

Adán Nieto Martín  
Marta Muñoz de Morales Romero  
*Editors*

# Towards a Rational Legislative Evaluation in Criminal Law

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# Preface

The evaluation of any public policy, legislative policies included, should be an obligation for any government. To put it differently, evaluation should be considered as a rule that no lawmaking actor of the twenty-first century should overlook. Therefore, evaluation agencies, in the case of Spain the AEVAL, should be provided with the best appropriate means to carry out its functions. The misrule of educational policy and also of many other public policies would probably not exist if legislative amendments had been introduced bearing in mind evidence of what works and what does not. The same may be said in relation to criminal policy, where the governments' whim leads to criminalise or decriminalise offences or to introduce, without any empirical evidence, fundamental changes in the system of sanctions or penalties, which result in serious restrictions on the freedom of citizens as probation and, especially, life imprisonment with parole.

In the context of the EU criminal law, although there is, undoubtedly, a greater evaluation culture, it cannot be said that the situation is substantially better. Anyone who has consulted the impact assessments previous to the adoption of a European legal instrument after the *White Paper on European Governance* is able to notice that there is not a model neither a clear assessment methodology. Therefore, EU impact assessments are more a formality than a true exercise of legal motivation.

With the aim of launching a criminal debate on the need for evaluation of criminal policies and, what is more complex and ambitious, for developing an evaluation method, the Spanish Ministry of Economic Affairs approved in 2012 the funding of a research project titled "Towards a rational evaluation of European criminal laws" [*Hacia una evaluación racional de las leyes penales europeas*] (Ref. DER2011-28225). Soon after starting our journey, Professor José Luis Díez Ripollés, a pioneer in Spain in researching these issues, launched the Spanish Group on Criminal Legislative Policy. Within this framework, an opportunity arose to conduct a joint investigation. Collaboration took place during the course of two seminars held at the Faculty of Law and Social Sciences, on 17 December 2013 and on 30 June 2014.

The result is the book that is now presented and whose strength lies in its strong holistic approach. Accordingly, the book is translated into an attempt to address all

key aspects of the issue: from theoretical-practical analysis on how evaluation should be done (Chap. 1) to studies of a procedural or formal type in relation to the adoption of criminal laws at a national level (Chaps. 4 and 5), in Sweden (Chap. 6) or in the EU (Chap. 9), to questions of legislative technique (Chap. 7) and adjustment of criminal laws to the basic principles of the discipline (Chap. 10) and to the constitutional control of criminal laws (Chaps. 12 and 13). The book also deals with the importance of statistics in carrying out quality evaluations (Chap. 2) and with what may be one of the newest topics such as the use of costs, cost-effectiveness and cost-benefits in the evaluation of criminal policies (Chap. 3) and the contribution of economic studies in the configuration of criminal principles as the harmfulness principle (Chap. 10), as well as the possible criminal liability of members of Parliament for having voted a law whose consequences have not been fully evaluated (Chap. 8).

All these questions appear in the book grouped into five thematic parts. Under the heading “Fundamentals of Policy Evaluation”, the first part pays attention to the methodology for public policy evaluation in general (Chap. 1), the preparation of criminal statistics (Chap. 2) and the analysis of costs, cost-effectiveness and cost-benefits (Chap. 3). From a methodological perspective, the two key ideas that are often overlooked, in the words of Alberto Muñoz, are the configuration of evaluation as a continuous and permanent process, which goes beyond the traditional *ex ante* and *ex post* dichotomy, and the necessity to establish evaluation criteria since the law is drafted: An act cannot be evaluated if the objectives that it seeks to achieve have not been foreseen in it.

As the majority of criminal policies are laid down in the EU, Ana Pérez’s contribution in Chap. 2 reveals how difficult it is to prepare reliable criminal statistics in order to compare successfully crime rates in different EU member states. Nevertheless, the use of standard offence definitions in the databases, the compilation of data on new forms of crime and the enhancement of cooperation between the academia and political representatives would contribute to the use of statistics as a means of evaluation. Finally, Iñigo Ortiz de Urbina, in Chap. 3, rejects the idea that the inclusion of costs, cost-effectiveness and cost-benefits as criteria for the evaluable quality of a norm implies detachment from the axiological dimension of criminal law. On the contrary, this type of analysis is necessary and also mandatory according to Article 88 of the Spanish Constitution, to guarantee rational criminal policies. However, practice shows that they are rarely done and, when they do, they are of dubious quality.

The next part of contributions analyses the state of affairs in Spain. In Chap. 4, Samuel Rodríguez highlights the normative efforts to introduce an evaluative culture in Spain. In particular, he looks in detail at the memorandum on the regulatory impact analysis introduced by the *Royal Decree 1083/2009 of 3 July*. However, he also claims that the memorandum has received little attention in the context of the adoption of criminal acts. Sometimes no regulatory analysis is presented; sometimes they are presented but just as a formality as it happened with *Organic Law 5/2010* and more recently with *Organic Law 1/2015* amending

the criminal code. In other words, impact assessment reports only have cosmetic effects because they do not carry out an in-depth analysis of the relevant questions. Faced with the lack of an evaluation culture of criminal acts, José Becerra proposes in Chap. 5 specific institutional and conceptual reforms in the pre-legislative or governmental phase. Regarding the proposals for institutional redesign, the creation of a *Criminal Policy Division* in the Ministry of Justice is stressed. It would be composed of permanent staff, specialising in criminal matters, which would advise the government in the initial phases of the definition of the problem. With regard to the criteria of rationality, his starting point is José Luis Díez Ripollés' model of rationality, distinguishing five levels of rationality: ethical, teleological, pragmatic, formal-juridical and linguistic rationality.

