REGULATORY INSTITUTIONS OF THE GLOBAL SOUTH: WHY ARE THEY DIFFERENT AND WHAT CAN BE DONE ABOUT IT?

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Abstract

Developing countries suffer from underperforming regulatory agencies compared to those in the developed world. The paper attempts to theorize general reasons behind such divergence. It argues that the differences lie in developing countries’ (a) higher priorities for redistribution, (b) structurally different institutional endowments, especially at informal level, and (c) limited informational channels. The paper proposes that a multi-stakeholder (with increased emphasis on judiciary and civil society) approach has potential to address the shortcomings. It tests these claims through studying cases of telecom and electricity regulation in India.

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1 Honorary Research Fellow at Jindal Global Law School (India) and PhD Candidate at University of Hamburg (Germany), Erasmus University (Rotterdam, Netherlands) and University of Bologna (Italy). An earlier version of the paper was presented at the Conference on ‘Commercial Laws in Asia Pacific’ jointly organized by Jindal Global Law School and Monash University, Department of Business Law and Taxation, in February 2013. Author thanks the participants of that conference for offering invaluable feedback. He would also like to thank participants at ‘Institute for Global Law and Policy’ Workshop, organized by Harvard Law School at Doha in January 2014, where this idea was discussed at length with fellow scholars attending the stream discussion on Law and Economic Development. In particular, author would like to thank Jorge Esquirol, Scott Newton, John Ohnesorge, Onur Ince, Nicolas Perrone, Maja Savevska, Daniel Vargas, Rafael Sakr. Discussions with and comments from Aseem Prakash, Ranjan Ghosh, Navroz Dubash, Bronwen Morgan and Pradeep Mehta have been extremely valuable. Research assistance of Titiksha Mohanty, Sree Ramya Hari, Durga Agarwal and Jai Agarwal was exemplary. All errors and omissions remain author’s alone. Author can be reached at ygoyal@jgu.edu.in and yugankgoyal@gmail.com
1. Introduction: Concept and Trend

Latter part of the twentieth century witnessed rapid emergence of regulatory agencies around the world. The annual rate of rise of new regulators increased from less than five between 1960s and 1980s, globally, to more than 20 between 1990s and 2002. Agencies not only multiplied but also grew in size - the number of civil servants employed in regulatory agencies increased from 28,000 in 1970 to 81,000 in 1979.

The idea of regulation has its roots in deregulating public utility industries, and then re-regulating it. The deregulation phase began with what is known as Reagonism and Thatcherism in US and UK respectively. The characterization was predominantly colored by stimulating growth through creating free markets and privatizing state industries. This essentially aimed at reduction in government regulation of private enterprises. Public delivery of services was crumbling and the widespread belief that government is not able to maintain competitiveness and efficiency was gaining momentum, in addition to prevailing economic and ideological forces. Of particular interest here is the privatization of utilities.

Public utility is a form of network infrastructure industry that provides public services (electricity, natural gas, transport, water, telecom and the like) to the customers and is allowed to behave monopolistically. It is not difficult to imagine that the State would like to keep control of the natural monopoly, since utilities have a powerful political impact; the consumers also being voters. Before the drive of deregulation, most public utilities were indeed State owned

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7 A theoretical account of move towards regulatory state is illustrated in Dempsey, 1989, supra n.

8 Majone 2002, infra n


10 Levy and Spiller, infra n. at 204.
enterprises, until the burden of state bureaucracy led to inefficiency and low productivity, thereby crippling these industries.\textsuperscript{11} The demand for privatization was high.

But since utility has widespread consumption as an essential service, its pricing has huge welfare implications.\textsuperscript{12} The privatization was therefore coupled with some sort of re-regulation, of a different sort.\textsuperscript{13} Reliance on old style of regulation that included public ownership, planning or centralized administration was not acceptable.\textsuperscript{14} Repeating the old style would mean that private utility will have no insulation from the possible administrative expropriation of the government, which may, say, want the former to push the prices to unsustainably low levels for gaining political mileage.\textsuperscript{15} Fearing this, private investment in the industry may not take place in the first place, or the private entity will limit its exposure.\textsuperscript{16} The governments need to control the private utility, and offer credible commitments\textsuperscript{17} to the investors that their investments will not be appropriated in future.

Such credible commitments are offered through regulatory institutions, ushering a new era of regulation and rise of regulatory state.\textsuperscript{18} These institutions act as autonomous and politically independent bodies possessing technical expertise over the subject of the utility.\textsuperscript{19} By sending credible signals through institutions characterized by independence, competence and technical understanding of the subject, States commit to the sustenance of stable, evenly applied and technically appropriate frameworks that enable the investors to take comfortable cognizance through long-term perspectives of their investments and returns. These institutions offer a promise of insulation of the private entity from whimsical decision-making of the political arm of the State.

Until the 1980s, regulation of public utilities was restricted to the US.\textsuperscript{20} Deregulation of state owned enterprises in UK took place in 1980s.\textsuperscript{21} Since then, there has been a gradual privatization

\textsuperscript{11} See Dempsey, 1989, supra n
\textsuperscript{12} Ibid.
\textsuperscript{13} Majone, G. (Ed.), Regulating Europe, Routledge (2002), at 1-2
\textsuperscript{14} Majone, G., \textit{The rise of the regulatory state in Europe}, West European Politics, 17(3) (1994), 77-101
\textsuperscript{15} Levy and Spiller, infra at 204.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid at 209.
\textsuperscript{18} Majone 1994, supra
\textsuperscript{19} Majone 2002, supra
\textsuperscript{21} In the UK, the most important evidences were the deregulating exercises of express coach (1980), British Telecom (1984), privatization of London bus service (1984), local bus service (1985) the railways (1993) and coal (1997). In European Union, the air industry was deregulated (1992). Australia famously announced the policy of ‘Minimum Effective Regulation,’ (1986). In the USA, the deregulation/privatization drive covered airline (1978), railways
of utility industries around the world and consequent emergence of regulatory institutions. It began with electricity and telecommunication, and slowly for many other infrastructural industries like natural gas, water, railways and the like.\textsuperscript{22} The pace at which regulatory agencies were developed in Latin America, Central and East Europe, and more recently in Asia and Africa, was indeed extremely swift.\textsuperscript{23}

The developments are interesting, as regulatory agencies highlight the rise of an alternative and new form of accountability. As Levi-Faur describes that \textquote{[d]emocratic governance is no longer about the delegation of authority to elected representative [sic] but a form of second-level indirect representative democracy – citizens elect representatives who control and supervise ‘experts’ who formulate and administer policies in an autonomous fashion from their regulatory bastions.}\textsuperscript{24}

