Introduction

During recent decades, effectiveness has become a popular topic associated with legislation. The word appears in many places: legislative texts use the adjective 'effective' or the adverb 'effectively' in their substantive provisions; international organisations claim the need for effective laws to ensure the achievement of policy commitments; documents setting quality standards or offering guidance to legislative drafting refer to effectiveness as an aspect of legislative quality; politicians require effective laws to satisfy their electorates; citizens to ensure enjoyment of their rights. Despite the rhetoric, however, the fact remains that we know little about what effectiveness is and even less about how we can produce effective laws.

This book puts forward the idea that effective legislation is not a utopic pursuit: instead, it is the result of complex 'mechanics' in the conceptualisation, design and drafting of legislation and the result of conscious decisions around four elements inherent in every law: purpose, content, context and results. Why is this hypothesis worth exploring? And what makes it novel?

The question of what makes law effective is by no means new. It has been lingering in the writings of legal philosophers and sociologists, scholars in the study of regulation and legislation and in the concerns of practitioners for years, but so far without a concrete answer. Compliance and enforcement are important aspects of it,[1] clarity of expression is another, but no definite formula or solution is proposed as to how to achieve it. Why? The first reason is, in my view, a question of perspective: effectiveness has been considered mainly an implementation issue, a measure of the success of legislation in achieving its goals. But do effective laws materialise magically? My claim is that this cannot happen unless laws are designed and drafted with the specific aim to be effective. Using effectiveness as a lawmaking principle marks a subtle but important shift in legislative decision making: from the abstract use of rationality and evidence based methods[2] towards their purposive use consciously

[1] H. Jones, *The Efficacy of Law* (Rosenthal Lectures Northwestern University Press 1968) at 4; A. Allot, *The Limits of Law* (Butterworths 1980) 11; Lawrence Friedman, *Impact. How Law Affects Behaviour* (Harvard University Press 2016) at 44–72.

[2] J. Rachlinski, 'Evidence-Based Law' (2011) 96 Cornell Law Review 901 at 910.

oriented towards effectiveness. A second reason is the fact that the concept of effectiveness itself remains largely abstract and ambiguous. What is it that makes a law effective? And can the relevant factors be proactively engineered to lead to effective laws? Disciplinary barriers and lack of clear focus have failed to give it a clear operational content. So, although the starting point of this study is by no means novel, the approach is fresh in terms of perspective: it looks at the potential of effectiveness to proactively guide lawmaking.

Hence, the focus is on lawmaking, and the lawmaker. Against the traditional focus of legal studies on black letter law and the perspective of the implementer or the judge,[3] the spotlight is now on the lawmaker, as an autonomous actor with the leading role in the early stages of the life cycle of the law. But who exactly is the lawmaker? Depending on the jurisdiction, the answer will vary: it might be policy makers, professional drafters, experts, civil servants, drafting committees, parliamentarians or combinations of the above.[4] My approach is a functional one: it is the job description rather than the job title that matters. My focus is on the individuals whose role is to conceptualise and 'engineer' rules and give shape and form to legal norms, independently of where they are placed within the system. Lawmaking is a global enterprise and despite the differences that make legislation jurisdiction and legal system-specific, the conceptual dilemmas of lawmaking are common – and unique – to those involved in their design and drafting.

Lawmaking on the other hand, as the 'enterprise of subjecting human conduct to the governance of rules'[5] is a complex process that entails the transformation of an idea into binding norms and its consequent exposure to the cruel test of reality. This transformative process is a constant interplay between substance and form,[6] a dialogue of minds, disciplines, languages and mindsets[7] and a decision-making process during which political concepts are transformed into legal material and rules acquire concrete shape and form. Contemporary lawmakers have a triple role as '*policy translators*', '*design-*

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[3] K. Tuori, 'Legislation Between Politics and Law' in Luc Wintgens (eds), *Legisprudence* (Hart Publishing 2002) 99; Luc Wintgens, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in Luc Wintgens and A. Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation* (Springer 2013) at 3.

