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Research Concept for the Study of Implementation

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1 Introduction

"Implementation" has become a catchword for studying the problems of decision makers in various fields.[1] It has a long standing in management theory, e.g., a study by Mumford and Pettigrew (1975) looked at the implementation of a firm's decision to establish electronic data processing, and found a number of unanticipated consequences, for instance, changes in established relations and power distribution within this organization. Here, like elsewhere, the catchword originates from problems of decision makers being disappointed, if their original intention does not come true (Pressman/Wildavsky 1973; Bardach 1977). It has repeatedly been pointed out that the concern of American scholars for implementation can be explained by their strong involvement in reform programs that started during the 1960s, and the disappointments which they experienced in the 1970s. The same holds true of German political scientists (Mayntz/Scharpf 1975; Schmid/Freiber 1975). Having been active in policy formulating processes and sharing the high expectancies connected to reform programs, they in hindsight tried to explain why only a few of these high hopes have come true (Mayntz 1980, 1983; Wollmann 1980). Disappointments in seeing high hopes dashed might simply be the

consequence of expectations on the side of policy formulators being unrealistic. This would especially be likely with political (and legislative) decisions which come about under controversial circumstances - policy makers often find a way out of a politicized issue by taking some symbolic decision which they know beforehand will be ineffective in the process of implementation. Only true believers could be disappointed in hindsight; professional politicians will not.

In this paper we shall discuss "implementation" as a problem of legislators, that is to say of a specified *subject* of public policy analysis. Implementation of *laws* just as that of other policy programs brings about unanticipated consequences, goal displacements and change of original conceptions. The difference of legally defined programs as contrasted with another policy, is that law does not always lend itself to evaluation by standards of *goal fulfillment,* it might rather be evaluated by standards of compliance to specific norms. Both sets of standards are of course intertwined: policy-makers use law among other means to achieve their ends, and law-makers do have policy-goals in mind, if they devise regulations for which they expect some compliance. Analytically, however, we should make a distinction between *goal-oriented policy* and *rule-oriented "conditional programs."*

Law makers, as any other policy maker, have to anticipate problems of implementation and they look for political analyses in order better to foresee likely shifts and problems in this process. This is how the need for "implementation research" was conceived: a case of scientific development stimulated by the interaction of scientists with government bureaucrats. The topos of "implementation" has been introduced by policy-makers with pragmatic problems of how to make their intentions effective. It serves as a catchword attracting contributions from a number of academic fields of specialization: policy process analysis, sociology of organizations, impact measurement, policy evaluation, etc. Each of the contributions will remind of the background of some traditional discipline - hopefully in the long run accumulating to a field of multidisciplinary studies with some theoretical convergence.

In this paper I shall try to show that a differentiation between policy formulation and implementation is useful, even if we regard them as being mutually interdependent. I regard the

distinction of policy *formulation* and *implementation* as a legitimation device of legal decisions designed to legitimately bind subsequent others. Such traditional conceptualizations of legal decision-making are especially prevalent in the perceptions of policy makers of *legalistic* political cultures as is the German one. My discussion shall refer to some of the limits of their concepts, showing the usefulness of research strategies aiming at an empirically based theory of implementation also of legal programs.

1.1 Policy formulation and its implementation

The 1970s saw a number of studies on the processes of policy formulation in the Federel Republic of Germany, portraying the influence of the government bureaucracy preparing legislation, of parliaments themselves, and of the post-legislation arena of implementing federal programs within the bureaucracies of the 11 federal states. They were the first studies to break with a tradition of looking at policy making only up to the point where a law is finally ratified.

The limitation of interest of former studies to the processes of policy formulation is a result of the notion of separation of powers, which is prevalent on the continent. This notion is due to the normative theories of democratic institutions: while legislative decisions have to be legitimized as the result of democratic procedures, the traditional theory of legitimacy of administrative decisions is that of relating them back to binding decisions of legislation. Reading Montesquieu, we see his theory as an attempt to establish a normative standard which has mainly the function of delegitimizing absolutistic power structures in his time. However, nowadays the theory of the separation of powers, which claims Montesquieu as its source, is very often taken as a *description* of contemporary policy processes - and as a matter of fact many participants in the political process look at themselves in these normatively preconceived patterns.

