

1. The ‘mechanics’ of effective legislation

Laws are like sausages. It is better not to see them being made

Attributed to Otto von Bismarck¹

1. INTRODUCTION: ON LAWMAKING AND LAWMAKERS

Lawmaking is serious business. Subjecting human conduct to the ‘governance of rules’² is a continuous to-and-fro between form and substance³ that transforms ideals, ideas, assumptions and solutions into rules. This ‘transformation’⁴ depends on the features of legal systems, constitutional frameworks, political and social structure, culture but also on a number of other factors.

The most challenging aspect of lawmaking is its *prospective* nature. Karl Llewellyn wrote that ‘one of the statutory draftsman’s major problems is to look into existent behavior beforehand, to make sure that his formula, when it becomes an official rule, will not merely bask in the sun upon the books. He must so shape it as to induce its application... or else... his blow is spent in air’.⁵ To devise this *formula* and *induce its application*, lawmakers have to rely on implicit or explicit assumptions about social reality and social problems, the ways in which they are expected to evolve, how the law will affect them⁶ and how people will react. The need to anticipate is the more creative, but also the more uncertain, part of lawmaking. Uncertainty arises not only from the

¹ <https://quoteinvestigator.com/2010/07/08/laws-sausages/>

² L. Fuller, *The Morality of Law* (Revised edn Yale University Press 1964) at 106.

³ P. Zumbansen, ‘Law’s Knowledge and Law’s Effectiveness: Reflections from Legal Sociology and Legal Theory’ (2009) 5:2 CLPE Research Paper 11/2009 11.

⁴ M. Zamboni, *The Policy of Law. A Legal Theoretical Framework* (Hart Publishing 2007) 91.

⁵ K. Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ (1930) 30 Colum L. Rev. 431.

⁶ A.D. Oliver-Lalana, ‘Due Post-Legislative Process? On the Lawmakers’ Constitutional Duties of Monitoring and Revision’ in K. Messerschmidt and A.D. Oliver-Lalana (eds) *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 259.

obvious limitations in human capacities and limited information but also from the lack of time, pressure for results, limited resources, among several other factors.

The second challenging aspect of lawmaking is that legislation is – and always will be – the ‘baby’ of both politics and the law. As the product of this intercourse, legislation is governed by different types of rationality: political, legal, cultural, operational, and internal.⁷ Combined with the distinct functions of the law (as a heuristic mechanism, as a social coordinative, power – limiting or justificatory function⁸ or as a symbolic or educational instrument) and the interaction with reality they might generate significant clashes. So, apart from anticipating the future, an important aspect of lawmaking is to balance these distinct logics.

It is obvious that lawmaking is far from a clinical experiment. It takes place in a dynamic environment. It is complex in terms of content, management, organisation, coordination and implementation. It is highly contextual. Several actors are involved, several processes take place in parallel or consequently usually under extreme time pressure. Pressure comes in many shapes and forms. Further, it is not static. The life of the law is an eternal cyclical⁹ process of action, reaction and more action that shapes its content. In this highly volatile context, lawmakers have to give shape and form to the law. How can they be guided in this task? How can they make the best possible decisions? But first of all, who are these ‘lawmakers’?

It is an oxymoron, but lawmakers, the individuals who actually design and draft legislation, are a notoriously obscure actor in the lawmaking process. Why? Firstly, because the ‘pre-legislative’ phase when laws are actually drafted remains esoteric, but also because there has been little emphasis on the lawmaker as an autonomous actor in the lawmaking process, the spotlight being primarily on the implementer or the judge.¹⁰ As a result, despite the importance of legislation, the persona of the lawmaker remains highly enigmatic. So, who exactly are the the lawmakers? There is no definite answer. Depending on the jurisdiction, the answer will vary: it might be policy makers,

⁷ Paul Wahlgren, ‘The Legitimacy Sphere: Between Law, Culture, Politics and Enforceability’ (2010) 56 *Scandinavian Studies in Law* 428–39.

⁸ Dirk H. van der Meulen, ‘The Use of Impact Assessments and the Quality of Legislation’ (2013) 1:2 *The Theory and Practice of Legislation* 205–325.

⁹ P. Noll, *Gesetzgebungslehre* (Rowohlt, Reinbeck 1973) 314.

¹⁰ K. Tuori, ‘Legislation Between Politics and Law’ in Luc Wintgens (ed) *Legisprudence* (Hart Publishing 2002) 99–107, 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.

professional drafters, experts, civil servants, drafting committees, parliamentarians or combinations of the above.¹¹ In any case, a number of individuals, no matter what their function within a jurisdiction is, are responsible for conceptualising, 'engineering' and giving shape and form to legal norms, independently of where they are placed within the system. But how do they actually do that?

