Effectiveness: a new Constitutional principle

FLUECKIGER, Alexandre

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Effectiveness: A new Constitutional principle
Alexandre Flückiger*

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Bibliography

* Professor of Constitutional Law, Geneva University.

1. FROM THE PRINCIPLE OF LEGALITY TO THAT OF EFFECTIVENESS: AN EVOLUTION IN THE LEGITIMACIES OF STATE ACTION

1.1 Legitimation by legality

The principle of legality postulates that law is the basis for, and limit of, the State.¹ State activity is compared to the prescriptions of law. Where they are congruent, the activity is legal, and therefore considered legitimate. Where they diverge, legality and legitimacy end. And a State that persists in acting outside the law can no longer be considered respecting the principle of the rule of law. Although this principle is fundamental, it presents serious limitations in contemporary society because the figure of law has difficulty governing them. Today the mandatory, general and abstract nature of that principle is a grave impediment to running a democratic society, since law is easier to impose in a pyramidal, unitary and hierarchical context. Respecting the principle of legality in an environment where law must govern complex situations that are non-reproducible or uncertain leads, at best, to an illusion of legitimacy, since the values underlying this principle (the foreseeable nature of decisions and judgments that are based on it; the rationality of law that anticipates the rationality of individual acts; the democratic principle and the separation of powers that is its institutional result; the guarantee of equal treatment) cannot be guaranteed in such a model. Requiring compliance with legality for its own sake can, on the contrary, create the dangerous illusion that such values can be preserved simply through compliance.²

1.2 Legitimation by effectiveness

To mitigate the shortcomings of legality, the advent of the managing State extends the analysis in terms of effectiveness. Henceforth, it is no longer comparison with the terms of law that legitimates State action, but the differential between the goal of a public policy (of which law is but one

¹ Title 5, paragraph 1 of the Swiss Federal Constitution.
² Atius, 1999, p. 277 s.
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component of implementation) and the actual effects observed in the field. It is no longer a matter of simply enforcing compliance with standards, but of evaluating the results achieved in implementing them. The principle of effectiveness thus requires that we select the instruments most likely to orient the behaviour of individuals in the policy's targeted direction and abandon instruments that have proven ineffective. The action's success justifies the chosen means while failure discredits it. The evaluator succeeds the judge.

This form of legitimation, however, is no less simplistic than the previous, as it amounts to justifying action by performance alone. It is managerial in nature and is part of economist and self-regulatory thought, like economic analysis of law or system theories. Yet State action cannot be legitimated by effectiveness alone. On the one hand, measurement of effectiveness is sensitive, and one illusory legitimacy should not be replaced by another, which would only masquerade as objectivity. For example, how can we measure the achievement of imprecise or contradictory objectives? How can we determine the quality of performances that are impossible to assess quantitatively? How can we guarantee the pluralism of evaluations to highlight underlying values? On the other hand, legitimation by performance alone is constitutionally excluded. The principle of effectiveness must therefore be in counterpoint to legality, rather than in dissonance with it, and cannot be weighed with the same intensity as the other principles of the rules of law, notably public interest and proportionality, as we will see.

While the rule of law has led to control of legality and the managing State has generated control of effectiveness, no State has yet introduced legitimacy controls, as François Ost and Michel van de Kerchove point out. Another way must therefore be found to legitimate the State in its non-imperative action. For example, we could again make use of the underlying bases of legality (i.e., rationality, democracy and equality, in particular) and gradually identify the conditions and mechanisms that would allow the State to regulate society based upon them.
2. A DEFINITION OF EFFECTIVENESS

Effectiveness usually means the nature of that which produces the expected effect. In everyday language it also refers to the ability to produce maximum results with minimal effort or expense.\(^8\)

Terminology is vague, both in the administrative and legal sciences. The concept is generally broken down into specific terms to reveal and emphasize its particular aspects from the perspective of legislation and public policy analysis. Many definitions have been suggested. Here we examine a triad of terms that restricts the definition of effectiveness and distinguishes it from efficacy and efficiency.\(^9\)

