

# *Legislated Rights in the real world*

Grégoire Webber\* and Paul Yowell\*\*

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## **I. Seven themes**

Our jointly authored monograph, *Legislated Rights: Securing Human Rights through Legislation*, argues that legislatures have a central, strategic role in protecting and promoting human rights. The book aims to shift “key premises of debate in human rights law, where it is regularly assumed that human rights are the special province of the courts and that legislation represents a threat rather than a means of protecting them.”<sup>1</sup> Together with the book’s other authors—Richard Ekins, Maris Köpcke, Bradley Miller, and Francisco Urbina—we defend “the special role and responsibility of the legislature in securing human rights in positive law.”<sup>2</sup> Our goal is “to reorient general thinking about the nature of rights, legislatures and courts, and legal and judicial reasoning” and, in so doing, to situate “legislation, rather than litigation and adjudication, at the centre of jurisprudential and legal thinking on human rights.”<sup>3</sup> Our argument proceeds by defending theses in relation to rights, the common good, the moral value of positive law, legislation as reasoned action, the role of legislation in improving human rights adjudication, and the contingent nature of the case for judicial review of legislation.

The careful and challenging contributions by Ittai Bar-Siman-Tov, Lech Garlicki, Vicki Jackson, James Kelly, and Yaniv Roznai all note the general neglect of the legislature’s central and strategic role in realizing human rights and give hope that such neglect is now waning. They also draw attention to some reasons to doubt that, when shifting one’s focus from the world of ideas to the real world, the legislature will realize human rights. Such doubt, in their view, should not lead to neglect of the many ways in which legislatures have contributed to realizing, securing, promoting,

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\* Canada Research Chair in Public Law and Philosophy of Law, Queen’s University, and Visiting Fellow, London School of Economics and Political Science. Email: [gregoire.webber@queensu.ca](mailto:gregoire.webber@queensu.ca)

\*\* Benn Fellow in Law, Oriel College, University of Oxford. Email: [paul.yowell@law.ox.ac.uk](mailto:paul.yowell@law.ox.ac.uk). We are grateful to Ittai Bar-Siman-Tov and Yaniv Roznai for organizing a book symposium workshop at Radzyner Law School, IDC Herzliya in May 2019 and we thank our commentators for their contributions to the workshop and this symposium.

<sup>1</sup> GRÉGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER, AND FRANCISCO URBINA, *LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION* vi, 26 (Cambridge: Cambridge University Press 2018) [hereinafter *LEGISLATED RIGHTS*].

<sup>2</sup> *Id.* at vii.

<sup>3</sup> *Id.* at 25, 15.

protecting, and specifying rights. But, in the real world, they contend, there is reason to question whether the legislature fulfils the role and responsibility as we envision it. In *Legislated Rights*, we note, on more than one occasion, “the reality of past instances of legislation violating human rights,” and we agree on the need to be sceptical about legislatures in certain times and places.<sup>4</sup>

We would stress, however, that the argument of *Legislated Rights* aims to transcend the empirical generalizations that might be made about legislatures of a given time or place. We offer a general theory about legislatures and their responsibility and capacity to protect human rights that counters four prevailing theses about legislatures outlined in our first chapter. These negative theses are themselves theoretical claims, not statistical assessments. We aim to counter this theory with a theory of our own. Our theory, like the one we challenge, is not idle and has important implications at the level of practice. Although the argument of *Legislated Rights* was developed “to make a contribution to the fields of jurisprudence, constitutional theory, and human rights law,”<sup>5</sup> it also speaks to the real world of rights and of legislatures and reconsiders some of the persistent doubts that accompany the legislature’s central and strategic role in realizing rights in community. We invite such reconsideration both by challenging “influential theorists [who] have characterised as paradigmatic what ought to be understood as legislative pathologies” and by expanding the scope of human rights legislation beyond bills of rights to encompass a wide range of legislative initiatives.<sup>6</sup>

We have organized our reply according to seven themes, as follows: (1) neglect of the legislature (sec. II); (2) the central case of the legislature (sec. III); (3) legislatures in the real world (sec. IV); (4) populism and non-central cases (sec. V); (5) the good legislator (sec. VI); (6) specific rights and general welfare (sec. VII); and (7) constitutional rights and judicial review (sec. VIII). For prompting these themes and for their probing contributions to this symposium, we express thanks to our generous commentators.

## II. Neglect of the legislature

While Jackson notes agreement with our claim that legislatures have long been neglected in constitutional theory,<sup>7</sup> and Kelly agrees with respect to the legal academy, the latter contends the same does not hold within his field of political science.<sup>8</sup> We agree to an extent, but recall that much political science literature tends to take either a reductive or sceptical view of legislatures, aiming to predict outcomes or quantify the presumptively suspect influence of donors or interest groups. Jeremy Waldron has drawn attention to this and to the lack of a philosophical view of legislatures corresponding to the outpouring of philosophical reflection on judicial interpretation.<sup>9</sup> To this end, we note that the examples Kelly

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<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at vii.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Vicki C. Jackson, *Pro-constitutional Representation and Legislated Rights*, [vol. no.] JERUS. REV. LEG. STUD., [first page], [pages cited] (2020) [Jackson].

<sup>8</sup> James B. Kelly, *Legislative Capacity and Human Rights in the Age of Populism: Two Challenges for Legislated Rights: A Discussion of Legislating Rights: Securing Human Rights through Legislation*, [vol. no.] JERUS. REV. LEG. STUD., [first page], [pages cited] (2020) [Kelly].

<sup>9</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* (Oxford: Oxford University Press, 1999).

cites to are studies of legislatures of a time and place rather than more general theoretical accounts.<sup>10</sup>

The neglect of the legislature can be seen in the work of a group convened by former British Prime Minister Gordon Brown and advised by a Philosophers' Committee chaired by Jeremy Waldron, which in 2016 published a report on the Universal Declaration of Human Rights.<sup>11</sup> The report makes a number of recommendations on the Declaration's implementation, ranging from strengthening the UN system on human rights to the work of NGOs and to the role of public education. Most telling is the section of the report devoted to the Declaration's implementation within national legal systems. It is there affirmed "that the front-line work of upholding human rights is always conducted under the auspices of national constitutions and bills of rights."<sup>12</sup> In relation to these legal instruments, it is said that "the judiciary has a pivotal role to play in upholding human rights" because "[o]nly an independent judiciary can render justice impartially on the basis of law, thereby assuring the rights and fundamental freedoms of the individual."<sup>13</sup> Other actors are mentioned, including bar associations, civil liberties groups, and regional human rights courts. Altogether missing from the discussion on how to promote the better implementation of the Declaration in national legal systems is *any mention of the legislature or legislation*, save one. The one reference is to "the impact of statutes of limitation" on litigating human rights claims before the courts.<sup>14</sup>

We point to this report as a telling example of "court-centred modes of human rights discourse."<sup>15</sup>

### III. The central case of the legislature

Early in *Legislated Rights*, we identify a central case of the legislature, which is given explanatory priority in our argument.<sup>16</sup> Our methodology could have been different. We could have selected the legislature of a time and place, such as the Westminster Parliament during the Cameron and May ministries or the Israeli Knesset in the year of its very first sitting in 1949. Our study would have awarded explanatory priority to this or that legislature, seeking to understand the institution and its legislative activity from the point of view of its participants. Like all such studies of all human affairs, our inquiries would have been directed by the question why: Why did the participants act the way they did? Synonymously: What were their reasons for so acting?<sup>17</sup> Recognizing that neither the Westminster Parliament nor the Israeli Knesset nor any of their legislative enactments would be as they are in the absence of human deliberation, judgement, and choice, we would have directed our study to understanding the reasons that informed the participants' actions in establishing or

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<sup>10</sup> Kelly, *supra* note 8, at [pages cited].

<sup>11</sup> THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD (Gordon Brown ed., Cambridge, UK: Open Book Publishers 2016), available online: <https://doi.org/10.11647/OBP.0091> (accessed on 30 March 2020).

<sup>12</sup> *Id.* at 95.

<sup>13</sup> *Id.* at 96.

<sup>14</sup> *Id.* at 96.

<sup>15</sup> LEGISLATED RIGHTS, *supra* note 1, at 1. See also Ittai Bar-Siman-Tov, *Beyond Neglect and Disrespect: Legislatures in Legal Scholarship*, in HANDBOOK OF PARLIAMENTARY STUDIES: INTERDISCIPLINARY APPROACHES TO LEGISLATURES (Cyril Benoît & Olivier Rozenberg eds., forthcoming).

<sup>16</sup> *Id.* at 3 (emphasis in original).

