Legislative errors and failures: the most common causes and flaws in legislative planning

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ABSTRACT: The paper analyzes the category of "legislative failures", differentiating it from "legislative errors". It explains important notions for measuring the success or failure of legislation. It presents a non-exhaustive list of the main causes of legislative failures (poor identification of the problem; poor definition of the objectives to be achieved; focus on short-term consequences, ignoring long-term ones; disregard for the political process; lack of diversification of alternative approaches, etc.), with several concrete examples, and offers suggestions for preventing and correcting such failures. The work uses the theoretical framework of public policies and guidelines for their elaboration and evaluation. The methodology employed is a literature review and documentary analysis. In conclusion, it states that the most common causes of failed laws stem from flaws during their planning. However, "legislative failure" is not all bad, as it is part of a learning process.

KEYWORDS: legislative error; legislative failure; legislative evaluation; failed public policies.

1. Introduction

Error is traditionally understood as a mistake, a false assessment of reality that decisively influences the formation and manifestation of will. Were it not for the ignorance or false knowledge of circumstances, the agent would act differently. Error refers to an involuntary flaw; for its configuration, the misjudgment of the situation cannot be voluntary; the mistake presupposes the absence of malice or intent, that is, subjective good faith. In these terms, error can be conceptualized as an unintentional discrepancy between the

agent's perception of the motives that underpinned their actions and the factual or legal reality. For legal purposes, error is usually addressed especially within the scope of private law regarding civil liability, notably professional misconduct (medical error, for example).

In criminal law, error is equated with ignorance, so that error means both a lack of knowledge about some object and a false representation of it. Legal systems do not give uniform treatment to the issue, and there are those that give broad relevance to the problem of error – even differentiating between the types of error of fact and error of law – and those that consider it totally irrelevant for the purposes of the agent's criminal liability.

In public law, the study of error stems notably from the civil liability of the State for errors committed by judges in the exercise of their judicial function. This refers to judicial error, which is usually compensable due to express constitutional provisions in various legal systems. Also within the realm of public law, there is a growing interest in the error of public administrators, with a tendency to establish their personal liability only in cases of intent or gross negligence, but not in cases of inexcusable error.

The discussion regarding legislative errors is more complex. In theory, the classic notion of error as a false perception of reality (factual or legal) would be applicable to the legislative field. Thus, legislative errors, that is, the false representation of reality by legislators in the drafting of laws, can also occur. However, given how the problem is presented in the literature, there are disagreements about civil liability for legislative acts, since in most systems legislators are protected by parliamentary immunity.

Furthermore, strictly speaking, regardless of the imperfect understanding of the world, the mere exercise of the legislative function – like any other state act – can cause harm. Therefore, for these purposes, the category of "error" would remain; and state liability could arise even outside the situation of unconstitutional laws or laws enacted with abuse of power. The fact is that there is extensive literature discussing the possibility of holding the state liable for legislative acts in general (parliamentary or regulatory).

This discussion does not intend to delve into the specific debate about whether or not compensation is due for laws that cause harm or for poorly drafted laws (i.e., whether it would be possible to attribute recklessness, negligence, or incompetence to the legislator); for laws that, in light of more up-to-date empirical information, have proven useless (thus causing disproportionate

harm); or for laws that have simply proven ineffective because they did not achieve their intended purposes.

This paper aims to analyze legislative errors from a more general and descriptive perspective, regarding their deeper causes, based on a literature review, in light of the most recent theoretical developments, which have been adding a series of normative guidelines for care and diligence in the creation of laws, demanding ever greater attention from legislators to typical legislative activity, using tools such as ex ante and ex post impact analysis and public consultations, among others.

Guidelines and best practices call for legislators to base their decisions on facts, real-world states of affairs, and empirical evidence. They also require that legislative measures be proportionate (imposing the least possible sacrifice), capable of solving the problems they are intended to address (an appropriate balance between means and ends), and, preferably, provide justification. Only then would legislation be rational.

Sometimes, when these guidelines are not observed in practice, legislation fails. Legislative failures would then stem not only from ignorance or imperfect knowledge on the part of legislators (error), but above all from problems in their preparation, deviations from expected practices (most often the deviations are unintentional, although here the motive is not relevant to what matters: the failure in legislation) or from the results of intentional actions that produce unintended negative (or high-cost) consequences.

It is undeniable that there are situations in which failures result from unforeseen events that occur only after the enactment of legislation. However, what is relevant to this work is presenting legislative failures that stem from flaws in planning, insufficient attention to institutional arrangements essential for implementation, or a lack of adaptability to unforeseen events. Thus, to address these situations, the term "legislative failures" is preferred over "legislative errors," as it is considered more appropriate for this analysis.

In this sense, the work was constructed in the form of different causes (hypothetical categories) of legislative failures, built from a review of the reference literature. The methodology, then, consisted of a systematic review of the bibliography and document analysis to, using the inductive method, extract general conclusions from the cases discussed by the authors, in the form of a catalog of the most common failures and their respective causes, with reference to the legislative planning stage. In part, the approach is also exploratory, since there is no complete theory on legislative failures. There-

fore, this research serves to provide an initial overview, generate hypotheses, and indicate problems for future studies and further research.

