

The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance

Edited by
Jacint Jordana and David Levi-Faur



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Reviewed by
S Sundar
Distinguished Fellow, TERI

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Regulatory studies and research have so far largely focused on regulatory economics, on issues such as privatization, restructuring and regulation, pricing, rates of return, rate structures, etc. It has not often been recognized that the effectiveness of regulation also depends on the social and cultural attitudes, the legal framework, the institutional structures, and politics of the country. The primary aim of this book is to bring into focus the politics of regulation which, as the editors argue, has become all the more important in the age of governance. The global spread of the wave of regulatory reforms, especially the establishment of independent regulatory institutions in over a hundred countries in the last decade and in various sectors of the economy, has raised important issues of governance and has made it necessary to look at the legal and political basis of this emerging phenomenon. This book makes a significant contribution to the re-examination of different theories in vogue and to the development of new techniques of analysis and comparisons. Part one of the book focuses on the theoretical perspectives and their application to the study of regulation; the evolution of regulatory institutions, the relation between regulators and private interests, and interrelation between multiple actors. The second part presents comparative perspectives and tools to interpret and analyse the political and institutional dimensions of regulation. This review focuses only on those chapters that are of particular relevance to India and other developing countries in South Asia, and attempts to draw lessons and ideas for research on regulatory reforms in these countries.

In chapter 1, 'The politics of regulation in the age of governance', the authors explore the meaning of regulation and the regulatory state. They go on to argue that the true colours of the regulatory state are yet to be determined, and this determination should, perhaps, be done with reference to the performance of the regulatory state. Conceding that this is not an easy task, the authors suggest that the jury might also want to consider the motives and the context that influence the rise of a regulatory state. They argue that the first motive could be the technocratic solution that the regulatory state provides to the lack of expertise of policy-makers and their time constraints. The second, they argue, is the political credibility that delegation provides by imposing constraints on policy change—a solution to the inherent tension between the demands of capitalism and democracy. They then go on to suggest that the rise of regulation as a major institution of governance has been largely due to the role of trust and the dynamics of trust building in the context of a decline of trust in the traditional political institutions and actors. Finally, in their view, the rise of the regulatory state and the growing demand for transparency and accountability are not one of cause and effect, but the outcomes of the growing trust in regulatory institutions, and these institutions may themselves be the solution to problems of transparency and accountability. The possible motives that the authors have suggested as responsible for creating regulatory institutions sound familiar; these have been among the more important factors that have influenced governments in the developing countries of Latin America, south and south-east Asia, to establish independent regulatory agencies. The argument that the rise of regulation has also been due to a shift in trust from traditional institutions to the new regulatory agencies is yet to be conceded or proven in the developing countries; there is an equal lack of trust both in the traditional political institutions and actors and in the new regulatory agencies. The regulatory agencies are essentially being seen as further extensions of the existing institutions and not yet as new mechanisms of governance which can provide expertise, transparency, and accountability, which traditional government forms had failed to do.

In the second chapter, W(h)ither economic theory of regulation? What economic theory of regulation? 'Anthony Ongas has examined the appropriateness of the economic theory of regulation, the private interests theory and the public interest

approach as possible explanations of regulation. He argues that there are limits to the contribution of economic analysis, and in many policy areas such as distribution justice, economists have little to say. This is of particular relevance to a country like India where both the discussion and literature on regulation focus on the economics of regulation rather than on the politics even as distributive policies and electoral compulsions are impacting on the effectiveness of regulation.

In chapter 3, 'The history of regulation in the UK: three case studies in search of a theory' Iain McLean compares the theories of public interest, regulatory capture, and the median-voter hypothesis as explanations for regulatory decision-making, using three events in the history of UK. One of the lessons that this chapter sheds light on is that the relative power of the politicians at work, industrial leaders or managers of dominant service providers, and the regulators could impact on the quality and effectiveness of regulation. And we see this happening in the regulatory agencies in India, both in the electricity and telecom sectors.

