



The “effectiveness test” as a tool for law reform

by Maria Mousmouti (Guest Editor)

Abstract

The article discusses the importance of effectiveness of legislation in the context of law reform and presents the ‘effectiveness test’ as an operational tool that can promote legislative quality and effectiveness across the life cycle of legislation.

1. Effectiveness of legislation and law reform

Law reform is a concept ‘dear’ to governments. Reforms are always high in political agendas and are often the ultimate proof of efficiency for governments. An objective (and somewhat cynical) observer would discern different types of Law reform: systematic reform on the one hand, with clear goals, scope, resources and timeframes; and ad hoc and random reforms expressed through changes in legislation or institutions but in fact motivated by public opinion, pressure groups and / or the media rather than a clear and identifiable need for change.

Legislation plays a central part in law reform. In many countries around the world reforms are synonymous to the amendment of existing legislation or the adoption of new legislation. Legislation is seen as a wizard’s wand that can magically transform reality in the desired direction. Designing or adopting new legislation is often enough to pacify even the most demanding citizens as a proof that reform is happening. However, if reforms are synonymous to the adoption of new legislation, the quality of this legislation is an indicator of the success of the reform. If legislation fails to achieve its objective, or is not adequate to achieve its declared objective, the entire reform is jeopardized. Effectiveness of legislation ends up being the main factor that determines the success of law reform.

But what is effectiveness of legislation? Is it just an abstract and theoretical term that describes a desired quality of legislation? Does it have a concrete content? How can effectiveness be made a tangible and measurable concept that can be used to improve the quality of law reform?

2. What is effectiveness of legislation?

Effectiveness has become an integral part of the values and principles that characterise legislative quality. Effectiveness reflects the relationship between the purpose and the effects of legislation and expresses the extent to which it is capable of guiding the attitudes and behaviors of target populations to those prescribed by the legislator¹. In simple terms, effectiveness expresses the extent to which a law can do the job it is intended to do and is considered the primary expression of legislative quality².

¹ Helen Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in Constantin Stefanou and Helen Xanthaki (eds) *Drafting Legislation. A Modern Approach* (Ashgate: 2008) at 17.

² Helen Xanthaki, ‘Quality of Legislation: an achievable universal concept or an utopia pursuit?’ in Luzius Mader, Mart Tavres de Almeida (eds), *Quality of Legislation. Principles and Instruments* (Nomos 2011) 80-81

Effectiveness is not an abstract concept. It is a feature of every legislative text and is determined by the purpose of legislation, its substantive content and legislative expression, its overarching structure and real-life results. These features determine, to a significant extent, the capacity of legislation to achieve results: purpose sets the benchmark for *what* legislation aims to achieve; the substantive content and legislative expression determine *how* the law will achieve the desired results and how this is communicated to its subjects; the overarching structure determines how the new provisions interact with the legal system; and the real-life results of legislation indicate *what has been achieved*³.

Although the influence of external factors on the broader effects of legislation cannot be undermined, every legislative text is the foundation of its effectiveness. Thus, the effectiveness of a legislative text is greatly determined by the way in which legislation is integrated in the legal system, the way its purpose is expressed, its substantive content, legislative expression and evaluation requirements that can inform on real-life results.

Effectiveness is at the same time a value and a principle that guides law making⁴ and a criterion for evaluating its results⁵. Therefore, it has two main dimensions: a prospective dimension when the law is formulated and drafted and a real-life dimension when a law is implemented. The former expresses the extent to which legislation is conducive to the desired regulatory effects (*can a law achieve the desired results?*) while the latter expresses the extent to which the attitudes and behaviors of target populations correspond to those prescribed by the legislator (*has a law achieved the desired results?*)⁶. Can such a concept, even with a concrete content, be made operational?

3. The “effectiveness test” as a way to operationalise quality of legislation

Effective legislation is the result of complex mechanics in the conceptualization, design, drafting, enforcement, and implementation of the law. This requires processes and institutions for regulatory governance and tools to guide legislative design, drafting and implementation. These tools can be assisted by an effectiveness test, a logical exercise that examines the unique features of existing legislation and legislation being designed, considering how the purpose, the structure, the content, and the results of the future intended law are aligned and consistent⁷.