Understanding lawmaking requires moving away from the focus on black letter law and judicial thinking towards the anticipatory thinking that lawmakers are involved in. Despite the alleged alliance in terms of aim and technique between judicial and legislative processes,¹² there are important differences: judges interpret or engage in post factum critique of established law while lawmaking involves weighing and balancing, hence discretion. Further, their position differs in institutional and deontological terms (the judge as a stable actor versus the legislator in the service of political power), in the type of deliberation involved (consensus versus negotiated compromise) but also in the type of reasoning required (subsumptive reasoning versus open and 'practical' reasoning directed to the future and dependent on causal factors that cannot be established in a normative way).¹³ Last but not least, the questions tormenting the lawmaker and the judge differ in nature, texture and scope and the challenges are fundamentally different: the judge has to address procedural, jurisdiction, evidence or interpretation questions, while the lawmaker deals with open-ended questions associated with the features of a specific problem, normative solutions, appropriate and adequate measures, the aims to be achieved and so forth.

If the main role of a lawmaker is to establish and delimit the law in a way that gives precise legislative shape to policy¹⁴ and 'draw the line' between the two then their role is increasingly complex: they have to 'master' their circumstances, receive diverse input, understand, analyse, 'converse' with different interlocutors, and finally design a solution that serves policy objectives and has the potential to work. This combines at least three distinct functions: that of a '*policy translator*' charged with the task to transform political concepts

¹¹ Constantin Stefanou, 'Comparative Legislative Drafting. Comparing across Legal Systems' (2016) 18:2 *European Journal of Law Reform* 123, 124–34.

¹² J. Landis, 'Statutes and the Sources of Law' in *Harvard Legal Essays Written in Honor and Presented to Joseph Henry Beale and Samuel Williston* (Harvard University Press Cambridge Mass 1934).

¹³ M. Atienza, 'Reasoning and Legislation' in L. Wintgens (ed) *The Theory and Practice of Legislation. Essays in Jurisprudence* (Ashgate 2005) 297–318, 300–313.

¹⁴ H. Xanthaki, *Drafting Legislation. Art and Technology of Rules for Regulation* (Bloomsbury Professional, 2014); Stephen Laws, 'Drawing the Line' in C. Stefanou and H. Xanthaki (eds) *Drafting Legislation. A Modern Approach* (Ashgate 2008) 19–35.

into legal material; that of a ‘*designer*’ of workable (effective) rules and that of a ‘*communicator*’ that effectively transmits the ‘message’ of the law to the targeted audiences.

Giving centre stage to the lawmaker and approaching lawmaking from their perspective is not only a novel endeavour but, most importantly, marks a change of perspective: the question – and the challenge – is no longer whether or how the law works in practice, but instead how it should be designed in order to work. What kind of guidance do lawmakers have in this complex task? How can they make the best possible decisions in this fluid, complex and uncertain environment?

2. ANY PRINCIPLES TO GUIDE LAWMAKING?

For years, there has been no comprehensive theory or analytical formula for lawmaking. Disciplines working with the law remained restricted within their disciplinary ‘silos’ with limited cross fertilisation of knowledge that could generate more holistic approaches. Legal theory and legal sociology focused on the operation of the law in the outside world and its applicability, observance, enforcement,¹⁵ the relation between law in paper and law in action and legal behaviour in reaction to it.¹⁶ Political scientists focused on processes, institutions and the emerging dynamics, while law and economics approached rules as structures of incentives¹⁷ whose efficiency (maximisation of expected costs and losses) depends on the type of rules and enforcement.¹⁸ Behavioural law and economics highlighted the role of cognitive biases in decision making¹⁹ and further possibilities to model behaviours. The study of regulation touched upon both design and delivery but at the level of regulation. Factors relevant

¹⁵ H. Kelsen, *Pure Theory of Law* (translated from the 2nd revised and enlarged German edition by Max Knight, The Lawbook Exchange 2009) 11; H.L.A. Hart, *The Concept of Law* (2nd edn Oxford University Press 1997) 103; H. Jones, *The Efficacy of Law* (1968 Rosenthal Lectures Northwestern University Press) 4, 5, 14–21, 76.

¹⁶ A. Sarat, ‘Legal Effectiveness and Social Studies of Law: on the unfortunate resistance of a research tradition’, *Legal Studies Forum* (1985) IX 1 23–31 at 23; A. Allot, *The Limits of Law* (Butterworths 1980) viii, 28, 30.

¹⁷ D. Friedman, *Law’s Order* (Princeton University Press 2000) at 11.

¹⁸ C. Veljanovski, ‘Economic Approaches to Regulation’ in R. Baldwin, M. Cave, M. Lodge (eds) *The Oxford Handbook of Regulation* (OUP 2010) 17–38 at 28.

