

LEGISLATIVE EVALUATION AS ALTERNATIVE DEMOCRATIC ENGAGEMENT

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ABSTRACT

This article grapples with the role that legislative evaluation can fulfill as a tool to reinforce the democratic dimension of public decision-making in western liberal democracies. The investigation started from the observation that China's National People's Congress called for legislative evaluation as a tool to develop democracy. Evaluation was consequently described as "alternative" democratic engagement. The investigation then proceeds to answer the question whether there might be a role for alternative forms of democratic engagement in liberal democracies as well, given the fact that electoral and other accountability mechanisms have already been institutionalized. The answer is affirmative, because of the numerous challenges that contemporary democracies face in addition to a string of fundamental developments that are summarized as the shift from government to governance. Now assuming that there is a role for alternative democratic engagement, an ensuing question relates to the actual prevalence of the democratic functionality of legislative evaluation in liberal democracies. Since the institutional context affects these functionalities, the question is answered for the specific case of Belgium. The proclaimed functionalities of evaluation were operationalized into a set of positive and negative markers. These markers touch upon three dimensions: formal aspects of regulatory policy laid down in policy, laws or internal norms; proxies for the salience of democratic evaluation based on observation of strong political preference for other objectives such as audit or administrative burden reduction; and quantifiable quality aspects of evaluation derived from "best practices". By means of illustration, these markers were then applied to the legislative and regulatory policies of Belgium.

KEYWORDS

Legislative evaluation, impact assessment, ex post legislative review, regulatory policy, democracy, governance

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1. *Chinese twins. The double rationale of legislative evaluation*

In the early summer of 2010, the city of Xi'an – now firmly on the global cultural map after the excavation of the “terracotta army” – hosted a UNDP-sponsored conference on the *ex post* evaluation of legislation. The event was co-organized by the National People's Congress (NPC), the People's Congress of Xi'an and a handful of prominent Chinese research institutions and universities. During the formal opening ceremony it became clear that this was a very domestic affair. Just two foreigners stood out from an otherwise all-Chinese crowd of government officials and academics. Subdued excitement was in the air. Once the majestic doors of the conference hall were closed, the vice-president of the NPC took the floor. Her welcome address started with the customary formalities and expressions of gratitude until she addressed the reasons to engage in legislative evaluation. Not only is evaluation a tool to improve the rational-analytical character of legislation, the speaker said, evaluation is also a way for us to develop democracy. My fellow foreign expert and I glanced at each other in disbelief. The mild sensations of modern-day orientalist wonderment that we had experienced so far instantly turned into feelings of bewilderment. Did we hear this correctly? Could we be the privileged witnesses of a new democratic dawn in China? The speaker subsequently pointed to actual evaluation projects and explained how the dual objective was achieved. One example was an impact assessment of health care measures for HIV-patients in which stakeholders were actively involved; another one was an *ex post* evaluation of the effectiveness of state subsidies to technology start-ups¹.

¹ Personal notes. See VAN AEKEN 2011 for an adapted version of my presentation at the Xi'an conference.

2. *Legislative evaluation as alternative democratic engagement*

Since this experience in Xi'an I have struggled to frame the evaluative ambitions that were expressed by the vice-president of the NPC. The keenness of Chinese Congress – both at the national and at the provincial level in Xi'an – to engage in legislative evaluation for the sake of fostering democracy, started to make sense when I learnt about a related issue, namely the introduction of judicial review of government legality in China. This new mechanism «added to a wide range of alternatives for citizens to raise grievances against the Chinese government» (MAHBOUBI 2014, 141). Whereas the text of the Administrative Litigation Law (1989) initially was limited, over time Chinese judges and the Supreme People's Court (SPC) succeeded in stretching its jurisdiction, *de facto* creating an instrument for monitoring and control of the executive. In liberal democracies, government is by default monitored and potentially remedied by a wide range of means, mostly formally entrenched in public law (STROM et. al. 2003). Such institutional accountability complements electoral accountability: some of the most obvious monitoring and control mechanisms in liberal democracies reside in parliamentary elections, where representatives are accountable to the voters (GWIAZDA 2016, 27 ff.). In tandem, institutional and electoral accountability provide the means for scrutiny of government conduct and the prevention of concentration of executive power in liberal democracies. From the vantage point of a society that lives under single party rule and is robbed from the prospect of democratic elections, any new “alternative” that offers even the slightest chance of exerting some control over governance or provoking political transformation, is incredibly valuable.

