Policy, Law & Regulation

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Lawyers and other legal practitioners working in the space of administrative law are frequently asked to interpret laws, regulations and policies, and to provide legal advice or to act on behalf of clients embarking on litigation.

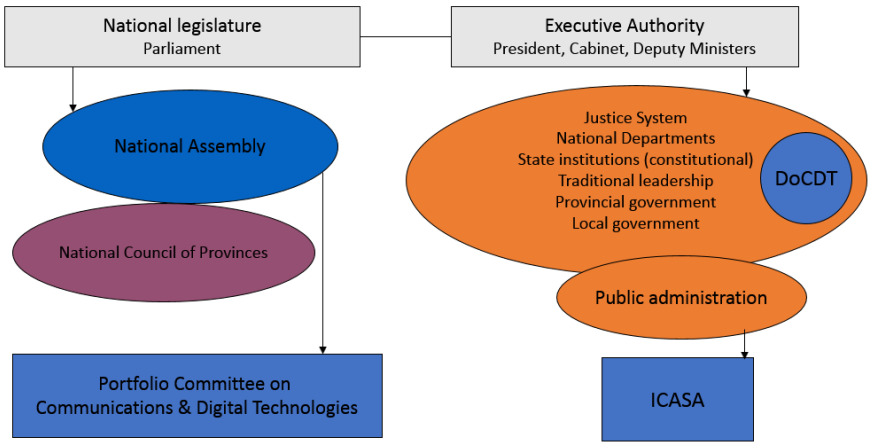
It is important for both them and their clients to have a clear understanding of the nature of these three elements, how they relate to and influence each other, and how they shape the sector environment.

Policy, law and regulation operate in a complex institutional environment, as can be seen in the diagram below, which outlines the relationship between policy-making, legislation and regulation, using institutional examples from the ICT sector.

The key role-playing entities dealing with ICT policy, law and regulation are highlighted in blue.

Their roles in relation to the legal process involving policy, law and regulation are discussed in more detail in the sections that follow.

Figure 1: Government Structures (South Africa)



Source: K Calenborne

Let us start off by exploring each of the three concepts - policy, law and regulation.

1 Policy

To begin with, what, then, is policy?

Wikipedia defines policy as a "statement of intent… a deliberate system of principles to guide decisions and achieve rational outcomes" developed and adopted by a "governance body" within an organisation.

In this article it is government policy that we are concerned with, at either national or lower level. Government policy sets out a structured position in response to an identified problem or issue, outlining what government aims to achieve, along with the planned steps, methods and principles to be used. Policy is, therefore, political, shaped and influenced by the agenda

of the governing party. Further, policy is usually seen as the primary driver leading to legislation and regulation.

From a legal perspective, it is essential to recognise that a **policy document is not a law** - although it may identify new legislation (or amendments to existing laws) needed to achieve its goals. Policy has no legal force on its own and is itself rarely the subject of litigation (unless it is *ultra vires*, meaning without legal foundation).

Policy is developed via a wide variety of processes and takes a wide variety of forms.

Policy can be very broad and sweeping (such as a national economic plan) or very narrow and specific (such SIM card registration).

Whilst policies may simply be issued and imposed, in most jurisdictions policy adoption takes place through some form of public consultative process. This might involve a colloquium or stakeholder workshop, or a more formal 'notice and comment' procedure[1], incorporating the opportunity for written or oral submissions (or both) on draft policy documents. In some jurisdictions, a preliminary 'Green Paper'[2] (or draft policy) is used to pose questions and float policy options, before being followed by a 'White Paper' (or final policy document), which formalises the policy position officially adopted.

Policy documents may be issued in a variety of formats, with differing degrees of formal status, ranging from gazetted policy papers, through policy directives (on, in the case of South Africa's ICT sector, 'policy directions', a formulation carefully chosen to preserve the formal independence of the sector regulator) to the tabling of an official policy White Paper.

Policies may further be preceded or accompanied by a range of impact assessment documents, some of which may be statutorily required. These may cover issues such as: cost of implementation, impact on the environment, and consequences for the sector. The latter fall under the overall rubric of Regulatory Impact Assessments (RIAs[3]) and are required in many jurisdictions (including the European Union).

