Cornell Law Review

Volume 24
Issue 2 *February 1939*

Article 3

Legislative Process

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THE LEGISLATIVE PROCESS

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It is quite amazing how many people are ignorant of the procedure by which our laws are made. Indeed, few understand even the nature of the legislative process which is the cornerstone of representative democracy. It is particularly disturbing that so many lawyers not only are not familiar with the subject, but are inclined deliberately to ignore it. Perhaps this is the fault of the law schools, which until recently were inclined to treat statute law as an unfortunate intrusion in the reasoning process by which the common law was developed. But, whatever the cause, the result is rather similar to that of the professional chauffeur who is satisfied with driving an automobile, knowing little or nothing of the machinery under the hood.

Statute law is the basis of legal practice. There are many lawyers, however, who do not know their way around the statute books and are lost if they must go outside the various compiled and consolidated laws. Probably even more encounter difficulty in the matter of statutory interpretation—the hunt for the mythical "legislative intent"—which includes not merely interpretation of language and court decisions, but the actual background and history of a law and each phrase contained therein. It is particularly discouraging to find how few lawyers are capable of good bill drafting, which is an art in itself, and how many assume that they have ability in this field.

The emphasis of the law is constantly changing. As one field of law diminishes in importance, others arise. Some trends are obviously of comparatively short duration, while others will doubtless last through at least several generations. The automobile negligence case which in the past twenty years has become so widespread will, in my opinion, prove to be of the former type, because the present machinery is out of trend with the social necessities of the modern era. On the other hand, as government becomes more and more complex, there will be an increasing growth of administrative law. What is often overlooked is that the basis of all administrative law and practice is statute law. There is also developing a field of practice which might be described as "legislative consultant"—the lawyer who, without participation as a lobbyist, advises on legislative trends and the remote as well as the immediate economic and social consequences of legislation.

How does a law come into being? In all legislative bodies there are differences in detail, but an outline of the procedure in the New York State Assembly will cover the usual and essential steps.

It is in committee that the real work of legislative bodies is done. A legislature is too large and unwieldy a body and is too inexpert in most of the technical problems presented to it to act in the first instance as a whole.

The sifting process is done, therefore, by committees. Each committee specializes in a particular field, but unlike the Congress, where committees are in session throughout the legislative term, in state legislatures the committees disband at the end of the session and, of necessity, are not especially expert in their subjects. Seldom does a committee itself draft legislation or even undertake to improve or change a bill that comes before it. It either accepts or rejects the proposal. Occasionally a member will indicate to the introducer what objections were raised, and if he is sufficiently interested he himself will prepare amendments to overcome these objections.

It is also important to bear in mind that almost no legislation originates within a legislative body. Requests come from citizens, agencies, organized groups and administrative officials. For example, an organization of rooming-house keepers, believing that a certain statute which refers to lodging-house keepers applies also to them, brings suit in the courts and is greatly aggrieved when the court rules that the protection afforded to lodging-house keepers does not apply to them. The organization thereupon writes to a member of the legislature pointing out the injustice of this situation and urges that the protection be made uniform.

The member takes the letter to the Bill Drafting Commission, an official agency of the legislature for the preparation of legislation in proper form. The commission prepares three typewritten drafts which the member "drops in the box" as, for historical reasons, the act of introducing bills by handing them to the Clerk is called. One copy is for the Committee on Revision, one for the printer and one for the Legislative Index. The next day when the legislature convenes, after the prayer and a motion to dispense with reading the journal of the preceding day, comes usually the First Reading of Assembly bills. The Clerk reads the title of three or four of the newly introduced bills (there may be a hundred or more on the desk) and the Speaker announces to what committees they are referred for consideration. The ninety-six which have not been read are, of course, also sent to committees but reading the titles aloud and making an announcement of committees is omitted to save time. Every bill must by Constitutional requirement have three readings and this reference to the committees constitutes the First Reading. Within three or four days the bills are printed, showing at the head to what committee they have been referred, and are placed on the desks of the members. No bill, except on emergency message from the Governor, may be passed until it has been in printed form on the desks of the members for three days.[1] For this reason copies of all bills which have been introduced in the Senate are also placed on the shelf of each member's desk as soon as printed.

[1]N. Y. CONST. 1938, Art. III, § 14 (formerly § 15).