According to these authors, effectiveness “strictly speaking” is a measure’s ability to achieve the objectives set out by the law or public policy. It is measured in terms of outcomes, that is, the series of effects that are causally attributable to a specific public policy.\(^10\)

Efficacy,\(^11\) on the other hand, indicates the degree of congruence between the objectives set and the actual behaviour of target groups. It is gauged by its impact on these groups, that is, by their change in actual behaviour further to outputs provided by the entities and persons responsible for implementing a public task (for example, decisions, contracts, material actions, planning actions, etc.). Efficacy is assessed based on indicators that vary according to the type of standard to be executed: degree of implementation, degree of observation (for obligations), degree of use (for rights) or degree of attention (for persuasion measures).\(^12\)

Finally, efficiency compares the resources invested in a law or public policy and the outcomes. It results from cost/benefit analyses when the objects to be compared are monetarily quantifiable or from cost/efficacy analyses showing the relative difference in cost between alternative measures, without estimating absolute values.\(^13\)

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\(^11\) On the history of this concept in the sociology of law, see Lascoumes/Serverin 1986.

\(^12\) "Evaluation législative" working group 1991, p. 15; Bussmann, Klöti, Knoepfel (Ed.) 1998, p. 97.

\(^13\) Bussmann, Klöti, Knoepfel (Ed.) 1998, p. 106 ss; Mader, 1985, p. 82 ss (using the term cost-effectiveness [p. 88]).
In short, a policy or standard is effective if its outcomes match its objectives; it is efficient if the resources required to do so are economic. However, it is ineffective, even if it offers numerous outputs and results in many impacts, when it yields mediocre outcomes counter to all expectations.\textsuperscript{14} Contrary to popular opinion, effectiveness is thus measured neither by the outputs supplied or used nor by the change in the actual behaviour of target groups (efficacy). This means a law can have efficacy, i.e., be applied and followed, but be perfectly ineffective.

3. THE LEGAL NATURE OF THE PRINCIPLE OF EFFECTIVENESS

3.1 The constitutionalization of the principle

The principle of effectiveness with respect to the Confederation’s measures is now entrenched in the Federal Constitution of April 18, 1999:

“Evaluation of effectiveness – The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness. (Art. 170 Cst.)”

Article 170 Cst. is not limited to public law alone, but includes all federal laws as well as their resulting measures.\textsuperscript{15} This provision amounts to the constitutional consecration of a theory and practice developed progressively in the discipline of legislative evaluation and that is becoming increasingly widespread both at the canton and federal levels. The principle of effectiveness was in fact already known, whether generally or specifically, directly or indirectly, through numerous evaluation provisions set out in both cantonal and federal law.

The juridicization of effectiveness is not unique to Switzerland. The French Constitution has given Parliament the authority to evaluate public policy since 2008 (Article 24, paragraph 1):

“Parliament adopts the law. It controls Government action. It evaluates public policy.”\textsuperscript{16}

\textsuperscript{14} Büssmann, Klöti, Knoepfel (Ed.) 1998, p. 69.
\textsuperscript{15} Feuille fédérale, 1997, III, 290.
\textsuperscript{16} [Translation] See also the assistance competence of the Court of Auditors [Cours des comptes] in public policy evaluation (article 47-2, paragraph 1).
While the principle of effectiveness can be shown to exist, that does not yet mean it can be placed at the same level as other constitutional principles, like the guarantees of the rule of law in particular; their juxtaposition in some of the above provisions should not mislead us. Title 5 of the Federal Constitution defines the principles of the rule of law. Effectiveness exists on another level. It is provided for only indirectly in article 170 Cst. in the sense that the constituent, by signifying that Parliament must ensure that the effectiveness of the Confederation’s measures is evaluated, wishes to implicitly state that federal action must be effective. However, the constituent deliberately gave this principle a status other than the guarantees of the rule of law: not only do the systematics of the Constitution show this by its location in the table of contents, but the wording itself clearly specifies that this principle is subject to evaluation and not, for example, to decision (whether judicial or administrative).