No wonder that there has been an extensive and ‘jaggernaut’-type\textsuperscript{25} academic scholarship emerging in the area of regulation. Yet, many gaps remain to be explored. One of the most important ones is the differential performance of regulatory agencies in Western and nonwestern countries, even when their constructions have followed the same principles. Regulatory institutions of nonwestern countries\textsuperscript{26} have not performed in line with the expectations, due to the poor implementation and institutional design of their agencies.\textsuperscript{27} For instance, since the idea of regulatory institutions emerges from delegating state’s authority to non-majoritarian agencies, the question of independence becomes paramount.\textsuperscript{28} More importantly, while citizens can observe performance of their governments and vote the latter out of the power in next elections, such direct forms of accountability cannot be employed in governing regulatory agencies. They need alternative accountability frameworks that must not only be rooted in statutes but also

\textsuperscript{22} Stern and Holder (1999), supra n. at 33
\textsuperscript{23} Ibid.
\textsuperscript{25} This term is invoked by Moran M, \textit{Publication Review: The Oxford Handbook of Regulation}, Public Law 4, 859–862 (2011)
\textsuperscript{26} Nonwestern countries here will mean developing, least developing countries, and ones which in social science literature is also referred to as Global South. I will use these terms interchangeably.
followed in practice. Unfortunately, developing nations and more generally countries of Global South have not been able to institutionalize the optimal design issues in practice. The article is an attempt to understand why it is the case. In particular, the article looks at the difference between the institutional setting of nonwestern countries and in their Western, developed counterparts and locate the underperformance of the regulatory state in those differences. In doing so, it calls for alternative modes of understanding regulatory state of the Global South.  

The remaining paper is structured as follows. Section 2 elaborates on the relevant literature in the field and explains the broad theoretical framework to which the concept of regulatory agencies is wedded to. Section 3 discusses the case for regulatory institutions of nonwestern countries highlighting the original intent and misguided evolution. Section 4 shows the three main sources of difference in conceptualization and construction of regulatory states as they develop in West and nonwestern world. Section 5 introduces a ‘stakeholder approach’ in the discussion, and shows its potential in addressing some of the challenges faced by nonwestern countries in the context of regulatory agencies. In section 6, I conduct brief case analysis of electricity and telecom regulation in India. Section 7 concludes.

2. Theory and Literature

It is interesting to note that in case of regulatory agencies, practice has preceded academic research. But concepts had been used to explain some general patterns. The problem of commitment is also termed as time-inconsistent issue. Kydland and Prescott first raised this issue in 1977 and one of their examples was monetary policy suggesting how incase of short run tradeoff between inflation and unemployment the government may renege on their past anti-inflation promises to boost employment in the short run. This will result in lack of credibility in

29 Dubash and Morgan (2012), supra n. offer an insightful motivation for labeling certain countries the Global South in this context, and analyzing them jointly, at general level. For them, the collection is sensible in that these countries have a shared history – reflected in colonialism, poverty and rise of ‘development’ as a process – and even though manifestations of regulatory state are contextually very different in each of these countries, three shared contexts encourage us to look at the Global South in the same light. These contexts are: (a) external pressures from, say, international financial institutions to transplant public policy (here of regulatory agencies) from the Global North, (b) greater emphasis of redistributive politics in distributing and regulating services to places hitherto poorly, if at all, offered services of say, infrastructure, and (c) limited state capacity. See ibid. I am inspired by these contextualization, and invoking the generality of nonwestern countries – interchangeably with Global South – in same setting. Hence, without diluting the importance of no-one-size-fits-all approach, I intend to build common contexts where we could locate failures of regulatory agencies in nonwestern nations. In one way therefore, this work could be seen as a more expansive extension to Dubash and Morgan (2012), and takes their contextualization to the next level. In another way, this offers an alternative tool to answer a question that Dubash and Morgan sought to answer. This alternative lens is offers higher fertility to this strand of inquiry.

anti-inflationary promises and people will increase salaries, raising inflation further. In utility monopoly, similar thing may happen, and the time inconsistency (called as hold-up problem) may become unavoidable. With doubts on credible commitments ex post, there will be under-investment ex ante. Much earlier, in 1971, Vernon had discussed the idea of ‘obsolescing bargain’ that will affect multinationals where the bargaining power of the companies reduces drastically once the investment has been made.31

The idea of regulatory institutions as bodies that signal credible commitments has been influentially advanced by Pablo Spiller (with his co-authors)32 in a series of papers. In their five country study, Levy and Spiller – using the transaction cost approach – show that the problem of failure of privatization in many countries lies in the issue of commitment. To address commitment problem and political expropriation, one needs to take into account a country’s institutional endowment, which in turn is defined through (a) legislative and executive decisions, (b) judicial institutions, (c) customs and informal norms, (d) social interests and ideology of the society, and (e) administrative capabilities of the country.33 The primary question that the utility investor will ask is ‘how easily can a legislation be reversed,’ before making long-term investments. In their three pronged approach, authors contend that (a) substantive restraints on arbitrary decision by the regulator/government, (b) restraints on regulatory system changes, and (c) enforcement of these restraints through institutions are necessary (and enough) ingredients for recipe of successful privatization. The idea with various determinants and in particular, its transaction cost approach has been taken forward in Spiller and Tomasi citing the case of Argentina.34 Their work develops the concept of regulatory governance, articulating powers of regulators, its separation from different branches of government and when would the society need a model of independent regulatory agencies. The model enables us to see that regulation

32 B. Levy and P.T. Spiller, The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation, Journal of Law, Economics and Organisation (1994); P. Spiller and J.L. Guasch, Regulatory Reform in Latin America and the Caribbean, World Bank (1999) and P. Spiller and M. Tommasi, The Institutions of Regulation: An Application to Public Utilities, Handbook of New Institutional Economics, Springer (2007). They argue that only if the basic institutional problem of overcoming the under-investment problem is solved, one can begin to address issues such as incentives, price rules or industry structure
33 This definition has been borrowed by Levy and Spiller from North (1990). See Douglass C. North, Institutions, Institutional Change and Economic Performance, Cambridge University Press, (1990)
needs to be understood by its scope for limiting the arbitrary administrative action of political actors, thus enabling conditions for a favorable investment.