The list resulting from the identification of observed patterns does not follow any particular order, so subsequent items can be read relatively independently of one another. The overall result is expected to be coherent; and, if not, even indirectly, the list will have served to record and prevent the aforementioned flaws (especially those that can be avoided) from recurring in the future. The concern, then, remains the interest in improving the quality and effectiveness of legislation. Finally, the text concludes with a summary that reiterates the main arguments presented.

Before moving on to the list itself, the following section offers brief considerations on some important concepts that the evaluator of legislation should consider in order to avoid spurious correlations or incorrect conclusions regarding the legislation being evaluated.

2. Preliminary considerations on the evaluation of legislation

Laws are the center of gravity around which the rule of law revolves. However, sometimes legislation fails to achieve its intended objectives in the real world. The idea of legislative failure is therefore associated with legislation that has not achieved the expected results, or, although it has advanced in that direction, has done so at high costs or with undesirable side effects, or even with the notion of legislation that has implied setbacks in the situation it intended to resolve. Thus, it can be seen that laws can fail in various ways.

Legislative failure is not always immediate, as it may only manifest itself later. Goddard (2022, p. 11) cites the example of a window tax enacted by the English Parliament in 1696. Calculated based on the number of windows in a residence, the tax initially generated substantial revenue, but over time, the revenue generated decreased. Owners of existing houses remodeled them to block the windows (the author even includes a photo of a typical house, a legacy of this tax). New houses were built with few windows.

This led to reduced ventilation and light in many homes. The revenue-raising measure became increasingly ineffective over time, exacerbated the spread of disease, and caused, or accelerated, many deaths (Goddard, 2022, p. 12). Even so, the window tax survived in England until 1851. As can be seen, laws that result in legislative failures are not always short-lived.

Furthermore, there are epistemological and methodological difficulties in ascertaining legislative failure. This is an assessment that is not exactly or strictly objective, requiring only a simple contrast between the announced goals and what was actually achieved. Sometimes, changes in the factual context – alterations in the reality in which the legislation is embedded – play an important role, the impacts of which cannot be underestimated in the analysis of eventual legislative (in)success.

Ellery Jr. *et al.* (2018, p. 377) give a hypothetical example to illustrate this situation: imagine the approval of legislation with a program to encourage consumers to request receipts. If, subsequently, the country enters a crisis, it may happen that tax revenue has fallen even if the program was successful. Thus, the design of the legislation, even if adequate, may have ceased to be satisfactory due to changes in the economic context. Hence, several variables need to be considered in legislative evaluation.

As a rule, the main strategy for carrying out legislative evaluation is through comparison of the target unit of the legislation (e.g., family, company, city, region, etc.) with other unaffected units, or through comparison of units before and after the policy, or even through combinations of comparison over time and between other units (Imbens; Wooldridge, 2009). Naturally, as has just been explained, such comparisons are often not simple, and some evaluation techniques may be compromised by a small number of units treated or compared, as well as by the absence of parallel realities for counterfactual verification.

The counterfactual refers to what would have happened in the absence of the event. For example, if a bridge collapses due to an accident, the counterfactual would be that the bridge did not collapse. In the case of legislation, the counterfactual is what would have happened without the legislation. However, the counterfactual of the world is never truly observed; it is merely an estimate, usually from a control group (or comparison group) statistically identical to the treatment group (formed by the participants, in this case, those affected by the legislation). From the control group, unaffected by the program, it will be possible to produce an estimate of the counterfactual outcome (the true impact cannot be established).

Furthermore, to evaluate the effect of a program, it is necessary to clearly understand the difference between correlation and causality. Correlation is a statistical measure that describes the strength or degree to which two variables are related; that is, how the presence of one variable can affect the

behavior of the other variable analyzed. In turn, causality means the existence of a material link between a variable (the cause) and the concrete result observed. Correlation does not necessarily imply causality.

Confusion between these concepts often leads to erroneous conclusions regarding the effects of legislation, and such confusion can also generate disorientation. One need only recall the example just mentioned by Ellery Jr. *et al.* (2018) – the program to encourage the issuance of invoices – which presents a problem of assessing causality.

Having made these preliminary explanations, we move on to indicating the main problems associated with legislative failures. As explained, this is a list of the most common flaws during the preparation of legislation, which ultimately affect the success and effectiveness of laws.

3. Misidentification of the problem; formulation of diagnoses incompatible with reality; statement of generic concerns, lacking consistency, without basis in studies prepared in accordance with objective criteria

Underlying this cause of legislative failure for some laws is the basic premise that legislation has the function of solving problems.

Without first properly identifying the original problem, legislation has little chance of offering an effective solution. According to Gouvin (1994, p. 1284), framing the problems that will receive legislative attention and selecting appropriate responses are aspects that often receive little attention. Framing the problem, specifically, is a step that serves to provide the basis upon which the legislative proposal will be drafted. In light of this, legislators will assess the adequacy of the proposed solution to resolve the issue.

