section C3).

1. The Reappraisal of Legislative Procedure in the Judicial Process

The previous section has argued that since regular order and procedural norms such as deliberation and participation serve diffuse interests while jeopardizing legislators’ immediate and stronger individual incentives, there is a constant risk that procedural rules and norms will be sidestepped. In the judicial process, the situation is reversed: the legislative procedural norms come to the forefront, while the other considerations that override procedural considerations in the legislative process become marginalized in the judicial process.

By definition, judicial review of the legislative process is a process in which the validity of legislation is challenged in court based on the argument that a certain procedural norm was violated in the legislative process. Hence, the very nature of this judicial process brings the procedural norm to the forefront. The debate centres around interpreting the relevant legislative procedural norm, on determining the factual question of whether this norm was violated, and on the question of whether this violation amounts to a defect in the legislative process that should render the law invalid.

Different courts employ different approaches to answer this last question. Some courts, for example, focus on the type of norm violated: some hold the view that only a violation of a constitutional rule governing the legislative process will justify invalidating a law, while others will also enforce statutory and chamber legislative rules or even unwritten norms. Other courts focus on whether the defect in the legislative process affected “the process of establishing the House’s will.” However, one would be hard pressed to find a court that will determine this question based on balancing between the procedural norm and the individual, policy, partisan or political reasons that actually caused legislators to violate the norm. These considerations are excluded from the judicial process; considered not only irrelevant, but illegitimate, for judges to consider. Can you imagine a judge ruling, for example, that the violation of the constitutional three-reading requirement was justified, because the passage of the law in question was crucial for members of the majority party’s re-election goal?

To clarify, my argument does not hinge upon accepting a naïve version of the “legal model” of judicial decision-making. I accept that a realistic view of legislators and their incentives calls for an equally realistic view of judges. My assumption, therefore, is that like

37 For a definition of judicial review of the legislative process see ibid 1921-23.
39 See Bar-Siman-Tov, ‘The Puzzling Resistance to Judicial Review of the Legislative Process’ (n 12) 1921-23
40 Navot (n 38) 203.
legislators, judges are also influenced by a combination of incentives and considerations (including not only legal, but also ideological, institutional and personal considerations).  
My argument, rather, rests on a more modest and well-supported assumption that even if judicial decision-making is not free from politics, the legal and institutional frameworks in which judges operate, and their perceptions of the judicial role, influence their decision-making. Hence, the fact that the legislative procedural norms are considered in a judicial process that brings the legislative rule to the forefront, frames the debate around it, and treats it (at least putatively) as the only legitimate consideration, is in itself a reason to believe that legislative procedural norms will be given greater weight than in the legislative process.

I believe, moreover, that the type of judicial process influences the degree of risk that judges’ legal reasoning will mask decisions based on ideological, policy or political considerations. I believe the risk is smaller in judicial review of the legislative process than in substantive constitutional review, as the former entails less judicial discretion and less substantive value-laden judgement. Indeed, “as a general matter, a model of judicial review that requires judges to examine whether a bill originated in the House, passed both chambers in the same form, or passed three readings, provides judges with less opportunity to instil their personal political views than a model requiring them to decide whether a certain law serves compelling interests, is cruel and unusual, infringes upon substantive due process, and so on.”

Furthermore, the judicial tendency to view procedural considerations and formal procedural rules as trumping other competing considerations can be demonstrated not only in cases of judicial review of the validity of a specific law that was enacted in violation of a procedural norm. In fact, this tendency is evident even in cases where courts had to determine the constitutionality of the legislative procedures themselves. This is significant, because this latter type of cases invites a balancing between procedural considerations and competing considerations.

The American Supreme Court cases INS v. Chadha, which invalidated the legislative veto procedure, and Clinton v. City of New York, which invalidated the line-item veto procedure, provide good examples. The congressional debates about the Line Item Veto Act and about the legislative veto provisions demonstrate that procedural norms – even constitutional norms – tend to be overridden by competing considerations in the legislative process. Case studies about the congressional consideration of these legislative procedures reveal that Congress

\[41\] For a recent review of the scholarship about judicial decision-making (supporting the view that judicial decision-making is influenced by some combination of the legal model, the attitudinal model, and the strategic/institutional model), see, e.g., Kate Webber, ‘Correcting the Supreme Court–Will It Listen? Using the Models of Judicial Decision-Making To Predict the Future of the ADA Amendments Act’ (2014) 23 Southern California Interdisciplinary Law Journal 305.


