Regulatory oversight and inter-agency coordination: infrastructure development

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1. Introduction

This paper considers the role of regulatory oversight and inter-agency coordination in infrastructure development. This central theme follows from the fact that large-scale infrastructure development lends itself to various regulatory actors sharing jurisdiction in respect of particular projects. This overlapping of jurisdiction creates situations of 'shared regulatory space'. Our contention is that in order to ensure that optimal decision-making occurs in this context there is benefit to, and perhaps even the necessity for, the establishment of effective oversight mechanisms.

Section 1 of this paper will set out the broad background and key theoretical developments with regard to regulatory oversight. Section 2 focuses on shared regulatory space and the design of oversight mechanisms that can achieve effective coordination of regulatory agencies and decision-making. In the final section, we analyse the Infrastructure Development Bill, which was tabled in the National Assembly in 2013, as a legislative attempt at establishing an inter-agency coordination mechanism in South Africa.

2. Regulatory oversight bodies

In areas of economic activity, the natural need arises to limit harmful externalities.[2] The corrections of these externalities are achieved through regulation. But as regulation increases, a new challenge arises: ensuring the optimal functioning of such regulation. Legal scholarship has for years grappled with the thorny dilemma of how, by whom and the extent to which regulatory agencies may be controlled. The need for such control is premised on the view that discretionary powers afforded to regulatory agencies carry an inherent risk: that the intention of the primary policy-making authority may diverge from that of the agency or may not be effectively implemented.

In this context, there emerges a 'policy-making accountability problem', [3] which implicates broader issues around regulatory oversight, the role of executive agencies, as well as separation of powers concerns. Following from these debates, various modes of accountability, monitoring and oversight of regulatory agencies have been developed, including: forward-looking procedures and directives aimed at ensuring that desirable

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[2] This is typically a function of the fact that most, if not all, economic activity occurs in imperfect markets, and such markets by nature produce sub-optimal results.

[3] Susan Rose-Ackerman "Regulation of Public Law in Comparative Perspective" University of Toronto Law Journal.

decisions are made by agencies; backward-looking monitoring of agency decisions to evaluate outcomes and impacts; judicial review mechanisms allowing for the testing of decisions already made; exercise of control over agency budgets; and, finally, various forms of political influence.

A movement steadily gaining pace in jurisdictions such as the United States and Europe is the emergence of regulatory oversight bodies with elements of inter-agency coordination. The concept of regulatory oversight is captured nicely by Lindseth et al as the: 'hierarchical supervision of regulatory action by executive and legislative actors'.[4] During the 1980s, the United States embarked on what can be considered the most ambitious project in ensuring the optimal operation of the regulatory apparatus.[5] The Office of Management and Budget, an executive body, was tasked with the centralised review of agency decision-making. This newly established process was justified with reference to key goals: the promotion of political accountability, inter-agency coordination, rational priority setting, cost-effective rulemaking, and the limiting of excess regulation.[6] Based on these justifications, the concept of regulatory oversight and the development of specific institutions to carry out that task began to evolve. Through these processes of regulatory review, these bodies have become an integral component of not only regulatory reform programmes in many countries, but also of their respective administrative systems.[7] As a corollary of adopting this role, an oversight body must possess a degree of expertise in relation to the policy that falls within its jurisdiction, as well as some form of political accountability itself in order to ensure that the regulatory decision-making remains congruent with the mandate of either the executive or legislative branch of government.[8]

The continuing evolution in regulatory oversight has seen the development of an ever more sophisticated array of complex analytical tools used to actively assess the decisions made by regulatory agencies and the flow of new regulations. These tools may come in the form of impact assessments of proposed legislation, benefit and cost analysis, cost effectiveness analysis, risk trade-off analysis and various other forms of scientific analysis. More recently, a focus on regulatory *due process* has come to the fore as an equally effective method of regulatory oversight. This may take the form of simplification of existing legislation and regulation, consultation procedures on drafting proposals, as well as screening and withdrawal of pending proposals.