<sup>17</sup> Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AM. J. JURIS. 51, 54 (2015) [hereinafter Webber, *Asking Why in the Study of Human Affairs*].

maintaining the institution of the legislature and in proposing and voting for or against legislation.

Or, instead of focusing on a specific legislature of a time and place, we could have adopted a related methodology, seeking out some generalizations about legislatures within a set period of time and geography, such as English-speaking legislatures in the immediate post-war period or legislatures in the years following the enactment of bills of rights on the Commonwealth model.<sup>18</sup> Although such a selection would have required justification, the investigation of the selected legislatures would have been directed by the same methodological question that asks why. As Hart explained, the “methodology of the empirical sciences is useless” for the study of law understood as a normative activity; “what is needed is a ‘hermeneutic’ method which involves portraying rule-governed behaviour as it appears to its participants.”<sup>19</sup> Though Hart framed his insight with reference to rule-governed behavior, it extends to all self-directing human activity. The generalizations about legislatures that we could have drawn from looking to a set period of time and geography would have been informed by patterns of reasons for maintaining the legislature, for proposing legislative initiatives, and for voting for or against.

These different methodologies would have had much merit if our project had been different, with a focus on the legislature of a time and place or a selection of legislatures across time and geography. Our project would have answered to the standards of truth for such a project. If our project extended its scope beyond understanding and reporting to evaluating and judging the merits of those institutions and their activities, we would have needed to confront the question: By what standard should we measure the legislatures of a time and place? In reflecting upon this question, we approach our focus in *Legislated Rights*, which is to “rehabilitat[e] a philosophical understanding of the legislature’s capacities and nature.”<sup>20</sup> In developing such a philosophical understanding, we confronted a question not dissimilar to the one just posed about the standard for evaluation and judgement. Is one to evaluate the Westminster Parliament of a given time against the standard of the Israeli Knesset of the same or another time? Is one to evaluate all legislatures against the generalisations that might emerge from the study of a group of English-speaking or Commonwealth legislatures within a set period of time and geography? If not by these standards, then by which? How is one to develop a philosophical understanding of the legislature?

These methodological questions are live for many working in the related fields of jurisprudence, constitutional theory, and human rights law, for “many scholars making claims about legislative irresponsibility do so *not* on the basis of a sociological-empirical foundation, *but rather* on the basis of a philosophical understanding of the point of legislatures and legislation.”<sup>21</sup> Such is the case, for example, with Dworkin’s influential division of labour between institutions on matters of policy and principle, with principled reasoning taking place, on the whole,

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<sup>18</sup> See STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* (Cambridge: Cambridge University Press 2013) and JANET L. HIEBERT & JAMES B. KELLY, *PARLIAMENTARY BILLS OF RIGHTS* (Cambridge: Cambridge University Press 2015).

<sup>19</sup> H.L.A. HART, *Introduction in* *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (Oxford: Clarendon Press 1983).

<sup>20</sup> *LEGISLATED RIGHTS*, *supra* note 1, at 15.

<sup>21</sup> *Id.* at 15 (emphasis in original).

in an institution other than the legislature.<sup>22</sup> Our answer to these methodological questions is to give explanatory priority to the central case of the legislature. The central case method is analogous to the method of attending to the legislature or legislatures of a time and place. It, too, seeks to understand human activity by understanding reasons for action. However, it differs with respect to *which* reasons for action are studied. If one studies the legislature of a time and place, one's primary scholarly attention is the reasons for action of its participants: their reasons for maintaining the institution, for proposing legislation, for voting for or against. One may critically evaluate such reasons as good or not, complete or not, true or not. Such reasons may, as with Hart's account of the internal point of view, "be based on many different considerations," including "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."<sup>23</sup> Against the standards of conscience and moral truth, such "reasons" may be no true reasons. Participants' reasons may be confused, founded on mistaken assumptions, misguided, unreflective, radically unreasonable, and so on. Yet, despite these failings, these reasons remain *their reasons*. To evaluate and judge their reasons, one must shift one's methodology so as to hold in view those reasons that participants ought to have, reasons that any good legislature, good legislation, good voting member should be based or act on.<sup>24</sup>

For the purposes of developing a philosophical understanding of the legislature, its capacities, and its nature, the standards of conscience and moral truth are all-controlling, for one is seeking out only good, complete, and true reasons. Such reasons for action are not bounded by the reasons of this or that participant in this or that legislature at this or that time and place. Rather, the horizon of good reasons is limited only by the theorist's experience and imagination. The theorist's aim, as is our aim in *Legislated Rights*, is to identify the truly good reasons for action that are available to any self-directing human person, reasons that, though they are ours, we judge to be "candidates for being yours because—so far as [we] can judge—they are good reasons for [us], you, and anyone else."<sup>25</sup> We explain that the central case is constructed by appealing to "the good reasons why one would favour introducing, maintaining, and complying with the legislature and its legislation."<sup>26</sup>

What are those reasons? "Doubtless they include," we say in *Legislated Rights*, "the reasons referred to by constitutional drafters when they confer authority on legislatures 'to make laws for the peace, order, and good government of the Commonwealth'."<sup>27</sup> We could have included the reasons encompassed in the US Declaration of Independence's reference to the need "to secure [inalienable] Rights" as a reason why "Governments are instituted among Men,"<sup>28</sup> an idea also given expression in the French Declaration of the Rights of Man and of the Citizen, which affirms that "the preservation of the natural and imprescriptible rights of man" is the "aim of all political association."<sup>29</sup> These reasons are not made good in philosophical argument by the fact that they are referred to in constitutional instruments of great

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<sup>22</sup> See the discussion in *LEGISLATED RIGHTS*, *id* at 7-8 and ch. 4, 5, 7.

<sup>23</sup> H.L.A. HART, *THE CONCEPT OF LAW* 203 (3rd edn, Oxford: Oxford University Press 2012).

<sup>24</sup> Webber, *Asking Why in the Study of Human Affairs*, *supra* note 17 at 54. On this methodology more generally, see R.G. COLLINGWOOD, *AN AUTOBIOGRAPHY* (Oxford: Clarendon Press 1978).

<sup>25</sup> Webber, *Asking Why in the Study of Human Affairs*, *supra* note 16, at 66.

<sup>26</sup> *LEGISLATED RIGHTS*, *supra* note 1, at 14.

<sup>27</sup> *Id.* at 3 n. 5.

<sup>28</sup> U.S. DECLARATION OF INDEPENDENCE (1776), para. 2.

<sup>29</sup> FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (1789), art 2.

weight. Yet, the fact that persons of great weight thought these to be good reasons to institute legislatures and to direct the point of their activities is of significance to one who seeks to interrogate which, if any, are the truly good reasons to favour creating legislatures and introducing legislation.<sup>30</sup> Drawing on these reasons and others, we say that the legislature is “established to act deliberately in response to reasons to change the law.”<sup>31</sup> We defend an understanding of those reasons to change the law as grounded in the common good of the political community, being “that set of conditions that enable each and every member of the community to realise his or her development and wellbeing.”<sup>32</sup> Human rights, we say, are “integral to the community’s common good.”<sup>33</sup> Given this “account of rights and the common good, the need for positive law in political community, [and] the central place of legislation as reasoned action as part of that positive law,” we affirm that legislation, “in its central case, does not oppose rights.”<sup>34</sup> We argue that there is no basis for affirming as sound any thesis about the legislature’s role or responsibility that would vest it with a mandate to infringe rights.

Our central case analysis of the legislature affirms the ends for which the legislature acts and explores “the relative practical capacities of legislatures and the special suitability and responsibility of legislation in securing human rights.”<sup>35</sup> These include the capacity for “principled, reasoned deliberation to promote the common good.”<sup>36</sup> Our account of the legislature’s capacity denies public choice or utilitarian accounts according to which rules “govern[ing] the law-making process are ... designed to aggregate preferences.”<sup>37</sup> We say, instead, that such rules “enable the legislature to deliberate and change the law for reasons.”<sup>38</sup> Legislation, we argue, is reasoned action.

So, is the central case analysis of the legislature and legislation awarded explanatory priority in *Legislated Rights* idealized? Roznai thinks so, affirming that our argument “makes perfect sense” “in an ideal world,” but that in the real world of “democratic erosion and executive aggrandizement,” “*Legislated Rights* portrays a somewhat idealized vision of legislatures.”<sup>39</sup> Kelly shares in this assessment, suggesting that we “have presented an idealized version of legislatures, the legislative process, and legislators,” adding that we have presented “a romanticized view.”<sup>40</sup> Jackson rightly notes that our method is to “draw our attention to the internal perspective of the legislator,” but adds that such attention is drawn to the internal perspective “in an idealized situation.”<sup>41</sup> Roznai, Kelly, and Jackson are not alone in reading *Legislated Rights* this way, with some reviewers (but not all)<sup>42</sup> claiming that our central case

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<sup>30</sup> See Richard Ekins & Grégoire Webber, *Legislated Rights in the Anglo-American Tradition*, 10 FAULKNER L. REV. 129, 134–35 (2018).