In China, the experimentations by the judiciary with administrative litigation as alternative means of control and contestation are helpful to understand the behavior of the legislative body. Like the SCP and the administrative judges who strived for procedural fairness and the possibility to litigate against government decisions, the NPC explores ways to both increase citizens' participation in public decision-making and monitor the executive's regulatory decisions. Since the enduring vitality of authoritarian governance in China stands in the way of electoral accountability and representation, the legislative body calls for alternative mechanisms of democratic participation and control. Interestingly, what is called “alternative” by western commentators, may be just ordinary practice in China. The notion of democracy in China indeed easily transcends the liberal, western conception of what a democracy should look like (WHITE 2014). But in spite of the very different nature of the political systems of China and the average western liberal democracy, the Xi'an example is useful as an introduction to the concept of “alternative” ways of democratic monitoring and participation mechanisms – that is, institutions and procedures that fall outside classical configurations to regulate the exercise of public power through constitutional law

and electoral representation at the operational level, but intrinsically correspond with the prime objectives of such constellations.

3. *Research design and methodology*

3.1. *Research questions*

The experiences in Xi'an set the stage for subsequent inquiries. A first one grappled with the counter-intuitive relationship between the NPC's acknowledgement of the democratic function of evaluation and the authoritarian nature of the political context. In the previous section I alleged that legislative evaluation was called for as a mechanism of alternative democratic engagement. This inspired a second inquiry, this time on the potential roles and practices of "democratic evaluation" in present-day western liberal democracies. Democratic evaluation is of course not something new. Since the late 1960s the democratic potential of evaluation has been expressed in a variety of ways, from "participation" to the more radical notion of "empowerment" (GUBA, LINCOLN 1989). But how does democratic evaluation fare in the late 2010s? How common is democratic evaluation in present-day legislative and regulatory policies of western democracies? And how can the prevalence of the democratic function be measured, not merely as prescribed in regulatory policies but rather as effectively implemented or realized? Or is democratic evaluation rendered redundant because of sophisticated mechanisms of institutional and electoral accountability? Is there a need for alternative democratic engagement anyway?

In sum, two research questions can be distinguished:

1. To what extent is there a need or urgency to develop "alternative" democratic mechanisms in liberal democracies?
2. How prevalent is the democratic function of evaluation in legislative and regulatory policies of liberal democracies?

3.2. *Overview, goals and methods*

In section 4 the need for alternative democratic engagement in present-day liberal democracies is discussed. Section 5 deals with the prevalence of democratic evaluation (*de jure* and *de facto*) in regulatory policy in liberal democracies. Concluding remarks are formulated in section 6.

The goals of this research are mainly explorative, partly descriptive. It seeks to explore whether there might be some use for the deployment of evaluation in liberal democracies as a tool to enhance the democratic character of public decision-making, and consequently to identify actual manifestations thereof. The notion of a "liberal democracy" in the explorative part has a broad coverage: it

refers to the type of democracy that is most common to the western observer, i.e. a model of democracy characterized by indirect representation of citizens through elections and safeguarding of fundamental rights. By contrast, the scope of the descriptive part of this study is limited to Belgium since the functioning of legislative evaluation is very much dependent of the institutional context (SAGER, RISSI 2011). The aim is to illustrate how a set of indicators can be developed and used for a systematic analysis of the occurrence of “democratic evaluation”.

Both research questions were answered by means of desk research (literature review). The data needed for the illustrative study of Belgium were collected through desk research of primary sources (governmental documents, policy briefs, legislation) and secondary materials (such as OECD reports).

3.3. Definitions

“Evaluation of legislation” or “legislative evaluation” are the terms used to describe «the systematic appraisal of features of legislation following an investigation that meets the minimal standards for scientific and legal research» (VAN AEKEN 2011, 50). When there is no need to distinguish between policy and legislative evaluation, I use the term “evaluation” as a short form for the evaluation of legislation.

Law and legislation are used as synonyms. Both are defined generically, so they tacitly include subordinate legislation (such as regulation).

Although their place and role in the regulatory cycle differ, *ex ante* and *ex post* evaluation are not discussed separately. Evaluation as a concept consequently refers to the systematic appraisal of features of legislation before or after its implementation. When actual practices are described I refer to *ex ante* evaluation as “impact assessment” (IA) or “regulatory impact assessment” (RIA), while *ex post* evaluation is referred to as “*ex post* evaluation”, “impact evaluation” (IE) and only occasionally “review” although the latter is quickly gaining popularity (MESSERSCHMIDT 2016).

“Rational-analytical evaluation” refers to evaluation that is primarily undertaken to improve the scientific, evidence-based character of legislation. “Democratic evaluation” points to evaluation that has the intentional purpose of enhancing the democratic quality of legislation.

Democracy points to a system of government, a governance model or a state that is explicitly non-authoritarian. It is an ongoing process that is never finalized. Its main functional components are monitoring (synonymous for control) of the power of the executive and representation (or participation) of citizens in the public decision-making process (HELD 2006). Although such conception is akin to “liberal democracy”, the adjective “liberal” may be still be added to stress the importance of the liberal norms such as a free press, due process, transparency, tolerance and civil liberties.

