

Jerusalem Papers in Regulation & Governance

Working Paper No. 32
February 2011

UNDERSTANDING THE RISE OF THE REGULATORY STATE IN THE GLOBAL SOUTH

Dr. Navroz Dubash

Senior Fellow, Centre for Policy Research
Dharam Marg, Chanakyapuri
New Delhi – 110021, India
Email: ndubash@gmail.com

Bronwen Morgan

Faculty of Social Sciences and Law
University of Bristol, Wills Memorial Building
Queens Road, Bristol BS8 1RJ, UK
Email: B.Morgan@bristol.ac.uk

הפורום הירושלמי Jerusalem Forum
לרגולציה וממשליות on Regulation & Governance
האוניברסיטה העברית The Hebrew University
הר הצופים Mount Scopus
ירושלים, 91905 Jerusalem, 91905, Israel
regulation@mscc.huji.ac.il :Email
<http://regulation.huji.ac.il>

Understating the Rise of the Regulatory State in the Global South

Navroz K. Dubash and Bronwen Morgan

Abstract: This paper is a draft framing paper for a workshop held in New Delhi at the Centre for Policy Research in January 2011, which explored whether, and how, the rise of the regulatory state in the Global South, and its implications for processes of governance, are distinct from cases in the North. With the exception of a small but growing body of work on Latin America, most work on the regulatory state deals with the US or Europe, or takes a relatively undifferentiated ‘legal transplant’ approach to the developing world. Our focus was on regulatory agencies as a particular expression of the regulatory state, though we acknowledge that the two are by no means synonymous. We took seriously the historical legacy of the idea of a North/South divide while also integrating the considerable changes occurring topically in this purported divide (caused by increased economic integration between North and South and increased differentiation within the South). The workshop as a whole drew on a series of comparative case studies of infrastructure regulators (water, electricity and telecoms) drawn from Egypt, India, Colombia, the Philippines, Argentina, Brazil and Mexico.

The paper sketches a framework for analysis of the issues identified above. The intent is to draw out common themes that characterize a “regulatory state of the South,” while remaining sensitive to the variations in level of economic development and political institutional contexts within ‘the South’. Three entry points into exploring the distinctive nature of the regulatory state in the Global South are discussed. First, is there a distinctive genesis of regulatory agencies in developing countries? Secondly, to what extent and how is the regulatory state of the South shaped by the interface between the domestic and the international? Thirdly, how does the practice of regulation and the political opportunities afforded by state-society interactions in regulatory agencies shape regulatory outcomes on the ground, particularly in relation to the much higher (in comparison to industrialised countries) levels of unserved citizens and informal service providers?

Key words: regulation, comparative political economy; development; Global South; utilities; infrastructure

Understating the Rise of the Regulatory State in the Global South

Over the last ten to fifteen years, a broad acceptance of the rise of the “regulatory state” around the world has emerged. In a nice turn of phrase, Michael Moran once asked if the regulatory state is simply an “intellectual brazier” around which diverse scholars can gather. Although one interpretation of this is that the term lacks a precise definition, it also conveys the stimulation and dialogue that can be generated by focusing on the regulatory state. This paper aims to provide a framework for a forthcoming project that is based on just such a dialogue. The project will bring together 12-15 scholars whose work focuses on the regulatory state in the so-called ‘developing world’ to try and understand better the rise of the regulatory state in the Global South. In this framing paper, we deliberately aim to integrate a range of diverse perspectives, organised in three broad sections. If there is a common argument to this framing paper, it rests on two broad theses. First, that in order to understand the rise of the regulatory state in the Global South, it is critical to integrate politics into not just an appreciation of micro-level case study dynamics, but also into our broader theoretical approaches. Secondly, this deep integration of politics into an understanding of the regulatory state departs from the more technocratic approaches of ‘mainstream’ literature on the regulatory state to suggest that the project of ‘depoliticization’ through regulation is not only near impossible, but also ignorant of core features of developing country regulatory states.¹ To put it differently, it may not always be possible to draw a line between ‘regulating’ and ‘governing’, which then requires *reclassifying* core features of developing country regulatory states, shifting them from ‘problems’ to be corrected to essential context to be internalized in the regulatory process.

¹ This is not, of course, to suggest that depoliticization is trivial in industrialized countries, but to suggest a more careful attention to this assumed role of regulatory agencies.

