Legislative Rationality in a Digital World

Issa Luna Pla and Khemvirg Puente*

Abstract

This article addresses the philosophical question on parliamentary transparency and accountability from the liberal notion of openness and communication in a digital world. It is argued that this thinking inspired many legal reforms and policies that remain far from the legislative rationality in congresses. While the liberal ideas uphold the need for open parliaments, based on arguments on integrity and interest, postmodern studies have prove that other elements such as information technology determine the results on transparency and accountability. This paper is part of a project that will analyze new variables of the transparency index to test this argument and analyze sub-national congresses in Mexico to assess the level of transparency of the legislative rationality based on the technology they use.

Introduction

The idea of openess and transparency are intrinsic to congresses. The moment a representation model was conceived, a communication bridge was needed to be draw between representatives and those represented in parliament. Either as a communication theory, an open meetings rule, an accountability system, or the publishing of congress debates and results, congresses around the world establish some sort of formula to reach the people. But this effort was never aimless to the process of legislating.

In the liberal tradition, the legislative work of representatives is to be legitimized by the press, and to be known and accountable by their constituency. But in order to legitimize a piece of legislation, to educate the population and to provide means for a congress to be accountable, it’s necessary the adoption of rules of openness, transparency and accountability. We believe that all this rules and mechanisms act upon the legislative rationality according to the congressional system practices and the use of technology.

The concept of legislative rationality has been defined in many ways in social sciences. Because the goal of this paper is not to define the concept, we rather use an operative idea that allows us to analyze openess and transparency roles within. By legislative rationality we understand the steps of the legislative process within the congress that has for an outcome the enactment of a law. It comprises a deliberative process and the arriving to general consent, by the means of argumentation and persuasion. Although the publicity of the law resulting from the legislative process comes afterwards, we consider it crucial for the process. Therefore we include it together with the stages that come before, in our idea of legislative rationality.

* Dr. Issa Luna Pla is Professor Researcher at the Legal Research Institute at the National Autonomous University of Mexico, UNAM. Dr. Khemvirg Puente is Professor at the Social and Political Science Faculty at the National Autonomous University of Mexico, UNAM.
In this paper we discuss that the way contemporary parliaments legislate in a digital world, has made the legislative rationality more open to the social participation. Although the technology use effects upon the legislation are uncertain, these can be meaningful to the rational process, by determining the votes and the credibility of the law among social groups and the government capacity for its enactment. We arrive to such conclusions by analyzing how technology use affects the legislative rationality, which didn’t happen in the past. Then we review some examples of technology use that have an impact in the deliberation process and we identify variables that can influence the process.

The way openness in deliberate process was understood

In liberal democracies, openness consisted on the people’s interest in knowing about their representatives through flowing communication between representatives and citizens. It was also understood as an interest in public opinion, expressed by the press, which since the sixteenth century has been important to legislatures due to its well-known legitimating force for political decisions. As a result, although legislators did not necessarily have an established legal obligation to fulfill this interest, informing their constituents of their acts was taken into account as a duty of legislators’ integrity (Pole, 1983).

So openness is an issue of parliamentary integrity that gives positive results, since public opinion is an effective controlling force against corruption (Schmitt, 1988). Openness and public opinion are two forces of democratic control in parliamentary decision-making.

Since representatives’ discussion is central to liberal democracy, it is fundamental for State institutions to protect it. This implies that there is a system of checks and balances, of guaranteeing people’s human rights and of accountability in place. This system is to be set forth in a State’s constitution and the government system must be covered in its entirety.

Although the role of parliament in the State is understood within a system of checks and balances, the congress itself needs to have an internal balance in terms of administration and finances. The concept of internal control of powers is taken from Maurice Hauriou, bringing concepts of classical public administration and applying it not only to the executive branch, but also to the legislative. This is an early idea of good governance in the congress that affects all functions, such as the legislative process.

