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## Combining efficiency and transparency in legislative processes

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### ABSTRACT

In this contribution, we will illustrate the modern-day dynamics of the interplay between the need for expedience and efficiency on the one hand, and the demand for openness, inclusiveness and transparency on the other by looking into one of government's main decision-making processes: the legislative process. Particularly in the field of legislation, the balancing of both efficiency and transparency is of the essence for modern legislatures in parliamentary democracies: laws expressed by acts and legislative instruments can only be truly effective if they rest on broad societal support. As we will argue, a transparent and inclusive legislative process functions as a kind of democratic check on government action: it guarantees sufficient deliberative activity before a government may act. Throughout our contribution, a 2012 comparative study commissioned by the Dutch Ministry of Security and Justice, and carried out by an interdisciplinary team of researchers from Leiden University will be used as a guiding rail to illustrate some the ways in which different jurisdictions in Europe have managed to combine, or at least balance, the need for legislative efficiency and transparency. We will use this study to demonstrate how traditional legislative processes nowadays grapple to translate the will of the citizens into effective legislation, how modern administrations still need democratically underpinned legislative procedures as the basis for the legitimation of (their) decisions, how efficient delivery of decisions and careful (lengthy) scrutiny interact. On the basis of this material we will further discuss concepts of, respectively, efficiency and transparency and especially the way modern legislatures examined in the study use information and communication technology (ICT) to overcome the sometimes opposing demands on their legislative processes. Insofar as possible we will try to highlight a few 'best practices' that show how legislative processes can (and cannot) adapt to new present day demands.

**KEYWORDS** Legislative process; efficiency; transparency; ICT; consultation; openness; participation

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'Legislative novelty is not necessarily fatal; there is a first time for everything.'  
Chief Justice John Roberts, in *National Federation of Independent Business v. Sebelius*, 567 US (2012), 132 S.Ct 2566

## 1. The issue

Many governments today are facing two important, potentially clashing, demands. On the one hand, citizens want governmental action to be ever more efficient: expedient government service delivery is growing ever more important.<sup>1</sup> Government agents and their apparatus are – for a variety of technological, economic and societal reasons – under increasing pressure to adapt quickly to changing circumstances. The need for speed and adaptability meets (and sometimes collides) with citizens' demands for a more transparent government as well as an increasingly (inter)active role in the decision-making process. There is an ever-growing demand for openness and transparency in modern societies, as a recent report by the European Parliament observes.<sup>2</sup>

Although efficiency – here predominantly perceived as the optimal balance between careful preparation and speed of the process – and transparency are not mutually exclusive notions, the realisation of both concepts in the fullest sense at the occasion of policy and decision-making remains a complex task. Balances are hard to strike. When more people, or groups of people, are involved in decision-making processes, these processes run the risk of slowing down and becoming less efficient. And vice versa, informed citizens' participation in decision-making processes (made possible by forms of openness and transparency) can be frustrated by the (perceived) need for governments to take swift action. Or does it? Some argue that Information and Communication Technology, and the opportunities it offers for participation, can overcome the divide between the need for speed and the demand for public inclusiveness and openness of the legislative process.<sup>3</sup> Different legislatures have picked up this challenge and are indeed implementing ICT-systems to enhance transparency and public participation in the legislative process.<sup>4</sup> Does the use of ICT indeed provide the proverbial 'third way'?

<sup>1</sup> See John Wanna, John Butcher and Benoit Freyens, *Policy in Action: The Challenge of Service Delivery* (UNSW Press 2010).

<sup>2</sup> European Parliament, Directorate-General for Internal Policies (Policy Department C Citizens' rights and Constitutional Affairs), 'Openness, transparency and access to documents and information in the European Union' (PE 493.035, Brussels 2013) 7 report to be retrieved at <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE\\_NT\(2013\)493035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT(2013)493035_EN.pdf)> accessed 19 September 2015.

<sup>3</sup> See for instance Euripidis Loukis, Maria A. Wimmer, Yannis Charalabidis, Anna Triantafillou, Rimantas Gatautis, 'Argumentation Systems and Ontologies for Enhancing Public Participation in the Legislation Process' (2007) *Participation and Democracy* 19.

<sup>4</sup> See for instance the EU itself, Commission of the European Union, 'eParticipation in the Context of Legislative Processes' (Work Programme 2006, DG Information Society and Media 2006). Or the Dutch Legis-programme, Ministry of Justice, 'Legis samenwerken aan betere wetgeving' (Legis – Cooperating for Better Legislation) (2012) which resulted in a new IT-supported legislative framework.