What then, do we take as the core of the regulatory state in this project? Its empirical manifestations include at a minimum the emergence of law-backed specialised agencies, often assumed to operate through administrative means to support the unitary goal of economic efficiency. More generally, the notion of the regulatory state connotes greater reliance on institutions operating at arms-length from government, insulated from daily political pressures and embedding their decisions in technical expertise. In Nicola Phillips' words: 'the emergence of the regulatory state refers to a process by which economic management has become 'proceduralised': it is characterised by an increasingly rule-based, technocratic and juridical approach to economic governance, in which there is a greater emphasis on institutional self-regulation' (Phillips 2006: 24 in Minogue and Carino (eds) 2006). The big questions raised by this transition include: Does the "regulatory state" represent a markedly different mode of governing? What is the relationship of the specialised agencies that typify institutional reforms in the regulatory state to recent arguments about 'regulatory capitalism'? How does the delegation of decisions, and the structure of formal or informal supervision or review, change both substantial and procedural aspects of decision making? And how does it shift the architecture of political agency that underpins intersecting paths of economic and democratic development?

Although these 'big questions' could be asked in relation to any specific empirical context, relatively little work has explored whether, and how, the rise of the regulatory state in the Global South, and its implications for processes of governance, are distinct from cases in the North. The oft-noted features in the South of weak state capacity, constrained resources and powerful external pressures to adopt particular policy transplants might reasonably converge to produce a distinctive trajectory. Whether or not such a distinctive trajectory is in fact emerging is often obscured in the policy literature by the concurrent normative impulse to 'correct' these contextual features in the service of the 'best-practice' model being imported. We argue that the task of understanding through empirical research is an important prior undertaking that needs to be separated from normative prescription. In other words, deepening our empirical understandings of different manifestations of the regulatory state will have both practical policy implications and implications for the theoretical underpinnings of the regulatory state literature.

Jerusalem Papers in Regulation & Governance

This framing paper, and the workshop as a whole, therefore asks as its core question: are there distinctive features of the contemporary “regulatory state” in the Global South, and if so, why and what are the implications? We aim to take seriously the historical legacy of the idea of a North/South divide while also acknowledging the limits to this purported divide caused by increased economic integration between North and South and increased differentiation within the South. Our starting point is the institutional reform of vital infrastructure sectors affecting consumers, in part because of their high social salience and in part because these sectors were typically crucibles for the initial introduction of regulatory agencies in many parts of the industrialised North, and have subsequently influenced patterns of institutional transplant in the South. But our broader aim is to move from an understanding of the empirical specificity of infrastructural institutional reform in the Global South, to a broader appreciation of the capacity of different theoretical approaches to forge the basis for a fresh understanding of the resonance of the regulatory state in a changing global political economy.²

Much of the extant body of work on the regulatory state focuses on the US or Europe, although there is now a growing body of work on Latin America. A significant amount is explanatory in orientation, with a tendency to assume relatively homogenous pathways of development and modernisation globally. In particular, functional arguments for the transplant of independent regulatory agencies have dominated, viewing them primarily as agents of depoliticization that diffuse across countries in a process of institutional isomorphism. The influence of Pablo Spiller’s work (Spiller 1993; Spiller and Tomassi 2005), as well as that of Giandomenico Majone (2001), have been particularly important here, highlighting a theoretical framework of sustaining ‘credible commitments’ in the context of delegation to non-majoritarian institutions. For Spiller, the problem of government opportunism is central, to which regulation provides a possible solution, if a complex and contingent one, by providing credible commitment. But in focusing on governmental opportunism as a deterrent to investors, concerns of regulatory legitimacy in the eyes

² We hope that this conception will also avoid the pitfalls of atheoretical and inappropriate regulatory policy transfer (Cook and Mosedale 2007, Ch.6), but do not intend the workshop to focus primarily on policy relevance.

of others, notably the public, get little attention. For Majone (1996, 2001), the legitimacy of ‘non-majoritarian’ bodies is obtained through expertise, consistency and other such technocratic virtues. However, this solution rests on being able to draw a clear line between efficiency objectives, for which legitimacy can be obtained through expertise, and redistribution, for which political accountability is necessary.

The applicability of these frameworks in the empirical context of the South has been taken forward by two lines of work: the valuable empirical work of Jordana and Levi-Faur on Latin America, and the work of the Manchester-based Centre for Regulation and Competition (CRC).³ Both these lines of work have explicitly sought to integrate legal and political analysis into what is felt to be a predominantly economics-focused literature, as well as to foreground the institutional and resource constraints faced by developing countries, and the greater dominance of poverty as an urgent policy issue in these countries.