The premises of accountability and good governance in parliament ensure the dialectic of opinions and ideas, questioning the work of parliament and legislative commissions, scrutiny from the press and ultimately a show of approval by reelecting members of parliament (Kennedy, 1988). In this theoretical view, the better-informed citizens are and the better-prepared society is, the better truths will come from the result of public deliberation. Openness is here a way that qualitatively affects legislative work and moreover legitimizes its decisions.

According to Carl Schmitt, parliament is true as long as public discussion is held and implemented seriously. This discussion does not only entail negotiation. Discussion is understood as an exchange of opinions with the goal of persuading one’s opponent by means of arguments based on truth and justice, and to allow oneself to be persuaded of something that is true and just (Schmitt, 1988). This premise is based on Friedrich von Gentz’s idea that laws arise out of the conflict of opinions and not out of a struggle of interests. Moreover, shared
convictions, the willingness to be persuaded and independence of party discipline must also form part of discussion.

From Guizot’s rationalist parliamentary tradition, a theoretical concept of parliament was built on three characteristics: 1) that the powers be always driven by discussion and a joint search for the truth; 2) that the openness of political life place the powers under citizen control; and 3) that the freedom of the press allow citizens to search for the truth by themselves and make it known to the powers.

Liberal political thinkers arrived at the conclusion that committees and coalitions agreed upon behind closed doors and what the representatives of interest groups agreed upon in small committees, had more impact on the destiny of millions of people than any political decision did. Therefore, an open legislative process is crucial to fulfill the public interest.

**Ideas shaping the laws**

An open debate, deliberation and resulting legislation are the underlying principle that was entrenched in the congress transparency legislation subsequent. Actually, rules of accountability, transparency, openness and access to public information law are included in liberal democratic debates. Behind these rules, lays the idea that freedom of expression and freedom of information allow citizens to control the use of power and reach, based on public discussion, truth and justice.

Is no surprise then that parliamentary openness approach shares the *moral* bases of transparency posed by Kant and Bentham (Hood and Heald, 2006) situating opacity as something evil and openness as always something good. Hence, contemporary access to information and transparency legislation adopted around the world seek to enable social participation by opening the congress actions, whether they are administrative or legislative.

So this explains that congress resolved to publish their debates in gazettes, include in the laws a preamble of reasons for the need of new rules, disseminate the legislation pieces, and establish open meetings acts, to host citizens. Also, the representatives would reunite with third parties interested in the legislation issues to discuss the impact of laws. So also, legislative process became more open to lobbysts, community groups, advocacy organizations, and public opinion.

In modern legislation, the interest of the public became a fundamental right and the integrity of congress an obligation to open and provide information to seekers.

The impact that society’ groups has have in legislation is not contested in this article, but rather taken into account. But this influence is not static and uniform, so we learned in the digital world.

**Changing legislative rationality in an digital world**

Theoretically speaking, legislative rationality has changed constantly through the times and various scientific analyses. There are new rules of the relationship between representatives in
congress, and even an ethical reformulation for the legislators’ behavior. Given the importance taken by the interest groups, in some countries emerged rules to allow private financial support to political campaigns with a reflection in laws. The political parties have grow and their influence too. For instance, in Latin American party executive committees have the authority to establish party discipline within congress that establish sanctions and benefits to compel representatives to follow party lines (Carey, 2003).

The use of technologies has surely influenced many of those small-systems of communicative actions. But here we only pursue the question of the relationship between representatives and constituents.

It's known that information technologies and communications are tools that help build bridges to facilitate discussion and spread knowledge of the decisions and actions members of the legislative branch are considering (Castillo and Perina, 2009). But the effects of this more fluent and open conversation into the deliberative process and the outcome law is yet to be explored.

What is the expected outcome of technology in legislative rationality? Participation is one. If in the liberal theory the congress openness was mainly for the sake of having the press sharing opinions and multiplying the congress action; in the digital age the openness are expected to have not only the effects of knowledge, but also to allow more stakeholders in the deliberative process.

Discussion is not anymore the main power to drive decisions into laws. Interests groups, lobbyists, political parties, media pressure, civil society groups, and some times the affected communities, in an uncertain way, play a role in defining legislation.