The warning might seem trivial, were it not for the propensity of parliamentarians to propose solutions even before adequately understanding the underlying problems, whether social, economic, or otherwise. In most cases, the legislative process begins with a proposed solution, and parliamentary debates revolve around these suggested legislative alternatives, not the problem itself. Any improvements made during the process rarely address defining the problem or demarcating the phenomenon that the legislation intends to correct.

In some situations, it is not even possible to say that the bill was drafted to address any particular problem. For example, consider Law 16,270 of July 5, 2016, from the State of São Paulo, which mandates the granting of discounts or half-portions to people who have undergone bariatric surgery or any other gastroplasty, in restaurants or similar establishments, and provides other measures. Had the debate progressed to demand an explicit and coherent articulation of the problem that the bill aimed to solve, perhaps the legislation would have taken on a different form or would not have been approved.

According to the justification presented, the proposal aimed to allow people with reduced stomach size to participate normally in meals, paying a fair price according to what they will actually consume. This law was ultimately declared unconstitutional by the Court of Justice of the State of São Paulo, for violating the Union's competence to legislate on commercial law (article 22, item I, of the 1988 Constitution) and for infringing on free enterprise (article 170). However, the example remains valid to demonstrate the importance of what is being pointed out here: the failure to use the appropriate methodology led to the approval of a law without a clearly identified problem.

Other laws similar to the one just mentioned can be found in Costa (2021).

One of the difficulties involved in identifying the problem is that the problem takes on a subjective character and can vary according to the perspective of the person defining it. In the words of Gouvin (1994, p. 1327), problems do not exist in the abstract, but with reference to a set of values that classifies a given phenomenon as problematic. Since each individual (or group) has their own set of values, the same phenomenon may represent a problem for one person (or group), but not for another.

Let's cite a concrete example that helps illustrate this obstacle: the issue of intimate searches of visitors entering prison establishments, the subject of Law 7,010, of May 25, 2015, of the State of Rio de Janeiro, which prohibited intimate searches in the prison units of the State of Rio de Janeiro. For one segment that prevailed in the discussion, the intimate search is vexatious, humiliating, embarrassing, and inadmissible; it is claimed that, in several prison units, there would be an obligation to perform several squats, regardless of the advanced age of the visitor.

On the other hand, some argued that not all strip searches are degrading, as less invasive methods exist; that there are situations where such a measure is necessary, especially given the lack of *scanners* and X-ray machines, and also exceptionally in the face of anonymous complaints, for example. Further-

more, some claimed that strip searches serve to protect visitors, especially women, who would have the perfect excuse not to carry objects, products, or substances whose entry is prohibited by law or that pose a risk to the security of the prison. In case of being caught during a strip search, there would be punishment.

As can be seen, the same factual data may seem problematic to some, but not to others. Therefore, formulating the problem involves identifying, implicitly or explicitly, the values offended by the phenomenon in question. Identifying the problem must also consider its causes and conditions; that is, it must relate to a specific problem. Failure to identify the problems hinders the legislative process and makes it difficult to evaluate the measure proposed in the bill.

The framing of the problem has a great effect on the evolution of the bill. It can even determine the proposed solution and, even if the bill does not become legislation, it has staying power and can shape the course of future negotiations on the content under discussion (Gouvin, 1994, p. 1341). As already indicated, the course of debates is unlikely to change the framing of the problem. Any changes tend to focus solely on the proposals to solve it. Depending on the framing, the consideration of political alternatives may be compromised.

Correct identification involves differentiating between a real problem and a perceived problem. Care must be taken not to fall into the trap of trying to fit the facts into a particular worldview. Given the scarcity of time and resources, dedicating time to issues that are not real problems is a wasted opportunity.

One way to mitigate these obstacles is by requiring a careful *ex ante assessment* of the issue; by demanding that diagnoses of reality be based on reliable data, grounded in studies that, if not in accordance with scientific methods, at least follow objective criteria. The failure resulting from flaws in the collection of relevant information should not be underestimated.

Paying attention to this cause of legislative failures would also be able to prevent some laws of a symbolic nature, which are not related to the effective solution of problems. These are laws that basically contain political statements or recognition of certain causes. For example, consider Law 14,489, of December 21, 2022, which amends Law 10,257, of July 10,2001 (City Statute), to prohibit the use of hostile construction techniques in open public spaces.

Nicknamed the Padre Júlio Lancelotti Law – in honor of a religious figure who promotes social work in the city of São Paulo and who became famous for using a sledgehammer to remove sharp stones installed under an overpass – this law established as a general guideline for urban policy the promotion of comfort, shelter, rest, well-being, and accessibility in the enjoyment of public open spaces, their furniture, and their interfaces with private spaces, prohibiting the use of hostile materials, structures, equipment, and construction techniques that aim to or result in the exclusion of homeless people, the elderly, young people, and other segments of the population.

By establishing a negative prohibition (not doing something), and moreover, without clearly defining what constitutes hostile activity (the legal definition is circular), it becomes difficult to measure the effectiveness of the law. This logic is similar to that of an environmental law that prohibits deforestation: the results may take time to become clearly visible.