\[43\] Bar-Siman-Tov, ‘Semiprocedural Judicial Review’ (n 10) 287-88.

\[44\] Bar-Siman-Tov, ‘The Puzzling Resistance to Judicial Review of the Legislative Process’ (n 12) 1962

was aware that these legislative procedures, which deviate from the traditional legislative process, might violate the lawmaking rules prescribed in the U.S. Constitution. Yet, these studies show that such constitutional considerations were not a deciding consideration for lawmakers. Even defenders of Congress, who view the legislative veto as a congressional attempt “to come up with a politically and substantively sensible policy solution to a complex problem,” seem to concede that this case illustrates that for legislators, constitutionality is only one consideration, which may be sometimes overridden by competing considerations.

When these cases came before the Court, on the other hand, the focus of the discussion turned solely on the question of whether these lawmaking procedures violate the constitutional bicameralism and presentment requirements. The majority opinion in both cases explicitly refused to consider other, practical or policy considerations that may justify deviation from the constitutional rules. These judicial opinions downplayed such practical considerations to the point of treating them as irrelevant and inappropriate. As the Court held in *INS v. Chadha*:

> [T]he fact that a given [legislative] procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government… [P]olicy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

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In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear… that the Framers ranked other values higher than efficiency…. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process. The[se] choices… impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but… [w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better

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46 US Constitution, art I, s 7.
47 Abner J. Mikva, ‘How Well Does Congress Support and Defend the Constitution?’ (1983) 61 North Carolina Law Review 587, 600 (discussing the enactment process of a legislative veto provision in the period between the lower court’s Chadha decision and the Supreme Court’s Chadha decision, and finding that “the constitutionality of the provision was only one factor that was considered in the Senate’s vote on the amendment and … it may not have been the most important.”); Elizabeth Garrett, ‘The Story of Clinton v. City of New York: Congress Can Take Care of Itself’ in Peter L. Strauss (ed), *Administrative Law Stories* (2006) 47, 98 (discussing the legislative process of the Line Item Veto Act of 1996, and finding that “the debate [on the Line Item Veto Act] does not demonstrate that constitutional concerns are the deciding factor in any lawmaker’s vote, nor do constitutional arguments appear to change the decision that members would [make] on policy or partisan grounds.”).
49 Chadha (n 46) 944-45, 958-59; Clinton (n 46) 447.
A way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.\textsuperscript{50}

Another illustrative example is the Israeli Supreme Court case regarding the legislative procedure called the “Arrangements Law” (AKA “omnibus legislation”) – the controversial practice of combining numerous unrelated measures in one long governmental bill, which is passed via an accelerated process that deviates from regular legislative procedure.\textsuperscript{51} In that case, the Court acknowledged that “the main claim of those who support the use of the Arrangements Law is that in view of the economic and political reality in Israel, this is the most effective means, and sometimes the only means, of furthering government policy and introducing structural and economic reforms, and it is doubtful whether some of them would have been approved by means of the ordinary legislative processes that are customary in the Knesset.”\textsuperscript{52} And yet, the Court refused to accept such arguments, holding that “arguments in favour of the effectiveness of the legislative mechanism of the Arrangements Law cannot stand against the importance of the principle of the separation of powers and the principles of representative democracy.”\textsuperscript{53}

Admittedly, the Israeli Court did not rule that the Arrangements Law procedure is necessarily and always unconstitutional, and emphasized that it will show great judicial restraint in exercising judicial review of the legislative process.\textsuperscript{54} However, it held that the Arrangements Law procedure cannot violate the “fundamental principles of the legislative process in our parliamentary and constitutional system,” emphasizing that efficiency cannot justify violation of procedural principles such as majority rule; the principle of formal equality; the principle of publicity and transparency; and the principle of participation (according to which each legislator has a right to participate in the legislative process).\textsuperscript{55}

To be sure, some critics have argued that such judicial decisions represent formalistic rather than functional approaches to separation of powers or that these decisions are insufficiently attuned to the realities and demands of the modern regulatory state.\textsuperscript{56} One can also argue that efficiency is a relevant and appropriate consideration that should be given greater weight in assessing legislative procedures.\textsuperscript{57} Indeed, critics may argue that the judicial process is ill suited to properly consider practical and functionalist considerations such as efficiency and expediency or balance between procedural ideals and larger policy considerations. It may well be that just like the legislative process in many legislatures gives

\textsuperscript{50} Chadha (n 46) 944-45, 958-59.