More often it's seen that where the intention is to include opinions, then participation must be open in an intelligent manner, inviting experts and players involved to share informed opinions that shape the decision in a realistic way. So often, the openness of political life can place the powers under citizen control, but also in the control of other stakeholders as they diversify.

Free speech forms have changed as well. The press is no longer the most important source of information of the citizens in a digital world. Tweeter, news feds, TV, radio and social networks are ahead. But even then, all the media and tools are not solely used to search the truth, if one there is. The information citizens get these days reflects an array of opinions and sides of the legislated issues that hardly a common citizen would be able to follow up congress debates.

We also found out that the sole fact that congress opens information, and the press does its work, constituents would not be able to participate. Formal participation in congress raises another debate, but enough to say here is that mechanisms such as the right to citizens’ initiatives in congress, referendums, reelection and others have proved excluding formulas. And here is where technology tools become challenging. Accountability is at reach of many today.

So the technology openness can play a role to legitimize or delegitimize votes and laws; to include or exclude participation; to offer truths and wrongs in public opinion; to organize
groups to push for legislation in the publics’ interest, or in the business interest; to control representatives and to sustain perverse incentives.

Within the deliberative process, technologies impact the communication cost, time and members participating. But as Noveck points out, there is still a way to go in determining if the communication translates into action reflecting the members’ positions, because “deliberation is toothless” (Noveck, 2009).

Technology elements changing the legislative process

Technology enables collective action, and civic groups are using communication and information sharing tools to promote political action, operate an opposition movement and mobilize community activism (Noveck, 2009). The distance is not an impediment anymore to acquire information, analyze and participate in politics.

The so called e-Congress includes live coverage of sessions, making it possible to know the participation of legislators on the stand; a “virtual” office to formulate popular initiatives in legal systems that can make them into laws; information services for constituents like sending RSS newsfeeds, e-bulletins, and press releases from congress directly to citizens’ mobile phones; websites that assist in queries about bills or regulations; legislators’ blogs and networks to make complaints, comments and suggestions directly. All of these tools aim at strengthening the law-making process and improve its quality in terms of stringency and legitimacy (Castillo and Perina, 2009). It also includes electronic voting that has been an increasingly popular policy in Latin American congresses, within the framework of modernization and administrative efficiency.

The level of engagement in legislative rationality is also changing given the new technology to present information, analyze data, create statistics and compare legislation and find more compelling arguments to refute proposals. So it could be said that the possibility to write better legislation is at reach with the precise information and predictability of its’ impact.

Congresses with constitutional principles of openness have developed websites and data systems to share the information as it is being produced inside their offices. For instance Thomas.loc.gov includes a list of current legislative activities, initiatives, committee hearings schedule, what is on the House and Senate floor of the US Congress. In countries of Latin America and the East Europe, Transparency and right to information legislation has made available this information as a routine transparency obligation to congresses.

The civic groups and data developers have used technology in various countries to track congress work, evaluate performance, and produce information that enhances openness and participation. The examples show the array of goals and direction that openness is taking in the digital world.

An interesting US case that contains information to educate the public and also enhance participation is KnowledgeasPower.org. The site provides information to answer the questions such as: who are my legislators and when are they in session? Do they prefer communicating with constituents by email or written letters? Why does the legislated issue matter to me? How it
affects me and what is the basic rational of legislation? The site also helps users to identify who is advocating for the legislated issue, so they can join the groups and participate.

Also in this line of education is the site GovTrack.us, that allows finding representatives using Google Maps API; the changes on the bills throughout the legislative process and status of legislation; biographical information on members of Congress; voting records; and cost estimates from the Congressional Budget Office.

To participate in accountability, activating social controls, we found MAPLight.org. Because in the US certain state congress sell legislative information to lobbyists (Schacht, 2010: 158), this monitoring is precisely relevant. So this tool helps finding out how a legislator vote on a particular bill and who are the top contributors of that legislator; When did special interest groups succeed in blocking bills; Cross-reference data to show the connection between campaign donations, legislative votes and special interest groups positions on bills.