The introducer of the rooming-house bill presently goes before the committee to which it has been referred at one of its meetings, explains the purpose of the bill and why he thinks it should be adopted. The committee, feeling the change desirable, by majority vote reports the bill favorably to the Assembly and it appears on the calendar on the Order of Second Reading. At the next session of the Assembly, shortly after the First Reading of bills, the titles of all bills on the Order of Second Reading are read aloud in the order they appear on the printed calendar which is on each member's desk. When the title of the rooming-house bill is read, if no one has objection to the bill it is advanced to Third Reading and will come up for final vote a few days later. But, if some member is opposed to the bill or wants an explanation, he calls, "Strike out," an abbreviation for the expression "Strike out the enacting clause," a motion which, if carried, would defeat the bill. Bills may be struck out on both the Second and Third Reading calendars. The bill is thereupon laid aside temporarily and the reading of the calendar continued until all the bills to which there is no objection are advanced or, in the case of Third Reading, finally passed. The bills which have been laid aside are then taken up once more, the title again read and debate on the proposal is had.

In the Assembly, it is seldom that there is serious debate or opposition to a bill on Second Reading because the pending question is the advancement of the bill and if the bill fails to advance it retains its place on Second Reading and appears on the calendar again the following day. Most debate, therefore, is on the Third Reading of bills when a vote to pass or defeat the proposal can be had.

There are two ways of defeating a bill. The first is on a motion to recommit the hill to committee. Once a bill is recommitted, it cannot be reported again except by majority vote of the entire Assembly. If the motion to recommit is lost, it is still possible that the bill will be defeated on the roll call, at which time a majority of all the members is required.

There are two kinds of roll call. The short roll call, used to save time when there is no serious objection to a proposal, consists of reading the first and last names and the names of the party leaders. Every member, whether present or not, is assumed to have voted in the affirmative unless he raises his hand and requests to be recorded in the negative. On the long or slow roll call, each of the one hundred fifty names is read, the member answering personally "aye" or "no". When the minority party wants to be recorded in the negative but does not wish to take the time for a slow roll call, the minority leader calls "Party vote" on a short roll call and the vote is then recorded with the majority members "aye" and the minority members "no" unless individuals indicate a contrary vote.

After a bill has passed its Second Reading it is sent to the Revision

Committee where the bill is reprinted in final form, or, to use the old terminology which still obtains, is "engrossed", and the "engrossed copy" in its "jacket" is at the desk when finally passed. It is then signed officially by the Speaker and sent to the Senate where it is referred to a Senate committee.

If a bill is defeated on Third Reading and the sponsor has reason to believe that he can pass it at a later date when absent members are present, he can move to reconsider the vote, lay the motion on the table and bring the bill up for a second vote at a later date. But only one reconsideration is permitted.

In some states a bill is introduced in one house alone, but in New York it is usual to introduce the same bill in both the Senate and Assembly. If the Senate, for instance, passes a bill first, it comes over to the Assembly and is referred to committee like any Assembly bill on First Reading. The Assembly committee may report favorably the Senate bill, but it frequently happens that the Assembly companion bill has already been reported and is on Second or Third Reading. Just before a vote is taken, therefore, the introducer of the Assembly bill moves to discharge the Assembly committee from further consideration of the Senate bill for the purpose of substitution, as the identical bill must pass both houses. If the Assembly passes the bill, the engrossed Senate copy which already bears the signature of the Senate's presiding officer (the Lieutenant-Governor) is signed by the Speaker, returned to the Senate and by the Senate transmitted to the Governor.

If a bill fails to pass both houses it is, of course, lost. But from time to time a bill will be amended in the other house before it is passed. It must in such case be returned to the first house. If that house concurs in the amendments the bill is automatically passed. But it may send the bill to committee and do nothing further, it may itself amend the amended bill, or it may decide to try to reach a compromise agreement through the appointment of a conference committee of the two houses. This is the usual procedure in Congress, but there has been only one conference committee in the New York State Legislature in over twenty years. That followed a deadlock on the budget.

Either house may, before action by the other and with the consent of the other, recall a bill which it has passed. Similarly, a bill can be recalled from the Governor. This procedure is used quite often at the informal request of the Governor who may want some amendment made to a bill or who may desire thirty days in which to consider a bill instead of ten days. A bill that goes to the Governor must be signed or vetoed by him within ten legislative days or else it will become law without his signature. However, the Governor is given thirty days to sign or veto bills which are passed within the last ten days of the session and if he does not sign

these so-called "thirty day bills" they fail to become law. As in Congress, the Governor's veto power is not absolute. A bill can be passed over his veto by a two-thirds vote.

