

MONOGRAFICA / 2

CONTEMPORARY AND MULTIDISCIPLINARY PERSPECTIVES ON LAW AND POLICY EVALUATION

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Contemporary and Multidisciplinary Perspectives on Law and Policy Evaluation. An Introduction

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ABSTRACT

Although public policy evaluation, program evaluation and legislative evaluation have often run parallel, they share some common concerns, such as – in a world where evaluation is supposed to influence policy and law makers – questions of social justice and democracy (including equal participation) in the evaluation process, as well as of establishing what kind of rule people are more likely to follow. Without claim of completeness, this introductory note describes some paradigms and approaches emerged in the field of evaluation, while in the last paragraph it provides an overview of the contributions to the monographic part on *Contemporary and multidisciplinary perspectives on law and policy evaluation*.

KEYWORDS

Legislative and policy evaluation, impact assessment, effectiveness, social justice, rule-following

Contemporary and Multidisciplinary Perspectives on Law and Policy Evaluation. An introduction*

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1. Premise – 2. Questions of social justice and democracy in evaluation – 3. Effectiveness and rule-following – 4. Structure of the monographic part.

1. Premise

Public policy evaluation (MARTINI, MO COSTABELLA, SISTI 2006; MARTINI, SISTI 2009), program evaluation (GUBA, LINCOLN 1989; GUBA 1990) and legislative evaluation (FERRARI 2004; PRINA 2016; REHBINDER 1972; ROTTLEUTHNER 1983) have often run parallel without many opportunities to share a common space for reflection. The idea of this brief monographic part, which includes contributions by Luigi Cominelli, Donna Mertens and Koen Van Aeken, originated with the idea of presenting some recent approaches to one or more of these kinds of evaluation in order to stimulate further joint and interdisciplinary debates and see how they can inform each other. There is a great need in many countries to develop such a discussion on both theoretical and practical aspects, and especially in Italy, where the Italian Senate's Impact Evaluation Office (Ufficio Valutazione impatto del Senato) was created by former Senate President Pietro Grasso only in 2017¹, although there had been previous experiences both at the Chamber of Deputies and Senate.

The term “evaluation” itself can be defined in different ways, depending on the disciplines, literature and very different approaches adopted (see at least GUBA, LINCOLN 1989; GUBA 1990; PENNISI 2008; VAN AEKEN 2011a; VAN AEKEN 2011b; VAN AEKEN 2018; for a bottom-up perspective, see BENEDI LAUHERTI 2013; GRIFFITHS 2003; GRIFFITHS 2005; for the counterfactual impact evaluation, see MARTINI, MO COSTABELLA, SISTI 2006).

More generally, even a cursory literature review reveals that, for a long time, there were significantly fewer legislative evaluations and related studies than public policy and program evaluations. As FERRARI (2004, 161) recalls, there was lively interest in the so-called Knowledge and Opinion about Law (KOL) studies in the 1970s and 1980s, but this decreased over time, with some exceptions. Also,

* I am very grateful to the contributors and co-editors for their feedback on the first draft of this introduction.

¹ See also the Osservatorio sull'Analisi di Impatto della Regolazione (Osservatorio AIR), available at: <http://www.osservatorioair.it/losservatorio/> (accessed 30 May 2018).

outside the sociology of law, «social science (meta-)interest in laws as a manifestation of policy is meagre. As a result, not much is known about the contents and functioning of *laws* as a whole nor about the content and quality of legislative *evaluations*» (KLEIN HAARHUIS, NIEMEIJER 2009, 419). In more recent times, however, there has been a flourishing of evaluations of regulation and related studies both in Italy and abroad².

Although public policies, programs and legislation are very different concepts³, have specific functions and have often been objects of different disciplines, their evaluation shares some common challenges. Additionally, the studies performed in each field can provide insights in others as well, by possibly contributing to the development of a general theory of societal regulation and by gathering information on how to improve public actions (MADER 1985).

Moreover, public policies, programs and legislation are becoming increasingly intertwined. In many cases, public policies are not directly generated by legislation and, vice versa, the implementation of legislation is not necessarily supported by public policies (REGONINI 2001) or programs realising them. However, in many others, legislation is but one element of, or is linked to, wider public policies. These interventions should also prevent law from remaining merely empty words “in the books” and should foster its implementation and effectiveness. An example of this kind of intervention concerns EU antidiscrimination legislation: in the Green Paper on *Equality and non-discrimination in an enlarged European Union*, the EUROPEAN COMMISSION acknowledged that «the effective implementation of non-discrimination legislation depends on the commitment of national authorities, the active support and involvement of civil society and complementary support for non-legislative measures to combat discrimination» (2004, 7).