4. *The urgency of alternative democratic engagement in liberal democracies*

4.1. *Flawed democracies*

The Xi'an anecdote illustrated that evaluation can be conceived as a means to enhance the democratic quality of laws that are produced in a political system that is unable or unwilling to provide or maintain the procedural or institutional standards for legitimate public decision-making. Although the political system in liberal democracies is quite different from the Chinese regime, they receive similar criticism regarding the standards for legitimate decision-making. «Our democracy does not function any longer» headlined a Belgium newspaper², putting the blame on the short-term, calculating behavior of policymakers. Such criticism is by no means limited to Belgium. Numerous challenges confront liberal democracies around the world and do not spare the established ones. I discuss five of the most pressing issues: voter turnout, representative lawmaking, political parties, legislative terms and fair elections.

Detailed observations across the globe demonstrate declining voter turnout since the beginning of 1990s. Because voter turnout is an excellent indicator of the quality of democracy (LIJPHART 1999, 283), a plummeting turnout is very worrisome (SOLIJONOV 2016, 8 and 25). First, it shows that the interest of citizens in representation is waning. Second, it indicates shrinking political equality, since turnout is strongly correlated with socio-economic status – high turnout thus implies social and economic homogeneity, which is increasingly seen as an essential condition for liberal democracy (MOUNK 2018, 151 ff.).

The notion of a liberal democracy assumes that throughout legislative procedures and policymaking various interests in society are considered and weighed in order to create fair and balanced rules and policies. Princeton researchers however famously demonstrated that the US were by definition no longer a democracy due to the excessive influence that the economic elite exerted on law and policy making. Drawing on unique empirical data, they found that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and groups representing the public interest have little or no independent influence (GILENS, PAGE 2014). Biased representation of public interest in regulatory processes and outcomes is not restricted to the US. In the Netherlands, for instance, Ramlal demonstrated that ministry officials first organized confidential consultations with trusted partners, the so-called “usual suspects”, to sketch the main lines of a bill. Representatives of affected groups of citizens who

² De Morgen, 5 May 2018, 13.

were not part of this privileged circle found it nearly impossible to voice their interests in this formative phase of the bill. This creates a democratic risk, the author concludes (RAMLAL 2011, 296).

Political parties are indispensable as drivers of representative systems in spite of numerous weaknesses. Tabloids feast on scandals involving politicians. Investigative journalism has a preference for wrongdoings of the party's leadership. Stories of corruption are rampant, damaging the credibility of politics in itself. But the real problems are situated at conceptual and operational levels. What justifies their profound impact on the governance of a state when that state's constitution remains tacit about them?³ Insofar a political party is conceived as a vehicle for collective expression of a set of related opinions, which guarantees are in place to ensure that the party remains loyal to these opinions? How is the electoral promise of representation enforced? Why is tax money spent on political parties in legalistic democracies?⁴ How can one justify the vexed relationship between the corporate world and political parties in competitive models of democracy? What should be done if a party wins the elections but is accused of micro-targeting potential voters (RUBINSTEIN 2014, 881 ff.)?

Mapping the problems associated with political parties inevitably requires a critical understanding of the high mass of representative democracies: the elections. Competitive democracies⁵ such as the US are typified by the central importance of leadership and the near-cult of personalities. Pieced together with powerful roles ascribed to media and business the result is an electoral process that conjures the loud atmosphere of a careless circus yet silently breathes the serious interests of the country's elite. Legalist democracies like Belgium and the Netherlands are less affected by these tendencies, because elections and ultimately public decision-making are subject to the legality principle and other strict constraints. But then again, the legalist model shares a systemic flaw with the competitive model: the legislative term of four or five years. The cycle is too long for voters and too short for policy makers. Voters cannot change their preferences halfway while policy makers have few incentives to reason in the long run.

David Van Reybrouck summarized the problem as follows:

«In a world where democracy boils down to periodical voting after a campaign dictated by commercial mass media and corporate sponsoring, elections are not helping democracy, but might quite simply be killing the very essence of democracy.

³ Neither Belgium nor the Netherlands mention political parties in their constitutions.

⁴ Available at: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2018/02/01/rapport-het-publieke-belang-van-politieke-partijen/rapport-het-publieke-belang-van-politieke-partijen.pdf> (accessed 5 May 2018).

⁵ For an in-depth comparison of different models of democracy, see HELD 2006.

Elections were once introduced to make democracies possible. Now, they are in the process of becoming the worst obstacles to democracy»⁶.