\textsuperscript{52} ibid para 11.

\textsuperscript{53} ibid para 12.

\textsuperscript{54} ibid para 16.

\textsuperscript{55} ibid paras 16, 18.


insufficient weight to procedural considerations such as deliberation and participation and tends to give them short shrift in favour of competing considerations. The judicial process suffers from the reverse problem. However, such criticisms only prove my point that the judicial process tends to emphasize procedural values over competing considerations that tend to get the upper hand in the legislative process.

My argument is that even if the judicial process is skewed toward procedural considerations, the introduction of judicial oversight will tilt the balance in the right direction, because the legislative process is currently significantly skewed against these considerations. The next sections demonstrate the ways in which the introduction of judicial review can tilt the balance toward more rule-following, deliberation and participation in the legislative process.

2. The Ex Post Rectifying Function of Judicial Review

One important function of judicial review of the legislative process is reviewing the enactment process after it is completed and rectifying defects that occurred in the process. If the problem is that procedural considerations are neglected and procedural rules are violated in the legislative process, by introducing judicial review, we provide an additional opportunity to remedy such problems.

The introduction of an additional layer of scrutiny, and an additional opportunity for remedy, is required not only because legislatures lack sufficient incentives (as section B elaborated), but also because they also often lack sufficient capacity to ensure an optimal level of rule-following in the legislative process. Indeed, as I have argued in greater detailed elsewhere, even if legislators were fully motivated to preserve the integrity of the legislative process, legislative enforcement and self-regulation mechanisms are simply insufficient. The effectiveness of these internal mechanisms is particularly curtailed, moreover, by the realities of the modern legislative process in many legislatures, which is characterized by enacting a great volume of legislation, under immense time-pressures. Indeed, as has been well-documented in the descriptive scholarship, in such a reality, mistakes are not uncommon, and are, in fact, simply inevitable.

In short, the introduction of an additional, external ex-post enforcement mechanism can serve as a solution to under-enforcement of procedural norms in the legislative process, whether they result from limited incentives or limited capacity to self-enforce. The

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59 Sinclair, ‘Spoiling the Sausages?’ (n 59) 83 (“There seems to be considerable agreement that [the House] tilted the balance [between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other] too far... at the expense of deliberation and inclusiveness.... [T]he minority party is routinely excluded from meaningful participation at every stage of the process... [and] deliberation has too often been given short shrift in the contemporary House.”).
60 For a detailed explanation and supporting examples see Bar-Siman-Tov, ‘lawmakers as lawbreakers’ (n 2) 817-27.
introduction of an additional layer of enforcement will contribute to a higher level of overall enforcement of procedural norms.63

3. The Ex Ante Deterring Function of Judicial Review

In addition to reviewing the legislative process and correcting defects that have already occurred, introducing judicial review of the legislative process can serve an important function of reducing the chances that such defects will occur in the first place. If it will function properly, I believe the main contribution of introducing judicial review will be not as a post-facto correcting mechanism, but as a deterring force that will enhance legislators’ motivation to pay greater attention to procedural norms and to self-enforce these norms.

As we have seen, the fundamental problem that causes procedural considerations to be systematically underrepresented in the legislative process lies in the interaction between legislators’ incentives and legislative procedure. The introduction of judicial review that enforces legislative procedure and emphasizes procedural norms can change the incentive structure motivating legislators. The same incentives discussed in section B as motivating disregard of procedural norms – the goals of furthering one’s ideology and making good public policy; being an influential policymaker; exhibiting institutional power and increasing one’s prestige; claiming credit and satisfying constituents; furthering the party’s agenda; fostering a distinct “party label” and enhancing the party’s image etc. – also create a strong motivation to avoid judicial invalidation that will derail legislators’ and their party’s policy agenda. Thus, the threat of judicial review can potentially transform the very forces that currently motivate lawmakers and legislative leaders to flout procedural considerations into incentives to adhere to procedural norms.