¹⁹ J. Wright and D. Ginsburg, ‘Behavioral law and economics. Its origins, fatal flaws, and implications for liberty’ in A. Hatzis and N. Mercurio (eds), *Law and Economics. Philosophical issues and fundamental questions* (Routledge 2017) 297–331, 300ff; Ch. Jolls, C.R. Sunstein, R. Thaler, ‘A Behavioral Approach to Law and Economics’ (1998) 50 *Stan. L. Rev.* 1471; C.R. Sunstein, ‘Behavioral Analysis of Law’, 64 *U. Chi. L. Rev.* (1997) at 1175.

to lawmaking, related to content, purpose, fit with the legal and social context, implementing processes, language, incentives and enforcement are highlighted with little, if any, systematisation. Further, all disciplines retain their ad hoc focus on legislation and offer little insight on how rules can be generated.

So, is lawmaking a completely liberal and anarchic process? On what bases are legislative decisions made? Is it circumstance and intuition? What kind of guidance does the legal system offer?

Constitutions reluctantly, if at all, and with very few exceptions,²⁰ express a clear theory to guide lawmaking, beyond the formal adoption of rules. Constitutional law on the other hand discusses principles of proper lawmaking²¹ that encompass proportionality, legal certainty and legality or substantive principles (rule of law, social state, etc.), among several others. These principles are indubitably relevant, but how concretely can they proactively guide legislative decision making?

There are two main concerns with the usefulness of abstract substantive principles (like proportionality or legal certainty) from a lawmaking perspective. The first is that they retain the ad hoc focus on the law. The impact of a rule on legal certainty or legality is considered after a norm has been enacted. Yet, as discussed before, norm formulation is fundamentally different from norm interpretation. The thinking process behind delivering a judgment or assessing the constitutionality of a law is different to the proactive thinking required in lawmaking. Let's take for example the proportionality test, which is used to 'correct' the rationality of lawmaking by examining whether a measure serves a legitimate purpose, whether it is rationally connected to the purpose, is the least restrictive of all equally effective means, and is not disproportionate in the strict sense.²² This ad hoc 'balancing exercise' looks at lawmaking in the light of the facts of a specific case. Can it also, and to what extent, proactively guide lawmakers to make more proportionate decisions? The proactive use of judicial tools (and thinking) in lawmaking is an issue that deserves closer study and attention in the future. However, at the moment, it does not offer a concrete solution.

²⁰ Art. 170 Constitution of Switzerland; art. 24 Constitution of France.

²¹ P. Popelier, 'Legal Certainty and Principles of Proper Law Making' (2000) 2:3 *European Journal of Law Reform* at 321; U. Karpen, 'Introduction' in U. Karpen and H. Xanthaki, *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017) 1–16 at 12.

²² N. Petersen, *Proportionality and Judicial Activism. Fundamental Rights Adjudication in Canada, Germany and South Africa* (CUP 2017) at 2.

Secondly, abstract standards like the ones mentioned above are elusive, relative and vague.²³ Legal certainty, that advocates for a coherent, simple and complete set of clear legal rules in terms of predictability and foreseeability can be deconstructed in a myriad of different dimensions.²⁴ Substantive standards like democratic legitimation, functionality, completeness and coherence, understandability and accessibility and legistic or procedural standards often lack concrete content, contradict each other and are challenging to operationalise.²⁵ And although their overall relevance in lawmaking is beyond doubt, the concrete proactive guidance they can offer is not evident. Without undermining their potential to assist lawmakers, these principles need further elaboration and operationalisation in order to reflect the concerns of the lawmaker in the early stages of lawmaking.

From another viewpoint, constitutional provisions enriched with judicial doctrines offer an emerging normative approach to lawmaking.²⁶ Constitutional (and other) courts are increasingly assuming a role as regulatory watchdogs²⁷ and attempt to place themselves in the prospective position of the lawmaker. Courts review the substantive and procedural rationality in lawmaking,²⁸ operate as an additional layer of scrutiny²⁹ and obligate lawmakers to anticipate judicial objections and incorporate judicial norms into legislative decision making. The German Federal Constitutional Court has ‘constitutionalised’ major tenets of rational lawmaking into judicial review standards, for example, the choice of options when legislating, the justifiable nature of data and prognoses, the duty to give reasons, consistency and coherence in the design of

²³ H. Schulze-Fielitz, ‘Paths Towards Better Legislation, Detours and Dead Ends’ in K. Messerschmidt and A.D. Oliver-Lalana (eds) *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (Springer 2016) at 36.

²⁴ P. Popelier, ‘Codification in a Civil Law Jurisdiction: A Northern European Perspective’ (2017) 19:4 *European Journal of Law Reform* 253–61 at 259.

²⁵ Schulze-Fielitz (n 23) at 35–6.

²⁶ D. Oliver-Lalana and K. Messerschmidt, ‘On the Legisprudential Turn in Constitutional Review: An Introduction’ in K. Messerschmidt and D. Oliver-Lalana (eds) *Rational Lawmaking under Review Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 1.

²⁷ P. Popelier and A. Mazmanyanyan, ‘Constitutional Courts and Multilevel Governance in Europe. Editors’ Introduction’ in P. Popelier, A. Mazmanyanyan and W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 13.