This criticism coincided with a series of high stake elections in which disgruntled citizens expressed their dissatisfaction with existing modes of democracies and their political elites in or around 2016. «There are more elections than ever before, but the world is less democratic» Cheeseman and Klaas commented in *How to rig an election* (CHEESEMAN, KLAAS 2018). The stories about the rigging of the 2016 presidential election in the USA made the already suffering legitimacy of democracy drop to an unparalleled low.

4.2. The shift from government to governance

The previous summary should be sufficiently ominous for political leadership to call for an all-encompassing search for alternative democratic engagement. But there is another compelling reason to do so, in the form of a string of sometimes opposing events that corrode our familiar understanding of nation state and government. These events are conveniently summarized in the tag line «from government to governance». Their beginnings can be traced back as early as the late 1930s, when increasing state intervention under the New Deal required a new era of American state building following the New Deal (LANDIS 1938). But it was only around the turn of the century that they were analyzed in an aggregated form⁷.

The overall conclusion was that the trusted conception of government, organized along the lines of the classical constitutional democracy and separation of powers, was exposed to a combination of changes⁸. For instance, administrative agencies were established to address complex problems of the modern economy and industrial society. Unlike generalist legislatures or formalist judges they would apply professional expertise to serve the public interest in an independent fashion

⁶ D. Van Reyrouck, Facebook, 1 March 2016. Available at: https://www.facebook.com/permalink.php?story_fbid=982049781870657&id=266204043455238 (accessed 4 May 2018). The author gained prominence through the organization of the G-1000 in 2011, a platform for democratic innovation that seeks to increase citizens' participation in public decision-making.

⁷ Credits go to the domain of Regulation & Governance.

⁸ Before that time some events were studied by lawyers, other by administrative scientists, sociologists or economists. The fairly new interdisciplinary domain called regulation and governance offered the shared workspace to study the various phenomena in relation to each other. These changes include: globalization; the dwindling role of parliament as legislator; the boom of evaluation, assessment and audit activities, in turn stimulated by developments in statistics and computer sciences; rising levels of education, pushing the demand for more participation in public decision-making, the awareness for environmental dynamics and social human rights; the fast rising size and power of a small number of tech companies; the demand for corporate social responsibility in supply chain operators and so on. The list is long and the domain is still in full bloom, devoted to understanding the interplay of all these factors across various disciplines. See the journal Regulation & Governance.

(RAHMAN 2018, 1671). But the rise of the administrative state also sparked an ongoing series of debates and efforts aimed at legitimating administrative authority.

Thumping traditional parliamentary procedures implied that new mechanisms had to compensate for the resulting lack of legitimacy. Regulatory governance consequently inspired an ongoing search for legitimacy through the development of new principles and techniques (JORDANA, LEVI-FAUR 2004; MAJONE 1996), such as a decentralized understanding of power, attention for networks and horizontal relations, evidence based lawmaking informed by experts' advice and experiences of affected stakeholders, experiments with new forms of participation, the development of meta-regulation, partnerships with societal and corporate actors, public voluntary programs, and, understandably, the design of various types of evaluation (HANBERGER 2004), including regulatory impact assessment and *ex post* evaluation⁹.

Starting points of this slow but steady landslide were the changing forms and roles of the traditional nation state and its constituting parts. These institutional and functional changes entailed procedural and principal changes. New procedures and design principles in turn paved the way for the autonomous design of practical institutional and procedural change. To what extent this cascade of shifts will affect the vitality of the state-as-we-know-it is a difficult question, not in the least because these shifts manifest in seemingly opposing trends – such as the simultaneous burgeoning of executive power and the administration's openness for civil society's involvement. But what is readily observable is the continuous growth of the evaluation and audit sector.

On top of the already pressing issue of the challenged representative democracy, the shift from government to governance lends further urgency to the exploration of alternative democratic engagement in liberal democracies. The following section discusses one form of such alternative engagement.

5. *Prevalence of the democratic function of evaluation in liberal democracies*

In the previous section it was demonstrated that there is an urgency for liberal democracies to develop alternative mechanisms of democratic control and

⁹ The manifest success of evaluation, however, results not so much from dedication to bestow democratic legitimacy to administrative authority. Rather, it results from the aspiration of an increasingly interventionist government to improve policy results and to maximize output effectiveness. With the world-wide economic and budgetary crisis of the mid-1970s the focus switched to reduce policies and maximize input efficiency. Ongoing budgetary crises in the 1980s and 1990s led to the development of NPM and the redirecting of evaluation efforts to internal processes, for instance revolving around agency performance (WOLLMANN 2003, 13). The subsequent phases are known as the first wave, second wave and third wave of evaluation.

participation. Since this role may be taken up by evaluation the obvious question arose whether liberal democracies already recognize this functionality in their actual legislative and regulatory policies. This section reports on the ensuing investigation in three parts. First, the conceptual connection between evaluation and democratic advance is concisely discussed. This is followed by an operationalization into a set of positive and negative markers that are helpful in identifying the actual prevalence of the democratic function of evaluation in a concrete case. Finally, this approach is illustrated with data from Belgium.