3.2 Measurement of effectiveness versus measurement of legality

Whereas violation of the principle of legality can be sanctioned by a judicial or administrative decision, failure to respect the principle of effectiveness will be revealed through evaluation. The jurist’s conventional methods and tools fall short when effectiveness is in play. Evaluation conveys a conception of rationality that differs from the traditional conception of the rule of law, whose generality and abstraction require concretization in a specific case. Effectiveness involves observing the effects of law in the reality of its implementation, not just studying case law, which can no longer be considered the exact reflection of law’s application in this context. This means that “to measure the overall effectiveness and justice of a law, one must take into account not only its legal texture, but also the materiality of its implementation.”

It follows that the principle of effectiveness is not justiciable in the same manner as that of legality, for example. While the latter can be judged directly by a court, the former does not fall under a judge’s jurisdiction for the reasons
stated earlier. The judge is not an evaluator. If the judge became one, he or she would overstep the judge’s office, which is to ensure correct application of the standard. In expressing an opinion on the effectiveness of legislation or a policy, the judge would risk bearing a politico-administrative responsibility that is not part of his or her institutional office: if a law or public policy does not produce the desired effects, citizens must look to the government, rather than the judge, for action. Judges must therefore show a certain restraint in this regard.

However, this does not prohibit judges from dealing with the principle of effectiveness. Quite the contrary: as the commissions of the federal Parliament’s political institutions reiterated, the results of the evaluation must provide useful information, including to the courts, which may use them to perfect their apprehension of facts, refine their understanding of a rule’s objectives (a prerequisite to teleological interpretation), or verify the aptitude criterion in the test of proportionality.

The courts’ acceptance of the principle of effectiveness and methodical evaluation of that principle might be based on Germany’s Constitutional Court, which, admitting the inherent uncertainty of State interventions, was not satisfied with them. The Court, in jurisprudence constante, requires the legislator to systematically collect and analyze the data needed to evaluate the law’s effects and to correct the law based on that evaluation when it has concerns regarding its effects on basic rights. In this case the judge is not acting as the legislator, nor does the judge become the evaluator: rather, he or she factors in the principle of effectiveness by instructing the institutionally competent authority to include that principle in its action as a decision criterion.

However, the main censor of the principle of effectiveness is not the judiciary power. The Parliament and the government have greater responsibility to the extent that their action should incorporate an evaluation’s findings without provoking political debate. Requiring the respect of effectiveness adds another element of rationality to the process of forming the will of authorities by providing a benchmark for policies.

As we see, the principle of effectiveness is part of a different logic than that of the guarantees of

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20 See in this regard Moor, I, 1994, ch. 4.3.3.2 p. 385.
the state of law. At the legal level, the principle of effectiveness is a useful complement to the principle of legality when the latter reaches its limits, that is, in a context where respecting legality for its own sake leads only to an illusion of legitimacy. In this case, the principle of effectiveness becomes, like other mechanisms, a way to offset the inadequate legitimation that stems from diminishing normative density. “A legitimacy based on the regularity of implemented procedures and on compliant conduct and behaviour is replaced by a legitimacy based on the effectiveness of actions and on the ability to achieve objectives set in advance,” states Jacques Chevallier. However, the scope of this change must be tempered with a reminder that legitimation by effectiveness is precarious, as explained earlier: “Legitimation by effectiveness is much more fragile than traditional legitimation, which is based on respect for the principle of the rule of law. It is harder to establish, because it requires considerable material means. It is always disputable, because no evaluation can provide absolute certainties. It is shifting, because a change in circumstances can call it into question. Legislative evaluation never enjoys the privilege of the force of a settled matter.”

