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The Impact of Legislation

A Critical Analysis of Ex Ante Evaluation

The Impact of Legislation

Jonathan Verschuuren (Ed.)

Around the globe, ex ante evaluation of legislation has become an established rationalisation of legislative processes. Legislator, politicians, and the public at large increasingly demand new laws to have particular effects, and too often, unintended side effects. Various instruments are being applied that all have in common that they must predict the effect of new legislation. Under how much, if any, has been extremely useful. Scarcely, however, it is in order as well as not to be so difficult to predict the future effects of a new set of rules in our complex society as it is to predict whether our society is as a whole is going. The search for an answer to this sceptical question is at the heart of the book. The newly established Research Group for Methodology of Law and Legal Research at Tilburg University (the Netherlands) brought together some of Europe's top specialists in the fields of evaluation of legislation, with backgrounds in law, social science, Political Science, and law and economics. The result of their collaborative effort is this comprehensive and critical book on the pro and cons of ex ante assessment of legislation.

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Chapter 5

*Ex Ante* Evaluation of Legislation: between Puzzling and Powering

*Robert Hoppe*

I. *Introduction*

Those interested in the theory and practice of *ex ante* evaluation of policy proposals are living in paradoxical times. On the one hand, the heydays of *ex ante* policy evaluation lie at least three decades behind us.¹ In the 1960s and 1970s its enthusiastic embrace by scholars sparked off policy analysis as a new academic discipline in the US; and led to scores of new courses in Planning, Programming, Budgeting Systems (PPBS) and Cost-Benefit Analysis (CBA) in political science and public administration in Western Europe. At first, practitioners uncritically followed academic interest. Emulating US government practice, in the Netherlands, e.g., the Commission for Policy Analysis (COBA) was established. Its explicit purposes were (a) to add policy-analytic methods and techniques to the bureaucrats’ toolkit of knowledge and skills; and (b) to establish high-level policy analysis staff units in every department.² Similar developments were seen in countries like the United Kingdom, Germany, and Sweden.

However, in the subsequent decades the interest in *ex ante* policy evaluation, PPBS and CBA waned for a number of reasons. First, in political and administrative practice attention shifted to implementation deficits of policy programs and

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projects adopted previously on the basis of very favorable ex ante evaluations. Second, trial-and-error learning through ex post summative or formative evaluation of a policy’s or policy program’s outputs or even outcomes became the new trade mark of good policy analysis. Third, empirical research into the actual uptake of scientific knowledge through ex ante policy analysis and other types of policy research showed very disappointing results for scientists. On top of that, fourth, cognitive psychologists and social judgment researchers, in numerous experiments, showed that expert judgment was bias-ridden, and not necessarily better that judgment by lay people or experienced non-experts. All in all, ex ante evaluation was disenchanted; ex post evaluation was lifted to the position of more cumbersome, but more sensible route for improving policy practice.

In view of these trends in the past, interest in ex ante policy evaluation experiences a strong revival. This goes both for the EU and OECD at the international level, and for national levels of government. In the Netherlands, e.g., experiences with CBA for large infrastructural works outsourced by public agencies to commercial consultants led to new national standards for the proper conduct of CBA. The Department of Finance even managed to revitalize old PPBS ideals and write these into novel comptrolling legislation for all levels of government under the new label “From Program Budgeting to Policy Accountability”.

In the UK, the trend is manifest in the movement for Evidence-Based Policy. Emulating ideas popularized through ‘evidence-based medicine’, the hope is that policy learning, alleviated by transparency and easier access to academic research findings and the results of evaluative research into the outputs and outcomes of previous policy programs made possible through the internet, may now well improve ex ante evaluation of new policy proposals beyond its previous limited levels.

As always, trends in policy analysis co-evolve with public opinion and policy agenda dynamics. The growing political interest in sustainability issues is propelling a policy-analytic trend towards Integrated or Sustainability Impact Assessment. The idea is that traditional (macro)economic CBA and socio-economic policy advice for Profits and growth of Gross Domestic Product (GDP), ought to become integrated with modeling of sustainability aspects and ex ante evaluation of policy proposals along a much more complex set of evaluation criteria representing all aspects of sustainability, especially People and Planet in addition to mere Profit.

In this chapter, another trend will take center stage. Since roughly the 1970s, people have become critical of the welfare state as over-sensitive and too responsive to citizens’ political demands. In diagnosing this problem, structural deep causes like demand overload, and problem symptoms like fiscal crisis have gradually receded in the background of analyses. More and more, the quality and quantity of government regulation of the world of business, of civil society organizations and associations, and of the life of private citizens, came to be seen as the major evil-doers. This trend of the retreat of the legislator in public and political opinion has spurred the policy-analytic trend to regulatory review or appraisal, regulatory impact assessment – or, as it is has been defined in chapter 1 of this volume, ex ante evaluation of legislation. The idea is that by means of a comprehensive or selective use of ex ante evaluation political authorities may be better informed about the future consequences of legislative and other regulatory proposals. This would enable them to select the better proposals and eliminate the worse ones, thereby gradually improving the quality of government regulation for the economy, society and private citizens.

It is important to point out that ex ante evaluation is treated here as one, rather specific, subcategory of policy evaluation practices. Not only is there a distinction between ex post evaluation of outputs and outcomes causally connected to policies, policy projects and policy programs in the past; and ex ante policy evaluation based on forecasting or ‘guessimating’ (as it is called by Van Aaken in the next chapter) possible future consequences of policy proposals. Equally important is the distinction between policy, policy program and policy project.

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8 See OECD, Regulatory Impact Analysis (RIA) Inventory (Paris 2004).
government may have one or several policies, i.e. (implicit or explicit) major strategic guidelines for governmental actions for dealing with a particular policy problem or issue in the long run. A policy may or may not resolve itself into a routinised and continuous set of policy measures (a policy program), or into one-off, non-iterative policy projects. As the label ex ante evaluation implies, it is about ex ante evaluation; but it is neither about policy, programs or projects. Ex ante evaluation is unique in focusing on one particular type of policy instrument, rule-making or legislation. Although ex ante evaluation ought to be seen against the larger backdrop of policy evaluation practices, its specificity is to be found in its limitation to rules or laws.