[4] Constantin Stefanou, 'Comparative Legislative Drafting. Comparing across Legal Systems' (2016) 18:2 European Journal of Law Reform 123, 124–34.

[5] Lon Fuller, *The Morality of Law* (revised edn, Yale University Press 1964) at 106.

[6] A. Seidman, R. Seidman and N. Abeyesekere, *Legislative Drafting for Democratic Social Change. A Manual for Drafters* (Kluwer 2001) 26.

[7] Helen Xanthaki, *Drafting Legislation. Art and Technology of Rules for Regulation* (Hart Publishing 2014) 22.

ers' of effective legislation and '*communicators*'. Balancing the competing demands of this complex role requires a clear focus, and, most importantly, a clear method.

But why effectiveness? Several values have been signposted as indicators of a 'good' law, for example legality, legitimacy, legal certainty or proportionality. Compared to them, effectiveness is 'humble' in terms of origin and aspiration. It has a managerial descent,[8] is 'neutral', relative and fluid, 'empty' in terms of substantive content and highly contextual: it can reflect distinct angles (macro or micro), can be formal or substantive, and can raise different questions depending on the standpoint.[9] Why is effectiveness, as the capacity of the law to achieve its objectives, so important? Its main strength is its straightforward logic: does the law work? Does it have the capacity to work? How can it be designed to work? Its value lies in adding rationality to legislative decision making by ensuring the connection between objectives and results,[10] rather than indicate which objectives or which results. Other values with a similar rationale, like efficacy and efficiency, are either too broad (efficacy), hence beyond the realm of the law, or too 'coined' in their focus towards costs[11] (efficiency). So far as legal systems are purposive[12] and legislation is a 'goal-oriented' intervention,[13] effectiveness is the value that best captures firstly, the capacity of legislation to function as a *system*; secondly its *mechanics* as the controllable factor that can influence the achievement of results; and last but not least, the items that fall within the mandate and the decision-making powers of the lawmaker. The thinking process that leads, or can lead, to effective legislative decision making is what makes effectiveness a fascinating topic of study.

A disclaimer: effectiveness is not a measure of perfection. From the proactive perspective of the lawmaker, effectiveness requires the lawmaker to do the best they can with what they have. Reality cannot be magically changed and the law is no miracle worker. Resources are not infinite. Circumstance

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[8] Ulrich Karpen, 'Efficacy, Effectiveness, Efficiency: from Judicial to Managerial Rationality' in Klaus Messerschimdt and A. Daniel Oliver-Lalana (eds), *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 304.

[9] Maria Mousmouti, 'Introduction to the Symposium on Effective Law and Regulation' (2018) 9:3 European Journal of Risk Regulation 387–90.

[10] Alexander Flückiger, 'Effectiveness: a new Constitutional Principle' (2009) 50 Legislação: cadernos de ciência de legislação at 190.

[11] Wim Voermans, 'To Measure is to Know: The Quantification of Regulation' (2015) 3:1 The Theory and Practice of Legislation 91 at 110–11.

[12] A. Allot, *The Limits of Law* (Butterworths 1980) 11.

[13] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17:2 Law & Society Review 239–85.

is not always opportune. People might not comply or comply creatively. The 'implementation game'[14] is complex, dynamic and can always evolve in unanticipated ways. Effectiveness is not a magical solution: instead, it is a realistic and grounded criterion for making decisions in a context of 'bounded' rationality,[15] with the view of delivering results.

Despite the rhetoric, the conceptual content of effectiveness remains fragmented, unsystematic and abstract. Compliance and enforcement are positively linked to it, yet is that all there is to effectiveness? Far from it. In my view, effectiveness is the 'functional link'[16] between four fundamental elements that are present in every law: objectives, content, context and results. Why these elements? Because they explain the why, the how and the what in relation to legislation. Purpose sets the benchmark for *what* legislation aims to achieve; the content of legislation (i.e. choices in substance, form, structure and language) determines *how* the law will achieve the desired results and how its messages will be communicated; context determines *how the provisions will integrate the legal system*; and, results indicate *what has been achieved*. These four elements, I feel, are the elements inherent in every law that make the concept of legislative effectiveness concrete and tangible. Each in isolation and all four in conjunction shape the invisible mechanics that lie under the surface of any law. And although reality can interact with legislation in unexpected ways and bring unfortunate surprises, these elements are what the lawmaker has at hand when putting together a law.