The ‘effectiveness test’ allows the identification of the direct relation between the purpose of the legislation, the appropriateness of the means used and the results and can be used throughout the life-cycle of legislation⁸. For draft legislation, it can help detect the best way to design legislation in order to achieve the desired results. For legislation in force it can examine the causal relationships between the law and its effects, the extent to which the legislation is working and what needs to change. In other words, the effectiveness test allows a diagnosis of the weaknesses in the conceptualization and design of legislation and can prevent regulatory failures. It allows identification at an early stage of the ineffectiveness of content and design (whether the rules used are inappropriate to address the problem tackled or are too broad or too narrow in relation to the stated purpose), the ineffectiveness of enforcement (whether the enforcement strategy or mechanism is inappropriate or implementation is inadequate) and drafting ineffectiveness (whether the subjects of

³ Maria Mousmouti, ‘Effectiveness as an Aid to Legislative Drafting’ (2014) 2 *The Loophole* 17.

⁴ Xanthaki, above n. 1 at 17; Alexander Flückiger, “Effectiveness: a new Constitutional principle” (2009) 50 *Legislação: cadernos de ciência de legislação* 187

⁵ Luzius Mader, “Evaluating the Effects: A Contribution to the Quality of Legislation” (2001), 22 *Statute Law Review* 119 at 126.

⁶ Mousmouti above n.3 at 17.

⁷ Maria Mousmouti, “Operationalising Quality of Legislation through the Effectiveness Test” (2012), 6:2 *Legisprudence* 201.

⁸ *Ibid.*

the law do not know how to comply with it or encounter difficulties in complying because the rules are not accessible, coherent or clear, or are complicated and imprecise). Through the effectiveness test, weaknesses can be identified and addressed.

The effectiveness test is a neutral tool. It does not promote specific legislative choices over others but looks at the content and the consistency of legislative texts and judges them objectively in relation to the regulatory objectives. It is not a measure of perfection in legislation but instead a feasible way of looking at legislation holistically with an eye to the achievement of the desired results. The effectiveness test consists of four ‘steps’ that are examined below.

3.1 Step one: does legislation have a clear purpose?

Purpose is the first element of the effectiveness test, where one seeks to establish *what a law aims to achieve*. The main questions that have to be addressed are: does the law have a clear purpose? Does it set a clear and meaningful benchmark for what the law aims to achieve? What is this benchmark? Does it provide sufficient direction for the implementer and interpreter?

In legislative practice, the purpose of a law is expressed in preambles, general or specific purpose provisions or long titles or alternatively, in explanatory material or extraneous documents such as policy papers, explanatory notes or impact assessments. However, quite often purpose is not clearly stated either inside or outside the text and significant deductive effort is required to identify it. This makes the overall objectives of a legislative text vague and arbitrary and affects its clarity, application and interpretation. The first step of the effectiveness test looks at purpose as an important element of effectiveness and seeks to objectively establish whether it determines clearly and substantively the results that the law aims to achieve.

3.2 Step two: is the substantive content of legislation realistic, aligned to purpose and conducive to results?

Legislation usually comes as a solution to a specific problem or problems. This solution is expressed through a choice of legislative techniques, enforcement mechanisms and legislative expression that best serve the desired objectives. The second step of the effectiveness test examines these choices and attempts to identify whether the choice of legislative techniques, enforcement mechanisms and expression serve the objectives of the legislative intervention and are capable to bring about the desired results.

The choice of rules determines how behaviours will be directed towards the desired goals, what obligations are imposed, how the rules will be enforced and the consequences attached to them. The content of the law determines *how* it will achieve its results and how rights and obligations are communicated to the subjects of legislation. 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 do not contribute to the objective of the law, the design of the rules 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 ineffective⁹.

Legislative reality confirms the importance of these elements and there are several examples of how poor choices in the content of the law affect its overall performance. Deficiencies include the insufficient analysis and understanding of the problem addressed through legislation, and

⁹ Julia Black, “Critical Reflections on Regulation” (2002), 27 *Australian Journal of Legal Philosophy* 3.

consequently the choice of inappropriate rules; rules that are not fully consistent or leave gaps in protection or are in tension with existing ones; solutions that are complex and difficult to implement; complex or inarticulate choices in legislative expression.

Urban laws are an interesting case study of rules whose content is detached from local realities. For instance, building standards often do not take into account local incomes, climates, building techniques, locally available materials and result in urban dwellers who cannot afford to build in compliance with existing regulations¹⁰. The building code of Mozambique was adopted in the 18th century after an earthquake in Portugal¹¹ and is one of the most stringent in Africa demanding brick and cement block walls and reinforced concrete beams, despite the fact that the country has little history of earthquakes, the prescribed materials are costly and beyond the reach of the majority of the population¹². In another example, a draft planning law in Uganda was designed in such a way that enforcement and implementation would require an additional 20,000 civil servants¹³! Enforcement had not been duly considered when legislation was being designed and resources and financial and institutional capacity were expected to fall in place magically, thus making the law liable to fail.