<sup>31</sup> LEGISLATED RIGHTS, *supra* note 1, at 3 and ch. 4.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 21, 14, 10.

<sup>35</sup> *Id.* at 3 (emphasis omitted).

<sup>36</sup> *Id.* at 6 and ch. 4.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> *Id.* at 6.

<sup>39</sup> Yaniv Roznai, *Legislated Rights, Democratic Erosion and the Rise of Executive Power*, [vol. no.] JERUS. REV. LEG. STUD., [first page], [pages cited] (2020) [Roznai].

<sup>40</sup> Kelly, *supra* note 8, at [pages cited].

<sup>41</sup> Jackson, *supra* note 7, at [pages cited].

<sup>42</sup> Leah Trueblood, *Review*, 82 MLR, 401, 401 (2019): “The book is not concerned with ideal cases. Rather, explanatory priority is given to those cases that reflect the rationale for legislatures.”

account offers “an idealized picture of legislatures and legislation”<sup>43</sup> and an “arguably unduly idealistic” presentation of legislative activity.<sup>44</sup>

Are these challenges to the central case of the legislature warranted? We say no. Our method is not idealized in relation to the circumstances of human interaction and activity on which the rationale for legislatures is constructed. We build up our central case of the legislature and legislation by appealing to the reasons to legislate in the circumstances of societies facing real opportunities for good as well as real threats, including violence, disease, poverty, and the like. The reasons to make law are reasons to legislate, “for legislation is a central source of law.”<sup>45</sup> These reasons stem fundamentally from the idea of the common good and the need to secure such in a community. Such need is related to the opportunities that only coordinated action can secure—opportunities like public education, health care, social security, and a functioning economy—such that even a society of angels would have reason to institute a legislature and enact legislation. Such need extends beyond such opportunities for advantage and encompasses the interpersonal wrongs that require remedy. There is nothing idealized or romantic about murder, assault, rape, theft, and fraud, all made offences in the criminal law of legislatures in the real world. As we explain, “our central case account of the legislature and legislation is *not* ‘about ideal cases, still less about ideal worlds untroubled by wrongdoing, scarcity, misunderstanding, and fear’.”<sup>46</sup> Thus, “claims about the central case build on the good reasons why one would favour introducing, maintaining, and complying with the legislature and its legislation, reasons articulated in the real-world circumstances of human experience and not in ideal circumstances that wish away human imperfections.”<sup>47</sup>

Is our central case analysis “ideal” in other way? Is it the very understanding of the legislature and legislation awarded explanatory priority in our argument that is the target of the label? Jackson suggests that we might have “better described [the central case] by such words as ‘the strongest case,’ or the ‘best case,’ or the ‘idealized case’.”<sup>48</sup> On her reading, the “very vocabulary of a central case carries an implication that it is somehow typical, or at least consistent with human nature and its empirical implications.”<sup>49</sup> This is a common criticism of central case methodology, and provides an opportunity for clarification. To set forth a central case is to make a claim about the proper ends and means of human activity, not to predict the frequency of success. An argument about a central case is not about what is “typical” numerically; it is not a claim about what is statistically prevalent. To say that the central case of medicine involves the aim of curing illness is not inconsistent with making a historical argument that until fairly recently in human history, many medicinal endeavours did more to harm health than protect it, because good practices were often intertwined with superstition and mistake.

Is there nonetheless something to the claim that the central case of the legislature and legislation should instead be described as “ideal” or “an ideal”? It is significant,

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<sup>43</sup> Brian Bix, *Review*, 38 LAW & PHILOS, 221, 224 (2019).

<sup>44</sup> Lord Sales, *Review*, 135 LQR 338, 340 (2019).

<sup>45</sup> LEGISLATED RIGHTS, *supra* note 1, at 92.

<sup>46</sup> *Id.* at 4 (emphasis added), citing to JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 47 (Oxford: Oxford University Press 1998) [hereinafter AQUINAS].

<sup>47</sup> LEGISLATED RIGHTS, *id.* at 14.

<sup>48</sup> Jackson, *supra* note 7, at [pages cited].

<sup>49</sup> *Id.* at [pages cited].

in our view, that the literature has settled on the label *central* rather than *ideal* to describe the case constructed from good, complete, and true reasons for action.<sup>50</sup> It has done this precisely because the label “central” calls forth the *centrality of reasons* in understanding human activity. Such centrality is not part of any ideal beyond the real world, but core to any methodology that investigates human deliberation, judgement, and choice in the real world. On one such investigation, the researcher will show that some of the reasons of the participants of a time and place conform in a thoroughgoing way to what reason requires and so the researcher will establish that the participants’ activities are *central in the real world*. On another such investigation, the researcher will show that participants’ reasons conform in part and fail in part regarding what reason requires and so the researcher will establish that the activities are non-central in the real world.

In this way, the central case has explanatory priority over all *non-central cases*, being cases made non-central by virtue of their relationship to reasons. All non-central cases of the legislature or legislation are cases of a legislature or legislation precisely because they resemble, in more or less imperfect ways, the central case of the legislature or legislation. The non-central case will differ from the central case by what Aristotle calls a “watering down,” a “subtraction from the reasons that are realized in the central case.”<sup>51</sup> In brief, the central case is central because it is the case against which all other cases are measured.

#### IV. What of the real world?

The concerns expressed by Roznai, Kelly, and Jackson in relation to the “idealized” conception of the legislature were not, to be sure, merely semantic. The concerns were more about the applicability of the central case of the legislature and legislation to the real world. When one shifts one’s focus from philosophical argument to the legislature of a time and place, will the central case of the legislature fail to inform one’s evaluations? Can the ideal case, to adopt their vocabulary, say anything helpful about the non-ideal? The concern is a longstanding one. Hart, for example, thought that appeals to an “ideal form of law” would be liable to offer only an “unbalanced perspective” and a “distortion of the facts.”<sup>52</sup> If the central case account is not the typical account of the legislature and legislation—if it, in other words, fails to “fit the facts”—what can it offer to one whose concerns are not in the worlds of “ought” or “can,” but in the world of “is”?<sup>53</sup>

The welcome analytical division between “ought,” “can,” and “is” animates Bar-Siman-Tov’s contribution. As he explains, *Legislated Rights* is “a conglomeration of normative arguments about what legislatures ought to do, institutional arguments about what legislatures are capable of doing, and empirical arguments about what

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<sup>50</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* ch. 1 (2nd edn, Oxford: Oxford University Press 2011) [hereinafter NLNR]; FINNIS, AQUINAS *supra* note 46, at ch. II; John Finnis, *Law and What I Truly Should Decide*, 48 AM. J. JURIS. 107 (2003); Webber, *Asking Why in the Study of Human Affairs*, *supra* note 17. For other jurisprudential appeals to “central case,” though not themselves grounded on the same theoretical foundations, see HART, *THE CONCEPT OF LAW*, *supra* note 23, at 123 and 81; John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 3 (2007); Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 5 (2003).

<sup>51</sup> *Politics* 2.1.1262b17 cited in FINNIS, NLNR, *supra* note 50, at 145.

<sup>52</sup> H.L.A. HART, *Introduction*, *supra* note 19, at 11, 12.

<sup>53</sup> Ittai Bar-Siman-Tov, *Legislatures and Rights: A Comment on Webber et al.’s Legislated Rights*, [vol. no.] JERUS. REV. LEG. STUD. [first page], [pages cited] (2020) [Bar-Siman-Tov].



legislatures commonly do.”<sup>54</sup> Our focus, he rightly recognizes, is “to provide a deeply philosophical normative theory” that is developed with “arguments of institutional capacity” and is “mindful of empirical realities.”<sup>55</sup> Those empirical realities include, as reviewed in the previous section, the many non-ideal realities of human interaction that ground the case for law and the case for legislation as a central source of law. They include, too, some empirical claims about what legislatures in the real world have done, not with a view to developing claims about what is typical or statistically frequent, but to illustrate how the central case is not fanciful or reserved to “ideal theory” or to realm of imagination. Our references to the Chilean building code;<sup>56</sup> the Westminster Parliament’s Representation Acts, Habeas Corpus Act, Education Acts, and National Health Service Act;<sup>57</sup> the US Congress’ Civil Rights Act, Voting Rights Act, and Elementary and Secondary Education Act;<sup>58</sup> and the Spanish System for Autonomy and Attention to the Dependence,<sup>59</sup> among others, are all real world examples of the central case of legislative action.