Yet the conceptual sway of the developed country literature proves difficult to dislodge. In Levi-Faur and Jordana’s work, this manifests in a striking tension between the macro and micro levels of analysis of the spread of independent regulatory agencies in Latin America. While at the macro-level a theoretical emphasis on functional diffusion of relatively depoliticised institutional design issues predominates, their micro-level analysis leaves more space for social and political dynamics as well as local specificity. And the analysis undertaken under the auspices of the CRC tends to veer back towards a perspective that places competition at the conceptual heart of the regulatory state, integrates institutional specificity of developing countries in terms of technical capacity-building, and addresses poverty as a relatively apolitical function of the welfare and distributional effects of regulation and competition.⁴ As Cook and Mosedale acknowledge in the introduction to *Regulation, Markets and Poverty*, the bulk of CRC work has a predominantly specialist audience in econometrics. Where CRC work departs from this, it reflects the

³ A representative snapshot of CRC’s work on regulation in developing countries is collected in Minogue and Carino 2006 and in Cook and Mosedale 2007.

⁴ Of course the CRC is not the only line of work that reflects this perspective: much World Bank analysis similarly does, and in fact key authors within the CRC take a much more political approach: see, e.g., chapters by Phillips and Minogue in Minogue and Carino 2006.

Jerusalem Papers in Regulation & Governance

macro-micro split identified as a feature of Levi-Faur's work: that is, the intertwined nature of politics and regulation is acknowledged at the case study level, yet is not deeply embedded at the macro-theoretical level.

In addition to these well known ideas, there is a growing literature on the regulatory experience and an emergent regulatory state emerging from within the Global South. Much of this work, although empirically driven, blends descriptive-analytical mapping with normative evaluation. This emergent literature is also eclectic in its theoretical moorings, drawing variously from political sociology, Global Administrative Law, and institutional economics. We suggest that it is helpful to begin identifying the specificity of the regulatory state in the Global South, to establish a productive dialogue between these different orientations to the spread of independent regulatory agencies to the South.

In order to do so, the workshop (and, mirroring that, this framing paper) proceeds in three sections. The first section explores the introduction of IRAs in infrastructure sectors such as electricity, water and telecommunications, highlighting functional delegation approaches to regulatory policy transfer and exploring their genesis, while at the same time interrogating and supplementing them. In the second section, we retain the focus on infrastructure sectors for the time being but move beyond a preoccupation with agencies at the institutional level, looking more broadly at other actors including courts, informal providers, and investors. In the final section, we detach our analysis from both infrastructure and IRAs to explore whether alternative theoretical starting points have the potential to capture the distinctiveness of regulatory state development in the Global South. Potential theoretical approaches include perspectives coming from recent adaptations of New Institutional Economics; broader sociological accounts of regulatory capitalism; global administrative law; international relations approaches to transnational governance; and perspectives from law and development especially on the developmental state.

1. The Spread of the Regulatory State: Independent Regulatory Agencies in Infrastructure Sectors

The rise of the regulatory state is typified by the spread of the regulatory agencies that constitute its archetypal institutional form. This project includes a range of case studies of this phenomenon, drawing from multiple geographic regions and infrastructure sectors. The case studies are not structured so as to form a basis for systematic cross-country or cross-sectoral comparison: instead, we hope to inductively identify from these case studies key elements of the regulatory experience in the South, building particularly upon two broad lines of questioning linked loosely to different levels of governance.

First, to what extent and how is the regulatory state of the South shaped by the interface between the domestic and the international, especially in relation to external agencies and multinational corporations? Pressures from external agencies, such as multilateral development banks, to establish regulatory agencies are oft-noted aspects of institutional history in developing countries, yet rarely explored in detail. Ahmed Badran's paper, for example, uses a detailed examination of the genesis of Egypt's telecommunications regulatory agency to point out that to explain delegation to an independent agency in terms of insulation against political uncertainty, as Moe (1990) does in the context of the North, depends upon assumptions of sovereign autonomy in the economic policy-making zone that is in practice severely constrained by external pressures from donors and private investors. Even the making of 'credible commitments', the famous explanatory concept articulated by Spiller, is invested with a different sensibility when it is fully understood to what extent the institutional arrangements assumed to secure such credibility have been effectively externally imposed. Credibility requires conscientious commitment and internalisation of particular moralities and logics: neither is easily developed under external pressure. Badran's paper, then, points to the altered resonance in the South of even the standard mainstream accounts of the genesis of regulatory agencies.