In this contribution, we will try to illustrate the modern-day dynamics of the interplay between the need for expedience and efficiency on the one hand, and the demand for openness, inclusiveness and transparency on the other by looking into one of government's main decision-making processes: the legislative process. Particularly in the field of legislation, the balancing of both efficiency and transparency is of the essence for modern legislatures in parliamentary democracies. Laws expressed by acts and legislative instruments can only be truly effective if they rest on broad societal support.<sup>5</sup> As we will argue, a transparent and inclusive legislative process functions as a kind of democratic check on government action: it guarantees sufficient deliberative activity before a government may act. Thus seen, transparency does not so much constitute a threat to, but rather becomes an integral part of, efficient and effective law making, as Beetham noted in 2006.<sup>6</sup>

A 2012 comparative study commissioned by the Dutch Ministry of Security and Justice, and carried out by an interdisciplinary team of researchers from Leiden University, which included the present authors, confirms this proposition empirically. The research analysed the performance of legislative processes in three European countries – Finland, Slovenia and the United Kingdom – in terms of efficiency and transparency and compared it to the performance of the Dutch legislative procedure. And as for the promising outlook ICT offers in combining the needs of speed and inclusiveness, we looked into the way legislative processes in these countries use techniques to rise to the challenges. Among other things, the study revealed that, indeed, the demand for greater efficiency needs to be dealt with in the context of the simultaneous call by citizens for more transparency and participation. Yet, at least the speed of the legislative process did not appear to suffer from meeting these demands.<sup>7</sup>

Throughout this contribution, this 2012 study will serve as a guiding rail to illustrate some of the ways in which different jurisdictions in Europe (notably Finland, Slovenia, the United Kingdom and the Netherlands) have managed to combine, or at least balance, the need for legislative efficiency and

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<sup>5</sup> Mere majorities of electoral mandates based on elections do not suffice as such – for true democracy (i.e. the one that commands sustained legitimacy and compliance) inclusiveness, fairness and openness of decision making processes play important roles as well. They reinforce the underlying 'regulative ideas' of democracy, notably popular control and political equality. These need to be reinforced time and time again – legitimate decision making is before anything a sustained *belief*. See David Beetham, 'Democracy: Key Principles, Institutions and Problems' in Inter-Parliamentary Union (eds), *Democracy: its Principles and Achievement* (1998) 21 <[http://www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf)> accessed 19 September 2015.

<sup>6</sup> See David Beetham, *Parliament and Democracy in the Twenty-First Century; A Guide to Good Practice* (Inter-Parliamentary Union 2006) 115–52 <[http://www.ipu.org/PDF/publications/democracy\\_en.pdf](http://www.ipu.org/PDF/publications/democracy_en.pdf)> accessed 20 September 2015.

<sup>7</sup> Wim Voermans and Hans-Martien ten Napel (eds), Michal Diamant, Marga Groothuis, Bernard Steunenbergh, Reijer Passchier and Stefan Pack, *Legislative Processes in Transition. Comparative Study of the Legislative Processes in Finland, Slovenia and the United Kingdom as a Source of Inspiration for Enhancing the Efficiency of the Dutch Legislative Process* (WODC 2012) <<https://openaccess.leidenuniv.nl/handle/1887/20333>> accessed 19 September 2015.

transparency. We will use it to demonstrate how traditional legislative processes nowadays grapple to translate the will of the citizens into effective legislation, how modern administrations still need democratically underpinned legislative procedures as the basis for the legitimation of (their) decisions, how efficient delivery of decisions and careful (lengthy) scrutiny interact. On the basis of this material we will further discuss concepts of, respectively, efficiency and transparency and especially the way modern legislatures examined in the study use information and communication technology (ICT) to overcome the sometimes opposing demands on their legislative processes. Insofar as possible we will try to highlight a few 'best practices' that show how legislative processes can (and cannot) adapt to new present day demands.

## 2. Modern society, traditional government & legislative processes

Tom Tyler has detected a shift in the way we accept authority and – thus – in the way authorities (such as government or the legislature) can arrive at legitimate decisions. Traditionally, authorities (such as legal authorities) could expect to be obeyed because the public believed – were morally convinced – that these authorities held title (be it institutionally, by power of their expertise, training or title) to decide over issues and/or dictate the law.<sup>8</sup> This seems to have changed. There seems indeed to be some evidence that authorities and institutions are viewed as more legitimate and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through procedures that people experience as being fair.<sup>9</sup> In modern society, citizens have also become increasingly accustomed to non-hierarchical structures. People, organisations and companies stand on virtually equal footing with one another.<sup>10</sup> In the last 20 years, the internet in particular has given a powerful boost to this emancipation process of citizens in this respect. So much so that modern citizens indeed seem to expect a similar 'horizontal' relationship with public authorities, including their government.

Expectations of horizontal treatment on equal footing run counter to the setup of government institutions and decision-making processes that are predominantly organised vertically (top down). Especially so for the legislative processes. Policy-making depends – because of the representative structure of democracies – at best indirectly on the views of citizens. According to the Dutch Council for Public Administration, this state of affairs causes a gap between society and government.<sup>11</sup> In its 2010 report, the Council argues that a horizontal society is

<sup>8</sup> Tom R. Tyler, *Why do People Obey the Law?* (Princeton University Press 2006).