It is comparatively easy to follow legislation in the New York Assembly. The bills themselves are clearly printed with all proposed new matter in italics and existing law, proposed to be deleted, enclosed in heavy brackets. Every bill when it is introduced receives in numerical order an introductory number, and by this number one can always find it without difficulty. At the same time, it also receives and there is printed on the bill itself a print number. When a bill is amended it has to be reprinted and thereupon receives an additional print number. These numbers are placed on the bill in numerical order as each bill is printed and a bill which has been amended several times will frequently carry three or four print numbers as well as its introductory number. One can, therefore, look up a bill in each stage of amendment. There is printed weekly during the session a Legislative Index which gives the introductory numbers, a brief synopsis and the exact status of each bill (*i.e.*, what committee it is in, or if it is on Second Reading, or Third Reading, or before the Governor, etc.), all the print numbers and their corresponding introductory numbers, and all legislation indexed both under the name of the introducer and under its subject matter. Accordingly, to follow any legislation, it is only necessary to know either of its numbers, its sponsor or the subject matter.

The legislature convenes the first Wednesday of January in each year.[2] Its term is without limit, but it usually adjourns in March or April. The first session of each week is held on Monday night at eight-thirty so that members from distant parts of the state can get to the session without traveling on Sunday. During January and the early part of February, most of the members go home on Tuesday, as there is little business before the house. The committees begin to function shortly after organization, but they are not inclined to report bills favorably until they have had an opportunity of finding what legislation will be proposed on a given subject, so that they may compare the various bills offered. Skeleton sessions are usually held at 11 A.M. each day during the balance of the week. It is not until a number of weeks have passed that these sessions are sufficiently important for most of the members to attend.

During the last few days of the session, the Assembly procedure differs very considerably from that which obtains in most states. As indicated above, all bills are referred to different committees for consideration. Towards the close of the session, however, these committees terminate their activities and all bills upon which they have not acted are referred to a

[2]In the new constitution, this is changed to the first Wednesday after the first Monday in January. N. Y. CONST. 1938, Art. XIII, § 9.

committee of which the Speaker is chairman, known as the Rules Committee. When Rules Committee takes charge, the legislative body begins to function very rapidly. Bills reported by the Rules Committee are reported on the Order of Second and Third Reading at the same time, so that there is no delay between the two readings. It is this period, and especially the last day, that is the object of much, and sometimes legitimate, criticism. On the last day of the session when it may be physically impossible to have a printed calendar of the bills, members have little opportunity to secure and look over copies before they are passed. Indeed, if the bill has been recently amended or introduced, there may not even be copies available,[3] and many votes are cast in complete ignorance of what is being voted on. Rules Committee is composed of the leaders of both parties, and the votes under these circumstances are based on political faith in such leaders. When the leadership is conscientious, no intrinsic harm results; but it is in such periods that a callous leadership "puts over" or lets "slip through" bill that would normally not withstand the crossfire of debate.

One other matter which receives occasional publicity deserves mention. The house can always by vote of a majority of its membership take over control of legislation and discharge a committee from consideration of a bill so that the bill comes before it. Motions to discharge committees are quite frequently made towards the end of a session. The purpose of such motions, however, is generally political in order to secure a record vote for use in campaigns. It is an unwritten rule from which there are but few deviations that the majority party will support the committees which it controls so that such motions, requiring a majority of the house membership, hardly ever prevail. Where there is a sufficient number of the majority members who wish to join with the minority, the committee, even though its members may not approve the bill, will generally report it to the house for consideration, although without recommendation as to the action of the house.

The procedure in every legislative body has two purposes. Its primary purpose is to secure careful consideration of each proposal and to safeguard the right of every member to express his views as he wishes and to vote, but at the same time care is taken that the majority party control the fate of legislation, for the passage or defeat of which it must assume public responsibility.

What seems to be the most common misconception as to the legislative process is its basic nature. Despite the procedure which at first glance may seem to be unrelated to other democratic processes, it is, in its essence, a judicial process, and this is clearly recognized in Massachusetts, where

[3]In the new constitution, there is a requirement that no bill may hereafter be enacted unless a copy, in some form although not necessarily printed, be on the desk of each member. N. Y. CONST. 1938, Art. III, § 14.

the legislature is known as the General Court. As already stated, very little legislation ever originates within a legislature itself. The legislature is the tribunal to which are brought proposed changes in the rules governing our lives. That tribunal, weighing the arguments for and against, renders judgment by the adoption or rejection of the proposed amendment to the laws.