Even when not explicitly dictated, indirect influence of regulatory ideas can considerably shape domestic frameworks. Mariana del Prado explores these effects by comparing Brazil's telecommunications regulatory structure, which was strongly

Jerusalem Papers in Regulation & Governance

influenced by the union of the international telecommunications industry and the World Trade Organization (WTO), with its electricity regulatory framework, which was developed in relative isolation. In his exploration of water regulators in Colombia, Rene Uruena further notes that when regulatory development is strongly influenced by international actors, such as the WTO, this can also have the effect of bringing other domestic agencies to the table, such as Ministries of Trade and Finance, with implications for autonomy of sectoral regulation. Regulatory design in conversation with international institutions and ideas can have both direct and indirect effects on domestic regulators.

Whether through *dictat* or more subtle nudges, regulatory agencies were established in the 1990s during a period when linked agendas of privatization and liberalisation were dominant: a context in which ‘credible commitments’ and the provision of stability and predictability for private investors seemed naturally to come to the forefront. But this is no longer the ‘commonsense’ political consensus in either North or South. Empirically, many countries are now aggressively promoting ‘national champions’ in infrastructure sectors. The single biggest new sources of investment are state-owned Chinese corporations.

What are the implications for regulatory transplant of the shift in investment patterns? Has the shift diversified or simply amended patterns of institutional isomorphism? In particular, has the revived popularity of the concept of the ‘developmental state’ (Leftwich 1995; White et al 1998; Trubek 2008) generated any new commonalities in the spread of regulatory institutions in the Global South? What is the role of different corporate regulatory traditions, which can cut across ‘varieties of capitalism’? Or are the important patterns more notable at national or even sub-national level, driven by factors such as variable investment needs or local political dynamics?

Second, how do the various ways in which regulatory agencies are embedded in national contexts shape the specificity of the regulatory state in the South? Although it is clearly important to be sensitive to the substantial differences that exist between states in the South, we want to pose the question of whether there are distinctive implementation dynamics of regulatory agencies in developing countries. We are especially interested in the implications for the growth of regulatory institutions of the

Jerusalem Papers in Regulation & Governance

all too frequent attributes of weak state capacity and ill-functioning political institutions with which agencies interact.

Here, an emerging literature including but not limited to regulators usefully contests a neat correspondence between institutional design and institutional practice to suggest attention to variability in enforcement ability and institutional stability as a way of mapping ‘weak institutional environments’ (Levitsky and Murillo 2009). For example, as Dubash describes for electricity regulators in India, where institutional stability is high but enforcement capacity is low, regulatory bodies may simply go through the motions of following rules, in an effort to garner legitimacy for regulatory actions, even while continuing business as usual behind the scenes. Other key points for exploration will include the salience of public vs. private ownership of regulated entities; the prospects for regulatory capture, including “everyday forms of capture” grounded in shared assumptions; specifics of institutional design including issues around inter-institutional collaboration; and the micro-politics or institutional sociology of regulatory agencies.

In addition to infirmities of the state, the simple fact of greater and widespread poverty in developing countries can affect the nature of the regulatory task by increasing the challenge of spreading the costs of regulatory reform. For example, the oft-repeated principle of cost recovery espoused by multilateral agencies carries far greater political and welfare implications in poorer nations where increasing costs can, in practice, mean exclusion from basic services.

Although it is useful heuristically to structure our enquiry by reference to ‘international’ and ‘national’ sources of influence, we would also argue that important features driving the spread of independent regulatory agencies subsist in a *transnational* space that is neither clearly international nor domestic (see also Morgan 2008). In water regulation, for instance, Uruena identifies an emergent field of global water governance that creates a complex of ideas and templates which is then adopted by countries such as Colombia. However, this need not be a one way story; as Uruena discusses for Colombian water and del Prado notes for Brazilian telecom regulation, global ideas were also being re-shaped through interaction between networks of

national regulators. International consultants who serve as vectors for generating and rapidly transmitting conventional wisdoms are also important denizens of transnational spaces that shape regulatory environments.

Influences that are neither explicitly global or national include, in particular, procedural changes that shape national political contexts (at the macro-level) and regulatory practices (at the micro-level) even while they originate as shifting global norms. Under certain conditions, such procedural changes can create opportunity structures within regulatory agencies that can foster their status as new democratic spaces, a theme we return to in the next section. In addition, variations in sectoral trends associated with technology (the mobile phone) or organization (electricity markets) are often transnational in nature, and may shape the genesis and form of the regulatory state in the South to a greater degree than geographic variation.