Part II also concerns with other particular experiences. In Chap. 6, Manuel Maroto performs a detailed study on the legislative procedure in Sweden. The contribution shows the great importance in that country of relying on the opinion of experts when adopting a criminal act. Likewise, he underlines how the courts use the reports on evaluation to interpret and implement a criminal law. Despite the above, the author also notes a certain decline in the rationality of Swedish criminal norms. In Chap. 7, Marta Muñoz deals with the US situation to highlight the way in which the use of a defective legislative technique is one of the grounds of irrationality in the American criminal system. She concludes with proposals at national and European level, such as the resort to a grading scheme (a system that groups by grades all the crimes together depending on their seriousness and that attaches a common penalty to them), as well as the use of sunrise provisions which force the government to inform the Parliament on the legislation that has been adopted and to prepare periodic reports on the act. In Chap. 8, Andreas Hoyer takes a step forward to support the criminal liability of elected representatives who vote for a criminal norm under political and media pressure in the absence of a serious evaluation on the consequences of the legislative reform. This part finishes with a contribution from Fernando G. Sánchez-Lázaro. In Chap. 9, the author notes that the regulatory impact analyses completed in the EU are also defective, because of the very few times they are done and also of the lack of quantitative, clear and specific evaluation criteria. Afterwards, he proposes the possibility of quantifying weightings on proportionality and of evaluating the principle of legality understood as a mandate for determination, through the analysis of technical-legal semantic normativity.

Given the close relationship between legislative evaluation and criminal principles, Part III deals with some of these principles. In particular, Chaps. 10 and 11 reinterpret the principle of proportionality and harmfulness with a view to make them "evaluable". On this point, the contribution of Ana Prieto (Chap. 11) upholds the need to distinguish between the principle of proportionality in a broad sense at an external and internal level in which the principles of necessity and proportionality operate in a broad sense. In particular, she supports that the evaluation of the principle of *ultima ratio* or subsidiarity should focus on whether there are measures other than criminal ones that also have optimal or reasonable efficacy. In Chap. 10, a specific target of Pablo Rando is to verify to what extent the contributions from the economy can benefit the debate on criminal harmful (social damage) in crimes against intellectual



property. After a detailed analysis of numerous economic studies, the author shows that it is easier to ascertain that piracy reduces music sales than to argue the contrary. However, the author also indicates that “not all piracy behaviour contributes to that damage” and, in consequence, only particularly serious behaviours should be criminalised. The problem is that economic studies are not useful to determine the point from which criminal protection would have to be chosen.

Constitutional courts’ control over a criminal act has been a controversial topic for a long time. The fourth thematic part is devoted to this issue. In Chap. 12, Juan Antonio Lascuráin supports a moderate control. The guiding criterion, which has also been followed by the Spanish Constitutional Court, is a deference criterion towards the legislator. Legislator has been chosen by the people and therefore it enjoys a direct legislative legitimacy which constitutional courts do not. Therefore, there is an *ius tantum* presumption of constitutionality of the law that is much more difficult to rebut when the control over the law is based on principles. In Chap. 13, Luis Vélez argues in favour of the constitutional control over criminal laws. His starting point is also the greater democratic legitimacy of the legislator although he shows that such an attribute is not real. As a large number of authors have highlighted, decision-making procedures are not nowadays democratic enough. Hence, constitutional control plays a role at least to review whether a criminal act has been adopted in the framework of a process that has taken into account all potential stakeholders and that is based on reliable empirical data (e.g. on probability analysis). The above opens up the possibility that the results obtained through an evaluation may be used by constitutional courts to decide on the legitimacy or unconstitutionality of a norm.

The book closes with Chap. 14, in which, as a conclusion, Adán Nieto conducts a cross-cutting analysis of all of the above. Thus, the historical evolution of the crises of rationality and legitimacy with the different proposals of legislative science is presented. Among these proposals, he upholds control over the constitutionality of criminal laws in connection with the principles of matters reserved to law and proportionality and the use of experimental legislation to evaluate the efficacy of a law on the basis of empirical data.

Despite the praiseworthy attempt of the book to deal with the various profiles and consequences that evaluation implies for criminal policy, this publication is only a starting point, which will be largely achieved its objectives if, as previously pointed out, it seeks to put on the agenda an evaluation culture in criminal matters. Undoubtedly, Springer’s help, accepting the publication of this work, will be an important step forward towards our goal.

2 March 2016

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**Part I**  
**Fundamentals of Policy Evaluation**

# Chapter 1

## Theoretical and Procedural Aspects of the Evaluation of Public Policies

Alberto Muñoz Arenas

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### 1.1 Introduction

Laws are the result of a political process, the purpose of which is to intervene in and to regulate areas of social life and activity. They are therefore, like any public policy, programme or action, open to evaluation.

The analysis of legislative policies is closely connected with the need to ascertain whether laws are useful, rational, coherent and effective; whether they serve the purpose for which they were passed. The introduction of evaluation into normative areas is, in itself, an indicator of improvements in legal and democratic quality, as well as a constitutional guarantee of the protection of the constitutional rights of the public (Montoro Chiner 2000–2001, p. 155 ff.).

However, such a purpose is usually found in political and technical cultures, in which the regulations are not designed to establish these fundamental questions. In many cases, the introduction of this tool of analysis in the regulatory area is limited

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to mere impact, or contents itself with an *ex ante* and *ex post* summary of events. However, evaluation should not be constrained by the perception that it is an isolated one-off activity to monitor results, but should be seen as a continuous and permanent *process* throughout the life of the norm, from the point at which it is designed. Only in this way may regulations be equipped with elements that make their evaluation possible.

In this short paper, I seek to illustrate some theoretical and procedural aspects of evaluation that make it a sound scientific tool for the analysis of public policy. To do so, I shall situate evaluation within the sequential analysis of public policies. Subsequently, I will approach the concept of evaluation and the different components that form it. I will continue with other descriptive elements such as the characteristics, the objectives and the different classes of evaluation. Finally, I will summarise the standard procedure for conducting an evaluation.

This perspective permits those with an interest to observe the contrast between the potential benefits of evaluation and the habitual practice of legislative evaluations. Lessons may be learnt from it to improve and to strengthen this specific area of work.