²⁸ R. Ismer and K. Messerschmidt, ‘Evidence-based judicial review of legislation: some introductory remarks’ (2016) 4:2 *The Theory and Practice of Legislation* 91–106, 92.

²⁹ I. Bar-Siman-Tov, ‘The role of courts in improving the legislative process’ (2015) 3:3 *The Theory and Practice of Legislation* 295–313, 312.

laws,³⁰ to name only a few. Other Constitutional Courts are still reluctant or even unwilling³¹ to acknowledge this relationship and role and involve themselves into the 'interna corporis' of legislative decision making.

Several questions remain with regard to evidence-based review of legislation,³² including its nature as a duty or a prudential obligation, methodological uncertainties,³³ its borderline relation with judicial activism, and, most importantly, the democratic legitimacy of courts to deduct and control a lawmaking method from the constitution.³⁴ No matter how actively courts engage in this process in the future, their constitutional role will always be that of a guardian rather than a 'reformer' of the law.³⁵ Constraints on the role of courts as agents of law reform include their attachment to precedent, the limitations of the litigation process, the lack of legitimacy to change the law, the lack of resources to examine problems of law comprehensively, the fragmented nature of information they are presented with and the limited scope of interpretation powers.³⁶ This evolving discussion, although inconclusive, highlights however the need to make legislative decision making less obscure. There is little doubt that the dialogue between judges and lawmakers merits more attention with regard to the ways in which it can proactively contribute to lawmaking.

Legislative studies or legisprudence³⁷ is the only discipline that acknowledged the role of the lawmaker as an actor with an autonomous sphere of decision making.³⁸ In this context, the focus is on ways to improve quality, make legislators more 'intelligent' and receptive, the process more legitimate and the

³⁰ See the contributions in K. Messerschmidt and D. Oliver-Lalana (eds) *Rational Lawmaking under Review Legisprudence According to the German Federal Constitutional Court* (Springer 2016) passim.

³¹ P. Popelier and Josephine De Jaegere (2016) 'Evidence-based judicial review of legislation in divided states: the Belgian case', 4:2 *The Theory and Practice of Legislation* 187–208; R. van Gestel and Jurgen de Poorter (2016) 'Putting evidence-based law making to the test: judicial review of legislative rationality', 4:2 *The Theory and Practice of Legislation* 155–85; P. García-Escudero Márquez, *Técnica legislativa y seguridad jurídica: ¿hacia el control constitucional de la calidad de las leyes?* (Cuadernos Civitas Thomson Reuters 2010).

³² Ismer and Meßerschmidt (n 28) 91–106.

³³ A. Daniel Oliver-Lalana, 'On the (judicial) method to review the (legislative) method' (2016) 4:2 *The Theory and Practice of Legislation* 135–53.

³⁴ Oliver-Lalana and Messerschmidt (n 26) at 2.

³⁵ Peter Sales, 'Law Reform Challenges: The Judicial Perspective' (2018) 39:3 *Statute Law Review* 229–43.

³⁶ *Ibid.*

³⁷ Karpen, 'Introduction' (n 21) at 3; L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22:2 *Statute Law Review* 119–31, 120.

³⁸ Wintgens (n 12) at 3.

end product simpler and easier to comply with.³⁹ Legislative studies approach lawmaking from two distinct perspectives: at theoretical level through the emphasis on rational or evidence-based lawmaking and at another level, through the emerging, and more applied, discipline of legislative drafting.

Rational lawmaking is concerned with procedurally and substantively rational laws⁴⁰ by emphasising two complementary elements: the well-grounded design of legislation through fact finding, analysis of means and alternatives, legislative balancing, smart goal setting and decision making (anticipation)⁴¹ and the appraisal of the actual impacts of legislation to ensure responsiveness to changing circumstances (retrospection).⁴² In its anticipatory aspect, law informed by reality – as opposed to intuition – is assumed to produce better laws.⁴³ In its retrospective aspects the need to monitor and correct legislation is the only way to ensure that laws perform as expected and do not produce harmful effects. Even though the link between legislation and logic is contested⁴⁴ and the direct connection between evidence-based lawmaking and evidence-based law is difficult to prove⁴⁵ rational lawmaking is more pragmatically oriented towards ‘neutralising’ the predominantly ‘intuitive’ effects of the political process with legistic quality.⁴⁶

Legislative drafting on the other hand deals with the actual process and intricacies of laying down the law. It approaches it as a dynamic process driven by practical, ‘applied’ wisdom, guided by theoretical principles and complemented by evidence, analysis and creativity. The aim is to make conscious and evidence-based decisions in the process of drafting a specific legislative text.⁴⁷ It explores choices in structure, language, syntax, form and expression. Although overall complementary, these two strands have a large gap between the mostly theoretical (and abstract) focus of rational law-making on evidence

³⁹ Karpen, Introduction (n 21) at 3; Mader (n 37) at 120.