<sup>9</sup> See Tom R. Tyler, 'Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members want from the Law and Legal Authorities?' (2001) 19 2 *Behavioral Sciences & the Law* 215.

<sup>10</sup> Raad voor het openbaar bestuur (Dutch Council for Public Administration), *Vertrouwen op democratie* (Trusting democracy) (2010) 39.

about dialogue and participation.<sup>12</sup> The decisions of a modern government therefore need to have a more direct basis in society.<sup>13</sup> A greater legitimacy of the legislation can be achieved by paying attention to the legislative process. Transparency and a participatory role for citizens in government are increasingly important. Many citizens nowadays ‘do not lean anymore on representative democracy alone, but in essence want to represent themselves [ ... ].’<sup>14</sup>

At the same time, however, citizens (and businesses) also ask for a more efficient government. Societal problems need to be solved quickly and effectively. As Parliamentary Acts are still seen as the proper basis for governmental action, much of this action begins with the preparation of legislation. Traditionally, law making is seen as something that not just takes, but also needs, time. That is the rationale for the different stages and steps of legislative procedures worldwide: to allow for careful preparation, consideration, input and scrutiny. Although this view still exists, it is being increasingly challenged by a rival view which sees legislation in a more instrumental manner: as a tool that can be used to solve long-term as well as short-term issues; as a commodity on a time-to-market clock.

### 3. Studying legislative performance

Under the influence of the shorter life cycle of legislation, improved technical possibilities and the role of the media in political and societal debates, the legislative process in many jurisdictions is under pressure to become more efficient, while guaranteeing the necessary high quality of the outcome. For the Netherlands in particular, the time pressures and constraints on the legislative process became more topical than ever. Due to developments in the political landscape, no less than five elections took place between 2002 and 2012, with an average life cycle of two years for a cabinet. Getting the result in and achieving the agenda of the successive cabinets proved hard indeed, especially since most of the policies sought required reforms to be implemented by parliamentary legislation. With an average time span of 12–14 months to pass through the legislative procedure (ministerial preparation, consultation of the Council of State and passage through both houses of parliament) it was hard to get any result in on time for the consecutive Dutch cabinets of the last decade.

Against this backdrop, the Dutch government put a taskforce to work under the tell-tale name ‘*for faster legislation*.’<sup>15</sup> The taskforce – working between 2011 and 2012 – was especially interested in possible measures and methods

<sup>11</sup> Raad voor het openbaar bestuur (n 10) 40.

<sup>12</sup> Raad voor het openbaar bestuur (Dutch Council for Public Administration), *Gij zult openbaar maken* (Thou shalt provide open access) (September 2012) 3.

<sup>13</sup> Raad voor het openbaar bestuur (n 12).

<sup>14</sup> Speech of J. Wallace, the current chairman of the Council <<https://www.youtube.com/watch?v=TeCh2QdtSs>> and <[http://www.rob-rfv.nl/documenten/boekje\\_advies\\_openbaarheid.pdf](http://www.rob-rfv.nl/documenten/boekje_advies_openbaarheid.pdf)> accessed on 15 December 2015.

<sup>15</sup> The taskforce worked within the framework of the Interdepartmental Commission for Constitutional Affairs with respect to Legislative Policy (ICCW).

to accelerate the legislative process. This laid the basis for the comparative study we are reporting here. The main question of interest was: can the performance of the legislative process in the Netherlands be improved? Can it be accelerated and perhaps, even more importantly, can it become more efficient if we compare it to the legislative process of other jurisdictions?

### 3.1. What is efficiency?

In legislative studies, 'efficiency' is a notoriously difficult concept to grasp and define.<sup>16</sup> One thing that can be noted, though, is that efficiency has to do with 'optimisation'. In an efficient legislative process, the available means to make a law are used in an optimal way: a legislative process, in other words, that *performs* well. To measure whether a legislative process performs well is also very hard to tell. It will all depend on the functions the process serves, the (legal/constitutional, scientific/professional, political, socio-economic, etc.)<sup>17</sup> demands set on it and expectations different actors/participants have. There are hardly any objective criteria around. On the other hand there are certain aspects that might give an indication of performance – and put in context: of efficiency – in the comparison of one legislative process with that of another jurisdiction. The same can be done with the level of openness and public participation in the process. For our study we decided to follow up on the aspects of performance that seemed to interest the Dutch taskforce, namely:

1. Pace/speed of the whole process in terms of time consumption;
2. (Sorts of) Procedure, dedicated (emergency) procedures;
3. Consultation;
4. Transparency of the process, openness to the public;
5. Public participation;
6. Planning (including procedures of prioritisation, 'budgets', time limits, discontinuity principle);
7. Coordination between the phases in the process and actors (especially the relation between government and parliament, but also in relation to – actors involved in – implementation and enforcement);
8. and use of techniques (especially ICT).