Socio-politically, the principle of legality is a perfect counterweight to an approach based solely on effectiveness. State activity, and administrative activity in particular, cannot be reduced to managerial imperatives alone. Where the pursuit of effectiveness fails to guarantee public services that respect the State’s democratic basis and infringes fundamental constitutional values, the principle of effectiveness must be relativized. François Ost reminds us that “one must recognize that the legitimacy of a rule is not measured exclusively by its efficacy, effectiveness or efficiency. It is also, and especially, we might say, a function of its ability to produce balance between justice and security, in accordance with legal forms, which are as many guarantees against the arbitrary.”

For the judge, the principle of effectiveness, arising indirectly from article 170 Cst., cannot be weighed with the same intensity as the principle of the rule of law, since it does not share their
status, as we have seen. In the event of open conflict, the scale must therefore tip in favour of the principle of legality or of the public interest in particular. The principle of effectiveness can only be part of this context as a complement, filling in where other principles fall short.

To sum up, we find, as does Jacques Chevallier, a hybridization of the logic governing the public right of action: legal rationality is imbued with that of effectiveness and, conversely, managerial rationality is amended by the principle of legality. The two logics are therefore augmented and enriched by their contact. Law has evolved toward greater effectiveness while management must deal with the principle of the rule of law.

4. EVALUATING EFFECTIVENESS IN AN EMERGENT ENVIRONMENT

4.1 The need to leave behind the goal-centred process

In defining effectiveness as a measure's ability to achieve set objectives, we aim for an ideal situation consisting of objectives that are clear, unambiguous, specific, easily measurable, operational, precisely determined, explicitly expressed, stable, certain, convergent and non-contradictory. In practice, such conditions are rarely met. Identifying objectives is a crucial preliminary step of any analysis of legislative effectiveness. Determining the effectiveness of a standard is very difficult unless objectives have been defined with a minimum of precision. How can effectiveness be evaluated in a rigorous, scientific manner if the fundamental benchmark that serves as the basis for reasoning (the law's objectives and goals) is imprecise, changing, elusive, and virtually indiscernible? How can one avoid the temptation of reconstructing a reading of the goals after observing the law's true effects, in order to arrive at the degree of (in)effectiveness that one wishes to demonstrate?

This difficulty is made more problematic with the transformations of contemporary law, in particular with the advent of the reflexive State's relational programs. In this system, vague objectives become vaguer because these
legal structures “admit, from the outset, the possibility of drift because they are part of the internal reflexive structures of regulated systems, as well as because they are open to absorbing emergences at the implementation level,” as Charles-Albert Morand synthesizes.\(^\text{33}\)

The very effectiveness of reflexive law depends on its ability to integrate, as circumstances evolve, the emergence of goals and measures that are both new and unexpected. In the economic sciences, Henry Mintzberg makes a very useful distinction in understanding the problem: he distinguishes between control of “planned performance” (analyzed in terms of the intentional strategy that sets objectives in advance) and control of “strategic performance” (analyzed in terms of the emergent strategy that arises from the evolving situation).\(^\text{34}\)

The underlying model in the definition of the principle of effectiveness is, in this configuration, much too linear and rigid, even if it takes into account the loops of retroactivity in the purposes-means-evaluation-adaptation schema. The evaluation can no longer be considered just a sanction of the administration’s inability to achieve the objectives of goal-centred legislation,\(^\text{35}\) like a judge before the rule of law. Nor can it simply, faced with such loose objectives, limit itself to measuring the disparity between the goal(s) and the effects of the law in its social and natural environment without being suspected of a certain credulity. This discrepancy, which is referred to as a “deficit of execution” in the administrative, political and legal sciences, should, as Jean-Daniel Delley rightly points out, instead be redefined as an “active attitude of re-appropriation of the legislation by those who apply it and those for whom it is intended in order to achieve their own objectives [...]. In light of the characteristics of legislation and public policy [...], we should instead refer to activation of the legislation’s potential scenarios rather than to a deficit [of execution], a term that indicates an action’s non-compliance with the normative model.”\(^\text{36}\)