⁴⁰ Ismer and Meßerschmidt (n 28) 91–106.

⁴¹ Oliver-Lalana (n 6) at 286; Oliver-Lalana (n 33) at 136.

⁴² Oliver-Lalana (n 6) at 259.

⁴³ J. Rachlinski, ‘Evidence-Based Law’ (2011) 96 *Cornell Law Review* 901–23 at 910.

⁴⁴ J. Hage, ‘The (Onto)logical Structure of Law: A Conceptual Toolkit for Legislators’ in M. Araszkievicz and K. Pleszka (eds) *Logic in the Theory and Practice of Lawmaking* (Legisprudence Library Vol. 2 Springer 2016) 3–49.

⁴⁵ Rachlinski (n 43) at 912.

⁴⁶ H. Schulze-Fielitz, ‘Paths Towards Better Legislation, Detours and Dead-Ends. An Appraisal of Consultation and Independent Experts, Justifications for Legislation, Impact Assessments and Controls of Efficacy’ in K. Messerschmidt and D. Oliver-Lalana (eds) *Rational Lawmaking under Review Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 33–57, 34.

⁴⁷ Xanthaki, *Drafting Legislation* (n 14).

and anticipation and the mostly practical approach of legislative drafting with little in-between on the numerous substantive legislative decisions that need to be made. The 'operating arm' of evidence-based lawmaking, originating from public policy and law and economics, regulatory reform programmes have contributed structures, processes and instruments to make lawmaking evidence based.⁴⁸ The broad framework is in place (anticipation and retrospection), the practical aspects are in place, the tools are in place. But what about the vast space in-between?

However, another important contribution of legislative studies to law-making, and the most important from the perspective of this analysis is the introduction in the discussion of principles of economic or 'managerial' rationality,⁴⁹ such as efficacy, effectiveness and efficiency to strengthen and complement the rational aspects of lawmaking. These principles interact with substantive ones⁵⁰ and add neutrality, objectivity and a 'managerial' rationality to the decision making process. However, even this, the triad, is not free of conceptual and operational challenges when considered from the perspective of lawmaking.

3. EFFICACY, EFFECTIVENESS OR EFFICIENCY?

None of these principles are new. Yet different disciplines prioritise and rate them differently: legal theorists 'prefer' efficacy,⁵¹ sociologists effectiveness,⁵² law and economics scholars and scholars of regulation efficiency.⁵³

A first problem is the conceptual confusion between these concepts and especially efficacy and effectiveness. Effectiveness was initially considered a condition of validity of a norm,⁵⁴ a link that was later rejected.⁵⁵ Efficacy (rather than effectiveness) was chosen to indicate the conformity of actual behaviours to the standards or models of behaviour prescribed by the law.⁵⁶

⁴⁸ P. Popelier 'Management of Legislation' in U. Karpen and H. Xanthaki (eds) *Legislation in Europe* 53–72, 53, 56.

⁴⁹ U. Karpen, 'Efficacy, Effectiveness, Efficiency: from Judicial to Managerial Rationality' in K. Messerschmidt and A.D. Oliver-Lalana (eds) *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (Springer 2016) at 304.

⁵⁰ Karpen, 'Introduction' (n 21) at 12.

⁵¹ H.L.A. Hart *The Concept of Law* (2nd edn OUP 1997) at 103.

⁵² Allot (n 16) at 11.

⁵³ R. Baldwin, M. Cave and M. Lodge (eds) *Understanding Regulation. Theory, Strategy and Practice* (2nd edn OUP 2012) at 25–31.

⁵⁴ Kelsen (n 15) at 11.

⁵⁵ Hart (n 15) at 103; J. Raz, *The Authority of Law* (2nd edn OUP 1980) at 87.

⁵⁶ Jones (n 15) at 4.

The relationship between these two principles remains particularly controversial even today. Mader linked efficacy to the achievement of the goals of legislative action and effectiveness to the correspondence between the attitudes of the target population and the normative model. Karpen and Xanthaki follow this definition.⁵⁷ Flückiger claims the opposite: he considers measures efficacious if applied and followed, efficient if the cost is proportional and effective if they achieve their objectives.⁵⁸ On the other hand, legal sociologists associate effectiveness (rather than efficacy) with the goals of legal policy and the results produced by a norm.⁵⁹ Allot defines an effective law as one that can do what it was designed to do and effectiveness is the degree of achievement of its objectives.⁶⁰ Efficiency, a term with economic origin, has clearer – and less disputed – content as it looks at costs in relation to outcomes.

The confusion especially in the definition of efficacy and effectiveness and the relation between them emerges both because the terms are used interchangeably but also because they are associated with sub-concepts that remain equally vague. Do both concepts link the goals of legislation with its results and effects? Is compliance a criterion of efficacy, effectiveness or both? Do goals and results coincide with compliance and observance? What kind of goals? What kind of results? Are the two synonymous? If not, what is the difference between them?