This idea helps us understand as to why governments will deliberately delegate authority to ‘non-majoritarian’ institutions (regulatory agencies). They do so to signal credible commitments to investors by suggesting that tariffs will be set by expert regulators and not governments having political mandate. Think about utilities for instance, whose tariff is an important political issue – governments would like to keep tariff as low as possible to gain political mileage from voters. But this will result in private investors getting discouraged from making investments if the low tariffs do not make economic viability visible. By delegating the responsibilities to regulators, governments give credible commitments to keep the regulators independent from their influence. Similarly, they delegate to address information asymmetry since specialized body is better able to govern a complex industry. Further, the delegation also absolves government from taking blame for unpopular policies.35

Influential work of Laffont and Tirole develops the idea of regulatory incentives.36 In their work, the static framework and theoretical determinant flows from principal-agent relationships under asymmetric information on operating costs.37 Williamson develops the approach to explain contracting issues amongst legislatures and place an emphasis on regulatory governance over regulatory incentives.38 This is an extremely important insight, since the impact of regulatory incentive can only be rigorously studied once the governance structure of regulation has been established. Thus institutional determinants of regulatory frameworks are crucial to be analyzed. The concern hovers around not so much in ideas of interest group politics or long run marginal costs but on processes and rules to uphold regulatory policies.39

39 Such emphasis on processes was done perhaps earliest in Joskow, Paul L., Inflation and environmental concern: Structural change in the process of public utility price regulation, Journal of Law and Economics 17, pp 291 (1974).
Even in the general categorization of regulation into three types – attributed to Morgan and Yeung\(^{40}\) - institutional theories are considered to provide robust theoretical tool to understand the governance structure. Regulation is a tool for state to control a private property where public interest is involved. For instance, regulation controls monopolies for provision of public goods or to arrest negative externality. Regulation therefore aids in increasing allocative efficiency. This is a \textit{public interest} view of regulation. However, in invoking issues of social justice, diversity and most importantly, redistribution in deciding regulatory aims, the theory appears rather naïve by overestimating the good intent and neutrality of regulators, their competency and developing a neat design for ensuring accountability.

The unrealistic assumptions of public interest theories are addressed in \textit{private interest} understanding of regulation.\(^{41}\) Invoking public choice arguments, the prevailing view emphasizes regulation as the product of interplay between voters, policy makers and bureaucrats who are self-interested individuals aiming to maximize their own welfare. As Stigler notes, ‘regulation is acquired by the industry and designed and operated primarily for its benefit.’\(^{42}\) This theory provides a framework to view regulators serving private interests of individuals and organized groups. Taking a step ahead of capture theory, it is also observed how regulation is a tool in the hands of political elite to retain its power.\(^{43}\)

Taken together, the \textit{public} and \textit{private} construction of regulation explains the structure and dynamics of regulation in general, across various sectors and jurisdictions. Yet, it misses out on the idea of how regulatory state emerges and functions as a rule-based entity, thus knocking out concerns related to interest-group intervention in the state-market interactions. The \textit{institutionalist} theories fill this gap. They focus on internal institutional dynamics that originates in a ‘regulatory space,’\(^{44}\) seek to regulate through public-interest groups and/or even through self-regulated, ‘responsive regulation.’\(^{45}\) It also attracts a ‘stakeholder model’ of regulation\(^{46}\)


\(^{42}\) Ibid, Stigler (1971) at 3


where network of relations of various stakeholders also become central to regulator’s concern. Dubash\textsuperscript{47} notes that institutionalist theories bring more realism in theoretical determinants of regulatory processes. Indeed, given their emphasis on stakeholders, interactions and designs of systems of regulatory processes, institutionalist theories are welcome particularly in the case of carving out regulatory institutions of nonwestern societies.

But much of the contemporary literature that employs the tool of transaction cost economics views the entire issue from a functional perspective of transplanting regulatory institutions to the South. Majone’s account for example, is sympathetic towards duality of efficiency and redistribution, but he expresses that legitimacy to non-majoritarian institutions could be achieved through expertise, capacity and other such technocratic tools.\textsuperscript{48} As this article shows, this is not as easy or practical, given the kinds of institutional endowments nonwestern countries are laden with. Exploring the redistributive determinants of poor state’s policies with references to developmental state\textsuperscript{49} need to be frequently invoked, especially when they are largely ignored in institutional literature\textsuperscript{50}. In addition, the diversity of country experiences in various regulatory agencies compounds the difficulty of generalizing a theoretical construct on nonwestern cases of regulatory failures. Therefore, even though there is some literature on discovering the pattern of regulatory behavior of developing nations,\textsuperscript{51} bulk of scholarship is driven through case study approach, either at regional or sectoral level.\textsuperscript{52}


\textsuperscript{47} Dubash (2008), supra n.


\textsuperscript{51} See for e.g., Minogue M, Carino L (eds), \textit{Regulatory Governance in Developing Countries}, Edward Elgar, Cheltenham (2006)

Yet, it is possible to draw some general patterns of institutional endowments that developing countries carry. Locating regulatory agencies in those endowments is a cost that nations struggle with. The aim of this article is to flag exactly those endowments and propose a way to address the misfits between existing institutions and new priorities. Regulators are ‘governments in miniature.’ Global South suffers from lack of trust and emotional legitimacy of their governments in the hearts of people. It is sensible therefore to assume that governments in miniature will also have these perceptions. The very power and responsibility of regulators call for a deeper introspection on how to design their accountability and legitimacy. The regulators do not stand immune to the influence of governments and so Western countries developed forms


of accountability through investor-focused approach.\textsuperscript{54} In the nonwestern countries, the risk of regulators being captured by private interests is equally large, and therefore in such countries, there is a need to complement investor-focused approach to a more citizen-focused perspective.\textsuperscript{55} The design of independent regulatory agencies, with experts offering non-partisan and coherent policies is indispensable for effective governance of a regulatory state. Given the entrenched political and business interests prevailing in interactions between the regulated, regulators and regulatees in developing countries, creation of regulatory agencies require separate examination.

3. Regulatory Institutions of the Nonwestern Societies

Nonwestern countries were net importers of the concept of deregulation and re-regulation. The growing literature in the field also shows a prevalent bias in form of deep-rooted Anglo-American experience as the standard model to emulate.\textsuperscript{56} Most of the nonwestern nations created regulatory agencies during 1990s reflecting the agenda of Washington Consensus, as part of larger goal of policy shaping in developing countries.\textsuperscript{57} The institutions transplanted from the Global North relied heavily on their experiences in previous decade. Establishment of regulatory agencies was driven by compliance framework of the South for loan conditions from multilateral development banks that also led to what is sometimes referred to as ‘coercive isomorphism.’\textsuperscript{59} World Bank was in particular, most instrumental,\textsuperscript{60} creating measurement techniques and scorecards and other such metrics, including disseminating ‘one-size-fits-all’ toolkits. Such toolkits lay emphasis on commercialization without advancing methods to improve regulatory

\textsuperscript{54} As espoused in Levy and Spiller (1994) supra n.
\textsuperscript{55} Dubash (2008), supra n.
infrastructure and institutional mechanisms. World Bank publication *Handbook for Evaluating Infrastructure Regulatory Systems* is a case in point.62

Thus, the creation of regulatory space and location of agencies therein was driven more by external influence, rather than an endogenous evolution of institutions, which keeps in sight, institutional endowment and path dependent trajectory of these countries. Between 1980 and 2000, independent regulatory agencies were established all across Latin American, Europe and much of Asia.63 This trajectory was informed more by external consultants, who seemed to have been convinced that the relations between government systems and regulatory agencies can reach their optimal independence through implementing technical and apolitical institutional arrangements. They vociferously argued for commercialization, privatization and liberalization of utilities that were historically driven by public sector. Such universalizing notification and implementation of foreign ideas without regard to historical and cultural fabric of the host nation state eventually led to undermining the importance of informal and customary approaches that have been in practice since centuries in the host countries. The concept of social and political customization of such ideas was entirely done away with. The assumption that institutional arrangements can be directly transplanted from one country/society to another dispenses away the importance of ‘heaviness’ of local culture and polity that will greet the newly conceived institutions with little receptivity, and create disjointed and competing sets of institutional incentives. Dubash aptly describes the regulatory agencies of the South beginning as ‘hollow institutional shells, which are populated by expectations, norms of institutional practice, and operational rules and culture over time.’64 Perhaps this is akin to imagining construction of a building over sliding sand.