4. Poor definition of objectives; from a teleological perspective, thinking about short-term consequences while ignoring long-term ones; defining vague objectives or not setting any objectives at all

The most frequently cited category of legislative failures is that of legislation that fails to achieve its intended objectives, which presupposes the prior definition of those objectives. However, there are situations where the objectives are poorly defined or do not even exist, contradicting the basic premise of rational legislation that laws should serve to achieve certain ends. These are cases of legislative failure, as any reflection on success is compromised due to this flaw in the preparation of the legislation.

Nevertheless, the objective can be achieved, but it may come with undesirable consequences that only appear later. Legislative failure in this case is indirect and stems from an inability to consider the long-term consequences of legislation. Recall Goddard's example (2022, p. 24) regarding the English window tax. The legislation worked well initially, but people changed their behavior due to a natural instinct to avoid paying taxes.

To prevent this failure, lawmakers have to calculate what the consequences of legislation will be over a longer period, especially how people are likely to react to legislative decisions.

Legislative myopia is a frequent theme in the case studies of legislative failures. Even more striking is the fact that, despite repeated failures, certain measures continue to be repeated throughout history. Recalling some of these situations is an attempt to ensure that past mistakes serve as lessons.

A prime example is price and wage control. There are no instances where this measure has succeeded in curbing inflation or overcoming the problem of product shortages. As Schuettinger and Butler (2020) detail, for 4,000 years, at various historical and economic moments, attempts have been made to apply this measure, and the compilation shows a sequence of repeated failures as a result. Instead of curbing inflation, price controls generate parallel markets and shortages.

From an economic standpoint, price controls widen the gap between supply and demand without addressing the root cause of inflation, which is caused by an increase in the money supply that exceeds the increase in production (Schuettinger; Butler, 2020, p. 15). The problem arises in the medium and long term: over time, price controls cease to be an effective measure.

The fact is that the cause of the aforementioned failure lies in the adoption of short-term policies with negative long-term consequences. Mendes (2022, pp. 13-14) gives the example of using government spending to generate growth. However, growth actually stems from increased productivity. The mistake lies in believing that if the government spends more, this increases household income and consumption, which, in turn, would lead companies to invest more. In the longer term, this measure generates an increase in the public deficit, interest rates, and inflation, and causes a recession.

The same type of difficulty arises in granting tax benefits to certain sectors (those in crisis, for example). This often implies unproductive companies that only exist because they pay less taxes. This issue is repeated every time there is short-term pressure for urgent solutions, so that the political class is urged to provide quick answers to complex problems (Mendes, 2022, p. 15). To adopt policies with beneficial long-term effects, it is necessary to resist the clamor for immediate or simplistic solutions.

Reflection leads to legislative failures of the type that exacerbate the problem the laws intended to solve. The flaw is not related to the definition of the problem, but to the dynamic aspect of legislation already discussed. Again, examples come from Goddard (2022, p. 25): at the end of the 19th century, the governor of Delhi, wanting to exterminate the large number of venomous snakes in the city, issued a law offering a reward for snake skins. The objective

was to encourage hunting and reduce the snake population. However, the city's inhabitants began to breed snakes, instead of killing them, precisely to earn the reward.

When it became clear that the program was costing far more than expected and was not reducing the number of snakes in Delhi, the rewards were discontinued. The bred snakes, which had lost their value, were released by their breeders, and the end result was an increase in the snake population and a waste of government funds.

This scenario was repeated in Hanoi at the beginning of the 20th century, where the problem was rats in the city's sewers. Similarly, the government offered a reward for rat tails. Soon, rat farms sprang up on the outskirts of the city, and instead of killing rats, the bounty hunters simply cut off their tails and left them alive so they would reproduce and generate more reward opportunities (Goddard 2022, p. 25). The succession of events and the results were identical: ever-increasing expenses on rewards, no progress in reducing the number of rats, cancellation of the reward, release of the rats from the farms, and a worsening of the original problem.

Along the same lines, Hoy no circula (No Driving Today) ban approved in Mexico City in 1989 is cited. Based on the respective license plate number, car circulation was restricted on a specific day of the week to reduce congestion and air pollution. As a result of this measure, many families ended up buying a second car to circumvent the ban, usually a cheaper, older, and more polluting one. The legislation, therefore, worsened the problems it intended to solve. The case was studied by Eskeland and Feyzioglu (1997) and by Davis (2008). The change in family behavior was not foreseen by the legislators. Even if ineffective, similar measures exist in several other cities in Latin America, such as São Paulo (Brazil), for example.

In all these episodes just mentioned, the legislation failed because its planners ignored the dynamic effects or long-term consequences of the incentives created by the new legislation. To anticipate all of this, legislation needs to be conceived in dynamic, not static, terms. Planners need to draw on advances in behavioral economics, formulate relevant questions, and move forward in predicting consequences.

