Roles of Law in the Regulatory States of the South

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The rise of the ‘regulatory state’ in the North Atlantic world is often associated with ‘a process by which economic management becomes “proceduralised” . . . characterised by an increasingly rule-based, technocratic and juridical approach to economic governance’ (Phillips 2006, p. 24; see also Loughlin and Scott 1995). Legalization overlaps with proceduralization, but legalization can have significant substantive and systemic as well as process dimensions (and conversely, much proceduralization takes place outside law). International bodies, such as the World Bank, which promote the creation of independent regulatory agencies (IRAs) and other elements of a regulatory state model in developing countries associate regulatory state reforms with the rule of law, purvey them through a language of governance (transparency, accountability, even participation) that derives force from its association with public law, and deploy ‘good governance’ indicators to measure the quality of national legal institutions. The chapters in this book invite consideration of the questions of how far legalization has in fact been a concomitant of the rise of regulatory states in distinct forms in developing countries, and what exactly such legalization has consisted of.

Law has long figured in some way in the arrangements for provision of utilities services in most countries. Even state-owned utilities with service provision managed by departments of government (often, in the cases of electricity or piped water, based on decades-old arrangements with colonial-era governance models) were frequently subject to laws and administrative regulations defining entitlements of households or businesses to access services, or at least specifying lawful means of enforcing payment or compliance with conditions of access. Privatization or corporatization of state providers, the entry of private operators to compete with former monopolies, and regulatory cultures associated with newer technologies such as mobile telephones and internet services, have typically been accompanied by legal innovation and greater roles for law (at least formally). Law is integral to the construction of much of the apparatus of the regulatory state (establishing contractual arrangements, constituting regulatory authorities, and prescribing their modes of functioning); to defining and adjusting the relations between corporations, consumers, and regulatory authorities, and between regulatory agencies and
the executive; and to courts or other legal institutions resolving disputes arising out of the regulatory process.

Although legalization is often seen as a unitary phenomenon in relation to regulation, and associated with a certain set of ideals (including ‘rule of law’ and property rights), the case studies complicate this picture by illuminating several diverging ways in which the shift to a regulatory state may interact with particular aspects of law or legal institutions. Our reading of the case studies suggests it may be helpful to distinguish between at least four different phenomena involved in ‘legalization’:

I. The use of structures or vocabularies of law (as opposed to, say, economics, morality, tradition) as a technique of governance.

II. The practice, role and relations of ‘legal’ institutions such as courts, arbitral tribunals, and administrative agencies, together with the private bar, government counsel, and attorneys-general.

III. The use of particular forms of law (whether norms are contained in treaties or contracts, executive decrees or statutes; whether they take the form of detailed prescription or general principle and so forth).

IV. Implications for the content of law at various different levels of abstraction (such as shifts in the importance of certain bodies of law vis-à-vis others, and the development of new norms within particular bodies of law).

This commentary elaborates briefly on each of these four phenomena, drawing out some examples from the case studies, and identifying questions for further research. We suggest that it will be useful in future research not only to assess the significance (sel non) of legalization as an overall phenomenon in regulatory states in the South, but to ask more focused questions about what legal vocabularies are in play, how they relate to alternative vocabularies (such as economics, and econo-legal hybrids), what kinds of legal institutions and instruments are most central to particular regulatory systems, and what changes are observed to the substantive content of law. Breaking ‘legalization’ into a cluster of distinct phenomena, and trying to assess the range of changes within each that may be associated with the shift to the regulatory state, is likely in turn to help address whether, or how, law is distinctive among the panoply of available vocabularies, institutions, and governance techniques, and give more critical purchase on notions such as ‘legalization’ and the ‘rule of law’ in regulatory systems.