## 1.2 Evaluation in the Sequential Framework of Public Policies

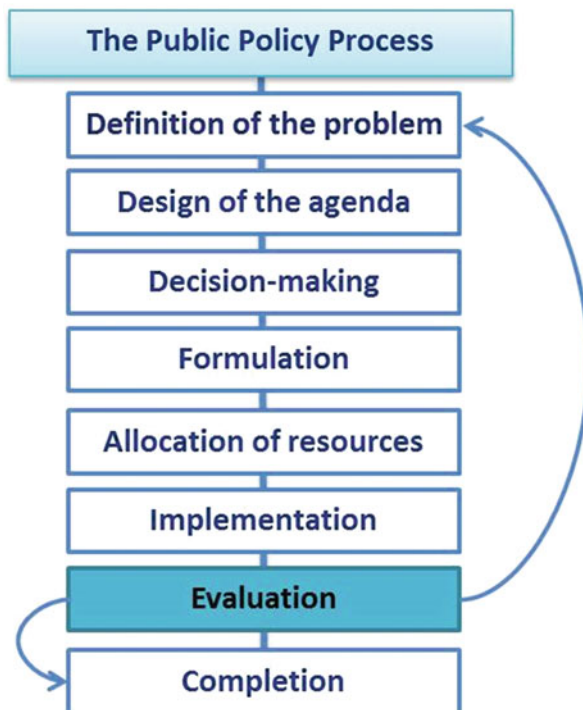
An approach to evaluation begins with the preliminary need to establish some particular sort of framework for the study of a specific subject, such as public policy, in general, or legislative policy, in particular. Focusing on this subject implies defining its boundaries, structuring and organizing its study through criteria that simplify its complex reality, without losing the overall perspective (Meny and Thoenig 1992). Although different analytical frameworks exist, I shall use the most generalized in this field: the sequential framework of policies. It is in this framework that evaluation arises as an action and as a process that helps to give coherence and rationality to political action and to examine it and to judge it in a rigorous way.

This analytical approach contemplates public policies as a *process* divided into different phases or stages that constitute a cyclical sequence (Fig. 1.1).

In the first place, the problems likely to be tackled by the political action are identified. These problems are defined and detailed in the agenda of a political body. Different solutions are then sought out and decisions are taken to establish some plan of action in relation to the problem. Having prepared the plan, the necessary resources are allocated for its implementation. Finally, the whole process is evaluated to establish the extent to which the problem has been reduced or eliminated. The evaluation can restart the cycle once again, or lead to a new phase in which the policy that has been applied comes to an end.

Thus, this framework not only allows the analysis of policies and regulations, but their preparation, which gives it a clear theoretical and practical function. In the

**Fig. 1.1** Cycle of public policies



words of Roth (2008, p. 78), “this sequential perspective constitutes an excellent gateway to the study of public policies due to its didactic, heuristic and perhaps esthetic qualities, as well as its flexibility and adaptability.” However, despite its generalization and effectiveness, it has received some criticism, probably because of its excessively reductionist view of reality. In effect, Parsons (2007, p. 114) feared that this approach would present an artificial and excessively rational vision of the formulation of public policies; it “imposes stages on an infinitely more complex, fluid and interactive reality”. Nevertheless, this type of objection should be relativized if the general scheme proposed for the sequential framework is taken “more as a support in the search for meaning in the decisions that are taken in the public policy framework, than as something real and traceable” (Subirats et al. 2012, p. 44).

The utility of this framework appears reasonable in the regulatory framework that concerns us here, as in many cases it suffers from a degree of improvisation and merely declaratory definitions, such that a sequential framework helps to arrange and to formulate objectives and paths of action. In addition, regulatory activity not only confronts material realities, but others that are more difficult to objectivize, social and relational values, etc., for which analytical tools are advisable that help to order and to hierarchize elements with complex interrelations. But in addition, legislative policy will have consequences and will generate impacts on other policy

sectors, which will make it necessary to impose boundaries and to define the limits of its action, the resources that are committed and shared, the alliances with other administrative areas, etc. This work is facilitated by sequencing the stages of the process in great detail and by defining the possible links, at each stage, with other bodies and interventions.

### 1.3 The Evaluation of Public Policies

I refer to the works of Ballart (1992), Bustelo Ruesta (2001) and Martínez del Olmo (2006) in the development of this section, as they are considered to set out and to explain the most relevant theoretical and conceptual aspects of the evaluation of public policies.

#### 1.3.1 Concept of Evaluation

Evaluation is presented as the last phase in the public policy process. Although neither designed nor treated as an essential element in the utopian scientific framework of public policies in general, it has provoked greater interest in the academic field and in certain areas of public life (above all in education and in social services). As a consequence of these efforts, we obtain a wide catalogue of definitions that help us set the boundaries of the term (Table 1.1), from which some common elements may be drawn on the basis of which to define the concept of evaluation.

From these definitions, we can draw some common elements of the concept of evaluation. These elements are the subject, the procedure and the role of evaluation (Bustelo Ruesta 2001) (Fig. 1.2).

The *object* refers back to the question of *what* to evaluate. In this sense, the evaluation has as its object “any social intervention that seeks to approach a public problem” (Bustelo Ruesta 2001, p. 30), whether of a general (*policies*) or a specific (*regulations, programmes, plans, etc.*) nature. And, among these interventions, the object of the evaluation has been changing over time. Thus, we have moved from a posteriori evaluations aimed at results and the impacts of public policies, to evaluations directed at the design of a public intervention and the specific intervention process. This greater diversity of objects has generated different classes of evaluations as will be seen further on.

Procedure, for its part, refers to how public evaluations are performed. Evaluation implies an intellectual and scientific process in which *awareness* of the objectives to achieve is implicit; these are, likewise, articulated around a *methodology* that structures the working process in a rigorous way following a *logical sequence* that compiles, interprets and values the information on the object (*policies, regulations, programmes, results, processes, impacts, etc.*) of the evaluation.



**Table 1.1** Some definitions of the term ‘Evaluation’<sup>a</sup>

Tyler (1950)	<i>The process of deciding to what extent the objectives of a programme have been reached</i>
Epstein and Tripodi (1977)	<i>Evaluation is the process by which the efficiency and the effectiveness of a programme are analyzed. This implies the collection, analysis and interpretation of information on the achievement of the objectives of the programme in relation to its forecast</i>
Joint Committee on Standards for Educational Evaluation (1981)	<i>Systematic investigation of the worth or merit of an object</i>
Cronbach (1980)	<i>Provision of information for decision-making in relation to an intervention</i>
Espinoza Vergara (1983)	<i>To evaluate is to compare at a given time what has been achieved through an action with what should have been achieved in accordance with the question</i>
Chelimsky (1985)	<i>The application of systematic research methods for the evaluation of design, implementation and effectiveness</i>
Patton (1987)	<i>Consists in the systematic compilation of information on the activities, the characteristics and the results of a programme for use by a specific group, in order to reduce uncertainty, improve effectiveness and to take decisions in accordance with what is being done with the programme and who it is affecting</i>
Rossi and Freeman (1989)	<i>Systematic application of the procedures of social research in order to value the conceptualization, the design, the execution and the usefulness of the programmes</i>
Monnier (1995)	<i>Pluralist initiative the core of which is the system of actors who are involved and the purpose of which lies in evaluating the foundation of a public intervention, based on the comparison of its effects with the current value systems</i>
Dye (1995)	<i>Objective scientific analysis of the short-term and the long-term effects of policies, both on social groups and in situations for which the policy is designed as well as on society at large, and the analysis of current and future cost ratios of any of the benefits that have been identified</i>
Vedung (1997)	<i>Careful retrospective valuation of the merits, importance and worth of the application, productivity and results of governmental interventions</i>
Gerston (2010)	<i>Evaluation assesses the efficiency of a public policy with regard to the perception of intentions and results</i>
Birkland (2011)	<i>Evaluation is a process of investigation aimed at determining whether a programme has achieved the desired outcomes</i>

