

# Parliaments in Europe Engaging in Post-legislative Scrutiny: Comparing the French, Italian and Swiss Experiences

Elena Griglio

Parliamentary Senior Official of the Italian Senate and

Adjunct Professor at LUISS University, Rome

Email: [egriglio@gmail.com](mailto:egriglio@gmail.com)

Nicola Lupo

Professor of Parliamentary Law and Director of the Center for Parliamentary Studies at LUISS University, Rome

Email: [nilupo@gmail.com](mailto:nilupo@gmail.com)

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## Abstract

Post-legislative scrutiny (PLS) is not completely new to European parliamentarism. In the last few decades, this activity has experienced rapid development, either pushed by supranational trends on better regulation or fostered by national constitutional reforms. However, the involvement of parliaments in the ex post stage of law-making still remains under-theorised. This article aims at providing a comparative overview of the main rules, practices and trends on post-legislative scrutiny in Europe, focusing on the experience of three bicameral Parliaments: the French, Italian and Swiss Parliaments which have been selected as examples of three proactive approaches to post-legislative scrutiny, based on alternative bicameral arrangements. After providing a general overview of the main options that support the involvement of parliaments in the ex-post stage of law-making, the article examines how the benchmark case studies address the following variables: the internal organisation of the ex-post scrutiny, including the role of the administrative staff; the scrutiny object, either referred to single pieces of legislation or to a whole policy; the scope of the ex-post scrutiny, verifying whether it is interpreted as a purely legal dimension or it comprises also forms of impact assessment; the outcomes of the ex-post scrutiny, and more specifically its contribution to the legislative decision-making. The paper demonstrates that PLS in parliament may lead to political outcomes addressing the government when the form of government, the constitutional framework and the party dimension support a competitive use of this tool in the legislative-executive interaction.

*Keywords: Post-legislative Scrutiny; European Parliaments; Parliamentary oversight; Impact Assessment; Ex Post Stage of Law-making*

## I. POST-LEGISLATIVE SCRUTINY IN EUROPEAN PARLIAMENTARISM: AN INTRODUCTION

Post-legislative scrutiny (PLS) is usually not considered amongst traditional parliamentary functions.<sup>1</sup> Nonetheless, in the last few decades, *ex post* assessment of legislation has gained increased interest among most European parliaments.<sup>2</sup> Largely, this development can be considered a reaction to trends at the supranational level, where better regulation discourse<sup>3</sup> has become a permanent program of the Organisation for Economic Co-operation and Development (OECD)<sup>4</sup> and a pivotal target on the institutional agenda of the European Union (EU).<sup>5</sup> In some cases, however, national parliaments' engagement in the field of PLS has been directly promoted by constitutional amendments aiming at providing the participation of popularly elected assemblies in the evaluation of public policies.<sup>6</sup>

This phenomenon comprises a vast range of activities, supports rather differentiated approaches and unfolds through a large variety of organisational and procedural solutions.<sup>7</sup>

Whereas PLS is usually not perceived as an autonomous function of representative assemblies,<sup>8</sup> its instrumental value in the regards of the 'traditional' parliamentary functions – law-making and oversight of the executive, primarily –

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- 1 For a recap (and further bibliographic references) of different classification of parliamentary functions see Nicola Lupo, "Part IV - State Institutions: 13. Parliaments" in Roger Masterman & Robert Schütze, eds, *British association of Comparative law* (Cambridge, 2019) 335-360.
  - 2 Ulrich Karpen, "Comparative law: perspectives of legislation" (2013) 168; For a broader legal perspective on better regulation, see, Anne Meuwese & Patricia Popelier, "The legal implications of better regulation: An introduction" (2011) (European Public Law No.17) 455.
  - 3 Stephen Weatherill, *Better Regulation (Studies of the Oxford Institute of European and Comparative Law): Hart Publishing* (Hart Publishing, 2007), On better regulation as a strategy against the democratic deficits of traditional lawmaking, see Patricia Popelier, "Governance and Better Regulation: Dealing with the Legitimacy Paradox" (2011) 17 European Public Law 55.
  - 4 The OECD has carried out more than 20 years of activity in this field after the first program launched in the mid-1990s, see *Recommendation of the Council on Improving the Quality of Government Regulation*, by OECD, OECD/LEGAL/0278 (1995).
  - 5 D Jančić, "The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments" in Cristina Fasone, Diane Fromage & Zoe Lefkofridi, eds, *Parliaments, public opinion and parliamentary : elections in Europe* (2015) 45.
  - 6 See *infra*, par. 2.
  - 7 Franklin De Vrieze & Victoria Hasson, *Post Legislative Scrutiny: Comparative Study of Practices of Post-Legislative Scrutiny in Selected Parliaments* (London: Westminster Foundation for Democracy, 2017).
  - 8 Due to political, resource, organisation and time constraints, parliaments are not the preferred subjects for performing *ex post* evaluations and impact assessment. See Andrea Renda, "Impact Assessment in the EU: The State of the Art and the Art of the State. CEPS Paperbacks. - Archive of European Integration" (2006) Centre for European Policy Studies 43; Some counter-arguments are offered in Elena Griglio, "Better Law-Making and the Integration of Impact Assessment in the Decision-Making Process: The Role of National Parliaments" in Alfredo De Feo & Brigid Laffan, eds, *Scrutiny of EU policies* (European University Institute, 2017) 63.

should not be underestimated.<sup>9</sup> It may be considered inherent to the law-making process<sup>10</sup> and referred to as ‘legisprudence’ (or ‘legistics’)<sup>11</sup>, a theoretical and practical science dealing with law-production and aiming at improving the quality of norms focusing on the whole regulation cycle.<sup>12</sup> At the same time, it may be seen as an instrumental tool for the purposes of oversight of the executive,<sup>13</sup> aiming at making the government politically responsible and accountable before the assembly for how laws have been implemented.<sup>14</sup> PLS does not necessarily result in binding instruments or legal sanctions,<sup>15</sup> but most often it serves parliament’s attempt to exercise influence over the executive.<sup>16</sup>

Additionally, PLS can also be structured as a parliamentary duty with the specific purpose of supporting parliament’s engagement in *ex ante* impact assessment and *ex post* evaluation. Not by chance, in the last few decades the attempts to situate these purposes among parliamentary tasks have significantly grown in number.<sup>17</sup>

Broadly speaking, parliaments have lately shown increased interest in their direct involvement in the *ex post* stage of law-making. However, this dimension still remains under-theorised. Therefore, the article aims to provide a comparative overview of the main rules, practices and trends featuring three bicameral Parliaments that identify three distinct proactive and direct approaches to PLS, two formals (France and Switzerland), and one more informal (Italy). Comparing these approaches with the referent form of government offers some hints on the contextual factors that tend to influence the success and effectiveness of PLS in parliament.

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9 See Elena Griglio, “Post-Legislative Scrutiny as a Form of Executive Oversight” (2019) 21:2 *European Journal of Law Reform* 36.

10 To fulfill this task, parliaments often resort to specific legislative techniques, such as the introduction of sunset or review clauses. See Ulrich Karpen, “On the State of Legislation Studies in Europe” (2005) 7 *European Journal of Law Reform* 62.

11 Peter Noll, *Gesetzgebungslehre* (Hamburg: Rowohlt, 1973).

12 Ulrich Karpen, “Parliamentarism, Legislation and Legisprudence in the Constitutional State” (2015) (Humboldt Forum Recht Essays) 20.

13 On the notion of parliamentary oversight and its connection with the notions of evaluation, scrutiny and control, see Elena Griglio, Nicola Lupo & Robert Schütze, *Parliamentary Oversight of the Executives: Tools and Procedures in Europe* (Oxford, UK ; New York, NY: Hart Publishing, 2020).

14 National Democratic Institute, “Strengthening Legislative Capacity in Legislative-Executive Relations” (2000) (Legislative Research Series Paper No. 6) 24.

15 Nicolas Grandguillaume, *Théorie générale du contrôle* (Paris: Economica, 1994).

16 Meg Russell & Meghan Benton, “Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches” (2009), online: <<https://pdfs.semanticscholar.org/b191/3bce50cbc3ed8780ac51a8f13b9d1b89d585.pdf>>, Paper for PSA Legislative Studies Specialist Group Conference.

