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Analyzing law-making from a business process view: The paradox of law-making

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ABSTRACT (REQUIRED)

The law-making process is the source of legislation and is inextricably bound up with the developments of improving the efficiency and effectiveness of e-government. Against this backdrop, both the normative law-making process (as prescribed in law) and the law-making processes as found in practice are being analyzed. Both types of processes are modeled using Business Process Modeling Notation (BPMN) and the process descriptions are compared with each other. The retrospective analyses of several cases show deviations from normative processes as prescribed in law. It was found that the law-making process is a highly fragmented process and that there is hardly any back office integration. Paradoxically, law (resulting from the law-making process) complicates the improvement of the law-making process. Our analysis shows that the law-making process can be treated like any other business process. We recommend the use of business process (re-)engineering and transformation instruments to improve the law-making process.

Keywords (Required)

Legislation, administrative burden, Regulatory burden, Process, Law-making process, BPMN, Business Process Management.

INTRODUCTION

Companies and citizens have expressed that they are experiencing too much of an administrative burden from the government. Politicians have recognized this and the Dutch government has explicitly dedicated itself to striving for a 'smaller and better' government (Coalitieakkoord 2007). A distinction between two aspects of this pursuit can be made. First, a smaller government, that can carry out its statutory tasks in an efficient manner, at lower costs. Second, a better and more effective government, that issues legislation (laws, rules and regulations issued by the government, hereafter also referred to as regulation) more effective in achieving the goals set out for it, and that reduces the costs companies and citizens bear and the activities they have to perform to comply with legislation. Several terms have been used in literature to refer to this phenomenon, like regulatory creep, administrative burden (Van Gestel et al. 2006), red tape (Baldwin et al. 1999), bureaucracy (Van Gestel et al. 2006) or regulatory burden (Helm 2006). The latter (*regeldruk in Dutch*) is being preferred nowadays in the Netherlands due to its emphasis on regulation (i.e. legislation). Regulatory burden is defined by the Dutch government as all aspects of (daily) activity that a citizen or an entrepreneur has to deal with caused by regulation.

More efficiency and effectiveness in the governmental processes calls for changes in legislation, which results from complex law-making processes. Ironically, in some cases, regulation (or legislation) has been identified as one of the causes for not accomplishing the desired level of back office integration and realizing a reduction of the administrative burden. Legislation is said to be too complex, the way in which rules are formulated is not suitable enough for the easy and proper implementation in business processes. An example demonstrating this argument can be found in the Dutch UWV (the Dutch government agency for disability benefits and unemployment benefits) case (www.uwv.nl). In order to implement a new law, UWV wanted to develop a new IT system that all 1,2 million 'customers' could use. During the realization of the plan, it turned out that the implementation of the legislation in the envisioned system was much more complex than anticipated, which caused the project to fail (Telegraaf 2008). In this project, people had their hope set on using IT solutions as a means to 'improve' the government, but the implementation of the system was being complicated to an undesired extent by legislation.

Law-making processes often hinder the realization of the reduction of the administrative burden. Yet, law-making has never been thoroughly analyzed and dealt with in the field of e-government. Furthermore, law-making is commonly not viewed as a type of process and treated as such. It remains the area of lawyers and politicians and separated from the operational implementation. In business process management (BPM) literature there are various types of processes. Armistead et al. (Armistead et al. 1999) identifies operational, support, direction-setting, managerial and change processes. Law-making could be viewed as a type of direction-setting process, as these types of processes are “concerned with strategy formulation and policy deployment” (Armistead et al. 1999 p. 97). This suggests that law-making might be viewed as a type of process. This is confirmed by definitions of processes. Hammer and Champy (1993b) define a process as “a collection of activities that takes one or more kinds of input and creates an output that is of value to the customer. A business process has a goal and is affected by events occurring in the external world or in other processes”. This definition is focused on transforming inputs in the process into outputs. Another definition of a process is “a lateral or horizontal organizational form, that encapsulates the interdependence of tasks, roles and people, departments and functions required to provide a customer with a product or service” (Earl 1994). This view expresses its emphasis on the various tasks and roles of people and departments. In this light our basic premise is that adapting a process view on law-making can result in significant improvements. The aim of this paper is to understand law-making in practice. A retrospective view on a case is created and this is compared with the normative processes as prescribed in law. This paper is structured as follows. In the following section the context and the background for the research is presented. Emphasis is placed on considering the law-making process as any other business process. Next, the research question and the research approach are presented. Based on case studies, some preliminary findings and possible points of improvement are then identified and discussed.