Because of such normative pre-conceptions, it is not enough to point at the empirical character of policy processes, which makes them appear as a sequence of decisions frequently frustrated by goal displacement and non-fulfillment of original intentions. If we were to explain only policy *outputs*, a strict differentiation between policy formulation and implementa-

tion would not make sense. Of course, we cannot deduce what a law or a political program "does" by an interpretation of its letter – *outcome* is dependent on further decisions and on institutions which implement it. But it makes a difference whether implementation agencies derive their legitimation from "strictly following a legal program", or whether they see themselves as using discretion or even "trying to achieve policy goals" (cf. Sabatier/Mazmanian 1983).

Such legitimation also comes forward in implementation studies which relate back to some legislative decision and its intention, as a point of reference from which they measure fulfillment or displacements of initial goals. Van Meter/Van Horn (1975) put this quite clearly in their definition: "policy implementation encompasses those actions by public and private individuals (or groups) that are directed at the achievement of objects set forth *in a prior policy decision.*" Asking for "implementation" makes sense only if there is some consensus that some policy decisions should legitimately be a determinant for subsequent decisions – i.e., if in the perception of most actors there is some differentiation between legislation an execution of a policy.

Thus, implementation theory is a consequence of normative theories of the political process, where a differentiation between legitimizing processes an legitimized ones is maintained. Nevertheless, policy makers in the formulation stage of this process have to anticipate the institutional structure of the implementation stage, and also, the vested interests of implementors trying to influence policy makers. Thus, we do not believe in the effectiveness of separating policy formulation and implementation, but we treat it as a heuristic device enabling us to analyze their mutual interdependencies.

1.2 Related concepts: implementation, compliance and impact

The theory of implementation is related to questions of "impact" in not taking for granted that policies come out the way legislators announce them to be. While "impact" studies concentrate on *measuring* the intended and unintended outcome of the policy, "implementation" studies try to *explain* impact.

On the other hand, implementation problems have some similarity to those of "compliance." If legal programs were really goal adequate we might be content with measuring compliance.

However most legal programs contain doubtful assumptions about the relationships of rules to intended goals. We might observe a high degree of compliance, but still (even because of the ritualism of compliance) non-achievement of the intended goal (cp. Bardach/Kagan 1982).

Most legal programs are somewhat ambiguous with respect to all three measures of impact: rules, goals as well as the relationship between them. Therefore we want to know about compliance by looking at binding rules, asking to which degree they are being obeyed or not. But we would also like to know about their impact by looking at law as a goal-oriented program, asking whether initial intentions are realized or not. The study of implementation should look at both, relating different degrees of compliance to different variations of impact. It might sometimes show that compliance does not lead to the desired impact, because legal programs were ill-devised to begin with. It might sometimes show a correlation between compliance and desired impact. What we should find out is when this correlation is positive, when it is negative, and when there is no correlation at all.

2. Four examples for the relevance of implementation structures

Let us illustrate the relation of impact to compliance by four examples.

2.1 First example: an "old-fashioned" legal program such as penal law

Due to its precise prescriptions and elaborate dogmatics and to the apparatus of controls through police, prosecutors and penal courts, penal law can be regarded as a law with an extensive infrastructure safeguarding enforcement of its decisions. Nevertheless, police and prosecution do not by far "control" criminal behavior. Saying this we do not want to point at the large percentage of uncleared offenses, which could be said to be "controlled," at least by police registration. Rather, we want to point at the bias which lies in the organizational strategies of detecting some crimes (like blue collar crimes of theft or

personal injury) and the absence of strategies of detecting others (like white collar crimes of fraud or embezzlement). Recent attempts to enlarge the capacity of prosecution agencies in fighting white collar crime result in rising figures of the registered criminality of this type. The chances of criminal detection remain to a large degree dependent on victims' reports, but in terms of gatekeeping they remain dependent on the capacities and organization of the implementation agencies.