The argument that the anticipation of judicial review itself impacts the decision-making of the legislature and promotes self-regulation is well supported in the scholarship. This idea has been skilfully articulated by Benjamin Cardozo as early as 1921.64

By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

Since then, a growing body of theoretical and empirical work has corroborated the existence of the anticipatory (or deterrent) impact of judicial review.65 Indeed, multiple

64 Benjamin N. Cardozo, The Nature of the Judicial Process (1921) 93.
studies, across a wide range of legal systems, have shown that legislators “attempt to anticipate judicial objections and incorporate judicial norms into legislative decision-making” in order to avoid judicial invalidation.\textsuperscript{66} Admittedly, notwithstanding this scholarship, I am not aware of any study that specifically examined the impact of judicial review of the legislative process (as opposed to substantive constitutional judicial review or federalism judicial review) on legislative behaviour. Undeniably, this is an area that requires further empirical work. Yet, there is no reason to assume that the anticipatory effect, which has been proven in other areas of judicial review, would not equally apply to the legislative procedure area.

In sum, judicial review of the legislative process, in both its rectifying and deterring functions, can potentially tilt the overall level of enforcement and vindication of procedural norms from its current sub-optimal levels to more optimal levels. Moreover, if judicial review would be exercised properly to create the proper level of deterrence, it has the potential to prompt legislators to improve their adherence to procedural norms, ensuring that most of the enforcement – and improvement – will be done in the legislative process by the legislature itself. Of course, there is also potential risk that the judicial solution will be insufficiently effective or even counter-productive. These risks will be dealt with in the next section.

D. Challenges to the Judicial Solution

This section explores two possible challenges to the judicial solution and responds to these challenges.

1. Judicial Review May Be Ineffective if Legislators Do Not Care About Invalidation

As we have seen, a major part of the judicial solution rests on the deterrent effect of judicial review: legislators who do not want to see their legislation invalidated will pay greater attention to procedural norms in the legislative process. The judicial solution may be ineffective, however, if legislators do not care if their legislation is invalidated. Some judicial review critics challenge the assumption that judicial review will incentivise legislators to act more responsibly, by pointing to the possibility that legislators will be merely interested in engaging in “position-taking” in the legislative process without actually being interested in seeing their legislation implemented.\textsuperscript{67} I do not contest that there may be some cases in which legislators do not care too much if their laws are invalidated,\textsuperscript{68} nor do I deny that the

\textsuperscript{66} Janet L Hiebert, ‘Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review’ (2012) 58 Supreme Court Law Review 87, 95. See also, Dan Illouz, ‘Anticipatory Effects of Judicial Review’ (M.A. thesis, The Hebrew University of Jerusalem 2012) (observing that “there is wide evidence of the existence of anticipatory effects of judicial review on the legislative process” and citing many studies); Ulrich R Haltern, \textit{High Time for a Check-Up: Positivism, Populism and Constitutional Review in Germany} (The Jean Monnet Center for International and Regional Economic Law and Justice, New York 1996), http://centers.law.nyu.edu/jeanmonnet/archive/papers/96/9605ind.html (arguing that “[i]t has been extensively proven that constitutional adjudication possesses huge pre-effects on the legislative process. Under the shadow of judicial review, Members of Parliament adjust their proposals and bills to former Bundesverfassungsgericht decisions, trying to anticipate possible future review.”).


phenomenon of position-taking exists. However, there are several good reasons to believe that most legislators, most of the time, would not want to see their legislation invalidated.

First, there is much evidence supporting the view that legislators are not single-minded re-election seekers, and that although re-election is an important goal, legislators also want to make good public policy and influence the world. Therefore, they do want to see their policy implemented.

Second, even if legislators were single-minded re-election seekers, their re-election goal creates a strong incentive to see their enacted policy implemented. Indeed, even Mayhew, the leading proponent of the view that legislators pursue re-election above all else, argues that lawmakers pursue re-election not only thorough “position-taking,” but also thorough claiming credit for policy change. In order to claim credit for policy change or for a desirable improvement in constituents’ lives, the policy needs to be implemented, rather than invalidated. In fact, empirical studies reject the view that legislators engage exclusively in position-taking, and reveal that credit claiming is very much evident, both in the legislative process and in legislators’ communications to their constituency.

Third, support for the fact that legislators do care about invalidation of legislation can also be found in research about legislative responses to judicial invalidation. This research demonstrates that rather than being content with the invalidation, in a very large percentage of the cases, legislatures re-enact the invalidated law. And it should be remembered that re-enacting invalidated legislation entails significant costs. As Janet Hiebert explains:

Regardless of which political party is in power, no government welcomes unforeseen obstacles to the pursuit of its legislative agenda. A government that has successfully passed legislation will often be reluctant to reopen the relevant issues, expend additional resources necessary to defend the measure politically, or manage internal divisions that could undermine caucus support, as may be required should legislation be struck down...