17 Franklin De Vrieze, *Post-Legislative Scrutiny: Guide for Parliaments* (London: Westminster Foundation for Democracy, 2017); On the wide-spread use of impact assessment and evaluation across Europe, see Irmgard Anglmayer, *Better Regulation practices in national parliaments* (Brussels: European Parliamentary Research Service Study, 2020).

## II. PARLIAMENTS' INVOLVEMENT IN POST-LEGISLATIVE SCRUTINY: THE EXPLICATIVE VARIABLES

There is no single scheme able to explain the alternative options that shape the unfolding of *ex post* scrutiny, evaluation and impact assessment in daily parliamentary practice. Different factors and patterns influence the way parliaments in Europe tend to approach the challenge of PLS.<sup>18</sup>

The main contextual factor is the legal basis. In a minority of cases, PLS as a main task for parliament is stated directly in the Constitution. Switzerland has been the first country in the world to introduce an evaluation clause at the constitutional level through the 1999 constitutional amendment.<sup>19</sup> In subsequent years, both France (Art. 24 of the French Constitution, as amended in 2008) and Sweden (Chapter 4, Art. 8 of the Instrument of Government that entered into force on the 1 January 2011) followed this example.<sup>20</sup> However, these remain isolated cases, often resulting from recent reforms. In the large majority of countries, PLS and *ex post* evaluation in parliament either find at the sub-constitutional level (in the rank of statutory laws or in parliamentary Rules of procedure) their legal basis or have no legal basis at all. It could therefore be argued that this activity is often part of the 'unseen' and informal work that is carried out daily in parliaments.<sup>21</sup>

Broadly speaking, four main variables shape the final layout of PLS in parliament. The first variable affects the internal organisation of PLS, i.e. the identification of the relevant (internal or external) units responsible for the preliminary fact-finding and analytical activity, whose aim is to evaluate the effects of implementing a single piece of legislation or a selected public policy. This variable feature two options; one option consists of engaging external independent institutions and relevant agencies or connecting to external experts and researchers with specific knowledge and experience. This is the preferred scheme in countries that acknowledge a solid *ex post* evaluation capacity within the executive branch or through independent

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18 See, Franklin De Vrieze, "Special Issue on post-legislative scrutiny" (2019) (European Journal of Law Reform, No.2), online: <<https://www.elevenjournals.com/tijdschrift/ejlr/2019/2>>.

19 The Federal Council of Swiss, "CC 101 Federal Constitution of 18 April 1999 of the Swiss Confederation", online: *The Protal of the Swiss Government* <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>>, art. 170, further implemented by art. 27 and 40 of the Swiss Parliament Act.

20 In Sweden, PLS is also regulated by the Riksdag Act and by the Riksdag guidelines adopted in 2001 and 2006, included in the report drafted by the Working Group on follow-up and evaluation (see Riksdag, *Forskning och framtid, uppföljning och utvärdering. Arbetsgruppen för genomförande av Riksdagskommitténs förslag* (Stockholm: Riksdagstryckeriet, 2006); For France, see the *Loi n° 96-517*, 1996, that strengthened the information and inquiry prerogatives of parliamentary committees; *Loi organique n° 2001-692*, 2001, on the lois de finances (so-called LOLF), and the two Houses' rules of procedure.

21 Walter Bagehot, *The Non-Legislative Functions of Parliament (1860)* (London : The Economist, 1965) and Id., 'The Unseen Work of Parliament' (1861) 47.

authorities, such as Germany<sup>22</sup> and the Netherlands.<sup>23</sup> The alternative option is establishing new appropriate administrative units in parliament in order to develop an autonomous expertise. The case of Switzerland is paradigmatic (see *infra*) and the European Parliament appears to follow this line.<sup>24</sup> The preference for either option does not seem to affect the reliability of the results obtained. However, the creation of internal administrative units shows a strong determination of parliaments to invest energies and resources in the field. The internal administrative evaluation capacity can be coupled with external specialised agencies, as in the experience of the French (see *infra*) and Swedish Parliaments.<sup>25</sup>

The second variable draws on the methods for identifying and selecting relevant pieces of legislation and/or policies to be scrutinised. The selection issue raises a number of alternative options. The first affects the object of the scrutiny or evaluation, whether it is a single piece of legislation, as in the case of PLS following a review or sunset clause placed in the legislative act,<sup>26</sup> or a selected policy, as required by the better regulation standards promoted by the OECD and by the EU.<sup>27</sup> The other main option deals with the selection procedure.<sup>28</sup> There is a wide range of solutions. Some legal systems make evaluations mandatory either before or after enacting a new law. More frequently, only a minority of Bills and Acts are selected for being scrutinised and evaluated. When the decision is not predefined through sunset or review

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22 The German Bundestag mostly resorts to indirect scrutiny of the ex post assessment carried out either by the government or by the two independent bodies, the Federal Statistical Office and the National Regulatory Reform Council (NKR), established by a Federal Law in 2006 (Law of 14 August 2006 (Fed. Gaz. I 1866 - hereinafter NKR), amended by the Law of 16 March 2011 (Fed. Gaz. I 420). See, Ulrich Karpen, “Regulatory impact assessment: current situation and prospects in the German Parliament” (2017) 2015:101 ac 17; H Gröhe & S Naundorf, “Bürokratieabbau und bessere Rechtsetzung, Eckpunkte, Erfahrungen und Perspektiven” in *Zeitschrift für Gesetzgebung* (2009) 367.

23 See the Dutch Advisory Board on Regulation Burden (ACTAL, Advies College Verminderende Administratieve Lasten), now regulated by the Constituent Act Actal 2011, Decree dated 16 June 2011, no. 11.001442.

24 Following the Niebler Report, (European Parliament report on guaranteeing independent impact assessments, adopted through the Resolution P7-TA-(2011)0259 on 8 June 2011), in January 2012 the European Parliament set up a dedicated impact assessment service which in November 2013 was included within the Directorate General for Parliamentary Research Service. Andrea Renda, “Best Practices in Legislative and Regulatory Processes in a Constitutional Perspective: the case of the European Union” (2016) Publications Office of the EU 14.

25 The Swedish *Riksdag* interacts with the National Audit Office (NAO) to support its activity in the field of *ex post* evaluation and impact assessment. Chapter 13, Art. 7 and 8 of the Instrument of Government. See also the Act on Audit of State Activities, 2002:1022 and the Act containing Instructions for the Swedish National Audit Office, 2002:1023).

26 On sunset and review clauses, see Antonios Emmanouil Kouroutakis, *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis* (New York: Routledge, 2017).

27 See, among others *OECD Guiding Principles for Regulatory Quality and Performance*, by OECD (2005); See also *Key findings and Conference proceedings, 9th OECD Conference on Measuring Regulatory Performance. Closing the regulatory cycle: effective ex post evaluation for improved policy outcomes*, by OECD (Lisbon, 2017).

28 Felix Uhlmann, “Evaluation and Regulatory Impact Analysis – Comments from a Swiss Legal Perspective” (2016) (Journal of Legislative Evaluation, No. 10) 105.

clauses,<sup>29</sup> the act or policy to be scrutinised is identified through a formal list of priorities set by political bodies;<sup>30</sup> by a discretionary decision of the administrative structure;<sup>31</sup> or in response to signals from civil society.<sup>32</sup>

The third variable identifies the scope of the *ex post* scrutiny, either interpreted as a purely legal dimension or comprising instances of impact assessment.<sup>33</sup> In the first instance, the *ex post* scrutiny only covers the monitoring of law enactment. Its aim is to check whether the implied regulations or administrative acts have been approved, whether all the legal provisions have been brought into force, and what judicial interpretations are provided by the courts.<sup>34</sup> This is an activity solidly anchored in the daily practice of many national constitutional traditions within the EU Member States.

