Legal basis for public policy evaluation in Switzerland and its implementation – research plan for subproject 2
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1. Interaction with the Overall Project
Establishing legal basis for public policy evaluation, highlighting the reasons for its existence and examining its implementation are all essential prerequisites in providing the complete picture of the institutionalization of public policy evaluation in Switzerland. Yet the data on this subject is inadequate, both on a federal and cantonal level. This subproject aims to fill in these gaps. The schema below situates this subproject within the overall project. In the subproject, the obligation of evaluation – an element of an evaluation culture – is the key variable. It is the dependent variable for objectives 1 and 2 as well as the independent variable for objective 3 (red arrows in Figure 1).

Figure 1: Analytical Framework

2. Detailed Research Plan
2.1. Aims and Rationale of the Subproject
This subproject aims to identify different types of legal basis of the obligation to evaluate public policies, explore its causes and to examine its implementation. The subproject will be divided into the following three specific objectives and sections: 1) Review legal basis for evaluation 2) Research into the causes of its’ existence 3) Implementation of its’ foundations.

Objective 1: Review legal basis for evaluation
The first objective consists of highlighting the legal basis for the obligation of evaluation. This implies reviewing and then classifying the legal basis for the obligation of evaluation in federal, cantonal and international law. We will study both legislative and case law sources.

This objective aims to fill in an important gap. Even though some literature can be found on the question of experimental laws (for instance Flückiger 2003; Morand 1993; Mastronardi 1991a) or Damocles laws (Flückiger 2005), only a first overview of clauses of evaluation have been addressed on the federal level (Federal Office of Justice 2011). To our knowledge, only Geneva, on the cantonal level, has compiled a list identifying clauses of evaluation in its cantonal legislation. We also note that such a census has not been carried out in terms of formally and informally international law, applicable in Switzerland.
The analysis should also take into account the fact that some clauses are broader than others. An umbrella clause such as Article 44 of the Environmental Protection Act, formulated for the field of environment, renders the presence of such clauses in the multiple ordinances in this domain unnecessary. The same applies to the evaluation of all legislative acts governing federal aid and allowances which is an obligation stated as a centralized basis in Art.6 of the Federal subsidies.

The proposed detailed census is expected, first of all, to test the typology set up by Bussmann (2005) and to open new fields of research on the cantonal level as well as in the fields of international law and in the case law practice. It will then determine whether areas and actors of public policies are particularly concerned. Finally, it will help to test empirically if, from now on, one can argue whether or not a real principle of effectiveness exists in the Swiss legal system, in addition to the classic principles of the rule of law such as legality, public interest or proportionality (concerning the emergence of such a principle, consult Flückiger 2001a).

Beyond the question of the legal basis that impose obligations to proceed to evaluations, the question of the right to evaluate, and to the competences of the authorities to this effect, also deserve to be classified. This issue has, for instance, always presented delicate problems to the evaluation boards which can proceed in self-referral following the example of the Commission externe d’évaluation des politiques publiques (CEPP) in Geneva.

Finally, we will add to our research project, the legislative or constitutional provisions establishing authorities responsible in conducting public policy evaluation. In the case of the CEPP in Geneva, the situation is quite straightforward, however, it may be more confusing in the example of the cantonal audit courts (cour des comptes), in which some reports move away from pure financial audit to be closer to evaluation in good standing.

Objective 2: explain why public authorities have introduced mandatory evaluation

The second objective focuses on the factors which explain the use of mandatory evaluation required by federal and cantonal parliaments. This objective is part of the extensive literature on the institutionalization of evaluation. On the level of comparative international analysis, several types of factors explaining the use of evaluation were compiled by, for example, Furubo/Rist/Sandahl (2002). In Switzerland, several studies were conducted first on the reasons for late entry of evaluation in the political and administrative system (Freiburghaus/Zimmermann 1985; Klöti/Schneider 1989; Horber-Papazian/Thévoz 1990; Derlien 1990a: 148; Freiburghaus 1990: 127; Germann 1991) and then the studies were conducted on the current institutionalization and its explanatory elements (Balthasar 2009a, 2007; Bussmann 2008; Widmer/Beywl 2009; Varone/Jacob 2004; Horber-Papazian, 2006; Widmer/Neuenschwander 2004).

However, to our knowledge, no studies have been devoted to the reasons why public authorities on the federal and cantonal level have specifically introduced evaluation obligations through evaluation clauses. This study is particularly interesting if the motives for the establishment of case law obligations may reside in certain constitutional principles, like proportionality or legality (art. 5 Cst.), those that governed the adoption of legislative provisions are less obvious. In addition, a survey found that most of the cantons have introduced a legal basis for use in the evaluation (Horber-Papazian 2006) but no studies have so far been conducted to determine which are the reasons for this introduction on the cantonal level.

Objective 3: examine if and how evaluation obligation is implemented

After the obligations of evaluation are reviewed and the reasons for their use are identified, it remains to consider whether and how they are implemented. If several works have focused on the question of the use of evaluation results by the administration in Switzerland (Fornerod 2001; Balthasar 2006, 2007, 2009a, 2009b; Widmer/Neuenschwander 2004) and Parliament (Janett 2004; Nideröst 2001) with the exception of the ongoing work within the framework of the CEPP, no research has been conducted to determine the effectiveness of the implementation of an obligation to evaluate.