<sup>16</sup> See for a (partial) attempt at operationalisation: Koen J. Muylle, 'Improving the Effectiveness of Parliamentary Legislative Procedures' (2003) 24 Statute Law Review 169, 170–73.

<sup>17</sup> According to Ignace Snellen, government policies and the legislative process are constantly 'pegged' between different rationalities (i.e. closed sets of criteria actors use to judge appropriateness of their actions). To complicate matters these rationalities are mutually exclusive most of the time – they do not go well together. Snellen discerns the legal rationality (conformity with legal principles, coherence of the system), economic rationality (demands efficiency and responsiveness in the means whereby resource-distribution is effected), professional or technical rationality (demands the application of proven theories and models) and the political rationality (process in which unequal distribution is performed in the face of equal claims). See Ignace Snellen, 'Conciliation of Rationalities: The Essence of Public Administration' (2002) 24(2) Administrative Theory & Praxis 323.

We elaborated this set of aspects into ten performance indicators (element 6 was broken down into different subparts) that we phrased as questions.

The method of research we then used during our 2012-project was quite straightforward. In a preliminary desktop research we first compared the legislative processes of 26 other Member States of the European Union on each of the ten aspects mentioned above.<sup>18</sup> From these 26 we selected three countries, with high scores on more than four of the aspects of interest (to be read from developments related to these aspects reported in these countries), for a further in-depth study including a site-visit and (10) interviews with actors involved in these processes. On this basis, Slovenia, Finland and the United Kingdom were selected and visited. The key actors involved in the interviews were persons such as Members of Parliament, civil servants from ministries, implementing agencies and representatives from the media and academia.

#### **4. Highlights of the study – Bird’s eye view**

As we noted before, it is very hard to give an appraisal of the performance and – based on that – the overall efficiency and openness/inclusiveness of a given legislative process in more or less objective terms. What we could do is to give an overview on how legislative processes in relative terms rate on different aspects related to performance indicators. In this paragraph we present a bird’s eye view of the comparison on the different performance indicators. The overview merely gives an impression of some of the highlights of the study and predominantly compares the countries in the three countries involved in the in depth study. It compares them very briefly on the basis on some of the most interesting performance indicators used in the study.

##### **4.1. Pace, speed and planning**

The average time it takes a bill to pass through parliament is about a year, the study shows (including the Netherlands and other countries). If we figure in the departmental preparation of a legislative proposal – that is the stage before a proposal becomes a bill – than the whole of the legislative process takes up about two years. A lot of time is spent in the countries under study on coordination between governmental departments and ministries.

Dedicated legislative procedures, like emergency procedures, can and do speed up things. The Slovenian legislative process, for instance, stands out in the study because of its speed. On average, the legislative process during the Parliamentary phase there takes between two to three months. This rapidness is mainly caused by a combination of a dedicated procedure and the strict work programme concluded between Government and Parliament. There is

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<sup>18</sup> See Voermans & Ten Napel (n 7).



however, according to domestic observers, a downside to all this. The speed is so overwhelming that there is limited (too little, even) time to reflect on and scrutinise bills carefully. This sometimes damages the quality of the Slovenian legislation. For this very reason quite often ‘repair’ laws have remedied recently adopted laws by way of quick-fix amendments.

Although the UK’s legislative process takes much longer in comparison with Slovenia’s (on average two years in total), the UK seems to face a similar problem. Its legislative process uses a rigorous planning system on the basis of political priorities – using a system of bidding for parliamentary time slots, combined with the discontinuity principle, which in effect stops the process and passage of a bill at the end of the Parliamentary term. On occasion, these restraints and pressures do compromise the required scrutiny according to some of the interviewed. Bills sometimes seem to be more or less ‘rushed’ through the House of Commons, forcing the Lords in a position of ‘corrective scrutiny’. This position is not really welcomed by the Lords because of their lack of a democratic mandate. The development in the relative positions of the Houses in the legislative process draws on the discussion of the reform of – especially – the House of Lords.<sup>19</sup> Time pressure and the finality of deadlines

at the end of Parliaments – or parliamentary sessions – are especially felt during ‘the wash-up’. This is the name for the practice whereby in the few days between the calling of a general election and the dissolution of Parliament – or just before a new session – outstanding Bills are rushed through the Commons and the Lords on the basis of deals made privately between the Government and the opposition party (parties). This practice has been criticised by many authors, but at the same time is more or less endemic to the present system.<sup>20</sup> To solve these kinds of problems some solutions have already been put into place. So-called ‘carry-over motions’ make it possible to extend the parliamentary debate on a Bill into the next session. A more realistic planning takes away some of the pressure too.