Policy documents tend to adopt a language that is far more generalised and far less legalistically specific than would be the case in another kind of legal document. The formulation of the issues and the adopted positions tend to be couched in language that is imbued rather with economic, social, political and developmental concerns, which may be time-bound or as a result of goals set to avoid or achieve a specific outcome in the near future.

Finally, it is important to recognise that while the best policies are well-structured, clearly presented and well-formulated, policies may equally be badly-written, incoherent and ill-conceived. In practice, most policies fall somewhere in between.

[1] So-called because a public notice is issued, inviting such comments.

[2] The terms derive from the Westminster system in the United Kingdom, where such documents were printed on green and white paper respectively. A Green Paper poses policy questions and alternatives. A White Paper sets out the answers and positions adopted by government.

[3] In South Africa these are known as SEIAS or Socio-Economic Impact Assessment Systems. See the article in the Learning Centre on the SEIAS.

Some examples of policy documents from South Africa[4]:

- Dept of Environmental Affairs & Tourism (1996) Green Paper on an Environmental Policy for South Africa
- RSA (1997) White Paper on Environmental Management Policy

2 Law

Legislation aims to give legal force and effect to policy. It is legislation rather than policy that is justiciable, that is the basis for and subject of litigation.

Legislation differs in its scope and application. Some may be foundational (such as a national constitution, which lays the basis for and is the ultimate test of all other legislation), fundamental (such as administrative justice legislation, which sets out basic procedural rights and requirements), economy-wide (such as competition legislation, which applies across all sectors of the economy) or sector-specific (such as telecommunications or broadcasting or Internet legislation, which covers a specific economic or technical sector, or sub-sector). Some legislation may be even narrower in focus, such as South Africa's company-specific Broadband Infraco Act to create a state-owned telecommunications company. It is often in the public sector that very specific legislation is formulated to apply very narrowly.

The language of legislation differs greatly from that of policy. It needs to be legally precise and formally accurate, and is thus couched in a very specific style of language, sometimes referred to as 'legalese', which may be both convoluted and formulaic.

In most jurisdictions, legislation follows a standard, well-defined path from its initiation to formally becoming law. In parliamentary democracies, this begins when draft legislation, in the form of a Bill, is introduced (or 'tabled'[5]) into the appropriate legislative chamber[6].

This step is sometimes preceded by the publication of a 'draft Bill' if a greater degree of public input is sought. Often, in cases where the Bill entails substantial revision to the legal framework, it will have been preceded by the Green and White Paper policy process outlined above.

Once tabled, the Bill usually follows some form of notice and comment procedure. This often takes place in South Africa under the aegis of the appropriate legislative portfolio[7] committee, and often opens the Bill for public comment via written and oral submissions from stakeholders and members of the public on both the substance and detail of the Bill. During this process, amendments to the Bill, some material, others more technical, will usually be made by the committee, either by consensus or subject to the outcome of a vote.

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[4] The examples here are drawn largely from environmental policy, law and regulation, since this provides a coherent sequence of publicly available documentation that illustrates the points being made.

5 So-called because of the action of placing the Bill on the table in the Parliamentary chamber.

6 The formal details of the process will vary from country to country, according to the differing constitutional frameworks, legislative structures, and procedural rules and requirements. In some cases, not discussed here, legislation is enacted by presidential proclamation.

[7] So-called because they are aligned to the portfolio or mandate of the respective government Minister.

The final, amended version of the Bill is then returned to the appropriate legislative chambers for debate and adoption. Once adopted, the Bill is then usually referred to the head of state for ratification or signature. Only then does it finally become an Act, with full legal standing, force and effect.

Legislation is by no means a simple and straightforward representation of policy. There are a number of reasons why law may not exactly mirror or accurately embody the policy positions that underpin it.

First, the drafting process itself may be flawed. The drafting team may misunderstand the intentions of those who formulated the policy, or they may lack the necessary understanding of the sector required for good drafting. There may also be a delay between formulating the policy position and drafting the Bill, such that the impetus for the Bill is lost.