Frequently, criticism is voiced of the "vast quantities of new laws turned out by our legislative mills". This is an easy criticism, but it is seldom based on more than a superficial glance at the number of session laws enacted. The repeal of an old law involves the enactment of a new law to effect such repeal. Appropriations for the support of the government require one or more statutes. A very large percentage of laws are the result of what might well be thought of as petitions in equity—the private individual who seeks the right to bring suit against the state for an alleged grievance; the municipality which, to strengthen its credit, seeks to have validated by the state its action in authorizing a local bond issue. The great majority of the other statutes are those which adjust or correct some comparatively minor situation, perhaps of administration, perhaps of relationships between citizens, which have been called to the attention of the legislature by those who found themselves affected adversely. It is a rare occurrence when as many as three or four really new laws affecting the people of a state are enacted at any single session of a legislature.

In the case of the rooming-house bill, it was assumed that the appeal for assistance was clearly meritorious and that no objection was raised by anyone either within or without the legislature. Had the proposal appeared without merit, even if no objection were offered, the committee would have rejected it. But suppose that the rooming-house operators had requested a privilege to which they felt they were entitled but which some other group felt would be detrimental to its interests. It is at this point that that much maligned individual—the lobbyist—performs his important function. While, of course, there are dishonest lobbyists as there are dishonest men in every walk of life, the honest lobbyist properly and with benefit to the public plays the part in the legislature that counsel plays in the court. The rooming-house keepers, directly or through a lobbyist, present, not only to the committee but to every member of the tribunal that they can, the arguments in favor of their proposal. The lobbyist for the opposing group presents the arguments in opposition. If the matter is one which is not of great importance, the committee and ultimately the legislature will reach its decision on the basis of these arguments. If it is of great importance and if the effect of the proposal will reach a large or important element of the population, frequently a formal, public hearing will be had at which the lobbyists will marshall others to impress the committee in the presentation of the factual background and arguments.

While a court in granting relief or awarding judgment is bound by the laws applicable to the case, even though personal justice may not always be served thereby, the legislature in its decisions is ultimately bound by the will of the majority of the people whom it represents. I use the word "ultimately" because there are several factors which come into play and sometimes cause a postponement of such a decision.

Individual influence can play an important part in the disposition of legislation. Sponsorship of a measure by an unpopular individual will seriously militate against its adoption. The support or opposition of an individual who is a dominant character or who has become recognized as an expert in a particular subject or who by seniority has become a committee chairman or achieved the ranks of the "older [in point of service] members" is not infrequently decisive. But the two chief factors are politics and caution.

Partisan politics play almost no part in the vast majority of legislation adopted or rejected. The extent of its absence, indeed, is always surprising to those who approach a legislature fed by lurid tales of partisan scheming. On the other hand, in important matters politics is a vital factor because it is the effort to ascertain what people want, as determined by votes which are the expression of democracy. When an organized minority, pressure group or other aggressive combination of citizens, who express their aggressiveness by votes, become interested for or against a proposal, they become an important element of the public whose views must be considered. Very frequently, the tribunal in giving its democratic judgment will bow to such an organized group, even though it may obviously be a minority, because their votes can be so directed as to outweigh and, indeed, outnumber the apathetic votes on the other side. This is the basic role which politics plays and it can be a factor in thwarting temporarily legislative decision in accordance with popular will.

The second important factor is the almost universal attitude that the burden of proof is on the plaintiff. A legislature is very disinclined to make an important change of law where there is serious opposition to such change even though a majority, were a census to be taken, favor the proponents. A legislature is inclined to be mildly conservative about changing the rules under which people are living. It must be satisfied not only that the change is desirable but that the great majority of people want it. A 51-49 division of opinion among the public would probably not result in the enactment of the legislation sought by the 51 per cent.

This attitude when intelligently applied is by no means harmful. Those desiring a major change must convince the great bulk of their fellow citizens. As a result, when the change is adopted, the people are behind it, those opposed have had time to anticipate the result, and what a few years before may have been considered a dangerous or radical innovation becomes quietly

effective with little or no social or economic disturbance. Far different would have been the situation had the 51 per cent been able to force enactment of a proposal violently disliked by 49 per cent of the people. Then again, this caution serves to winnow the passing emotional fancy from the deep rooted substantive reform. Public views are seldom static. If the 51 per cent cannot succeed in persuading the bulk of their fellow citizens that their particular reform is desirable, the proposal will soon be disclosed as a temporary emotional surge and its own adherents will drop away.