<sup>a</sup>Author’s own basing on Bustelo Ruesta (2001), Tyler (1950), Epstein and Tripodi (1977), Joint Committee on Standards for Educational Evaluation (1981), Espinoza Vergara (1983), Chelimsky (1985), Patton (1987), Rossi and Freeman (1989), Monnier (1995), Dye (1995), Gerston (2010) and Birkland (2011)

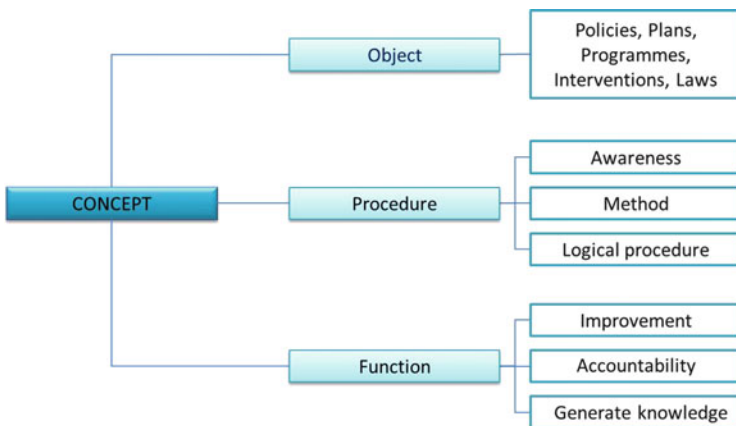


Fig. 1.2 Components of the evaluation concept

The last component of the evaluation concept, the why and wherefore of its completion, is its *function*: the reason for which the evaluation is done, or in other words, the use to which it will be put. In this sense, there is unanimity over assigning three essential functions to an evaluation, so that it may be considered as such: *to improve* the public action (policies, regulations, programmes) under evaluation; *to be accountable*; and/or *to generate knowledge* with a view to future evaluations.

In the first place, evaluation is done for the purpose of improvement. Thus, “evaluation aspires to guide improvement and mastery of the programme” (Vedung 1997, p. 139). It is, therefore, a function that assumes a service or its improvement (Stufflebeam and Shinkfield 1995), both in a strategic and a technical dimension. Authors such as Anderson and Ball (1978), have therefore considered that this function determines the educational nature of an evaluation, as it helps to modify and to improve programmes and public policies, based on what has been learnt in earlier cycles and processes. In consequence, so that this function is really effective, evaluations should be sufficiently flexible to incorporate rapid changes and adjustments in the programmes.

In second place, a function related to responsibility may be recognized in evaluation directed at *accountability*. This evaluation of responsibility serves to “facilitate information on those responsible for the programmes and policies for decision taking” (Martínez del Olmo 2006, p. 180). Hence, evaluation may be understood as a mechanism that guarantees responsible compliance with the principal contract/agent (Vargas Hernández 2008). And, following Martínez del Olmo (2006), the aforementioned function of responsibility may be understood in a twofold policy-making and administrative sense. From a political point of view, the evaluation of responsibility implies satisfaction with the democratic commitment established between the public and their political representatives. In this sense, evaluation determines the level of compliance of public responsibility, in

other words, the degree to which political representatives have achieved their set objectives and the rationality with which the resources entrusted to them within society have been used. There again, the evaluation of responsibility analyzes the degree and the way in which the bureaucratic apparatus of the State (the Administration) has understood its compliance with political objectives and resource management. Thus, we find that the evaluation of responsibility implies the existence of two levels of supervision. One that is bottom-up, of the technical-administrative level of the policy, which comes before another that is top-down, which is the political level of the individual citizen. The idea of Lipsky (2010, p. 160) is verified in this way: “responsibility is the link between bureaucracy and democracy. Modern democracy depends on the responsibility with which bureaucracies put policy measures into practice so as to administer certain governmental structures”.

This double perspective represents a scaled-down version of the evaluation of responsibility. Some authors have looked at it in greater detail. Thus, Vedung (1997) considered four perspectives of responsibility:

- Political perspective: political representatives can test whether the Administration is really undertaking the allocated tasks.
- Management Perspective: directors can remain informed about the degree to which technicians are fulfilling their tasks.
- Public perspective: the public can evaluate the extent to which the elected representatives and public sector employees are performing their duties
- Client Perspective: clients can demand satisfactory, fair and quality services.

Rossi et al. (2004) drew up their own list of aspects that should be the object of a responsibility evaluation: legality, fiscality, service provision, impact and efficiency.

These efforts to detail different levels, elements and areas in which the evaluation of responsibility in public action may be demanded hardly hide a much more common reality that is difficult to combat. As Vedung (1997) recognized, there are reasons for which executives would wish to avoid the evaluation of responsibility. On the one hand, they might wish to avoid evaluation, because a negative responsibility evaluation of their subordinates might constitute, in an indirect way, a negative indicator of their own field of responsibility; on the other, because excessive emphasis on responsibility might pervert it to such a point that it is turned into complacent servility towards political authority rather than a truly rational and responsible act. The balance between both possibilities will depend on the level of commitment and the culture of evaluation of those who may be able to conduct it.