In the second instance, parliament's scrutiny comprises forms of *ex post* policy evaluation and impact assessment. These are technically demanding activities that parliaments are rarely able to satisfy through their internal administrative resources and procedures. These may rely on different methodologies,<sup>35</sup> including effectiveness

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29 This is the standard procedure in Germany (Art. 44.7 of the Joint Rules of procedure of the Federal Ministries, hereinafter GGO). See M Rani Sharma, "Expert report on the implementation of ex-post evaluations - Good practice and experience in other countries" (2013) NKR 106.

30 In Germany, ex post IA is mandatory for all the legislative proposals that overcome certain thresholds of annual compliance costs (Decision of State Secretaries 'Strategy for evaluation of new legislative proposals', *Better Regulation 2012: Reducing Regulatory Burden, Cutting Red Tape, Securing Dynamic Growth*, by The Federal Government (Berlin: Federal Chancellery, 2013). By contrast, ex post evaluation in the European Parliament depends on the choice made by standing committees that 'select the files to be evaluated according to their political priorities' - I Anglmayer and A Scherrer, 'Ex-post evaluation in the European Parliament: an increasing influence on the policy cycle', *Journal of Legislative Studies* (forthcoming). The selection brings about both a political outcome (the drawing up by the EP competent standing committee of an 'implementation report', which is then voted in plenary) and an administrative evaluation activity (the publication of a factual evaluation study by the dedicated unit of the European Parliamentary Research Service). See *Evaluation and ex-post impact assessment at EU level - Think Tank*, by Irmgard Anglmayer (Brussels: European Parliament Research Service Briefing Better Law Making in Action, 2016).

31 This is the practice followed by the Italian Senate (see *infra*). Also, the thematic in-depth evaluations carried out by committees at Riksdag depend on a discretionary choice of the committee. See Riksdag, (2006) 47; Aström Christer, "Évaluation et qualité de la législation : quel rôle pour les Parlements ?", (5 December 2013), online: <[https://www.senat.fr/rap/evaluation\\_qualite\\_legislation\\_quel\\_role\\_pour\\_les\\_parlements\\_notice/evaluation\\_qualite\\_legislation\\_quel\\_role\\_pour\\_les\\_parlements\\_notice2.html](https://www.senat.fr/rap/evaluation_qualite_legislation_quel_role_pour_les_parlements_notice/evaluation_qualite_legislation_quel_role_pour_les_parlements_notice2.html)>.

32 Actal provides strategic advice on the reduction of regulatory pressure when regularly occurring complaints are submitted by the business community and organised associations of citizens and professionals (Section 2 of the Constituent Act Actal 2011).

33 Patricia Popelier, "A Legal Perspective on Regulatory Impact Assessments".

34 De Vrieze, *supra* note 17, 11.

35 Shahidur Khandker, Gayatri Koolwal & Hussain Samad, *Handbook On Impact Evaluation: Quantitative Methods And Practices* (Washington: World Bank, 2010); John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, 2014); Paul Gertler et al, *Impact Evaluation in Practice: Second Edition* (Washington: World Bank Institute, 2016).

studies,<sup>36</sup> which assess the casual effect of the program on the expected outcomes<sup>37</sup> and they may include the estimation of the counterfactual outcome on comparison groups.<sup>38</sup> Impact evaluations are usually complemented with evidence on the costs of the program being evaluated, leading to cost-benefit or to cost-effectiveness analysis.<sup>39</sup>

The fourth variable deals with the outcomes of *ex post* scrutiny. Broadly speaking, PLS unfolds through two different types of parliamentary tools: the fact-finding tools, aiming at seeking information, explanation and policy positions from the government and the oversight tools directed at holding the government to account for the outcomes produced in the *ex post* stage. When the fact-finding dimension prevails, PLS is instrumental to the political decision-making but does not itself result in a political outcome. By contrast, when the second dimension is duly taken into consideration, PLS can be appreciated in the relationship of parliament with government, resulting in the setting of political directions or in the execution of oversight powers.<sup>40</sup> The latter usually requires a solid legal framework<sup>41</sup>, anchored in the constitution or in equivalent legal sources.

Strictly connected with this fourth variable is the identification of the pertinent parliamentary body. Broadly speaking, PLS is more suited to committee rather than plenary work. This is the solution adopted in Switzerland, where oversight committees play a pivotal role in the evaluation process (see *infra*). Moreover, in Sweden and in France, follow-up and evaluation have become a natural task for standing committees that can rely on multiple sources of information and documentation and on a large variety of oversight tools. Another option may be locating PLS in appropriate bodies. This solution might eventually complement the involvement of standing committees in the evaluation of public bodies, as in the case of France (see *infra*).

All these variables should be framed into the form of government supporting the interaction between the legislative and the executive branch. Having regard to the broader constitutional framework, therefore, the following sections will discuss how the three selected case studies have dealt with the alternative options when structuring PLS.

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36 For a catalog of impact assessment designs, Peter H. Rossi, Mark W. Lipsey & Howard E. Freeman, *Evaluation: A Systematic Approach, 7th Edition* (Sage, 2003).

37 G. Imbens & D.B. Rubin, "Rubin Casual Model" in Steven Durlauf & Lawrence E Blume, eds, *The New Palgrave Dictionary of Economics*, 2nd ed (New York: Palgrave, 2008).

38 *Ibid*, 54.

39 Anthony Boardman et al, *Cost-Benefit Analysis: Concepts and Practice, 2nd edition* (New Jersey: Prentice Hall, 2001).

40 Griglio, *supra* note 9, 36.

41 On the legal framework supporting impact assessment and policy evaluation, Anne C M Meuwese & Stijn van Voorst, "Regulatory impact assessment in legal studies" in CA Dunlop & CM Radaelli, eds, *Handbook of Regulatory Impact Assessment* (Cheltenham: Edward Elgar Publishing, 2016) 21.

### III. THE CASE OF SWITZERLAND: A ‘CONSTITUTIONAL’ MODEL OF PLS

PLS architecture in Switzerland is inherent to the nature of the form of government, which is neither parliamentary nor presidential in character but brings elements of separation between the branches of government.<sup>42</sup> Switzerland is a federal country. The Federal Parliament consists of two Chambers with equal skills, which, in a joint session, elect the Executive of the Confederation and the Federal Council, but they have no power to dismiss it. Since the Federal Council is irrevocable, there is no relationship of confidence between the two branches of government. At the same time, there is no possibility of an early termination or dissolution of the legislative Assembly. A system of checks and balances – the *contrôle mutuel*<sup>43</sup> – links the two branches of government, thus leading to a dual leadership.

PLS in the Swiss Parliament may therefore be interpreted as an additional tool available to the two Houses to exert oversight of the in a competitive attitude, which is typical to presidential more than to parliamentary systems.<sup>44</sup>

#### 1. The Evaluation of Public Policies as a Constitutional Duty of Parliament

Switzerland was the first country to introduce an evaluation clause at the constitutional level.<sup>45</sup> The process of institutionalisation started by the Swiss administration at the end of the 1980’s led to the formal recognition of the evaluation of public policies among the functions performed by the legislative Assembly.<sup>46</sup> *Ex post* evaluation therefore represents a specific constitutional duty and it is identified among the formal tasks of Parliament.<sup>47</sup>

Art. 170 of the 1999 Constitution was further expanded by the Parliament Act,<sup>48</sup> which committed the organs of the Federal Assembly designated by law to “ensure

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42 James Bryce, *Modern Democracies, Vol. 2* (New York: Cosimo, 2008); Vishnoo Bhagwan & Vidya Bhushan, *World Constitution - A Comparative Study: Political Science* (New Delhi: Sterling Publishers, 2009).

43 Andreas Auer, Giorgio Malinverni & Michel Hottelier, *Droit constitutionnel suisse* (Berne: Stämpfli, 2006) 29.

44 Katia Horber Papazian & Marion Baud Lavigne, “Factors Contributing to the Strong Institutionalization of Policy Evaluation in Switzerland” in Andreas Ladner, Nils Soguel & Yves Emery, eds, *Swiss Public Administration Making the State Work Successfully* (Switzerland: Palgrave, 2019) 366.

45 The Federal Council of Swiss, *supra* note 19; Cristoph Bättig & Andreas Tobler, “Art. 27 ParlG” in Martin Graf et al, eds, *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz* (Basel: Helbing & Lichtenhahn, 2014) 242.