I. Vocabularies of law

The case studies as a whole demonstrate the global spread of legal vocabularies as a means to articulate principles and concepts concerning governance of utilities. Legal vocabularies focused on rules, rights, and obligations, repeatedly bump into economic discourses focused on efficiency and incentives (or, as in Chng’s chapter on informal water service provision in the Philippines, complex ‘moral economies’
embedded in local communities). Much of the literature on utilities regulation emanating from global bodies (e.g., Brown, Stern, Tenenbaum, and Gencer 2006) reflects a fusion between economic discourses and some structures and vocabularies familiar from public law, producing a hybrid discourse of ‘good governance’. René Urueña, for example, argues that the reform of water governance in Colombia initially shared many features of transnational neo-liberal trends, including an understanding of the constitutional and legal order as primarily limiting the power of the state and protecting property and basic liberties. Urueña then shows, however, how this neo-liberal framing encountered resistance grounded partly on the notion of water as a human right, and partly on the constitutional and legal order as guarantors of socio-economic rights more generally. Urueña’s analysis reveals two distinct turns to ‘law’ rather than ‘politics’, one focused narrowly on property entitlements, and the other on a broader and more dynamic set of rights. When the new regulatory policy in the water sector (guided by economic efficiency) was challenged on constitutional grounds, the Constitutional Court adroitly brought the neo-liberal and neo-constitutionalist perspectives into relation. Asserting that the goal of regulation was to guarantee the effectiveness of the ‘estado social de derecho’ (‘social state grounded on the rule of law’), the Court accepted economic efficiency as a tool for achieving this, rather than an end in itself.

Urueña suggests that the neo-liberal and neo-constitutionalist views might actually have certain concealed compatibilities. Both drew strength from globalized discourses, were channelled into Colombian political debates by elites trained overseas, and converged on the need to wrest power from a political system seen as corrupt and inadequate. Moreover, the view of access to water as a human right, though originally articulated in opposition to privatization, might end up resembling a neo-liberal account in which corporations and individuals hold rights enforceable against the collective. Global discourses of ‘good governance’ which fuse legal and managerial vocabularies may parallel the hybrid approaches articulated in Colombian judicial discourses, and the various fused or hybrid approaches may influence each other; indeed quite different vocabularies may coexist and be rendered ‘legal’ through their employment by courts and lawyers. In some situations, the differences between various legal vocabularies, in terms of the rationales for regulation of particular kinds, or the interests that are privileged, may be more significant than the distinction between ‘legal’ and other ‘non-legal’ vocabularies.

The chapter by Murillo and Post on post-crisis concession renegotiation indicates that there may also be a temporal dimension to the adoption of particular vocabularies—perhaps even a process of de- and re-legalization. In the post-crisis renegotiations they document, arrangements embedded in contract and legislation become the subject of pragmatic bargaining, in which law may not be the dominant feature, the putatively responsible regulator is often sidelined to make way for direct negotiation between investors and governments, and investors’ other holdings in the state may play an important role in determining the course of these negotiations. If negotiations are successful, the new arrangement reached is re-enshrined in a new legal regime, and the regulator re-established as the primary decision-maker.
II. Legal institutions

Regulatory processes involve a wide range of lawmaking and law-applying institutions, from legislatures to enforcement agencies and administrative review panels. The role of courts is highlighted in some of the studies in this book, both in pivotal constitutional cases, such as the Colombian Constitutional Court’s decision on a challenge to the constitutionality of new water privatization and regulation arrangements (Urueña, this volume), and in more routine engagement with regulatory processes (Thiruvengadam and Joshi, this volume). Across these different contexts, courts may be important in a range of different ways:

(a) Litigation and the threat or existence of adverse judgments may be instruments of different interest groups: the financial and reputational cost, and the implications of public or governmental scrutiny associated with litigation, may serve as weapons in conflicts over regulatory policy.

(b) Courts provide a privileged forum for the invocation of particular (legal) vocabularies in which to debate economic and regulatory policy, and may thus be a site for persuasion and legitimation (or de-legitimation) of broader liberalization and privatization agendas.

(c) Courts may sometimes be called upon to systematize and endorse particular factual evidence, such as evidence about how privatization or reform projects have fared, or about regulatory norms and the functioning of regulatory institutions, in other jurisdictions, and this marshalling and presentation of information may in turn influence the policy process.