Other chapters in this book describe, analyse, and evaluate some of these efforts at ex ante evaluation in different countries, levels of government, and policy domains. This chapter aims at a preliminary overall evaluation from a policy studies perspective. What may be said of the quality of present efforts at ex ante evaluation? Do they really live up to the high expectations suggested by the promises of its proponents? Can they really contribute to more reflexive governance? Or will the present cohort of ex ante evaluations suffer the same mismanagement of expectations and subsequent decline as the previous upsurge of ex ante policy analysis and evaluation? Where illuminating and possible, I have gone beyond the experiences with ex ante evaluation of legislation reported in this book, which are limited to applications in continental Europe. After all, regulatory review originated in the USA. Like the UK, this country has a common law tradition. This may imply a more instrumental, utilitarian or pragmatist problem-solving perspective on rule-making and legislation.14 It is beyond the remit of this article to speculate on whether or not this different attitude is a potential explanatory factor in the early rise of regulatory reviews in the USA and the UK compared to the rest of Europe.

My strategy in arriving at conclusions and evaluations is to look at ex ante evaluation of legislation from two contrasting perspectives. I will distinguish between a sacred and a profane story of the nature of public policymaking. In the sacred story, policymaking is collective problem solving; and policy analysis is merely cognitive decision support for political authorities – it is a form of puzzling. In the profane version, policymaking is a (civilized) political battle between protagonists and antagonists of competing policy proposals; consequently, policy analysis is a method of fighting – it is a form of powering. The second section is devoted to setting out these two contrasting perspectives. Sections III and IV look at ex ante evaluation of legislation through the lenses of the sacred and the profane versions, respectively. From the sacred story perspective, ex ante evaluation can be shown to have numerous methodological flaws and shortcomings. From the contrasting perspective, the relative success of ex ante evaluation of legislation will be shown to depend on political contingencies. The fifth and final section discusses two possible strategies for using ex ante evaluation to achieve more reflexive governance: (1) approximation of the sacred ideal of policy analysis as puzzling by creating independent, more neutrally competent institutions for ex ante evaluation of legislation; or, alternatively, (2) to make the most of existing ex ante evaluation practices by building upon and strengthening suitable parts of the profane version of policymaking as powering.

II. The Sacred and the Profane in Public Policymaking

On the face of it, ex ante evaluation of legislation could simply be discussed as one element in the dominant paradigm of policy and conventional map of the policymaking process. This is, of course, the stages model of instrumentally rational problem solving (see chapters 2 and 4 of this volume). It tends to see policy analysis primarily as decision-support by policy analysts and evaluators for political authorities. The problem solving process usually begins with problem identification; as a next step, objectives are selected; subsequently, the process runs through stages of exploration and analysis of alternative options and their probable consequences; and issues in a weighing up of alternatives in light of several decision criteria, which leads up to a 'best' or at least 'optimal' or 'balanced' choice of policy measures. In other words, policymaking embodies rationality as a transparent, logical sequence of thinking movements issuing in the discovery of the best possible arguments in favor of one policy option.

On closer examination of the state of the art in policy studies, the dominant paradigm and model is contested.15 A first rival paradigm sees policy as structured interaction, or play of power constrained by formal and informal rules on political strategies and tactics of partisan mutual adjustment among stakeholders and proximate policymakers. A second competing paradigm views policy as social construction of meaning, conferred in the battle between protagonists and antagonists of policies on concepts used in (competing) political and administrative discourses on social problems, policy programs and projects, but also political leadership and political obstacles or opposition. It is important here to clarify my response to this situation. Whether or not one sees the existence of multiple


accounts as problematic or not; and if not, how one sees the relationships between them, ultimately determines how one conceptualizes policy and policymaking.

Colebatch calls the accounts of 'policy as authoritative choice' and 'policy analysis as advice or decision support' the official or sacred account. It is used by politicians, proximate policymakers and experts as 'front-office talk' because it offers excellent rhetorical means to rationalize and 'sell' the outputs of policymaking to voters and citizens. After all, citizens expect government to respond to their problems; so the apparently rational movement from 'problem' through 'analysis', 'ex ante evaluation', and 'decision' to 'solution' is common sense. It easily justifies the outsourcing of responsibilities for political judgment by ordinary citizens as 'lay' persons; and vice versa, legitimizes the prerogatives and specialized tasks of proximate policymakers, expert advisers or policy analysts, and political authorities.

However, the sacred account is used, both in theory and practice, not because of its empirical accuracy. Actually, the puzzle is rather why, in the face of mounting evidence for alternatives, it is still the dominant account. Leading policy scholars accept that policymaking is not a rational, linear and sequential process; rather, they see it as discontinuous, contested, and dynamic, with only loose couplings between problems and solutions. Equally important, the assumption of a unitary decision maker or single coordinator is palpably wrong. Policy decisions are the result of complex interest constellations and structured, but difficult to predict political interaction patterns between multiple actors, connected through numerous mutual resource and path dependencies in complicated network structures. And knowledge in policymaking is hardly an 'object' moving unidirectionally from experts to policymakers and authorities. Rather, knowledge is a joint construction produced during boundary work between policymakers and experts and public opinion and the media. Each party to the process uses information strategically in order to influence and bias the eventual authoritative definition of the problem and its underlying realities. The doubts about the dominant paradigm of policymaking are not limited to academics quarreling over the interpretation of research data and theories. Perhaps more importantly, in policy practice too there is "...a disconnect between the analysts' perception of self-worth (often drawn from the rational-actor model) and the real contribution that the individual makes in the nooks and crannies of the policy process." 20

In essence, the dominant model serves as a social myth; it is a Platonic 'noble lie', without which practice is alleged to fall apart. It validates the outcome of policymaking processes as a rational account of how politicians make a difference. In itself, this shows that the problem solving account has strategic power-implications for the practice of policy work. For example, by saying, "We are talking just ideas now, not decisions", policymakers implicitly distinguish between policy analysis or ex ante policy evaluation, and policy adoption or decision-making. Drawing such a boundary implicitly reinforces status and power differences between proximate policymakers or analysts, and authorities and elected politicians who, in the regulated play of power, defend their monopoly on authoritative decisions against other policy players. Similarly, stressing "This is mere implementation!" implicitly commands street-level bureaucrats and non-state organizations in a policy network around some issue not to challenge the politically dominant problem definition or adjust policy objectives inherent in adopted policy designs. Yet, such challenges and adjustments might well merit the label 'rational' if they are reflexive responses to changing circumstances 'on the ground'. These examples alone suffice to show how puzzling and powering, intellectual cogitation and struggle for power, intertwine in real policymaking processes.