Finally, evaluations are understood to have the function of *knowledge generation*. So, the information that is generated, serves to “throw light” on future public actions, to illustrate the inventory function of public policies and to justify the need to adjust some budgets on public action in accordance with the accumulated theoretical-practical corpus of knowledge. This information not only increases and improves knowledge on processes that configure the specific programmes,

but contribute to broadening general knowledge on social problems and the way of approaching them from the public sector (Bustelo Ruesta, 2001). Stufflebeam and Shinkfield (1995, p. 24) called this evaluation function “exemplification” as it could serve as an example and a guide in specific programmes, as well as “illustrating theoretical investigations and questions”. Nevertheless, it has also been suggested that this informative and knowledge-generation-based function does not represent a true evaluation function. And Vedung (1997) understood that this knowledge is a collateral and not a fundamental consequence of the evaluation that is subordinate to those that are its two fundamental functions: improvement and responsibility.

### 1.3.2 Characteristics of Evaluation

Having analysed the elements that constitute the concept of evaluation, we shall now briefly dwell on its principal characteristics (Fig. 1.3).

First of all, it may be pointed out that a characteristic of evaluation is its usefulness. It is appreciated in this way by Bustelo (2001), for whom evaluation is useful in two ways. On the one hand, it generates pertinent information, which is to say, useful for the purpose of the programme, norm or policy under evaluation. On the other, it generates practical information, insofar as it can provoke changes in public actions. This faculty endows evaluation, according to the same author, with a prospective nature or anticipating future actions.

Apart from this general characteristic, evaluation is distinguished by other forms of investigation and analysis by another set of specific characteristics.

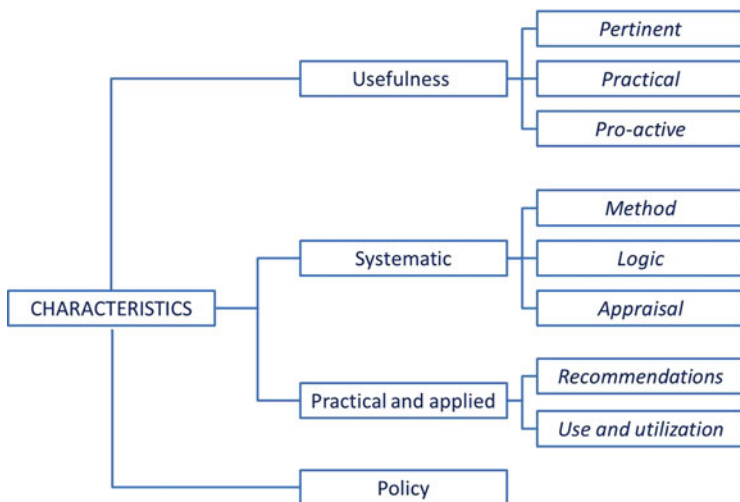


Fig. 1.3 Characteristics of evaluation

Evaluation is of a systematic nature insofar as it employs a logical procedure, as mentioned earlier, in its development. It begins with the prior definition of a purpose and it is articulated in an ordered sequence of steps: recovery and analysis of information; valuation and appraisal of that information; and finally the proposed recommendations. In other words, evaluation is not limited to issuing information but it is accompanied by an appraisal or *critical judgement*. For this reason, the *systematic nature* is not only due to the logical organization of the overall process, but to the need for critical appraisal of the information, also done in a systematic way.

In line with the utility of the evaluation, another specific feature is its practical or applied nature. The way in which the evaluation generates useful information for its practical application is through the proposal of recommendations for action. And in this last phase, the systematic nature of evaluation continues to stand out, as the recommendations are the logical consequence of earlier phases. This means that, on the basis of the appraisal of information that has previously been gathered, evaluations issue recommendations on the public work under evaluation (regulations, programmes, policies) in coherence with the functional aspects of the evaluation. In other words, recommendations aimed at improving the specific intervention under evaluation; to comply with public responsibility (accountability on that particular intervention); and to increase the quantity and quality of the knowledge that is generated in the intervention process.

A last specific element of the evaluation is the interest in its utilization. In other words, the effort to ensure that the results of the evaluation (information, recommendations, etc.) may effectively be put to good use in practice. And this effort means, on the one hand, determining who are or who will be the final users of the evaluation, and on the other, how to stimulate their interest in the results. On this point, Buselo (2002) drew a set of elements from the literature that could *facilitate the use* of evaluations and that are, in brief, the following: taking into account the *context* of the evaluation; encouraging the *implication of the participants* in the evaluation; raising the *frequency* of contacts with the participants; guaranteeing *adaptation to the needs* of participants; ensuring *fidelity* and *definition* of the findings of the evaluation; as well as the *opportunity* of the findings that are presented; and the *clarity* and *simplicity* of the language that is used.

Efforts to facilitate the use of evaluations are not sufficient to explain what their real uses could be. In this way, a relation may be established between the possible uses and the functions of the evaluation that were pointed out earlier (Fig. 1.4).

In the first place, evaluation may be used to *take decisions* directed at *improvements* or, if appropriate, to terminate a public intervention (policy, programme or regulation). It would coincide with what Weiss (1998) called instrumental use of the evaluation or what Torres et al. (2005) saw as decisions and actions to develop as a consequence of an evaluation. It would be directed at both internal users (politicians, managers, regulators, technicians etc.) to analyze the results of a specific intervention and to assess the opportunity of continuing with it, to adjust it to make improvements, or to end it. It would likewise serve so that the possible external users (beneficiaries or prejudiced by the intervention, clients, users and the

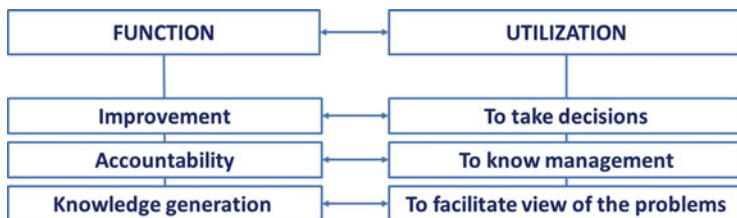


Fig. 1.4 Relation between functions and utilization of an evaluation

public in general) could take decisions to the extent that they are linked to the object under evaluation.

In second place, evaluation may be used to *know the details* of the management, application and development of a particular policy, regulation or programme; in other words, to call for responsibility and *accountability* associated with any public action. In this case, the use of evaluation can have a symbolic (Palumbo 1987) more than a real nature, and a more general rather than particular target group. In other words, it is not a question of satisfying the interest of particular users, but of responsible compliance with the duty to be accountable to society as a whole. The fact of providing this information and of making it available to society gives it a symbolic value that goes beyond whether the information generated by the evaluation will finally be used by someone. The concept of use would be reinterpreted in this way, moving from a utilization based on particular interests to another that would consider the general interests of society as more relevant (Chelimsky 1998, p. 35 ff.).

