

Public policy and projects: making connections and continuing the conversation

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Abstract

The objective of this paper is to explore the concept of ‘public policy’ from a project management perspective. In particular, we intend to contribute to emerging literature that has sought to establish a relationship between project management (specifically, project organising) and public policy. In the process, we continue with the conversation initiated in Winch and Sanderson (2015) and subsequently in Sanderson and Winch (2017). However, in a marked departure from the approach adopted in these two seminal studies (and associated works) our study is undertaken from a *legal* perspective as against the *administrative sciences* perspective which we opine dominated these prior studies. It is our position that a holistic understanding of the intersection between project management and public policy requires a balanced exploration of both perspectives of public policy. Our study that is undertaken in the context of arbitration undertaken within the United Arab Emirates construction industry. We do so taking into consideration the ‘unruly’, fluid and multifaceted nature of public policy. Findings from our study serves as the foundation for further empirical exploration of what is a nascent and developing area of project management research.

Keywords

Infrastructure projects; Public administration; Public policy, Legal perspectives; Arbitration; Conceptual article

1. Introduction

1.1 Background context

Public sector infrastructure projects can be utilised as tools for public policy implementation (Shiferaw and Klakegg, 2012). As a tool for policy implementation, projects can be utilised to organize the relationship between the public (the society) and the state. Projects therefore serve to enable the materialization and operationalization of public policy. Public policy may engage in diverse infrastructure projects. For example, it may touch upon projects focused on increased mobility for the disabled or projects focused on increasing access to drinkable water. Although major public sector infrastructure projects such as the Hinkley Point C Nuclear Power Station project, are utilised to implement public policy(Daniel and Daniel, 2019), it is important to acknowledge that the public and larger society rarely in direct contact with a number of these projects. Often than not, it is the products and services that emanate from these projects that the public will have direct experience of.

Projects are increasing being assessed as to whether they are in line with the needs, aspirations and priorities of the public. This public policy test examines whether the objectives of such projects will meet or contribute to societal needs. Underlying this ‘public policy’ consideration is not only the question of *how* and *whether* these projects should be able contribute to the well-being of the wider society (in addition to its expected economic benefit), but also the questions of the *purpose* and the *scope* of such policy. Governments however face a major challenge ensuring that public sector projects are in line with public policy. This is because more than often, an assessment of public policy is not based on any clear commercially oriented transactional exchange between the government and the public (society). Furthermore, public policy is usually drawn very broadly and in a generic manner which makes it difficult to articulate precisely the specific tools (in this case, projects) that will be required for its successful implementation.

1.2 Conversations on the interface between project management and public policy

Currently, conversations on the interface between project management and public policy have commenced (see Winch and Sanderson, 2015; Sanderson and Winch, 2017). These conversations also appear replicated in the wider operations

management field (see Hazlett et al. 2013; Joglekar et al. 2016), it is however in reality *still* unclear what do we mean by the ‘public policy’ from a practitioner and/or scholarly project management perspective. In fact, at present, the academic literature will suggest that it is still unclear how public policy justifies the transfer of what should be the public sectors infrastructure provision responsibility to the private sector. Exploring what precisely the ‘what’ and ‘how’ of the interface between project policy implies within the context of projects is a challenge because what is meant by ‘policy’ (Fimyar, 2014; Plunkett, 2016) and ‘public policy’ is characterised by ambiguity (Gibson, 2008; Hollander, 2016). Thus, recognising this challenge, this study is couched in the legal perspective of public policy. In adopting this approach, we respond to earlier assertions made by Padroth et al. (2017) that “*legal knowledge in construction [in effect, projects] has never been more important*” (p. 04517015-2).

1.3 Winch and Sanderson’s position

The theoretical exploration of the relationship between projects and public policy was initiated in Winch and Sanderson (2015) two years after it was operationalised in Sanderson and Winch (2017). The main thesis of these two studies was that public sector projects are characterised by a lack of any requirement for explicit financial reciprocation. This is despite the reality that at the conceptual stage, projects usually undergo various economical and other best value assessments (Ojiako et al. 2014; Park et al. 2014). However, more recently, they are also being scrutinised to ensure their alignment with ‘public policy’ (Brown and Rossi, 2010). This is despite the reality that public policy is not a concept that is referred to or mentioned in various project management practitioner bodies of knowledge such as the Association for Project Management (APM) Body of Knowledge (APM, 2012) or the Project Management Institute (PMI) Body of Knowledge (PMI, 2017). It is also the case in academia where existing research touching upon public policy and project management has been largely restricted mainly to the works of Winch and Sanderson (2015; Sanderson and Winch, 2017) and other scholars who contributed to the 2017 Special Issue on Public Policy and Projects published in International Journal of Project Management (Volume 35, Issue 3).

