



LEGISLATIVE POLICY AND EFFECTIVENESS: A (SMALL) CONTRIBUTION FROM LEGAL THEORY

Mauro Zamboni, Faculty of Law, Stockholm University, Sweden

Effectiveness in legislation: this is what legislation is all about!

However, what does effectiveness imply in the reality?

(e.g. redirecting the legislative panorama in the desired direction, obtaining the desired changes in society, achieving legislation's political goals).

Purpose: to clarify the meaning of effectiveness in legislative policy from the legislative drafters' perspective (by using a legal theoretical approach).

1. EFFECTIVENESS OF LEGISLATIVE POLICY: FROM “VALUE” TO FUNCTIONAL LINK AMONG MILESTONES

Fragmentation as to “what effectiveness is in practice” is produced by two factors:

- the widespread notion of *effectiveness as a value “per se”*
- the different views as to *where effectiveness should be located.*

Fundamental misunderstanding = effectiveness as a value in itself of legislation (just like democracy or basic rights).

No: effectiveness is a *relative* criterion (i.e. a path that *can* be chosen in order to fulfill other values).

Core idea: effectiveness in legislative policy is the *measure* of the capacity of chosen legislative patterns in obtaining results that are as close as possible to realizing the ideal expressed by the political actors, considering the context of operation.

Effectiveness as a road between:

- 1) the ***original idea*** to be legislated upon (what one wants to achieve with the legislative process);
- 2) the ***actual situation*** in which to legislate (the environment in which the legislative process operates);
- 3) the ***results*** of legislation (what the legislative process has actually achieved).

Effectiveness: a criterion to measure of the capacity of the chosen legislative patterns to obtain the *results* that are as close as possible to the original *ideals*, considering the *context of operation*.

2. INTERNAL VS. EXTERNAL EFFECTIVENESS OF LEGISLATIVE POLICY

Second factor encouraging fragmentation: *results?*

(e.g. for politicians, they have shown the population that they act; for financial actors, legislation has an impact on the financial market; for legal actors, legislation has an impact upon the current regulation).

Two basic types of effectiveness of legislative policy:

- 1) ***internal effectiveness***: it measures *legal policy outputs* (impact the new legislation has on the actual legal system)
- 2) ***external effectiveness***: it measures *legal policy outcomes* (changes the altered legal system has brought upon the social, economic, and political realities).

3. A PRACTICAL CONSEQUENCE: LET'S FREE THE DRAFTERS... BY LIMITING THE NON-LEGAL EXPERTS

Distinction between external effectiveness and internal effectiveness:
concrete implications as to drafters' and non-legal "experts" role in the
legislative process.

Legislative drafters are purely legal actors → educated, hired, and legitimized to produce legislation according to legal principles.

Legislative drafters:

- *competence and legitimacy to evaluate the internal effectiveness of legislative policy* (to measure and evaluate how a new statute may affect the legal system).
- (often) *lacking knowledge as to evaluate the external effectiveness of the law* (i.e. to measure and evaluate how a new statute impacts upon the environment surrounding the law).

Non-legal experts in the legislative process: pivotal role in ensuring that internal effectiveness (concrete change of the law) becomes external effectiveness (concrete change of reality) in the direction expected by the political actors who formulated the original idea.

When should non-legal experts enter into the lawmaking process, to guarantee that the statutory provisions may be externally effective?

In recent decades, non-legal experts are usually called upon throughout the entire lawmaking process (original idea to be legislated → assessment of the actual situation → evaluation of the results).

+) it increases the amount of knowledge acquired during the legislative process.

-) it increases the chances that the legislative provisions will be less effective.

Non-legal experts in legislative drafting: unfamiliar with the basic structures and working methods of the legal system → new legislative provisions are frequently structured so that they perform poorly in terms of internal (and consequently external) effectiveness.

E.g. non-legal arguments and discourses while writing the law →

- legal drafters are ill equipped (e.g. as amateur sociologists or economists).
- legal drafters must introduce concepts and ideas which are ill-suited for truly affecting law (and consequently society).

Solution: to limit the role of the non-legal experts at the ***beginning*** (***formulation of proposals***) and ***end*** (***evaluation of the law's impact upon society***) of the legislative process.

4. CONCLUSION

Specific nature of legislation: a normative tool (with specific principles) placed in the hands of politicians (with specific principles) to change reality (with specific principles).



extremely difficult work of legislators (and legislative drafters) = *to build a functioning road connecting ideals (politics) and reality (society), according to “engineering” paradigms (law).*

Muito obrigado!!