Several other considerations, which are paramount to design institutions in the nonwestern countries, were ignored in scholarly literature that developed in Western organizations and universities. The focus on credible commitments from the government to the investor has been the dominant building block of theoretical determinants of regulatory agencies in the West. Such a view, while rightly observing problems in commitment between governments and investors, develops an oversight to the commitments between governments and citizens at large. This simplification can (and has proved to)65 debilitating substantive bit of theoretical framework of governance of regulatory agencies. Southern nations are characterized by underperforming and poor service provision of utilities, coupled with a large population unable to afford the price of

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64 Dubash and Morgan (2012), supra n.

even the most reasonably priced utility good/service. And commitment problems from part of the public to the policy makers are equally important.\textsuperscript{66} This means that poor voters – who are substantial in most developing nations – may simply throw out ruling party out of power, if the concerns of efficiency have eroded those of redistribution during incumbent’s tenure. This puts a huge responsibility on informational sources and channels like media in these countries to shape public opinion. Yet, the information asymmetries are high in developing countries. Commitment problems in South therefore are even more complex. Bardhan also identifies potential tensions between procedural and participatory democracy, and consequently, conflicting priorities of country’s poor and the rich.\textsuperscript{67} These arguments can be further employed, quite usefully, in the unequal economies of the South, where popular opinion of poor majority undermines property rights of the rich thereby creating political polarization. One visible impact is inequality acting as a barrier to development and institutional reform.\textsuperscript{68}

And it is only in the moment of crises, as we presently see undergoing, that the fragility of assumptions used to build theories of change, becomes visible.\textsuperscript{69} The incompatibility of local conditions in adapting to foreign plans becomes clear only after implementation is concluded.\textsuperscript{70} The ‘outsider’ consultants who have thorough knowledge about the implementation plans usually fail to appreciate importance of distinguishable path-dependent trajectories of the host nations with respect to implementing such policies. The hope that such policies will help ‘fix’ the ailing economy ‘quickly’ only exacerbates the institutional confusion that remains uncomfortably embedded into the overlap of new and old systems of governance. With little far-sightedness of these consultants (owing to their limited cognizance of local customs), the institutional arrangements are imposed on a distinctively diverging path a country is already on, and belief that the path will converge towards global-optimal is held closely to the heart. The signs of deterioration show much later, sadly until when, incalculable harm is already done.

Internalizing local institutional context is therefore crucial to any regulatory transplant. Southern states are endowed with weak institutional capacity evoke sharp empirical realities that may


\textsuperscript{67} Ibid.

\textsuperscript{68} Ibid. Bardhan (2005). See also, Easterly, W., Inequality Does Cause Underdevelopment, mimeo (2005) and Easterly, W.; Ritzen, J.; Woolcock, M., Social Cohesion, Institutions, and Growth, mimeo (2005)

\textsuperscript{69} Assumptions act as pivots of theoretical constructions, but their universality is incorrectly assumed and forgotten. They surface when theoretical construction begins to fall apart. This is beautifully captured in David M. Trubek and Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, Wisconsin Law Review 1974 (1974) at 1069.

\textsuperscript{70} Rosenzweig MB, Voll SP and Pabon-Agudelo C, Power Sector Reform: Experiences from the Road, The Electricity Journal 17,16–28 (2004)
differ widely from expected outcomes.\textsuperscript{71} It is high time the question whether regulatory models from countries endowed with strong (and suitable) institutions require institutional prerequisites in host countries, failing which transplants could be premature.\textsuperscript{72}

4. Pivots of Difference

In this section, I show how the diverging experience of western and nonwestern countries have gone through in their regulatory avatar, can be located in (a) different levels of importance given to redistribution as a policy goal for utilities, (b) informal institutions, and (c) lack of informational channels, in nonwestern countries.

4.1. Redistribution Question: Credible Commitments to the Consumers

Little account of redistributive politics has existed in contemporary literature on regulation. This is not surprising given the fact that most scholarly contributions have emphasized regulation experience in the North, where focus on efficiency has usually trumped redistributive concerns, perhaps also for a good reason. This differential emphasis on redistribution stems from differential abilities to pay by majority of population for costs of basic utilities. Political dynamics in regulatory agencies in the nonwestern nations will therefore find their way through, despite creating textbook type institutional arrangements.

The tension between redistribution and efficiency is an established discourse.\textsuperscript{73} Most scholars have however tended to tip in favor of efficiency as primary goal of regulatory decision making. Majone’s account of rise of regulatory agencies in Europe is an illustrated study, where he contends that neat distinction need to exist between efficiency and redistribution, where former

\textsuperscript{71} See for interesting case study on Brazil that invokes similar sentiments, Prado M, Implementing Independent Regulatory Agencies in Brazil: The Contrasting Experiences in the Electricity and Telecommunications Sectors, Regulation & Governance 6, 300–326 (2012)
\textsuperscript{72} Jarvis (2010), supra n.
rests with the agencies and latter becomes the prerogative of government.\textsuperscript{74} This is understood by comparing the relative advantage of the two bodies – while regulatory agencies need a measurable criterion to base their technical decisions on, government is more suited to appreciate public welfare function and act accordingly on matters related to equity.\textsuperscript{75} Yet, the idea remains naïve given its ignorance of practical experience of nation-states in the past. It is difficult to imagine such neat distinctions in socio-political games, where consumers and producers may have competing interests. The possibility may deterministically lie on societies that have already assumed a general desirability of efficiency, like Western countries, where concerns of equity remain weaker. In poor nations characterized by large scale deprivation, regulators and government cannot divide their ‘jobs’ so neatly. Even in the West, ‘regulatory welfare regimes,\textsuperscript{76} are a result of ‘smuggling social goals via the backdoor into the regulatory regime.’\textsuperscript{77}

Jayasuriya provides another argument to reconcile efficiency and equity in practice.\textsuperscript{78} The idea is to separate procedure and outcomes.\textsuperscript{79} Such a separation will eventually yield promising duality of efficiency and redistribution priorities.\textsuperscript{80} But there are doubts with regard to how depoliticizing proceduralization will not create opportunities for broader political mobilization within the anticipated neat regulatory space.\textsuperscript{81} This is even more unlikely in nonwestern societies, which have fluid procedures and overlapping administrative structures owing to their inexperienced democratic governance, giving sizeable room to either dilute or solidify the procedures with other branches of government.