One example that fits both the cause of previous legislative failure (misidentification of the problem) and the failure to set objectives now under discussion is the so-called *Truth-in-Lending Act* (Pub. L. 90-321, currently 15 USC 1601 *et seq.)*. Three basic objectives were stated: 1) to stabilize the economy by

increasing the informed use of credit; 2) to allow consumers to purchase the most favorable credit terms; and 3) to protect consumers against inaccurate and unfair charges. The first objective (economic stabilization) is too broad to be adequately evaluated and to allow a conclusion about the success or failure of the legislation. The case was dissected by Rubin (1991).

Defining the objectives or purpose of the law is achieved by answering the following questions: What is the desired outcome of the legislation? How will the behavior of relevant actors need to change for this outcome to be achieved? (Goddard, 2022, p. 156). At the same time, the analytical exercise should advance to questions such as: How will the proposed legislation likely work in practice? What will change compared to the status quo? What aspects of the post-legislation scenario are difficult to predict with reasonable confidence? (Goddard, 2022, p. 158).

All considerations up to this point are important because, without knowing the objective of the legislation beforehand, it is impossible to discuss its effectiveness. To reduce the risk of legislative failure, a careful analysis must be carried out to determine whether the legislation is capable of achieving the desired states of affairs (feasibility) and whether the means employed are adequate to the proposed end (means/ends adequacy). For this, it is necessary to identify precisely what the purpose of the legislation was (without prejudice, obviously, to the correct identification of the problem it intended to solve, as already noted).

5. Disregarding the fact that politics influences decisions; blaming legislative failure on the political process; in a democracy, decision-making on legislation involves a negotiated adaptation of interests

In democracies, the Legislative Branch is expected to represent, debate, and address the needs and aspirations of citizens. As a result, legislation is the outcome of this negotiated process of adapting interests. This applies both to the drafting of legislation itself and to its subsequent evaluation. Legislative processes involve various actors who need to cooperate with each other to achieve the desired outcome.

It is known that there are institutional arrangements that favor this cooperation more, and this is a topic with extensive literature, which points to the effect of different institutions in democratic systems (among others, Payne, 2006).

It is not being argued that there is an ideal or unique institutional arrangement for carrying out the work of drafting laws. It is simply being emphasized that a strictly technocratic approach to legislative formulation – which ignores the stages of discussion, accommodation, negotiation, and deliberation – disregards the broader context of parliamentary politics, which is inescapable in the lawmaking process. Thus, legislative planning that refrains from anticipating how politics might influence the decision tends to fail.

Drafting legislation that disregards the political preferences of representatives, who reflect their electoral bases and tend to embody the deeply ingrained beliefs and customs of society, can result in failure, and sometimes the legislation is never even approved by parliamentarians.

In theory, legislation tends to be better when legislative bodies develop the capacity to formulate it and when they participate constructively in the formulation of national policies, instead of simply adopting a subservient role in which they only endorse recommendations supposedly based on strictly technical and neutral criteria from technocrats (in practice, a small group of officials) or the wishes of the Executive Branch.

The politicization of the legislative process, therefore, is not only inevitable but entirely desirable. The lawmaking process functions as an arena for public debate. It is the only way to enable an agreement between opposing forces and different stakeholder groups and to ensure that legislation reflects a wider range of perspectives.

The lack of more active participation on the part of legislatures can result in legislation that is poorly suited to the real needs or demands of society's interests. In the medium and long term, this means that the legislation lacks minimum consensus, becoming politically unsustainable and/or inefficiently or unfairly implemented (Stein et al., 2006, p. 42).

Translating this idea to the field of political theory, it refers to the deliberative approach, in which democracy is a value *per se* and, at the same time, the means for making decisions that will bind the community, given its advantages in generating new and superior ideas. The purpose of the legislative process and parliamentary debate remains to find viable solutions to social problems, provided that certain preconditions are met: open, sincere, and rational public debate (Ackerman, 1980; Cohen, 1967; Dryzek, 1980; Gutmann; Thompson, 1996). These would be the requirements for legislative success.

This text does not intend to delve into the extent to which these conditions are actually met in practice, but merely to highlight this fact: legislation involves a matter of collective action, which needs to be considered in the drafting of legislation. In most of the literature, this political space is not considered.

In turn, still within the deliberative theory, failure occurs when channels of debate are limited in some way, or when a large number of citizens refuse to participate in the debate or cling to irrational opinions (Ely, 1980; Fishkin, 1991; Habermas, 1996; Sunstein, 1993). Legislative failure invariably occurs if parliamentary debate is distorted or restricted.

It is indeed true that some authors – for example, Zapatero (2009, p. 114) – place little hope in the capabilities of parliaments in this regard.[1] In fact, parliamentarians do not usually follow the traditional desirable script in their debates: defining the problem, analyzing its causes, investigating its possible solutions, evaluating the options, and then choosing the best one.

In the real world, parliamentarians do not even have the knowledge or the time necessary to conduct such a calm analysis. For Gouvin (1994, p. 1283), however, the inability of legislators to find viable solutions results from the lack of use of the problem-solving methodology in question or the legislative method discussed by Rubin (1991).