Several key attributes are associated with regulatory oversight bodies. First, such bodies

[4] Peter Lindseth et al in "Administrative Law of the European Union: Oversight" (eds) George Bermann et al.

[5] Nicholas Bagley and Richard Revesz, Centralized Oversight of the Regulatory State, Columbia Law Review 106 No.6 (2006) 1260

[6] Christopher DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harvard Law Review. 1075 (1986).

[7] Jonathan B. Weiner and Alberto Alemanno 'Comparing regulatory oversight bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU' in Comparative Administrative Law.

[8] Comparing regulatory oversight bodies across the Atlantic.

are typically staffed with highly trained professionals with expertise in the fields they are tasked to oversee. The benefits of such expertise simply relate the improved quality and appropriateness of regulatory oversight and review. However, such expertise may not always be the priority in establishing these regulatory agencies. An oversight body could in fact be headed by a political appointee and may therefore simply exercise politicised influence over the expert regulators. It is argued that such influence would undermine the legitimacy of the oversight body as the outcome of any oversight would not necessarily be the product of expert analysis, but rather the furtherance of a political agenda.[9]

Second, political accountability, established by the close link with the executive branch, ensures that the regulation serves the agenda of whichever high level political officials have assumed the responsibility for the oversight body.[10] These officials are themselves held accountable to the electorate and carry a democratic mandate regarding policy decisions. The benefit of such supervision of the oversight body is that it limits the influence of the regulators' own political constituencies. However, accountability is not only achieved through the installation of political officials in the leadership of oversight bodies. Courts and other adjudicatory bodies can play a large role in the oversight of regulatory agencies through the mechanism of judicial review or administrative appeal. Nevertheless, an intriguing tension arises as any form of influence that an oversight body may be subject to, necessarily derogates from its function as an expert institution.

This tension between the oversight bodies' use of experts, the political agenda of officials charged with the oversight of these bodies and the possibility of other forms of influence requires that an incredibly delicate balance be struck in order to ensure optimal functioning. The oversight body must be sufficiently independent so that its technocratic ability may be adequately exploited, and must be sufficiently linked to the executive power in order to maintain its authority and progress its, and the executive's, regulatory agenda.

The effect or existence of this tension is dependent on several factors, such as the method of appointment and removal of the leadership of the oversight body, the effect that such a method may have on the performance of the oversight body, the type of expertise that the oversight body has or is required to have, and finally the manner in which such expertise, as well as political position, is used to influence the quality of regulatory decision-making.

The crux is this: the role of oversight of regulatory agencies has become an increasingly important aspect of regulatory design. While the justifications for regulatory oversight

[9] Jonathan B. Weiner and Alberto Alemanno, 'Comparing regulatory bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU' in Comparative Administrative Law at page 310.

[10] Ibid. See also Peter Lindseth, Alfred Aman and Alan Raul "Administrative Law of the European Union: Oversight (2008); Alexander Bickel, 'The least dangerous branch: The Supreme Court at the bar of politics'. (1986); and Mark Tushnet, 'Policy distortions and democratic debilitation: Comparative illumination of the counter-majoritarian difficulty', Michigan Law Review (1995) 245.

are relatively uncontroversial, there are complex debates on how best to achieve it. Adding to this complexity is the growing trend for several regulatory agencies to overlap in terms of their jurisdiction.[11] This may occur, for example, where legislatures assign responsibility for large regulatory projects to several distinct regulatory agencies. The manner in which these agencies fulfil their role and the division of labour between these agencies may vary widely and create an added difficulty of inter-agency coordination. We turn to this aspect of regulatory oversight next.