In nonwestern countries it is simply not possible to institutionally coagulate one against the other. Dubash cites convincing reasons for this.\textsuperscript{82} There is a sizeable lack of access to services in the nonwestern countries exacerbating the service delivery problem.\textsuperscript{83} Large population lies in

\textsuperscript{75} Ibid.
\textsuperscript{77} Dubash and Morgan 2012, supra n. at 269.
\textsuperscript{78} Jayasuriya (2001), supra
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{82} Dubash and Morgan (2012), supra n.
\textsuperscript{83} Ibid. at 269
abject poverty thus making cost spreading an essential element of policy design in any sector.\textsuperscript{84} This also means that emphasis on cost recovery for the investor will impact poor population much more than the relatively affluent population of the West.\textsuperscript{85} A minor hike in tariff will eject massive number of people outside the service delivery net increasing deadweight losses enormously. Nonwestern states are also characterized by very high costs of last-mile-connectivity, owing to lack of basic infrastructure and historically ill-conceived urban planning. For e.g., lack of roads will make it very difficult for the transport sector to extend its services in those regions. This makes utility projects costlier to implement if coverage targets are to be achieved at reasonable rates. Recouping the increased investments is even more difficult. Indeed path dependency suggests that having begun with weak institutional endowments, the service delivery sectors of the developing countries are likely to be financially, technically and institutionally dysfunctional for some time.\textsuperscript{86} But important is to recognize that imposing the costs of reforms disproportionately on the “social class ill-equipped to bear them” by the regulating agencies makes it a politically difficult exercise to fulfill.\textsuperscript{87} Dubash notes, “[r]edistributive politics are embedded in the very contexts that give rise to regulatory agencies.”\textsuperscript{88}

Infact, so powerful is the force of equity as a normative concept of society that regulatory welfare regimes is a term often used to denote weak social security programs.\textsuperscript{89} Nonwestern countries lack strong institutional mechanisms to safeguard social security and therefore welfare questions become even more pressing. Such intervention can come about through state intervention in the regulatory agencies\textsuperscript{90} (or even through social mobilization\textsuperscript{91}). Functional arguments for transplanting\textsuperscript{92} Western institutions, which are inherently silhouetted with different landscape is simply not enough.

\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{87} Dubash and Morgan (2012), supra n. at 269
\textsuperscript{88} Ibid.
\textsuperscript{89} Haber, supra n.
\textsuperscript{92} Majone (2001), supra n
If the definitional premise for a regulatory agency is a technical expert unconcerned with questions of equity, then this premise gets diluted in nonwestern countries because equity concerns are paramount.\(^\text{93}\) Therefore, if construction of regulatory agencies in poor countries is done with the stated definitional premise, it is bound to fail. A technocratic and expertise based evaluation of numbers by the regulatory agency will now be compelled to spell out subjective concerns of how much should the price of the utility be undercut so that it becomes affordable to the population. This is an important question, and it cannot not attract political intervention. As a consequence, regulatory agency emerges as an organization with muddled up priorities. The answer to this does not lie in doing away the agency altogether, or to have it subsumed under the Ministries. The answer lies in appropriate regulatory design, and attracting multiple stakeholders in the process. Due to the inherent economic differences between West and nonwestern countries, regulatory institutions need to be imagined in alternative space that has room for such stakeholders.

### 4.2. Institutional Endowments: Informal Networks

The idea of informal institutions in nonwestern societies is explained most illustratively in Prakash Reddy’s anthropological work in Danish villages,\(^\text{94}\) reviewed by *Economist* in 1992.\(^\text{95}\) Reddy spent a few months in a village in Denmark called Hvilsager. He was surprised to see that villagers hardly knew each other, and were largely living in microcosmic world of their own with almost absent social network.\(^\text{96}\) In contrast, in India (or any other similar region, say Africa\(^\text{97}\)), in a similarly populous village, everyone would know everyone, commonly visiting each other, being interested in business and lives of others. Social relations would be common in India.\(^\text{98}\) If one assumes Denmark and India to be representative of western and nonwestern countries,\(^\text{99}\) we get a picture of regulatory society. If a regulator is to be established in the two villages in Denmark and India, say regulating water supply, it will work perfectly well in the insulated

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\(^{94}\) G Prakash Reddy, *Danes are Like That: Perspectives of an Indian Anthropologist on the Danish Society*, unpublished English manuscript. The original version is in Danish. Cited in Tanzi (1995), infra n.

\(^{95}\) This illustration has been referred in Vito Tanzi, *Corruption: arm’s length relationships and markets*, in Gianluca and Sam Peltzman (eds.) Fiorentini, *The Economics of Organised Crime*, (1995).

\(^{96}\) At one point, Reddy notices, “Coming as I do from India, and born and brought up in a village, I am used to seeing people… But here in this village, not a single soul was sighted…The doors of all the houses were closed and created a doubt in me, as to whether this village had any people at all.” See Reddy (1991) supra n. at 13.

\(^{97}\) I mention Africa, because Reddy continues to write about her driver, Maria, “Maria, looking at my dismayed face, said she knew what I was thinking, as she had lived in Africa for three years.” Ibid at 13

\(^{98}\) Time is treated as time in the Danish village, while as social time in India. See ibid at 113-114.

\(^{99}\) Tanzi (1995) supra at 165-166
space it will enjoy in Denmark. Arm’s length relations would be common amongst Danish.\textsuperscript{100} In Indian village however, the idea that regulator is treating her friends and relatives in the same way as others in the village will seem inappropriate, even immoral.\textsuperscript{101} Regardless of the space being private or public, regulatory space immune from informal network and institutions is difficult to be imagined in India, like in most developing countries.