Klein Haaruus and Niemeijer examined 75 legislative evaluation reports in various policy areas in the Netherlands between 1998 and 2005. Their review provides interesting insights, revealing that laws very often encompass public management interventions directly addressing executive bodies and aiming at «realizing self-regulation, transparency and autonomy of executive bodies» (KLEIN HAARHUIS, NIEMEIJER, 412). These scholars conclude that «because of their inherent complexity, researchers should consider most laws as policy programmes. The objective of fully understanding their functioning presents evaluators with a number of methodological challenges. An important challenge is to reconstruct the programme theory, that is, how the various interventions in a

² See at: <http://www.astrid-online.it/> and <http://www.osservatorioair.it/losservatorio/> (both accessed 30 May 2018).

³ Public policies are commonly defined as a «set of linked actions of varying complexity and intensity that is designed to resolve (or attempt to resolve) a public problem» (MARTINI, SISTI 2009, 22; PRINA 2016); depending on the discipline, “program” can be defined as short-term and specific delivery tool of public policy to provide goods and services (cfr. SHADISH, COOK, LEVITON 1991); for the definition of law, see FERRARI 2004.

law were supposed to bring about change in the behaviour of target group members – and to what extent this occurred in practice» (KLEIN HAARHUIS, NIEMEIJER, 420).

In all cases, both institutions and citizens show a growing interest in both evidence-based policy and understanding the consequences, i.e. the effects, of a given policy (SISTI 2006, MERTENS 2018a, PRINA 2016), law (FERRARI 2004, PRINA 2016) or program (GUBA, LINCOLN 1989) on the target groups. Today's complex societies – that are often characterised by legal pluralism, increasing inequalities in the allocation of scarce resources and neoliberal imperatives – confront law and policy makers with as many complex public problems. In this type of scenario, the effectiveness of a given public policy becomes «one ingredient of “good governance”» (SISTI 2006, 11; in the same vein for legislative evaluation see VERSCHUUREN, VAN GESTEL 2009) and its evaluation serves many purposes, such as understanding whether public financial resources were used well or wastefully in past interventions and which policies and programs deserve further investments. As far as law is concerned, in multi-level governance like the European Union (EU), Member States «become co-actors in a multi-level network of law-making where national parliaments and European institutions feeds the quest for a reduction of uncertainties in the legislative process» (VERSCHUUREN, VAN GESTEL 2009, 4). They need to harmonise their national legislation with EU hard law provisions, which coexist with other regional and national pieces of law on subjects ruled out of EU competencies.

In the EU, it is common knowledge that Italy is one of the countries with the highest number of laws (LONGO 2017, 86) and it is obvious that a systematic legislative evaluation would probably serve the purpose to ensure quality of legislation, identify the merely symbolic effects of many laws (HASSEMER 1989) and, on another issue, determine whether existing laws should be amended or new laws be issued. While much effort has been dedicated to ex post evaluation, ex ante evaluation (or impact assessment, see VAN AEKEN 2018, in this Journal) – «that aims at predicting snippets of the future» (VAN AEKEN 2009, 105) – has become popular mainly since the early 2000s. Although many such studies are limited to cost-benefit analyses (VERSCHUUREN, VAN GESTEL 2009), several reasons point to the need to adopt ex ante evaluation more broadly, such as «the growing complexity of legal systems in Europe»; «a growing attention for principles of accountability and good governance»; «a growing fear for regulatory accretion»; and more transparency in the legislative process (all quotations are taken from VERSCHUUREN, VAN GESTEL, 4). The need for ex ante evaluation seems even greater for legislation than for public policies and programs. Indeed, «once a piece of legislation has been enacted, it will be difficult to change it substantially, let alone to totally revoke the draft-Bill, even when [ex post] evaluation shows that the legislation has little or perhaps even an

adverse impact» (VERSCHUUREN, VAN GESTEL 2009, 4). On the contrary, findings about the ineffectiveness of specific public policies or programs could cause policy makers to decide not to finance them in the future. This is particularly true when public policies and programs include a so-called “sunset clause” (CAPPELLETTI 2016), a tool that is not yet very widespread in legislation and that makes further financial support to public policy and programs contingent on the findings of ex post evaluation.