Lawmakers usually anticipate the capacity of their implementation agencies, when deciding on a legal program. Very often the political ambiguity is expressed in symbolic decisions in substantive law without furnishing agencies with the means of implementing it anywhere near efficiency. This is the case with laws against abortion: highly symbolic fights about legislation against abortion notwithstanding, they have long been widely neglected by the prosecution agencies, leading to penal sanctions only in extremely rare cases. Legalizing abortion entirely would meet high resistance from groups which at the same time do not press for any effectiveness in prosecution. It is mainly the symbolic importance of abortion laws which causes the politization of this issue - the implementation practice has abolished its punishment long ago.

We know that laws serve symbolic functions. The degree to which they do this exclusively, varies (Edelman 1964). They can do so much better if the degree of fulfillment is left to implementing agencies. Underenforcement is a way of adapting laws with high symbolic importance to controversial social standards, especially if there are conflicting views in a society whether a legal prescription is obsolete or not.

2.2 Second example: laws and regulations concerning environmental policy

As Renate Mayntz (1978) stated, new laws on waste disposal, and air and water pollution in the Federal Republic of Germany passed parliament with a relatively low level of resistance, simply because standards and methods of enforcing them were left to the definition of local authorities. There is no general dissent over the necessity of exerting more rigid environmental control, but there is a lot of resistance to be expected as soon as precise standards are defined and as soon as there is some

likelihood that these are going to be implemented. In the policy formulation process conflicts are avoided by leaving the details of enforcement to the implementation agencies. A law might be quite specific as to the goals and standards - such as waste disposal laws which define what is to be considered as "orderly waste disposal" - but the burden of implementation is put on agencies which have vested interests in interpreting them leniently. In the case of waste disposal:

1) All conflicts are delegated to a level of government where a coalition of interests between local authorities (interested in maximizing tax revenues by being attractive for industry) and industrial waste producers is more likely (cf. Hucke et al. 1980).

2) This causes local differences in the degree of fulfillment and the intensity of execution of the general policy. Local authorities tend to be more strict where industrial waste problems are not very big; they tend to be more lenient where strictly enforcing legal standards might hurt local industry more severely. Thus, enforcement deficits tend to rise, the more serious local waste disposal problems are.

Local non-enforcement of policies which have been decided by a decision-making center, must not necessarily be a bad thing. Central decisions tend to overlook the various conditions which might stand in the way of implementing, and which might produce adverse effects. In the case of the waste disposal law a strict enforcement of equal standards seems quite unrealistic. The only alternative, to lower the standards so that even the communities with very serious problems can fulfill them, would have left more parts of the country without any effective waste disposal requirements. Thus, allowing for enforcement deficits somewhat ameliorated the situation in all communities, leaving the final outcome to the discretion of local implementors (cf. Bohne 1981, Hawkins 1984).

2.3 Third example: mobilization of private law

Laws which control behaviour by imposing negative sanctions need organizations for surveillance and enforcement. Legal claims among citizens as they are laid down in private law, do not have any such authoritative apparatuses for implementation - they rely on mobilization by the interested party in order to be effective (Black 1973; Blankenburg 1980). There are a number of barriers to be overcome: the individual has to recognize a legal

claim as such, he must know to which institutions to go and which language and procedure to use, in order to mobilize law for his claim. He has to be motivated to do so and willing to bear the costs. Finally he has to actually initiate the legal process. It is obvious that access to law courts and to lawyers is easier for middle class people, thus creating a tendency of private law to reinforce social inequalities rather than to compensate for them. Of course there are lawyers to advise and help mobilizing law, but low education and low status people experience similar barriers with regard to consulting them. Independent of the content of material law, the conditions of access to law courts and to legal advice determines the chances of legal claims to be realized. Implementation (or effectiveness) of private law is dependent on an infrastructure of institutions which organize access to legal means.

For a long time private law has assumed to deal with citizens who are equal in determination and competence in claiming their rights. However, research (cf. the so-called 'legal needs' studies; Conlin et al. 1967; Abel-Smith et al. 1973; Curran 1977; Schuyt et al. 1978; Blankenburg et al. 1982) has shown a "darkfield" of latent (i.e. non-mobilized) legal claims. The normative conclusion from such findings much not be that lawyers and courts should become involved in the regulation of all conflicts which are potentially legally relevant: as long as alternative forms of conflict resolution provide results which are satisfactory to all participants, there is no reason to invoke long and costly legal proceedings. Not realizing legal claims and not mobilizing legal institutions may be a rational choice in view of the costs in terms of time and money, and in view of costs of regulating personal relationships by formal rules, and with the help of third party mediators. But whether such a choice is a deliberate one, whether the selectivity of mobilizing legal means is concordant with the overall goal of compensating for social inequalities, depends on the social distribution of the barriers limiting access to law.