The many examples of legislatures and legislation in the real world that populate the arguments in *Legislated Rights* do not signal a shift in methodology away from central case analysis. Rather, the examples aim to illustrate how the good, complete, and true reasons that inform our central case of the legislature and legislation—our “ought” claims—are general because such reasons are good, complete, and true for all persons. Such illustration proceeds by pointing to examples where persons have acted on such good reasons by enacting legislation to secure human rights. To be sure, the illustration is not a derivation: good reasons are not made good by virtue of having been acted on by many or some. However, the unbounded nature of good reasons for action allows the theorist to “anticipate finding in existence, to one degree or another, in any human community” legislatures and legislation that secure human rights.<sup>60</sup> Our examples are illustrations of the relevant good reasons for action at work.

In the analytical division that structures Bar-Siman-Tov’s contribution, “can” follows “ought” and, though he does not say it expressly, the relationship between the two conforms to the maxim that “ought” implies “can.” No legislature “ought” to do what it does not have the capacity to do. In turn, all good legislatures are designed to have the capacity to do what they ought to do. And therefore much of the argument in *Legislated Rights* is devoted to exploring “the unique capacities that legislatures have for realising rights in community,” including by defending the following theses against others that conceive of the legislature’s capacity quite differently: “the legislature is capable of principled, reasoned deliberation;” “the legislature is not inherently biased against minorities and is fit to engage in principled decision-making about human rights;” and “the legislature is capable of securing human rights by specifying them in a form so that rights are not defeasible against countervailing interests or the general welfare.”<sup>61</sup>

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<sup>54</sup> *Id.* at [pages cited].

<sup>55</sup> *Id.* at [pages cited].

<sup>56</sup> LEGISLATED RIGHTS, *supra* note 1, at 16-17.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 143.

<sup>59</sup> *Id.* at 76-79.

<sup>60</sup> Finnis, *Law and What I Truly Should Decide*, *supra* note 50, at 113.

<sup>61</sup> LEGISLATED RIGHTS, *supra* note 1, at 25.

Roznai is here in agreement, saying that “[t]here are indeed various reasons why legislatures are institutionally capable of securing rights,” including for the reason that “the legislature can be proactive in protecting rights, and does not have to wait until a violation of a right occurs in order to provide a remedy.”<sup>62</sup> Bar-Siman-Tov, while in agreement in principle, would have welcomed more by way of “institutional analysis,” including the “procedural arrangements” and the “motivating forces that shape legislative behavior.”<sup>63</sup>

The call for more such analysis is well placed and brings us to “is,” the third in Bar-Siman-Tov’s analytical division and the one closest to the real world. Whereas a maxim affirms that “ought” implies “can,” there is no similar maxim to govern the relationship between “can” and “is.” After all, “can” does not imply “will.” A claim about capacity is not a predictive claim. For all of our arguments about the reasons for instituting a legislature and enacting legislation (“ought”) and the capacity of the legislature to secure human rights (“can”), we are clear-eyed in affirming the fact (“is”) that legislatures have not always done as they could and ought to have done. We say that “not all legislative activity conforms to the central case of legislation that is awarded explanatory priority throughout the book,” that “many legislatures in different times and places have failed to be fully responsive to the reasons that favour introducing a legislature and legislation in a constitutional system,” that some legislative “members act not for sound reasons but as tools of a state or party politburo,” and so on.<sup>64</sup> But, as reviewed above, we also give examples where legislatures have done what they could and ought to have done in enacting legislation that promotes the common good and secures rights.

Can more be said about the real world beyond chalking up welcome and unwelcome examples? Yes, much more. On the one hand, one can chalk up enough examples within the realm of “is” to formulate claims about “what is normal or usual in the sense of empirically regular or statistically likely.”<sup>65</sup> Roznai points to the possibility that “empirical or evidence-based work would show that legislatures might not be taking this responsibility [assigned to them in *Legislated Rights*] seriously, at least in given places, times, or topic.”<sup>66</sup> Kelly formulates a stronger claim, in saying that “*Legislated Rights* is about the parliamentary system we should have, and not the ones that we have in Westminster systems such as Canada, New Zealand, and the United Kingdom.”<sup>67</sup> Jackson draws attention to “situations of persistent subordination of particular groups” where “prejudice and lack of access ... may result in prejudice against [a] group” that will, in turn, “infect[] legislative processes.”<sup>68</sup> Each one of these “is” claims is targeted. Neither Roznai, Kelly, nor Jackson make sweeping claims that the legislative forum is, everywhere and always, a vice-ridden den of prejudice or nakedly partisan competition for power. Each one of them pinpoint conditions—persistent subordination, a given legislative topic, a Westminster system of government, among others—that may frustrate the progression from “ought” and “can” to “is.”

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<sup>62</sup> Roznai, *supra* note 39, at [pages cited].

<sup>63</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>64</sup> LEGISLATED RIGHTS, *supra* note 1, at 24, 4, 9.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> Roznai, *supra* note 39, at [pages cited].

<sup>67</sup> Kelly, *supra* note 8, at [pages cited].

<sup>68</sup> Jackson, *supra* note 7, at [pages cited].

We elaborate no specific position on these or other unwelcome examples in *Legislated Rights*, and instead say something different about all unwelcome examples. That something different helps to show the relevance of the central case of the legislature and legislation in the real world. We say that “when the legislature commits injustice and violates human rights, it is departing from, *not fulfilling*, its responsibility to legislate for the common good.”<sup>69</sup> Indeed, it is by appealing to the central case of the legislature and legislation that we can evaluate the examples as deficient, “showing *how* legislatures in different times and places have failed to be what they *ought* to be.”<sup>70</sup> No amount of cumulative examples can furnish an evaluative standard. No claim about what is typical or statistically likely or empirically regular can yield an evaluative standard: no “ought” from “is.” In turn, no evaluative standard can, without argument, establish itself as the standard to which the legislature ought to respond *qua* legislature. If one conceives of the legislature as a preference-aggregating machine, the legislature may well fail to respect human rights, but such failure is not a *legislative* failure since it is no failure of preference aggregation to fail to respect rights. Only an understanding of the ends to which legislative activity is to be directed can provide the evaluative grounds to affirm, as we affirm, that legislative violations of human rights are “*failures to be what the legislature and legislation are supposed to be*.”<sup>71</sup> The central case methodology helps frame practically reasonable forms of institutional practice and, in so doing, helps frame pathological and deficient forms of such practice.

Examples of legislative violations of human rights may well be statistically frequent in whatever time horizon and geographical site one focuses on, but such “empirical normalcy is *not normal* when evaluated against the normative standard of the central case.”<sup>72</sup> Against this standard, such instances of legislatures and legislating are instances of legislative failing. As one reader of *Legislated Rights* has captured the thought, “pathology is best understood as a reminder of the good from which it deviates.”<sup>73</sup> It is for these reasons that, no matter the number of flawed instances one may chalk up, our central case analysis is “unfazed” by them in the same way that one’s central case of friendship will be unfazed by any number of examples of friends failing to act as a good friend ought to act.<sup>74</sup> Non-central cases answer to the central case, not the other way round.

## V. Populism and non-central cases

Orban, Erdoğan, Duterte, Kaczyński, Netanyahu, and Trump. These are, says Roznai, “the real legislators (or those who ultimately control or lead legislation) in the real world.”<sup>75</sup> His selection of prime ministers or presidents from Hungary, Turkey, the Philippines, Poland, Israel, and the United States is animated by his theme of “the real messy world of populism, democratic erosion and rise of executive power.”<sup>76</sup> This theme, and especially its focus on populism, is taken up in near all of the contributions. Garlicki suggests that “recent advances of populism ... seem to

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<sup>69</sup> LEGISLATED RIGHTS, *supra* note 1, at 9 (emphasis in original).

<sup>70</sup> *Id.* at 4 (emphasis in original).

<sup>71</sup> *Id.* at 15 (emphasis in original).

<sup>72</sup> Ekins & Webber, *Legislated Rights in the Anglo-American Tradition*, *supra* note 30, at 136.

<sup>73</sup> Robert Lowry Clinton, *Legislative Authority and Judicial Power: A Review of Legislated Rights: Securing Human Rights Through Legislation*, 10 FAULKNER L. REV. 29, 48 (2018).

<sup>74</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>75</sup> Roznai, *supra* note 39, at [pages cited].