2. Mapping Regulatory Spaces: Practice and Politics

Possibly one of the clearest lessons emerging from attempts at North-South regulatory transplant is the ambiguity of the label ‘independent’ as a descriptor of a regulatory agency. This ambiguity arises in significant measure from the fact that regulatory agencies operate at the intersection of both political and private sector influences. Either or both of these very different sources of influence can be characterised as undermining independence, with different normative import depending not only on the specific context but also on the pre-commitments of those writing about or shaping the regulatory regime. Tony Prosser (2010) argues that two different visions of regulation contest for space in regulatory debates – one emphasising regulation as an infringement of autonomy and one stressing its collaborative nature – which suggests alternative pre-commitments would lead to very different evaluations of ‘independence’. But even given a shared prior vision of regulation, the persistent hybridity of contemporary forms and contexts of regulatory transplant is arguably even more distinctively present in the South than in the North, given the influence of consultants on regulatory design, the fact that regulation is more often imposed on state-owned operators than on private enterprise, or the frequency of contracting-out to complex public-private partnerships. All this combines to suggest intractable limits to the concept of ‘independence’ as an organising principle.

Given this, the second move in our consideration of the specificity of the regulatory state in the South starts with the premise that the regulatory *agency* may not be a necessary or even useful place to start in understanding a regulatory context. Papers in this section will explore and map regulatory problems from a range of different starting points.

To begin with, the literature on ‘weak institutional environments’ discussed in the previous section suggests the need to unearth ways in which regulatory *practice* differs, even while regulatory design may not. For example, Murillo and Post argue that variations in imported corporate practices, different political configurations and therefore incentives, and the degree of technological innovation explain differences in the practice of regulation across Argentine provinces, even while regulatory form is isomorphic. Thiruvengadam and Joshi ask why the judiciary has played such a significant role in telecoms regulation in India, given the design objective of regulation was to deepen the role of technical and sector-specific expertise in the regulatory process. The answer, they suggest, has to do with accommodating the specifics of the Indian political and institutional context.

Latent in these forms of accommodation to weak institutional environments is a recognition of the necessity (and even virtue) of viewing the regulatory state as a political rather than technical enterprise. In literature focused on independent regulatory agencies, the tendency is to prioritise a technical-functional analysis, even when observation of micro-level dynamics concedes an inevitably more hybrid perspective. The papers here share a commitment to (productively) integrating macro-politics into considerations of how the regulatory state works.

There are several ways of understanding this integration of politics. As part of a direct dialogue with the first part of our framing argument, one might argue that what is going on here is a common enterprise of grafting broader considerations of ‘regulatory space’ onto the institutional focus more common to the agency-focused literature, encouraging a view of regulation that encompasses collaboration across networks and deliberation between different participants -- such as investors and the

judiciary -- rather than a narrower focus on institutional design. The extent to which this brings in 'politics' per se remains, however, quite open-ended.

Take for example, a line of argument that would put issues of democracy more to the forefront than they usually are in regulatory state literature. In a rare example of thinking through the specificity of developing countries, John Braithwaite explores the relevance of 'responsive regulation' to that context (Braithwaite 2005). His emphasis is on the importance of NGOs and local social pressure groups as an avenue for developing a 'regulatory society' model that might bypass the regulatory state, and in so doing, avoid problems caused by weak institutional capacity at the state level. He elaborates in ways that bring democratic theory to the forefront of the analysis:

If we believe that democracy is fundamentally an attribute of states, when we live in a state with limited effective capacity to govern, we are disabled from building democracy...and waste our breath demanding state responses that it does not have the capacity to provide. But when our vision of democracy is messy – of circles of deliberative circles, there are many kinds of circles we can join that...actually matter in building democracy. (Braithwaite 2005: 5-6).

He concludes (p.16) that a fertile research agenda for the future would combine theories of networked governance, responsive regulation and republican separation of powers.

So far, so coherent, perhaps. But this agenda could take very different turns depending on the resonance of 'politics', which has a very different resonance for different audiences. For some, 'politics' may encompass deliberative brainstorming by semi-professionalised NGOs with significant expertise in the regulatory arena (Sybil Rhodes, focusing on the role of consumer organisations); for others it may mean the repertoires and informal practices of community activists and social movements (Nai Chng). And while both of these otherwise very different perspectives move beyond state actors, the shadow of the state can usually not be ignored, if only because it remains part of the 'messy circles' to which Braithwaite refers. And once more, 'politics' will here again connote very different things, from negative attributions (politics as a source of partisan and clientilistic intervention, or as an arena for corrosive arbitrariness) to more positive conceptions of deliberative state fora (Thiruvengadam and Joshi, focusing on the role of the courts, Dubash, examining

Jerusalem Papers in Regulation & Governance

regulatory hearings as deliberative arenas) or virtuous cross-sectoral connections between domestic investors and local politicians that actually help stabilise the regulatory environment (Post and Murillo).

