
II.

GOOD LEGISLATION AND WELL-MADE LAWS — AN OBSERVATION

1. Introduction

Legislative science, as it stands, is frequently perceived to be in a lamentable state, entrenched in clichés and overemphasised values. These values have proven to be, whether intentionally or not, reductive, and emphasises concepts such as, efficiency, economy, and formal legislative techniques.

Such a perspective often overlooks essential and *a priori* realities: the legal-political framework, a State's (in this case, the MSAR's) position within supranational frameworks, multi-composite and multi-level strands of constitutionalism, the prevailing discourse on the separation and interdependence of powers, and the catalogue of competences, among other considerations.

For these reasons, and others more specifically related to what the modern art of legislating should be, GOMES CANOTILHO, with his usual clairvoyance, warns that the current science of legislation has fallen into a precipice: a mere formal science of better legislation.³⁵

Given such a warning, it is hence worthwhile to proceed by retrace steps and consider the test to be applied to “good legislation”.³⁶

³⁵ JJ Gomes Canotilho, ‘Sobre o clube dos Nomófilos/Nomógrafos e a difícil arte de legislar no Estado Contemporâneo’ (2009) 50 Legislação 109.

³⁶ António Manuel Hespanha, ‘Leis bem feitas e leis boas’ (2009) 50 Legislação 31. Also, as someone said “we can with some confidence say that the practical point or object of the legislative process is to promote or achieve the common good”: Patrick J. Kelley, ‘Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature’ (2009) 1(I) Washington University Jurisprudence Review 123. See also “In the acts of lawmaking, one must enshrine the guiding idea of valuing the quality and not the quantity of legislation. Quality in legislation necessarily means justice, rationality and adaptability in terms of its substantive content, as well as systematisation, rationalisation and the technical expression of such legislation based on scientific criterion”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 Administração 997, 1014. Emphasising a connection between the quality of laws and the legislative procedure, see Joan Ridao Martín, ‘La influencia del procedimiento legislativo en la calidad de las leyes’, (2022) 64 Revista Catalana de Dret Públic 37.

2. Good Legislation and Legitimation

With a local touch, one might add:

“For a normative act to become good legislation, it is not enough that it is well drafted. Above all, it is necessary that the approval thereof be timely, that the solutions therein contained be socially just, and that such act be accepted into the way of life adopted by a certain society (Article 5 of the Basic Law, in the case of Macau) and in the constitutional order and under the supranational law in force.”³⁷

In the context of the MSAR, good legislation must *inter alia*, resonate with the overarching principle of "One Country, Two Systems". This principle, in turn, necessitates that such legislation conforms to and is legitimised by both the Sino-Portuguese Joint Declaration on the Question of Macau and the Basic Law.

Beyond this primary framework, good legislation should also abide by several principles constituting the second system. These include safeguarding fundamental rights, maintaining the previous way of life, adhering to the separation of powers, and upholding the principle of legality (both in terms of constitutionality and legality *stricto sensu*). It should also be in line with international law instruments, especially as stipulated in Article 40 of the Basic Law. Essentially, it should embody the basic tenets of a *Region under the Rule of Law*,³⁸ within a legally limited and defined presence of the first system, namely the "One Country" element.

None of the above excludes the adjacent driving ideas of justice, social inclusion, adequacy, necessity, solidarity, equality, and non-discrimination. These principles bolster the Joint Declaration and the Basic Law, aiding both in compliance with the other major principles and in legitimating good legislation.

Returning to generalities and in summation, as stated by JORGE MIRANDA,

³⁷ António Marques Da Silva, ‘O problema da proliferação das leis’ (*JTM*, 16 December 2014) accessed from <<https://jtm.com.mo/opiniao/problema-da-proliferaacao-das-leis/>> 16. The author goes on: “And this is because the creation of laws does not correspond to isolated political acts, regardless of the circumstances. Therefore, the decision to legislate must be made in correlation with the values in place in a given society and the facts under analysis. Only then will the idea of justice cease to be an abstraction and become something alive and in conformity with ethical and legal values”. Furthermore, it is advisable to pay attention to the following doctrine — “Whenever it is necessary to revise or draft a law, one should, first of all, answer how and why the review or drafting is needed, as well as the theoretical foundations for such a measure, bearing in mind the worthy examples from comparative legal scholarship and comparative law, thus allowing us to find our position, through appropriate comparisons and studies. In view of the aforementioned situation, all the pronouncements related to legal reform are just an illusion, if such studies and research are not carried out; even if there is room for some reform, it will only be superficial in nature.”: Zhao Guoqiang, ‘Uma Ponderação sobre Alguns Problemas da Reforma Jurídica’ (2012) 1 *Revista de Estudos de “Um País, Dois Sistemas”* 117, 121.