<sup>76</sup> *Id.* at [pages cited].

infect elections and parliaments more easily than the courts.”<sup>77</sup> Kelly argues that “political populism,” especially with respect to penal policy, is an “undeniable challenge to the central thesis of *Legislated Rights* that reasoned debate is what provides legislatures the capacity to protect human rights.”<sup>78</sup> Bar-Siman-Tov expresses “serious doubts as to whether legislatures overtaken by populism and nationalism and strong illiberal sentiments could be assumed to be the proper institutions to promote and specify rights.”<sup>79</sup> Roznai suggests that our “somewhat enthusiastic reflection[s]” should be tempered by “the global trend of populism,” which should lead us all to question “whether we will want to trust the legislatures to secure rights.”<sup>80</sup>

Those who corrupt the legislative process, legislate otherwise than for the common good, and abuse the good of legislation to violate human rights will find no friends among defenders of the central case of legislation and the legislature. Yet, we recoil from conclusions that such corruptions speak against the arguments in *Legislated Rights*. Our arguments contain no reforming agenda for the separation of powers in a given country at a given time, except as a side-effect of a successful shift in some key premises of debate. Each of the cases identified by Roznai is different from the next, and any appropriate reform agenda would need to be tailored to the specific conditions in each country. And we would be cautious about using “populism”—a term without a fixed definition—as providing a definitive guide for setting such an agenda. In the mid-1930s, U.S. President Franklin Roosevelt famously proposed adding members to the U.S. Supreme Court who would vote to uphold New Deal legislation and other popular laws that the *Lochner* era Supreme Court was routinely ruling unconstitutional. Roosevelt defied convention to run for an unprecedented four terms, and he ordered the wide-scale detainment of Japanese residents in internment camps. Yet it would be too simplistic to dismiss his court-packing plan as “populist” or Roosevelt himself as a xenophobe, even though many of his decisions are rightly subject to strong criticism. Lastly, we note that Roznai’s list singles out the leaders of six nations and wonder what this implies for the wider world. Does it suggest that most countries have resisted undesirable forms of populism? If so, then why are the rest not considered to be the *real* “real world” and the others to be outliers?

Our focus in *Legislated Rights* is, on the whole, the central case of the legislature. In the final chapter, we confront the challenge of responding to a non-central legislature by asking whether, “given the potential pathologies of legislatures and legislation, judicial review of legislation under a bill of rights is a sound addition in a community’s commitment to human rights.”<sup>81</sup> The conclusion of the chapter is to warn against thinking that there is “an overall balance sheet of competing risks that can be drawn up so as conclusively to make the case for or against judicial review of legislation.”<sup>82</sup> Instead, we argue that the assessments and evaluations “can only be carried out within particular political communities, by those with a deep knowledge of those communities, their people, and their institutions.”<sup>83</sup> We are, in this respect,

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<sup>77</sup> Lech Garlicki, *On Specification and Entrenchment of Fundamental Rights (Discussion of Legislated Rights)*, [vol. no.] JERUS. REV. LEG. STUD., [first page], [pages cited] (2020) [Garlicki].

<sup>78</sup> Kelly, *supra* note 8, at [pages cited].

<sup>79</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>80</sup> Roznai, *supra* note 39, at [pages cited].

<sup>81</sup> LEGISLATED RIGHTS, *supra* note 1, at 24 and ch. 7.

<sup>82</sup> *Id.* at 182.

<sup>83</sup> *Id.* at 200.

in ready agreement with Jackson when she says that “neither courts nor legislatures ex ante and in general will always be the best place for the sensible protection of rights in a democracy.”<sup>84</sup>

No community, we say in *Legislated Rights*, can secure human rights absent a legislature. We argue that law is needed to realize and to specify rights and that “human rights are most effectively secured ... by the painstaking, everyday work of legislatures.”<sup>85</sup> Our central case analysis of the legislature helps to show two broad categories of ways in which the legislature can be non-central. It can be non-central, first, in acting not for common good but for private or partisan or other unwelcome ends. This is the risk and harm identified by Roznai, Garlicki, Kelly, and Bar-Siman-Tov. But more than this, the legislature can be non-central in a second, often overlooked way: by failing to fulfil its role and responsibility to legislate to secure human rights. Where legislatures are corrupted, they will wrong their community by legislative action *and* they will wrong their community by legislative inaction. In this respect, we think it better to say not that populism may give one reason to be “more critical of legislatures when it comes to securing rights” than we are in *Legislated Rights*,<sup>86</sup> but rather that the arguments in *Legislated Rights* allow one to be even *more* critical of legislatures because they provide a standard for criticism of the legislature for failing to be what a good legislature ought to be.

Are there more general lessons to be drawn from the rise of populism? Might we, with Bar-Siman-Tov, allow ourselves to rethink “normative arguments on what legislatures ought to do and what [they could] realistically be expected to do” if “empirical work reveals a large gap between the central case and empirical reality?”<sup>87</sup> We think not. As reviewed in section III, central case analysis proceeds on the strength of the good, complete, and true *reasons* for legislating. No part of it assumes away the reality of legislative wrongdoing. Bar-Siman-Tov’s thought that “empirical work” may reveal “a large gap between the central case and empirical reality” may well depend on the scope of one’s empirical work. Yet, no matter the scope and no matter the gap, we think that Bar-Siman-Tov better assesses central case analysis when he says that it survives any gap by providing a “benchmark for assessing deviations from the central case” and for criticizing them.<sup>88</sup> So, with ready agreement with Jackson’s claim report that “no one argues that legislatures are not sometimes subject to pathologies,”<sup>89</sup> we say that the rise of populism, either within specific legislative areas or generally within the political realm of a given community, does not deny the lessons of the central case and invites no rethinking of the normative arguments.

## VI. The good legislator

Jackson is right to highlight that the treatment of judges and judicial decisions in law schools differs in important respects from the treatment of legislators and legislation. Whereas the former are studied by reference to “an internal perspective,” “little comparable effort is given to the internal perspectives of legislators.”<sup>90</sup>

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<sup>84</sup> Jackson, *supra* note 7, at [pages cited].

<sup>85</sup> *Id.* at 116.

<sup>86</sup> Roznai, *supra* note 39, at [pages cited].

<sup>87</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>88</sup> *Id.* at [pages cited].

<sup>89</sup> Jackson, *supra* note 7, at [pages cited].

<sup>90</sup> *Id.* at [pages cited].

Instead, legislators are “sometimes assumed to be cynical and to care only for maintaining their own elected position.”<sup>91</sup> Such an assumption is contrary to her assessment that “many who run for public office do so not because they want to hold a position but because they are motivated by a conception of the public good, which they believe they can promote if elected.”<sup>92</sup> We agree.

Jackson’s report that the widespread expectation that legislators are “narrowly self-interested” may well “have impacts on how the job is performed” and “may contribute to a downward spiral of cynical and self-interested behavior in the legislature.”<sup>93</sup> She calls for “an enriched normative understanding of the obligations of a good legislator in a constitutional democracy,” one that is a “pro-constitutional legislator” fully seized of the “multiple and conflicting obligations of accountability” that fall to a legislator.<sup>94</sup> These range from obligations to constituents, to the public interest, to the legislative institution, to the political formation, and to supporters generally. A clear-eyed view of the many pushes-and-pulls that play on the good legislator will help inform a normative standard that denies the cynicism of prevailing accounts, but that does not go so far as to set a standard so unrealistic that a legislator will be “demonized” for “responding reasonably to competing normative demands.”<sup>95</sup> We agree.

Our agreement here is not in tension with the primacy we award in *Legislated Rights* to the common good as the organizing point of the good legislator’s activity. We explain that, when “one deliberates about the common good, one should be aiming to pick out worthwhile states of affairs, realised in the lives of individual members of the community and in their interaction as members of one community.”<sup>96</sup> A legislator’s constituents, colleagues in the legislature, colleagues within the political formation, and supporters at large will all take a view on what the common good requires. A legislator will be alive to the range of differing opinions on the common good and what is required to secure it and what is inimical to it. A legislator’s accountability to the range of different participants and actors is never to be realized by abdicating the legislator’s own judgement to that of others; to do so is to abandon one’s accountability to others. The good legislator—the central case of the legislator—is always the case of what Hart called the “conscientious legislator:” one who deliberates on the basis of “beliefs and values” and a “sense of what is best” in law-making decisions.<sup>97</sup>

Now, there are reasons to doubt that the legislators of the real world, all and always, act as would the conscientious legislator. As we say in *Legislated Rights*, some elected politicians act with “irresponsibility, self-interest, malfeasance, partisanship – or indeed simple incompetence.”<sup>98</sup> Beyond these instances of non-central legislative activity, Roznai, Kelly, Bar-Siman-Tov, and Jackson add others, including executive dominance over the legislative process, the pull of party and coalition discipline, the prevalence of non-rights based legislative discourses, and legislative compromise.

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<sup>91</sup> *Id.* at [pages cited]

<sup>92</sup> *Id.* at [pages cited]

<sup>93</sup> *Id.* at [pages cited]

<sup>94</sup> *Id.* at [pages cited]

<sup>95</sup> *Id.* at [pages cited]

<sup>96</sup> LEGISLATED RIGHTS, *supra* note 1, at 103.