'Private' legal claims are not made effective by any implementation agency, they depend on the individual claimant's willingness and capacity to mobilize the law. The conditions of moblization are subject to a number of policy decision: the barriers of formalization and procedural requirements in invoking the law; the provision of an infrastructure of legal

services which is able to lower some of the barriers of access to law; and the legal and professional rules controlling the performance of these services.

2.4 Fourth example: "Active Labour Market Policy"

With growing unemployment in the 1970's, governments in all developed countries increased their attempts to regulate the balance of demand and supply on the labour market by administrative programs. Theretofore, labour market policy had been an artifact of regional and economic policies. To try to systematically "steer" the development of labour markets by administrative programs has been quite a recent innovation of welfare state policies. Labour administration in Sweden was the first to begin in the 1950's, enlarging adminstrative competence in order to encompass economic and employment policies. In the late '60's a number of European industrial countries followed this example with a high degree of coordination and mutual imitation with regard to policy instruments. Nevertheless, due to different legal and administrative traditions, the implementation structures of "Active Labour Market Policy" took somewhat different shapes from one country to the next (Blankenburg 1980).

The subject matter of labour market policy is a prime example of a field where central policy makers can only formulate highly idealistic and somewhat vague goals, but leaving the use of a number of policy measures to the discretion of implementing agencies which have to adapt them to the constantly changing business cycles and to regional and local peculiarities of labour markets. Therefore, the German Labour Market Improvement Act (AFG) of 1969 opens with an aspirational norm: "The policy of this law is to see to it, that within the framework of the overall economic policy of the government, a high level of employment is reached and maintained, that the structure of the labour force is improved, and the growth of the economy is furthered." In its subsequent paragraphs, the AFG contains long and detailed regulations as to the institutional setup of the Federal Labour Agency (Bundesanstalt für Arbeit), its range of competence and the way the agency has to administer federal labour policies. Quite typically for a policy field in constant change, these detailed regulations are being amended almost every year, and

they are supplemented by intra-agency regulations (Richtlinien) which undergo frequent changes even more often.

Complying with these detailed regulations might not lead to a policy consistent with the general declarations of intent in the first paragraphs of the AFG. As a matter of fact, a widespread critique of the AFG after the first attempts of implementing it has been that its precise legal prescriptions (those which regulate retraining and further training) miss the intentions of the law by being widely 'misused' for private interests without effect on the labour market.

Implementation problems arise, when the legal program under study is based on ill-founded assumptions. Laws and political programs may contain means-end-hypotheses which might be false, they might contain contradictory intentions and unrealistic expectations, so that their impacts are countering intentions - and this even more so, the better compliance is observed. Compliance to some parts of the legal program may lead to missing its intended over-all impact. Partial non-compliance might lead to fulfilling the intentions of legal program better than would strict compliance.

3. Elements of a Theory of Implementation Structures

3.1. Policy formation and implementation as a two-way-relationship

In all four examples given above, the implementation structure has influenced the scope and goals set during the phase of policy formulation. Studies on policy formulation in federal bureaucracies in the Federal Republic show, that these have elaborated procedures for integrating conflicting views and finding compromises between interest groups before any policy goes into parliament. As the personnel of federal bureaucracies is recruited to a large extent from those organizations which later will have to implement its policy, the problem-finding capacity, and the ways of solving problems are largely channeled by the views of implementation staff. As the ministerial bureaucracy is going to be the controling organization for implementation

agencies, implementors see to it that their views are incorporated into the process of policy formulation (cf. Seidman 1970).

Thus, if we assume that any implementation agency is trying to influence the content of policies, which it one day will have to implement, they can actually do so with varying success. The more an issue passes through legislation under the cover of a small group of experts, the less controversy brings an issue into open conflict and into the mass media, the more implementation agencies can keep legislation, which becomes relevant to them, under their control. Their impact on policy formulation is inversely related to the degree of politization of an issue, which again is - among other variables - dependent on the heterogeneity of, and conflicts among implementation agencies (cf. Scharpf et al. 1976, 1977).