The line of reasoning of these two authors ends up reducing the problem to a single cause: the reason for the failure of legislation would be the political process. From this perspective, failures would be inevitable; any legislative effort would be doomed to fail unless it circumvented the mechanisms of political influence. However, this does not appear to be the only source of legislative failures.

In this sense, evaluating legislation after a certain period has passed is a resource for organizational learning, aimed at guiding, clarifying, persuading, and aligning actors involved in public policies. It is not (or at least should not be) an auditing activity (certifying inspection), as a means of punishing or rewarding bodies, teams, or programs. The focus of the evaluation is to understand "how" public policies are developing, as well as the "whys" of their good or bad functioning.

Once the assessments are made, it is up to the Legislative Branch to analyze the empirical and legal data underlying the legislative prognosis and

1 "*Parliament can technically worsen a good bill; but it can hardly improve a bad one. Therefore, if you want to improve the quality of our laws, the greatest effort must be concentrated on the drafting of bills before their submission to the Chambers; and even before starting their drafting. This is where the suggested methodology has full application*" (Zapatero, 2009, p. 114, our translation).

to reconsider the interests involved based on the new conditions of the post-legislation reality. Following this logic, if the Legislative Branch is essential in the policy-making process, it is also essential in assessing the information produced during the evaluation of these same public policies. It is impossible to "depoliticize" either activity.

Nevertheless, what planning can do is anticipate some critical questions typical of parliamentary debate, for example, as suggested by Goddard (2022, p. 190):

a) Who is intended to benefit from the legislation?

> i. Identify the groups that the legislation intends to benefit.
>
> ii. Identify the benefits that each of these groups intends to obtain.
>
> iii. What are the advantages and disadvantages among these different groups/benefits?

b) What benefits do these beneficiaries intend to obtain?

> i. Identify the criteria a person must meet to qualify for the benefits provided for in the legislation.
>
> ii. What are the implications of these criteria for the complexity of the legislation, for the predictability of its operation, for the ease of access to these benefits for the intended beneficiaries, and for the cost of implementing the scheme?

These are just a few examples of questions, and for each answer, the idea is to have a plausible justification.

6. Failing to consider alternative paths for legislative intervention; punitive approach, coercive implementation, or the need for court intervention to ensure enforcement of legislation

In this cause of legislative failure, legislative planning fails to broaden the range of alternatives capable of solving the underlying problem and tends to prioritize a single path. Avoiding this failure involves establishing different ways to achieve the specific objective to be reached with the legislation. Furthermore, the scenario of no action, that is, without the approval of regulatory options, must be considered. In addition to listing each of the different legislative approaches, it is advisable to establish the costs and benefits associated with each of the options under consideration.

Illustrating this type of failure regarding the lack of legislative creativity, one can mention the debate on automotive safety in light of legislation that focused exclusively on driver behavior in the United States.

In this sense, an important shift in perspective occurred with the approval of the *National Traffic and Motor Vehicle Safety Act* of 1966. To prevent traffic accidents, instead of focusing solely on the driver, American legislation changed its perspective and began to target vehicle manufacturers specifically, aiming to have them build safer vehicles that better protect their occupants in the event of an accident. The focus became promoting collision prevention technologies or modifying the vehicle (environment) so that the interaction between the passenger (host) and the deceleration forces of accidents (agent) would produce less trauma. This case is analyzed by Mashaw and Harfst (1987).

The authors' interpretation, however, is that there was success amidst failure because the National Highway Traffic Safety Administration's (NHTSA) – the US regulatory agency responsible for enacting additional standards to enforce automotive safety *design technology* – ultimately encountered significant difficulties in defending its regulations in court cases. US courts frequently demanded a level of scientific certainty from the NHTSA regarding the effectiveness of safety standards that was difficult to achieve, hindering the implementation of the 1966 legislative mandate.

However, in compensation, the NHTSA began to enforce the *recall* of motor vehicles that contained defects related to safety performance. During the decade of 1976-1985, the NHTSA oversaw the *recall* of more than half of the new American vehicles sold. The courts considered the recalls less intrusive. Thus, the courts' actions ended up influencing regulatory action towards the adoption of corrective actions directed at specific defective products (*recalls)*.

According to Mashaw and Harfst (1987, p. 313), the NHTSA's success in obtaining *recalls* was positive, but it did not fully compensate for its failure to enact automotive safety regulations. Still, the case reveals an important learning process, whereby some of the ambitious goals of the 1966 law were abandoned, notably the attempt to actively shape the future of automotive safety through regulation. However, it should be added that the case also shows an important shift in the focus of legislative intervention.

Along these lines, reducing the risk of legislative failure requires considering alternative approaches. Preferably, this involves examining whether they have already been tried (tested) elsewhere, along with the results and

relevance of that experience to the specific problem (Goddard, 2022, p. 155). Goddard (2022, pp. 157-158) suggests formulating the following analytical questions:

> a) Is there a well-established and successful international model that should be used as a starting point for the proposed legislation?
>
> b) What precedents exist in comparable societies for the proposed approach adopted in the legislation?
>
> c) Was the approach successful in those other societies? How can we know?
>
> d) Will success in other places translate to a positive social, economic, and institutional environment in your society?