RESEARCH QUESTION AND APPROACH

The results of the law-making process have an influence on the administrative burden. Against this backdrop the Ministry of Justice initiated the IST Law-making Process Research, in order to create an understanding of the way current laws are made. The research aims to answer the research question:

What is the current situation in law-making, regarding the process, the products resulting from it, and the technical support used?

The basic idea is to analyze the law-making process from a process perspective and see which type of deliverables (outputs in the terms of Hammer and Champy (1993a) these processes produce, using which kind of IT support. The approach to answering this question consists of three important elements as shown in Figure 1. As a first step, the normative procedures (prescriptions found in legislation) were analyzed. This was followed by an analysis of the processes as they actually took place in practice. Then these two were confronted with each other which resulted in discrepancy analyses. The combination of normative and real-life analyses is elementary, since the comparison of the process in practice and the procedures can provide insight in the problematic parts of the procedures.

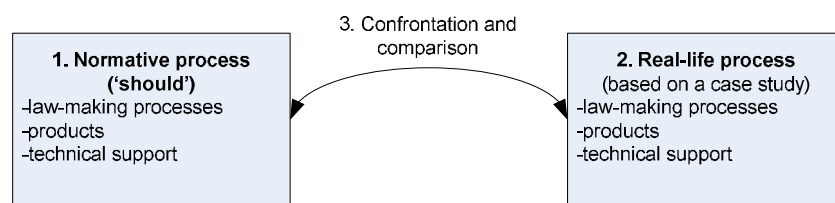


Figure 1. Research Approach

First, the way in which laws *should* be made according to law-making-procedures (rules on the requirements for the process to be followed, the documents to be produced and the technical support) was determined. The resulting process models were made accessible online and officials and experts involved in the law-making process were asked to comment on the processes. This resulted in several small improvements and after that in agreement of the persons involved on the description of the processes.

Second, case studies of the law-making process *in practice* have been examined and modeled. Using 30 interviews, a retrospective view on the law-making process and the deliverables was created in these cases. The method of analysis was based on process modeling, (official) documents and interviews. The interviews were conducted during the period of May 2009 until January 2010. The interviewees include officers of the ministries involved, members of parliament, parliament staff, support staff and legal counsels.

Finally, the processes and deliverables of these processes as found in these cases were compared to the prescriptive processes (procedure) in a discrepancy analysis. This resulted in finding several mismatches between actual processes and prescriptions in law; and in finding several activities forming (potential) bottlenecks for efficiency and effectiveness.

The method used to model the law-making processes is Business Process Modeling Notation (BPMN). This language is a *de facto* standard that enables one to model business processes and services. Furthermore, in the Dutch National Reference Architecture, BPMN is mentioned as the standard for analyzing business processes (<http://www.e-overheid.nl/thema/referentiearchitectuur/nora/nora.xml>). The modeling notation provides a graphical notation for specifying business processes in which responsibilities can be expressed by swimlanes and in which interactions can be based on services (White 2004). There is good support for BPMN and there are several tools that support both the making of BPMN diagrams and the simulation of processes. Regarding the fact that the law-making process can be seen as a typical business process (see above), BPMN is very suitable to map this process. BPMN makes the many parallel and sequential information flows that the law-making process consists of, visible. Another reason to choose this modeling method is that it can show how processes are integrated with each other. The necessity of business process- and back office integration is one of the principles of Business Process Management (BPM). Homburg and Bekkers (Homburg et al. 2002) formulate this as follows: *“The use of process management techniques in the development of interorganizational information systems (and: in the integration of back offices) provides a promising perspective on the problem of integrating the back office of e-government initiatives.”* Back office integration is identified as a means in achieving a smaller and better government, which applies also to the law-making process.