In third and final place, evaluation may be used to *add to the stock of knowledge* on the object under evaluation and, in general, on the administrative and political processes that surround it (Weiss 1998; Torres et al. 2005). But, in addition to this cumulative function, it generates a positive effect on participation in the evaluation, as it facilitates a broad overview of the problems, the framework and the conditions in which a public intervention takes place. It is therefore an integrative use, which can facilitate implication and identification with the problem under evaluation and interest in participating in its solution.

The last specific feature that is attributed to evaluation is its *political nature*. This peculiarity is recognized in as far as evaluation is done in a given political context, affected by political decisions and conditioned by processes of political negotiation between the different agents that are involved. This reality appears to have reduced the political nature of evaluation to a merely practical plane. However, various authors have tried to return politics to the field of normality. In this sense, works like those of Weiss (1998), Palumbo (1987), Monnier (1995), Vedung (1997) and Chelimsky (1998) have served to incorporate a political element in the theory of evaluation and to transcend its everyday technical and bureaucratic nature.

### 1.3.3 Evaluation Objectives

Although there may be a degree of confusion between *functions* and *objectives* of the evaluation, it is necessary to consider them as different elements. So, the function of an evaluation is more limited and is restricted, as has been seen, to three specific aspects that justify the sense (the *whys and wherefore*) of the evaluation (*improvement, accountability, knowledge generation*). Whereas, the objectives of the evaluation may be more diverse and can represent the practical and specific ends pursued by a particular evaluation. In such a way that it should be possible to determine which function an evaluation is fulfilling when it pursues a specific objective. In relation to this point, the following evaluation objectives may be listed:

- Facilitate the decision-making process. As Weiss (1998) has said, it is a question of generating information that allows decision making on some aspect of the programme or policy under evaluation (adjustment, correction, continuation, suspension, etc.). Or, like Chelimsky (1998), of taking decisions in the different phases of the political process (formulation, execution, accountability, etc.).
- Facilitate organizational learning. In this case, it is a question of using evaluation to generate information that serves to provide feedback to the organizational process itself, which leads to the development of the intervention that is under evaluation. So, this objective lends special interest to the process, structure, organization and other elements that constitute the programme under evaluation.
- Satisfy administrative requirements. In other words, to attend to the formal requirements of certain public administrative procedures (grants, subsidies, agreements, contracts etc.) which require an evaluation of the project or action that will be submitted.
- Reach certain strategic ends. These strategic ends may cover a set of questionable objectives that conceal certain spurious ends. The purpose of these objectives may be to avoid certain political responsibilities, to delay decisions, to review social commitments, to create an acceptable public image, etc. If so, it relates to an “evaluation of a ritual nature that is done solely to comply with legal provisions but is of no utility for the administrators of the programme” (Ballart 1992, p. 84).

### 1.3.4 Types of Evaluation

Following the literature, two fundamental criteria may be used to classify evaluations. One explains a *typology* of evaluations in which formal or procedural elements have a greater presence. The other is based on the theoretical-practical model that upholds evaluation as an activity that may be understood as the focus of the evaluation. In the two following sub-sections, we will present a summary of

both criteria on the basis of the works of Osuna and Márquez (2000), AEVAL (2010), Bustelo (2002), and Ballart (1992).

#### 1.3.4.1 Evaluation by Typology

In this case, the most common classification considers the following *types* of evaluation:

*According to Their Function* Evaluations are considered here by when and how they are used. In other words, if the evaluation is used during the evaluation process to continue constructing the object under evaluation (policy, regulation or programme), we are dealing with a *formative evaluation*. If, on the contrary, the evaluation is used as a summary at the end of the public intervention, it is a summative evaluation, as it includes an overview and a final overall evaluation.

Both evaluations are complementary and can, although not necessarily, be respectively linked with the improvement and with the accountability function. In other words, a continuous evaluation such as the formative evaluation has a purpose that can be adjusted in line with the process and execution of the public intervention under evaluation, whereas a summative evaluation tends to describe the result of an intervention responsibly, although in some cases the contrary is also true.

*According to the Element Under Evaluation* In this case, the evaluation is classified in accordance with the element or phase that is to be evaluated.

So, we can find *design evaluation* that may be used to test the coherence of a regulation that is evaluated. This type of evaluation focuses its interest on the theoretical and methodological aspects of the regulation, in other words, on establishing that the conceptual and procedural structure is consistent with the reality to which it will be applied.

In second place, we have the *evaluation of the process*, the purpose of which is to test the effective functioning of the regulation in the context in which it is presently applied. An effort is made to understand the way in which the regulation is being applied, if problems arise with its application, if those responsible for applying the regulation are working in a satisfactory way, if the regulation is being effectively applied to the target group and, in short, any circumstance that is related to the regulation and its course of action.

Finally, the end purpose of the evaluation of the results is to verify the achievements of the public intervention, in this case, of a particular regulation. And these may be of two classes. On the one hand, the *product* of the regulation and, on the other, the *effects* that it has had may both be considered. Normally, the efforts are oriented towards the evaluation of the products more than the effects, as they are more difficult to measure. But, apart from the products that are obtained, the direct effects of the regulation on the target group may be evaluated, as well as the *indirect effects*, those that have greater protection and affect a sector of the population that is not directly linked to the regulation.



*According to Who Evaluates* An internal evaluation is conducted by the same administration or body that approved the regulation. In this case, the technical experts will be the ones to evaluate the application of the norm from within. This circumstance: (a) facilitates access to the necessary information; (b) favours assimilation of evaluation results; and, (c) eliminates the feelings of encroachment that are at times perceived in evaluations.