Nonwestern nations belong to a different genre of institutions. Francis Fukuyama paints a suggestive picture through his example of Melanesian society, inhabiting in the Pacific in several hundreds of tiny islands.\textsuperscript{102} The diversity in this group is so intense that by one count, there are more than 1,319 languages in Melanesia making the language density to be one language per 716 sq. km.\textsuperscript{103} These islands have been inhabited – by some estimates – for more than 30,000 years. When British troops left the islands, they installed their Westminster style governments in these islands.\textsuperscript{104} The existing socio-political framework was relational and community driven.\textsuperscript{105} The tribes – for centuries – had hunted for their own tribesmen/tribeswomen and had a community leader, called the ‘Big Man,’ responsible for gathering and sharing of the bounty for his tribe.\textsuperscript{106} Without redistribution in his tribe, the Big Man would lose his status.\textsuperscript{107} The concept of electing a leader that would govern everyone in the group of islands was totally unheard of. No wonder therefore that the democratic models of the West were an utter disaster in the islands, with enormous political turmoil and instances of rent seeking.\textsuperscript{108} What Westerners view as rampant corruption is basically what the Big Men have always been doing there – ‘to redistribute resources to their kinsmen,’ which now instead of pigs and shells are revenues of mining companies.\textsuperscript{109}

\textsuperscript{100} Ibid at 165
\textsuperscript{101} Ibid
\textsuperscript{102} Fukuyama, Francis. The Origins of Political Order: From Prehuman Times to the French Revolution. Profile books, (2011) at Preface, p. i
\textsuperscript{103} Consider Solomon Islands for example: the tiny island group has a population of 523,000 and has distinct 74 (of which four are extinct) languages! Even though English is the official language, hardly 2% of the population speaks it. Fukuyama 2011, ibid at i
\textsuperscript{104} Ibid at ii
\textsuperscript{105} Ibid
\textsuperscript{106} ibid
\textsuperscript{107} Fukuyama cites another study that discusses in detail, on how historically, empires were redistributive in general. Karl Polanyi, The Economy as an Instituted Process, in Polanyi and C. W. Arensberg, eds., Trade and Market in the Early Empires, New York: Free Press, (1957).
\textsuperscript{109} Fukuyama, (2011) at iii.
The above illustrations may seem extreme, but the reality in most nonwestern countries is not dramatically different. Cultural norms are entrenched deep within cognitive abilities of humans, which are hard wired within them in accordance with institutions they grew up within.\textsuperscript{110} If transplanting policies were so easy, then, societies would not have diverged in their economic indicators.\textsuperscript{111} After all, the knowledge dissemination (of say, improving economic well-being as a result of improving factors of production) should yield the best practices everywhere. But institutions are path dependent and not easily replaceable.\textsuperscript{112} They follow fossilized modes of behavior, and developing nations are bound more by customary norms than rule of formal law. Economic transactions there are characterized by social networks, formed informally and a heavy impetus on these networks to achieve desired aims.\textsuperscript{113} These networks generate through castes, ethnicity, language, or any other means of group identity. The social networks in political relations have important bearing on all political decisions. Even in seemingly formal structures of business and corporations, political connections affect the decision-making: stock market valuations,\textsuperscript{114} corporate bailouts\textsuperscript{115} and even access to credit.\textsuperscript{116}

More than \textit{homoeconomicus}, the phrase of ‘sociological citizens’ describes all of us, and surely the public servants, politicians, voters, local leaders, private investors.\textsuperscript{117} For such sociological citizens, technical and pure independence can never be realized in practice due to the non-stop sociological osmosis taking place through history. Instead, what stems from their institutional endowment is what Silbey calls, ‘\textit{relational interdependence},’ which utilizes the perspectives of unseen threads of networks that assemble the social, for ‘meeting occupational and professional

\textsuperscript{111} North (1990), supra n.
\textsuperscript{112} Ibid.
\textsuperscript{117} I borrow this phrase (though not exactly in the same vein) from Silbey SS, Huiising R, Coslovsky S, \textit{The Sociological Citizen: Recognizing Relational Interdependence in Law and Organizations}, L’Année Sociologique 59, 201–229 (2009)
obligations.' Such regulation can closely be called as ‘relational regulation.’ Bureaucrats, private investors and politicians will locate their profession and occupation in the complex web of interconnections and interpersonal relations with each other and not necessarily in the statutes that produce them. The statutes, instead of formalizing relations, deformalizes such interactions and gives way to a hitherto unknown (or unchartered) path towards creating water tight containers of responsibilities and interests. This gives rise to a tendency to deliberately choose to ignore impact of one’s action on those who do not fall into the domain of relational networks.

The accountability to people more than the statute is kept paramount, and as risk-averse individuals inaction emerges as the first best equilibrium. This is not to say that relational regulation will restrict the ability of organizations to be technical deft. But organization will begin real-life examples of the diverging practice from theory. Organizations then develop people-centric approach, rather than procedure driven exercise.

From the standpoint of regulatory institutions, these networks at political level will have an important and decisive bearing on how decision-making is informed in seemingly independent regulatory space. Stern and Holder (1999), in their influential work, in discussing main issues impacting regulatory governance, evolve a set of six criteria for appraising the performance of regulatory frameworks (for infrastructural industries). One of these criteria is ‘autonomy’ from political intervention. The creation of regulatory space was expected to create an institution

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120 For an illustration of how independence in regulatory institutions is diluted through recruitment of certain ranks of civil service officers in India, see, Mehta, Pradeep and Yugank Goyal, *Independence and Competence of Regulatory Institutions: An Inquiry into Indian Regulatory State*, in Pradeep Mehta (ed.) *India Competition and Regulation Report* (2015) (forthcoming)

121 Huising and Silbey, 2011 supra n.

122 Mehta and Goyal (2015), supra n.

123 The concept of regulatory space is borrowed from Hanicher and Moran’s work. Hanicher, Leigh, and Michael Moran, *Organizing regulatory space*, Capitalism, Culture and Regulation 272 (1989). See also, Hanicher, Leigh, and Michael Moran, *Introduction: Regulation and Deregulation*, European Journal of Political Research 17, no. 2 (1989): 129-136. They mention that regulation is performed by organization in a specific space that is shaped not only by different national, legal, cultural frameworks but circumstances of time and place. Even while elaborating on notion of space, the authors insist that in order to understand regulation, we need to understand how organizations enter the regulatory space, and to understand the interdependence between organizations build on the trusses of informal links. Going further, authors also contend powerful arguments to view regulatory issues as ideological constructions, whose recognition depends on the dominant organization in the regulatory space. The most important take-away from this work is formal law and authority has limited role in regulatory space. Since the formation of such space is necessarily dependent on existing links, it is not surprising why we see limited role of formal law and statute.

where decisions could be taken autonomously. While the idea of deregulation was forceful the implementation was carried out with a naïve assumption that the space for regulatory agencies will be created on its own. In a complex web of interconnectivity between political actors and bureaucrats,\textsuperscript{125} the micro-politics becomes absolutely crucial to shape institutional settings at macro level. Losing track of the former makes organizations in such economies appear as ‘garbage cans’\textsuperscript{126} rather than a neatly arranged boxes. In most developing nations generally, and specifically in India, the regulatory agencies remain subservient to their line Ministries, with statutory provisions of Ministerial intervention in appointing and removing regulators.\textsuperscript{127} There is little doubt that an appointee through political patronage will not be able to take decisions purely on merit, particularly when there is significant political cost that her decision may inflict on the incumbent government.\textsuperscript{128} Similarly, upon devising policies contradictory to the expectations of the Ministry may easily attract the brunt of politicians in removing or not elevating the regulators.\textsuperscript{129} Promises in such socially designed networks will outweigh the value of promises made outside the network. More importantly, promises that involve personal stakes (pride/reputation/bribes/favors/nepotism) are scrupulously fulfilled, while those involving public stakes (delivery of services) are ignored.\textsuperscript{130} Reliance on contract is fairly low, but on word of mouth personal exchange is high. Systems as these will create innovative ways to avoid dwelling on specific regulatory requirements that seem to thwart personal/group objectives.