Nai Chng's paper later in this panel provides one example of a nuanced interweaving of several of these perspectives. He argues that contentious collective action by informal water providers in the Phillipines makes a (possibly unintended) positive contribution to the water regulatory environment. This occurs by means of regulatory mobilisation, when 'brokering' NGOs institutionalise previously weakly connected sites of local resistance into a sustainable network with regulatory clout, assist local informal operators in securing formal cooperative status, and support dialogues that influence macro-policy issues in favour of the local cooperative operators. Chng counters the optimism inherent in this assessment of the micro-dynamics of the water sector, however, by pointing out how these dynamics (again in possibly unintended ways) tend to facilitate an entrenchment of the patrimonial state at the macro-level, particularly over the medium to long-term.

The proceduralisation of decisionmaking introduced by the creation of regulatory agencies is often an important facilitator of broader political mobilization, in ways quite unanticipated by designers intent on providing safeguards to investors. Indeed, regulatory institutions can occasionally be the beachhead for formalization of administrative law traditions, where these previously were *ad hoc*, as in India. Provisions ensuring transparency are a precondition for regulatory dialogue, while hearings and requirements for reasoning and redress provide and amplify voice. Indeed, returning to Prosser's contending visions of regulation, while procedural safeguards are useful for the preservation of autonomy view of regulation, they are essential for regulation understood as collaboration. In the limit, as Prosser (1999) has suggested, regulation tends toward "government in miniature" bringing the study of regulation directly into conversation with larger questions of governance.

3. Toward Understanding a Regulatory State of the South: Broadening the Conversation

The final section of this framing paper returns to the big questions of how to govern, given weak institutional capacity, distinctively large challenges of inequality and poverty, and the pathologies of command and patrimonial clientilism. As a basis for forging a common ground for a broad discussion of larger governing questions such as these, we are including in this section attempts to theorise the regulatory state drawing on a variety of other literatures that approach similar questions from different perspectives. Four such potential bodies are briefly discussed here. A possible common theme uniting them is they all increasingly centre on “partnership” stories that cross state-market-civil society lines, taking the centrality of politics as an important starting point for exploring the appropriate institutional structuring for those partnerships.

From this starting point, several different directions emerge. One direction opens up perspectives that can *reclassify* core features of developing country regulatory states, shifting them from ‘problems’ to be corrected to essential context to be internalized in the regulatory process.

Michael Dowdle’s paper, for example, uses economic geography to argue that distinctive economic logics found in industrially-peripheral Global South countries produce affirmative regulatory responses that are, far from the regulatory failures they appear as through the lens of mainstream regulatory literature, rational adaptations to the specifics of their environment that can provide resilience, flexibility and coherence.

From a different theoretical perspective, we could ask whether the developmental state, currently enjoying a revived popularity, better captures the distinctive conditions of the Global South than notions of the regulatory state? Peter Evans’ well-known concept of embedded autonomy (Evans 1995) claims that only when bureaucratic autonomy and societal embeddedness are properly joined can a state be

called developmental.⁵ His elaboration of the relationship between autonomy and embeddedness supplements the notion of bureaucratic autonomy from societal and political interference (which by itself is consistent with mainstream regulatory literature) with an insistence that bureaucracies must also become involved or embedded in concrete social ties that bind them to society. These ties underpin institutional channels for negotiating – and importantly, renegotiating – goals and policies with external groups – effectively an avenue for constructive political engagement between state and society that is minimised by traditional accounts of the regulatory state. In more recent work that links in interesting ways to the democratic concerns of Part II of our framework, Evans suggests (Evans 2006) suggests that positive developmental trajectories in the South are typically embedded not in the narrow conceptions of private property rights that are increasingly the object of protection by the regulatory state, but instead in a state apparatus with two distinctive characteristics: a relatively egalitarian distribution of property rights to a broad cross-section of the population, and a focus on building capacity to provide effective infrastructure (as opposed to building up coercive force to protect narrowly concentrated property rights’ allocation).⁶ Evans’ analysis shares a commitment to integrating politics into an understanding of Southern states, but goes further than the analyses in Part II insofar as it suggests this integration produces an entirely different *kind* of state. This approach raises the challenge: if the regulatory state integrates politics, collaborative procedures and democratic aspirations to the extent that Part II suggests it could, does it in fact morph into something conceptually different, where the label ‘regulatory state’ begins to confuse rather than aid analysis?

A third theoretical perspective that could shed light on the specificity of the Global South, and even go further in assisting an understanding of differentiation *within* the South, is that of varieties of capitalism. Murillo and Post’s paper in Part II engages with this literature essentially by rejecting the constrained isomorphism implied by varieties of capitalism and suggesting that in the weak institutional environments of

⁵ See also the recent work of Professor David Trubek and his colleagues in a project on *Law and the New Developmental State*: <http://www.law.wisc.edu/gls/lands.html>.