5.1. *How legislative evaluation can advance democracy*

In the late 1980s the so-called “fourth-generation evaluation” was introduced. That was the label coined by Guba and Lincoln to designate a social-constructivist approach to evaluation that stressed participation and empowerment of stakeholders. This approach opposed the apparent tendency to reduce evaluation to a scientific process and a merely technical process of enquiry (GUBA, LINCOLN 1989, 7). Instead, defenders of fourth-generation evaluation were committed to «bringing men back in»¹⁰. The people that directly experienced the effect of government policy had to be firmly repositioned at the center of the evaluation, which consequently had to be stripped from its positive, quantitative, and even scientific nature. Only then could democratic empowerment be realized.

Such radically different outlook on evaluation is however not required to acknowledge the various ways in which legislative evaluation can strengthen democracy. Quite the reverse is true. Denouncing the scientific nature of evaluation is harmful, because this invalidates its rational-analytical functionality and damages its credibility in democratic deliberation. Furthermore there is no reason why adherence to standards of scientific research should be incompatible with participatory objectives in evaluations¹¹.

Returning to evaluation as «the systematic appraisal of features of legislation following an investigation that meets the minimal standards for scientific and

¹⁰ This is the title of a landmark article by Homans (HOMANS 1964), an American sociologist who contested the preoccupation with roles and functions in his discipline. He reproached the theoretical perspective of functionalism for getting «positively [...] in the way of our understanding of social phenomena». His argument signaled the emergence of the interpretivist or social-constructivist paradigm in the social sciences. Its proponents denounced a sociology that was blindly mimicking the methods of the positivist, natural sciences with the sole intention to demonstrate a social equilibrium. Instead they emphasized the importance of individual meaning as drivers of behavior (TRAVERS 2002, 165 ff.).

¹¹ The origins of the alleged opposition can be explained, however. Qualitative and interpretivist researchers have been criticized for not representing a legitimate mode of inquiry according to the standards of positivist science. They fought back by arguing that qualitative methods are uniquely suited to study the lives of oppressed and subaltern groups. The debate is thus intertwined with larger moral concerns. See SALLAZ 2011.

legal research», the following democratic functionalities of legislative evaluation¹² are distinguished in the literature¹³:

- Enrichment of the public debate on legislation with objective data, thus supporting a critical appraisal of arguments and counterarguments for the sake of finding the right balance of interests in the legislative process.
- Shedding light on the actual implementation and enforcement of laws, thus reinforcing control of the executive.
- Voicing the interests of stakeholders in the preparatory phases of lawmaking through the provision of a platform for stakeholder input, thus fostering public participation and indirectly making citizens more responsible and better deliberators.
- Providing a formal embedding for consultation and participation processes, thus rendering these processes more relevant and legitimate.

It has to be added that these functionalities were identified for Belgium and thus in relation to a representative, legalist democracy with state-coordinated¹⁴ governance. This model of democracy and this type of governance are still the most familiar types in the nation-states of Western Europe (HANBERGER 2004). However, types and models are typically ideal representations, so actual practices may deviate somewhat across countries in Western Europe. This may manifest in a slightly different set of functionalities and consequently in a somewhat different set of markers. But when countries with different democracy or governance types are studied, more drastic changes in the set of functionalities and markers will occur.

5.2. *Indicators of the actual prevalence of democratic evaluation*

By now it has become clear that the democratic function of evaluation is actually an aggregation of a number of distinct functionalities. This is a first step towards operationalization, allowing a more targeted search for manifestations of democratic evaluation. For example, a researcher can identify a manifestation of “Voicing the interests of stakeholders” in the mandatory consultation phase that is entrenched in the Impact Assessment procedure. Unfortunately, this manifestation only expresses the intention to consult. Its prescriptive nature does not mean that stakeholders are effectively consulted, or consulted in a timely manner, or consulted in a representative way. Empirical research from Flanders

¹² By contrast, evaluation may also be used as a political tool to counter, delay or disturb democratic processes. For instance, “submarine evaluations” are instrumentally designed to “torpedo” policies of the ruling party by the opposition (LEWIS 2001, 39).

¹³ See FUNG, WRIGHT 2003, HANBERGER 2004, LEURQUIN-DE VISSCHER 1995, POPELIER et al. 2007, POPELIER et al. 2010, MEUWESE 2008, VAN AEKEN 2002.