### 4.3. Informational Channels and Constraints

Regulatory capture is a political phenomenon that has plagued democracies around the world, West and non-west alike.\textsuperscript{131} By capturing the regulator, the investing firm may be able to alter regulator’s decision or have it hiding some information from the government thereby raising rents through information asymmetry.\textsuperscript{132} In poor countries, where fiscal restraint is anyway much higher, these incentive structures may be very costly to the society.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{125} See, Mehta and Goyal (2015)
\item \textsuperscript{126} Cohen MD, March JG, Olsen JP, A Garbage Can Model of Organizational Choice, Administrative Science Quarterly 17 (1) (1972)
\item \textsuperscript{127} Mehta and Goyal (2015)
\item \textsuperscript{128} Ibid
\item \textsuperscript{129} For brief case studies highlighting the examples that show problems of informal network in regulatory agencies in India, see, Mehta and Goyal (2015), ibid
\item \textsuperscript{130} Ibid.
\item \textsuperscript{132} This has also been invoked in Laffont and Tirole 1993 supra note at 22. Note that the government can create reverse incentives too, but such incentive game, tied up with limited liability of regulators can be very expensive.
\item \textsuperscript{133} C. Aubert and Pouyet, Incomplete Regulation, Market Competition and Collusion, Review of Economic Design (2006) show that this is made worse if there is the possibility of collusion between the regulated firm and a non-
In environments marred by high level of corruption, accountability is far more important and workable. Accountability can be improved by transparency through frequent auditing and monitoring of the regulator. The problem however, is that there is no reason to believe that governments cannot also collude with the firms. The rate of government collusion will be much higher when political accountability to the populace is low. In nonwestern countries, there is an enormous trust deficit between citizens and governments. One of the primary reason is the lack of information flow from government to the public at large, and processing the information by consumer groups and civil society. Therefore, if a society creates frameworks for eliciting out information and democratic dissemination of valuable, rich, investigative information, civil societies will be empowered to take up issues and address them through active political participation. This paves way for more robust structures of regulation.

regulated competitor since the competitor may encourage the firm to feign inefficiency in order to soften competition.

See for example, Bertolini, Lorenzo, How to Improve Regulatory Transparency: Emerging Lessons from an International Assessment, World Bank, Washington, DC. (2006). A. Ogus, The Economic Basis of Legal Culture: Networks and Monopolization, Oxford Journal of Legal Studies (2002) (suggests that it leads to regulation becoming a compromise between interest groups, which is most beneficial when capture is a threat.)

For example, McCubbins and Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms, American Journal of Political Science (1984) suggest that ‘fire-alarm’ supervision of regulators – which relies on responding to complaints - is more susceptible to organized interest group capture than ‘police patrol’.


The importance of trust in democratic regimes is well established through scholarly works. See for instance, Braithwaite, Valerie, & Levi, Margaret (Eds.), Trust and Governance, New York, Russell Sage, (1998).

That politicians may not be able to pay their attention to poor even when poor are in large numbers is not unusual, particularly when the vulnerable population is less informed than richer and better educated population. This is invoked in Besley, T., & Burgess, R., The Political Economy of Government Responsiveness: Theory and evidence from India. The Quarterly Journal of Economics, 117(4), 1415-1451 (2002).

I choose Conway’s definition of political participation here: ‘activities of citizens that attempt to influence the structure of the government, the selection of government officials, or the policies of the government. See, Conway, M. Margaret, Political Participation in the US, 3rd edn. Washington DC: CQ Press (2000).

There is some evidence that regulation can happen simply by information, or in other words information based modes of regulatory governance, most specifically in the case of European agencies (see, Giandomenico Majone, The New European Agencies: Regulation by Information, 4 Journal of European Public Policy 262 (2010)), which are usually not accorded power that one would expect to be vested in a regulatory agency. But again, such possibilities have potential in countries where institutions of information are fairly strong, as well as old. This is not usually the case in the Global South, where regulatory institutions are only now showing signs of birth.
Political participation rests on the existence of democracy, where the voice of the people is not dissolved in the cacophony of dictatorship and ruling elites. Yet, that may not necessarily be enough, as we see glaring instances of de jure democracies being de facto compromised by ruling elites.\(^\text{141}\) Active citizenry as the basis of democratic theory has been the cornerstone of multiple fields of inquiry in several disciplines,\(^\text{142}\) and it hinges on the existence of community integration\(^\text{143}\) whose active and participatory mobilization helps centralized policies remain in check. Indeed, “the role of politics and political organization are frequently undervalued by failing to take account of the social organization of the electorate.”\(^\text{144}\)

The most crucial missing link between democracy and political participation is information flow and dissemination, generally manifested in media (press and other organizations what is referred to as the fourth estate).\(^\text{145}\) Classical theory requires electorate to be informed.\(^\text{146}\) In the absence of information, citizenship will remain ignorant of ‘real’ decision-making at the political level, and therefore will not be triggered to participate. Willingness to participate in local or national polity is a dynamic process that rests largely on information.\(^\text{147}\) There is nontrivial scholarly contribution to show the impact of communication through media on local political

\(^{141}\) As North et al (2009), define the natural state society (comprising of developing and least developed countries) embedding powerful members of society in a coalition of military, political, religious, and economic elites that possess special privileges, access to valuable resources or activities and the ability to form organizations. Because these rents are reduced if violence breaks out, elites credibly commit to each other to limit violence. Similar sentiment is mathematically modeled in Acemoglu, D., & Robinson, J. A., Economic origins of dictatorship and democracy, Cambridge University Press (2005)


\(^{143}\) Community integration can broadly be understood as binding citizenship, where the contextual population shares certain aims, ambitions, emotions and even features.