The search for alternative paths also involves diversifying the instruments that can be used in each case. The traditional technique of using command-and-control norms can give way to other implementation options, such as negotiation, persuasion, and convincing (Hood, 1986; Howlett, 2005). There are several governmental means to structure the response to the problem, even if not necessarily legislative, such as the granting of subsidies (incentives), information campaigns, etc.

The tools do not necessarily have to be punitive (accompanied by sanctions, whether financial or restrictive of rights or freedoms), as this depends on the desired degree of coercion. Eventually, the instruments can also be mixed; all this to ensure the best possible legislative design.

In this sense, in addition to failing to consider alternatives, choosing the wrong implementation tools can lead to legislative failures. We will now analyze some historical examples of this flaw.

The *War on Drugs* was a policy adopted by the United States in the 1970s with the goal of reducing the trafficking and consumption of illicit drugs. The War on Drugs is a metaphor used to associate drug use with a threat to national security. The main objective of the *War on Drugs* was to combat drug trafficking and consumption through the adoption of rigorous punitive measures. Among the results of the *War on Drugs* was an increase in the prison population, even though the rate of drug use remained stable (or increased in certain periods). It is said that the reasons for its failure are associated with the exclusively punitive approach, the unequal application of laws (which disproportionately affected African Americans and Latinos), and the lack of focus on preventive and treatment measures in terms of public health.

The One-Child Policy was implemented in China in 1979 with the aim of reducing pressure on natural resources and public services by controlling the country's population growth. However, assessments indicate that the policy resulted in significant gender imbalance, population aging, and human rights violations. Among the reasons for its failure are listed coercive implementation, lack of respect for individual rights (freedom of choice and family planning), and the absence of family support policies. India – which also faces overpopulation challenges, adopted less coercive policies and invested in family planning and education programs – managed to avoid some of the problems experienced by China.

Starting in 1985 in China, families living in rural areas were allowed to have a second child. In 2015, the government began allowing all families, regardless of region, to have two children.

Indeed, within this cause of legislative failure, there is the situation where, due to the complexity of the legislation, its application will require the intervention of the courts. Goddard (2022, pp. 18 and 84) cites the example of the 2001 reform of the law governing the division of assets between couples in New Zealand: the law gave the courts the power to decide on claims related to the disparity in earnings after separation, caused by the division of roles within the family. The focus of the legislation was the situation in which, due to the separation, the human capital and earning capacity of one partner (almost invariably the man) were enhanced and the human capital and earning capacity of the other (almost invariably the woman) were diminished.

The new regime, especially due to the generality of the clause on economic disparity, was complex and opaque. Furthermore, it was administered by the courts in a way that made its application slow and expensive, as it required the presentation of expert evidence on the potential for real and counterfactual gains (Goddard, 2022, p. 84). As a result, the legislative reform became a dead letter. In practice, a barrier to the effectiveness of the legislation was established, since, to see it applied, people had to resort to the courts, which implies costs. Those who could most benefit from the legislation (mainly women) were precisely those who had the most difficulty in invoking it.

7. Failing to package legislation in a compelling narrative (storytelling); adopting appropriate communication is an important step for the success of legislation

As previously seen, according to best practices and theoretical guidelines, the legislation drafting process should go through several analytical stages, which involve: defining the problem; understanding the actions previously taken (or not taken) to solve it; enumerating the available or possible alternatives; deliberating and choosing the best option; adopting and implementing the legislation; evaluating the results achieved; and deciding on any eventual revision or modification of the legislation. These activities coincide with the traditional public policy cycle, whose process, as is known, is not as linear as the previous list suggests.

All phases of the lawmaking process are permeated by argumentation, which is fundamental. Although not listed here, communication about each of these phases is a key element in providing visibility and shedding the appropriate light on achieving the objectives. Underestimating the need for rhetoric and the development of the communicative skills necessary for drafting legislation is one of the factors that can contribute to legislative failures.

Effective communication of a legislative proposal formalizes concepts and allows discussions to move forward. It must encompass both context and process. It involves the ability of the drafters to explain and defend the action plan, to package the proposal in a way that is persuasive in public debate. In drafting legislation, what cannot be written or explained simply and convincingly tends not to succeed. Identifying persuasive arguments plays a crucial role in the process, more so than reasoning based on logical demonstrations, data, information, and evidence.

The argumentative character aimed at justifying norms is explored by several authors – such as Atienza (1997; 2004), Oliver-Lalana (2022), and others. Added to this approach is the strategic element developed by Majone (1989), in the sense of fitting the legislative proposal into a *storytelling,* a plausible narrative constructed in a simple and convincing way about the reasons for the proposed legislation and how it will be implemented. This narrative is an explanatory tool and, at the same time, a decisive test for the clarity and coherence of the ideas and for the consistency of the bill with the original political objective (Goddard, 2022, p. 161).