3. Inter-agency coordination

3.1. Development of shared regulatory space

The emphasis in public law theory has typically been placed on the functioning of individual agencies and how political oversight and the courts affect their decision-making. As the regulatory state evolves, a further extension of the oversight role has been developing. Law-makers may craft legislation in a manner that results in the delegation of responsibility to multiple agencies in respect of same, similar or interconnected issues. Essentially, this means that regulatory responsibility with respect to a single regulatory goal is shared among several agencies. Various circumstances may justify the construction of shared regulatory space and the delegation of overlapping authority to multiple existing agencies, such as when:

i) consolidating the regulatory authority within a single agency is too costly;

ii) the ultimate outcome produced by the multiplicity of agencies is closer to the intended outcome designated by lawmakers than if produced by a single agency; or

iii) the intent is to harness the specialist expertise of different agencies to tackle subject areas that are inherently complex, such as social and economic regulation.[12]

3.2. Forms of shared regulatory space

There is no single form that shared regulatory space can take. In fact there are several types of multiple-agency delegations, such as:

i) *overlapping agency functions*, where lawmakers assign essentially the same function or responsibility to more than one agency;

ii) *related jurisdictional assignments*, where lawmakers assign closely related

[11] Eric Biber, 'The more the merrier: Multiple Agencies and the future of administrative law scholarship' in Harvard Law Review 125 (2012) 78; Neal Kumar Katyal, 'Internal Separation of Powers: Checking today's most dangerous branch of government from within' 115 Yale Law Journal (2006) 2314

[12] Jody Freeman and Jim Rossi, 'Agency Coordination in Shared Regulatory Space' Harvard Law Review 125 (2012) 1131 at page 1142.

but distinct roles to multiple agencies in a larger regulatory regime;

iii) *interacting jurisdictional assignments*, where lawmakers assign agencies different primary tasks but require them to cooperate on certain other tasks; and

iv) *delegations requiring concurrence*, where all agencies involved in the same regulatory function must agree in order for an activity to occur.

In the context of state-driven new build infrastructure development, the relevance of interacting jurisdictional assignments may be particularly instructive. Here we refer to the circumstance where the legislature creates 'situational interdependence' among agencies that have different and potentially incompatible primary tasks. More specifically, a regulatory regime could create several agencies each tasked with an aspect of the greater regulatory project. Each agency is dependent on the one or a number of other agencies in order to perform its function. We return to this in greater detail below when we discuss the Infrastructure Development Bill, 2013.

3.3. Coordination in shared regulatory space

As overlaps and fragmentation of jurisdictions have become increasingly common-place in complex regulatory regimes, so too has the need to ensure the operability of the regulatory system and the minimisation of inefficiency that can arise.

The potential weaknesses that may arise in the functioning of the shared regulatory space can be measured against the criteria of 'efficiency', 'effectiveness' and 'accountability'. These concerns can include, for example:

i) transaction costs to government of managing jurisdictional disputes, forgone economies of scale, wasteful duplication of services or functions, and unproductive agency competition;

ii) increased compliance costs for parties that fall within the regulatory jurisdiction;

iii) increased monitoring costs borne by political overseers and the public;

iv) the decrease of policy effectiveness that may result from a discordant regulatory regime, conflicting agency operations and limited information sharing;

v) greater possibility of bureaucratic drift, which could eventually evolve into regulatory inaction.

By way of example, there may be situations where multiple agencies are required to concur before processes can move forward. This creates impediments to the proper functioning of the greater agency collective in the form of effective veto power granted to each agency. This situation particularly arises in circumstances where a single project requires the participation and approval of several regulatory agencies, each of which

has some form of statutory authority over an aspect of the regulated project.