The challenger, called the profane or experiential account, is policy as structured interaction and rule-constrained power play. In such an account the 'advice' or 'decision support' by policy analysts is transfigured into a completely different story. Policy analysts become ordinary policy workers as 'political auxiliaries', as 'networkers' or policy 'diplomats', or as 'policy entrepreneurs'. Not analytical competencies, but negotiation, 'soft' coordination, maintenance of good contacts with other key players, and instigation of supportive or at least non-veto stances become key social skills for trained policy workers. In these types of 'back-office' account of policy, the rational solution, based on unshakable evidence and the persuasive power of the better arguments, is deconstructed as the lucky, victorious alternative which just happened to get more political support from stakeholders in processes of mutual adjustment based on calculated interests and 'deals'. Policy is not a rational solution to some problem; to the extent it is a cognitive or cultural phenomenon, it is part of shaping the

23 See Charles E. Lindblom, Inpurity and Change: the Troubled Attempts to Understand and Shope Society (Yale University Press, New Haven 1990); see Hoppe, supra note 5.
24 See Rabin, supra note 1, p. 183.
political action itself. Saying "We need a gun control, anti-abortion, or climate change policy" and "Alternative A trumps alternative B in major dimensions of the problem" is a political claim for attention on other policymakers; it is a politically inspired attempt at problem framing or even for exclusive control over problem definition; it seeks commitment of (some of) their resources for achieving your policy objectives.

I want to stress that the sacred and profane, official and experiential, front- and back-office accounts of policy and policymaking are being actively used both in academic theory and political-administrative practice. These are plausible facts in the social construction account of policy. If policy is viewed as being part of political sense-making, as claims to control and fix the meaning of concepts used in political debates and struggles, it is only logical to apply this insight to the policymaking process itself. It means we may sublime the sacred and profane accounts of policy under the social construction account. The implication is that policymaking may be constructed or viewed as, indeed, encompassing puzzling (sacred, rational problem solving account), and powering (profane, structured interaction and power play account) because policy players are all engaged in exercises of sense-making and meaning-giving.

III. Puzzling: Ex Ante Evaluation of Legislation as Policy Analysis

Ex ante evaluation of legislation started its career as 'regulatory review' during the late 1960s and the 1970s in the USA.22 It was President Nixon who first demanded the circulation within the executive branch of newly proposed environmental legislation. Under Presidents Carter and Ford centralized regulatory review was extended to all major policy initiatives with an economic impact estimated over $100 million per year. The system was perfected in Executive Order 12291, issued in February 1981 by President Reagan. He required CBA and centralized review for all, not just 'major' policy regulations. The required CBA was to be performed by the rule proposing agency itself. Thus, CBA as core analytical element in regulatory review is an ex ante evaluation activity performed and/or initiated by the relevant policymaking unit in the administrative part of the executive branch of government. The second element is centralized review, or a meta-analysis of such departmental ex ante assessments, by a body that is part of the Executive Office of the President; in this case, the Office of Information and Regulatory Affairs (OIRA), as part of the Office of Management and Budget (OMB).

Although originating in a presidential political regime like the USA, the idea of regulatory review was supplanted to the Westminster democratic regime of the UK (Daffern & Wyatt, 2001), to the other types of democratic regimes of Continental Europe (like Germany and Sweden), and even to the European Union (EU)23 (also see chapters 7 and 8 of this volume). In all cases, CBA as method of 'puzzling' has been combined with some stronger or weaker form of centralized overview, as mode of 'powering'. In the Netherlands, e.g., ex ante evaluations are formally conducted by the Council of State (as described in chapter 9 of this volume). But the development of a specific method of CBA for ex ante evaluation of legislation for compliance costs to busines deriving from government regulations was entrusted, in 1998, to an ad-hoc but independent advisory commission, the Advisory Board on Administrative Burdens (ACTAL). Since then ACTAL's competency has evolved beyond the 'think tank' function of a policy and organizational infrastructure systematically aiming at the reduction of administrative burdens. Nowadays, there is one strong coordinating minister (of Finance), supported by one special-purpose interdepartmental project unit. ACTAL reviews all departmental ex ante evaluations for administrative burden reduction, assists departmental units in its analytic tasks, and prior to formal decision making or policy adoption, advises the Cabinet and Parliament about the quality and effectiveness of departmental regulatory proposals.24

Now, from a puzzling perspective, policy analysis is the art and craft of constructing and solving 'doable' problems for collective action; or, in other words, creating problems that can be solved.25 Ex ante evaluation may be said to emerge from a long gestation process of problematisation of the role of laws and rules as major policy instruments. This was triggered by the neo-liberal political developments of the 1970s and 1980s. In the mood of citizens, the good intentions and achievements of the welfare state paled in comparison to its failures and perverse side effects. From well-intended and largely successful efforts to remedy market failures, the welfare state came to be seen as a major government or

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24 See Actal (Dutch Advisory Board on Administrative Burden), Annual Report 2006 (The Hague 2006).