CASE STUDY: LEGISLATION ON COMPENSATION

One of the cases analyzed in the IST-study is a regulation (order) on compensation for certain groups of citizens. The order is part of a law replacing a tax measure for the target group. Because the tax measure had already been abolished, a new compensation measure had to be designed and implemented on very short term. The short time until the target date of commencement and the political sensitivity of the topic put time pressure on following the law-making procedures. Some procedural steps that had to be taken, like drawing up the required formal notes to accompany documents, took up a lot of time without adding to the quality of these documents themselves.

Another relevant characteristic of the case was the involvement of many parties: three ministries, and several agencies (governmental and non-governmental) responsible for the eventual application of the order were involved in the law-making process in parallel. All parties submitted different changes to the same text simultaneously; having to sort this out manually and to process and incorporate all necessary changes in one final version was a lot of work. The officials involved did not dispose of adequate IT support to handle these activities -time-consuming formal notes, comparing different versions of the same text etc.- more effectively and efficiently.

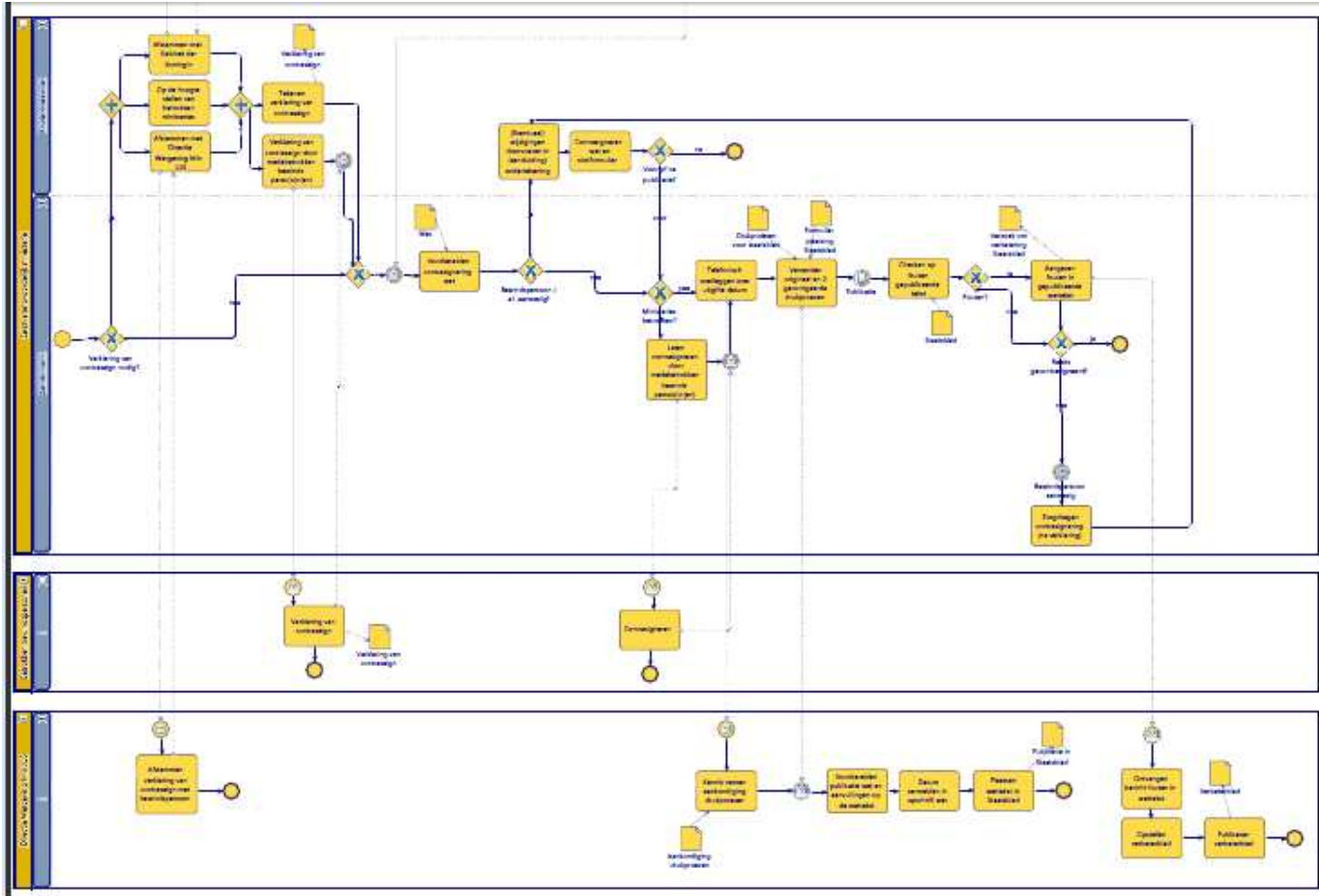


Figure 2: Overview of BPMN law-making process

Figure 2 shows a snapshot of the law-making process in the BPMN modeling notation. This figure and the complete analysis confirms our premise that a law-making process can be viewed and analyzed as any other business process and administrative process. Furthermore, it shows that BPMN is suitable for showing the need for systems integration of the various parties. Although there was limited IT support, it was found that BPMN is less suitable for modeling the actual IT support.

BOTTLENECKS IN LAW-MAKING PROCESS

Not only does the research provide insight into the role of the applicable legislation (procedures) in the future adaption of the law-making process into a smaller (more efficient) and better (more effective) governmental process by using IT, it also uncovers the bottlenecks in the current process due to procedure and the extent to which parties involved in the process deviate from the prescribed procedure in practice. The discrepancy analysis allows us to identify current bottlenecks in the law-making procedure. The main examples are described below.

Coordination processes