46 Werner Bussmann, Peter Knoepfel & Frédéric Varone, *Politiques publiques: évaluation, Politique comparée* (Paris: Economica, 1998).

47 See S Jacob & F Varone, *L’institutionnalisation de l’évaluation des politiques publiques: expériences étrangères et scénarios pour la Belgique* (Louvain: Mimeo, 2002); D Jannet, *Parliamentary Evaluation in Switzerland and its effects on Legislative and Administrative Action* (Lausanne: Mimeo, 2000).

48 Federal Act of the Federal Assembly of December 13, 2020.



that measures taken by the Confederation are evaluated as to their effectiveness<sup>49</sup> and detailed the options available to the Federal Assembly. These comprise of three alternative arrangements: entrusting the conduct of impact assessment on the Federal Council;<sup>50</sup> examining the impact assessments carried out on the instructions of the Federal Council;<sup>51</sup> conducting in-house impact assessments.

In the latter option, the Federal Assembly relies on the activity of the *Commissions de Gestion* (CdG) established in each House and charged to perform a finer level of control of the Federal Council, the central administration, the federal courts and the other federal institutions.<sup>52</sup> CdG have different tools available including the conduct of inspections, organisation of hearings, access to data and documents and review of annual reports.

The two committees can rely on the information system provided by the office for Parliamentary Control of the Administration (PCA), a technical unit providing autonomous expertise in policy evaluation. The setup of PCA dates back to 1991, but only after the constitutional reform of 1999 its evaluation assignments have been defined in detail. It is part of parliament's services, and it specifically answers to the secretariat of the CdG. PCA finds its legal basis in art. 10 of the *Ordonnance sur l'administration du Parlement* (OLPA) dated 3 October 2003. Its duties on the evaluation of effectiveness stem from art. 27 of the Parliament Act.<sup>53</sup> Methodologically, PCA cannot decide to conduct researches on its own: its work is entirely based on mandates on behalf of parliamentary committees.

The CdG can ask the office to provide several in-depth analyses, including reviews of the implementation of federal programmes, verifications on the performances of public bodies and estimations of the effects produced by selected policies. Studies on the legality, expediency and effectiveness of federal activities can be conducted on behalf of the CdG or of any other parliamentary committee. It therefore serves as a consulting body to the CdG and to the other standing committees, providing opinions on the issues that need to undergo parliament's high supervision. It issues approximately three (large) research reports per year.

PCA has a "light" structure. The office is made up of five analysts, selected by means of a public competition, and one administrative employee with secretarial tasks. Moreover, the Unit has a budget to hire experts and outsources part of its work. The evaluation methods are based on the standards set by the Swiss Evaluation Society and international associations.<sup>54</sup>

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49 Art. 27 of the Federal Act of the Federal Assembly.

50 Art 44 of the Law on the functioning of the Federal Parliament.

51 The federal agencies carry out impact assessments based on an annual evaluation strategy. The Swiss Federal Audit Office also assists the Federal Assembly and the Federal Council.

52 The CdG are composed of 25 members at the National Council and 13 members at the Council of States. Members are elected for a four-year term, following the proportions among parliamentary groups (art. 43 par. 3 LParl).

53 Artt. 67, 153 and 156 of the Parliamentary Act set a legal basis for PCA's right to obtain information.

54 De Vricze & Hasson, *supra* note 7, 9.

## 2. In-between Technical Assessment and Political Follow-up

In Switzerland, as in many other countries, the bulk of evaluations are carried out by the executive branch.<sup>55</sup> Nevertheless, Switzerland is at the same time one of the systems with the higher degree of institutionalisation of parliamentary evaluation.<sup>56</sup> This is the outcome of several factors, including the evaluation prerogatives vested on parliamentary bodies that include wide-reaching rights to obtain information and a mandatory follow-up by the executive.<sup>57</sup>

In Parliament, not every piece of legislation is subject to post-legislative scrutiny, as it is up to the CdG to select the evaluation tasks to be performed by PCA. At the start of the year, PCA carries out preliminary research and as a result of contacts with the relevant federal services, creates a draft project, including a list of suggested investigation proposals. Based on this list and collected suggestions and proposals from the other standing committees, the CdG select the federal policies to be evaluated *ex post*. Both the scrutiny priorities and the work schedule therefore come out of a political decision.

If *ex post* evaluations are started by a political mandate, PCA enjoys autonomy in the choice of the investigative methods and in the fulfilment of scrutiny tasks. For each of the selected policies, PCA prepares three alternative projects (*esquisse de project*) to be presented to the pertinent CdG sub-committees. The latter are called to select one of the proposals and give an official mandate to PCA (*mandate d'évaluation*) to accomplish the investigation.

From here on, PCA works autonomously. It performs the investigation project according to the methods of empirical research in social sciences; it enjoys extensive information rights in regard to pertinent federal services. Intermediate reports may be set to update the relevant sub-committee on the state-of-the-art of the evaluation project; confidential report drafts may be shared with federal services to detect and correct any clerical errors. A period of 12-18 months usually elapses between the presentation of the draft project and the final report submission, which is submitted to the relevant CdG sub-committee. Based on the PCA report, each CdG prepares its own 'political' report, drawing conclusions and making recommendations to the Federal Council. Both reports are publicly available. Based on the PCA's technical evaluation, the CdG can also draft a motion, submitting amendment requests to the Federal Council.

The third level of the CdG's involvement in PLS – following the commitment of evaluation reports to PCA and the drafting of a political report – starts after two years, with the inception of a post-evaluation follow-up to assess the implementation of the recommendations submitted to the Federal Council.<sup>58</sup> The type of information

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<sup>55</sup> Anglmayer, *supra* note 17, 51.

<sup>56</sup> Steve Jacob, Sandra Speer & J-E Furubo, "The institutionalization of evaluation matters: Updating the International Atlas of Evaluation 10 years later" (2015) 21 *Evaluation* 13, 19.

<sup>57</sup> Based on these reasons, Anglmayer, *supra* note 17, 51. qualifies parliamentary evaluation in Switzerland as 'a powerful scrutiny instrument vis-à-vis the federal government'.

<sup>58</sup> For further details, see Cristoph Bättig & P Schwab, "La place de l'évaluation dans le cadre du contrôle parlementaire" in Katia Horber Papazian, ed, *Regards croisés sur l'évaluation en Suisse, Lausanne* (Presses polytechniques et universitaires romandes, 2015) 1.

and analysis included in PCA reports allows the CdG to fulfil these assessment tasks quite easily, checking whether the Government has adequately filled in the implementation gaps and where appropriate urging the adoption of Acts.

This architecture provides an intense ‘procedimentalisation’ of the evaluation process, which offers the opportunity to channel PCA analytical work into the political debate between the legislative and the executive branches. Committees’ recommendations to the federal administration can be discussed and approved in the plenary. The common practice is for these recommendations to be transposed into governmental ordinances or ministerial acts that adapt the implementation process to the political directions adopted in parliament. Whereas the dialogue with the government is the follow-up to the evaluation processes in parliament, the drafting of parliamentary legislative initiatives is a rather less common option.

Post-legislative scrutiny can therefore result in the revision of the legal and administrative framework by the federal Administration or in the onset of parliamentary initiatives by the CdG. However, it can be argued that PCA reports are an effective evaluation mechanism even before they are formally followed-up. The mere decision of starting an evaluation and engaging in a dialogue with the involved administrative units allows lawmakers to draw specific insights on the sensitive points affecting the legal implementation process.

In a broader perspective, due to the separation of power regime linking the legislative and the executive branches, the PLS arrangement in the Swiss Parliament brings about some of the features typical of presidential experiences. This can be qualified as a ‘constitutional’ model, because the fundamental features of PLS are deeply embedded in the constitutional regulation of the overall interaction between the legislative and the executive branches.