Despite these potential weaknesses, several advantages may be realised from within a shared regulatory space. For example:

i) constructive interagency competition;

ii) greater expertise over various stages or aspects of the decision-making process;

iii) backstop to any agency failure;

iv) opportunities for agency compromise in order to prevent stagnation; and

v) reduced monitoring costs.[13]

In order to maximise the benefits of a shared regulatory approach and to minimise the attendant costs of such a formulation of regulatory design, certain coordinative measures must be undertaken, such as the establishment of an oversight regulatory body, with one of its core functions being inter-agency coordination. The tools for inter-agency coordination can include consultation provisions, inter-agency agreements, joint policymaking processes, and centralised executive review.[14] Even though the goal of coordination is to maximise the strengths of the distinct agencies within a shared regulatory space, inefficiencies could arise in the very process of coordination if regulatory design mechanisms have not been properly theorised and applied to meet the demands at hand and a variety of contingent factors, such as the relationship between the overlapping agencies, the goals of these agencies and the internal dynamics of these agencies.[15]

Of interest to us is the relative under-theorisation of overlapping, or shared regulatory space in South Africa and a consideration of inter-agency coordination mechanisms in regulatory design. It is here that we find that the policy drive toward infrastructure development and the spotlight that this has placed on interagency regulation particularly intriguing.

4. **Inter-agency coordination and oversight: Infrastructure development**

On 5 November 2013, the Infrastructure Development Bill, 2013 ('the Bill') was tabled in the National Assembly. On its own terms, the Bill aims to provide for the facilitation and

[13] Ibid at page 1151.

[14] Compare William W. Buzbee, Recognising the Regulatory Commons: A theory of regulatory gaps, 89 Iowa Law Review 1 (2003), and Jason Marisam, Duplicate Delegations, 63 Administrative Law Review 181 (2011), Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Supreme Court Review, 201, Anne Joseph O'Connell, The Architecture of smart intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 California Law Review, 1655 (2006).

[15] Jacob E Green 'Designing Agencies' in 'Research Handbook on public choice and public law' at page 334.

coordination of public infrastructure development in South Africa. It does so by affording legal status to the Presidential Infrastructure Coordinating Commission ('the PICC'), which is an existing committee that directs policy initiatives in the field of infrastructure planning and development. The Bill provides a fascinating attempt at establishing inter-agency coordination mechanisms and oversight in the arena of infrastructure development.

The Bill has, however, attracted severe criticism from a variety of sectors, with anxiety developing around the additional levels of bureaucratic red tape that the Bill is perceived to impose, conflicting targets and timelines, and usurpation of the roles of other organs of state.[1615] Despite the technical and practical criticisms that have been raised, the merits behind a formal mechanism aimed at streamlining and coordinating regulatory processes in respect of infrastructure development projects nevertheless seems to be recognised. The questions then are how and why does the Bill seem to come short in designing an effective system of regulatory streamlining? In our view, the problem lies in the failure to properly theorise the role of the PICC as an oversight body.

As a starting point, the envisaged scope of the PICC is broad. Indeed, so extensive and varied are its functions that it is difficult to distil a coherent character and purpose to the body. In trying to delineate the core of the Bill's objectives, we set out at least two main expectations that the Bill seems to have for the PICC.

The first is to act as a coordinating body. Here, the PICC is tasked with, among others, coordinating the determination of priorities for infrastructure development; designating strategic integrated projects ('SIPs'); designating SIP chairpersons and SIP coordinators for those SIPs; ensuring cooperation between organs of state affected by projects undertaken; and facilitating improved coordination and integration within SIPs.

The second expectation of the PICC is that it may serve as a body through which infrastructure development projects and regulatory processes can be monitored for the purpose of future decision-making. In this latter role, the PICC is tasked with needing to identify, among others: current and future needs in relation to infrastructure development; regulatory impediments to infrastructure development; the impact of SIPs on employment and economic inclusiveness; as well as the broader social impact of SIPs.

These objectives appear laudable and, intuitively, make sense in a field such as infrastructure development. This is so because infrastructure development, by its nature, is likely to be a field where the dynamics of shared regulatory space play a dominant and determining role. In the categories of different forms of overlapping agency space referred to earlier, the circumstances created in any particular infrastructure development project can be described as a scenario of 'situational interdependence'.