<sup>97</sup> HART, THE CONCEPT OF LAW, *supra* note 23, at 273 and 275, cited in LEGISLATED RIGHTS, *supra* note 1, at 8 n. 20.

<sup>98</sup> LEGISLATED RIGHTS, *id.* at 14. See also 9 and 14–15.

Our reply to these instances could be limited to saying that add to the list of “ways in which legislatures and individual legislators can deviate from the central case.”<sup>99</sup> Yet, we say more, for not all of these instances are instances of non-central legislating.

Consider first the concern expressed by Kelly that, at least as pertains to legislatures based on the Westminster model, “the legislative agenda is dominated by government bills, and not private members bills,” such that there is “executive dominance of the legislative process and timetable” and therefore a need to draw a distinction between “categories of representatives, between executive and non-executive members.”<sup>100</sup> A central case of the “conscientious legislator” may appear to favour a legislative assembly of independent members, with no one member or set of members having any priority over any other. Yet, the same reasons to legislate that ground our central case of the legislature also ground “a certain kind of institution.”<sup>101</sup> That institution, to function well in carrying out the task assigned to it, may require that “a subset of legislators, especially party leaders, the mover of the bill, and committee leaders, enjoy unequal control over the shape and content of the proposal.”<sup>102</sup> Such unequal control over proposals is set against equality in decision-making for all members, such that no one member has more votes than any other. The reason to favour unequal control against a background of equal voting is that it “helps make it possible for rational plans to be formed notwithstanding the possibly conflicting intentions of the many legislators.”<sup>103</sup> The subset of legislators with unequal control over the shape and content of proposals may be the government in Westminster-style legislatures, but that is not to say that it is the government that has such legislative control. Though the distinction may be a fine one, it is the *legislative members who serve as government members* that exercise the unequal control. As Bagehot observed, the cabinet is the “greatest” of the many committees in Parliament, and legislators choose those in whom they have the most confidence for this committee.<sup>104</sup> Though the choice is indirect rather than direct, Members of Parliament are, in the final analysis, omnipotent over those indirect means. The distinction between government member and legislator is clear in a presidential system like the American, where the President and other members of the executive are not members of Congress and do not exercise any direct control over the legislative process.<sup>105</sup> As we say in *Legislated Rights*, “the division of legislators into political parties and the creation of legislative offices help the many legislators deliberate and decide together, helping order and coordinate their joint action.”<sup>106</sup> We therefore resist the thought that associates unequal control over the legislative process to a subset of legislators with a non-central case of a legislature. Indeed, such division, unless carried to extremes, is an intelligible means to realize good law-making.<sup>107</sup>

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<sup>99</sup> *Id.* at 9.

<sup>100</sup> Kelly, *supra* note 8, at [pages cited].

<sup>101</sup> LEGISLATED RIGHTS, *supra* note 1, at 92.

<sup>102</sup> *Id.* at 97.

<sup>103</sup> *Id.* at 97.

<sup>104</sup> WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* ch. 1 (New York: Oxford University Press 2001).

<sup>105</sup> See Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). An exception relates to the Vice President, who is assigned the role of president of the Senate under the U.S. CONSTITUTION, Art. 1, sec. 3, cl. 4.

<sup>106</sup> LEGISLATED RIGHTS, *supra* note 1, at 98.

<sup>107</sup> See Grégoire Webber, *Loyal Opposition and the Political Constitution*, 37 OXFORD JOURNAL OF LEGAL STUDIES 357 (2017); and Grégoire Webber, *Opposition*, in *THE CAMBRIDGE HANDBOOK OF*

The first concern is closely related to a second on the pull of party and coalition discipline. Roznai asks: “How can one discuss legislators as protectors of rights when they are bound by the coalition’s will?”<sup>108</sup> Kelly contrasts the view of “parliamentarians as private members that freely engage in reasoned debates” with what is, “in fact,” the reality that parliamentarians are “members of disciplined parliamentary caucuses where unity is prioritized over legislative disagreements.”<sup>109</sup> Bar-Siman-Tov also compares the ideal of an individual legislator’s “independent, principled, reasoned decision-making” with “the prevalence of strict party-discipline.”<sup>110</sup> We agree that a legislator who suspends judgement to the party whip and abandons conscience to the hope or promise of a front bench appointment is no true legislator. Adhering to the party line for the reasons of party only betrays the reasons why the legislature is instituted and maintained. In these respects, party and coalition discipline may contribute to non-central cases of legislative activity. However, party and coalition discipline is not contrary to the central case of legislative activity in every respect. Party formations are broadly organized around competing conceptions of the common good, some of which are radically unreasonable, but many of which fall within the range of the reasonable. Party lines can be developed further to internal party discussion, where dissenting members may assent to the party majority’s understanding of what the common good requires on a proposal in the same spirit that a dissenting member of the legislature will assent to the enacted legislation as what now governs all. Here, again, when carried to an extreme, the pull of party and coalition discipline is inimical to the central case of the legislature but, within reason, such pull is consistent with our central case. Moreover, despite their potential for flaws, political parties are, for many citizens, the only effective means to participate in the democratic governance. The discipline that holds party members to commitments in election manifestoes, for example, enables citizens to anticipate the result of their vote.

A third concern relates to the discourse within the legislative assembly. Kelly queries whether “a human rights discourse trump[s] all other policy discourses within the legislative assembly,” especially when those other “more dominant policy discourses” are more firmly “entrenched.”<sup>111</sup> On a related note, Bar-Siman-Tov queries whether we adopt too broad of a conception of human rights, such that it encompasses “mundane” matters. We would resist any firm demarcation between rights and policy discourses or between important and lesser rights. Our argument is that “human rights law is not primarily a *specialised* branch of legal learning but is rather the object of *every* branch of legal learning.”<sup>112</sup> We give, as an example, how the realization and specification in positive law of the human right to life and wellbeing “confronts great complexity,” including with respect to:

requiring testing and approval for new drugs; regulating the medical profession; categorising medication as available “over-the-counter” or only by prescription; licensing commercial food preparation and imposing hygienic standards; mandating disclosure of contents of food products, nutritional information, and negative health

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CONSTITUTIONAL THEORY (Richard Bellamy and Jeff King eds., Cambridge: Cambridge University Press forthcoming).

<sup>108</sup> Roznai, *supra* note 39, at [pages cited].

<sup>109</sup> Kelly, *supra* note 8, at [pages cited].

<sup>110</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>111</sup> Kelly, *supra* note 8, at [pages cited].

<sup>112</sup> LEGISLATED RIGHTS, *supra* note 1, at 16 (emphasis in original).



effects; authorising and funding various educational programmes on healthy lifestyles and vaccination; and in some jurisdictions by directly providing medical care or insurance through public funds.<sup>113</sup>

To these illustrations we add “laws on pollution and clean air and water, and in establishing public works like sewer systems and waste removal.”<sup>114</sup> By some standards, these are matters of “policy” and debate over them within the legislative assembly will fit comfortably within “entrenched policy discourses.” However, if it is accepted that detailed positive law is necessary for realizing human rights, then there need be no firm contrast between policy and rights discourses. As we argue in *Legislated Rights*, “[r]easoning about human rights should generally take the form of determining what specific standards and rules are required to secure rights, and it should centrally include deliberation about how such standards and rules should be expressed in the community’s positive law.”<sup>115</sup> The detailed discussion of the Spanish System for Autonomy and Attention to Dependence in *Legislated Rights* begins with the *principle* “protect wellbeing” and, by a progressive specification of *policy* choices, concludes with the specified right that qualified persons have a right to home care assistance between 8:30 and 9:30am each day of the week.<sup>116</sup>

Such reasoning about policy to specify rights in positive law is not, to be sure, about the aggregation of preferences. As Jackson correctly notes, we deny that any “organ in society [should] pursue some aggregative or collective notion of the public good.”<sup>117</sup> Relatedly, we deny that a legislator’s desire to “be re-elected” counts as a “reason’ for a vote”.<sup>118</sup> While we agree with Jackson that “democracies want legislators to take account of their re-election prospects” for reasons of “electoral accountability,”<sup>119</sup> we deny that reasonable legislating includes “the transmission of popular preferences.”<sup>120</sup> Ours is not the view of representation that would require “the set of judgments and preferences of legislators to reflect in direct proportion the set of judgments or preferences of the voters.”<sup>121</sup> Of course, in a democratic system, the legislative assembly “will likely include persons who share and reflect the range of different, credible political groups and views salient in the community” and so will be broadly representative of views beyond the debating chamber.<sup>122</sup> But the first responsibility of any legislator is to legislate well. That responsibility is facilitated by a legislative process that invites outside opinion to inform the work of the legislature, including expert opinion heard in committee study of a legislative proposal. Such a process also facilitates broad debate on the principle and then details of a proposal, and provides opportunity for amendment. All of this would be superfluous if the good legislator was no more than a transmitter belt for preferences formulated with or without considered opinion.