#### IV. THE FRENCH CASE: A ‘FORMALISTIC’ MODEL OF PLS

The French experience in the field of post-legislative scrutiny is embedded in the revision of the semi-presidential system fostered by the 2008 constitutional amendment to 1958 Fifth Republic Constitution, which, without altering the hybrid nature of this form of government, has tried to revitalise the role of parliament vis-à-vis the executive branch.<sup>59</sup>

Evaluation is part of the French parliamentary tradition. In 1983, the Parliamentary Office for evaluation of scientific and technological options<sup>60</sup> was set up with the task to gather information and formulate assessments about science and

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59 Philippe Lauvaux, *Destins du présidentielisme* (Presses universitaires de France, 2002); Richard Ghevontian, “La révision de la Constitution et le Président de la République : l’hyperprésidentialisation n’a pas eu lieu” (2009) no. 77:1 *Revue française de droit constitutionnel* 119; Maria Rosaria Dommarumma, “Le régime semi-présidentiel. Une anomalie française” (2013) no. 93:1 *Revue française de droit constitutionnel* 37.

60 *Office parlementaire d’évaluation des choix scientifiques et technologiques* set up by the *Loi no. 83-609* of July 8, 1983, with the scope “to inform Parliament of scientific and technological options in order, specifically, to make its decisions clear”.

technology issues, acting as a sort of ex-ante advisory body.<sup>61</sup> However, only through the constitutional reform approved in 2008<sup>62</sup> has Parliament gained formal competence in the evaluation of public policies. Beyond the competence recognition provided by art. 24, the constitutional amendment reinforced the inquiry prerogatives of the two Houses (art. 51-2), fostered the instrumental role of the *Cour des Comptes* in support to parliamentary oversight and to the evaluation of public policies (art. 47-2)<sup>63</sup> and committed one week out of four of parliamentary work in the plenary to the oversight and evaluation procedures (art. 48-4).<sup>64</sup>

The constitutionalisation of the evaluation of public policies in Parliament is therefore part of the attempt to rebalance the legislative-executive interaction by means of reinforced parliamentary oversight and strengthened governmental accountability.<sup>65</sup>

### 1. The Composite Network of Actors involved in PLS

Post-Legislative Scrutiny in the French Parliament shows distinctive organisation, based on a *composite* model that sees the simultaneous involvement of parliamentary standing committees, appropriate parliamentary administrative units and the *Cour des Comptes*.

Standing committees are strategic actors, since they are in charge of adopting statutory decisions and of assessing their enactment *ratione materiae*. To fulfil this task, pursuant to articles 1 and 2 of the *Loi no. 96-517*, standing committees can be conferred the same powers and prerogatives of an inquiry committee (the so-called ‘mission’) and they can interact with administrative units specialised in legislative assessment.

Some relevant differences shape the PLS organisational approach followed by the Senate and by the National Assembly. The former reinforced the role of the seven standing committees responsible for each subject matter, without creating new

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61 Before 2008, several bodies (the so-called offices), mostly bicameral, were established by the French Parliament to evaluate public policies, see Manuel Sánchez De Dios, *Parliamentary accountability in Europe: How do parliaments of France, Italy and Spain fight information asymmetries?* (Rennes, 2008), ECPR Joint Sessions; On the relevance of parliamentary offices in the French tradition, see Didier Maus, “Le parlement et les cohabitations” (1999) *Pouvoirs*, no 91 71.

62 *Loi constitutionnelle no. 2008-724* of July 23, 2008, aiming at the modernization of the Fifth Republic’s institutions.

63 Jean-Raphaël Alventosa, “La Cour des comptes : une place constitutionnelle confortée (L’article 47-2 de la Constitution)” (2008) *Petites affiches* - no 254, online: <<https://www.labase-lextenso.fr/petites-affiches/PA200825425>>.

64 The constitutional amendment was complemented by the *Loi n. 2011-140*, that reinforced parliamentary mechanisms to monitor government’s action and evaluate public policies, and to the 2009 reform of the Rules of Procedures of both Houses. Cfr. Laurence Baghestani, “A propos de la loi tendant à renforcer les moyens du Parlement en matière de contrôle de l’action du gouvernement et d’évaluation des politiques publiques” (2011) *Les Petites affiches*, no 78, online: <<https://www.labase-lextenso.fr/petites-affiches/PA201107803>>.

65 Danièle Lamarque, *Contrôle et évaluation de la gestion publique: Enjeux contemporains et comparaisons internationales* (Bruxelles: Bruylant, 2016).

units.<sup>66</sup> Monitoring tasks are performed by *ad hoc* delegations, acting as collegial bodies with across-the-board competence.<sup>67</sup> By contrast, the National Assembly revised the Rules of Procedure<sup>68</sup> establishing the Committee for Evaluation and Control (CEC),<sup>69</sup> which centralises the evaluation function. The Committee is composed of *ex officio* members, including the Speaker, and other MPs designated by parliamentary groups as to reflect party composition in the House.<sup>70</sup> CEC acts upon its own initiative or upon the request of a standing committee. According to the Constitutional Council<sup>71</sup>, it may ‘inform’ the plenary on any issue, exception made for financial and budgetary matters. It cannot address injunctions to the government.<sup>72</sup>

CEC’s activity in the National Assembly is complemented by two *ad hoc* administrative units: the Evaluation and Control Mission (MEC) and the Evaluation and Control Mission of Social Security (MECSS). The former, set up by the Finance Committee in 1999, is a joint committee co-chaired by one member from the majority and one from the opposition. Its main task is to conduct an inquiry on the implementation of sectorial public policies.<sup>73</sup> The latter, set up within the Social Affairs Committee in 2004, permanently monitors the implementation of financial legislation supporting social services.

*Ex post* budgetary scrutiny is another relevant field of action of the French Parliament and it is vested on the Finance standing committees. Pursuant to art. 58.2 of the *Loi organique no. 2001-691* on the financial acts (the so-called LOLF), Finance Committees may assign investigative tasks to the Cour des Comptes.<sup>74</sup>

On the whole, the French Parliament has complemented *ex post* scrutiny in standing committees with *ad hoc* units specifically responsible for the evaluation of public policies. This organisation is flanked by the long-established audit national

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66 See art. 22 of the Senate’s RoP and the Resolution adopted on 2 June 2009.

67 Delegation for women’s rights and gender equality (set up in 1999); delegation for territorial communities and decentralization (2009); delegation for strategic foresight (2009); delegation for overseas territory (2011); and delegation for enterprises (2014).

68 Resolution no. 212, adopted on 27 May 2012.

69 Art. 146-2 of National Assembly RoP; Pierre Avril, “Le contrôle. Exemple du Comité d’évaluation et de contrôle des politiques publiques” (2008) *Jus Politicum*, no 6, online: <<http://juspoliticum.com/article/Le-contrôle-Exemple-du-Comité-d-évaluation-et-de-contrôle-des-politiques-publiques-368.html>>.

70 A resolution to amend CEC’s composition, as to make this body fully reflect the political make-up of the Assembly, was proposed by the President of the National Assembly, M Richard Ferrand, “Proposition de résolution no. 1882 tendant à modifier le Règlement de l’Assemblée nationale”, (29 April 2019), online: <[http://www.assemblee-nationale.fr/dyn/15/textes/115b1882\\_proposition-resolution](http://www.assemblee-nationale.fr/dyn/15/textes/115b1882_proposition-resolution)>.

71 Decision no. 2009-581 of 25 June 2009.

72 The *Loi n. 2011-140* further strengthened the role of the CEC, extending its prerogatives to the assumption of temporary inquiry powers and to the activation of the *Cour des Comptes*.

73 Irène Bouhadana, *Les commissions de finances des assemblées parlementaires en France : origines, évolutions et enjeux* (Paris: LGDJ, 2007).

74 Likewise, art. 132(4) of the Code on Financial Courts allows Social Affairs Committees to commit the Court to conduct inquiries on selected topics. Assemblée nationale, “Les enquêtes demandées à la Cour des comptes (article 58-2° de la LOLF)”, (2011), online: <[http://www.assemblee-nationale.fr/commissions/cfin\\_enquetes\\_Cour\\_comptes.asp](http://www.assemblee-nationale.fr/commissions/cfin_enquetes_Cour_comptes.asp)>.

institution, the Cour des Comptes, whose consultative tasks to Parliament were reinforced by the 2008 amendment,<sup>75</sup> thus shaping what can be defined as a composite network of actors.