The law-making process is a highly fragmented process in which organizations work in a compartmentalized way, each organization having its own support. There is hardly any coordination among the organization and none or only a few of the parties involved have an overview of the status of the process and what is needed. Organizations might work and change documents in parallel, which can result in confusions concerning the status of documents and the incorporation of changes. The activities of the various organizations are not in coordination, which is complicated when activities are part of parallel processes.

The reduction of the regulatory burden is viewed as a valid concern by most participants, but is hardly given any attention. There is a formal check by an agency responsible for reducing the administrative burden. This results in a recommendation which can be neglected by the ministry responsible for the law in question.

Deviations from normative procedures

The procedure guiding law-making states that every law-making project should start with an initiation document ('*startnotitie*'). Even the specific form and contents are defined in the procedure. In some of the cases investigated, documents on policy drafted early on in the process were regarded as *startnotitie*, but there was no official document drafted in accordance with the requirements of the procedure.

The procedure provides for certain tests and analyses for applicability and enforcement of the law (quantification of the consequences for applicability and enforcement), to be carried out by the officials of the issuing ministry during the preparation of the draft-law. As a first step, to identify which tests will be required, the ministry makes a 'quick scan' of the draft, which should be evaluated by a specialized division of the ministry of Economic affairs. The cases investigated show that in practice, these rules are deviated from. There is no explicit quantification of the consequences for applicability and enforcement in the explanatory statement, and the test is often not carried out in accordance with the rules. As for the 'quick scan', this step is skipped in general (according to experts), moreover, the division responsible has been discontinued.

Rule 97 of the *Aanwijzingen voor de regelgeving* (AR), the rules and procedures for law-making, contains requirements to the division of draft-laws into chapters and sections. This rule has been deviated from in one of the cases. The bigger part of the law in question is divided into chapters and sections as prescribed in Rule 97, in one part, however, the division is in disaccordance with the rule (and, therefore, inconsistent with the rest of the text).