Can a legislator legislate well by compromising with other legislators? That is a fourth concern. Jackson notes that agreement between legislators “based on

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<sup>113</sup> *Id.* at 16-17.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Id.* at 13.

<sup>116</sup> *Id.* at 76.

<sup>117</sup> Jackson, *supra* note 7, at [pages cited].

<sup>118</sup> *Id.* at [pages cited].

<sup>119</sup> *Id.* at [pages cited].

<sup>120</sup> LEGISLATED RIGHTS, *supra* note 1, at 109.

<sup>121</sup> *Id.* at 109.

<sup>122</sup> *Id.* at 109.

principled debate and considerations may not occur,” whereas “[w]hat does occur in many instances are compromises – within or across parties, to provide some or part of what different groups, believing in different principles or goals, want.”<sup>123</sup> She reasons, rightly in our view, that “[s]ometimes having some action taken towards a goal, even if not the ideal, is better than inaction,” but queries whether such compromises “fulfil the authors’ central case.”<sup>124</sup> Along similar lines, Bar-Siman-Tov agrees that “a deliberative and reasoned process” is normatively attractive, but recommends adopting “bargaining, compromises and political and electoral considerations ... as a legitimate part of law-making.”<sup>125</sup> With a qualification, we agree with Jackson and Bar-Siman-Tov that compromises are an important part of reasonable law-making and that such compromises are part of the central case of legislating and are, so far forth, “legitimate.” As we say in *Legislated Rights*, “compromise is an important part of legislative craft and prudent politics,” in part because the common good is served by making “reasoned provision for what is to be done by articulating a plan that is capable of being supported by a wide range of legislators and citizens notwithstanding their many disagreements.”<sup>126</sup>

The qualification is this: the compromise should be a “compromise about which scheme of justice to adopt rather than a compromised scheme of justice.”<sup>127</sup> The compromises envisaged in *Legislated Rights* as part of the central case of legislating are those that “involve principle” and are not “divorced from reason”: we say that the “legislature often – rightly – chooses a principled, reasoned compromise.”<sup>128</sup> Some compromises fail to be principled and reasoned precisely because they fail as proposals: no sound legislator would propose such schemes. So the good legislator may compromise with others, voting for proposal B rather than A, knowing that others would have also voted for a proposal other than B, but also knowing that no one proposal other than B would secure ready or continued agreement.

Bar-Siman-Tov raises a fifth concern, namely whether our central case of the good legislator allows for a different order of compromise, namely between “a deliberative and reasoned legislative process” and “the outcome-related goal of enacting human rights legislation.”<sup>129</sup> Bar-Siman-Tov asks: “do we favor a legislature because this institution will promote rights ... or because this is a deliberative institution?” In other words, which “justification for the existence of legislatures is more important?”<sup>130</sup> The central case of a legislature is one in which there is reasoned debate on the merits of a proposal, which is enacted to promote the common good, one aspect of which are the rights of each member of the community. In one way, a sound deliberative process is instrumental to securing sound legislative proposals and, so, the good legislator may well assent to a truncated, yet adequate, process where circumstances warrant the enactment of legislation for common good. But there are also many inherent goods in a deliberative legislative process, including the appeal to reason rather than sheer voting power in justifying the enactment of a proposal and the manifestation of a legislator’s representation of electors’ participation in self-government in the law-making process. So we resist too ready a

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<sup>123</sup> Jackson, *supra* note 7, at [pages cited].

<sup>124</sup> *Id.* at [pages cited].

<sup>125</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>126</sup> *LEGISLATED RIGHTS*, *supra* note 1, at 90 n. 23. See also 101 and 178-179.

<sup>127</sup> RONALD DWORKIN, *LAW’S EMPIRE* 179 (Cambridge, Mass: Belknap Press 1986).

<sup>128</sup> *LEGISLATED RIGHTS*, *supra* note 1, at 101.

<sup>129</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>130</sup> *Id.* at [pages cited].

ranking of process and outcome. A sound process with an unsound outcome is a non-central case of legislating, as is an unsound process with a sound outcome.<sup>131</sup> The central case involves both a sound process and a sound outcome.

## VII. Specific rights and general welfare

Is it correct to understand legislation as implementing or specifying human rights? Are there dangers in taking such a view? These questions are raised by Jackson, Garlicki, and Bar-Siman-Tov. Both Jackson and Bar-Siman-Tov see some merit in what we call the received approach to human rights, the two-stage process in which a court first declares that a law or other measure has interfered with a right and then proceeds to determine whether such interference is justified. We contend that this method has the effect of robbing the concept of a right of its potency, indeed of its tie to justice. The grammar of rights, traditionally grounded in claims about what is just in regard to relationships between individuals, is displaced by language of weighing and proportionality, and every claim of right is liable to be outweighed by a competing claim about the general welfare.

Jackson characterizes our argument as contending that the received approach “tends to devalue or overlook the interest of the entire community in advancing what is right and just overall.”<sup>132</sup> She replies that “the question of justification is a capacious one, in which the rights of third parties, and the collective interests of society are considered.”<sup>133</sup> Our argument, however, is not that the interest of the entire community is undervalued but that it is conceived in aggregative terms in the received approach. When a “right” is weighed against a general “state interest,” a concrete individual benefit is set against something amorphous, and the intelligible good at stake is hard to grasp. Consider whether an individual who tests positive for a dangerous, infectious disease can be quarantined for 14 days after crossing a border. Any attempt to weigh the interference with his right to liberty against the general welfare will misfire unless it is understood that the quarantine law aims to protect the right to health possessed individually by many people. Jackson indeed grasps the nature of this problem when she observes that while some rights have their complete expression or fulfillment in individual actions, such as the liberty right to go for a bike ride, other putatively individual rights have their complete fulfillment as part of a collective action, such as voting. The act of voting would indeed be misunderstood if considered in isolation. Viewing it thus, some economists have suggested that voting may not be a rational action because the likelihood of an individual’s vote affecting outcome of an election is so small that is not worth the time and effort. The right to vote is best understood not in this atomized way but as an individual right exercised in concert with other members of a community.

Jackson agrees with us that some of the “more extreme claims for what is included in the *prima facie* definition of a right should be rejected,” adding:

To say that one has a “right” to commit murder, subject to justified prohibitions, could trivialize the idea of a right; it may detract from the normative and rhetorical force of a “right” as something which, at least presumptively, one is entitled to do or refrain from doing. Thus, proportionality analysis should include, as it does in some

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<sup>131</sup> See JEREMY WALDRON, *PARLIAMENTARY RECKLESSNESS: WHY WE NEED TO LEGISLATE MORE CAREFULLY* (Auckland: Maxim Institute 2008).

<sup>132</sup> Jackson, *supra* note 7, at [pages cited].

<sup>133</sup> *Id.* at [pages cited].

jurisdictions, as a meaningful first step whether the action sought to be protected from government regulation is within the scope of the right claimed.<sup>134</sup>

But why stop there? Why not specify the scope of the right all the way, so that it is a constituent part of the common good rather than opposed to it? That is the argument we pursue in *Legislated Rights*. In defending it, we resist the practice of most courts that apply a very light touch at the first stage. They may do this because they share an underlying concern of Kai Möller: that to scrutinize the value of a claimed right too closely would run the danger of imposing a paternalistic approach rather than embracing the liberal, autonomy-promoting nature of rights.<sup>135</sup> At any rate, it is common for a claim of right to pass muster at the first stage but wholly fail at the second.<sup>136</sup> Yet, we argue that if a court ultimately concludes that it is justified to interfere with or infringe the right to X, then it seems there was no good reason to think that there was a right to X in the first place.