## 2. PLS in the Parliamentary Practice: From Reporting to the Dialogue with the Government

The *ex post* scrutiny and evaluation process in the French Parliament identifies as standard unit selected pieces of legislation rather than a whole public policy.<sup>76</sup> Due to the lack of clear selection criteria,<sup>77</sup> large part of the post-legislative scrutiny is carried out on legislative acts pre-identified by review or sunset clauses.

Pertinent committees monitor the enactment of any piece of legislation whose implementation is entrusted on statutory instruments by publishing a report after six month from the entry into force of the legislative act.<sup>78</sup> The report, arranged by two committee members (of which one selected from the opposition), must account for the statutory instruments (regulations and decrees) issued to implement the act and for the unaccomplished provisions. This construction confirms that post-legislative scrutiny in France is interpreted as possessing a legal dimension. Under this narrow approach, the evaluation process focuses on law enactment rather than on the impact assessment.<sup>79</sup> In the last fifteen years, several attempts have been made to widen the object of parliamentary evaluation of legislation as to include cost-benefit analysis. However, these efforts have been rather unproductive.<sup>80</sup>

In daily practice, the scope of PLS mostly depends on *who* performs it. When parliamentary standing committees are involved, PLS primarily serves a formal purpose: monitoring the enactment of all legislative provisions and checking their implementation. Budgetary aspects are a specific concern of the *ex post* scrutiny performed by the Finance Committee on laws with effects on budget or by the Social Affairs Committee on laws financing social services.

By contrast, when the *ex post* scrutiny is performed in the National Assembly by the CEC, *ex post* analysis strives to cover substantial aspects of policy-making, checking the performance of public services and conducting cross-sectional studies based on evidence-based methodologies.<sup>81</sup> Lastly, the evaluations performed by the

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75 On the traditional ‘privileged bond’ between the Parliament and the Cour des Comptes, Alain Lambert, “Vers un modèle français de contrôle budgétaire ?” (2010) no. 134:3 Pouvoirs 54.

76 In 2011, a Committee for monitoring the implementation of legal acts was set within the Senate, but it was dismissed in 2014.

77 Elena Griglio & M Boschi, *How to structure Post-Legislative Scrutiny in Parliament: Insights from the Italian Senate* (London, 2019), co-organised by the Centre for Legislative Studies of the University of Hull and by the Westminster foundation for Democracy.

78 Art. 145(7) of the National Assembly Rules of Procedure, amended in 2009.

79 Franklin De Vrieze, “Principles of Post-Legislative Scrutiny by Parliaments” (2018) 6.

80 E.g. see the *Decret* no. 90-82 of January 22, 1999.

81 Pauline Türk, *Le contrôle parlementaire en France* (Paris: LGDJ, 2011).

MEC are more results-oriented, as the approach followed corresponds to the quantitative measurement of policy outcomes.<sup>82</sup>

PLS is carried out in a continuous dialogue with the executive and the outcomes are conveyed in a series of reports submitted to the government and associated to the launch of different parliamentary procedures. The type of interaction started with the government is not at all homogeneous. Only in a few cases, the follow-up of PLS reports supports real accountability checks; in the majority of cases, the submission of these reports merely results in the strengthening of MPs' fact-finding requirements or in the activation of a debate with the government.

Different procedural solutions, with a diverging impact on the legislative-executive interaction, are featuring the two Houses.

In regard to the French Senate, every standing committee is required to draft a yearly report on the monitoring and evaluation of activity. These reports are summarised into a unique document (the *Bilan annuel de l'application de lois*), which is submitted to the Conference of the Presidents and debated in a plenary session before the Government. After completing the yearly evaluation process, each Senator may ask the government to provide information on the missed implementation of single pieces of legislation, resorting to written or oral questions or sending a letter to the relevant Minister or to the Prime Minister.

In the National Assembly, the outcome of every CEC cross-sectional evaluation is a final report addressed to the Government. The Government is due to reply within three months in the plenary. The debate should take place in the lot of the plenary agenda reserved to oversight and evaluation by art. 48 of the French Constitution.

By contrast, the results of MEC's control of individual budgetary units are shared with the Finance Committee that may decide to release a report, submitted to the Government, which is required to answer within two months.

In other instances, PLS results in parliamentary procedures with a prevailing fact-finding purpose. The reference is to the evaluation performed by standing committees pursuant to art. 145-7 of National Assembly Rules of Procedure, which may elicit a public debate without voting.

These procedures confirm that PLS is experienced in the French Parliament as a fundamental component of the interaction with the executive. However, two limits tend to hinder its effectiveness: the legalistic approach to PLS prevails over the substantive evaluation of public policies; moreover, PLS is never raising compulsory follow-up engagements on the government, rather resulting in a softened dialogue between the two branches. This outcome, which turns out to be in line with the overall nature of the semi-presidential system, shapes what can be defined as a 'formalistic' model of PLS in Parliament.

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82 Daniel Hochedez, "La mission d'évaluation et de contrôle (MEC). Une volonté de retour aux sources du Parlement: la défense du citoyen-contribuable" (1999) RFPP, no.68, 264.

## V. THE ITALIAN CASE: AN 'ADMINISTRATIVE' MODEL OF PLS IN PARLIAMENT

Post-legislative scrutiny in the Italian Parliament shows three distinctive features. The first relates to the peculiar 'administrative' arrangement of PLS, strongly rooted in the role of parliamentary bureaucracies.<sup>83</sup> Both Houses have administrative units dedicated to PLS, providing evaluations and analyses independently from the government and any other external agencies. This activity is conducted on a permanent basis, producing a significant amount of documentation and reports which are made available to MPs and the public.

The second feature lies in the peculiar bicameral arrangement of the Italian legislature, which is confirmed in the field of PLS. The two Houses mirror each other from the point of view of functions and powers, but at the same time they enjoy complete administrative and procedural autonomy. This arrangement has enabled the adoption of rather different organisational solutions and approaches to PLS.<sup>84</sup>

The third factor lies in the absence of meaningful political follow-up. Administrations are rather proactive on PLS, but this research and documentation activity does not necessarily trigger procedural consequences and political decisions. Connections with the legislative activity are occasional and weak. This outcome must be interpreted in the light of the peculiar nature of the Italian parliamentarism, which is increasingly dependent on the contextual executive-parties dimension<sup>85</sup> and tends to regulate the daily legislative-executive interaction in a rather flexible manner.

### 1. A Perfect Bicameralism Resulting in Bicameral Asymmetries

The PLS objectives, scope and research/evaluation methodologies in the lower and in the upper House differ substantially. In the Italian lower House (the Chamber of Deputies), an administrative unit, the Service for Parliamentary Oversight, evaluates the implementation of laws and monitors reports requested to the Government. The body is expected to engage in a legal and narrow dimension of PLS, "based on data provided by the Government and by other competent institutions."<sup>86</sup> It is tasked to

83 On the role of parliamentary administrations and parliamentary staff in support for ex-ante scrutiny and quality legislation, see Giovanni Piccirilli & Paolo Zuddas, "Assisting Italian MPs in Pre-Legislative Scrutiny: The Role Played by Chambers' Counsellors and Legislative Advisors in Enhancing the Knowledge and Skills Development of Italian MPs: The Assistance Offered to an Autonomous Collection of Information" (2012) 65:3 Parliamentary Affairs 1.

84 Having regard to the attitude followed by the administrations of the two Houses in the supply of services to the political sphere, Regonini Gloria, "Parlamenti analitici" (2012) 1 *Rivista Italiana di Politiche Pubbliche*, online: <[http://www.capiro.org/capiroinforma/scaffale/2012/05/parlamenti\\_analitici.html](http://www.capiro.org/capiroinforma/scaffale/2012/05/parlamenti_analitici.html)> deplored the excess of 'bad redundancies' and the lack of 'good redundancies'.

85 Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (New Haven: Yale University Press, 1984).