This monographic part identifies two main concerns in evaluation, whether public policy evaluation, program evaluation or legislative evaluation: questions of social justice and democracy in evaluation (§ 1) and the relationship between effectiveness and rule-following (§ 2).

2. Questions of social justice and democracy in evaluation

If evidence-based policy and evidence-based law are needed, then evaluations are supposed to influence policy and law makers. In this scenario, the evaluator acquires a relevant political role «even when he does not aspire to it» (CRONBACH 1980, 67). This issue raises questions of social justice and democracy⁴, including equal participation in the evaluation process.

As Mertens underlines in her contribution in this Journal, closer cooperation between evaluators and policy makers is needed to make findings accessible, while there is also a need to take human rights and social justice into consideration by including the perspectives of those beneficiaries whose voice is not heard in society. Some of these issues were already discussed in the Eighties by Guba and Lincoln (GUBA, LINCOLN 1989), who introduced a Fourth Generation Evaluation (see also VAN AEKEN’s contribution in this Journal) as an alternative route to previous generations characterised by measurement (First Generation Evaluation), description (Second Generation Evaluation) and judgement (Third Generation Evaluation) (GUBA, LINCOLN 1989). As Van Aeken asserts in his contribution, Fourth Generation Evaluators «were committed to “bringing men back in”» (HOMANS 1964, quoted in VAN AEKEN 2018, footnote 10, 297).

Guba and Lincoln enucleate three paradigms⁵ that had dominated in the previous generations of evaluations and that they call the positivist (or conventional) paradigm, the post-positivist paradigm, and the critical theory

⁴ See also Cominelli’s contribution to this Journal, for issues related to the consistency of nudging with democracy.

⁵ In his work *Structure of Scientific Revolutions* (1962), Kuhn explains the basic beliefs that guide scientific research, how they are challenged and how they lead to a paradigm shift in the field of natural science. When situations arise that cannot be managed by the existing science paradigm, a scientific revolution occurs, opening the door to a new and more adequate approach.

paradigm. Then, they introduce the constructivist paradigm, proposing a «responsive constructivist» approach (GUBA, LINCOLN 1989, 38; cfr. VAN AEKEN 2011b, who speaks about “interpretivist paradigm”) in which parameters and boundaries are negotiated with stakeholders, rather than being determined *a priori*.

In the constructivist paradigm, axiology implies raising participants’ awareness and providing different points of view, while its ontology states that reality is socially constructed. Its epistemology does not rely on objectivity (unlike the previous post-positivist paradigm). Instead, knowledge is produced by the interaction between the evaluators and participants, who are considered “equal partners” (GUBA, LINCOLN 1989, 11). In terms of methodology, this paradigm does not dismiss quantitative methods (GUBA, LINCOLN 1989, 42), although qualitative ones are preferred. In a feminist perspective, the constructivist turn has been acknowledged to include «an ontology of becoming» and a «theory of agency» (both in LOCHER, PRÜGL 2001, 111) that become relevant in evaluation as well, by considering stakeholders and participants on an equal footing with evaluators and by exploring the process of social change caused by public policies, programs and laws. Despite that, one of the main objections to constructivism is that, even though it seeks to reconstruct realities by giving voice to people in research and evaluation, it often leaves the understanding of power relations under-theorised, and, in doing so, it does not really challenge existing social structures or openly advocate for change. In this way, constructivism runs the risk of being liberalism «in a new cloth» (LOCHER, PRÜGL, 113), which carries two main consequences: by valuing each and every individual’s perspectives, it virtually accepts even the most racist ones, and does not consider power asymmetries in knowledge production.

In Guba and Lincoln’s taxonomy, some of these aspects are taken into consideration in what they call the critical theory paradigm or, as Guba himself suggests «ideologically oriented inquiry» (GUBA 1990, 23) that relies on a wide range of theories, «including neo-Marxism, materialism, feminism, Freireism, participatory inquiry, and other similar movements as well as critical theory as well» (GUBA 1990, 23). Although this paradigm aspires «to transform the (real) world by raising consciousness of participants so that they are energized and facilitated towards transformation» (GUBA 1990, 24), its limit is that its subjectivist epistemology still seems to serve a realist ontology (characterising the positivist paradigm of evaluation), or in the best case, a critical realist ontology (typical of the post-positivist paradigm).