The question of the passage between the anchoring of a legal obligation to evaluate and effective implementation of an evaluation is, however, even more important than Dentes’ (1998) conclusion for Italy in which he states that the legal basis is necessary but not sufficient for evaluation practice.
2.2 Theoretical Background and Hypothesis

Objective 1: Review legal basis for evaluation

The legal bases are not entirely known. Yet along with the development of evaluation practice in the Swiss political system, we have witnessed its integration into the legal system. Under the impetus of the doctrine (Mader 1985), it has occurred not only in the legislative sources (a), but also in case law (b) and even contractual sources (c).

a) The laws, both federal and cantonal, contain clauses imposing evaluation. We speak of evaluation clauses, or «provisions contained in a law which have been adopted by the Parliament and which impose the realization of evaluation within a certain time limit and under certain conditions» (Jacob 2006: 64; author’s translation). Therefore, they compel the designated institution (for instance the Federal Council, a Department or an Office in charge) to proceed to an evaluation.

Despite their different origins, the existence of clauses imposing evaluation is becoming progressively more frequent in Switzerland. Since 1984, 54 federal laws have included evaluation clauses, only one of which applies to prospective evaluation (Art. 141 of the Law on the Federal Assembly (LParl, RS 171.10); Federal Office of Justice 2011). We can finally note that Article 170 of the Federal Constitution is a general evaluation clause as it binds the Federal Assembly to guarantee that “federal measures are evaluated with regard to their effectiveness” (Art. 170 of the Federal Constitution).

In his typology, Bussmann (2005) highlights at the federal level the existence of general evaluation clauses or clauses applying to the costs and/or on the impacts of laws. Four types of laws may include evaluation clauses:

- **Experimental laws**, time-limited, whose function is to test innovative regulatory solutions, evaluated at the end of the experiment (Morand 1993; Mastronardi 1991), for instance the introduction of e-voting (Flückiger 2003);

- **Damocles laws**, whose function is to result in the self-regulation of a particular sector by specifying the objectives to be pursued, while juridical formalizing the threat to exercise a regulatory competence, if evaluation shows that goals were not reached (Flückiger 2005: 234), for instance the CO2 Act;

- **Laws provided for planning** are of a particular nature since their implementation is subject to evaluation (Flückiger 1996), for example Art. 44a LPE and OPair;

- **Ordinary laws**, for instance Art. 44 of the Federal Act on the Protection of the Environment requiring the Confederation and the cantons to conduct surveys on environmental pollution and to check the effectiveness of the measures taken to this effect.

While evaluation is obligatory because of the nature of the three first types of laws, such an obligation is not imperative for the fourth type.

b) Another legal basis for imposing evaluation depends on the courts. If the Constitutional Court in Karlsruhe, Germany was able to play an important pioneering role in this respect (Flückiger 2007b: 156 ss), the limitation of judicial review of federal laws imposed in Switzerland to the Federal Court by the Constitution (Article 190) has prevented, to date, the development of an extensive practice. Only a few scattered cases concerning a federal ordinance and a cantonal law are, to our knowledge, reviewed. However, since the principle of proportionality (Article 5 II Cst.), which requires that a measure be able to achieve the target goal under penalty of being unconstitutional and since the principle of legality (Art. 5 II Cst.) requires a certain normative density, both are likely to require the production of evaluations. Federal jurisprudence has, to our knowledge, never been systematically analyzed in terms of the courts. We can draw the same conclusion at the cantonal level.

c) Finally, instruments of a contractual nature (we think particularly to the performance contract, even though their juridical nature remains controversial) are also likely to impose evaluations, even if the doctrines’ rudimentary nature has been criticized (Carter 1989; Bouckaert/Peters 2002; Thiel/Leeuw 2002; Horber-Papazian 2011). Here too, a list of evaluation contractual clauses seems
to be lacking in both federal and cantonal levels. However, this will not be discussed in detail within this subproject because of its potential magnitude.

Objective 2: explain why public authorities have introduced mandatory evaluations

Internationally, many studies, notably in the United States, have examined the reasons of appeal to evaluation by Congress (Zweig 1979; Radin 1984; Weiss 1989; Fishman 1989). Among those aforementioned, we also cite the research conducted on the development of new and controversial legislation, reauthorization of existing legislation, annual appropriations and budget cycle, oversight hearing and the expansion of the body of knowledge.

These studies will inspire, in part, the conceptualisation of a working hypothesis relative to the Swiss case. In addition to these direct legal causes (Art. 5 or 170 Cst.), we can also mention:

- The need to obtain certainty concerning implementation (specifically in the private sector where efficient measures must be put in place in order to fight against global warming in the example of the CO₂ Act).
- The diminution of uncertainty associated with an implementation (Patton 2008).
- The research of scientific arguments destined for the political debate and the decision-making process as underlined, for example, by Valorvita (2002) and Bowell (2009a, 2009b).
- The monitoring of the proper use of public funds (Fishman 1989; Derlienn/Rist 2002).
- The monitoring of agents’ activities responsible for implementation notably in subsidization laws.
- The studies based on the principal agent theory (Williamson 1975) have highlighted the need for public authorities to develop monitoring tools especially through contracting in order to verify that the work is correctly carried out by the implementation agents (Braun/Guston 2003).
- The attempt to diminish conflict surrounding a measure taken in order to promote its adoption.