(d) The status of courts as arbiters of the meaning of legislation and other legal texts requires courts to articulate conflicts between, or reconcile, newly crafted or imported regulatory structures, on one hand, and existing structures and norms of public law, on the other, and to determine the powers of the different bodies involved in the regulatory regime (particularly important where there is confusion or uncertainty about the mandates and roles of various actors, and courts may effectively be teaching new regulatory agencies or other actors about relevant principles or proper process).

Multiple aspects of courts’ importance may be present in any given case. The Colombian Constitutional Court articulated the rationale of regulation and the role of economic efficiency in the new water regulatory system, but in the distinct context of the existing constitutional order. That court also determined some specific aspects of the regulatory regime, such as the requirement that regulatory agencies to adopt notice and comment procedures for new regulation, and it helped inculcate a ‘legal consciousness’ into regulatory officials. The Indonesian Constitutional Court, in considering the constitutionality of the 2002 Electricity Law which paved the way for transition from a state-owned monopoly to a competitive energy market, acted as a forum for the contestation of privatization; systematized and laid out a number of facts about privatization and its effects in
other jurisdictions; and articulated the incompatibility of new regulatory structures with constitutional requirements, indicating that government regulation of the sector alone would not satisfy the requirement in article 33(2) of the Constitution that ‘[p]roduction sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state’ (Jarvis 2012; see also Butt and Lindsey 2010, p. 246).

Indian courts, in the challenges brought by the Indian Department of Telecommunications against the telecommunications regulator Telecom Regulatory Authority of India (TRAI), were used strategically to bring pressures associated with litigation to bear in the struggle for control of telecommunications policymaking. But decisions in these cases, such as the judgment of the Delhi High Court in *Union of India v. TRAI*,1 also clarified and explicated the mandates of these two bodies, and fleshed out the structure of the regulatory regime (Thiruvengadam and Joshi, this volume). This decision was effectively reversed by legislative amendment, prompting in turn a new round of litigation over the powers of the reconstituted regulatory bodies. When a newly established administrative tribunal took an unduly restrictive view of its own powers, the Supreme Court ‘adopt[ed] a pedagogical role towards empowering’ the reconstituted telecom regulator and articulating its proper role (Thiruvengadam and Joshi, this volume). A concurring judgment seemed similarly to be directed towards laying out the jurisdiction of a new Telecom Disputes Settlement and Appellate Tribunal, and fostering the Tribunal’s exercise of its proper powers. In another foundational decision, at the very outset of telecommunications privatization, the Indian court in the *Delhi Science Forum* case2 drew into the Indian discourse ideas from a comparative study of other jurisdictions in making the point that in other cases of privatization, governments had created an IRA prior to privatization processes—and the Court’s attitude seems to have prompted the government to announce the establishment of an IRA prior to handing down of judgment.

Courts exist in an ecosystem of other institutions and actors. Most are reactive institutions, taking cases that are brought before them, and their activity and influence is in considerable part dependent on enabling actors and interlocutors (such as plaintiffs and the legal profession). Further, the significance of courts in the regulatory landscape can change over time. Indian courts played strong tutelary roles in the early days of private telecommunications provision as regulators were established (Thiruvengadam and Joshi, this volume), but courts’ behaviour evolved as regulators become better established. In Colombia, regulatory processes changed as regulators absorbed and tried to implement judicial decisions (a process discussed in Urueña, this volume).

It is likely that distinctive features of the Indian and Colombian legal systems allocate to high-level courts a greater role than such courts would play in other countries (Shankar and Mehta 2008; Rodríguez Garavito 2011). Indian and Colombian courts have been prominent political actors more generally, not merely

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1 *Union of India v. TRAI*, 3 Comp LJ 400 (Del) (1998).
in the arena of regulatory policy, and their centrality is therefore unsurprising (Thiruvengadam and Joshi suggest that the high level of judicial independence contributes to the influence and interventionism of the Indian judiciary, together with the fact that telecommunications are under the control of the central government, rendering responses to judicial decisions more predictable than would be the case if the matter were delegated to subnational units). South African courts have also been much involved in utilities regulatory issues, for example in relation to disconnection of the poor from water or electricity services (Dugard and Langford 2011). Counterpoint studies could helpfully address countries in which courts have not been heavily involved in social policy, or in which the regulatory system actually seeks to bypass existing courts for the resolution of regulatory disputes, by narrowly circumscribing grounds for overturning regulatory decisions, or requiring courts to consult experts (see, e.g., the recommendations in Brown, Stern, Tenenbaum, and Gencer 2006, pp. 106–8).