1.4 Limitation with existing scholarship

The ability to foster a comprehensive understanding of the public policy concept is questionable. Thus the need to continue the conversation. The limitation of these studies comes from their focus on only one of the two perspectives of public policy – the *administrative sciences* perspective. Winch and Sanderson (2015) had identified the interface between project management and public policy as likely to be manifested in eight different areas. However, our assertion is that these areas are manifest of an *s administrative sciences* perspective of public policy. It is therefore a restricted view of public policy. To draw a more comprehensive view of public policy, we posit that a comprehensive understanding of public policy as applied to project management does need a simultaneous exploration on not only this *administrative sciences* perspective, but also drawing from Fimyar (2014) and Plunkett (2016), a *legal* perspective as well. This position is driven by a recognition that the two perspectives (i.e. *administrative sciences* perspective and the *legal* perspective), fulfil two distinct but complementary roles. That is that the *administrative sciences* perspective provides us with insights into not only how policy influences and shapes the various facets of project organising, but also the necessary contradictory managerial responses, routines and resource utilisation strategies required to engage with any social role of projects. On the other hand, the *legal* perspective sets out the enabling frameworks required for implementing public sector projects (which are a manifestation of public policy).

1.5 The research questions

We set our study within the construction industry. This industry is well recognised in the literature as one in terms of the *administrative* perspective, characterised by strong institutional structures (Oliver, 1997). It is also in terms of the *legal* perspective, characterised as one governed by not only numerous regulations and legal frameworks, but also highly regulated professional institutions.

Two research questions will be addressed. Firstly, is *What is public policy and what is the purpose?*. Inevitably, the second question then becomes *What is the scope of public policy from a legal perspective?*. To address these two questions, our study is set within the United Arab Emirates construction industry. This is an industry that is valued at approximately US\$313.6 billion (export.gov, 2018). It is one also characterised by a high rate of failure (see Faridi and El Sayegh, 2006; Johnson and Babu, 2018), and thus disputes, intense claims and legal activity (Mix, 1997; Gerber, 2009; Mishmish and El-Sayegh, 2018; Zanelidin, 2018).

2. Policy and Public Policy

2.1 Public and private forms of policy

The primary function of policy is to articulate social action that are to be adopted and pursued by governments. In fact, as stated by Bacchi (2000, p. 48), policy is primarily “...*what governments do*”. Wedel *et al.* (2005) claims that the objective of policy is to articulate ideals on normative citizenship and societal behaviour. At its core is its ability to convey information on the standing and outlook of society (its values) concerning matters of profound interest.

Policy can be developed and enacted both *privately* and *publicly*. *Public* forms of policy focus on matters of public interest (Rosenau, 2000; p. 11). Therefore, public forms of policy *must* be open and subject to public scrutiny which is generally of a legal nature (Resnik, 2015; Brekoulakis, 2019). Conversely, *private* policy focuses primarily on matters of exclusive interest to the individual. A major difference between *public* and *private* forms of policy relates to agency (Benn and Gaus, 1983). In *public* forms of policy, the government as an agent of the state is construed as acting on behalf of the interest of the community or society (the idea of the public interest). On the other hand, in *private* forms of policy, there is in reality no obligation for agency. Individuals are able to make the choice to act on their own behalf in a private manner to resolve matters which touch solely upon themselves.