25 See David Drey, Problem Definition in Policy Analysis (University of Kansas Press, Lawrence 1986); Robert Hoppe, Het beleidprobleem geprobleematiserend. Over beleid antwoorden en probleemvorming (– inaugural address; Coutinho, Muiderberg 1989).
regulatory failure. Politicians like Carter and Reagan in the US, and Thatcher and Major in the UK, managed to win electoral victories through blaming centralized government and ‘bureaucrat bashing’. In the concomitant newer philosophies of governance like the New Public Management (NPM), government reforms were clearly based on individualist, rational choice, and economic thinking. Its core assumption was to view “organizations as a chain of low-trust principal/agent relationships (rather than fiduciary or trustee-beneficiary ones), a network of contracts linking incentives to performance” (Dunleavy and Hood, 1994). In NPM-thinking laws and regulations are no longer the unquestioned major instruments of governing they used to be. They are part of a larger set of policy instruments; and not necessarily the preferred tools (Hood, 1983).

As a matter of fact, in contemporary government practice legal expertise in the public sector is regaining part of its historical prominence because politicians and public agencies desire to be fully informed about the legal risks of engaging in all kinds of contractualized relations with firms or civil society organizations.

The once dominant paradigmatic view of legislation and regulation was gradually challenged by a neo-liberal reframing as compartmentalized legal designs leading to rule over-complexity and overload. From ‘pet’ policy instrument for legal professionals in ordering society, the impact of laws and rules on society and the economy was reframed as a risk and major contributor to uncertainty, economic underachievement and social disorder.

To become ‘doable’ policy-analytic problems, such political and ideological frame shifts have to be translated into or aligned with, to the extent possible, standardized and well-known disciplinary or professional concepts, criteria, models and theories. The neo-liberal ideological drift generally has boosted an economistic, public choice academic-professional framework in policy analysis.


This is not to say that public choice was the only way of structuring the problem of rule pressure. In the Netherlands, e.g., NPM-like administrative and organizational thinking at the Department of Administrative Reform and Internal Affairs informs the idea of ‘Alternative Government’ (Andre Overland). One of its themes is to test all existing and new state regulations for unnecessary and superfluous administrative burdens on citizens. The Department of Justice attempts to tackle entire systems of legislation from a new philosophy of law perspective. In its project ‘A Usable Legal Order’ (Bricks and Reasons) the ambition is to rethink the legal relationships between government, private citizens and firms in the general direction of a self-quieting society, where citizens and firms are enabled to solve their own problems through mediation and negotiation in out-of-court settlements. Yet, it would be fair to say that the administrative-organizational and legal-theoretical problem structuring has been less productive in creating double policy problems than the public choice frame.

See respectively Carl Böhmer, Gesetzesfolgenabschätzung (GFA) in Heinz Schäfers (ed.), Entstehung der Gesetzesfolgenabschätzung in Österreich und konzeptionelle Ausweitung (Manserche Verlags- und Universitätsbuchhandlung, Wien 2005), pp. 31–45; European Commission, supra note 7; OECD, supra note 8; Cabinet Office, supra note 11; <www.acatn.nl>.
instrument, (and) a reduction objective... (2) (to) introduce one objective test that dovetails with the main point of Cabinet policy... (and) (5) express all regulatory pressure objectives in one currency: the euro.”

The italicized (by RH) words clearly position CBA in the rationalistic, analytically driven and neo-positivist epistemological ambitions of the linear model of policy analysis as knowledge transfer by experts to political authorities. Needless to say, this model allows politicians to appeal to scientific expertise as a basis for their decisions. Only the EC guidelines, on paper, somewhat attenuate the positivistic aspirations. At least, they contain some post-posivist ideas that fit a more profound conception of policymaking: ex ante evaluation of legislation does not substitute for decision-making, but remains just an aid; in their final reports, analysts should not ignore but flag up uncertainties and pivotal assumptions in the analysis; and, finally, the analytic process is not entirely expert-driven but includes consultation procedures with stakeholders.

In the reports on actual use of CBA and handbooks or guidelines for ex ante evaluation of legislation a lot of “normal shortcomings” show up. It turns out that, like in the case of handbooks on uncertainty analysis and risk management in environmental policy, handbooks or guidelines on ex ante evaluation of legislation rarely inform actual practice (Veit, in this volume). No doubt, the most important complaint is that, so far, there are no clear signs that ex ante evaluation lives up to its promise of more enlightened political debate and illustrative use of information in political decision making. In that sense, ex ante evaluation of legislation does not differ from most other forms of ex ante policy analysis in the past and present. There appear to be numerous causes. Frequently, ex ante evaluation of legislation is squeezed in at the very end; it occurs too late or too downstream in the policymaking process to make a difference (for a particularly...)

clear example, Van Gestel and Vranken in chapter 9 of this volume). In these cases, narrow instrumental or political use of marginal knowledge production by experts during an ex ante evaluation is the best that can be hoped for. As far as political use is concerned, interestingly, in the UK, “many desk officers hold the view that the function of (regulatory, RH) policy assessment is to justify the burden on business and citizens created by regulation.” If there is a lack of (additional) analytic resources (while being burdened to capacity by other, more important normal tasks) and insufficient policy-analytic skills or methodological myopia (Van Aken, in the next chapter of this volume) non-use is very likely (see chapter 10 of this volume) – and even justified, I would add. Leaving ex ante evaluation of legislation to policy analysts that belong to the regular staff of lead agencies and departments, like in Germany (Veit, chapter 8 of this volume) and the EU, leads to a rather formalistic, ‘licking off’ mentality. Says one German analyst: “The regulatory impact assessment is just a little hoop we have to jump through... We try to assess the cost because we are required to do it.” Consequently, exploration of more than one policy option is often disregarded. Countries that entrust ex ante evaluation of legislation (also) to external bodies, like the USA, the Netherlands and Sweden (Veit, chapter 8 of this volume) appear to do a little better in this respect.

There are complaints about comprehensiveness in ex ante evaluations which also merit attention. Frequently, ex ante evaluations like CBA's are claimed to be lacking in promised comprehensiveness (Veit, chapter 8 of this volume). In principle, CBA’s attractiveness to policy analysts is that it allows them to decide whether investing in, e.g., wind energy production is better than administrative burden reduction, or the other way around. However, such conclusions are only warranted if all costs and all benefits of both options can be reliably measured and, properly discounted for future effects, expressed in monetary terms; and then related to utility functions expressing global economic efficiency or aggregate social welfare to determine their policy merit. The 'silo mentality' permeating bureaucratic politics normally prevents serious attention to aggregate social welfare. Rather, analysts in lead agencies and ministries focus on their own missions and objectives; a tendency hard, perhaps impossible to break.