⁶ He cites Costa Rica and Botswana as examples of where these strategies have produced positive developmental outcomes.

developing countries, domestic political incentives, technological diversity and investors' corporate practices will influence outcomes more than regulatory institutions or rules. Other approaches remain more committed to identifying a limited range of variation at a general level, such as the recent work of David Levi-Faur identifying four varieties of regulatory capitalism in an increasingly globally integrated world (Levi-Faur 2009),⁷ the work collected by Martinez and her colleagues on varieties of capitalism in Latin America (Martinez et al 2009), and even the allied work of Gough and Wood (2006) on welfare state varieties in the developing countries.

The 'varieties of capitalism' lens, in contrast to that of the developmental state, remains more committed to the utility of retaining the notion of the 'regulatory state'. Levi-Faur defines this in his recent work in ways that link to a fourth perspective: that of global administrative law. 'The regulatory state', argues Levi-Faur (2009:184) 'invests in rule making, monitoring and enforcement at the expense of other types of policy including service provision, subsidies and, more generally, redistribution'. Stated as such, the focus of this lens overlaps considerably with that of the literature on global administrative law. In contrast to varieties of capitalism, however, global administrative law is more firmly focused on transnational rather than national regulatory spaces, albeit with explicit accommodation for national agencies acting as "distributed administration" with reference to global administrative law, and on an implicitly normative and prescriptive agenda highlighting transparency and accountability rather than interpretive or explanatory accounts of geographical variation.

While all these bodies of work can illuminate the distinctiveness of the Global South as a generalised category, the common theme noted at the start of this section – that is, a theme of increasingly complex hybrid partnerships that cross state-market-civil society lines – reminds us that it is equally important to acknowledge the *limits* to the purported North/South divide. Two important sources of such limits arise from

⁷ The varieties are Corporatist, Pluralist, Command & Control and Laissez-Faire forms of regulatory capitalism.

increased differentiation within the South and from increased economic integration between North and South. The first of these, increased differentiation within the South, is capable of being dealt with up to a point within the confines of the theoretical lenses so far alluded to. As noted above, the varieties of capitalism lens explicitly lends itself to this, but so too does the institutional turn advocated by Peter Evans' exploration of the developmental state – as shown, for example, by Ladawn Haglund's work disaggregating the notion of 'embeddedness' into a typology of developing country states' capacity to foster broad citizenship by the production of public goods (Haglund 2010).

The second limit on assumptions of a North/South divide – increased economic integration between North and South – is analytically much more challenging to engage with. It produces complex dynamics: for example, Mikler (2008) argues that domestic liberalisation, a common antecedent of the regulatory state at the domestic level, can, under conditions where states with effective market-friendly regulations are capable of influencing outcomes beyond their borders, generate global regulation. The examples Mitner uses – UK gambling regulation and Japanese and European fuel-economy regulation – are North-South in terms of directional influence, but the reverse is also possible, such as in the regulation of geographical indicators in international intellectual property (Rangnekar 2006). As Levi-Faur notes in his discussion of varieties of capitalism (Levi-Faur 2009), the influence of non-state, global and regional regulatory structures creates a powerful hybridity in the emergence of 'types' of regulatory states; and even Dowdle, who argues for a relatively bright-line conception of the South's distinctiveness, notes that conditions of 'peripherality' –are increasingly appearing even within the core nations of the industrial North (Dowdle forthcoming).

In relation to the complication of increased integration between North and South, it bears notice that of the four different theoretical perspectives noted above, only global administrative law takes as its *starting* point the predominance of the transnational. It may be that other theoretical perspectives, in particular that of international relations, could provide a fertile reorientation of the regulatory state to complement the work undertaken. This might come from the direction of the transnational spread of commercial relations (see for example Elkins, Guzman and Simmons 2010 on the

Jerusalem Papers in Regulation & Governance

global diffusion of bilateral investment treaties) or the spread of transnational advocacy networks (Keck and Sikkink 1998; Hilton 2009). The more sociological approach of Braithwaite and Drahos in their comprehensive *Global Business Regulation* is yet another potential locus. The sources are many; the terrain is fertile: the overarching question which we hope to provoke is whether and how regulatory theory can provide a basis for engaging the particular puzzles of regulation in the Global South, the ways in which this engagement can integrate politics at both micro and macro levels, and in doing so, shed light on the larger challenges of governing in ways that may well reorient our understanding of the regulatory state in the North as well as in the South.