The two examples, from the UK and Slovenia, demonstrate that greater speed in the legislative process does not necessarily make the process more efficient. Greater speed can have side-effects and may thus, in the end, come at a greater cost.

## 4.2. Consultation

Wide consultation of a legislative proposal has different, potentially benign, effects. It engages stakeholders and members of the public, it contributes to

<sup>19</sup> See also Kate Malleson and Richard Moules, *The Legal System* (Core Texts Series, 4th edn, Oxford University Press 2010) 49–56.

<sup>20</sup> Ruth Fox and Matt Korris, ‘Reform of the Wash-up: Managing the Legislative Tidal Wave at the End of a Parliament’ (2010) 63(3) *Parliamentary Affairs*, Hansard Society 558.

careful preparation and may help in seeing the problem and solutions from different angles. Thus, it enables the proposers to take on board different perspectives, oversee more aspects and alternatives, prevent blind corners and make for a more enforceable and implementable result. It may also benefit the overall transparency and the legitimacy of the proposed measure. In this respect, investment in preparation might even speed up the ensuing handling and debates on the bill that results from the proposed measure. Not duly informing and consulting experts, citizens or stakeholders may result in overlooking elements and interests as well as missing out on necessary support of the addressees and actors who will have to implement the law.

In the United Kingdom, the Government and Parliament for these reasons are committed to improve the overall engagement of the public in the legislative process. There is – as a rule – wide consultation on policies and proposals that may develop into legislation. A two-step procedure of White Papers and Green Papers is used to discuss and consult government policy on a step-by-step basis. Stakeholders and interest groups, as well as citizens, are invited to put forward their views throughout the process. ICT and the internet are used more and more for purposes of consultation. In Slovenia, government ministries are even obliged to consult the public very early on in the process through the so-called *e-Democracy Portal*. During the second stage of the Bill drafting phase, the consultation process is more ‘traditional’ in nature. Ministries then consult more or less the ‘usual suspects’, i.e. ‘standard’ stakeholders that are always consulted.

In Finland, not only the input of citizens and stakeholders is taken on board, but also that of experts who are consulted as a standard element of the legislative process. The expertise of civil servants – internal actors in the legislative process – is valued very highly. When the proposed law is discussed in Parliament, the Parliamentary Committee in question hears the civil servants who drafted the law. Furthermore, the Committee also hears other experts and stakeholders. After discussing the technical features of the law, the Committee discusses the political aspects.

The consultation of stakeholders and experts can contribute to the quality of a law. Legislative mistakes can be prevented. The Finnish practice of discussing a law in Parliament with the relevant civil servants, without the media being present, can ensure that the quality and (technical) merits of the law will be discussed first, without political interests taking over.

#### **4.3. The use of ICT**

Planning the legislative process, disseminating legislative information and consultation with experts, citizens and stakeholders (in other words: the efficiency of the legislative process) can all be facilitated and sometimes even be improved by the use of ICT.<sup>21</sup> With the exception of the United Kingdom –

where the legislative process is still largely print-based and a certain adherence to tradition seems to prevail – the use of ICT has become an important factor in attempts to improve the overall performance of the process in the countries under study (not only the countries involved in the in-depth study).

The use of ICT in the Finnish legislative process, for instance, is fairly advanced, especially in the Parliamentary phase of the legislative process. Document structures have been standardised in order to allow electronic access, transferability and input. Two important benefits of this are the long-term accessibility of information in documents, and the strengthening of the collaboration between Parliament and the ministries. Internet consultation of citizens in the legislative process has existed for quite some time. E-democracy applications such as Otakantaa.fi and Kansanvalta.fi were launched more than 15 years ago (1999) and have been used by citizens and organisations from many parts of society since then.

ICT plays an important role throughout the legislative process in Slovenia as well. One example of an important ICT system operating within the legislative process is the IPP system. This system functions within the ministries as a virtual environment in which different versions of the proposals and the reactions to these proposals are filed. This system also functions as a tracking system with which deadlines are monitored. Within this tracking system a multi-stage structure is operated in which hierarchical lower units have the responsibility, within the line ministry, to observe the deadlines – within the time frame – that are set for the preparation of the Bill. ICT is used not only to speed up the process but also to make it more inclusive.

Not only is ICT used to assist in the operation of parts and elements of the legislative process, it is also used as a means to reform the legislative process itself. The legislative procedures and processes we currently know are largely technique dependent; they are paper-based.<sup>22</sup> In the bulk of Western parliamentary democracies, and indeed in most Commonwealth jurisdictions, most legislative procedures were hatched out in the nineteenth or the beginning of the twentieth century. Legislative procedures and processes as a consequence are deeply rooted in paper and – in turn – the paper underpinnings have shaped the rules and the processes. The legislative procedure and process is commonly shaped as a conveyer belt on which a piece of paper (be it a draft or bill) is transported and each actor involved has a sequential input. There is, for instance, no simultaneous editing possible nor group work. The strong paper base of legislative processes also shows very clearly in drafts or bills that propose amendments to existing legislation.