The very process of education has beneficial results. When first some new change is offered, a kernel of sound and intelligent reform may well be completely enclosed in a shell of impractical proposed administration. The advocates fight for the kernel, the opposition is terrified by the shell. Gradually, the arguments on each side make some impression on the other and, because of merit or expediency, or both, changes are made to make the program more effective and workable. The waiting period forced by the conservative policy of most legislatures results in knocking off the rough edges of many such proposals and, incidentally, in greatly improved draftsmanship.

But against these advantages, there exists one very serious danger. The normal delay of a legislative body may and, indeed, often does develop into a lag that makes its attitude completely reactionary and a force that militates against sound democratic government, since it is out of tune with the settled opinion of the people.

It has long been a popular pastime in this country to make fun of legislative bodies and legislators; yet a legislature reflects fairly accurately the public which, as a body, it represents. There are always enough buffoons, individuals of limited intellect, and gentlemen with sticky fingers, to be a source of comedy or scorn. The many able individuals in legislative bodies, who quietly go about their tasks and perform the duties assigned to them, escape the public notice. When a legislative body or a member does something of which the press does not approve, cartoons aplenty festoon newspaper pages. On the other hand, when their actions are reasonable and sound such is taken for granted and passed over in silence. As a result, idiosyncrasies and occasional errors or stupidities receive the great bulk of publicity by which public opinion is molded.

This aspect of diminishing legislative prestige has been accompanied by two others. Almost no attempt is made by the public to understand the actual problems before a legislature. We are a people who love labels. Only infrequently does the public endeavor to determine whether a label is properly affixed. In writing of pending legislation, the press generally finds it impossible to discuss the details of a proposal and, accordingly, over-simplifies its comments. It is apt to advocate a proposal simply because it approves the

kernel or condemn a proposal because of the shell. Once a label is affixed in the public mind, it is almost impossible to secure rational consideration and perhaps needed modifications. A member may sincerely believe in a certain social reform but feel that the bill before him is so badly drafted or its administrative provisions so unworkable that the result sought would not be accomplished. Unable to secure intelligent amendment, he votes against the bill. Promptly he is damned by those who care only for the publicized objective, who are totally unfamiliar with the details, and who, indeed, care nothing about the details of the bill itself.

A further aspect of declining esteem, and one that is of especial importance, is the prestige and power of the executive which, for several decades, has been progressively increasing at the expense of the legislature. A long time has passed since the struggle between royal governors and the representatives of the people who fought for the liberties of the people. The American people like personalities. They can render hero worship to an executive as a person, which is something they can never do to a legislative body made up of numerous individuals. Many executives have taken advantage of this simple psychological fact. Baiting the legislature is an accepted political formula for an executive, which, unless he is almost wholly in the wrong, is more often than not only too successful. When an executive talks, the radio and the press carry his version of a controversy to every citizen. But the legislature with its large membership cannot so speak, and it is at a complete disadvantage in broadcasting its point of view, whether on the air or in print. Such a controversy, furthermore, often becomes in the public mind a quarrel between the courageous one and the contemptuous many.

In recent years, for one cause or another, there has been a tendency on the part of executives to try to break the innate caution of legislative bodies and to force changes at a faster rate than the legislature feels desirable. Frequently this leadership has been very necessary. A legislative body which lags behind settled public opinion not only is a threat to democracy, but of itself is an incentive to opposite extremes. On the other hand, when an executive forces the legislature to accept his judgment in all matters and to enact changes before they are supported by settled public opinion, there is an equal threat to democracy—one which is in line with tendencies visible today in so many parts of the world.

Representative democracy requires a balance between a legislature which lags behind contemporary thought and an ill-considered bending to every passing breeze. It also requires a balance between the executive branch and the legislative branch of government. The breakdown of the one is, indeed, frequently the cause of the collapse of the other.

There is a definite obligation on every citizen to preserve the legislative

bulwark of representative democracy, striving militantly to maintain the essential balance. There should be tolerance for the foibles and faults of legislative bodies—too often but the mirror of our collective selves. There should be understanding and sympathy with the work and the actual problems before legislative bodies—too often condemned or praised on labels or emotional appeals. But above all, there must be an end to that fatal attitude of letting others run the government; there must be a resurgence of active interest in all government, and there must be widespread participation, to some extent at least, in the politics which make it operate.