This is even more so since measurement and expression of measurements in monetary terms is not possible for all problem dimensions. As is well known from other experiences, the urge to quantify has its opportunity costs. Even in the already limited case of ex ante evaluation for administrative burden reduction, some administrative burdens are easier to quantify than others. Visible,...
quantifiable reductions in administrative burdens are easier to achieve for business than for ordinary citizens. Information provision costs for enterprises implied by regulation are easier to capture in a Standard Cost Model, and consensual cost estimation is more likely for information costs than for other types of compliance costs. In the Netherlands, e.g., only in the year 2008 ACTAL is pushing to broaden the scope of its methods to include all compliance costs for enterprises. Similarly, the method was only recently pilot tested on administrative burdens falling on individual citizens. ACTAL follows a step-by-step target group approach, prioritizing citizens that particularly suffer from high administrative burdens like the chronically ill, the physically challenged, elderly social benefit recipients, and volunteer workers.42

In sum, only particular types of burdens for some social groups are measured, not all of them. Most conspicuously missing from *ex ante* evaluation’s claim to comprehensiveness is that burden reduction is just assumed to be beneficial, on average, for the short and the long term. Especially non-economic costs and benefits are excluded from the consideration in the present practices for conducting *ex ante* evaluations. There is no Standard Benefit Model to logically complement the Standard Cost Model.

On top of that, *ex ante* evaluations suffer from serious intellectual impediments in the *forecasting* of policy effects necessary for proper CBA. Intellectual challenges to modeling and forecasting in the case of normal economically focused CBA are difficult enough. It is only fair to observe that the state of the art in forecasting outputs and outcomes in *ex ante* evaluations of legislation was and still is underdeveloped. Forecasting provides information about future states of society, particularly expected policy outcomes – both in the case of unchanged continuation of current policies, and in the case of policy adaptation or radical changes. Forecasts come in three shapes. *Predictions* are based on the extrapolation of historical trends and data on the current situation into the future; if possible they use classical time-series analysis on an accurate data set reaching back far into the past. An example would be an extrapolation of the total number of rules contained in past and present laws or ministerial decrees. In the case of *ex ante* evaluation of legislation, extrapolative forecasting is still very much in its infancy. *Predictions* are derived from theoretical assumptions between causes and effects, combined with data about the past and the present. Econometric modeling of key economic indicators reflecting the (future) state of an economy is a well-known example. In contrast to some ecological and sustainability issues, theoretical forecasting in *ex ante* evaluations is way beyond reach. The third type of forecast is a *conjecture* founded in informed judgment, e.g. through conventional policy Delphi methods. But this is a questionable method in the case of *ex ante* evaluation of legislation due to the alleged impact of information asymmetries between the legislator-cum-*ex ante* evaluation-analyst and those stakeholders who possess relevant information, but have a strategic interest in hiding it (Bohne, chapter 4 of this volume).

The response of academics and professionals to information asymmetries is circumvention-through-standardization. In the case of *ex ante* evaluation of legislation, this response is the rapid introduction and spreading of the Standard Cost Model (SCM) (also Veit, chapter 8 of this volume). In order to be able to start working toward improved forecasts, the Dutch government established the above-mentioned temporary Advisory Board on Administrative Burdens (ACTAL). Similar advisory bodies with similar tasks were instituted in the UK, the Better Regulation Commission, in Germany, the Normenkontrollamt, and in Sweden, the intended Regelbör. ACTAL’s first task was to design a method for zero-measurements for the year 2002 of administrative burdens on enterprises derived from departmental laws and regulations. The method devised is to let experts and representatives from business jointly produce agreed upon but standardized judgmental forecasts for particular types of administrative burdens. Standardization is necessary for comparable quantitative data about all types of administrative burdens caused by laws and rules across departmental domains. Standardization is achieved mainly by imposing one identical system of cost element structuring, the Standard Cost Model. Costs are expressed as amount of Euros. An interesting feature of the method is that the cost estimation procedure allows for consultative interaction between experts and business representatives by way of panels, interviews and surveys in the production of consensus judgments. The effects of information asymmetries are circumvented by application of statistical methods detecting gross overestimation by self-interest stakeholders, and by comparisons between several commercial branches and between different countries. Also, once a benchmark year has been agreed between experts and stakeholders, governments and experts use historical data analysis over a few years to justify further reduction targets for stakeholders in later years. This is similar to the way Statistics Holland assembles and calibrates its data for the production of economic indicators. It reflects the neo-corporatist culture and structure of government policymaking in the Netherlands. It is a very instructive example of how official 'facts', 'data' and indicator systems are, literally, socially and politically co-constructed by government experts and stakeholder representatives.43 It is also a good example of how intelligent policy analysis (or puzzling) may inform more productive political interaction (or powering).

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42 See ACTAL, supra note 24, p. 24.

IV. Powering: Ex Ante Evaluation of Legislation as Political Arena

In section II I discussed an alternative depiction of policymaking as political struggle, in which policy analysis is not a substitute for politics, but is itself a method of fighting. In politics the questions, Who evaluates what, for whom, how, when, and why? define the nature and function of evaluation. And even though practices of (ex ante and ex post) policy analysis and evaluation can partly be measured by scientific standards, they are also political by nature. In section II it was observed how politics as sense-making and meaning-giving implied that political talk about evaluation itself is part of the political process. By speaking of fact-finding and evaluation as decision-oriented and learning-enhancing activities, policy analysts and evaluators claim a most important role in policymaking; they compete with other players in the political arena for attention, status, and power. On top of that, analysis and evaluation of policy is not restricted to data collection or fact finding. Even though positivistically inclined policy analysts and evaluators deny it, other policy actors will not believe them and quickly point out the errors of their thinking.