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<sup>21</sup> See T. Arnold-Moore, 'Public Access to Legislation and the Democratic Process' (2004) 5 *RegelMaat* (Dutch Journal for Legislative Studies) 161.

<sup>22</sup> See W. Voermans, 'Free the Legislative Process of its Paper Chains: IT-inspired Redesign of the Legislative Procedure' in: Ig Snellen, Marcel Thaens and Wim van de Donk (eds), *Public Administration in the Information Age: Revisited* (IOS Press 2012) 237-251.

Because a precise and consolidated print of a single legislative text is the required outcome of most legislative processes, amending bills give detailed instructions to the editor/publisher on the parts and elements that need to be changed. Most of the time the general idea is that amendments are fitted or inserted into the existing text, creating a new single document. As a rule, most jurisdictions do not repeal old acts as a whole and then replace them with new acts in the event of minor amendments;<sup>23</sup> they simply give instructions to insert new elements into an existing text. This is a common enough and – according to most parties involved – evident practice, which departs from the premise that a people’s representatives are themselves best set, situated and suited to write and scrutinise parts of law enshrined in legislation, even if this involves very technical subjects and difficult interest representation. It also departs from the idea that democracy is best served by direct involvement and hands-on control from members of Parliament about the text of legislation. ICT provides opportunities to rethink the way the legislative procedure and its processes are set up: to redraw it, as it were. Some jurisdictions have already gone that way and have reformed the way government prepares proposals and bills (Estonia for example) and the way Parliament handles legislation.<sup>24</sup> The Legis-project in the Netherlands (2009) is an initiative<sup>25</sup> of the Dutch government that is aiming to redesign the legislative process by using electronic and IT services.

#### 4.4. Transparency and openness

Citizens and stakeholders’ attitudes as regards their involvement in the legislative process have changed in the information age we are living in. In general terms, citizens want to be better informed and have more opportunities to participate. Traditional legislative processes are set up to make the participation between the legislative actors, that is the decision-makers, involved, possible – hence the focus on the internal communication and information transfer between ministries, formal advisory bodies, members of parliament and so on. The traditional legislative process is, by its set-up and very nature, not very open to ‘outsiders’. And for those doubting that: take a brief look at all the numbers and abbreviations, lists of technical meetings, committee calendars, and so on, to feel how inward-looking and ‘in-crowd’

<sup>23</sup> *The Dutch Drafting Directives* (a Dutch Drafting manual used by all civil servants working for the central government) for instance, only recommend to repeal the old act and replace it with a totally new one in case of substantial amendments. See Directive 224.

<sup>24</sup> See for instance one of the first initiatives of the Tasmanian (Australia) government. Timothy Arnold-Moore, ‘Automatic Generation of Amendment Legislation’ in *Proceedings of the Sixth International Conference on Artificial Intelligence and Law* (ICAIL 1997) 56–72.

<sup>25</sup> *Kamerstukken II 2009/10*, 31731, nr. 6. (Dutch Parliamentary Papers of the House of Representatives of the Netherlands).

the entrails of the legislative process really are. For the general public to really engage and participate in the government's and parliament's decision-making process during the legislative process, transparency and openness are key.<sup>26</sup> Pin-pointed information and access to more documents are necessary in order to be able to truly participate in the decision-making process.<sup>27</sup>

Grimmelikhuijsen defines the concept of 'transparency' as follows: 'Transparency is the availability of information about an organisation or actor allowing external actors to monitor the internal workings or performance of that organisation.'<sup>28</sup> The meaning of transparency for public authorities is twofold: first, the government must make information public and secondly, citizens must be consulted. In Finland, Slovenia and the United Kingdom, the transparency of the legislative process is realised and promoted in several ways. The Finnish public sector is generally considered to be quite transparent. A code of consultation was adopted in order to support greater transparency, for instance by specifying a minimum time limit for the consultation period. Finland – as we have seen – also employs ICT to improve the transparency of the legislative process. The Finnish administration operates three important websites that have the specific purpose of making the legislative process more transparent and improving consultation for citizens.<sup>29</sup> One of these is the – already mentioned – website [Kansanvalta.fi](http://kansanvalta.fi), 'the democracy data bank'. The website is used by the government and departments to inform the public on a number of topics, varying from specific legislation projects to general information about the functioning of the public sector. On [Kansanvalta.fi](http://kansanvalta.fi) citizens can find, for instance, information on fundamental rights, democracy, political parties, and so on. The website, inter alia, explains in what ways a citizen can participate in the decision-making process. Furthermore, information about current issues can be found on the web portal. Notably, on a number of occasions the information is published with the contact details of the civil servants concerned.

