

Institutional Policy Coherence

The Case of Swiss Transparency Act

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Policy coherence has been studied primarily under the scope of several public policies. However, few studies have been made on the coherence between institutional and public policies. This article addresses policy coherence as such. Based on a model of the hierarchy of institutions developed by Knoepfel et al. (2006), we examine the case of the Swiss Law on transparency (LTrans). Knoepfel et al.'s model suggests that there is a hierarchy of normative institutions, where each level can have positive or negative effects upon a lower level. This model places institutional policies at a higher level than public policies, suggesting that tensions between institutional and public policies can impede the implementation of the latter. This can result in either a public policy killer or an institutional policy killer situation. Our study of the LTrans shows that one can observe constant tensions between institutional elements of LTrans and the act itself. However these tensions resulted in an equilibrium instead of either a public policy killer situation or an institutional policy killer.

Keywords: Access to information, policy coherence, institutional policies, public policies

1 Introduction

Studies of policy coherence usually focus on how different public policies are connected with one another, whether in terms of formulation or implementation. Policy coherence is generally presented as being either 'vertical' or 'horizontal' in nature. This dual-axis construct can nevertheless be understood in different ways. For instance, vertical coherence could be seen as international (i.e. between EU and its member states) (May et al. 2005; Gauttier, 2004; Azoulay, 2005), federal (i.e. between the federal government and the cantons) (Koschinsky and Swanstrom, 2001; Savard, 2010), or national (i.e. between a department and its regional offices) (Taylor, 2000; Jordan and Halpin, 2006). Horizontal coherence refers to policy coherence within the same level of government. The logics of

coherence are used in one of three ways: 1) in public policy evaluation, to better understand the elements explaining the impacts of public policies; 2) in the analysis of public policies to understand the interactions between policies at the local, national or international levels; or 3) in a predictive manner to understand the elements most conducive to effective public policies. However, very few studies actually focus on the coherence between institutional policies and public policies, between the policies internal to the public administration and policies intended for the public.

This seems peculiar since authors of public policy analysis have stressed the importance of public policies to be well attuned to governmental institutional policies. For instance, in Canada Pal (2006) and Savard (2012) explain that institutional policies shape public policies by imposing administrative rules that public policies must follow. In Switzerland, Knoepfel, Larrue and Varonne (2006), further elaborate on this point by demonstrating how frictions between public and institutional policies have significant effects on both types of policies.

To highlight specific aspects of coherence between public and institutional policies, this article examines the case of the Swiss Law on Transparency (LTrans). To do this we use the theoretical framework developed by Knoepfel et al. on the hierarchy of institutions. This framework illustrates the dynamics between institutional and public policies, and manages to attributes to each a corresponding weight. Using the LTrans as a case study, this allows us to demonstrate in which way institutional policies can (or cannot) be coherent with public policies, all the while highlighting the consequences of such a situation.

2 Understanding coherence between public and institutional policies

We define coherence as the integration of ideas from different actors, which generate a synergy between elements of public policies associated with the same domain and thus providing a common understanding of the expected effects of these policies (Savard, 2010). This definition is structured around the two aforementioned axes of policy coherence. This being said, the policy analysis literature often discusses another type of coherence, usually used in policy evaluation, called internal coherence. Internal coherence is concerned with the consistency of one public policy, which means that the policy's problem definition, its objectives and the proposed means of actions (instruments) are well harmonized, and the policy's implementing activities are logically linked to the formulated public policy (Knoepfel et al., 2006; Pal, 2006). Internal coherence provides a framework to assess the efficiency and effectiveness of a public policy. However, it lacks the capacity to gauge the level of synergy between different policies. For this reason, we are hesitant to call internal coherence a third axis. We nevertheless believe that a third axis is necessary. This axis should be transversal. A transversal axis is concerned with the level of synergy or impediments between public policies and

institutional policies, and its analysis will not, contrary to policy evaluation, lead to the assessment of the effectiveness and efficiency of a public policy.

Institutional policies are of crucial importance to a government. They define the principles and the internal practices that departments and governmental agencies must follow. Institutional policies, on the other hand, aim to provide a framework guiding the fulfilment of the state's functions through the deployment of various public policies (Knoepfel et al., 2006). This includes formal directions to departments, directives, standards and guidelines, which dictate specific responsibilities to departments and guide their actions. Institutional policies are enforced to ensure administrative consistency for the whole of government. Thus, institutional policies make it possible for the state to fulfill efficiently its mission towards the population.

It would be naive to believe that public policies are not affected by institutional policies, since the latter control the government's actions and the resources the state can assign to a given issue. Therefore, the idea of a third axis of coherence makes sense, since a public policy can be in harmony with others in the same domain but its implementation can be impeded if its design is not supported by institutional policies. Consequently, coherence between public and institutional policies contributes to optimizing the expected effects of a public policy.