In the case of ex ante evaluation of legislation, the essential political purpose has been to rein in bureaucratic freelancing; and the use of CBA has provided the political protagonists with an initial screening device. From a profane, political view of policy and politics, CBA was a power mechanism and, simultaneously, a `scientific' mode of legitimizing their political purpose. Moreover, centralized regulatory review, whether by an Executive Office of the President (like in the USA), or by the Prime Minister's Cabinet Office (like in the UK), or by the Minister of Finance supported by an external advisory board (like in the Netherlands), also serves the political purpose of early warning system against policies that duplicate each other, or conflict with overall government policy guidelines, or the implementation of policy programs of other agencies. The Dutch ACTAL makes no secret of this political role. In its mission statement it stresses that reducing regulatory pressure means (1) "to call in one strong coordinating minister with interdepartmental project management", (2) to device an objective test which "dovetails with the main points of Cabinet policy" (italics, RH), and also (3) to "commit implementation organizations, fellow authorities and fellow government bodies and supervisors to the objectives of reducing regulatory pressures".

Clearance of departmental rule-making through centralized overview is a potentially significant addition to the normal power mechanisms through which executive political authorities (presidents, prime ministers, cabinets) may promote their political purposes through administrative processes. Traditional means all have an input character: budgets, spending powers, appointments, cabinet agreements, persuasion and/or political deals with department ministers — and all this on condition of parliamentary approval. Centralized regulatory review, in principle if not in actuality, enables central government authorities and bodies to screen rulemaking as major administrative output of individual departments or agencies. Of course, central government authorities already reviewed departmental proposals and may subject them to central government approval, in a cabinet meeting or a prime minister's or presidential office, before being sent to parliament. But certainly centralized regulatory review enhances central government's capacity to influence the exercise of normally distributed jurisdictions of departmental and bureaucratic policymaking. This may not go so far as to oblige departments to have 'regulatory calendars' to centrally monitor their legislative efforts in detail (like under Reagan in the USA); or to send them 'prompt letters' to signal the urgency of some politically desired legislative initiative. But the political 'groundwork' exists once ex ante evaluation of legislation and central regulatory review have been institutionalized. It will take quite some political alertness by individual ministers and agency heads to not let the possibilities for generalized political responsiveness inherent in this architecture overpower its original, single purpose of tackling regulatory rule pressure.

Thus, what is primarily an instrument for one particular policy purpose, serves equally as a potential means of centralizing power for key players in the government. Bohne (in the previous chapter) therefore correctly observes that ex ante evaluation, combined with central regulatory review, can be politically rational in marrying a policy logic of means-ends analysis to a political logic in gaining and/or maintaining power. In Germany, Sweden and the EU the centralized review element may still be more implicit and hidden. The limited powers of the federal government in Germany, and Sweden's allegedly 'rational' administrative culture may stand in the way of openly recognizing the political functions of ex ante evaluation-cum-central regulatory review. But the EC, after all the watchdog of the EU's political purposes and the only EU body

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45 See West, supra note 22.
46 See ACTAL, supra note 24, p. 6.
47 See West, supra note 22, p. 79, p. 83.
48 See West, supra note 22, p. 80, respectively p. 83.
competent to initiate new policy proposals, cannot but be aware of this informal and potential function.

Returning to the most important political question in *ex ante* analysis and evaluation, Who evaluates for whom? some important differences meet the eye. In some cases, *ex ante* evaluation is conducted by lead agencies and departments through their own career civil servants. Centralized regulatory review is weak or absent. This appears to be the case in Germany, and the EU's departments in Brussels. Obviously, politicians believe that the quality of *ex ante* evaluation and its political impact are best served by respecting the stability of existing administrative organizations, the continuity of their personnel, and upgrading career civil servants’ policy-analytic skills through central handbooks, guidelines, and special training. In other cases, centralized external bodies staffed by ‘political appointees/missionaries’ or ‘gatekeepers’ play a central role; although actual rule-making and design of legislative proposals remains a primary task of lead agencies and departments. This is clearly the case in the USA's OMB/OIRA as part of the Executive Office of the President under six administrations of both Republican (Nixon, Reagan, Bush Sr., Bush Jr.) and Democrat stripes (Carter, Clinton), and in the UK’s strong Cabinet Office, with, consecutively, a Regulation Unit under Conservative administrations (Thatcher, Major), and a Better Regulation Unit and Regulatory Impact Unit under Labour administrations (Blair, Brown). In the Anglo-Saxon world, bureaucracy and bureaucrats obviously are distrusted by politicians as inert at best, and acting in their own bureau political interests (maximizing budgets and policy scope, exploiting knowledge asymmetries) at worst. Hence, presidents and prime ministers have redefined the administration-politics dichotomy. They have severed the supposedly innovative political forces of *ex ante* and *ex post* policy analysis/evaluation from the inherently conservative mass of officialsdom and vested political interests. Instead of defining CBA as part and parcel of a bureaucracy’s neutral competence, they have used it as an instrument, wielded by external experts, for enhancing the bureaucracy’s and career civil servants’ political responsiveness.40 Shapiro, a one-time political appointee heading OIRA, has observed that when politics and analysis openly conflict, politics always trumps analysis.50

Apart from these two opposite types, there are also mixed cases. In the Netherlands, centralized regulatory review is one of the formal tasks of the Council of State. The Council is an independent organization, external to the administration judicial apparatus. It tests the quality of legislation by administrative organizations; only after its approval, these may be sent to parliament for final adoption. In chapter 9, Van Gestel and Van den Broek will show that, from a policy-analytic and political point of view, the Council of State’s centralized regulatory review is very weak. Due to its being understaffed and (from a policy-analytic point of view) underskilled, centralized regulatory review is too little; and due to its timing in the sequential process of policy advice, it is too late. However, the centralized regulatory review organized in the trial between the Minister of Finance, a central administrative body for interdepartmental project management made up of representatives of major departments, and ACTAL as well-staffed and expert advisory body, appears to be fully up to its task. One of its interesting features is that ACTAL somehow combines two distinct roles. On the one hand it acts as collaborative consultant and training center to single departments and agencies (also at lower levels of government); on the other, in its clearance of regulatory proposals and advice to the Minister of Finance, it acts in the heart of government as a watchdog or ‘gatekeeper’ for the special purpose of tackling regulatory pressure. Whether or not these inconsistent roles can be played in the long run is an interesting topic for further research.