There is, however, no total transparency in Finland nor in any other jurisdiction we have studied. Sometimes negotiations or debates need to be – more or less – kept from the public eye in order to be effective. Several interviewees emphasised that in Finland, for instance, there is a debate on the degree of transparency in the work of the Parliamentary Committees, and especially the perceived 'lack of transparency' in the hearings of the Committees. At present, these hearings are not open to the public: only invited persons can attend. This makes it difficult for journalists to find out what exactly

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<sup>26</sup> S.G. Grimmelikhuijsen, *Transparency and Trust: An Experimental Study of Online Disclosure and Trust in Government* (diss. Utrecht 2012) 56.

<sup>27</sup> Raad voor het openbaar bestuur (n 12).

<sup>28</sup> Grimmelikhuijsen (n 26) 55.

<sup>29</sup> See <[www.kansanvalta.fi](http://www.kansanvalta.fi)> and <[www.otakantaa.fi](http://www.otakantaa.fi)> accessed 20 September 2015.

happens in the Committees. Other interviewees seemed to be more in favour of closed committee meetings: the fact that the hearings are conducted behind closed doors was believed to be essential for the quality of the process and for the ‘consensus component’ of it. This support mainly stems from the fact that the minutes are published afterwards and that the other phases are very much open once again. Most actors we spoke to felt that the level of the political debate benefited enormously from the reclusiveness of the meetings.

The British government is currently trying to improve the overall transparency of the legislative process. All Bills and Acts are published on the internet, as well as other relevant documentation.<sup>30</sup> A lot of effort is put into the structure of the information on the websites of both the government and Parliament. The government publishes legislative calendars that allow the public to keep track of Bills and their stage of passage through the Houses.

Information on legislative initiatives and pending Bills is published as proactively as possible and, in language terms, as plainly as possible. The House of Commons uses social media to get messages across. Some of the interviewees regretted the absence of a lobby register. It is not always clear how interest groups and stakeholders lobby MPs. Pilots to further improve drafting in plain English are underway as well, in an attempt to increase the public’s understanding of a Bill. Some of the interviewees are critical of the way amendments are drafted. The amendments are very difficult for laymen to read and understand. According to the interviewees, it would be a good idea to have consolidated versions that show what the effect of an amendment is to the amended text.<sup>31</sup>

#### **4.5. Public engagement and participation**

Finland, Slovenia and the UK are, in view of an open and inclusive legislative process, introducing opportunities for citizens to participate directly in the legislative process. Although direct or participatory democracy, as opposed to representative democracy, is not very common as a part of the legislative process, elements of direct participation are being experimented with. In the current day and age, direct democracy seems to be craved more and more, and also as an integrated part of legislative decision making. It does however not come easy. Cook and Morgan warn against over-exalted expectations of (direct forms of) participatory democracy:

The concept of participatory democracy seems to be in part a critique of the zealous democrat’s utopia of only yesterday: universal suffrage for selection and control of elective officials claiming to be representative of the electors

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<sup>30</sup> <[www.legislation.gov.uk/new](http://www.legislation.gov.uk/new)> accessed 20 September 2015.

<sup>31</sup> See for an interesting concept in this respect R. Cormacain, ‘Keeling Schedules and Clarity in Amending Legislation (2013)’ 15 *European Journal of Law Reform* 96.

and meritocratic selection and control of other officials. Now the advocates of participatory democracy, seeking egalitarianism through a new and broader concept of citizenship as well as democracy, wish to enhance the citizen's role by reversing the trend toward concentration of political authority in the hand of elected representatives and appointed experts.<sup>32</sup>

The concept and success of participatory democracy requires committed citizenship and a strong motivation for involvement on the part of citizens. While both the organisation of citizens' participation and the participation itself are easier nowadays because of the internet and ICT, this does not automatically entail commitment and active engagement in the form of voicing opinion and a willingness for dialogue in order to influence government decision making.<sup>33</sup> In the internet and media age, ICT-facilitated participation easily risks becoming simply a form of 'trolling'.<sup>34</sup>

Slovenia has implemented many means to enable citizens to directly partake in the legislative process, both by way of consultation of citizens and by opening up the legislative process for citizens' initiatives. Consultation takes place in the form of the obligation of government ministries to consult the public through the aforementioned e-democracy portal. Citizens' comments are sent to the ministry responsible for the proposal, which is obliged to respond to all comments that are posted on the e-democracy portal. The documents accompanying the Bill in the parliamentary phase include a summary of citizens' comments on the proposal.