Beyond these institutional feedbacks of implementation agencies on policy formulation, their potential power, range of competence, competition and conflict determine what sort of policy may be feasible. The few examples which we used above, show that the preconditions for implementation depend largely on the characteristics of the agencies which are responsible for implementing. Implementation analysis turns out to a large degree to be an analysis of organizational mechanisms and possibilities of control within and between organizations. However, this takes place within the framework of contingencies, which are defined by the characteristics of policy problems and the instruments which have been chosen by the policy under study (Shapiro 1968).

Tensions can arise, because the structure of implementation agencies does not correspond to the contingencies required by the instruments applied, and it can be related back to the instruments not being able to solve the policy problems adequately. Ideally, such tensions should be analyzed on the level of objectives indicated, very often, however, in empirical studies we do not have any better data than interviews with the actors involved. These may be conflicting as to the real nature of the policy problems or the handling of the prescribed instruments. Many implementation studies get their stimulus from differences of the perceptions of actors at different levels in the implementation structure.

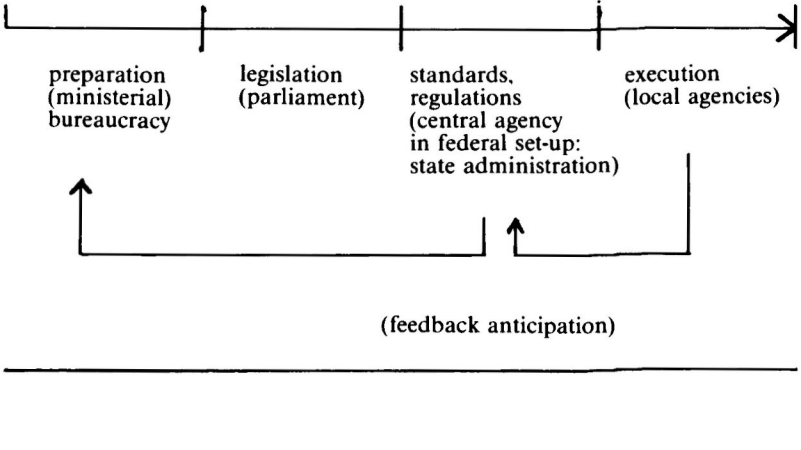
Thus, implementation is a special case of interorganizational decision-making - with one special characteristic: There is a

normative theory claiming that some decisions within the total policy process (those of legislators) are more binding than others, and enjoy a particular legitimation.

Implementation problems are defined by one major decision which is binding for these to follow. The phase before that decision we may call "policy formulation". For the purpose of comparison between different policy fields this is further differentiated into the phase of policy formulation in the ministerial bureaucracy, and the phase of legislation in parliament. The following process of implementation could be divided along the lines of central decision-making on standards (i.e. regulations to be implemented) and the actual execution of it which normally is a decentralized line operation.

Constitutional lore looks at such a scheme with neatly separated phases in terms of a hierarchy: the ministerial bureaucracy (being politically neutral) prepares alternative policy programs, which are decided upon in the legislative process. Implementation is then directed by a central authority which controls staff organization to implement the program according the true legislative intensions. "Implementation"

Phase model and its main feedback loops:



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research in this understanding of the political process is asking technocratic questions: What has to be the organizational structure and the instrumental capacity of executive agencies, in order to adequately execute the policy which has been formulated by the legislative process?

However, as shown by our examples there is a two-way relationship of policy formulation and implementation: Policy formulation is anticipating problems of implementation, it is incorporating personnel of executive agencies to varying degrees, so that we have to ask both ways: In what way are implementation structures programming policy formulations according to their selective way of perceiving and solving problems, and to what extent do policy decisions anticipate the restrictions of resources for implementation? And on the other hand: To what extent is it possible to program executive agencies according to legislative policy goals, and what are the loopholes for administrative discretion and the chances for displacing legislative intentions according to the strategies of those who implement such policy?