Fabrizio Gilardi in his contribution on 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' seeks to address the question of where independent regulatory agencies come from and as to why governments are increasingly relying on them, notwithstanding the fact that they are non-majoritarian institutions. He advances three possible explanations: first, rational choice, which prompts politicians to improve the credibility of their policies and solve the problem of political uncertainty; second, the sociological argument that regulatory agencies have now been taken for granted as the appropriate form for regulation; and historical institutionalism which is based on the hypothesis that once an institution is in place, the path is followed because of 'positive feedback' or 'increasing returns'. Both the arguments of rational choice and sociological institutionalism are among the various influences that have persuaded governments, irrespective of their ideologies, to establish independent regulatory agencies. In developing countries, independent regulatory agencies are being seen as a mechanism that can build investor confidence and offer protection against the opportunistic behaviour of governments, and this has led to a tendency to seek a regulator in every sector where there is an attempt to seek private sector participation.

In their chapter on ‘Regulatory co-opetition: transcending the regulatory competition debate’, Damien Geradin and Joseph A McCahery first discuss the concept of regulatory competition which compels national governments to perform economic policy functions more efficiently through the process of decentralization in order to attract mobile resources. While recognizing the merits of horizontal competition between governments to address the location needs of citizens and attract investments, the authors argue that regulatory competition can be ineffective because of market imperfections such as externalities, imperfect information, lack of mobility, economies of scale, and transaction costs. Instead, they recommend regulatory co-opetition – that is intra governmental, inter governmental and extra governmental cooperation – as an alternative model. Horizontal competition between Indian states to attract investments through a process of deregulation in the areas of labour, industries, and fiscal policy has demonstrated that such competition may not result in anticipated economic benefits. The need for cooperation between different branches of government, between the regulator and government, or between governments and non-governmental players is clearly understood; there is also no dispute regarding the merits of intergovernmental regulatory cooperation as demonstrated by the cooperation between the US and European Union systems in harmonizing standards, mutual recognition of procedures, exchanges of information and policy experience. However, regulatory cooperation between the developed and developing countries in harmonizing standards and recognizing procedures is not always on an equal footing; in most cases there is a tendency on the part of the developed world to impose their standards on developing countries, which needs to be guarded against.

In chapter 6 ‘Accountability and transparency in regulation: critiques, doctrines and instruments’ Martin Lodge argues that accountability and transparency are not goals in themselves; their purpose is to maintain a system in a desired range of equilibrium. He suggests a transparency tool box through which regulation can be made accountable and transparent and then examines the applicability of these instruments to the doctrines of fiduciary trusteeship, consumer sovereignty, and consumer empowerment. He then argues that any thorough discussion of accountability and transparency needs to acknowledge the numerous dimensions of a regulatory regime which require to be

held to account and be transparent in order to remain within the desired range of outcomes. There has been much debate on accountability and transparency in regulation in India. While the debate has focused largely on process transparency in regulation and accountability of the regulator through the process, and more importantly through the provision for appeals, not enough attention has been paid to the larger issues of how power is negotiated and allocated in the regulatory regime between the governments and the regulator or between the regulator and regulated utilities. There is also a general acceptance in India that the regulators hold a 'fiduciary trusteeship' and provide technocratic expertise to deal with complex economic issues. There has been very little discussion on 'empowering citizens' as a mechanism for reducing the distance between the regulator, the utilities and the consumers and in the process enhancing accountability and transparency. These are areas for further research in India.

Colin Scott in chapter 7, 'Regulation in the age of governance: the rise of the post-regulatory state', suggests that one should think of regulatory governance in a manner that is not dependent on state law or where state law is central and look beyond the regulatory state on concepts such as community control structures, which are sufficiently aligned with conceptions of public interest so that underpinning of state law becomes unnecessary. In the developing world where regulatory reform is yet not deep and the credibility of the regulators is yet to be established, it would seem that for some time to come the state and state law would be essential to underpin regulation. Eventually, however, it would be necessary for our countries also to move beyond seeing independent regulation as a mechanism created by state law and accept it as an improved form of governance.