Bar-Siman-Tov is concerned that something valuable would be missing in the absence of the received approach to human rights law. While our view “could be beneficial for promoting the dignity of legislation (and legislatures),” he maintains that it could be “potentially dangerous” with regard to protecting and promoting rights, and may lead to “legitimizing rights infringements.”<sup>137</sup> He gives the example of antiterrorism legislation and laws advanced for the sake of national security:

The problem, of course, is that under such reconceptualization, there’s a greater risk of overly legitimizing infringements of rights, because the balancing is no longer between the infringed rights and a state interest, but merely an exercise in drawing the content and scope of these rights, often vis-à-vis other, more important rights (such as the right to life). ... I am certainly not saying that this is what the authors do or intend. I am arguing, rather, that their line of argument could be manipulated in such a manner.<sup>138</sup>

Indeed we do think that counterterrorism and national security laws should, in line with our argument above, be conceived of as protecting the right to life of many individuals rather than as securing a “state interest.” This is not only an accurate picture of the situation that flows from an appropriate conception of the nature of rights, it is the only way to understand the real human interests at stake. When terrorists bomb a theatre or subway, they do not attack the state interest: they violate the right to life of a child, a father, a mother, and the rights of every individual who loved them and planned to spend a lifetime enjoying that love. This is why the UK Parliament’s Joint Committee on Human Rights has stressed that the right to life in Article 2 of the European Convention of Human Rights imposes a “positive obligation on states to take appropriate steps to safeguard the lives of those within its jurisdiction.”<sup>139</sup> This includes a duty “to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against

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<sup>134</sup> *Id.* at [pages cited].

<sup>135</sup> See KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (Oxford: Oxford University Press 2012).

<sup>136</sup> Some such examples are reviewed in *LEGISLATED RIGHTS*, *supra* note 1, at ch 2.

<sup>137</sup> Bar-Siman-Tov, *supra* note 53, at [pages cited].

<sup>138</sup> *Id.* at [pages cited].

<sup>139</sup> 27th Report of 2005/06, *LEGISLATIVE SCRUTINY: CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL*, HL 246/HC 1625.

the person,” which should be backed up by effective law enforcement.<sup>140</sup> During his chairmanship of the committee, Andrew Dismore stated that all ten of the Joint Committee’s reports on counter-terrorism policy in the 2007–08 Parliament “start from the same basic premise in human rights law: the state’s positive obligation to protect us all from terrorism and violence, and the state’s duty to prosecute those who are guilty and to make that prosecution more effective.”<sup>141</sup>

## IX. Constitutional rights and judicial review

*Legislated Rights* does not argue that legislation should be protected against judicial review of legislation. We think that the decision whether to set up (or retain) a system of judicial review of legislation—and how any such system should be structured—is a question that requires careful deliberation by constitutional framers in light of local situations. There is no one-size-fits-all solution. We think it is often the case in well-functioning democracies that a strong system of judicial review of legislation is not necessary to protect human rights. But we do not make that argument in the book; we do not analyze many considerations that would be a necessary part of such a decision.

We disagree with a number of Garlicki’s claims that presume that entrenchment of constitutional rights and judicial enforcement thereof are simply part of the conceptual fabric of a modern legal system. He writes: “Legislatures, *by definition*, cannot act on constitutional level.”<sup>142</sup> And: “Once, it has been accepted that national constitutions must be regarded as the supreme law of the land ... it becomes clear that legislative decisions must be subjected to some form of external scrutiny.”<sup>143</sup> Finally: “As, in principle, the courts act as guardians of the supremacy of the ‘higher law,’ no discussion on legislative implementation of rights can leave that aspect aside.”<sup>144</sup> Although Garlicki assumes that these are conceptual or necessary truths about the relationship between legislatures, the constitution as supreme law, and bills of rights, the truth is that it was only in the post-World War II era that this kind of constitutional arrangement became the norm and even now some countries depart from it. In the United Kingdom, New Zealand, and, Australia, courts have no power to nullify legislation for compliance with constitutional rights. The UK and New Zealand have statute-based bills of rights that can be relied on in the judicial interpretation of rights but do not set up courts as the final guardians of rights.<sup>145</sup> Australia has a form of strong judicial review, but no federal bill of rights. In these countries and many others there are ongoing debates about the proper reach of judicial power over rights—debates to which *Legislated Rights* aims to contribute. These debates cannot, we say, be circumvented through *a priori* claims about the nature of constitutional law and human rights.

Kelly disagrees with our portrayal of the historical record of courts: “I question whether courts necessarily undermine rights in the contemporary era, which is an argument that runs through several of the chapters, particularly the discussion of

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<sup>140</sup> *Id.* at 7 (citing *LCB v. UK*, 27 EHRR 212, 36 (1998); *Paul and Audrey Edwards v. UK*, 35 EHRR 19 (2002)).

<sup>141</sup> Statement of Andrew Dismore, 1 April 2008.

<sup>142</sup> Garlicki, *supra* note 77, at [pages cited] (emphasis added). We note that insofar as the claim turns on a distinction between constituent and constituted authorities, it must also exclude courts.

<sup>143</sup> *Id.* at [pages cited].

<sup>144</sup> *Id.* at [pages cited].

<sup>145</sup> Human Rights Act 1998 (U.K.); New Zealand Bill of Rights Act 1990 (N.Z.).

the human-rights denying jurisprudence of the segregationist era in the United States.”<sup>146</sup> He further contends that we overlook progress courts have made in protecting rights in the modern era. We did not, however, aim at any overall assessment of the historical or modern record of courts across the range of issues considered in his defense of courts. The main purpose of our discussion of the history of legislative and judicial treatment of racial equality in the United States and United Kingdom is to argue that *neither legislatures nor courts* necessarily undermine rights. Nowhere do we argue that courts necessarily undermine rights. In our survey, both institutions made major errors at times and both helped to promote racial equality at other times. We conclude that on balance legislatures did more in that regard on this issue, but none of the correct decisions or mistakes were the result of any kind of necessity imposed by the nature of the institution. We selected the issue of racial equality because it is frequently given as an example to demonstrate the need for judicial review, usually with a background assumption that legislatures are inherently biased against minority rights. This is an example of a pervasive premise in debates about judicial review that needs to be re-calibrated.

Jackson writes that “[o]n some issues, legislatures may well be expected to be good decisionmakers on the concrete ways in which rights should be protected,” such as when the rights at issue affect everyone similarly (rather than particular groups being singled out on basis of income or social status) and “where suffrage is widely shared and exercised.”<sup>147</sup> However, “with respect to other rights, which are most likely to need to be asserted by persons who are viewed as ‘outsiders,’ or as ‘unmeritorious,’ there are grave risks in having legislatures declared, *ex ante*, as *their only protector*.”<sup>148</sup> We agree. The historical survey of racial equality does provide strong evidence of the capacity of legislatures to protect outsiders, since this is the classic case of a minority that has been marginalized away from political power. But our book does not argue that legislatures should, as a matter of general constitutional theory, be their only protector. To repeat, that is a decision that must be tailored to historical circumstances and local conditions.

## X. Conclusion

Legislators are not the only protectors of human rights but they have, through the centuries, had a central and strategic role in securing rights. In *Legislated Rights*, we have aimed to rehabilitate this understanding of the legislature and to recalibrate premises used in debates over judicial review of legislation. Legislatures do not operate in a vacuum. A legislated right can only finally be secured when courts stand ready to enforce it and to perform this task with all the prudence it requires. We do not rule out the need for courts to have a further supervisory role with regard to certain rights, when that is justified at a given time and under a given set of circumstances. We hope that our arguments contribute to determining how constitutional framers can appropriately allocate power between institutions in pursuit of the overall aim of protecting and promoting human rights.

We have drafted this reply during the extraordinary crisis of the coronavirus pandemic. Every government and legislature in the world has been compelled to respond to this crisis, and many have adopted unprecedented measures resulting in

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<sup>146</sup> Kelly, *supra* note 8, at [pages cited].

<sup>147</sup> Jackson, *supra* note 7, at [pages cited].

<sup>148</sup> *Id.* at [pages cited] (emphasis added).

severe curtailment of liberties such as freedom of movement, the right to work, and the right to attend religious services—even, in some cases, the right to leave one’s home and walk in a neighbourhood or park. In many cases, legislation has been adopted on an accelerated timetable leaving little time for parliamentary scrutiny and deliberation. While the immediacy of the crisis may have justified this, it is rather easy to see—no matter how sceptical one might be of legislatures in general—that such process of law-making courts danger in the absence of representatives with time to probe the justification and evidentiary base for law and to question governmental proposals. Time will tell whether certain legislative decisions were a justified response to the crisis. There are now numerous court challenges under way to some of these laws, with some already successful, including a decision on 18 May 2020 by the French Conseil d’État ruling that edicts prohibiting religious services violated the right to religious liberty and must be revised.<sup>149</sup>

Who is best placed to make grave decisions about rights in order to preserve the life and health of thousands and millions at danger from a virus? Who should decide the question of proportionality when the unimaginably high stakes include (among many other things) the threat of unemployment for millions on the one hand, and the possibility of death for tens of thousands on the other? Our answer is that theory alone cannot answer that question, but it can identify the unique capacities that legislatures have to combat a problem such as the one the real world now faces.

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<sup>149</sup> Conseil d’État (France), 18 May 2020, *Rassemblements dans les lieux de culte* (Ordonnances n°s 440361, 440511).