¹⁴ State-coordinated governance means that governance starts with a state decision, taken by the people’s representatives or the political or administrative elite (PIERRE, PETERS 2000).

all the way up to the EU level demonstrates indeed that consultations in IA are often ritualistic, formal affairs (POPELIER et al. 2007). Consider another functionality: “Enrichment of the public debate with objective findings”. Although legislative policies frequently and prominently prescribe that evaluation reports have to be shared with parliament within due time, it is not uncommon that the information is withheld for a long period¹⁵, thus *de facto* annulling any possible contribution the public debate.

In sum, the commitment of a government to democratic evaluation cannot be measured solely by manifestations of functionalities in the books. What truly testifies of the political salience of the democratic functionalities of evaluation is the effective and sound implementation of these measures. The additional need for empirical data on the operational aspects of evaluation certainly complicates the issue. Fortunately, the growing body of research on evaluation allows to identify a number of general markers that are illuminative of a government’s commitment to democratic evaluation. These markers touch upon three things: formal aspects of regulatory policy laid down in policy, laws or internal norms; proxies for the salience of democratic evaluation based on observation of strong political preference for other objectives such as audit¹⁶ or cutting red tape; and quantifiable quality aspects of evaluation derived from “good practices.” Some have a positive orientation, indicating a sound concern for the democratic function of evaluation, while others have a negative orientation, thus pointing to the lack of real interest in this function. The following overview illustrates what a set of markers may look like, based upon review of existing studies on the topic in the Belgian context¹⁷.

Positive markers

- introduction of mandatory IA and/or IE in regulatory policies
- presence of democratic objectives in the mission of institutional evaluation bodies
- actual consultation of stakeholders in the IA drafting process
- participation of representative bodies in various phases of the evaluation process
- timely dissemination of evaluation results
- the use of open, bidirectional, dialogue methods in consultation

¹⁵ See for instance France, where the evaluation reports of the consecutive Acts on Bio-ethics were delayed in the order of one to three years. Available at: [http://fichiers.acteurspublics.com/redac/pdf/Octobre/20141008%20MI%20simplification%201%20C3%20Aggislative%20-%20projet%20de%20rapport%20\(1\).pdf](http://fichiers.acteurspublics.com/redac/pdf/Octobre/20141008%20MI%20simplification%201%20C3%20Aggislative%20-%20projet%20de%20rapport%20(1).pdf) (accessed 16 May 2018).

¹⁶ See POWER 2003.

¹⁷ These markers are operationalized indicators from previous studies I have undertaken on the topic of evaluation, IA, ex post evaluation, and consultation of stakeholders, and that were reported on in the following publications: VAN AEKEN 2002, VAN AEKEN 2003, POPELIER et. al. 2007, VAN AEKEN 2009a, VAN AEKEN 2009b, VAN AEKEN 2011, VAN AEKEN et. al. 2011, VAN AEKEN 2015.

- parliamentary debate on evaluation outcomes
- co-setting of evaluation agenda
- public involvement in early stages of IA procedures
- strong structural position, marked by independence of agency and structure from executive and administrative powers

Negative markers

- political dominance of administrative burden reduction and simplification
- political dominance of performance audit
- absence of democratic objectives in the mission of institutional bodies established to evaluate legislation
- dysfunctionality of institutional bodies established to evaluate legislation
- public discussion of the lack of financial, material or human resources
- restriction of consultation methodology to closed, unidirectional methods
- ad hoc nature of evaluation efforts
- lack of attention for evaluation methodology

The rudimentary character of this overview is in line with the explorative purpose of this part of the investigation. Individual analysis of each of the different forms of evaluation throughout the regulatory circle combined with a more stringent analysis of “good practices” for each of these forms will certainly result in a much more sophisticated overview.

5.3. *Illustration: Belgium*

The following example serves to illustrate how such markers can structure an empirical investigation of the government’s commitment to democratic evaluation.

Positive markers

- introduction of mandatory IA in regulatory policies
- Since the mid-1990s, evaluation has gradually gained political salience in Belgium (VAN NIEUWENHOVE 2002). RIA was introduced by Royal Decree in 2013¹⁸. The introduction of RIA in 2013 was flanked by the establishment of an Impact Analysis Committee (IAC). The IAC was entrusted with two tasks: first, the (on-demand) ex ante scrutiny of Impact Assessments which had been conducted by various governmental departments, and secondly, an «ex-post evaluation, presented in the

¹⁸ Royal Decree of 21 December 2013 regarding execution of Title 2, Chapter 2 of the Law of 15 December 2013 regarding diverse dispositions on administrative simplification. (Koninklijk besluit van 21 december 2013 houdende uitvoering van titel 2, hoofdstuk 2 van de wet van 15 december 2013 houdende diverse bepalingen inzake administratieve vereenvoudiging).

form of an annual report, intended to draw lessons from the application of the law, its implementation, and if necessary, to provide additional support tools available to the authors of impact assessments»¹⁹.