The procedure provides for an independent advisory body to evaluate the regulatory burden that draft-regulation may impose. If the draft-regulation fulfills certain criteria (the main criterion is: the regulation is expected to have actual consequences in terms of regulatory burden), the officials involved present the draft-regulation to this body. This happens in the latest stage of the preparation, after all other advisory bodies have been consulted. In practice, the advisory body is often involved earlier on in the process, and may give suggestions to the officials in drawing up the regulation. One could say that this has consequences for the independency of the official advice later on in the process. Another deviation from procedure in this context is that the advisory body receives all draft-regulation automatically (via the Ministry of Justice, responsible for performing a general quality test for every draft-regulation), and makes the selection of regulation to be evaluated itself, this choice is not left to the issuing ministry.

Limited IT support

The level of back-office integration and the use of process-based technical support in law-making processes are limited. Each organization or department has its own support which is often limited to check lists, excel sheets and word documents. There is no integration among the activities of the parties involved and there is an overlap and duplication of activities.

Every organization or participant involved forms its own case file with official and unofficial documents. There is no single (complete) dossier in which all documents having to do with one (draft) law are being archived. This makes ex-post accountability difficult. In performing the research, this aspect made it hard to analyze the whole process. Overall, the AR are in lack of a rule requiring the registering of steps taken in the process of drawing up legislation, which would be necessary to enable officials to work with a single centralized filing system.

PARADOX: LAW AS A BARRIER FOR FUTURE IMPROVEMENTS OF THE LAW-MAKING PROCESS

The approach of also investigating the process prescribed by legislation applicable to the making of laws (law-making procedures), enables us to identify potential problems to IT implementation (to enhance efficiency and effectiveness) in the law-making process raised by these procedures. During the research, several rules that may pose an issue for IT implementation in the law-making process were identified. For example Rule 97 of the AR, which provides how a law should be divided in chapters and sections, giving a number of options for division on several levels. This rule is formulated in a complex manner that is hard to understand. Grasping it is difficult and creating an IT-service executing this rule as it is, is difficult. Another rule that may form a barrier is rule 63 of the AR. This rule prohibits the use of the expression 'and/or' in laws. The rule adds as a clarification that the use of the expression 'or' in laws may refer both to situations where the usual sense of the word applies (exclusive options), as well as to situations where several of the options named may apply (i.e. and/or situations). The use of the expression 'or' in laws in this matter (having several possible meanings, each with very different consequences) complicates the automatic execution of laws or the adding of metadata to such laws. Whereas machines expect that these expressions are clearly defined, they are ambiguous. 'Or' can be interpreted as both 'and/or' and 'or'.

These illustrative examples show that improvement of the law-making process is largely hindered by requirements imposed by existing law. The legislation in force forms an obstacle for the improvement of these processes. Paradoxically, the law

resulting from the law-making process complicates the further improvement and automation of the law-making process. Another illustration of this paradox and the role of applicable laws in the efforts towards effectiveness through IT is 'online publication'. When the Dutch government wanted to publish their official documents -laws, decrees, rules and so on- online, instead of merely on paper in the official law gazette, the legislation in force formed an obstacle. The applicable law (*Bekendmakingswet*) precluded online publications from having a formal status. The law had to be amended in order to enable the government to implement this change in the law-making process and officially publish laws, rules and regulations online.

Our findings suggests that for two reasons, the law-making process cannot refrain itself from the tendency to make a transition to more efficiency and more effectiveness through the use of IT. The main reasons for this are that,

1. The law-making process is the basis for all governmental processes, and forms an important part of the activities of the government. Therefore this process will also have to be more efficient, smaller and striving for cost reduction.
2. The law-making process is the source of rules that cause a regulatory burden. It will have to produce rules that cause less of a burden, that are more effective ('better'). For example rules that are easier to apply and more accessible.

The fact that the law-making process is inextricably bound up with the developments of improving and reducing the government by using IT can be seen in recent projects such as a pilot for online consultation (consulting citizens and companies on drafts for laws online, <http://www.internetconsultatie.nl/>) and the implementation of online publication of official documents, where technical developments led to a new approach to publishing and providing access to official documents.