An evaluation of effectiveness must therefore be part of a model other than that of the goal alone. This problem was identified early on in the evaluative sciences and has been the topic of wide-ranging debate.\(^\text{37}\)
Accordingly, some have suggested expanding the field of analysis to all effects, not just an analysis of efficacy, efficiency and effectiveness per se, due to the difficulty of defining vague and evolving objectives as well as the importance of unexpected effects.\textsuperscript{38} This brings to mind, in particular, “goal-free” evaluation,\textsuperscript{39} which attempts to include undesired effects, intended or not, in the analysis.\textsuperscript{40} Others have also suggested using a systemic model.\textsuperscript{41} Dissatisfied with earlier theories, still others have proposed alternative models like theory-driven evaluations.\textsuperscript{42} Similarly, a reflexive approach to evaluation based on a legistic emergent planning model, for example,\textsuperscript{43} is also an attempt to solve this problem.

Nevertheless, from the perspective of the principle of effectiveness, evaluative techniques that challenge the purely goal-centred model and claim to disregard goals hold a logical question for our definition: if we are to explain effectiveness in relation to objectives, disregarding them would prevent us from assessing this principle within the meaning we have assigned it.

As such, we are suggesting another potential solution: to consider the concept of effectiveness from another angle.

4.2 Toward a new conception of effectiveness: From the discrepancy between model and reality to exploiting a situation’s potential

The earlier problem stems from the fact that effectiveness is defined based on a series of objectives that are set in advance and that must be achieved.

Can we conceive of this principle without setting a model as a goal and without making the distinction between theory and practice that inevitably involves a disparity, echoing the sanction-evaluation?

In fact, François Jullien, a contemporary philosopher and sinologist who finds inspiration in Chinese philosophy of the 4th, 5th and 6th centuries before our era,\textsuperscript{44} suggests in his work \textit{Traité...
de l’efficacité that we radically rethink effectiveness in this way.45 He shows that our civilization, descending as it does from Greek tradition,46 conceives of effectiveness only based on the abstraction of ideal forms set as goals that must then be made a reality.47

In Jullien’s view, it is nonetheless possible to envision another approach wherein success does not arise from a model that serves as a standard for action, but from an ability to identify favourable factors at work in the course of events, to rely on that which is fruitful and on a situation’s potential and to subtly harvest the fruit of its evolution.48 From this standpoint, a situational event is no longer an unexpected factor that may upset the plan; instead, thanks to its mobility, it becomes a tool that can be profitably employed to influence the situation.49 With such a system, the variable, unexpected or uncertain is no longer a problem we dread because it threatens the targeted model, but indeed the very element that drives effectiveness.50 It follows, then, that strategy is no longer predetermined. It takes shape only in relation to a situation’s potential,51 with regulation arising from continuous compensation of the polarities.52

The two basic concepts at the heart of this theory are, first, the concept of situation or configuration, as it becomes a relationship of power and, second, the concept of potential, as this situation entails it and which can be advantageous.53 A situation’s potential is like a torrent that charges through a narrow but deep river bed, generating a force strong enough to move or wear down rocks: the situation itself is a source of effect.54 It will be up to the commander to find success in this potential instead of asking his soldiers to do so; depending on his ability to muster support, he will make them cowardly or courageous.55 If potential is identified early, obtained and used in one’s favour, then victory arrives of its own: however heavy the rocks, they will be easy to roll on a slope, though difficult to move by force.56

If we reframe the issue at the legal level, pursuing this path is destabilizing because it seems to

45 Jullien, 1996.
46 François Jullien reminds us of the métis, or cunningness, that existed in ancient Greece and that sophists began to explore (Jullien, 1996, p. 19). However, the Greeks were unable to theorize it and the concept remained undeveloped (ibid., p. 20). Jullien believes that exploring this concept would allow an unfettering from the schema of the model set as a goal for its action (ibid., p. 222 s).
47 Jullien, 1996, p. 11.
48 Ibid., p. 28.
49 Ibid., p. 34.
50 Ibid., p. 36.
51 Ibid., p. 35.
52 Ibid., p. 220.
53 Jullien, 1996, p. 29.
54 Ibid., p. 29.
55 Ibid., p. 30.
56 Ibid., p. 227.
involve questioning the division between the structure of law and its very conception with the State's introduction of goal-centred programs to counter unemployment, pollution, exclusion, etc. \(^{57}\) The standard, which had so far been entrenched in a bipolar relationship with its application in the case at hand, develops through a management structure based on action governed by purpose, means and their evaluation. \(^{58}\) This concerns the law of both the propulsive State and the reflexive State, since the latter also entails objectives, means of action and evaluation, though more flexible. \(^{59}\) The same can be said of the persuasive State since it remains in the sphere of reflexive law. \(^{60}\)