2.2 The two perspectives of policy

The *administrative sciences* perspective of policy can be construed to represent a set of attitudes, propositions, moral standards and values in the form of statements of intent that serve to guide decisions made by government and organisations (Fimyar, 2014; Ball, 2015). Policy from an *administrative sciences* perspective, has the ability to be disruptive leading to the need for routines to be altered and resources to be redistributed (Moynihan and Soss, 2014). The *legal* perspective serves as the ‘other side’ of policy. The *legal* perspective is particularly interested in understanding how socially framed policy, which are in reality discretionary, can be validated utilising instruments of the law (Kreis and Christensen 2013). However, this legal perspective is associated with considerable “...*uncertainty*” (Waddams, 2008; p. 7). This ambiguity exists because rather than simply addressing matters of specific interest to disputants, it seeks to address wider economic, political and social welfare concerns (Jones, 2013). Due to the mentioned uncertainty that is manifested in the legal perspective of policy, the courts play an active role in its operationalization. However, difficulties can arise in that the courts can in some instances make laws drawing either upon legal principles (Winfield, 1928) or policy (Daynard, 1970; Plunkett, 2016) or through a confluence of both legal principles and policy (Dworkin, 1978). However, in most cases the courts will interpret the law by drawing upon policy considerations. There are three principal factors that will favour the courts adopting a policy-based approach when making law (Plunkett, 2016). These are (i) transparency, (ii) a clear differentiation between legal principles and policy, and (iii) conceptualisation of policy itself. In effect, the courts will take into consideration what the society is likely to consider as appropriate. Doing so requires a rigorous examination of societal values, its intentions (directions) and likely (expansive) meanings within the context of justice (Daynard, 1970; Plunkett, 2016). It is a role the courts generally take extremely seriously. A combination of these can lead to uncertainty and confusion as pronounced values of the society are sometime difficult, especially when seeking to formulate revised or new legal principles (Doyle, 1998).

2.3 Public policy: An unruly concept

What is meant by public policy has not only historically been unclear (Paulsen and Sovern, 1956) but continues to remain so (Hollander, 2016). It has variously been described in western legal circles as an *unruly* ‘horse’ (Yelpaala, 1989; Arfazadeh, 2002). In the Middle East, it has been described as an *unruly* camel (Blanke, 2012). As a concept, public policy is not a determinate single phenomenon, but reflects a process with numerous decision points and participants (Greenberg *et al.* 1977). In the United Arab Emirates (see Article 3 of UAE Federal Law 11 of 1992), public policy is defined as matter “...*relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic sharia*”. This definition gives the appearance that matters deemed to engage UAE public policy are wide and varied (Almutawa and Maniruzzaman 2014). For this reason, public policy is impacted by a wide range of economic, social and political factors (Burstein, 2018).

Different types of public policy can be aligned to different facets of project organising. For example, ‘*administrative public policy*’, can serve as a mechanism (i.e specific managerial action), used in public sector infrastructure projects (see for example, Williams *et al.* 2010; Brunet, 2019; Matinheikki *et al.* 2019). The notion of ‘*structural public policy*’ can be representative of project stakeholder collaborations (Mok *et al.* 2015; Chipulu *et al.* 2019). We are also able to refer to ‘*response public policy*’, which is representative of public framed around transaction

cost economics. This perspective suggests that role of the government in projects must be restricted to economise project costs. Another form of public policy is referred to as ‘*time framed public policy*’. This perspective focuses on ensuring that projects being commissioned are done so at the required time which it will fulfil time-dependent public interest.

2.4 Public policy and the law

In the absence of the law, there cannot be public policy (Cooper, 2017). The law is important to public policy because, in the view of the inherent uncertainty associated with public policy, the law plays an important role in ensuring that the necessary frameworks that will structure the relationships between the government and the society are in place. The law is pronounced for example through national legislations. In the United Arab Emirates, such laws are reflected in Federal Law No. 6 of 2018 on Arbitration.

Arbitration is dispute resolution mechanism (see Tanielian, 2012; Lee et al. 2016; Ojiako, 2017, 2019; Ojiako et al. 2018; Besaiso et al. 2018). Arbitration is a popular means of dispute resolution in the construction industry (see Myers, 1996; Nicklisch, 1999; Seng, 2019).

Arbitration represents is an attractive alternative to court-based litigation (Mustill, 1989; Drahozal and Hylton, 2003). Its advantages include that due to their consensual nature, it can be utilised to settle matters which involve disputes much wider than those of national courts. Disputes that are being resolved via arbitration are also likely to be settled in a relatively shorter time than through court litigation (Kritzer and Anderson 1983). Arbitration is widely used in infrastructure project dispute resolution (see Myers, 1996; Nicklisch, 1999; Seng, 2019).

3. Arbitration, public policy and the law

3.1 Arbitration and public policy arbitration awards

Along with (i) manifest disregard for the law (Randall, 1992; Galbraith, 1993; Poser, 1998; Gronlund, 2010), (ii) the contravening of a core element or the essence of a contract or acceptable business practice (Randall, 1992), (iii) illegality or serious irregularity (Brown and Rose, 2000; Drahozal, 2006; Marcantel, 2008; Ware, 2014), (iv) public policy serves as one of the main considerations in arbitration hearings.

The reliance on public policy considerations in arbitration engages two views. One view suggests that interference by the courts with arbitration creates uncertainty and poses a risk to finality of disputes. An alternative view suggested by Meltzer (1988) and Randall (1992) suggests that arbitration awards should only be declared null and void when the courts find that the essence of an arbitration proceeding or award is in conflict with public policy.