If our schematization of feedbacks proves right they will vary according to the institutional set-up of implementation agencies and their informal/formal, professional/legal links to policy formulators. The analysis of implementation as a two-way-relationship could come up with additional evidence for the declining influence of parliament on policy-outcomes: it is not necessary to circumvent parliament in the process of policy formulation formally, if the informal channels of feedback in the stage of preparation leave out parliament already.

The degree to which implementation agencies exert influence on policy formulation is dependent on the degree of politization of the issue and on characteristics of the issue. The more an issue is politicized, the more it is likely that party organizations and parliament get involved in the formulation process, thus restricting the influence of bureaucracy. On the other hand, if implementation agencies are uniform and hierarchically organized, they have a higher likelihood of monopolizing their views on policy. If they are decentralized, or contain rivalling organizations, there is a higher likelihood of open conflicts arising, and thus of politicizing the issue.

Looking at implementation as a two-way process sheds some doubts on the hierarchical perception of the political process.

Our scheme of four phases can be used as a normative folio - which might even be part of the role perception of political actors - for analytical purposes; however, we should look at policy formulation and implementation as an ongoing process with feedbacks and with chances for goal displacements in each of its phases.

3.2 The impact of implementation agencies in the policy process

The discussion of implementation problems can be organized along two major dimensions:

1) The allocation of policy decisions in time: i.e. if we talk about decision processes, we have to analyze them historically, as a sequence of events. This suggests using case study methods.
2) The allocation of a policy in institutional structures, identifying such characteristics as number and size of organizations and individuals involved, authority and power relations among them, patterns of coordination and communication differentiated by policy fields and its action systems. This suggests a comparative analysis of structural features of different policy fields.

The two suggestions for the study of implementation can be combined. In order to obtain generalizable knowledge on the interrelations of policy formulation and implementation, we need a number of case studies on the formulation and implementation of new laws or policy programs. Structural characteristics of implementation agencies have to be identified in a comparable, maybe even standardized way. Besides using a characterization of policy content and analyzing the instruments used for it, a third dimension which we call "implementation structure" is added. Implementation studies are a special case of policy analysis which focuses on such institutional features as

- *institutional set-up of implementation agencies*: Do we have a policy field with its own established implementation structure (like for example penal policy)? How is implementation structure organized: in a federal set-up (like environmental control in our case) or by some dependent federal agency (like labour market administration in our case)?
- *personnel orientation in implementation agencies*: What are the disposition of the personnel of these agencies towards the

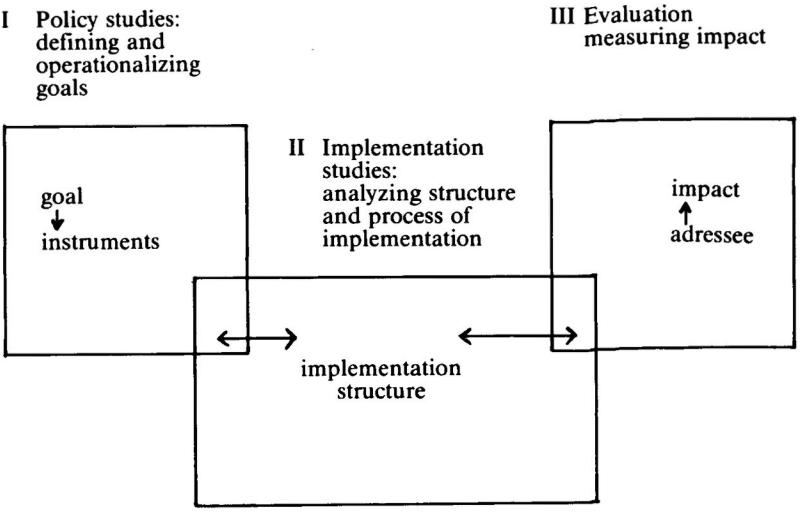
policies they have to implement? Do they regard themselves as pursuing professional values, or do they perceive themselves as executive bureaucrats? If they are allowed to use administrative discretion, are they going to use it along the lines of the present legislative majority, or more conservatively, more progressively?