Yet the beliefs of ancient Chinese thinkers are too analogous with the transformation in contemporary law to doubt on their veracity. Both the former and the latter show, for example, the limitations of set standards. Compare in this respect the touted “end of fixed rules,” to emphasize the role of guiding principles in how public policy law operates, \(^{61}\) with Li Ch’uang’s interpretation of the Sun Tzu: “Now when troops gain a favourable situation the coward is brave; if it be lost, the brave become cowards. In the art of war there are no fixed rules. These can only be worked out according to circumstances.” \(^{62}\)

However, analogies find their limit in the apologia for Chinese stratagems of deception held up as the founding principle (“The whole art of war is based on deception”), \(^{63}\) strategic manipulation \(^{64}\) as well as a certain cowardice (“avoid what is strong and [...] strike what is weak”). \(^{65}\) Note also that the issue a crucial one for a democratic State of legitimizing processes to continuously adapt rules to circumstances should be addressed.

However, in our view, the Eastern approach is a fresh and beneficial perspective on the evolution of law, in particular because it forces us to relativize the importance of objective identification and evolution. It also pushes us to abandon the purely goal-centred mode, despite the fact that it clearly cannot be conceived in its absolute form in a democratic State. \(^{66}\)

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\(^{57}\) See the concept of “plan-program,” the legal nature of which we analyzed elsewhere (Flückiger, 1996[b], p. 14 ss).

\(^{58}\) Morand, 1999, p. 76.

\(^{59}\) Ibid., p. 132.

\(^{60}\) Ibid., p. 160.

\(^{61}\) Morand, 1996.

\(^{62}\) Sun Tzu, 1972, ch. V, ad § 19; p. 127.

\(^{63}\) Sun Tzu, 1972, ch. I § 17 p. 95.

\(^{64}\) Jullien, 1996, p. 163 ss.

\(^{65}\) Sun Tzu, 1972, ch. VI § 27 p. 137.

\(^{66}\) Morand, 1999, p. 128.
This outlook requires us to *rethink the concept of effectiveness outside of the purposes-means context*. In doing so, emphasis would shift to the ability to perceive, detect and anticipate early enough the most minute indicators of change in a situation where we need only allow its potential to unfold. Effectiveness would then become the ability to identify, then exploit, a *promising* factor, i.e., a factor whose promise is to develop as a means of support. Conceived in this way, effectiveness would begin to move in the direction of *efficiency*. Moreover, it would justify enveloping all those effects that converge to make a policy successful, including emergent (unwanted, out-of-bounds) effects. Finally, it would contribute to shifting the focus of effectiveness from planned performance (analyzed with respect to an intentional strategy that sets objectives in advance) to the evaluation of “strategic performance,” within the meaning inferred by Henry Mintzberg (analyzed with respect to the emergent strategy, revealed only in the unfolding of the situation).

To conclude, this conceptual change would contribute to the realization that continuous transformation of reality, unceasing changes in network imbrication, the complexity resulting from differing rationalities, and the resulting uncertainty are not a public policy trap the State must navigate, but the very building blocks of effectiveness. This shift in perspective should reassure those observers who are destabilized by the description of a complex world, and of law that is but an elementary reflection of that complexity.

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67 Ibid., p. 84 ss, 224.
68 Ibid., p. 7.
69 Ibid., p. 145 ss.
70 Mintzberg, 1994, p. 359.
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