This controversy can be resolved if we accept that the three principles are mutually complementary and reflect different functions of legislation. Efficacy is the concept that focuses on the broader functions of legislation and the extent to which it contributes to broader policy or societal goals (the question being: *has the law achieved its broader objectives on the legal system or the society, for instance, to promote equal opportunities?*). Effectiveness on the other hand focuses on results directly associated with the rule and its mechanics (the question being: *does the law work as planned? Does it achieve its direct goals?*) while efficiency looks at objectives in relation to costs (the question being: *does the law achieve maximum benefits with the least cost?*). Seen in this light, each principle reflects a different function of a legislative text: achievements in the legal or social arena (efficacy), application and observance of the law and achievement of direct results (effectiveness) and the cost-effectiveness of the solution (efficiency). From this perspective, the three principles operate

⁵⁷ L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22:2 Statute Law Review, 119–31 at 126. See also Karpen (n 49) at 304–8.

⁵⁸ A. Flückiger, 'Effectiveness: a new Constitutional Principle' *Legislação: cadernos de ciência de legislação* (2009) 50, 183–98, at 190.

⁵⁹ Sarat (n 16) at 23.

⁶⁰ Allot (n 16) viii at 28, 30.

in synergy to allow a multidimensional understanding of legislative quality. Xanthaki's pyramid of virtues⁶¹ reflects the different scope of each principle.

This 'solution' shows firstly, that out of the three values effectiveness is the most suitable to encapsulate the internal systemic consistency, coherence and purposive nature of legislation; and, that it is the primary expression of legislative quality that lawmakers can realistically pursue within their mandate.⁶²

There are several reasons for this. On the one hand, efficacy (as the connection between the law and regulatory goals) is too broad as it goes beyond the scope of the law in the realm of policy; efficiency is guided by a narrower, 'coined' rationality looking at resources in relation to outcomes but downplaying important substantive elements which are not valued by cost-related concerns. Despite its advantages in terms of objectivity and inclusivity, the prevalence of cost-related arguments in legislative decision making can over-technify decisions, obscure broader impacts which are not easily quantified, cannot always weigh all effects (and especially social impacts) and, most importantly, can oversee public interest elements which go beyond the economic, but are nonetheless important in lawmaking.⁶³ Effectiveness on the other hand, as a concept tailored to the measure of the legislative text or rule, contributes a layer of rationality by setting clear benchmarks⁶⁴ and connects them to the mechanisms introduced, the results prescribed by the legislator and those achieved in real life. Further, it renounces a thinking primarily oriented towards numbers to include consideration of social, psychological and political effects.⁶⁵ Effectiveness as the capacity of legislation to do the job it is meant to do, reflects the *mechanics* of legislation and its *systemic* capacity to work.

Hence, effectiveness combines many features which are particularly relevant in the anticipatory aspects of lawmaking: first, it is a *purposive* concept that reflects the orientation of legislation towards specific goals. Second, it is 'neutral' and 'empty' in terms of substantive content (it does not tell us what to do) but highlights the 'link' between ideals, situation and results.⁶⁶ Third,

⁶¹ H. Xanthaki, 'On Transferability of Legislative Solutions' in C. Stefanou and H. Xanthaki (eds) *Drafting Legislation. A Modern Approach* (Ashgate 2008) 1–18 at 17; H. Xanthaki, *Drafting Legislation. Art and Technology of Rules for Regulation* (Bloomsbury Professional 2014) at 7.

⁶² H. Xanthaki, 'Quality of Legislation: An achievable universal concept or a utopia pursuit?' in L. Mader, M. Tavres de Almeida (eds) *Quality of Legislation. Principles and Instruments* (Nomos 2011) at 80–81.

⁶³ W. Voermans, 'To Measure is to Know: The Quantification of Regulation' (2015) 3:1 *The Theory and Practice of Legislation* 91–111 at 110–111.

⁶⁴ Flückiger (n 58) at 187, 189.

⁶⁵ Karpen (n 49) at 306.

⁶⁶ Mauro Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory' (2018) 9:3 *European Journal of Risk Regulation* 416–30.

it is *systemic* to the extent that it reflects the *mechanics* of legislation and its capacity to function as a ‘system’. Fourth, it is element inherent in every law and defined to an extent (but not exclusively) by the substantive choices made by the lawmakers. Fifth, effectiveness evolves together with the rule from a *prospective* to a *real* dimension (and hence captures both aspects of rational lawmaking): the former expresses the extent to which legislation is conducive to the desired results (can a law achieve the desired results?), which is pertinent to lawmakers, while the latter expresses the extent to which the attitudes, behaviours, results and outcomes correspond to those prescribed by the legislator (has a law achieved the desired results?). The answer to these questions and their interrelation is an indicator of the effectiveness of a rule.