- introduction of IE in regulatory policies

The intent to implement *ex post* evaluation in the regulatory cycle was expressed in consecutive governmental accords and numerous legislative proposals and draft bills (VAN AEKEN 2009). This resulted in 2007 in the establishment of a parliamentary committee responsible for the *ex post* evaluation of legislation²⁰. This committee can also initiate review of legislation at the request of citizens. The RIA report, which is mandatory for all primary and subordinate legislation submitted to the Cabinet of Ministers at the federal level, is usually shared with social partners as a basis for consultation (OECD 2015).

- timely dissemination of evaluation results

The annual report of the IAC has to be presented to the Cabinet upon which it had to be published on the ASA's website²¹. Although the IAC does not engage in actual legislative evaluation, the Committee is instrumental to the development of an integral outlook to better regulation by stressing the importance of *ex-post* legislation in the regulatory cycle which starts with an IA²².

Negative markers

- absence of a systematic approach to legislation

Research carried out in 2000 (VAN AEKEN 2002) and 2009 (OECD 2010) could not identify a coherent system of legislative evaluation at the federal level of Belgium. According to the OECD overview of 2015 only a handful of laws were evaluated. These findings support the thesis (ADAMS, VAN AEKEN 1999, VAN AEKEN 2003) that legislative evaluation in Belgium is above all a matter of lip service. The lack of a systematic approach surely is not favorable for the development of evaluation, let alone democratic evaluation.

- absence of democratic objectives in the mission of institutional bodies established to evaluate legislation

The establishment of the Parliamentary Committee for Legislative Monitoring resulted from a governmental accord in which was stated that «a system of evaluation of existing laws will be introduced; effectiveness, proportionality, transparency and coherence will

¹⁹ Art. 7, Royal Decree of 21 December 2013.

²⁰ Parlementair Comité voor de Wetsevaluatie / Comité parlementaire chargé du suivi législatif. Available at: <http://www.comitewetsevaluatie.be/indexN.html> (accessed 1 May 2018).

²¹ The annual reports of 2014 and 2015 are available online. The last one, finalized in December 2016, covers 2015. Available at: http://www.vereevoudiging.be/sites/default/files/documents/Analyse%20d%27%20impact/RIA_Evaluatieverslag2015_IAC.pdf (accessed 1 May 2018).

²² Available at: <http://www.vereevoudiging.be/nieuws/ria-evaluatieverslagen-2014-et-2015> (accessed 1 May 2018).

be the main evaluation criteria»²³. The selection of these specific criteria indicates a political preference for an analytical-rational conception of evaluation.

- dysfunctionality of institutional bodies established to evaluate legislation
Although the bi-cameral Parliamentary Committee for Legislative Monitoring was established by law in 2007, its mandatory yearly reports only cover 2011, 2012 and January 2013 - April 2014. This implies that the Committee was inactive for three years after its foreseen installment, and again for three years since 2014. Observers attribute this dysfunctionality mainly to political disagreement over the role of the Senate in legislative affairs, even though the law prescribed a bicameral composition (VAN AEKEN 2009, 204).
- political dominance of performance audit
While *ex post* legislative evaluation is still a rarity in Belgium, audit is on the rise. The salience of performance audit manifested in the creation of a common internal audit service (CIAS)²⁴. Furthermore, the Cabinet of Ministers agreed that existing audit services had to be integrated vertically under CIAS. CIAS presents internal auditing as a guarantee that an organization's mission is realized in an effective, efficient, economical and ethical way. These reforms, including the creation of a new audit oversight body, appear to indicate the growing importance of audit mechanisms as a meta-regulatory quality tool in federal Belgium. But audit is fundamentally different from evaluation. Audits primarily relates to institutions, whereas legislative evaluation only concern legislation; audits are mostly driven by accountancy principles, while legislative evaluation is less concerned with budgetary issues; audits deal mostly with an internal point of view, while legislative evaluation seeks to measure the impact of laws from an external perspective; audit is strongly associated with control, where legislative evaluation is driven by a scientific outlook. The narrow, internal focus of audit contrasts with the open, external outlook of evaluation (VAN AEKEN 2011, 190). The recent revitalization of audit appears to have drained the political salience of legislative evaluation, and with it the prospect of democratic evaluation.
- political dominance of simplification programs and administrative burden reduction
In December 1998, the Belgian government created by Royal Order a dedicated unit for administrative simplification. The Administrative Simplification Agency (ASA)²⁵ has taken the lead in the federal better regulation program with a dual mission: to promote simplification of legislation and reduction of administrative burdens with

²³ Federal Government Belgium, Government statement and coalition agreement 2003, 76. Available at: <http://www.mobielvlaanderen.be/pdf/beleidsnota-brieven/federaalregeerakkoord2003.pdf> (accessed 1 May 2018).