The second step of the effectiveness test can help identify rules which are incongruent with reality, hurdles to compliance and enforcement and challenges in legislative expression in order to make the substantive content of legislation proportional and responsive to the purpose of legislation and conducive to results.

3.3 Step three: is there adequate information to measure the results of legislation?

When a law is enacted it is no longer a conceptual exercise: the “implementation game”¹⁴ begins and is expected to achieve results. The relation between the law as a vision and the law in reality is not always linear, since in practice they often differ substantially. Information on the results of the law is necessary in order to evaluate its performance and determine the achievement of the desired objectives. The third step of the effectiveness test examines (for draft legislation) whether enough provision is in place in order to have data to evaluate the results of legislation (eg adequate reporting, review or sunset requirements in the legislative text) or (for legislation in force) how legislation has been applied and what its results have been. This step enables learning about the real-life results and effects of legislation and connects the purpose of legislation with its real-life results.

3.4 Step four: how do the new provisions interact with the legal order?

The overarching structure of legislation is the result of several factors: constitutions and legal traditions, but also political need to show action, timing and pressure to legislate. Quite often, in the context of law reform, the choice of whether to introduce a new Act, to amend an existing one or to consolidate or to bring existing material together in a code is determined by factors other than the impact of these choices on the effectiveness of the new legislation. These options affect the potential of legislation to be effective for three main reasons: firstly, because the structure of legislation affects the accessibility of the law; secondly, because structural weaknesses can lead to inconsistencies and difficulties in applying the law, and thirdly, because they can jeopardise the achievement of its overall objectives.

¹⁰ Maria Mousmouti and Gianluca Crispi, ‘Good Legislation as a Means of Ensuring Voice, Accountability, and the Delivery of Results in Urban Development’ in World Bank Legal Review 2014 (forthcoming)

¹¹ Mozambique was a Portuguese colony

¹² UN-Habitat, *Legal Assessment* (UN 2014)

¹³ Patrick Mc Auslan, *Law Reform in East Africa: Traditional or Transformative?* 89 (Routledge 2013).

¹⁴ Eugene Bardach, *The implementation game: what happens after a Bill becomes a Law* (MIT Press: 1977).

The fourth step of the effectiveness test examines how a new law or new provisions are integrated in the legal system and how these interact with their broader legislative context. Questions addressed include how the new provisions interact with other related legislation; whether they are aligned or whether they leave gaps or inconsistencies? Whether definitions of related terms are coordinated and consistent? For example, in the area of equality legislation, prior to the introduction of the *Equality Act 2010*, several different Acts co-existed in the UK¹⁵. Although this made the protected grounds (gender, disability, etc.) visible, it caused serious inconsistencies in the protection offered and in the definition of identical or related terms. The unification of all material dealing with equality and non-discrimination in a single Act was a solution to the multiple problems that emerged in the course of the years from the co-existence of related acts.

The overarching structure of legislation directly affects not only the accessibility and coherence of legislation, but ultimately also the ways in which the effectiveness of legislation is understood, approached and measured. The fourth step of the effectiveness test allows to give due consideration to the distinct options with regard to the overarching structure of legislation.

4. The “effectiveness test” as a tool to support law reform

Effectiveness is a fundamental quality of legislation of particular relevance for law reform. Law reform needs to be guided by an objective assessment of how legislation can work in practice in order to deliver the results it promises. The effectiveness test is a dynamic tool that examines the main features of legislation (purpose, content, results, overarching structure) from the viewpoint of effectiveness, can highlight weaknesses in the conceptualization, design, drafting or implementation of legislation in a way to promote effective legislation and law reform.

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¹⁵ Non-discrimination legislation included the *Race Relations Act 1965* (RRA 1965) amended by *Race Relations Act 1968* (RRA 1968), the *Race Relations Act 1976* (RRA 1976) and the *Race Relations Act 2000* (RRA 2000); *Equal Pay Act 1970* (EPA 1970); *Sex Discrimination Act 1975* (SDA 1975); *Disability Discrimination Act 1995* (DDA 1995); *Employment Equality (Religion or Belief) Regulations 2003*; *Employment Equality (Sexual Orientation) Regulations 2003*; *Employment Equality (Age) Regulations 2006*; *Equality Act 2006* (EA 2006).