Second, the formulations produced by the drafting team may be poorly-crafted or lead to unintended outcomes in the marketplace.

Usually, all of these slippages will be present, hopefully to a lesser degree, but nonetheless making the final Act an imprecise instrument of policy.

The parliamentary process is intended in part - and in addition to its role in ensuring public consultation - to provide an opportunity to correct these flaws. However, the inputs of stakeholders and opposition members of parliament are also likely to bring about varying numbers of changes to the Bill, potentially also shifting it away from government's original policy intention.

Finally, the interaction of a new or amended piece of legislation with existing laws may not fully have been foreseen or anticipated by either the drafters or the legislature, producing outcomes only tested in the application or enforcement of the law. This is so particularly if the Bill has been rushed through the process, and if a RIA is not undertaken properly, or at all.

It should further be noted that a piece of legislation may be inconsistent with or in violation of one or more of the provisions of either over-arching legislation or the constitution within the country concerned (in South Africa the Constitution is paramount in law and often a determinant of policy). These last two sets of problems may only be exposed through litigation.

Some examples of legislation[8] from South Africa:

- Dept of Environmental Affairs (2018) Climate Change Bill
- RSA (2008) No 59 of 2008: National Environmental Management: Waste Act, 2008

3 Regulation

Sometimes referred to a 'secondary legislation'[9], regulations are issued by regulatory bodies, such as the competition authority, the ICT sector authority, or the body responsible for consumer protection.

The delegation of such authority to regulate may take place through specific enabling legislation which sets out the overall status, powers, functions and mode of operation of the regulatory entity concerned – such as the 2000 Independent Communications Authority of South Africa Act, which established ICASA). Further, one or more pieces of legislation may confer a more precise and detailed mandate upon the regulatory agency concerned[10], such as the 1998 Postal Services Act, 1999 Broadcasting Act, the 2002 Electronic Communications and Transaction Act and the 2005 Electronic Communications Act[11], all of which deal with differing aspects of ICASA's mandate.

Acting in terms of its legal mandate, the regulator will then proceed to issue a variety of regulations[12]. These regulations are intended to be primarily technocratic, based upon expert interpretation and application of the provisions of legislation in the light of the changing market and technology environment.

In most jurisdictions, regulations too will follow a formal notice and comment procedure, offering stakeholders (usually the entities directly affected by the regulation, as well as interested members of the public) the opportunity to make written and oral submissions in response to the publication of a draft regulation, before a final version is published or gazetted.

Regulations, in their turn, are equally subject to the kinds of drafting vagaries that affect laws. Regulations are perhaps even more likely to be the subject of litigation, mainly because they may have a direct and substantive impact upon the business cases and financial bottom lines of market players, but also because they derive their authority from their enabling legislation, which is far more precisely formulated and thus more justiciable than the policies from which they originated.

[8] It is recommended that readers examine the differences in language and formatting between legislation and the policies from which they emanated.
[9] So-called because regulation derives from primary legislation, one or more Acts of Parliament.
[10] Sometimes a single Act will cover both aspects, as in the case of South Africa's Competition Act.
[11] Each of these Acts has since been amended.
[12] Regulation is usually only one of the many competencies assigned to a regulator. Others may include issuing licences (which may themselves contain regulatory components); adjudicating disputes between entities under its jurisdiction; vetting mergers and acquisitions; or producing research and reports, for example. These functions are not specifically discussed here but see the Knowledge Centre for additional information.

Although regulations are made in terms of law, they may nonetheless be out of step with the policy goals set out in national policy. Some balancing of the two may be required so that national interests are preserved at the same time as upholding the letter of the law. We will examine practical examples of this in another chapter.