²⁴ Gemeenschappelijke Interne Audit Dienst. Available at: http://fedweb.belgium.be/nl/nieuws/2015/20150716_cm_interne_audit; <http://www.comitedaudit.belgium.be/nl/auditcomit%C3%A9/opdrachten-bevoegdheden> (accessed 1 May 2018).

²⁵ Dienst Administratieve Vereenvoudiging (DAV). Available at: <http://www.vereevoudiging.be> (accessed 1 May 2018).

regard to federal regulations, and to promote regulatory co-operation across the federal, regional and community governments. One of their methods, known as the KAFKA-test, is similar to the Standard Cost Model²⁶. The ASA's institutional foundations are strong, nested within the Chancellery of the Prime Minister. The institutional importance of this agency is indicative of the political preference for a narrow definition of Better Regulation strategies, focusing on reducing administrative burdens rather than improving public participation. This may be partially explained by the encouragement of the OECD that described the ASA and its mission as a «key asset which needs to be preserved and developed» (OECD 2010, 65).

6. Concluding remarks

Returning to Xi'an, the initial puzzle to solve was the nature of the relationship between an authoritarian government and the confident articulation of the democratic objective of legislative evaluation by the NPC. A solution was presented in the form of evaluation as “alternative” democratic engagement. The qualification as alternative is an implicit reference to the vantage point of the western observer; more explicitly it results from a confrontation of the Chinese model with the western model of a liberal democracy. In liberal democracies, various mechanisms of electoral and institutional accountability prevent the arbitrary use of power. Hence, a concoction like “democratic evaluation” would be redundant, just as any other alternative to elections.

But is that true? Is it far-fetched to argue that western democracies are in dire need of some fresh democratic engagement when voter turnout is at a historical low, high-stake elections are allegedly rigged and legislation serves the corporate world first? And you don't have to be politically alienated to observe the soaring regulatory power of the executive, leaving you wondering what became of the vote you casted during the elections some years ago.

That there is a need for fresh engagement is manifest in the mushrooming of grass roots activities, citizens' movements, social media activism, the succes of digital platforms that enable participation of citizens in local public decision-making, and many more initiatives rooted in society. From the viewpoint of the state, we see new roles emerging for the courts, for instance as regulatory watchdogs, or for ministerial departments, that reach out to professionals, for instance by organizing a help desk for architects that struggle with new regulations. The list stretches as far as imagination does. Evaluation of legislation and regulation is indeed only one possibility out of many to reinforce the

²⁶ Available at: http://www.vereeenvoudiging.be/webfm_send/88, 15 (accessed 6 June 2018).

democratic quality of public decision-making. But it is precisely the varied nature and the multitude of mechanisms that contribute to what Keane (KEANE 2009) called “monitory democracy”.

Nonetheless, an explorative study of the prevalence of democratic evaluation in the regulatory policy of Belgium did not indicate a high level of political salience for the democratic cause of evaluation. Rather, evaluation seems to suffer from competition with performance audit, simplification programs and reduction of administrative burdens. This observation corresponds with the role of evaluation as a means to control and reduce the costs of governmental interventions in a welfare state under pressure. But in spite of the many similarities, legislative evaluation differs from policy evaluation. The legal system is in the end not concerned with budgets and effects, but with legitimacy, and ultimately with fairness and justice. Social-psychologist Tom Tyler (TYLER 1990) demonstrated that people find a rule fair when they had the feeling that they had a voice and they were heard in the deliberations preceding the decision. Compliance with an unfavorable rule that resulted from a procedure in which the respondent was heard, was higher than compliance with a rule that benefited the respondent but was created without that individual’s participation.

In sum, democratic evaluation is part of a new outlook on democracy that responds to the urgency to reinforce the challenged liberal democracies. It is thus important to know to which extent governments take this outlook and this particular manifestation seriously. Therefore, a number of markers were presented that derived from the functionalities that are inherent in legislative evaluation. These markers resulted from a first exploration, confined to Belgium. Follow-up research can improve these markers in a number of ways. First, the functionalities of democratic evaluation can be developed further. There is certainly some merit in extending to multiple models of democracy and governance. In addition, it may be useful to apply a better distinction between monitoring and participation. Next, the operationalization could be improved by studying impact assessment and *ex post* review individually in the regulatory circle, and focusing more systematically on the good practices in order to identify more detailed markers for empirical scrutiny.

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