- *political situation of implementation agencies:* What are the opposing forces to be expected from the political/social environment of the implementation agencies? Is there going to be resistance to the measures to be taken? Are there going to be distribution conflicts? How far have conflicts over a policy been delegated from the policy formulation phase to that of implementation?
- *political/economic/social resources of the policy program:*
  a) If implementation implies mainly enforcement of standards and rules: What are the control capacities? What are the available sanctions?
  b) If implementation implies mainly giving incentives or rendering services, we do not have to ask for compliance, but rather for the condition of use on non-use of such a program: how is information and access to use of such a program socially distributed? How is misuse prevented?

In listing our questions with regard to implementation problems, we consistently find that answers differ according to the kind of policy we are envisaging. The emerging field of "implementation" studies has to be built on the foundations of contingency theories for different policy fields.

However, defining the subject matter of implementation studies by institutional features assumes that task contingencies do not determine which organizational set-up is built up for implementation. If we compare public institution's cross-nationally, we discover a variety of alternative institutional arrangements within the scope of quite similar policy problems and goal definitions. Again, finding alternative institutional solutions does not mean that success of policies varies considerably, and if it does, that it must not necessarily be causally related to the differences in implementation structures. But our argument shows that policy goals and the choice of instruments rest on the anticipation of possible implementation structures. These determine which impact a policy has on the addressee of their

instruments. Therefore the study of implementation structures is a necessary link explaining part of both: the choice of goals and instruments, as well as the evaluation of their success or failure.



4. Regulation Models of Public Policy

4.1 Implementing laws

Our examples above have shown that we cannot assume that lawmakers are always interested in their programs being effectively implemented. Politics implies a lot of double talk; laws may be passed more for symbolic reasons than for actual implementation, they may express different intentions on the level of general statements of intent than on the level of their operationalization, and they may be self-contradictory on each of these levels. Policy makers may have foreseen such barriers to implementation, and they may have taken them into account deliberately.

In order to understand the meaning of double talk, a theory of implementation should analyze policy content at its different

level of abstraction. Policy goals may look one way on the level of general statement of intent, they can look quite differently, if the operationalization in terms of specified instruments is analyzed. The next step of the analysis is to confront the different goal statements with contingencies of the policy problem and with the capacities and characteristics of those agencies which (directly or indirectly) implement the policy.

After having analyzed content and contingencies of policies, we propose to organize studies of implementation along ideal-typical models of how government regulation works. Neither the attempts of classifying policy content, nor a classification of institutional infrastructure seem to qualify for the purpose of a theoretical framework: both variables are very complex and therefore resist any one-dimensional ordering along classificatory criteria. Furthermore, policy content and institutional infrastructure are key variables in the variation which we want to study. It is not wise to force them into a scheme which might lead to dogmatism in research strategies precluding the questions we want to study.

Therefore, we should look for criteria along other lines, preferably such as to show why simple classifications fail. The basic assumption of 'implementation' research is that there exists a causal link between 'instruments' of government activity and 'goals' which they are aiming to achieve. A classification of 'instruments' of law allows for a very simple scheme to begin with. Basically these are:

- *negative sanctions,*
- positive sanctions (*incentives*).

However, this leaves out such governmental instruments as providing services, organizing transfer payments, regulating prices and tariffs, interest and exchange rates or investing in an economic activity. As our examples have shown, legal programs are working with at least two additional types of instruments:

- institutional *infrastructure* for deciding on, and applying negative and positive sanctions,
- regulation of *social services* helping clients to deal competently with legal institutions.

As each of these types of instruments works on specific assumptions of *how to regulate social behaviour*, we can expect each of

them to have its specific chances of, and barriers to implementation.

As we have seen in our examples above, the traditional fields of law lend themselves to such an analysis; penal law exclusively threatens non-compliance by *negative sanctions*, and it has its specific *infrastructure* of surveilling deviance and of enforcing sanctions. The basic features of this set of instruments seem to reoccur cross-culturally. But any detailed comparison will show that there is certain discretion as to procedural rules, to institutional capacities, and thus intensity of law enforcement.