However, rather than setting out a clear framework of the powers that the PICC may itself exercise in relation to coordination and oversight activities, the Bill curiously

[16] See 'Municipalities, business decry Infrastructure Bill' Paul Vecchiato, Business Day 15 Jan 2014

proposes different structures through which inter-agency coordination and oversight will happen. It is beyond the scope of this paper to set out the structuring of the PICC in detail. Suffice it to state that the PICC is proposed to be composed of: (i) a Management Committee; (ii) a Secretariat and (iii) chairpersons, coordinators and steering committees. The Management exercises oversight over the Secretariat, and the Secretariat exercises oversight over the steering committees. At the same time, an SIP chairperson (the Minister under whose portfolio the infrastructure project falls) will be appointed in respect of each SIP. The Bill requires the SIP Chairperson to convene a forum of executive authorities involved in the SIP from the different spheres of government; coordinate implementation of the SIP that he or she chairs, provide information to the Secretariat; and promote alignment of government activities in support of SIPs.

In addition to the SIP chairpersons, the Bill proposes the establishment of multi-disciplinary steering committees. These are described as "a one-stop-shop where any matter relating to the implementation of [an SIP] can be resolved". These committees will be headed by SIP coordinators, which may be either a person or an agency as designated by the PICC. While the other appointments within the PICC are mainly political and drawn from the executive, the steering committees are primarily composed of technical experts. They are tasked with identifying all relevant approvals, authorisations, licences, permissions and exemptions that may be applicable to a SIP. Significantly, where any application is not granted, the relevant agency must provide reasons to both the applicant and the steering committee. The steering committee is then required to report on these reasons to the Secretariat. From here, it is not entirely clear what the Steering Committee is mandated to do in relation to these reasons.

In our opinion, this brief description makes apparent core difficulties in the current formulation of the PICC and its role. The multi-tiered structure of the PICC seems to be geared toward maximising both accountability as well as efficacy in inter-agency coordination. These are lofty goals and, in our view, worthy of pursuit. However, it appears that the Bill has not properly theorised the nature of the inter-agency coordination aimed for. The Bill creates multiple agencies *within* the agency-coordinating mechanism all tasked in some way *with* inter-agency coordination. In doing so, the Bill's proposals have the potential for establishing a bloated bureaucracy around its very own structures - threatening to undermine the key aims of accountability, effectiveness and efficiency in oversight and agency coordination.

Some areas that may be worth development, from a theoretical and regulatory design perspective are set out below.

a) As currently conceived, the work of inter-agency coordination and oversight by the PICC takes place through a variety of sub-structures – the personnel and powers of which sometimes overlap. Between the steering committees, the SIP chairperson, Secretariat and Management Committee, the potential for a gridlock of overlapping jurisdiction without clear lines of accountability is high and this is likely to lead to conflicting decisions in respect of regulatory processes. Removal

mechanisms for individuals within these bodies is also left unclear. This weakens all three aims of accountability, effectiveness and efficiency.

b) Particularly affecting accountability, there is no clarity as to where final decision-making authority rests and, to the extent that it exists, what that final decision-making authority may be directed toward. A contradiction then emerges between an oversight body and/or bodies that seem to have very wide discretionary powers, but at the same time are still constrained by existing processes and requirements of the individual agencies that they monitor. In this complex web, the key objectives of both accountability and efficacy risk being lost. This is particularly so when there is a lack of any detailed stipulations as to remedies that can be applied if there are delays o obstructions in the process of implementing a SIP.

c) It is also unclear how existing mechanisms for inter-governmental cooperation dovetails with the Bill. In this regard, there may be uncertainty as to whether the Inter-Governmental Relations Framework Act, 2005 is subsumed by the coordination and consultation mechanisms provided for in the Bill or will operate parallel to the Bill. Again, this lack of certainty seems to emerge out of an attempt to have the PICC structures to serve as a 'consultation' platform where disputes between different spheres of government can be identified and resolved – but without sufficiently clear guidance on how that will be achieved.

d) Cross-border coordination – and questions of accountability and effectiveness of oversight – is also an underdeveloped aspect of the Bill. While SIP chairpersons may be in a position to identify the agreements and arrangements that need to be in place for effective cross-border projects, it remains wholly unclear how the PICC will ensure effective coordination of these needs. This is particularly relevant given the National Infrastructure Plan's identification of certain regional SIPs.

e) The Bill does not set out any clear approach to regulatory due process. The ability of directly affected persons to be informed of decisions of any level of coordination or oversight is not articulated and there are no guidelines as to what the purpose of combining and consolidating public notification processes should be geared toward.