The law-making process is governed by rules and procedures (legislation). Characteristics of the law-making process are: (a) the law-making process is a process where organizations cooperate to achieve a common goal, (b) following strict procedure (rules and regulations applicable to process and product). This makes it a typical business process and matches the definitions of processes as stated at the beginning of the paper.

It becomes apparent that the law-making process is a typical process and that the law-making domain cannot refrain itself from the move to increased efficiency and effectiveness, which may be achieved by using IT, realizing interoperability and back-office integration. This is a similar development that has happened in e-commerce and in other areas of e-government. In order to realize successful e-business, private organizations and divisions have reached a high level of integration and interoperability (Klischewski 2004). Integration means forming large units of organizational entities, temporary or permanent, for the purpose of merging processes or sharing information; interoperability refers to the ability of diverse systems and organizations to work together (Scholl et al. 2007). This approach also needs to be taken in using IT to achieve a smaller and better government. A precondition for IT to successfully offer a solution here, is the integration of the business processes, information resources and underlying information systems (Bekkers 2005; Layne et al. 2001; Scholl et al. 2007; Weerakkody et al. 2006; Weerakkody et al. 2007). A relevant aspect of this integration is the use of standard terms (Homburg et al. 2002).

CONCLUSIONS

In order to reduce the burden that companies, organizations and citizens endure from the government, the government has dedicated itself to the transition to a smaller (efficient) and better (effective) government. Private organizations and the government agree that the use of IT, aimed at back-office integration and interoperability, may help to achieve this smaller and better government. Often however, the complexity of applicable legislation forms an obstacle for the successful reduction of the administrative burden. Against this backdrop, the normative processes were compared with those as carried out in reality. These analyses show that improvement of the law-making process is largely hindered by requirements imposed by existing law. The law-making process can be characterized as a process in which organizations cooperate to achieve a common goal and which is governed by rules and procedures (legislation). This leads to two conclusions that (1) the legislation applicable (law-making procedures) may form a barrier in the transition to more efficiency and effectiveness of law-making processes; (2) the law-making process can be viewed and analyzed like a typical (business) process.

The analysis of the cases show that law-making processes are highly fragmented processes in which organizations work in a compartmentalized way, each organization having its own support. Few people have an overview of the status of the process, of what is necessary and the steps to be taken. The level of back office integration, support-sharing between organizations and thorough registration of the process is limited.

BPMN was found suitable for modeling the law-making process and was used to uncover various limitations and bottlenecks. Our premise was confirmed that the law-making process can be viewed as a typical business process. By treating law-making as a process, the principles of analyzing and improving business processes can be used and process management and

workflow techniques could be deployed to control this process. The retrospective analyses of several cases show that the weaknesses in the law-making processes closely resemble those as found in business process literature (Davenport 1993; Kettinger et al. 1997). We can envision a future situation where the law-making process is supported using IT, in order to improve the legislation resulting from it. Some of the applicable rules are not fit to be executed in an automated manner using IT. Moreover, the current process shows deviations from normative processes as prescribed in law (procedure); in some cases because the applicable rules are too complex to be executed correctly. It appears that the law-making process can be made more efficient and effective by using business process engineering (BPR) methods (O'Neill et al. 1999) and IT, including application integration and workflow support. It is recommended to further analyze these processes from these points of view.

The observations lead to recommendations for further research: based on the output of the research, an analysis should be made in order to identify the potential improvements. The questions to be answered are: how can we make the law-making process more effective, in order to produce legislation that is more suitable for application (better government) and that helps to reduce the regulatory burden (smaller government) and how can we make the law-making process more efficient, i.e. more effective against less costs? In addition to that, it may be useful to investigate the typicality of the law-making process as a (public) chain concerning the application of legislation. Other chains, related to the application of specific parts of legislation, may have to deal with the same type of problems and points of improvements. The knowledge of problems with a generic character may help to improve both the law-making chain and other chains of application of legislation. It may provide insight into what legislation would be more suitable, to improve the law-making process and to realize more efficiency and effectiveness in the governmental processes.

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