Finally, local and national tribunals operate in a global system, in which perceived failures or inadequacies in the local regulatory system may prompt investors to seek recourse outside the national judicial system, for example in arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). Global standards, such as ‘fair and equitable treatment’ for investors, have invited the elaboration of a minimum threshold for regulatory systems (indeed, some now argue for a more sophisticated comparative methodology that would connect international investment norms to older notions of rule of law: Schill 2010, pp. 151–82). The direct impact of global jurisprudence (emanating from ICSID and other arbitral panels) on the functioning of regulatory regimes appears to be quite limited, although this has not been systematically studied, and may be a fruitful area for further research. Arbitral awards are occasionally referred to in national courts, and much more often in national press or public discussions of particular cases (one instance in which ICSID proceedings have constrained the approaches open to local administrative authorities and tribunals is discussed in Morgan 2006, pp. 229–31). In some countries, politicians appear willing to disregard the shadow of future potential liability under international investment law, partly because by the time any adverse arbitral award is issued, it is likely to be someone else’s problem. On the other hand, Peru, for example, has established a Special Commission including representatives of different state agencies involved in investment to coordinate responses to investment disputes, including negotiating with investors, mediation, and other processes prior to arbitration (UNCTAD 2011). The Special Commission is also empowered to determine the liability of particular agencies for any costs arising from investment disputes, and these costs can in theory be internalized, by being subtracted from the budget of the specific agency whose actions breached the treaty. The development of centralized and uniform processes of this kind may increase the impact of international investment law and disputes on domestic practices. Systematic research is needed assessing the influence of investment treaties and arbitral jurisprudence on domestic public law, and connecting and comparing it to the degree and pathways of influence of other global bodies of law (e.g., human rights norms).
III. Forms of law

The case studies do not deal directly with the different forms of law implicated in shifts to a regulatory state, but they do contain traces of some of the variations that arise in this domain: whether legal obligations concerning the regulatory process are elaborated primarily in public law (treaties, statutes, regulation) or in contracts with particular corporations; the relative role of statutes versus regulations and other subordinate instruments not requiring direct legislative sanction; and the relative role of detailed and prescriptive rules versus general principles. Variations in the forms of law in which the norms governing the regulatory state are enshrined may be associated with very different processes of lawmaking and actors involved in the lawmaking process, and thus different procedures for the change of legal rules over time; differences in how responsive rules are to particular needs, or to pressure or influence from global institutions or experts; and differences in how rules interact with other aspects of the domestic legal system. No doubt in many countries there have been such vast gaps between the formal law and what in fact happens in practice that studies of the niceties of variations in form may seem arcane and naïve. But the proposition that the forms of law are irrelevant needs to be established rather than simply asserted, at least in all but the most egregious cases. To completely disregard all aspects of legal form may be to miss aspects that have policy or distributional significance or hold the potential for leveraging change over the longer term (Prado, this volume).