So, if effectiveness can be consciously 'engineered', what conceptual and methodological insights are needed to guide the choices of lawmakers? Two important aspects are missing, in my view, from existing scholarship and practice: firstly, the emphasis on legislative *design*. Although an unusual term to associate with legislation, it is the process of making strategic choices about legislation as an instrument that intervenes in social and legal reality, the required elements and their role. It is the process of designing the 'formula' according to which the law will intervene. The process of design involves thinking, reflecting, analysing and coming up with a strategy on how the law will change the status quo. Design allows the elements of the final product (the law) to make sense and to have, at least conceptually, the potential to produce results. The second element are *mechanics*. They are not about intuition, circumstance or luck but about selecting the right ingredients and mixing them in the appropriate dosages. What kind of ingredients? The lawmaker's

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[14] E. Bardach, *The Implementation Game: What Happens after a Bill becomes a Law* (MIT Press 1977).

[15] Wintgens (n 3) at 14.

[16] Mauro Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory' (2018) 9:3 European Journal of Risk Regulation 416–30.

toolkit includes legislative techniques, doctrinal and legal concepts, drafting principles, structure, language, form, even layout. Out of these, the lawmaker will have to choose the right ones and articulate them into a coherent whole. The 'effectiveness test', a simple thinking process, proposes an open set of questions to prompt the lawmaker to think around their choices and the use of the tools to ensure mechanics that allow the law to be effective. Effective legislation does not need only bright ideas or minds, imaginative or ambitious strategies, but also skilful mechanics.

Last but not least, effectiveness lies at the intersection of theory and legislative practice. It is an interdisciplinary concept that, like legislation, evolves in two parallel universes: conceptual choices put to the test of reality. Theories offer particular lenses on social reality and legal practice has inescapable theoretical dimensions.[17] Any attempt to deal with effectiveness has to involve both: looking at concepts and how they work in practice; looking at legislative choices, how people reacted to them, what worked well, what not and why; learning from patterns, identifying limitations and automatisms and factoring them into the process. My effort is to nurture this dialogue around the four elements of effectiveness. I look at theory, I look at practice and try to figure out what could work.

Against this background, I am not proposing any grand, all-encompassing new theory of effectiveness. My aim is much humbler: I test the elements of effectiveness in theory and practice. I explore the ways in which content, structure, language and form can be used to formulate solutions that have the potential to be effective. My focus is not on fixed and abstract solutions but on the questions that need to be asked and criteria on the basis of which to make decisions. Between the choice of an approach and the choice of precise words for the product, lie a number of critical decisions to be made.[18] Which requirements will best achieve the goal? How specifically should these requirements be framed? Who should be responsible for implementing the legislation? What sort of enforcement strategy should be employed? How will results be monitored and reviewed? For this set of questions, modern scholarship and practice provide no comprehensive answer.

The book has the following structure: Chapter 1 explores the fundamental theoretical questions around effectiveness and its position and role in lawmaking. It focuses on its evaluation evolution along the life cycle of legislation, its potential and limitations as a lawmaking principle and identifies its four fundamental elements: objectives, context, content and results. The following

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[17] C.R. Sunstein, 'On Legal Theory and Legal Practice' (1995) 37 Nomos 267–87.

[18] E.L. Rubin, 'Legislative Methodology: Some Lessons from the Truth-in-Lending Act' (1991) 80 Geo. L.J. 233.

chapters take a closer approach to the design and the mechanics of the elements of effectiveness in legislation. Drawing on examples from distinct jurisdictions to illustrate the diversity and wealth of lawmaking, they evolve around the main challenges that lawmakers have to address.