In Sweden, too, there is a huge difference between the weak form of centralized regulatory review organized through its Government Office and central agencies, and the more concrete and impact-rich *ex ante* evaluations conducted by Commissions of Inquiry (Veit, chapter 8 of this volume). The Swedish commissions are in fact special purpose task forces to study particular subject areas of policy implementation in depth. A number of characteristics are important for mentioning. First, frequently, the commissions mix expertise and political rationality in their composition: experts, public administration representatives, stakeholder representatives, and MPs. Second, commissions are supported by experienced commission-secretaries, which do most of the ‘text-work’ implied in policy reporting. Such secretariats, like their counterparts in the Netherlands, become experienced boundary workers between commission members (as ‘agents’) and departments (as ‘principals’); an experience which is an invaluable resource for creative and productive relations and the ‘selling’ of the commission report. Third, commission reports, and sometimes interim-reports, are published and therefore accessible to the general public. Fourth, reports are subjected to a protracted consultation procedure.

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What is most remarkable about them is that, although analysis is constrained by strict governmental instructions, time and budget limits, the puzzling, in the spirit of Lindblom and Wildavsky, may be productive for the powering, compromising and consensus-seeking. The Swedish experiences therefore suggest that the political uses cannot be clearly separated from conceptual uses: a fair amount of 'enlightenment' sometimes occurs among the members of the committees as they are confronted with and forced to assimilate various stakeholder positions, knowledge and perspectives' (italics by RH). What may be concluded from the examples is that the practice of ex ante evaluation of legislation is much more contingent upon political contexts than it is dependent on methodological precepts. What is actually needed is thorough comparative study of practices of ex ante evaluation for presidential, Westminster and more consensus-type democratic systems. Special attention should be given to conditions, like in Sweden's commissions of inquiry or the Netherlands' ACTAL advisory commission, where puzzling apparently strengthens powering in the sense of producing 'serviceable truths'.

V. Ex Ante Evaluation for More Reflective Governance?

Ex ante evaluation-practices inevitably lead to a major question: may the executive parts of governments and government organizations ever be or become self-evaluative? Does it make sense to mobilize ex ante or ex post evaluators as change agents against the alleged inertia and conservatism of normal bureaucracy and career civil servants? Or is it more plausible, as West argues, that "...it may just be unrealistic to expect that bureaucratic agents charged with accomplishing the policy objectives of...political executives can do so by remaining non-partisan and objective." In other words, does ex ante evaluation-practice suffer from the normal tendency that political responsiveness drives out neutral competence; or are there possibilities in ex ante evaluation of legislation for more reflective governance? After all, by studying the potential impact of legislation and rule-application on the economy and society, public debate and political decision-making ought to become more informed and therefore enabled to arrive at more rational decisions. Reflectiveness about legislation and rule making as core governance instruments ought to lead to a wiser, more prudent use of those same instruments. In my view, there are two, not mutually exclusive, routes for ex ante evaluation of legislation to achieve somewhat more reflexive governance. The first route is to set about approximating the sacred ideal of policymaking through combining powering and puzzling in the creation of neutrally competent, independent ex ante evaluation-institutions (Bohne, chapter 4 of this volume). The alternative route is following Lindblom's advice to make the most of ex ante evaluation-practice by building on certain favorable ingredients of the profane story of policy-making.

More objective and balanced ex ante evaluation of legislation may be achieved by creating institutions that embody a reputation for neutral competence, independence as an antidote to (too much) political responsiveness, professional norms as a basis for interaction, and transparency as a resource for balancing views and shaming severe bias or abuse of analysis. Instead of having ex ante evaluation by centralized or departmental parts of the executive, the cases of commissions of inquiry in Sweden and ACTAL in the Netherlands, suggest that governments can also arrange for ex ante evaluation to be done at arm's length. Temporary advisory bodies or quasi-governmental think tanks outside of, but linked to executive agencies, may produce evaluations that are more credible and respected as neutrally competent in public debate. Their institutional design ought to reflect sufficient independence, but without becoming completely politically unresponsive. In order to be successful they would need a non-partisan leadership with tenure contracts independent from changing governments or elections; guaranteed funding that would not make them dependent on annual appropriations; but without giving them 'eternal' existence; and a regular analytical task which ties them into standard political routines, like budget policymaking or some annual or bi-annual state-of-the-nation reviews for parliament. Involving professions to make sure that professional and not merely political norms prevail in the practice of ex ante evaluation of legislation would also be desirable. Professional ex ante evaluation of legislation requires a balanced mix of three professions. Although the economic and the legal professions both provide norms relevant to ex ante evaluation across substantive policy areas, neither of these professions alone suffices. On top of that, as argued by Bohne (in chapter 4 of this volume) and above, ex ante evaluation badly needs ex post evaluation as a resource and quality check. This means that social science methodological

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57 In the Dutch system for expert advice, all major three government-sponsored think tanks – the Center for Economic Policy Analysis (CPB), the Environmental and Nature Assessment Agency (MNP), and the Social and Cultural Planning Agency (SCP) – reflect these three design elements for independence.
expertise would also have to be part of the interdisciplinary set-up of professional \textit{ex ante} evaluation (as will be elaborated by Van Aaken in the next chapter of this volume). One should be aware, though, that combining these three professional norms in one institute is not at all easy. Efficiency, justice, and scientific truth are not always mutually compatible professional values. Handling interdisciplinary professional conflict and prudence in balancing different professional angles will definitely be required of the leadership of a professional body for \textit{ex ante} evaluation of legislation. Once such professional bodies exist, it may inspire faculties of law, economics and social science to train students with a special view to these job opportunities. Also, with the existence of specialized university training and bodies of independent, professional \textit{ex ante} evaluation, (international) peer review may become an important factor in upholding professional norms and professional standardization in \textit{ex ante} evaluation of legislation.