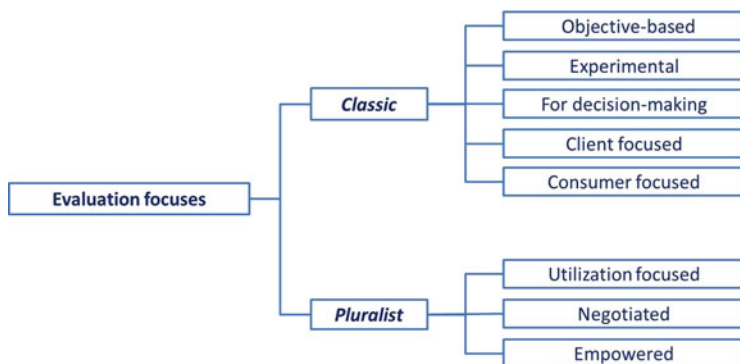
However, *external evaluations* may also be used to give the task greater credibility and objectivity. In this case, professionals with no links to the administration are those involved in the evaluation. This method may be more difficult for some of the people responsible for organizing the norm to accept, however, it offers better guarantees of independence with regard to society as a whole.

In any case, the minimum requirement is that the internal evaluation is guaranteed so that some of the recognized functions of the evaluation take place.

*According to the Moment When It Is Evaluated* Thus, the evaluation can be *ex ante* if it is done before the norm under evaluation comes into force. This type of evaluation analyzes the context, the conditions under which it will be applied, the precedents and trial projects that have taken place in relation to the problem that has to be solved and any interventions performed earlier. There again, the *ex post* evaluation is done once the norm has been applied and is, in general, the standard way of conducting public evaluations.

#### 1.3.4.2 Focus-Based Evaluations

The classification by the *focus* of the evaluation shows the historic evolution that evaluation has followed. The first *focused evaluations* aiming to establish how public policies had changed reality have slowly given way to evaluations directed at provoking changes in social reality by themselves. This progression led Asensio (2006) to consider *classic models* of evaluation, centred more on the achievement of *objectives*, and some *pluralist models*, interested in evaluation as an open, flexible and participatory *process*. Beginning with the first proposals from Tyler (2010), the classic ‘objectives’ model has been improved. First, through the application of methodologies belonging to the experimental sciences; then through the incorporation of new critical agents and interest groups (clients and consumers) that sought useful information for decision-making from the evaluation. And the rigid and closed bureaucratic/administrative model that is interested in the fulfilment of set objectives through a top-down model has finally been transcended, by establishing, in a participative and democratic way, the priorities and the courses of action on social problems that have to be developed. This diversity of focuses is briefly developed below (Fig. 1.5).



**Fig. 1.5** Evaluation focuses

#### 1.3.4.2.1 The Evolved Classic Focus

This focus places the centre of attention on awareness of the degree of compliance with previously defined objectives. These objectives may be found in a generic and specific form in policies, plans, programmes and regulations; or those that certain stakeholder groups expect, in a more particular way, for correct decision-making. From the above, the following list of evaluations that follow a more or less evolved classic approach may be drawn up.

*Objective-Based Evaluation* Based on a useful theoretical and analytical framework to verify whether the results achieved by the public intervention, through a particular regulation, are those foreseen in the prior objectives. However, this focus, developed by Tyler (2010), faces a more complex reality than it might wish. On the one hand, it is difficult to find regulatory interventions that have pre-defined objectives, beyond a mere declaration of political intent. On the other hand, it is uncommon to have formally expressed plans, and even if they exist, they are usually modified in the course of the action. Finally, the objective-based focus provides a partial view of the regulatory intervention as it is solely interested in its final results and not in the overall process.

*Experimental Evaluations* In this case, the approach employs an experimental research methodology. The objective of these experimental evaluations is to test the validity of certain previous hypotheses and to find cause and effect relations between the variables of the model. It is therefore a more suitable focus for the natural sciences than for the social sciences and especially for a field as difficult to control as processes related to public policies. In addition, it is an approach that shows greater interest in its methodological quality than in the use of the information that is generated.

*Evaluation for Decision-Making* This focus centres on evaluation as an integral process, in other words, not only methodological nor results oriented, but aimed at

generating useful information for decision-making. In a more or less broad sense, the proposals of different researchers consider it in this way. For example, Cronbach (1980) understands evaluation as a process, the essential function of which is to improve the programmes and to help public policies. And this function is possible because evaluation identifies, analyzes and interprets the value of information, making it available to those users who have to take decisions on programmes and policies. In an effort to give evaluation a more defined orientation, Stuffelbeam (2000, p. 293 ff.) proposed a theoretical and analytical framework in which evaluation is seen as a mechanism that generates useful information for decision making. Finally, Weiss (1998) justified the contribution of evaluation to decision-making in so far as it is developed in a political context in which the public intervention is the consequence of political decisions that therefore require the possession of information that is useful for decision-making on public interventions.

*Client-Oriented Evaluation* In this case, the evaluation is focused on the technicians and professionals, as internal clients in charge of executing and overseeing a particular programme, service or regulation. It therefore represents a focus that permits the participation of managers and aims to help them to understand their work better, their progress in relation to the plans, as well as the repercussions that it has among the beneficiaries of the programme that was undertaken or the regulation that was applied.

*Consumer-Oriented Evaluation* Directed at satisfying the informational needs and expectations of the final consumers on certain goods and services. The results and recommendations of this evaluation may help the consumers to direct their consumer intent, but the work calls for the intervention of professional evaluators with very specific knowledge and qualifications which, in many cases, are not present in this type of evaluation.

#### 1.3.4.2.2 Pluralist or Participative Focuses

These approaches show more interest in the interaction of multiple agents, plural values, flexibility and global reach of the process, than in the results of the evaluation. The participative evaluation models distinguish themselves because of the emphasis that they lay on each of these elements (Asensio Coto 2006) and on the multiplicity of participants that intervene.

The principal models of evaluation that follow the *participative focus* are briefly described below.

#### 1.3.4.3 Utilization-Based Evaluation

It was previously mentioned that one of the specific characteristic of an evaluation is its interest in the effective use of the results that are obtained in its development.

This interest has led some authors to consider that evaluation should be oriented right from the design stage towards the final use that will be made of it. The most significant of these is that it is considered (Kellaghan and Stufflebeam 2003) that the major problem of evaluation is that the results obtained and the recommendations issued are hardly used. Hence, that author advanced a set of recommendations seeking to improve the situation and that, in general terms, may be summarised in three lines of action:

- (a) the final use of the evaluation should be borne in mind throughout the evaluation process. In other words, the evaluation should be designed, organized and developed, bearing in mind who the users of the information that is generated will be and what their interest in the evaluation is;
- (b) in the evaluation process, groups that have greater interest in the programme, policy or regulation under evaluation should be given greater weight. Their expectations should be known so as to fine tune the orientation of the evaluation;
- (c) the evaluator should become a flexible and proactive agent who encourages the motivation of participants and the satisfaction of their expectations, in such a way that the use of the results is greater.