On this last point, we can already make the following sub-hypothesis: The more the degree of conflict is predictable during the elaboration phase of a law and real during the consultation phase and parliamentary debates, the more frequent is the request to include an evaluation clause. Wegrich et al. (2005) were interested in the effects of evaluation clauses on the decrease of bureaucracy. Their study builds on an international comparison, including Switzerland. They defend the hypothesis that evaluation clauses enable the abrogation of unnecessary laws. Albeit, they were not able to succeed in verifying their hypothesis: They reached to the conclusion that, in Canada, evaluation clauses are mainly used as checking instruments of controversial measures containing uncertain effects (Wegrich et al. 2005: 32). In addition, they highlight that the existence of such clauses enables political compromises and, thereby, reduce the conflict tied to the decision-related process. With respect to Switzerland – the country which, in international comparison, resorts the most to evaluation clauses (Wegrich et al. 2005: 19; 33) – no conclusions are drawn regarding the effects of such clauses on the decision-making process. Verifying this sub-hypothesis will permit to fill in this gap.

Objective 3 examine if and how obligation of evaluation is implemented

Although there are databases such as ARAMIS at the federal level, no central tracking reliable to evaluative activity seems to exist at the federal level as well as in the cantons, with the exception of work in progress at the CEPP. No study in Switzerland has so far allowed the possibility to determine the impact of the evaluation obligation on evaluative activity. The hypothesis concerning the implementation of the evaluation requirement is that the existence of specific obligations leads to increased evaluative activity in the sector concerned. Another hypothesis concerns the subject of obligation: an evaluation is more likely to be carried out all the more when financial stakes are high (Furubo/Rist/Sandahl 2002). A final hypothesis based on the work of Boswell (2009a, 2009b) will relate to the conflicting nature of a policy: the more a measure is subject to conflict on capital gains, the less likely the related evaluation clause will be implemented effectively.
2.3 Methods and Data Collection

2.3.1 Corpus

To answer our questions, we will consider all laws containing a retrospective or a prospective evaluation clause, on cantonal, federal and international levels (limited to formal and informal international law applicable in Switzerland).

2.3.2 Methods

Census of legal basis for evaluation

The census of legal basis for evaluation will be based 1) on data already available (esp. Federal Office of Justice 2011 for federal legislation; list of the Commission externe d’évaluation des politiques publiques for Geneva legislation (CEPP 2011); legal literature for case law and contractual obligations) and 2) on data to be collected from the legal database of the Confederation (domestic and international law) and those of 26 cantons (lexfind.ch database of the Institute of Federalism of the University of Fribourg). Additional interviews will be conducted within cantonal chancelleries, for example, in order to complete and validate the obtained lists.

Determining the reasons for introduction of evaluation obligations

Determining the reasons for the introduction of evaluation obligations will be based on the study of preparatory documents, notably on the study of parliamentary proceedings for constitutional and legislative clauses as well as on federal and cantonal case law for the obligations imposed by the courts. Among all the explanatory variables emphasized pertaining to the introduction of evaluation obligation, it will be determined whether or not the attempt to reduce conflictuality related decision-making is a dominant variable. To this effect, thirty semi-structured interviews will be conducted among a selection of federal and cantonal actors (presidents of parliamentary committees, department heads).

The implementation of legal basis for evaluation obligation

The established census will highlight the areas in which evaluations were obligated and the actors responsible for their implementation. An online questionnaire will be sent to them in order to determine whether the requested evaluations were conducted, and which constituent elements of public policy the evaluations have affected (input, output, outcome, impact). In the event that the obligation to evaluate has not been implemented, the reasons for this lack of implementation will be requested. To determine the impact of the obligation to evaluate the evaluative activity in the areas studied, the information gathered will finally allow to compare the number and the objects of evaluations with and without obligation to evaluate.

2.3.3 Data collection

Data will be collected using both qualitative and quantitative methods. Thus, at the federal as well as at the cantonal level, data will be collected. On one hand, this data will be collected from existing databases of law projects and of evaluation reports, and their document analysis as well as consultations and answers to Parliamentary debates. On the other hand, the data will be collected by conducting semi-directive interviews with the administrative representatives, the Parliamentary Committee Chairmen and the Parliamentary Group's leaders concerned with the law project under scrutiny. An online survey will finally be carried out among those designated by legislation to conduct evaluations.

2.3.4 Access to information

The Freedom of Information Act should facilitate the access to data at the federal level. Since many cantons have also established such a system, accessing the data should not pose any particular problems in terms of availability. Access to legislation and to judgments is, in any case, guaranteed. The census will be made from existing databases at cantonal and federal levels.