Mertens’ well-known transformative paradigm⁶ relies in part on Guba and Lincoln’s critical theory paradigm, in that it explicitly addresses power imbalances

⁶ For a schematic description of research and evaluation paradigms, see MERTENS 2010, 11.

and admits aforementioned critical and participatory theories as a theoretical basis. Among the underpinnings of this new paradigm is the idea that «addressing issues of power, discrimination, and oppression can play a key role in redressing inequities» (MERTENS 2009, 3).

This new paradigm emerges «partially because of dissatisfaction with the dominant research paradigm and practices and because of limitations in the research associated with these paradigms that were articulated by feminists, people of color, indigenous and postcolonial peoples, people with disabilities, members of the lesbian, gay, bisexual, transsexual, and queer communities, and others who have experienced discrimination and oppression, as well as other advocates for social justice» (MERTENS 2010, 22; see also MERTENS, WILSON 2012). Many dimensions of diversity should be included in the evaluation in order to assess the effectiveness of policies and programs. Like Guba and Lincoln, Mertens also considers participation to be a crucial aspect in evaluation, but highlights the importance of acknowledging that social positioning generates «various versions of reality» (MERTENS 2010, 11) and that power inequalities should be addressed in order to strengthen less empowered persons' agency even in their co-operation with the researcher/evaluator. Both quantitative and qualitative methods are admitted, including mixed methods that, as the author explains in her contribution to this Journal, have the advantage of «establish[ing] a dialogic relationship along with a deep contextual understanding» (MERTENS 2018b, 255). In this way, evaluation also becomes democratic exercise.

The issue of evaluation – both policy and legislative – as a tool to foster democracy and «the democratic quality of legislation» (VAN AEKEN 2018, 274, see also DE BENEDETTO ET AL. 2011) also lies at the heart of the contribution of Van Aeken, who explores «the potential roles and practices of “democratic evaluation” in present-day Western liberal democracies» (VAN AEKEN 2018, 273), beyond the meaning that it held in other conceptualisations (e.g., «from “participation” to the more radical notion of “empowerment”» GUBA, LINCOLN 1989, quoted in VAN AEKEN 2018, 273).

It is a fact that in modern democracies, many social actors (e.g., NGOs, experts, lobbies) participate in the law-making process along with political parties within parliaments (PRINA 2016; VAN AEKEN 2018) and civil society's interests don't always prevail over those of economic lobbies. These social dynamics can be counter-balanced by evaluation as an alternative democratic engagement, provided it regains its scientific nature (VAN AEKEN 2018, in this Journal). Another aspect that is still often under-estimated and under-explored is the role of legislative drafters in evidence-based legislation (SEIDMAN, SEIDMAN 2009, see footnote 8 below).

3. *Effectiveness and rule-following*

Another common concern that gains importance when evaluating the effectiveness of public policies, programs and legislation⁷ is establishing what kind of rule people are more likely to follow. In the field of legislative evaluation, ROTTLEUTHNER (1983) explains that some of the most interesting aspects explored by studies on legislative effectiveness are questions like why some laws are effective and others are not and why people obey or disobey a law. These questions have been given different answers, for which I recall the rich literature on the topic (AUBERT 1967; FERRARI 2004; GEIGER 1964; ZOPPEI 2017). After decades during which top-down and instrumentalist legislative evaluations prevailed, BENEDI LAHUERTE (2013) explains that rule-following has been analysed from a bottom-up perspective more recently. The scholar herself adopts this approach by relying on Griffiths' social working of law (2005). The main question Griffiths raises is «[u]nder what conditions do people follow a (legislated) rule» (GRIFFITHS 2003, 73). According to this scholar, «there are two critical prerequisites for rule-following: knowledge and interpretation of the applicable facts and knowledge and interpretation of the applicable rules» (GRIFFITHS 2005, quoted in BENEDI LAHUERTA 2013, 4)⁸ and the focus must be on rule-following on the “shop floor” of people's social life, as well as on considering how this level of social life is organised.