³⁸ Or *Rechtsregion*, by synonymy with *Rechtsstaat*.

“In short, the *Rechtsstaat* / rule of law postulates the quality of the law.”³⁹

At this juncture, closely tied to the *Rechtsstaat* postulate, there is an imperative need to introduce, albeit succinctly, potent words that lucidly articulate the intended message in a profound manner. One may allude to LON LUYVOIS FULLER’s illustrative narrative of King Rex, a tale inspired by historical dictatorships:

“Rex’s bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster.

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis.

The other routes are:

- (2) a failure to publicise or at least to make available to the affected party, the rules he is expected to observe;
- (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change;
- (4) a failure to make rules understandable;
- (5) the enactment of contradictory rules or
- (6) rules that require conduct beyond the powers of the affected party;
- (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally,
- (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.”⁴⁰

These above words are, indeed, food for thought on the present topic, context, and times.

³⁹ Jorge Miranda, ‘Lei, Estado de Direito e qualidade das leis. Brevíssima nota’ (2009) 50 *Legislação* 95. See also, *à propos* the Rule of Law/*Rechtsstaat* and some issues regarding legislation *vis-à-vis* the former structural principle, with interest, ‘We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a *Rechtsstaat*, a government of law that serves as well as makes possible the ideas of both justice and legal certainty. [...] a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such a government’, Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26(1) *Oxford Journal of Legal Studies* 1, 11.

⁴⁰ Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 38–39. Changes to the structure of the original text have been added for clarity.

Moving on, it is worth briefly revisiting LUZIUS MADER's interpretation of *good legislation*,⁴¹ specifically its legal, procedural, and substantive requirements thereof:

- Good legislation stands as legitimate (aligning with constitutional and international principles and rules; this encompasses the principle of constitutionality, the principle of legality, and the ideas of serving the public interest, prohibiting unlawful or disproportionate restrictions on fundamental rights, and upholding respect for the division of powers);
- Good legislation is enacted in an appropriate and procedurally legal manner (ie at stake are not only the legality of the respective content, but also how such content is shaped, herein gaining particular importance the principle of constitutionality, and, naturally, the centrality of the legislative procedure — compliance therewith and correlation thereof with the legitimation of legislation);
- Good legislation demands a level of substantive quality (ie by taking into account the needs and expectations of the society it seeks to regulate, by achieving certain social objectives, by being adequate and effective, and by being coherent, both internally, and also externally, vis-à-vis other norms);
- Good legislation must also meet formal requirements on quality (ie it must be structured in a logical way, be drafted in an understandable fashion, be properly published, and also accessible to all);
- Good legislation should be drafted as a direct, to the point, text, and be limited to the necessary provisions (Montesquieu's maxim is fully applicable: one should not make unnecessary laws, among other factors);
- Good legislation is stable (ie firstly, one should avoid too many amendments; secondly, amendments should not be introduced hastily, soon after approval of a law — in other words, good legislation is characterised by consistency and durability).

In summary, these are the features of good legislation as outlined by the aforementioned author, of whose *lesson*⁴² a translated précis is attempted here. The first

⁴¹ Luzius Mader, 'From the Struggle for Law to the Nurture of Lawmaking – Recent Efforts by the Swiss Confederation to Improve the Quality of Legislation' (2009) 50 *Legislação* 295, 296 et seq.

⁴² Luzius Mader, 'From the Struggle for Law to the Nurture of Lawmaking – Recent Efforts by the Swiss Confederation to Improve the Quality of Legislation' (2009) 50 *Legislação* 295, 296 et seq. Within this scope, I would like to draw in a proposal by David C. Elliot, who advocates that "high quality legislation" is shaped by reasonable legislative policy, is well drafted and operates well, in practice, after entering into the legal order, 'Drafting legislation: High Quality legislation and How to Get It' (2012) 1(1) *International Journal of Legislative Drafting and Law Reform* 49, 51. See also, Zafar Gondal, 'Universal Responsibility to Draft Democratic, Participatory, Effective and Efficient Laws and Law Reform Projects' (2013) 1(2) *International Journal of Legislative Drafting and Law Reform* 239, et seq.

three items are especially important: good legislation ought to be legitimate, enacted in a constitutionally appropriate and procedurally legal manner, and entail a certain substantive quality.