However, even if we accept that effectiveness best reflects the tangible aspects of the quality of a rule that falls within the making scope of the lawmaker, this solves neither the question of how it can be operationalised nor how it can serve as guidance to lawmaking. Does effectiveness have concrete content? Can lawmakers consciously work towards effectiveness? How? Which legislative choices promote effectiveness and which ones do not? Can effectiveness move from an abstract and theoretical principle into one that guides legislative decision making?

4. THE FUNDAMENTAL ELEMENTS OF EFFECTIVENESS

Taking a closer look at effectiveness, existing scholarship and practice fail to offer a convincing answer to the question what makes a law effective. Rather, they highlight a number of elements. Philosophers acknowledge the link of effectiveness to the communication of the legislative ‘message’, supportive action in courts and society, enforcement and motivating compliance in the subjects of the law.⁶⁷ Legal sociologists acknowledge vaguely its links to the content of the law, the character of norms, the clarity of purpose, the interaction and fit of the law with other components of the legal system and the social context, implementing norms, institutions and processes, language, the audiences, deterrents and enforcement mechanisms.⁶⁸ Overall, emphasis is placed on the deterring function of sanctions, compliance and enforcement but goes in little depth on all other issues. So is effectiveness about the content, the process or the results?

⁶⁷ Jones (n 15) at 5, 14–21, 76.

⁶⁸ Allot (n 16) viii at 13.

If legislation is a to-and-fro between form and substance⁶⁹ and the lawmaker has to transform ideals, ideas and assumptions into effective provisions using concepts, the law, language, structure and form, effectiveness has to comprise four fundamental elements that are present in every law: objectives, the 'solution' expressed in the content of the law, results and context (overarching structure or superstructure).⁷⁰ Each element plays a distinct role: purpose sets the benchmark for *what* legislation aims to achieve; the substantive content determines *how* the law will achieve the desired results and how this will be communicated to its subjects. The results of legislation indicate *what has been achieved* while context (overarching structure of legislation) determines *how the law integrates the legal system and interacts with it*.

Seen as a synthesis of these elements, the content of effectiveness is no longer abstract. On the contrary, it becomes specific, concrete, tailored to specific elements present in every legislative text, and, most importantly tangible because the four elements fall within the decision making sphere of the lawmaker. This is a good starting point for operationalising effectiveness as a concept to guide lawmaking. But let us take a closer look at each element and try to identify the lawmaking challenges associated with them.

4.1. Purpose of legislation: the benchmark of effectiveness

Purpose dominates the life-cycle of legislation: when a rule is conceptualised and drafted, purpose is the 'link' between the specific problems addressed, the broader policies of the government and the means chosen to address them; when a law is interpreted, purpose helps diagnose the intention of the legislator to interpret vague provisions. Further, purpose is the obvious starting point in the effort to connect legislation with its results and determine what a law has achieved. Objective-setting is the obvious starting point of every rational decision-making process. However, when it comes to lawmaking, objectives remain notoriously vague.

The purpose of a law indicates *what* the law aims to achieve. Obvious as this may sound, the closer one looks at legislative practice the less it appears to mean. Despite its supposedly leading role when designing, drafting and implementing legislation, the purpose of legislation is difficult to trace, and

⁶⁹ Zumbansen (n 3) at 11.

⁷⁰ M. Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test' (2012), 6:2 *Legisprudence* 201; M. Mousmouti, 'Effectiveness as an Aspect of Quality of EU Legislation: Is it Feasible?' (2014) 2:3 *The Theory and Practice of Legislation* 309–27; Maria Mousmouti, 'Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking' (2018) 9:3 *European Journal of Risk Regulation* 445–64.

understand. Objectives are often conflated with the justification of legislation; their formulations leave much to be desired and, last but not least, they often do not give clear messages. How can lawmakers use purpose to design legislation which is clearer on what it aims to achieve? How can they formulate clear and meaningful expressions of purpose that set a clear and substantive benchmark for what the law aims to achieve? These issues will be explored in Chapter 2.

4.2. Content of legislation: the ‘heart’ of effectiveness

The second fundamental element of effectiveness is the content of legislation. Laws often come as a solution to a problem. The ‘mechanics’ of the solution involve important decisions on the choice of rules and legislative techniques to be used, incentives for the target audiences to comply, enforcement or administration mechanisms and choices in communicating the messages of the law using language, structure, form etc. Seen from the perspective of effectiveness, the content of the law determines *how* it will achieve its results.

The choice of rules determines how behaviours will be directed towards the desired goals, what rights are conferred or obligations are imposed, how the rules will be enforced and the consequences or motives attached to them. Finally, the way in which the ‘message’ of the law is stated, determines how the targeted audiences will be reached. These choices obviously have a significant impact on the capacity of legislation to achieve results. If the selected rules (or combination of rules) are inappropriate to address the problem or to the audience or do not serve the objective of the law, their design is ineffective; if enforcement mechanisms are inappropriate or implementation is inadequate, enforcement is ineffective; if the subjects of the law do not know how to comply or encounter difficulties in complying or interpreting rules, drafting is ineffective.