Bibliography

- Bauman, Zygmunt. *The Individualised Society*. Polity Press 2001
- Cook and Mosedale, 2007. *Regulation, Markets and Poverty*. Manchester: Edward Elgar Press
- Dowdle, Michael. Forthcoming. The Geography of Regulation. In David Levi-Faur (ed). *Handbook on Governance*. Oxford: Oxford University Press
- Elkins, Guzman and Simmons. 2010. Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000; C. *The Backlash Against International Arbitration*. Netherlands: Kluwer Press
- Evans, Peter. 1995. *Embedded Autonomy: States and Industrial Transformation*. Princeton, NJ: Princeton University Press.
- Evans, Peter. 2006. Extending the ‘Institutional’ Turn: Property, Politics and Development Trajectories. Research Paper No. 2006/113. United Nations University World Institute for Development Economics Research Paper series. Available at http://www.wider.unu.edu/publications/working-papers/research-papers/2006/en_GB/rp2006-113/_files/78091813717280945/default/rp2006-113.pdf
- Gough and Wood. 2006. *A Comparative Welfare Regime Approach to Global Social Policy*. *World Development* 34(10): 1696-1712.
- Haglund, LaDawn. 2010. *Limiting Resources: Market-Led Reform and the Transformation of Public Goods*. Penn State University Press.
- Hilton, Matthew. 2009. *Prosperity for All: Consumer Activism in an Era of Globalisation*. Ithaca, NY: Cornell University Press
- Keck and Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell University Press

Jerusalem Papers in Regulation & Governance

- Leftwich, Adrian. 1995. Bringing Politics Back In: Towards a Model of the Developmental State. *Journal of Development Studies* 31 (3):400-427
- Levi-Faur, David. 2009. Regulatory Capitalism and the Reassertion of the Public Interest. *Politics and Society* 27: 181-191
- Levitsky, Steven and Maria Victorial Murillo. 2009. Variation in Institutional Strength. *Annual Review of Political Science*, 12: 115-33.
- Majone, Giandomenico. 2001. Nonmajoritarian Institutions and the Limits of Democratic Governacne: A Political Transaction-Cost Approach. *Journal of Institutional and Theoretical Economics*. 157 (1) March: 57-78
- Majone, Giandomenico. 2006. Regulatory Legitimacy. In Giandomenico Majone (ed.) *regulating Europe*. London: Routledge: 284-301.
- Martinez, Molyneux and Sanchez-Ancochea (eds). 2009. *Latin American Capitalism: Economy and Social Policy in Transition: Special Issue of Economy and Society*: 38(1)
- Mikler, John. 2008. Sharing sovereignty for global regulation: The cases of fuel economy and online gambling. *Regulation and Governance* 2(4): 383-404
- Minogue and Carino (eds). 2006. *Regulatory Governance in Developing Countries*. Manchester: Edward Elgar Press
- Moe, Terry. 1990. Political Institutions: The Neglected Side of the Story. *Journal of Law, Economics, and Organization* 6: 213-254
- Morgan, Bronwen. 2008. Comparative Regulatory Regimes in Water Service Delivery: Emerging Contours of Global Water Welfarism?. CLPE (Comparative Law and Political Economy) Research Paper No. 33/2008. Available at <http://ssrn.com/abstract=1292785a>
- Prosser, Tony. 2010. *The Regulatory Enterprise: Government, Regulation, and Legitimacy* Oxford: Oxford University Press.

Jerusalem Papers in Regulation & Governance

- Prosser, Tony. 1999. 'Theorising Utility Regulation', *The Modern Law Review* 62 (2 March), pp 196-217.
- Rangnekar, Dwijen. Trade-related Intellectual Property Rights. In Conca and Scholte (eds) *Encyclopaedia of Globalisation*. Routledge 2006
- Spiller, Pablo. 1993. The Institutional Foundations of Public Policy: A Transactions Approach with Application to Argentina. *Journal of Law, Economics and Organization* 19(2): 281-306
- Spiller, Pablo and Mariano Tomassi. 2005. The Institutions of Regulation. In Claude Menard and Mary M. Shirley (eds.) *Handbook of New Institutional Economics*.
- Trubek, David. 2008. Developmental States and the Legal Order: Towards a New Political Economy of Development and Law. Paper presented at Presented at the Conference on Social Science in the Age of Globalization, National Institute for Advanced Study on Social Science, Fudan University, Shanghai. Available at <http://www.law.wisc.edu/gls/lands.html>.
- White, Gordon, and Robinson, eds. 1998. *The Democratic Developmental State*. Oxford: Oxford University Press