To analyse the coherence between public and institutional policies, we adopt Knoepfel et al.'s (2006) hierarchy of institutions model. This top-down model suggests that all state's actions are steered by a set of institutional rules that are hierarchically structured. The concept of institutional rules here is loosely defined and refers to all institutions (from the very formal to the very informal) that impact on public actors' actions. This hierarchical model consists of three levels of institutions where each level must comply with the one directly above it. At the top of this hierarchy one finds the constitutional framework of a state. This level includes constitutional rules and principles that preserve the state's democratic functions. The second level of institutional rules is comprised of all the rules that govern the public machinery of the state. More specifically, it includes the laws, regulations and institutional policies that guide the administration's actions and their use of the state's resources. These institutional rules of the second level also determine which tools or policy instruments an administration can use to resolve a public issue. The third level of institutional rules consists of public decisions, public agreements, state actions, which are used to implement a governmental solution to resolve a public issue. Public policies are found at this third level of the hierarchy.

In such a framework, institutional rules at one level act as positive or negative constraints on rules at the lower-level: constitutional rules constrain laws, regulations and institutional policies, which, in turn, constrain public decisions, public agreements or public policies (Knoepfel et al., 2006). In this framework, public policies should not be formulated independently from institutional policies. This situation has merits since institutional policies ensure management consistency

within a public administration; they increase, by the same token, the relative coherence of the state's public policies. For Knoepfel et al. (2006) this guarantees a certain level of stability of the state's actions. However, this stability comes at a price. It demands a high level of intra and inter-departmental coordination that can considerably limit departmental actions, even to the point of inertia. This can easily lead to tensions between institutional and public policies.

By adopting Knoepfel's hierarchical model, we argue that the design of public policies is subject to a series of institutional policies that govern a public administration. No public policy can override the mandatory requirements of institutional policies. We agree with Knoepfel et al. (2006) that tensions can emerge between the institutional policies' requirements and public policies' objectives. These tensions are most likely to emerge when institutional policy requirements impede the proposed instruments or proposed actions of public policies.

These tensions are explained by the fact that institutional policies and public policies are developed and evolve in two different environments. On the one hand, institutional policies of the second level are designed to optimize the governance of the institution, and evolve depending on administrative issues they face or on governmental decisions (for instance, the implementation of New Public Management practices). On the other hand, public policies are designed to resolve a social problem by modifying the socio-conditions of actors who are affected by the problem and evolve depending on the dynamic interactions of different social-actors. Public policies also evolve because the problem itself changes over time and requires different actions from the state. Furthermore, institutional policies and public policies evolve not only in two different environments, but also in environments that change at a different pace. Consequently, there is always a reality gap that exists within the environments that gives rise to the tensions between institutional and public policies. Simply put, because institutional policies are concerned with a different reality than public policies, they are not necessarily attuned to the needs of their public policy counterparts.

These tensions can result in two possible outcomes (Knoepfel et al., 2006). Most often than not, the institutional policy will be stronger than the public policy and public actors will have to redesign the public policy to comply with the institutional policy requirements. This can be understood as a public policy killer situation (Knoepfel et al. use this terminology as a metaphor to express the idea that the institutional policy forced a change in the public policy and therefore has "killed" its original version). Sometimes, however, dynamics between social and public actors or the importance of a public problem can overcome the strength of an institutional policy and force public actors to repeal the said institutional policy or to modify it according to the needs of a given public policy. This can be understood as an institutional policy killer situation (Knoepfel et al. again use this metaphor to mean that the public policy forced changes in the institutional policy and therefore "killed" its original version). In most cases, institutional policies have the upper-hand.

This transversal axis of coherence can result in three different scenarios. First, one will observe a relative harmony and coordination between institutional and public policies. Second, one will observe tensions between institutional policies that led to a public policy killer situation. Third, one will observe tensions between institutional policies that led to an institutional policy killer situation.

In the following sections, we will use the Swiss Law on transparency as a case to analyse the coherence between that act (which serves here as a public policy) and the institutional policies on which it rests. This analysis is based on a three-fold content analysis method. First, we review the LTrans to highlight the elements that interact with institutional policies. Second, we identify the institutional rules and policies that can reinforce or impede the Act. Third, we look at how the Act and the corresponding institutional policies interact. This leads us to determine if the coherence between the Swiss Transparency Act and the identified institutional policies is characterized by a relative harmony or, on the contrary, by tensions, in which case we establish if these tensions result in a public policy killer situation or an institutional policy killer situation. But more importantly, we detail either how the harmony is observed or, the effects of the tensions between the LTrans and the institutional policies that constrain it.