Contingency constraints are even more limiting in the field of private law. Governmental activity here is restricted to the formulation of legal rules and to the provision of an infrastructure, or conflict settlement and means to enforce its judgments. The initiative to mobilize private law rests with the interested parties, courts do not do any canvassing for cases or marketing for increasing the rule of law. Their effect in implementation could only be negative; by the courts being clogged, procedural and financial barriers preventing access to courts or by long delays in court, they may withhold the service expected from them. This, withholding regulation and possibly investments in legal aid services may jeopardize the implementation of private law.

For public law, we could not give a simple description of instruments, nor of institutional set-ups. Our discussion has made it obvious that instruments and institutional infrastructure for implementation are contingent on each other. In addition, public policies usually *combine instruments of several types* in order to achieve the desired goal. Thus, implementation problems of a policy field have to be described as a consequence of a whole *set* of instruments used in a policy field – both the choice of instruments and the resulting problems of implementation possibly being to some degree contingent on the specific characteristics of each policy field. The most complex combination of governmental instruments we find in less traditional legal fields such as a public law, labour law, economic regulations and antitrust laws, etc. Here a combination of negative sanctions, positive incentives and infrastructure investments is quite common. In addition, we here find government policies which are no longer limited to the form of law, but rather use plans and programs, project funds and public relation campaigns as

instruments for influencing social (especially economic) behavior.

This is illustrated by two examples given above: a law like the German Labour Market Improvement Act (AFG) gives an analytical frame for pursuing general, very vaguely stated goals. Its legal prescriptions specify in the first place which administative institutions have to fill the frame of this law, leaving it to them to act according to changing labour market conditions. The example of environmental policy includes negative sanctions as well as incentives, using existing infrastructure of judicial and administrative set-ups. "Environmental policy" is a summary concept taking together a number of legal an administrative instruments with respect to a general policy goal. Several traditional institutions of justice and of administration are used as infrastructure. In both these cases, there has to be a complex evaluation of whether the means chosen with respect to their general goals actually satisfy them.

Taking traditional legal concepts as a starting point for developing our argument, serves to show their limitations. As we turn to public law, decision-making tends to be more and more a continuous process without one stage of decision having definite, legitimate binding power on later stages. Our concepts are heuristic insofar as they show where traditional legal distinctions (those of policy formulation versus implementation as well as the distinction of legal fields) loose their descriptive validity.

Complex legal programs involve goals at different levels of generality. Highly general declarations of intent are specified by enumerating subgoals, they again are operationalized by giving detailed prescriptions and providing policy instruments. Between these levels of generality, and among different instruments there tend to be inconsistencies and contradictions. The more complex a law, the more any study of implementation has to include the analysis of the consistency of different levels of generality of goal statements.

4.2 Participation as a means to anticipate resistance at the stage of implementation

Policy implementation invariably involves generating motivation of other actors to behave according to policy goals. *Legality*

is a means of generating general motivation - to some degree independent of the content of what is being prescribed. Our discussion has led to the point, however, that legal prescriptions can be very vague and that their binding force can be rather weak: in a legalistic political culture as Germany, many public policies are put into the form of a law which in Anglo-American countries would simply be a "government program". Planning as an alternative form of legitimizing and binding decisions of various public actors has mushroomed in the course of the reform movements in the 1960's, promptly being followed by a discussion of their legitimacy (pointing to the lack of participation by parliaments) and their legal status (pointing to the lack of binding authority).

Two factors have contributed to the growing use of alternatives to legal regulation:

1) rising program complexity - resulting from needs to devise programs involving many actors, from rising expectations with regard to the anticipation of consequences, and from needs to be flexible with regard to uncertain future events;
2) increasing use of participation schemes - resulting from efforts to involve organized interest groups, implementing agencies and powerful actors might potentially build up veto positions into the policy formulating process in order to reduce the likelihood of resistance at later stages.

Both developments are interrelated: growing complexity has led policy makers to look for alternatives to strictly legal regulation, partly replacing parliamentary and legalistic modes of policy formulating by program-specific forms of participation.

Motivating by participation (of implementation as well as addressees) is an answer of policy makers to anticipated resistance in the stage of implementation. It can be used by ministerial bureaucracies when formulating laws, but it increasingly by-passes parliaments when plans and non-legal programs are prepared. Thus, our argument is going in a full circle; anticipating the problems of implementation, policy making turns to participation as a means to build up consensus, thus being less dependent on legality as a general motivator.

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