Public policy is also identified in the academic literature as one of the six grounds specifically identified in United Arab Emirate legislation (see Article 2 of UAE Federal Law No. 6 of 2018 on Arbitration) as a justification to nullify and void an arbitration proceeding or award (see Angell and Feulner, 1988). Specific provisions being identified in Article 2 and Article 4 of UAE Federal Law No. 6 of 2018 on Arbitration.

4. The Bechtel dispute

The dispute between the International Bechtel Company Limited (‘Bechtel’) and the Department of Civil Aviation of the Government (the ‘DCA’) of the *Emirate of Dubai* (‘Dubai’) was the outcome of a long running contractual dispute between ‘Bechtel’ and the ‘DCA’ over a project management professional contract for the commercial development of a theme park and adjoining residential units that were to be located in Dubai. Citing reasons of public policy, the Dubai Court of Cassation¹ (the highest court operating in Dubai), confirmed that an earlier arbitration award worth approximately US\$25.4 million made to Bechtel in its dispute with the DCA had been nullified. In doing so, the Dubai Court of Cassation² confirmed an earlier decision of the Dubai Court of First Instance³ and subsequently, the Dubai Court of Appeal. The Dubai Court of Cassation in nullifying the arbitrators award, confirmed that the arbitrator had failed to follow UAE laws (specifically, Article 41(2) of the Civil Procedure Code), in the proper manner as to which witnesses should be sworn in civil proceedings such as arbitration proceedings.

5. Discussions and conclusions

Public sector projects serving as instruments of public policy in that they are not only subjected to public policy criteria (which is different that the ‘usual’ financial and ‘best-value assessments), the expenditure of public sector projects are

¹ Dubai Court of Cassation in Judgement 503 of 2003¹

² Dubai Court of Cassation in Judgement 503 of 2003²

³ International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 288/2002 [Court of First Instance]

quite substantial. However, there seems to be a view (at least in some scholarly circles), that there is also little evidence of major societal benefits being accrued from some of these projects (Ika et al. 2012; Shiferaw and Klakegg, 2012). This suggests that some of these projects have been commissioned without a full and detailed assessment of their public policy role. It also suggests that a number of public sector projects have been commissioned despite the reality that they may have contravene public policy (Shiferaw and Klakegg, 2012). Thus the need to examine public policy within the context of projects. Such a comprehensive examination will include that both the routines and organisational structures that serve to guide decisions made by government and organisations (the *administrative sciences* perspective of public policy), but also the frameworks that need to be validated utilising instruments of the law (the *legal perspective* of public policy) are fully accounted for.

Despite the differences in assessment criteria (from most privately financed and commissioned projects), public sector projects are also manifestly susceptible to disputes. With the interest of the state to ensure social harmony, the state through the national courts and private arbitration instituted have collaborated to provide dispute resolution mechanisms such as private or publicly mandated arbitration to resolve disputes that exist in these project environments (Mann, 1985; Conklin, 2016). It must be noted that as arbitration is a process that may involve both a private and public entities (as in *Bechtel*) or proceedings that have implications for public interest (Ullah, 2016; Brekoulakis, 2019). For these reasons, arbitration has increasingly been subjected to public policy considerations (Ullah, 2016; Brekoulakis, 2019).

Our study made assumptions that the notion of public policy articulation within projects required a full acknowledgement of both the administrative sciences and legal perspective of public policy. On the basis that prior research in this area traditionally emphasised an administrative sciences perspective, our study proceeding on the need for its legal perspective to be accentuated. Exploring this thesis, we focused on this legal perspective in the form of arbitration in the UAE construction industry. Utilising the *Bechtel* judgement, we demonstrated how possible complexities in the interpretation of legislative provisions (in this case, in arbitration), can lead to ambiguity in terms of how public policy may be construed.

To conclude, this study represents the first step towards our intention to theoretical espouse the conversation initiated by Winch and Sanderson (2015; Sanderson and Winch, 2017). For example, the study helps in advancing a project-focused understanding of public policy. There are therefore two possible approaches we can choose from in terms of future studies. First, we can seek to advance this outline study by focusing on expanding our appreciation of the complementarity between the *administrative sciences* and *legal* perspective of public policy within a project management perspective. Second, we can examine how public policy may be utilised as a managerial tool for the establishment, maintenance, consolidation and legitimisation of public sector infrastructure project implementation.

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