In conclusion, the utilization-based focus expresses special interest in incorporating a larger number of critical agents, as their interest in the evaluations of policies, programmes and regulations will depend on the utilization of the evaluation in the future.

#### 1.3.4.3.1 Fourth Generation or Negotiated Evaluation

This type of evaluation seeks to involve all the stakeholders and is mainly directed at total quality evaluations of policies and programmes (Ibar Albiñana 2002). It is an evaluation that takes “the concerns, complaints and questions of the different critical agents in the programme under evaluation” as its reference point (Bustelo Ruesta 2001). Guba and Lincoln (1989) developed and systematized this focus, describing it as a model that accepts a wide set of values that represent the diversity of the critical agents that are involved. Hence, the result of negotiation should be an understanding of the reality to be evaluated, as consensus between such different values will be difficult. According to this proposal, evaluation becomes a more complex tool than in its classic form, as it is given a strong political character. In this way, reality is not assumed as something given, but as a social construct arising from the political negotiation of all stakeholders that will as a consequence produce an unpredictable set of results that will not necessarily have to satisfy the plurality of stakeholders.

### 1.3.4.3.2 Evaluation of Empowerment

This approach implies the radicalization of the participative dimension of evaluation, as it starts out with the idea that it is the stakeholders themselves who promote, direct and develop the evaluation on the basis of their own motivations and interest. Evaluation for empowerment was proposed by Fetterman et al. (1996, p. 4) who defined it as “the use of evaluation concepts, techniques and results aiming to encourage improvement and self-determination among people, organizations, societies and cultures, with special attention paid to programmes”. The theoretical support for this focus is found, according to Fetterman, in the meaning that the concept of empowerment has in the works of psychology developed by Julian Rappaport. Thus, Rappaport considered that the community empowerment model came from the conflict between public intervention directed towards the satisfaction of needs (directive and paternalist) and public intervention directed at upholding people’s rights (1984). Accordingly, the proposal of Fetterman would rest on the latter model. So, the evaluation of empowerment is, in the words of Asensio, “a type of evaluation with a focus that centres on rights” (2006, p. 115).

In summary, the different types of evaluation according to their particular focuses respond more to a debate between epistemological paradigms than to the function that the evaluation should have in the general framework of the analysis of public policies. In effect, as may be noted, the majority of the types of evaluation centre their attention on the relation that is established between what is evaluated and the agents that undertake the evaluation, a relation that is most obvious in the pluralist focus. These approaches display an orientation towards social constructivism “centred on the preparation of holistic analyses and the dominancy of qualitative methods” (Bouzas Lorenzo 2005, p. 75).

## 1.4 Stages of an Evaluation

Having presented the theoretical elements of the evaluation, the process by which they are conducted will be briefly described.

In the classic scheme evaluation comes at the end of the cycle of public policies (Fig. 1.1), however, the present conceptualization of evaluation means that it is present throughout the whole cycle. So, this integral approach to evaluation applied to the legislative field no longer centres exclusively on the final results of regulations, but it should be present at the start of the planning and subsequent application of the regulations. In addition, it incorporates other elements such as design, rationality, coherence, and the evaluative nature laws. In this way, legislative evaluation is turned into a public action in itself and is understood as an ongoing process in the cycle of legislative policy rather than a final isolated act (AEVAL 2010). This dynamic and continuous dimension of evaluation justifies the existence of multiple approaches and typologies, as seen in earlier sections (summative

evaluation, formative evaluation, design evaluation, process evaluation, results evaluation, *ex ante* evaluation, *ex post* evaluation, etc.).

As Osuna and Márquez (2000) have done, we may summarize the evaluation process into four fundamental stages: design of evaluation, collection of information, completion and follow-up and results of the evaluation.

In the first place, the design of the evaluation has the purpose of determining the justification of the evaluation and its organization. The design of the evaluation lends it conceptual rigour and should guarantee its rationality and coherence. To do so the *direction of the evaluation* has to be decided, which means expressing the reasons that justify it (support decision-making, improve management, promote participation, etc.). Subsequently, the *object of the evaluation* and its objectives should be set, together with identifying the stakeholders and setting up a steering committee. This phase is completed with an analysis of the evaluative nature of the particular policy or norm. In other words, a preliminary evaluation of the extent to which a norm (regulation) or law may be evaluated. In this way, the evaluative design has the purpose of facilitating and guaranteeing that a law may be evaluated. To do so, a prior diagnosis of the reality that justifies the public action (problematic issue or concrete need), the existence of an intervention strategy, the availability of information and resources to finance the evaluation will all be necessary, as well as knowledge of the sociopolitical context and of the main agents that are involved. The following step will be to *define the questions of the evaluation*, for which purpose certain criteria should be observed (membership, efficiency, effectiveness, impact, viability, coherence, participation, coverage). It will then be necessary *to choose the type of evaluation* that will be used (process, results, impact, *ex ante*, *ex post*, etc.) in accordance with the end that is pursued. Other aspects to take into account in the design are the *estimation of the deadlines for completion*, the *budget* for the work to be done, as well as the *choice of evaluation team*. All of this will be written in the terms and conditions agreed for the whole evaluation: the *Evaluation Terms of Reference*.

The second stage begins with the *choice of information collection techniques* on the basis of available sources and other information generation techniques (panel of experts, surveys, interviews, etc.). The treatment and *processing of information* so as to obtain, if necessary, the indicators that relate variables and that yield new sources of information, and finally, the *analysis* and appraisal of the information. The set of these sources, techniques, preliminary data and final information constitutes an authentic *information system for evaluation* that will be conditioned by the characteristics of the object under evaluation, the type of evaluation that is chosen and the context of the evaluation.

The third stage of the evaluation takes place in the course of the public policy or while the regulation on which interest is focused remains in force. The *evaluation of the management system*, which supports the application and the execution of the regulation in question, is of special interest in this phase. It is of interest to know the rationality of the management objectives, the division of labour and responsibilities, internal coordination and the sufficiency of means and resources. Additionally, the *evaluation of the follow up system* has an interest in establishing the degree of