As a general proposition, and assuming a loosely representative legislature, sectoral reforms established by statute are likely to require broader public and political support than reforms introduced by decree or subordinate instrument, or outlined in a contract with a particular private-sector provider (although unpopular reforms of the latter kind may also have electoral consequences). Depending on the jurisdiction of domestic courts, statutory regimes may also be subject to greater judicial scrutiny (e.g., in Indonesia, the government was able to partly circumvent a ruling of the Constitutional Court striking down a law on reform of the electricity sector by reintroducing some aspects of the law in a regulation, which the Court did not have jurisdiction to examine (Butt and Lindsey 2010, pp. 252–3)). In some scenarios, there will be significant scope for judicial involvement in developing legal norms (as in the Colombian Constitutional Court’s enunciation of a requirement for notice and comment on new regulations). In other cases, the adoption of detailed rules may actually forestall or replace developments of this kind (e.g., Dubash notes that the statutory apparatus for electricity regulation in different Indian states contained a number of procedural requirements, departing from the primarily judge-made character of Indian administrative law). Variations in which actors (executive, private companies, legislature, courts, etc.) are most involved in the lawmaking process may make a difference to which interests are best represented, and which models are drawn upon in developing national systems. Moreover, the shift to a regulatory state and in particular the creation of IRAs charged with particular responsibilities and subject to certain
procedural requirements may itself change how laws, in the form of subordinate instruments of various kinds (such as those setting prices or terms of service), are made in relation to relevant sectors, for example by requiring some process of expert review or public consultation.

Differences in the forms of law may also be associated with different degrees of interconnection between specific sectoral regimes and other bodies of national public or administrative law. Regulatory regimes that comprise detailed and specific rules, functionally tied to individual sectors, may end up being virtually isolated in the legal system, whereas those more reliant on general principles common across sectors may, through the action of administrators, judges, or advocacy groups, come to borrow the norms or practices of other sectors, or be more closely integrated with background law on matters such as transparency and public participation in decision-making.

Whether or not variations in the forms of law are associated with some of the factors mentioned here (lawmaking processes and which actors are most heavily engaged and represented, the revisability of laws and their integration into the larger legal system) depends to a great extent on the material, social, and political circumstances in which regulatory policy is made. The post-crisis renegotiations outlined by Murillo and Post make clear that even the most elaborate regulatory systems may be sidelinied or remade in direct bargaining between political principals and private actors. Moreover, global institutions and external consultants are often heavily involved in the design of regulatory systems regardless of the form in which these systems are ultimately enshrined. In many of the cases collected here, the World Bank played some role in requiring or supporting the transition to liberalization, privatization, and concomitant regulation (Dubash; Prado; Urueña; Badran; Thiruvengadam and Joshi (all this volume); see also Jarvis 2012, and Butt and Lindsey 2010). In pushing for reforms, global institutions may interact primarily with the executive, while nevertheless seeking to have reforms enacted in the form of comprehensive legislation. The World Bank Handbook for Evaluating Infrastructure Regulatory Systems, for example, argues for the superiority of statutory reform relative to reform by decree, and outlines how expert evaluators can present governments with ready-made programmes for legislative and even constitutional reform to achieve recommended policy changes (Brown, Stern, Tenenbaum, and Gencer 2006, pp. 34–5, 185–6). Material such as this indicates an understanding of the differential effects of particular forms of law in embedding reform, even as the particular lawmaking process associated with the statutory form may be dominated by global institutions and expertise, and driven by the executive, in practice.

IV. Content of law

The cases are not focused specifically on the content of law, but they provide glimpses of the different ways in which the content of law may be changed by (or constrain) the emergence of a regulatory state. The shift to a regulatory state may be
accompanied by constitutional reform to remove public monopolies, require changes to property law (e.g., by creating new kinds of property and property rights capable of being traded or licensed), and raise questions about the extent or enforceability of social and economic rights. The creation of independent regulatory agencies may, depending on whether there are analogous bodies already in existence, require the development not only of corporate and public contracting law affecting the regulated service providers, but also of public law concerning the organization or organs of government, together with ancillary matters such as employment and personnel conditions, records retention, and freedom of information. New provisions for matters such as notice and comment and public participation (some of which may result in quite significant changes to regulatory process, depending on the existence of qualified interlocutors and the degree of mobilization) may require the development of, if not law, then at least procedures that confront questions such as the evidentiary threshold required for public comments to be given weight, or the kinds of organizations accepted as representing public constituencies. Courts will face questions about the applicability and nature of judicial review of decisions of independent regulatory authorities.

Although there are strong elements of borrowing and diffusion in the higher order features of the regulatory state, and even in the detail of the design and procedure of regulatory institutions, there remains scope for considerable variation in the content of regulatory regimes, and a certain contingency in their potential interactions with the existing body of law and legal institutions within states.