As part of a thorough theory of social control, Griffiths attempts to articulate an explanatory theory of rule-following (GRIFFITHS 2003, 73) that he deems applicable to «non- “legal” rules» as well (GRIFFITHS 2003, 74). This scholar concedes that the rational “legislate-and-sanction” approach does not persuade every individual who might be influenced by other contextual and contingent factors, and the organisation of social relations on people's “shop floor”, including how the law has been mobilized at the local level (BENEDI LAHUERTA 2013, 4). Although, by his own admission, Griffiths does not solve the theoretical question regarding the very concept of “following a rule” (2003, 74) and assumes that «the idea [of “following a rule”] is conceptually coherent and can be empirically operationalized» (GRIFFITHS 2003, 74), he starts from the idea that «social behavior is, to a far greater extent than is often recognized, rule-guided behavior» (GRIFFITHS 2003, 75). According to him, for instance, «the degree to which and the circumstances under which legal rules are followed in bureaucratic behaviour are

⁷ For different ways in which effectiveness has been defined, see at least FERRARI 2004; LA SPINA, ESPA 2011; least MARTINI, MO COSTABELLA, SISTI 2006; MADER 1985; MADER 2001; PRINA 2016; REHBINDER 1972; ZOPPEI 2017.

⁸ Although Griffiths does not address the issue of drafting, it is worth mentioning that according to Seidman and Seidman, drafters fail to predict behaviours and, therefore, drafting effective laws «lies embedded in the four fall-back methodologies that, the world around, drafters commonly adopt» (SEIDMAN, SEIDMAN 2009, 448).

regarded as dependent above all on the social organization of the bureaucratic shop floor» (GRIFFITHS 2003, 64).

The issue of rule-following, of course, can be addressed from many other and very different perspectives from Griffiths' one. For instance, Cominelli's contribution discusses "nudging" (THALER, SUSTEIN 2009; COMINELLI 2015 and 2018b), in which policy and law making borrow information from behavioural sciences and dismiss the traditional "carrot-and-stick" pattern. In this case the state is the starting point, rather than the social field (as in Griffiths' approach)⁹. In a nutshell, "to nudge" means «to "gently push" or "elbow" someone into doing something» (2018a, 293; see also COMINELLI 2018b). This can happen in several ways: a simple example is the tobacco packaging warning message. The scholar underlines (2015) that this new tactic can be considered a nuanced version of a «libertarian-paternalism approach through incentives/disincentives» (COMINELLI 2015, 225) and paves the way to alternatives to traditional regulation, although it does not imply indiscriminate deregulation. Rather, by uncovering the cognitive framework in which common people take decisions, it seeks to understand human decision-making and influence it. Of course, while behaviourally-informed intervention by law and policy makers has its own advantages, such as its educative potential, it also involves risks since it must not violate individuals' freedom of choice. Governments around the world are relying increasingly on nudging to refine public interventions (ALEMANNO, SIBONY 2017).

4. *Structure of the monographic part*

The three contributors to this monographic section come from different geographic and disciplinary backgrounds. They approach evaluation in a complementary manner that paves the way to further reflections on how policy, program and legislative evaluation can learn from each other.

The collection starts with Donna Mertens' contribution *Transformative Mixed Methods and Policy Evaluation* that explains how transformative mixed methods evaluation can address relevant variables that foster use of evaluation findings for policy making. To explain the application of the transformative framework to policy evaluation, she describes the case of policies related to drug use and mental health in the United States.

The second essay on *Legislative Evaluation as Alternative Democratic Engagement* by Koen Van Aeken zooms on the role of legislative evaluation as a tool to

⁹ I am particularly grateful to Koen Van Aeken for his remarks on this point.

reinforce democracy in public decision making, with particular regard to the case of Belgium.

Last but not least, Luigi Cominelli's contribution *Framing Choices to Influence Behaviours: A Debate on the Pros and Cons of "Nudging"* critically discusses the potentialities and constraints of nudging, from the micro-sociological and cognitive point of view.

Despite the small size of this monographic part, as co-editor, I trust that the variety and contemporaneity of the presented approaches will be an interesting starting point for a broader reflection on evaluation and nurturing between policy, program and legislative evaluation. Therefore, I thank Luigi Cominelli, Donna Mertens e Koen Van Aeken and for their contributions and their commitment to this project. I would also like to thank Monica Cappelletti and Giorgio Pino for co-editing, as well as the journal *Diritto e Questioni Pubbliche* (more precisely editors Giorgio Maniaci, Giorgio Pino and Aldo Schiavello as well as Marco Brigaglia) for granting the space for it.

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