3 Access to Information as a Ground of Inquiry

The concept of transparency rests upon a non-negotiable ‘right to know’ (Fung, Graham and Weil, 2003) that is linked to the fundamental freedom “to seek, receive and impart information” (art. 19 UDHR) (UNO, 1946). In the public sector, the concept of transparency is active through a number of different laws and procedures. Over the last 20 years, one of the key instruments of transparency has been access to information laws (ATI). These laws give individuals the opportunity to request, without need to justify or substantiate the request, information, or a document containing the desired information. Citizens thus have a legally guaranteed right of access to information held by public institutions. This right is qualified by a specific and limited number of exceptions and exemptions to the generalised rule of disclosure. This is, for administrations and citizens alike, a significant cultural transformation from the traditional and historical notion of administrative privilege.

Since the 1990s, the adoption of such legislation has greatly accelerated, in part as a development of the rise of both administrative democracy and democratic governance. There are now more than 80 countries with ATI laws with many more being observed in sub-national political entities (Vleugels, 2010). These laws now represent a non-negligible part of the ‘good governance’ institutional policy rules of modern states.

3.1 The Swiss ATI case

In Switzerland, the federal government's first attempt to enact an ATI law had the specific objective of positioning the state 'closer to citizen via increased transparency' (Conseil Fédéral, 2010). When 'la loi fédérale sur le principe de la transparence dans l'administration' (Swiss Transparency Act) was passed in December 2004, it was in order "... to promote the transparency of the mission, organization and activity of the administration. To this end, it contributes to public information by guaranteeing access to official documents" (LTrans, RS 152.2). In its Message, the Federal Council outlines the fact that "...the project aims at making more transparent the decisional procedures of the administration with the objective of reinforcing their democratic character of public institutions as well as citizen's trust in these same institutions." (Conseil fédéral, 2003: 1819) It also mentions that through this project the work of the administration could only become more effective. These goals are in line with those outlined in most countries: 1) better governance; 2) greater trust; and 3) increased participation (Pasquier, 2013). The principles and objectives are what constitute the institutional policy aspect of the ATI law. The public policy aspects are to be found in the specific way in which this policy is to be implemented.

Laws on access to information have relatively similar legal characteristics that frame their application as a public policy (Frankel, 2001). Among those are elements pertaining to the coverage of the law (what organisations are under its purview and what type of information or documents can be requested), exceptions (information or documents that are expressly shielded from the law for reasons of protection of personal privacy, public interests or organisational prerogatives) and appeals mechanisms (institutions charged with the proper respect of the legislation). Other aspects, such as the costs, specific channels for making requests and the listing of available documentation and/or information are also relatively standard.

3.2 ATI and 'Coherences'

The interest of ATI as a case study of coherence between institutional and public policies goes beyond its increasingly widespread acceptance. It is rooted in its relatively standardised legal form and the systemic and holistic nature of its objectives. It involves all levels of an organisation and is aimed at the whole citizen body. In such a situation the coherence of ATI regimes can be analysed on all three coherence 'vectors' previously identified:

- 1) Horizontal coherence;
- 2) Vertical coherence; and
- 3) Transversal coherence.

Horizontal coherence here refers to the ability of the ATI law to interact successfully and, where possible, seamlessly with the other policies of a same level of government (in this case, the Swiss federal level). One can identify some of the most problematic elements from a political point of view, security or foreign affairs, but also in administrative terms in the data intense department of social security or health care. The second type of coherence, vertical coherence, refers to the interaction of ATI policies between levels of government. This is most evident in federal systems where rules guiding transparency might differ for a same policy object or even, at times, a same document. The third type of coherence, transversal coherence, deals with the general nature of an institutional policy and its incarnation as a deliverable to citizens in the form of a specific public policy. It refers to the coherence between the policy itself and the means and resources allocated to its implementation as well as the internal administrative and political willingness to enact all its provisions.

While studies looking at horizontal and vertical coherence are few, the reflection on the notion of transversal coherence seems almost wholly absent. This is surprising given the increasing development of transversal and institutional level policies. The institutional aspect of the Swiss Transparency Act can be understood as its main objective but also its coverage. The public policy aspect of the Swiss Transparency Act relates to its concrete application, in fact making the overall concepts and objectives tangible. If it is clear that there is potential for synergies or impediments between institutional policies and public policies in ATI laws, these tensions might take three different forms.

A first, and most contentious aspect of the tension is related to the attribution of resources for the proper deployment of the public policy. The treating of information requests, as well as the informational architecture necessary for the proper delivery of documentary transparency, require a large investment of resources. This tension is evident in numerous countries. In the case of Switzerland, with a relatively low number of requests being filed, one could nevertheless point to the very low budget dedicated to it and, more specifically, to the integration of the transparency policy in the flow of current business without the attribution of greater resources to departments.