Concluding remarks

The use of technology to influence legislative rationality seems to bring paradoxical consequences within, just as the new technologies have brought in all social fields. Basically what technology brings to the deliberative process is a more complex and diversification to the liberal idea of rationality, opening a vast amount of information and inviting more stakeholders to the deliberation process.

More data available and information shared by congresses requires a legal expert to decipher. The legal language is an obstacle to using the information to participate because of the legalist slang (Schacht, 2010). So even when congresses make the effort to make information available, the impact is low, and those who will use it are the same elite of advocates, law firms, and specialized journalists.

The fact that civic groups are able to produce signing petitions, these rarely change the outcome of a Congress vote (Reich, 2010). And this is reinforced when advocacy groups and society’s perception still clinging to the idea that important issues, or substantial reforms, are far from being made.

Openness has also been used by congress to bring popularity to representatives and their work. The argument of trust and legitimizing it has been taken to the extreme, by drawing a congress driven by the majority’s will. Even in this view, the result shows the approval of reforms that make congress more popular –in which the people participate in decision-making and demand accountability– does not increase the institutional “popularity” of congress (Hibbing, 2002). In other words, although e-Congress maximizes the possibilities of citizens’ participation, nothing guarantees that technological policies will encourage populism in law-making.

Electronic voting may have consequences for legislators when they make their decision public over the heads of their party leaders and they are punished or benefited. Even this voting can have an impact in laws when the possibility to vote against the will of certain minority of constituents makes the representative look unpopular.
We believe that in order to counteract the downsides of the use of technology tools and sharp them towards the use of participation and accountability, some theoretical and operative changes must be addressed.

A congress that inherited the liberal tradition, in a democratic system, is destined to be unpopular, favoring the will or the best interest of the majority. This situation leads to a vicious circle, where more information about congress activities and results, will be taken almost most of the times disliked. But the problem must be solved without changing the representation system, or even democracy itself.

Upon our observations in this research, we believe the positive influence of information and communication technologies will depend on the system of decision-making, the flow of private and public resources into political parties and representatives, and idiosyncratic practices. Therefore, the rules of openness have to be \textit{ad-hoc} and oriented to the transparency goals, once the legislative rationality has been understood and mapped. This means changing the theoretical background of transparency laws, to a normative design that seeks to bring together the legislative rationality to the aims of transparency, leaving aside the problem of representation and majority versus minority interests.

Technology tools often start from a map of the information flows in a congress as the first task. So what the tools achieve is to organize information for multi-goals, such as education, knowledge, accountability or participation. We believe that these maps can be complemented with additional information, such as defining who produces the information and for what propose it is produced, and also to whom it is addressed can bring more elements to construct information to participate in deliberative processes.

A model such as MAPlight.org cross-reference data to show the connection between campaign donations, legislative votes and special interest groups positions on bills. But for this to happen, transparency legislation must make a special emphasis in the production, internal flow and openness of the information. This is also a big step for the access to information legal debate, since involves not only placing obligations into governments to open information. Moreover, implies regulating its' content and production, the internal and external flow, together with its organization and design to be understood for those potentially interested and oriented to the transparency goals.

There is also a need to make sure that the technological tools are operated by an institutional content management procedure system that is validated, regularly updated, and efficient. In other words, the generation of information, databases, statistics, studies and bills must be constant and have a certain degree of quality, as well as be well managed.

And finally, there must be indicators to evaluate the impact of laws over time, leading to the possibility of having objective elements to evaluate the work of congress and of legislators in particular. The ICT-Parliament study for the United Nations shows that practically none (just 17\%) of the legislative branch websites around the world have documents that measure the impact of laws over time\(^1\).

\(^1\) Available at: www.ictparliament.org
Within congresses there is a lack of technology knowledge, so they underestimate the potential good they can get from their use. But we bare in mind that congresses also fight to preserve control over the legislative rationality, and technologies are seen as hazardous.

References


Christopher Hood and David Heald (Editors). Transparency. The key to Better Governance? (United States: Oxford University Press, 2006).