Actors will need to explain their positions in the political arena. Therefore, Majone (1989) argues that the analyst involved in public policy development needs to act as a speaker who seeks to persuade political actors and the general public, recognizing the complexity of the problems and the need to justify the decisions made. The author highlights the importance of consensus-building in the public policy formulation process. The main objective is, by providing evidence and arguments, to enable public deliberation. The policymaker should not limit themselves to identifying solutions to the problems underlying the proposals, but should seek to persuade, communicate effectively, transcending the mere application of rational decision-making models.

Among the discursive skills required by this approach are simplification, planning, and the ability to make information intelligible.

According to Smith (2013, p. 23), communication aims to produce information useful to the political process of drafting legislation. Useful information has four main characteristics: it helps solve problems; it serves action; it has consequences; and it is accessible to the public. When drafting communication or deciding to provide information about the legislative process, it is important to answer some questions: Who is this relevant to? How will this help solve the problem? What is the intended goal of providing the information? What is likely to happen as a result of this information? What impacts might this information have? How will this information be made public?

Smith (2013, p. 24) goes on to explain the aspects that influence this communication, such as prior knowledge of the expectations involved, gender, credibility, etc.

8. Conclusion

This work addressed the idea of legislative failures, listed some of their main causes, and pointed out how the available guidelines for improving legislative drafting can help prevent the approval of laws that do not achieve the expected results or, although they advance in that direction, do so at high costs or with undesirable side effects or, even worse, by exacerbating the problem they intended to solve. The list was not intended to be exhaustive, but simply aimed to understand the most common factors that lead to different types of legislative failure and to illustrate that certain failures could be avoided with the application of appropriate methods.

As we have seen, however, legislative failure is not entirely a bad thing, insofar as it is involved in a learning process. Without failures, legislation does not evolve. Following Gouvin's (1994, p. 1286) assertion, without the prospect of failure, the legislative process loses a vital link and the possibility of improvement. Hence the importance of correctly identifying the problem that the law intends to solve. Without this, it is impossible to assess legislative effectiveness, which is measured by the problems that the legislation sought to resolve. Therefore, failure to identify the problem makes it difficult to gauge its success or failure.

Even with the prior application of the methodology for rational legislation, failures can still occur. External causes may have arisen, or the mechanisms may have failed to identify vulnerabilities *ex ante.* However, failures *can always be assessed ex post.* Therefore, it is advisable to conduct legislative evaluations, which provide valuable *feedback* on which approaches work and which do not. Institutionalizing this activity of evaluating legislative outcomes is the best solution for dealing with (correcting and preventing) legislative failures.

The list of the main causes of legislative failures analyzed left out some flaws in lawmaking planning that have already been sufficiently mapped in the literature, such as, for example, disregarding the importance of the institutions that will be responsible for implementing the legislation, whether by applying, interpreting, or ensuring its enforceability; if they already exist, it is necessary to know how such institutions function in practice; if not, their planning is necessary when drafting the legislation (Bardach, 1977). Undoubtedly, the lack of institutional capacity is one of the main causes of legislative failures (King; Crewe, 2014).

Nor did it delve into another common flaw: neglecting the fact that the most important perspective to consider is that of the legislation's ultimate recipient, the people to whom the law applies; if these people are unaware of the legislation or do not understand its rules, the legislation tends to fail. In these terms, accessibility is an essential element for the law to be effective. Besides making the legislation public, the mechanism for making legislation accessible is to write and present it in simple language to facilitate its understanding and application. On the other hand, if the target audience of the legislation is specialized, it is advisable to use technical language.

As seen, many legislative failures result from a lack of attention to the behavioral changes that a new law will encourage, in dynamic terms, considering

not only the short-term, but also the medium- and long-term consequences. Failing to pay sufficient attention to the long-term incentives created by the law – as occurred, for example, in the cases of the window tax, car-free days in Mexico City, snakes, and rats – generates the worst types of legislative failures, those that exacerbate the problem they intended to solve.

A more complex argument for legislative failures can be found in Scott (2021), who argues that social engineering schemes often fail due to a combination of four factors: 1) oversimplification of the complexity of social and natural life; 2) what the author calls the "ideology of high modernism," prevalent in the 20th century, consisting of the belief in the capacity of science and technology to transform society, which led to the application of unique and universally applicable solutions, ignoring specific local contexts; 3) authoritarian states, with a greater capacity to impose top-down social engineering plans, suppress resistance and *feedback* from civil society and eliminate adaptability and responsiveness to unforeseen problems; and 4) a weakened civil society, lacking the capacity to resist state-imposed social engineering plans. Although this approach has not been explored in depth in this work, it is not incompatible with the one used here.

In summary, considering everything discussed, it is stated that the most common causes of failed laws stem from flaws during their planning, from shortcomings in the analysis, especially of the problem (due to a lack of relevant information gathering), and from the recognition and prediction of consequences. The more explicit the problem that the legislation intends to solve, the objectives it aims to achieve, and how to achieve them (the means to do so), the greater the chances of identifying and correcting any flaws. Without these minimum elements, the evaluation itself can be compromised. And the failure to conduct legislative evaluations is one of the recipes for legislative failure.

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