In short, the argument that legislators do not care if their enactments are invalidated and that they are mere position-takers is an unrealistic, overly cynical view of legislators. Note, moreover, that ironically, the case for judicial review of the legislative process rests on a

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70 See n 23-24.
71 Mayhew (n 24).
more respectful (and, I believe, more realistic) view of legislators, whereas the argument against judicial review resets on a disrespectful cynical view of legislators.

2. Judicial Review May Be Counterproductive: The Judicial Overhang Argument

The previous section discussed the argument that judicial review may be ineffective. A more radical argument is that judicial review may be counter-productive. Several judicial review critics have argued that judicial review may create a “judicial overhang” or “moral hazard” effect. Their argument in brief is that legislators’ knowledge that courts are available to correct their constitutional errors, may induce them to pay less attention to constitutional issues, passing the responsibility to judges.

I do not think that this “judicial overhang” risk can be summarily dismissed, and I agree that much more empirical work is required in this area. My impression from the existing scholarship, however, is that there seems to be significantly more empirical support for the claim that the anticipation of judicial review induces legislators to pay more attention to the constitution than for the counter claim. Indeed, as Michael Gerhardt argues, “[t]he suggestion that judicial overhang might be a disincentive for some members of Congress to become more engaged is not a fact but an assumption that sorely needs testing.” The positive anticipatory effect of judicial review, on the other hand, “has been extensively proven.”

There is basis to believe, moreover, that there is less risk of “judicial overhang” effect in the case of judicial review of the legislative process than with substantive constitutional review. At least some psychological research supports the observation that the impact of external review and accountability mechanisms works better when decision makers know that their decisions will be evaluated based on the process that they used, rather than the outcome. Such procedural review tends to encourage more responsible and careful decision making than when decision makers know that they will be evaluated based on the substantive outcome of their decision. Indeed, this psychological insight has already led some scholars to advocate procedural review of agency rule-making.

Incidentally, Mark Tushnet, the leading proponent of the “judicial overhang” argument against substantive judicial review, seems to have also indicated receptivity to the idea that there may be difference between the impact of procedural review and substantive review. In discussing semiprocedural judicial review, he argued that this type of judicial review may undermine the case for substantive judicial review, based on the argument that procedural review is “likely to improve the political branches’ performance.”

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77 ibid.
79 Haltern, High Time for a Check-Up (n 68): n 65-66.
81 ibid.
E. Conclusion

This article began with the observation that procedural norms and values, such as regular order, deliberation, participation and procedural fairness are all too often flouted in the legislative process. Against this backdrop, the article tried to make two main contributions. First, it offered a fresh perspective on this problem, by uncovering its underlying causes. It argued that there is inherent tension between procedural norms (especially those designed to foster procedural democratic ideals) and legislators’ incentives. This, in turn, leads to a legislative process in which procedural considerations tend to be undervalued and deemphasized, and often sacrificed, in favour of competing considerations.

Second, the article proposed a novel solution to this problem, arguing that judicial review of the legislative process can contribute to improving the legislative process. It argued 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. This is based on the argument that the judicial process tends to emphasize (and perhaps even overemphasize) legislative procedural considerations, which, in turn, counterbalances their neglect in the legislative process. Judicial review is expected to tilt the overall balance between procedural norms and other considerations in the legislative process through the dual impacts of judicial review: ex-post correction of procedural defects and vindication of procedural norms that were violated; and anticipatory impact, which can potentially incentivize legislators to give greater weight to procedural considerations ex-ante.

To be sure, judicial review of the legislative process is not a panacea for all the pathologies in the contemporary legislative process, nor should it replace the legislature’s primary responsibility to improve the legislative process. However, in an area where no silver bullets exist and political will is often lacking, the judicial solution has great potential, in part because it can motivate legislators to take responsibility for improving adherence to procedural norms.

Whether this potential will materialize remains to be seen. Hopefully, this article will be the first in a series of studies, including, inter alia, much-needed empirical studies about the impact of judicial review of the legislative process on legislative behaviour. This article can provide the theoretical background for such empirical work and the basis for their hypotheses. In the meantime, the arguments in this article suggest that there is at least hope and potential in this solution. And hope and potential are certainly a good start given the grim state of the lawmaking process.