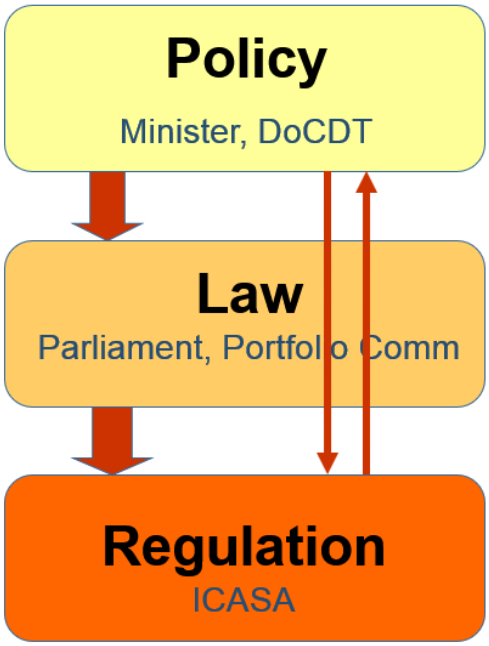
The relationship between policy, law and regulation is shown in the diagram below.

The large brown arrows illustrate how policy affects legislation, and how legislation in turn determines regulation. They also mark the points at which slippages that may occur between policy intent and regulatory effect.

These slippages are sometimes referred to as the 'principal-agent problem', whereby the regulatory agent may not carry out the intentions of the policy principal. The situation is complicated by the fact that the goals and objectives that are top-of-mind for the regulator may well differ from those animating the government ministry that initiated the policy.

The thin brown arrows show that there is another level of interplay between policy and regulation.

Figure 2: Policy vs Law vs Regulation
(South Africa, ICT sector)



Source: C Lewis

Policy may specifically influence how regulators interpret the law. This influence may be formalised in legislation, which may include provisions which empower the minister to issue policy directives that the regulator is required either to adhere to or to consider[13]. More informally, the regulator is in any event likely to take into account the policy documents and pronouncements of government when it comes to interpreting legislation and turning it into regulation.

In addition, an effective regulator needs to be able to give feedback to government on both policy and regulation, as to their workability and impacts within the sector. Such feedback can then be used by government to revise policy or amend legislation in order more effectively to manage the sector.

[13] In South Africa, these are labelled 'policy directions', implying something less specific and more generalised (except in certain specified instances such as spectrum), in order to protect the independence of the sector regulator, which is only required to 'consider' such directions. Neither term has yet been tested in a court of law as to its precise import or implication.

Some jurisdictions seek to resolve the principal-agent problem, and to ensure far tighter alignment between policy and regulation, by making regulations subject to formal approval (or rejection) by the responsible minister.

Apart from the fact that it undermines the independence of the regulator, such an approval procedure has the distinct disadvantage of slowing down the regulatory process by adding in an additional, cumbersome check and balance.

It also removes several of the advantages of having an independent regulator. A sector regulator should be able to respond with far greater timeliness, agility and flexibility to the vicissitudes of a dynamic, fast-changing sector (such as ICT) than is possible via the policy and legislative process. Further, the depth of sectoral expertise embodied in the regulator allows for a far more nuanced response to the complexity and intricacies of the sector.

Regulations remain legally binding until overturned in a court of law. It is therefore important to ensure regulations are clearly grounded in the specifications and requirements of legislation. Regulations that are without legal foundation are easily challenged and overturned in courts of law.

Some examples of regulation[14] from South Africa:

- Dept of Environmental Affairs (2019) Draft national norms and standards for organic waste composting
- Dept of Environmental Affairs (2017) National Greenhouse Gas Emission Reporting Regulations

4 Conclusion

This short summary has attempted to set out the scope and nature of the three key drivers of activity - policy, law, and regulation and to sketch some of the dynamics of their interplay. Many of the issues touched on here remain the subject of debate in literature and in the courts.

Both legislation and regulation are key and fruitful areas for lawyers with an understanding of the broader issues and a grounding in administrative law. The economic, bottom-line impact of both law and regulation can be profound, driving players to invest heavily in good legal advice and sharp litigatory expertise.

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[14]It is recommended that readers find the relevant law and note the differences in how the regulations are worded compared to the primary law. Again, it is worth noting how regulations differ in wording and tenor from the original policy vision.