V. Legalization and its tensions

The picture of legalization sketched so far is of its formal aspects, rather than how institutions and regimes actually work: their reconstruction under crisis conditions (Murillo and Post, this volume), the complexities of social norms and networks that affect their function (Chng, this volume) and the ‘micropolitics’ that can produce significant variations even in systems that are formally similar (Dubash, this volume).

However, even leaving aside these irreducibly contextual matters, the foregoing elaboration of different aspects of legalization indicates that the notion of a regulatory state as involving a more ‘legalized’ mode of economic management may not, itself, indicate much about the contours of the regulatory state. The precise legal vocabularies in use, the legal forms, content of legal norms, and role of legal institutions may be significantly different across sites, especially where global models encounter national legal particularism. Even if the degree of borrowing or institutional isomorphism has masked these differences in practice, breaking down legalization into different aspects at least gives a better sense of the breadth and complexity of the model that is being diffused, and its potential variations. Looking more closely at the different facets of legalization also calls into question associations between the regulatory state and specifically IRAs, on one hand, and the rule
of law, on the other, and indicates the wide range of values or ideals which ‘legalization’ may further.

At the simplest level, various cases indicate that recourse to vocabularies of law, and the creation of rule-backed institutions, need not be manifestations of ‘rule of law’ in any broad sense. In Indonesia, a rule-bound independent electricity regulatory agency and a competitive power market were brought into existence by a regulation apparently designed, at least in part, to circumvent the judicial review that would have attended a primary statute (Butt and Lindsey 2010, pp. 252–3). In Latin America, the investment regime promoted and facilitated by global institutions, themselves insisting on the importance of independent, depoliticized regulators, reverts in circumstances of crisis to a negotiation between the executive and private investors, in which considerations of legal obligation appear far less relevant than financial imperatives (Murillo and Post, this volume; Morgan 2006, pp. 228–32). In many cases, the way in which regulatory policy and regulatory law is made reflects close engagement between the executive and global bodies, bypassing the legislature, and sometimes a lack of meaningful control even by the executive. Disentangling the different dimensions of legalization may ultimately reveal a system in which law is used episodically and instrumentally, to create a particular institutional apparatus primarily geared to encouraging, and stabilizing the environment for, private involvement in service provision.

Greater attention to the specific dynamics of legalization within regulatory states in the South, as exemplified by the studies in this book, is now enriching global thinking on regulatory governance. It is precisely insights from Southern contexts about the ambiguity of ideas like rule of law, and the tensions within legalization, which offer opportunities to diversify current thinking, and potentially open it to a wider range of accounts of the kinds of principles which should govern infrastructure regulation, and of what these principles actually require in practice. There is nothing inherent in public law as such, as distinct from the actual content of constitutional norms in particular systems, that mandates collective ownership of utilities. Yet different legal vocabularies, or the content of particular norms, may be invoked to argue for ends other than, or transcending, efficiency, such as minimum levels of service for all, or some more ambitious notion of collective benefit, or priority for populations currently marginalized or underserved. Globalized vocabularies of rights, or principles of equality or economic development in national constitutional frameworks, may be deployed in these ways. Notions of ‘participation’, ‘accountability’, and ‘transparency’, often promoted as necessary or desirable features of regulatory frameworks and associated with particular institutional processes (like notice and comment-type procedures prior to tariff reviews), are rather open-ended, and potentially amenable to development through experiment at the local level. ‘Participation’, for example, might be understood as requiring something more than bare arrangements for public comment, for example scrutiny of the range of public submissions, and perhaps deliberate efforts to seek out and, over time, enhance the calibre of comments from under-represented groups, to ensure that ‘participation’ is as broadly-based as possible and not skewed to already-privileged sectors of the population. Principles such as ‘accountability’ and

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'transparency’ might exert significant leverage if transposed from the lower reaches of regulatory processes to the higher order policymaking that precedes major reforms, for example by requiring a clear statement, prior to the introduction of major statutes or decrees, of the roles played by global institutions, expert consultants, and corporate actors in the preparation and design of those reforms.

References