From the perspective of the lawmaker, the formulation of the content of rules poses three important challenges: what kind of rules for what kind of problem? How to anticipate compliance? What kind of enforcement? and how to best communicate? These topics, common in the discussion around legislation, are so far treated as implementation problems. However, seen from the perspective of lawmakers they raise questions of distinct texture and content. How can the lawmaker choose rules the subjects are more likely to comply with? How can they anticipate which legislative techniques are more likely to bring the expected results? And what criteria can they use apart from intuition? How can the most appropriate enforcement styles and mechanisms be selected? Not all laws are the same, not all audiences are the same. What can work best in each case? How can language, as the main communications medium of the message of the law, be used to transmit clear signals? Last but

not least, what factors might limit the capacity of the lawmaker to make objective decisions? These issues will be explored in Chapter 3.

4.3. Overarching structure or superstructure: the context of effectiveness

Every new piece of legislation, following its enactment, becomes part of the legal system. Every legal system is saturated with legal messages with obvious or hidden interactions between them. Every new Act comes with a new message (or messages) that will compete with those transmitted by other laws for the attention of the end-recipients.⁷¹ The way in which the different messages coexist has an impact on the effectiveness of the message itself, on the capacity of the end-recipient to locate it and understand it and on the capacity of the implementer and the judge to apply and interpret it.

From the perspective of the end-user, the challenge is firstly to identify relevant messages within a complex legal system (identify does not mean understand, it means locate) and secondly, to differentiate a message from competing ones and figure out their relationship. Does the new message change, override, alter or leave pre-existing or competing messages unaffected? How does it affect what we already know? From the perspective of the lawmaker, these considerations translate into three lawmaking challenges: firstly, how to ensure that the message is accessible to the end-recipient within the legal system? secondly, how to ensure that the message is coherent with other messages? and thirdly, how to ensure that the message is identifiable and measurable? These questions will be considered in Chapter 4.

4.4. Results of legislation: the 'measure' of effectiveness

A law is enacted in anticipation of specific results. The relation between the law as a vision and the law in reality is not always linear. The need to learn about the results of legislation is a requirement of democratic governance, a way to prevent adverse effects on fundamental rights and to consistently appraise the responsiveness of the law to the regulated problems and phenomena.⁷² However, the legal discipline is not particularly at ease with measurable concepts like results, outcomes or effects. Despite this, it is a fact that every law produces specific results and effects, wanted or unwanted.

⁷¹ Allot (n 16) 36.

⁷² A. Flückiger, 'L'obligation jurisprudentielle d'évaluation législative: une application du principe de précaution aux droits fondamentaux' in A. Auer, A. Flückiger and M. Hottelier, *Les droits de l'homme et la constitution: études en l'honneur du Professeur Giorgio Malinverni* (Schulthess 2007) at 170.

Information on the results of legislation shows *what has been achieved*. It is critical for effectiveness, firstly because it enables learning about the real-life results and effects of legislation and secondly because it connects the different phases of the life-cycle of legislation and allows the juxtaposition of initial purposes and real-life results. Without information on results, effectiveness cannot be appraised, the self-correcting process cannot be initiated, errors cannot be identified and addressed. This information is an important requirement for effectiveness. From a lawmaking perspective, challenges pertain to the kind of results expected; the design of meaningful monitoring, review and evaluation mechanisms. What can the lawmaker do in anticipation of the real-life results of legislation? These questions will be examined in Chapter 5.

4.5. Interaction between the elements

Needless to say, the four elements are closely interrelated and interact to shape the unique ‘working’ of every law in a specific context, space and time. How coherent, aligned and mutually reinforcing are these elements? What is their role in making the law effective or ineffective? And how can these be proactively anticipated?

5. CONCLUSION: THE LAWMAKER AS THE ‘DESIGNER’ OF EFFECTIVE LAWS AND THE EFFECTIVENESS TEST AS A THINKING PROCESS

Lawmaking is a challenging yet fascinating exercise. Effective lawmaking presents the challenge of having to anticipate – to the extent possible and in as much detail as possible – that the choices and solutions considered have the capacity to work. In this effort, effectiveness provides a framework for legislative decisions – and a clear decision-making criterion. The hypothesis is that, following a meticulous thinking process that involves analysis, design and drafting, legislative effectiveness becomes manageable and feasible.

In this process the effectiveness test is a practical exercise that operationalises the elements of effectiveness through a loose set of questions that trigger reflective thinking. The next chapters will take a closer look at each element, their theoretical and practical dimensions, the challenges they raise from a lawmaking perspective, in the effort to identify solutions that promote effective lawmaking. Additionally, the self-correcting process of scientific inquiry and legislative practice are welcome to negate, refine, particularise, test and improve them.