The second part of the book uses comparative perspectives, based mainly on the experience of the European Union, to arrive at some conclusions on the politics of regulation. Chapter 8 'Comparative research designs in the study of regulation' by David Levi-Faur urges researchers to move away from a dependence on statistics to the use of comparative strategies in political research. The chapter proposes four major approaches to comparative research to facilitate case-oriented research.

Chapter 9 by Nicolas Jabko on the 'Political foundations of the European regulatory state' analyses the growth of the Regulatory functions of the European Union, and argues that the rise

of the regulatory state in the Europe is more a phenomenon of power, influenced by politics rather than by a straightforward pursuit of economic efficiency.

In chapter 10, 'Modes of regulation in the governance of the European Union: towards a comprehensive evaluation', Christoph Knill and Andrea Lenschow examine the changes in the nature of the regulatory state and emergence of multiple regulatory forms. Taking the European Union as an example, this chapter looks at four different modes of regulation namely, new instruments, regulatory standards, self-regulation and the open method of coordination, and analyses these four regulatory modes with reference to democratic mandate, due process, and accountability. The chapter concludes that any final evaluation of regulatory formats would depend on the weighing of individual criteria and this in turn needs to be done on a case-by-case basis and, perhaps, needs to be done with respect to a combination of regulatory modes.

In chapter 11, 'Divergent convergence: structures and functions of national regulatory authorities in the telecommunications sector', Marc Tenbucken and Volker Schneider point out that while there has been a convergence of regulatory objectives and there is a common understanding on the need for regulation in the European Union, the structures of the agencies and the allocation of functions to these agencies differ widely. The article analyses this variance on the basis of the functional profiles of the regulators and the competencies allocated to them and their organizational independence and finally comes to the conclusion that, while there is a clear trend towards policy convergence, major national differences persist in the institutional implementation of regulatory reforms and this divergence has a direct bearing on the level of material independence of the individual regulators. In India, a peculiar situation obtains in the electricity sector where regulatory agencies have been set up by the same legislation and have the same objectives, structures, and competencies but there is no convergence of policy as policies vary between states for reasons of distributive justice or electoral compulsions. Material independence or effectiveness of the regulators in India are thus affected by reasons which are quite the opposite to that which obtains in the European Union.

In chapter 12, 'Law in the age of governance: regulation, networks and lawyers', Patrick Schmidt argues that lawyers, as an influential professional collective, play a central role in defining

and determining the content of regulation and that often this legal character of regulatory politics is not appreciated.

In the concluding chapter, 'Regulatory designs, institutional constellations and the study of the regulatory state', Jacint Jordana and David Sancho argue that individual regulatory institutions should be seen as part of the institutional constellation, that is the whole institutional area or institutional settings, and it is this complex configuration of institutions created over a period of time that influence and shape the regulatory process and outcomes. This advice is of particular relevance to students and critiques of independent regulation in India, who often tend to evaluate regulatory decisions in isolation without looking at the overall sociological and institutional structure within which these decisions are made. Also, in a situation where regulatory competencies vary between sectors, and governments continue to play a major role in matters that influence regulatory outcomes, there is clearly a need to look at regulation as an outcome of the totality of governance rather than as decisions of only the regulatory agencies.

This book is the result of a series of research workshops and the contributors are eminent academicians from across Europe and the US. It is the second book of the series on regulation, competition, and development, published by the Centre on Regulation and Competition. The editors point out that the politics of regulation is an under-researched area especially outside the US, and the politics of regulation has become especially important following the rise of the regulatory state and the diffusion of regulatory reforms around the world. This book is essentially intended for those engaged in research on the law and politics of regulation and who are familiar with the theories that form the basis for discussion in the various chapters. Nevertheless, even those researchers in developing countries, who are not familiar with the law and politics of regulation but recognize that regulation is influenced not only by economics but equally by legal, sociological and political forces, would find the book stimulating and rich with ideas for further study and research.