More than possible for \textit{ex ante} evaluation in executive agencies, \textit{ex ante} evaluation in advisory bodies or quasi-governmental think tanks ought to be transparent for a wide audience. \textit{Ex ante} evaluations ought to be readily accessible to the public, for which internet portals provide excellent opportunities. Generally, \textit{ex ante} evaluation-bodies should follow the practice of publishing proposed rules, invite comments from immediate and hopefully also some not-so-immediate stakeholders, and responding to comments in its final proposals. Especially the Swedish commissions of inquiry show that transparency has its rewards in learning among stakeholders and improved debates in parliament. The expectation of outsiders’ scrutiny is a very important incentive for analysts and decision-makers to do a balanced and competent job, and argue their proposals in a comprehensive, fair, and clear way.\footnote{See Philip E. Tetlock, ‘An alternative metaphor in the study of judgment and choice: people as politicians’ in William M. Goldstein and Robin M. Hogarth (eds.), Research on judgment and decision making. Current, connections, and controversies (Cambridge University Press, Cambridge 1997), pp. 657–680.}

Yet, the strategy of improving reflexive governance through creating neutrally competent, independent bodies for \textit{ex ante} evaluation of legislation means creating a separate institutional niche at arm’s length of normal practice. Numerous studies have shown that these arrangements suffer from problems of up-take of their analytical outputs in the everyday arenas of politics and policymaking. Therefore, a second strategy may also be considered. It follows from Lindblom’s insight that, in politics, analysis is one way of conducting the political battle, but that one may still make the most of it.\footnote{See Lindblom, supra note 21, pp. 21–27.} In other words, instead of aspiring to approximate the sacred ideal of policy analysis in special institutes, one may also stick to the profane world of policy as political struggle over alternative policy proposals and yet use a number of opportunities to improve \textit{ex ante} evaluation from the ground up.\footnote{See Hertin, supra note 23, pp. 20–21.}

First, and contrary to the guideline and handbook approach which stresses rules for analytic method (like number of options, ways of quantification, \textit{et cetera}), practitioners of \textit{ex ante} evaluation could pay more attention to process. This involves mutually dependent issues like the scope and framing of the \textit{ex ante} evaluation of legislation and which participants to select for what kind of involvement at what stage of the process. Asking such questions automatically generates ideas about who may learn what from whom, and how to integrate such different perspectives. Although high levels of conceptual learning may stay out of reach due to participants’ unwillingness (information asymmetries) or sheer inability to transcend their own narrow self-interests, at least the odds for true policy-oriented learning are better than in purely administrative, expert and method-driven \textit{ex ante} evaluation inside executive agencies or departments. Second, also in contrast to the technical emphasis in guidelines and handbooks on the importance of ideals of completeness and quantitative measurement issues, \textit{ex ante} evaluation-analysts should be less wary of incomplete data and dare rely on grounded, qualitative datasets.\footnote{See Ray C. Rist, ‘Influencing the Policy Process With Qualitative Research’ in Norman K. Denzin, and Yvonna S. Lincoln (eds.), Handbook of Qualitative Research (SAGE, Thousand Oaks 1994), pp. 545–557.} Meaningful policy research is not restricted to positivist cost-benefit or cost-effectiveness analysis on which most \textit{ex ante} evaluation is modeled. Third, and this is equally applicable to the alternative strategy discussed above, \textit{ex ante} evaluation-analysts should not think of themselves as having a monopoly on ‘expertise’. This hardly helps them to safely navigate the deep waters of the relationship between science, policy, and politics. It is much more productive to think of themselves as ‘boundary workers’; people who know how to bridge the sometimes yawning gaps between science and political practice by both demarcating and coordinating these different institutional spheres in a creative division of labour.\footnote{See Willem Hallman, Boundaries of Regulatory Science (Albarros, Boechout 2003).} Paying more attention to process, framing \textit{ex ante} evaluation of legislation less positivistically, and defining it as boundary work, practitioners of \textit{ex ante} evaluation could start doing a more reflexive job in the nooks and crannies of the normal world of bureaucratic politics. However, perhaps the most important contribution to more reflexive governance can be made by sustained serious reflection on the relationship between the domain of law and the domain of public policy. Both in political and administrative practice and the academic discourses on public administration and political science, legal rationality is distinguished from professional/scientific, economic
and political rationality. Legal rationality comprises all the requirements for confidence in the law: equality before the law, legal security, and protection (of citizens) against arbitrary (government) action. Economic rationality calculates the attainment of a maximum positive difference between benefits and costs, derived from the efficiency principle in perfect markets. Professional/scientific rationality aims at valid (theoretically related) statements of cause-effect knowledge of specific subject areas, which plays an informative and/or critical role in the policy practices in specific sectors of society. Political rationality, finally, seeks to power maintenance for one's favorite collectivity; or, more broadly, it is the preservation of a sufficient amount of effective and/or symbolic problem processing capacity, and willingness to cooperate to this end, in a political system. The four rationalities in politics and policy may be considered as autonomous domains of discourse and practice in permanent boundary struggles. Each domain attempts to capture parts of the other domains by claiming the role of super-rationality overriding the other types. What is striking in the literature and practice of ex ante evaluation of legislation is the legal profession's naïveté about social scientific methodology, and its willingness to reflexively sacrifice its substantively rational function of normative constraint for the sake of the other types of rationality in the politico-administrative system. This aligns well with a macro-political trend of the retreat of the legislator and the professional trend in public administration and policy analysis to consider rules, decrees and laws as just one possible, convenient instrument in the governmental toolkit. However, in this toolkit-view of rules the legal acceptability of government actions is left undiscussed. (Public) law is supposed to serve a double function: both enabling legitimate government, and protect citizens from arbitrary action. To the extent prudent coping with ambivalences and ambiguities is political wisdom, keeping alive this continuous balancing between the functions of 'sword' and 'shield' of (public) law is the legal profession's most crucial contribution to reflexive governance. Applied to ex ante evaluation of legislation, it means it is high time for development of a Standard Benefit Model of legislation and rule-making for the present knowledge society.

See Christopher Hood, supra note 28.