Slovenian citizens are more actively involved in the legislative process by means of citizens' initiatives. For example, the website 'I suggest the government'<sup>35</sup> offers the possibility to put forward ideas about new legislation. The users of the website can vote on the ideas posted on the website. If the idea can count on a certain level of support (50% of the voters, of which a minimum of 5% are registered users), the ministry is obliged to provide that idea with a reasoned answer, and indeed feedback. According to interviewees this website is used frequently by interested members of the public. In the UK and the Netherlands, citizens' initiatives are possible and suggestions for legislation are allowed as well. However, a successful initiative does not automatically lead to a proposal – it only means that the subject matter of the initiative is put on the agenda of Parliament as a topic to be debated. No strings attached: just a parliamentary debate.

Participatory democracy is not only becoming increasingly popular at a national level, but also as a part of the legislative process (and decision-

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<sup>32</sup> T.E. Cook and P.M. Morgan, *Participatory Democracy* (Canfield Press 1971) 3–4.

<sup>33</sup> F. Poletta, 'Participatory Democracy in the New Millennium' (2013) 42(1) *Contemporary Sociology: A Journal of Reviews* 42.

<sup>34</sup> Trolling is a skill, defined by a series of well-placed and thought-out arguments regarding a subject, which may or may not be refuted by persons who are of lesser intelligence than the troll himself.

<sup>35</sup> <[www.predlagam.vladi.si](http://www.predlagam.vladi.si)> accessed 20 September 2015.

making process) of the European Union. Although the Treaty on the European Union (TEU) provides that the functioning of the Union shall be founded on representative democracy (article 10, paragraph one), several provisions concerning participatory democracy have been added. One of these is the citizen's initiative.

## 5. Conclusion

Modern demands for a more efficient legislative process, which is also transparent and encourages citizen participation are not easy to combine. Efficient law making is not just creating a law as quickly as possible. Efficiency implies that the available means, including the methods to plan the process and the use of ICT, are used optimally. The modern development towards more horizontalisation, citizen participation and government transparency, can contravene the need for more efficiency and accelerated legislative processes; the simultaneous realisation of both concepts is difficult. The traditional paper-based set-up of the legislative processes is not helpful either. The 2012 study, on which this contribution reports, shows how modern legislatures are grappling with the different demands and are trying to accommodate them.

From the study it shows that an efficient, expedient legislative process does not automatically rule out high levels of transparency and participation, nor that it contravenes careful preparation, consultation and consideration. Indeed, informing and involving citizens in the legislative process is very much a part of efficiency and expediency in modern legislative processes. The 2012 study into the performance of different legislative processes (in Finland, Slovenia, the UK and other European countries) framed in terms of efficiency and transparency and inclusiveness, has demonstrated that the increased transparency and participatory nature of government organisations does not necessarily have a negative influence on the efficiency and speed of the legislative process. In these countries, the procedure is organised in such a way, particularly by using intelligent ICT applications, that there is enough room for citizen participation, while the overall efficiency and the speed of law making are not negatively affected. It also proved that attitudes as regards public engagement in the legislative processes have changed and that legislative processes themselves are affected and changing. Although the speed of the process does not seem to have changed much, the operation of the process has. Increased transparency and levels of 'outsider' (i.e. citizen's) participation within the legislative process may well have added value in the form of a new and modern checks on government. Increased and direct involvement of citizens in the legislative process might boost the overall legitimacy of it, improve the fit to the problem at hand, increase the overall quality, help implementation and compliance, and, who knows, ensure the legislation has a longer life.



On the other hand, the positive effects of transparency and inclusiveness should not be overestimated. Transparency is a complex and multifaceted concept.<sup>36</sup> Moreover, there is, we know, no necessary causal link between increased transparency and openness on the one hand and citizens' trust in public authorities on the other.<sup>37</sup> As Juan Carlos de Martin, recently and rightly noted: 'cyber-democracy is just the first step':

In criticising – often justifiably – the Italian political system it should not be forgotten in particular that political activity is an essential democratic art, as Bernard Crick wrote in 1963 in a now classic book, *In Defence of Politics*, 'an art based on virtues such as prudence, conciliation, compromise and adaptability.' His conclusion reads that '[i]t might be better, then, to look at how we can encourage representative democracy to evolve towards more participatory forms, towards what we might call, in the words of Stefano Rodotà, the "continuous democracy". [...] In other words, it is neither direct democracy nor the defence of the status quo that will allow us to emerge from the current crisis, but an evolution – led by parties that have been thoroughly overhauled (or completely new parties) – of representative democracy towards forms that are more participatory: perhaps there is someone [...] up to the challenge?'<sup>38</sup>

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<sup>36</sup> E. Scholtes, *Transparantie, icoon van een dolende overheid* (Transparency, Icon of a Wandering Government) (Boom/Lemma 2012).

<sup>37</sup> Grimmelikhuijsen (n 26) 55.

<sup>38</sup> Juan Carlos de Martin, 'Cyber-democracy is Just the First Step', PressEurop (16 April 2013).