This first aspect is in many ways rooted in the cultural transformation that transparency imposes on public sector organisations. Resistances to the proper implementation of ATI laws, the second form of tension, have been documented from both a political stand-point and an administrative one (Pasquier and Villeneuve, 2007). There are resistances, whether based on the politically sensitive nature of the information to be revealed or on the loss of control and power entailed by the law. This relegates the institutional policy to the background, the internal dynamics of the public policy taking precedence.

One must also contend with an institutional policy that has objectives that are difficult to evaluate beyond the mere assessment of outputs (number of infor-

mation provided, documents communicated, appeals filed, etc.), which leads to a third form of tension. We are in a situation where the public policy becomes the vector that is used for a proper evaluation of the institutional policy, thus creating a blurring effect of both the border between the two and of their level of tension.

If one were to take that same tension and analyse it from the point of view of the institutional policy, the main vector of enforcement appears to be the appeal procedures and the presence of an ombudsman (in Switzerland the *Préposé fédéral à la protection des données et à la transparence*). Public pressure, either from the citizens, politicians or various NGOs, is also part of the defence mechanisms of the institutional policy. However, in the Swiss case one has to note the dual job of supervising both the transparency dynamics and those related to data protection that falls on the *Préposé*.

The dynamics evolving from the public policy side or from the institutional policy side are different in nature, but they both seamlessly tie into the larger debate on governmental and administrative transparency. The nature of the incoherencies (on the one hand lack of resources, lack of political will, lack of administrative will, difficulty of evaluation and on the other political and popular pressures) all point to a standstill. We face neither a public policy killer situation nor an institutional policy killer situation. Both the institutional policy and the public policy are in a constant tug of war. This might point to the fact that the transversal coherence of ATI laws is both inherent and at least to a point, part of the very construction of the fragile equilibrium that is transparency.

Zusammenfassung

Studien zur Politikkohärenz wurden bisher vorwiegend im Zusammenhang mit verschiedenen öffentlichen Policies durchgeführt. Es sind jedoch nur wenige Studien über die Kohärenz zwischen den institutionellen Regulierungen und den öffentlichen spezifischen Policies vorhanden. Dieser Artikel widmet sich diesem Zusammenhang. Er basiert auf einem von Knoepfel et al. (2006) entwickelten Modell über die Hierarchisierung der Institutionen und untersucht den Fall des schweizerischen Bundesgesetzes über das Öffentlichkeitsprinzip der Verwaltung (BGÖ/franz.: LTrans). Das Modell von Knoepfel et al. legt nahe, dass es eine Hierarchisierung der normativen Institutionen gibt, wobei jede Ebene eine positive oder negative Auswirkung auf eine niedrigere Ebene haben kann. Dieses Modell sieht die institutionelle Politik auf einer höheren Ebene als die öffentliche Politik, was darauf hindeutet, dass es Spannungen zwischen institutioneller und öffentlicher Politik geben kann und die Umsetzung der letzteren behindert werden könnte, und es dadurch zu Situationen kommt, in welcher die eine Politik die andere vernichtet. Unsere Studie zeigt, dass das BGÖ tatsächlich ständigen Spannungen zwischen institutionellen Elementen des BGÖ und dem Gesetz selber unterliegt, dass diese Spannungen aber zu einem Gleichgewicht führen, ohne dass die institutionelle Ordnung oder die öffentlichen Policies geschwächt werden.

Schlagnworte: Informationszugang, Politikkohärenz, institutionelle Politik, öffentliche Politik

Résumé

La cohérence des politiques a surtout fait l'objet d'analyses entre plusieurs politiques publiques. Toutefois, peu d'études portent sur la cohérence entre des politiques institutionnelles et des politiques publiques. Cet article propose d'aborder la cohérence sous cet angle. En se fondant sur un modèle développé par Knoepfel et coll. (2006) de la hiérarchisation des institutions, nous proposons d'étudier le cas de la loi suisse sur l'accès à l'information (LTrans). Le modèle de Knoepfel suggère qu'il existe une hiérarchisation des institutions normatives dont chacun des niveaux peut avoir des effets négatifs ou positifs sur le niveau inférieur. Le modèle place les politiques institutionnelles à un niveau supérieur par rapport aux politiques publiques, théorisant ainsi l'idée que des tensions entre des politiques institutionnelles et des politiques publiques peuvent venir entraver la mise en œuvre de ces dernières et même parfois conduire à une situation où l'une oblige le changement de l'autre. Notre étude de la loi sur l'accès à l'information montre qu'il existe en effet des tensions perpétuelles entre les éléments institutionnels de la loi sur l'accès à l'information et la loi elle-même, mais que ces tensions résultent dans un certain équilibre qui ne s'est pas traduit en un scénario catastrophe pour la politique institutionnelle ou la politique publique.

Mots-Clé: Accès à l'information, cohérence des politiques, politiques institutionnelles, politiques publiques

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