Chapter 2 focuses on the role and function of purpose in legislation. Purpose is an internalised benchmark for every law (and its effectiveness) yet a notoriously amorphous and shapeless concept. This chapter takes a fresh approach to the debate around purpose and the challenges of how to shape, phrase and locate purpose. It argues that in effective lawmaking purpose needs to be an objective, rather than subjective, concept that clearly identifies the functions, aims and intended effects of legislation and sets a clear benchmark for the effectiveness of every law.

Chapter 3 looks at the challenges involved in designing the content of legislation. The formulation of the content of the law is the 'heart' of effectiveness and involves complex decisions on the appropriate type of rules, compliance motivations, enforcement mechanisms and conscious choices on how to communicate the law in a context of bounded rationality. The chapter concludes that effective formulation of content requires a clear process of legislative design, decisions grounded on reality and evidence, consistency and coherence in the formula designed, openness to innovation and experimentation, and most importantly, learning from experience and legislative practice rather than automatically replicating existing legislative patterns.

Chapter 4 focuses on the context of new legislation, as the broader framework within which laws operate. Adopting the perspective of a communications medium, I examine how legislative messages can integrate legal systems and the impact of different choices on accessibility, coherence and effectiveness. The chapter puts forward a strong argument that lawmakers need to consider superstructure when deciding how to 'package' the legislative messages and consciously select the choices that best promote accessibility and coherence.

Chapter 5 explores results. It addresses the fundamental questions of what kind of results can be expected from legislation, how these can be monitored, and when, how and by whom they need to be appraised. The chapter concludes that results need to be clearly identified when laws are designed, and need to be framed by appropriate mechanism to monitor implementation and evaluate results.

Moving from the theoretical challenges of lawmaking to the actual business of policy and lawmaking, Chapter 6 critically considers the usefulness of practical tools like Impact Assessment and Consultation in the design of effective legislation. The main finding is that both tools contribute to legislative design but fail to go into the detail required for the design and drafting of the mechanics of legislation, while they lack an explicit focus on effectiveness.

The 'effectiveness test' is proposed as a solution to add 'effectiveness lenses' to the existing toolkit and examine the selected formula from this perspective.

Chapter 7 tackles an issue rarely addressed in academic literature on legislation: failure. It examines fundamental, yet difficult, questions: when has a law failed? Who is in the position to say so? What are the reasons for failure? What comes after? Ultimately, can future failure be avoided? The chapter concludes that failure is intrinsically linked with the objectives and anticipated results of the law: the clearer they are the more realistic the expectations of what the law can and cannot do and although it can never be excluded scepticism and analysis, proper consideration, holistic approaches and learning from past experience are the main ways to set solid foundations for the future.

Connecting the threads running along the previous chapters, Chapter 8 wraps up the findings of this journey. Firstly, that legislative decision making in practice has two distinct starting points: as a 'top down' process that transforms ideas or ideals *to* specific rules or as a 'bottom up' process that attempts to deal with real life situations and problems *through* rules. The critical difference between the two is their connection to reality: the former favours more abstract and 'intuitive' choices, while the latter is more 'grounded' and open to evidence and knowledge. However, both might be necessary. Secondly, lawmakers differ in the way they approach decision making: they can be 'intuitive', if they rely more on abstract assumptions or automatisms when designing the law, they can be 'reflective' to the extent that they engage in an active thinking process during lawmaking or might just 'muddle through' doing what they are asked to do, without much thought. Thirdly, lawmakers are limited in their decisions by heuristics and cognitive biases[19] – unique to their trade – that often appear to prevail over reflection: legislative styles and traditions, drafting conventions, legislative 'patterns', path dependence, borrowed or imported solutions replicated without consideration, in fact any automatism that goes unquestioned, limits the scope of choices of lawmakers. Last but not least, practice confirms that effective lawmaking requires more than good engineers: it needs a genuine commitment to make the law work, a clear thinking and learning process and a method.

[19] R.H. Thaler and C.R. Sunstein, *Nudge* (Penguin Books 2009) at 21–3.