The work of Cass Sunstein is particularly valuable here. One of Sunstein's key areas of focus during his tenure at the Office of Information and Regulatory Affairs (OIRA) in the United States was on improving systems involved in regulatory decision-making processes, such as the manner in which public comment is facilitated and taken into account by regulators. Related to this was an emphasis on building and nurturing inter-agency consultation and coordination in order to improve regulatory outcomes. In this regard, OIRA served as an 'information aggregator' or 'regulatory referee', facilitating a conversation between the rulemaking body, other interested government agencies and then, more broadly, members of the interested or affected public. We see elements of this in the

current framework of the Bill, but the focus is lost in the dizzying levels of oversight and coordination that it then attempts to formulate.

f) Tying into the discussion on regulatory due process, greater detail around a set of arrangements for how the information obtained from both inter-agency and public consultation can feed into the *forward-looking function* of the PICC – that of monitoring SIPs for economic and social impact as well as future needs remains underdeveloped. In a 2007 paper on Infrastructure Development in Developing Countries, Anton Eberhard made the following recommendation:

> *One powerful mechanism to build the competence, credibility, and legitimacy of regulatory institutions is to mandate in primary or secondary legislation the requirement of prescheduled, periodic, independent reviews of regulatory performance and impact. These are ex post evaluations and should include recommendations that are made public and are used to guide remedial action. The reviews should cover regulatory governance and regulatory substance, as well as the impact of the regulator's actions and decisions on sector outcomes. Regulatory reviews could be undertaken by a panel of independent national and international experts.*[17]

Currently the Bill does not specify any tools that could achieve this type of monitoring of outcomes, even though there is great potential here.

Drawing from the above, and put simply: the Bill complicates rather than simplifies, and in doing so it has the potential to defeat its own ends. But this should not mean an end to the endeavour. There are important and exciting opportunities here in developing a systematic approach to shared regulatory space, taking into account the theoretical foundations outlined above and the specific needs arising out of a developing country context. The seeds are there, but further theoretical justification and consideration behind the purpose of the Bill and the structures it establishes appear to be warranted.

It would be overly ambitious to suggest any definitive redesign or resolutions to the complex issues raised by the Bill. However, from a preliminary perspective, it appears to us that the real nerve centres of coordination and oversight in the Bill are the steering committees. They are well-geared at a technical level to streamline and oversee the work of individual agencies in any particular project. At the same time, the appointment of an SIP coordinator potentially serves the role of direct executive/political oversight to ensure accountability. If the role of these steering committees can be developed and expanded, with properly detailed mechanisms for information aggregation as well as methods of intervention, then it is arguable that the additional levels of executive oversight are to a large extent necessary. To the extent that judicial review remains a continuing check over both the regulatory agencies below and decisions of the steering committees, this may be the proper channel through which discretion is kept on balance. In addition, it is worth noting the potential for the steering committees to undertake

[17] Page 26.

systematic post-implementation monitoring. It may be necessary to cater for this in a more detailed manner (for example, through the use of a national information database by each regulatory agency) so as to optimise future efficiencies in decision-making.

5. Conclusion

Infrastructure development and regulation is a complicated arena for regulatory design. We have attempted to highlight: a) the theoretical framework of oversight and inter-agency coordination within which infrastructure development can be situated; b) the concerns for accountability, effectiveness and efficiency that such bodies are directed toward resolving, but also that needs to be taken into account in the design of oversight mechanisms; and c) the practical challenges of inter-agency coordination in regulatory design of bodies such as the PICC.