86 Art. 25 of the Rules on Services and Personnel of the Chamber of deputies, amended in 2002 (Deliberation of the Bureau no. 57 dated 25 March 2002), enacted through the Decree of the President no. 478, 27 March 2002. See also House of Representative of Italy (Camera dei Deputati), *Segreteria Generale, L'amministrazione della Camera dei Deputati (L'organizzazione interna, 2004)*, online: <<http://legislature.camera.it/files/pdf/organizzazioneinterna.pdf>>.



monitor formal compliance of Government's implementing duties agreed during the parliamentary proceeding and set forth in statutory law. The outcomes of this 'administrative' scrutiny are included in the yearly Report on legislation by the Chamber of deputies.<sup>87</sup> These reports provide background information in order to reinforce the evaluation capacity of the House, but they do not automatically connect directly with ongoing legislative activity. They are not specifically discussed in committees or in the plenary and they are rarely mentioned during political debates.

A first attempt to reinforce the link with ordinary parliamentary procedures was made in 2017, when the Report on parliamentary oversight published the results of the impact evaluation conducted on law 22 May 2015, no. 68, on crimes against environment.<sup>88</sup> This *ex post* evaluation was promoted as a follow-up to the activity of the Bicameral Committee of Inquiry on illegal activities in the waste cycle and related crimes,<sup>89</sup> thus setting a significant example of how to make use of the outcomes of committees of inquiry in the development of *ex post* evaluation. However, this still remains an isolated case and the Italian Chamber of deputies has yet to identify the impact assessment and *ex post* evaluation as a specific task within its administrative units.

A different approach to PLS was started by the upper House (the Italian Senate). The formal perspective of PLS builds on the Italian Senate's solid administrative tradition of research and documentation. These tasks fall under the remit of the Service for the Quality of Regulations, the unit providing research and documentation on the quality of legislation, including *ex post* monitoring on law enactment and on Government's reporting duties.<sup>90</sup>

At the same time, ahead of the failed 2016 constitutional reform,<sup>91</sup> the Italian Senate started an autonomous path to PLS, following a rather original framework. The organisation of PLS was vested on a newly established unit, specialised in the analysis and evaluation of public policies as to complement pre-existing structures. In 2016, this led to the establishment of the Impact Assessment Office (IAO, *Ufficio di*

87 The first Report on legislation was released in 1998. Since then, 18 reports have been issued.

88 House of Representative of Italy (Camera dei Deputati), *Rapporto sull'attività di controllo parlamentare 2016* (Roma, 2017).

89 The bicameral committee of inquiry was established by Law 7 January 2014, No. 1.

90 These tasks are entrusted on the Observatory on law enactment, a subunit of the Service for the Quality of Regulations responsible. See Annex B of the internal Rules concerning the personnel of the Senate, lastly adjourned on 17 January 2012.

91 The constitutional reform aimed at introducing an asymmetric bicameralism, with the Senate excluded from the confidence relationship and sidelined in the participation at the legislative process. The only function entrusted on the upper House as an exclusive competence was the evaluation of public policies. Hence, the 'administrative' efforts to structure an internal capacity in policy evaluation can be interpreted as a sort of 'anticipated' adaptation to the potential impact of the constitutional reform. On the purposes and content of the reform, see Raffaele Bifulco, "A New Senate: A First Look at the Draft Constitutional Bill" (2014) 1 *Italian Journal of Public Law* 46 and Erika Arban, "Discussing a Reform of the Senate: A Comparison between Italy and Canada" (2015) 2 *The Italian Law Journal* 273. On the conferral to the Senate of the 'new' function of the evaluation of public policies, see Elena Griglio, "I poteri di controllo del Parlamento italiano alla prova del bicameralismo perfetto" (2015) *Il Filangieri Quaderno*; Napoli, Jovene, (2017) 199 Nicola Lupo. On its failure see "The failed constitutional reform of the Italian Senate" (2019) 2 *DPCE Online* 1595-1608.

*Valutazione d'Impatto*),<sup>92</sup> tasked with promoting research, studies and training programs in the analysis and evaluation of public policies, including the impact of European policies on domestic affairs.<sup>93</sup>

From the standpoint of internal governance and operational methodologies, IAO has been structured as a hybrid body. Its governance is comprised of a Steering Council and a Secretariat. The former is chaired by the President of the Senate and it brings together MPs, officials of the Senate bureaucracy and a representative of the Conference of the presidents of regional legislative councils. The Secretariat is organised as a typical administrative unit, led by the Secretary General or a Deputy Secretary General and it is responsible for developing research, documentation and training in thematic areas related to public policy analysis and evaluation.

This organisation confirms that the Italian Senate's IAO has been conceived of as a flexible entity, acting as a research service specialised in policy evaluation<sup>94</sup> and connected to the political parliamentary dimension. The substantial novelty lied in the search for a different approach to PLS, based on an autonomous administrative capacity of the Senate: first, the PLS focus was on whole policies, not on a single Bill or law; second, IAO was meant to develop not just quantitative studies, but real assessments of expected and unexpected public policy effects, following the counterfactual scenario; third, the Office was due to provide broad disseminations of the research products in view of increasing the instrumental value of PLS. In a broad perspective, IAO was designed to perform a public policy evaluation as defined by academic literature.<sup>95</sup>

Since 2019, IAO has undergone a *de facto* suspension of its activities. This outcome must be interpreted as a general weakness of PLS in the Italian Parliament, which is not required by legal norms at the constitutional or sub-constitutional levels.

## 2. Why PLS Fails to Enter the Political Domain in the Italian Parliament

In both Italian Houses, administrative efforts to support PLS lack a strong legal base. There is no reference in the Rules of procedure of the two Houses to *ex post* evaluation as a formal task of parliament or even as a procedure through which parliamentary bodies may scrutinise how laws are implemented.

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92 See the Bureau's Deliberation no. 90/2016, establishing the Impact Assessment Office, approved on 28 June 2016 and the Decree of the President of the Senate no. 12480 dated 19 July 2016.

93 G Coppola & FS Toniato, "La valutazione delle politiche pubbliche" in F Bassanini & A Manzella, eds, *Due Camere, un Parlamento: per far funzionare il bicameralismo* (Passigli: Bagno a Ripoli, 2017) 160.

94 On the instrumental contribution offered by research and documentation units in response to the functional levels of parliament, see Riccardo Pelizzo, Rick Staphenurst & Robert Miller, "Parliamentary Libraries, Institutes and Offices: The Sources of Parliamentary Information" (2004) World Bank 2 and *Strengthening the Capacity of Parliaments through Development of Parliamentary Research Services*, by Fotios Fitsilis & Alexandros Koutsogiannis (Wroxtton, 2017), 13th Workshop of Parliamentary Scholars and Parliamentarians.

95 Gertler et al, *supra* note 35.

Even the 2017 reform of the Senate Rules of Procedure<sup>96</sup>, which followed the establishment of IAO, was not able to fill in this gap. The Office was not given a formal basis in the Rules of procedure, nor were its procedural connections with parliamentary committees made explicit.<sup>97</sup> The setting up and functioning of the body remained based on an administrative act, a decree of the President of the Senate. The decision to keep an administrative legal base for the Office explains why, starting in 2019, and this structure could experience *de facto* a suspension of its activity with no procedural implications. The Office has not been reformed, nor abolished, but no evaluation projects have been conducted in the last year, in the absence of any initiative coming from the Speaker of the Senate.

This confirms that lack of a formal legal base for PLS in the two Houses is the major cause behind the weaknesses of a pure administrative approach. Moreover, the decision not to formalise this function in the internal Rules of procedure can be connected to different factors. One factor may be identified in the prevailing executive-centred approach to PLS: *ex post* evaluation finds formal regulation in the Italian legal order as an exclusive field of executive competence; the Italian Government has traditionally approached impact assessment as a bureaucratic duty more than as a real policy-making tool, focusing on single Bills, rather than on the overall policy contextual framework.<sup>98</sup>

Another factor relates to the fear that proceduralisation of PLS in parliament may lead to the introduction of a competitive tool in the legislative-executive relationship which is not fully consistent with the structure of the Italian party system. In Italy, the solid tradition of coalition governments, jointly with intense party fragmentation<sup>99</sup> and with the ongoing swing between proportional and hybrid electoral systems,<sup>100</sup> creates an unfavourable framework for PLS. The frequent repositioning of political party lines of division between the government, its

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96 On the reform, approved on 20 December 2017 (*Gazzetta Ufficiale*, 19 January 2018, no. 15), see Nicola Lupo, “La riforma del 20 dicembre 2017 del (solo) regolamento del Senato, nella faticosa ricerca di un’omogeneità regolamentare tra i due rami del Parlamento” (2017) 197–198 *Studi parlamentari e di politica costituzionale* 23; A Carboni & M Magalotti, “Prime osservazioni sulla riforma organica del Regolamento del Senato” (2018) *Federalismi.it*, online: <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35527>>; Federico Silvio Toniato, “Innovazione e conservazione nel Regolamento del Senato” (2018) *Innovazione e conservazione nel Regolamento del Senato* 59.