Why is it important to have good legislation? DAVID C. ELLIOT⁴³ mentions five reasons for good legislation or, in his terminology, high quality legislation;-

- “High quality reinforces compliance with legality and confers additional credibility to legislation;
- High quality legislation shall be designed to respect the Constitution, human rights and the instruments of international law;
- From high quality legislation shall flow laws that are more efficient, clear and effective;
- High quality legislation promotes the stability of the economic and commercial environment;
- The high quality of legislation means that such legislation shall be kept permanently updated.”

I shall briefly introduce another idea that often accompanies the analysis of laws. This perspective recognises not only a wide range of criteria for assessing legislative quality but also a multiple range of criteria for the types of analyses to be performed. These indices include the quality of lawmaking, the legislative environment, normative action, technical aspects of legislation, norms, and finally, quality of laws *per se*.⁴⁴ One can derive intriguing conclusions from this matrix: for instance, legislation can be technically good *stricto sensu* yet fail to achieve its intended objectives, or it can be sociologically good but lack technical precision.⁴⁵

The need for good legislation is self-evident. It goes beyond mere eloquent drafting that adheres to formal technical criteria; well-crafted legislation alone is not sufficient.

⁴³ David C. Elliot, ‘Drafting legislation: High Quality legislation and How to Get It’ (2012) I(I) International Journal of Legislative Drafting and Law Reform 49, 51–52.

⁴⁴ Yoel Carrillo García, ‘Calidad de las leyes Algunos puntos críticos’, (2010) Legislação 52, 8.

⁴⁵ *ibid*, 26. See also the following remarks potentially carrying *additional* or *reinforcement* effects: ‘*It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the ‘must’ of compulsion, it never serves as a basis for the ‘ought’ of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. To be sure, one value comes with every positive-law statute without reference to its content: Any statute is always better than no statute at all, since it at least creates legal certainty. But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice.*’, Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26(1) Oxford Journal of Legal Studies 1, 6, from the starting point of (hyper, one would say) positivism shortcomings on this regard.

An excessive focus on formal legal drafting techniques should not overshadow the primary goal. This preoccupation should not evolve into a Thelxiepeia-like, full “siren” mode of distraction, especially if it detracts from, or undermines the objective of enacting good legislation, as previously emphasised.

For legislation to be deemed ‘good’, it must possess legitimacy.⁴⁶ This is determined by universal criteria and specific parameters relevant to the specific legal order in question. In the context of the MSAR, this refers to the adherence and efficacy of the “One Country, Two Systems” policy and compliance with both the Joint Declaration and the Basic Law.

Furthermore, good legislation should also be framed by the need to shape and promote justice, solidarity, equality, non-discrimination, suitability of solutions.⁴⁷

⁴⁶ Addressing the issue of legal and political legitimacy of the legislative act, see eg Carlos Blanco de Morais, ‘Democracia e Consenso na Decisão de Legislar’ (2004) 3 Revista Brasileira de Direito Constitucional 117, et seq. See also, addressing the connection between legitimacy and legislative procedure, with a focus on some Asian jurisdictions: Megan Elizabeth Cox, ‘Legislative Procedures and Perceptions of Legitimacy’ (unpublished and archived with the Author, Portland State University 2022).

⁴⁷ As well as, at the same time, it can be promoting the image and proving the worth of the Parliament that enacts it. This aspect, many times forgotten, has been an issue for quite some time and in several geo-political areas. See eg ‘*I believe that legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law. Our silence on this matter is deafening compared with our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of judicial decision-making.*’, Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 1. Plus, legislation itself should have dignity, as emphasised by Jeremy Waldron in the above-mentioned work and other papers, such as in ‘Legislation and the Rule of Law’ (2007) 1(1) *Legisprudence* 91, and, ‘Representative Lawmaking’ (2009) 89 *Boston University Law Review* 335.