97 In theory, standing committees may grant a follow-up to the IAO reports resorting to the procedures that allow a debate regarding a certain ‘affair’ (art. 34.1 and 50.2 of the Senate RoP) and to submit a motion for a resolution to the plenary (art. 50.1 of the Senate RoP). However, these procedures have never been used for such purposes.

98 See Impact Assessment Office, *The Uncompleted Evaluation of Legislative Acts in Italy: Critical Issues, Prospects and Good Practice* (Roma: Senato della Repubblica, 2018); R Leonardi & A Cantone, “Impact Assessment and Multi-level Governance: a comparison between Italy and the United Kingdom” (2009) (European Network for Better Regulation) .

99 Adriano Pappalardo, “Dal Pluralismo Polarizzato Al Pluralismo Moderato. Il Modello Di Sartori e La transizione Italiana” (1996) 26:1 *Italian Political Science Review / Rivista Italiana di Scienza Politica* 103.

100 Gianfranco Pasquino, “Tricks and Treats: The 2005 Italian Electoral Law and Its Consequences” (2007) 12 *South European Society and Politics* 79.

parliamentary majority and opposition<sup>101</sup> does not encourage the capacity of the parliament to develop non-party modes which tend to favour its unitary identity vis-à-vis the Government, as required by PLS.<sup>102</sup>

These factors explain why a pure administrative model of PLS in parliament may be prevented from providing real political outcomes, able to insert elements of accountability in the legislative-executive interaction, when a legal base is completely missing and when the party system does not support the inclusion of elements of institutional competition and mutual check between the government and the legislature, as a whole.

## VI. CONCLUSIONS

Although PLS is considered to be a developing sphere of action for parliaments in Europe, some national experiences demonstrate that this activity has been positively included in daily parliamentary practice, although in rather different ways. The cases analysed in the article offer an overview of three proactive parliamentary approaches to PLS, supported either by formal procedural arrangements (Switzerland and France) or by the role of the parliamentary administrations (Italy).

		Countries		
		<i>Switzerland</i>	<i>France</i>	<i>Italy</i>
<b>Variables</b>	<i>Organisation</i>	Parliamentary committees, supported by a technical-administrative body (PCA)	Composite (both parliamentary and external units)	Lack of formal political organisation. PLS entirely vested on parliamentary administrations
	<i>Object</i>	Single pieces of legislation	Mostly on single pieces of legislation	Attempt to include PLS reports on whole policies
	<i>Scope</i>	Legality, adequacy and effectiveness of the federal authorities' activity	Narrow. Prevailing legal dimension	At the administrative level, concern for the substantive approach to PLS also
	<i>Outcomes</i>	Report that draws the political conclusions, with recommendations to the Federal Council. Two-years follow-up	Yearly reports, debated with the government	No granted procedural follow-up

*Figure 1 - Alternative PLS arrangements in the Swiss, French and Italian Parliaments*

101 Vezio Crisafulli, *Aspetti problematici del sistema parlamentare vigente in Italia* - Vezio Crisafulli - *Vita e Pensiero* - *Articolo Vita e Pensiero*, JUS 2 (1958).

102 Anthony King, "Modes of Executive-Legislative Relations: Great Britain, France, and West Germany" (1976) 1 *Legislative Studies Quarterly* 13.

Independently from the internal arrangements, one background question arises as to what factors have enabled these three parliaments, more than others, to promote proactive approaches to PLS. In response to this question, it is easily demonstrated that, in each of the three cases, parliament's engagement in the field of PLS has been promoted in response to amendments or proposed amendments of the Constitution. This is true not only for Switzerland and France, but also for Italy, where the major changes in the PLS internal organization and practices of the Italian Senate were promoted on the basis of the 2016 constitutional bill, approved by both Houses and then rejected by the popular referendum.

The decision to set a constitutional clause in support for the development of the evaluation of public policies in parliament may be influenced by many factors. It might be argued that the form of government is one determinant factor. Parliament's involvement in PLS is in fact based on a fundamental premise, i.e. the legislature's capacity to act collectively, as a unitary body, vis-à-vis the other governing institutions. This condition is more likely to be found in presidential rather than in parliamentary systems, as in the former the legislative and executive branches are more willing to engage in competitive attitudes that bypass party cleavages.<sup>103</sup> By contrast, in parliamentary systems, the confidence relationship and the party dynamics between government, parliamentary majority and opposition make it harder to structure PLS as a mechanism that might challenge the executive conduct of public affairs.

Not by chance, Switzerland and France are probably the two European systems supporting the sharpest separation between the branches of government. In Switzerland, this is due to the directorial form of government. In France, a not too dissimilar effect is produced by the peculiar semi-presidential arrangement that even after the 2008 constitutional amendment might result in misalignments between parliament and the executive. The case of Italy confirms the idea that in a pure parliamentary government, with no amendment to the Constitution, an administrative and technical approach to PLS may hardly lead to significant political outcomes.

This argument does not mean that parliamentary systems are *a priori* precluded from developing effective practices of PLS. The experience developed in this field by the UK Parliament,<sup>104</sup> which has not been specifically examined in the article, confirms that the form of government is not an absolute limit to the establishment of PLS in parliament. As a matter of facts, other factors may contribute to shape the type and nature of parliamentary involvement in the *ex post* evaluation.

Among them, the level of parliament's independence from the government in the access to relevant information and in the technical analysis of these data should

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103 *Monitoring and evaluation in the United States government : an overview*, by Katharine Mark & John R Pfeiffer, documents.worldbank.org, ECD 26 (Washington: World Bank, 2011).

104 Tom Caygill, "A Tale of Two Houses?: Post-Legislative Scrutiny in the UK Parliament" (2019) 2 *European Journal of Law Reform* 87.

not be underestimated.<sup>105</sup> Countries that enjoy a solid tradition of *ex post* assessment of legislation structured on the role of independent authorities have a reduced need to have autonomous PLS capacities in parliament. By contrast, where a government is the single institution performing *ex post* impact assessment, parliament's engagement in this field may enrich the opportunities for transparency and democratic oversight.<sup>106</sup> The presence of a solid tradition of parliamentary oversight, supported by non-party oversight bodies and procedures, is another relevant factor.

What would need to be duly considered is the political outcome of PLS implemented at parliamentary level.<sup>107</sup> Since policy evaluation in parliaments is always permeated by party dynamics, the balance between technical analysis and political assessment in these pluralistic institutions is a challenge still to be faced fully.

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105 Florian Meinel, “Confidence and Control in Parliamentary Government: Parliamentary Questioning, Executive Knowledge, and the Transformation of Democratic Accountability” (2018) 66:2 *The American Journal of Comparative Law* 318.

106 Allen Schick, “Congress and the ‘Details’ of Administration” (1976) 36 *Public Administration Review* 521.

107 On the inherently political nature of evaluation, see Mark Bovens, Paul 't Hart & Sanneke Kuipers, “The Politics of Policy Evaluation” in RE Goodin, M Rein & M Moran, eds, *The Oxford Handbook of Public Policy* (Oxford University Press, 2008) 320.

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**Elena Griglio** is Senior Parliamentary Official of the Italian Senate. Adjunct Professor of "Legislative Drafting" in the Department of Political Sciences of LUISS University in Rome.

**Nicola Lupo** is Full Professor of Public Law at LUISS University, Rome, and Visiting professor at Nicolaus Copernicus University, Torun.