\(^{146}\) B. Berelson, Democratic theory and Public Opinion, 16 Public Opinion Quarterly 313 (1952)

participation. One of the main contributions of media is to enable citizenry to access knowledge about a system of politics that attempts to be exclusionary, thereby (in)forming public opinion. Scholars have noted that typical citizen, uninspired by politics, can be mobilized into action by prompted by extreme media attention. Communication intermediaries like media and civil society interest groups act as key information channels between government and citizens, both ways: citizens know about the activities of public officials, who in turn know expectations of the citizens. Indeed the growth of information and communication technology has shown how ‘new media’ is changing political configurations in the world – widespread evidence was illustrated in the Arab Spring revolt.

From the standpoint of regulatory agencies, this insight has important take-aways. Freedom of press and proactive involvement of civil society has a significant impact on corruption levels (strong negative correlation). The vital role of informational channels in maintenance of perception, reality and openness of the system acts as a two-way flow and open mike function.

The manner in which regulatory agencies function can be greatly influenced in the ways in


150 Milbrath and Goel (1977) supra n.

151 I borrow the term new media from Eric Busey and Kimberley Gregson, Media Participation: A legitimizing mechanism of mass democracy, 3 New Media Society 357 (2001): new media refers to novel technologically-driven formats which include internet, talk radio, call-in television shows and forums. This goes beyond the 24-7 news channels and rapid expansion of newspaper industry.


which informational channels become catalysts for engaging citizenry as elements of constant feedback. When political participation has remained rather unfulfilled even in Western countries,\(^{155}\) it is not incorrect to imagine that the problem would be acutely visible in nonwestern nations due to lack of information institutions and their spread across class spectrum.

Poor nations find themselves in information vacuum with woefully inadequate freedom of press and active citizenry. There are studies on lack of press freedom in Global South, particularly Africa\(^ {156}\) and Latin America.\(^ {157}\) Globally, press freedom has seen noticeable decline, particularly worryingly in Soviet Union, Asia and sub-Saharan Africa.\(^ {158}\) Also, note that studies from early on have been shown that individuals with higher socioeconomic status form the active citizenry of political life.\(^ {159}\) Indeed, low levels of income have been shown to result in lower media demand.\(^ {160}\) The rich form a very tiny fraction of the total population in the poor countries, and are mostly subsets of the elite groups who are relatively better cushioned against woeful performance of regulatory agencies.\(^ {161}\) Development of media and informational channels in the these countries hasn’t taken permeated through social classes, and no surprise that one of the main reasons for this lies in lower level of disposable average income in these countries.

At general level therefore, monitoring capacity of civil society, reflected in institutions like press and judiciary are paramount for elevating human capital through arresting corruption in government and government agencies.\(^ {162}\) The decisions of regulatory agencies in nonwestern countries take place behind opaque walls that have little analysis done in circles that shape public opinion. There is a need for cultivating informational capacity in poor countries through

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\(^ {157}\) See Hallin, D. C., & Papathanassopoulos, S., *Political clientelism and the media: southern Europe and Latin America in comparative perspective*, *Media, Culture & Society*, 24(2), 175-195 (2002) (the study compares Southern European countries – Greece, Spain, Italy, Portugal – with Colombia, Brazil and Mexico and shows media is characterized by political instrumentalization largely attributed to historical political clientelism).


\(^ {161}\) This is acknowledged in the influential work of Besley and Burges (2002), at 1415.

continuous monitoring and support by professional associations and civil society groups. Information is powerful tool in hands of citizens, amply evident for example, from the enormous success of right to information legislations in India.\textsuperscript{163} This information is the cornerstone of accountability, poor nation suffer hugely from the lack of information disclosure and consequently, good governance. World Bank’s global participatory ‘Consultations with the Poor’ concluded that, ‘[f]rom the perspectives of poor people worldwide, there is a crisis in governance…State institutions…are often neither responsive nor accountable to the poor…Poor people see little recourse to injustice, criminality, abuse and corruption by institutions.’\textsuperscript{164} The accountability of public institutions remains unobtainable dreams in poor countries, and this creates an inevitable gap in performance of regulatory agencies in these countries.

5. What can be done about it: Stakeholder Approach

The differences in regulatory performance pattern in Global North and Global South are largely sourced from the above-discussed three important sources: firstly, the South exhibits a strong and legitimate claim towards redistribution as opposed to efficiency; secondly, the South has vividly different institutional endowments that call for different approach to conceptualize regulatory institutions; and finally, in the South, there is a significantly hindered flow of unbiased and accurate information for people to raise threats of mobilization. Indeed this is not an exhaustive causal summary, but these factors remain powerfully explanatory. A serious customization can lead to a major refurbishment of the laboratory of regulatory experiments through hybrid forms of accountability.\textsuperscript{165} These accountability measures should be such that they recognize the relative location of nonwestern countries so as to conceptually calibrate regulatory institutions in existing socio-political milieu.

The customization needs to recognize that the world finds itself in a quagmire of post Washington Consensus,\textsuperscript{166} where Western powers are gradually realizing that firstly, development needs to be at the center stage of any politico-economic discussion,\textsuperscript{167} and secondly

\textsuperscript{163} For a field experiment showing the positive impact of Right to Information Act in India, see Peisakhin, L., & Pinto, P., \textit{Is transparency an effective anti-corruption strategy? Evidence from a field experiment in India}, Regulation & Governance, 4(3), 261-280, (2010)


that development is not bestowed by rich over poor, but rather achieved by poor themselves. In light of shifting agendas, and growing repository of experiential knowledge of failures of regulation in the South, brings us to a moment of self-reflection, and a pre-crisis platform. It is in these conflicting opinions and tensed discourses that the need for a re-centering of new methodology emerges. The second factor that any process of customization needs to recognize is the limited State capacity in the South. The capacity constitutes independence, financial autonomy, staffing requirements, technical expertise, academic/training exercises and so on and so forth. Dubash diverts our attention to what he calls ‘thick’ state capacity (as against the ‘thin’ capacity as proposed earlier), which enables the State to interlink interested state and non-state actors while ‘maintaining procedural correctness and assurances of independence and reasoning that underpin these procedures.’ In the light of Post Washington Consensus, the thick capacity – owing to its broad cover of ‘developmental state’ – assumes crucial importance.

Given the emergence of developmental state and the relative lack of State capacity (which is crucial to carry the developmental agenda), the Regulatory State of the South can be sustainable only through a multi-stakeholder approach. In that sense, there is merit in appreciating Braithwaite’s or Levi-Faur’s conceptualization of the regulatory society stresses 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.’ A successful regulatory state needs to modulate policies through larger questions of governance. Governance objectives are fulfilled only if all possible actors that may be directly or indirectly affected by those objectives or representative of those affected are incorporated into the governance equation. To reiterate,

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169 Dubash and Morgan (2012), supra n.
171 Dubash and Morgan (2012), supra n. at 273.
174 Dubash and Morgan (2012), supra n.
177 Dubash and Morgan (2012), supra n. at 272.
the problems of regulatory state in the South is not a problem of South, but a problem of regulatory approach in the South. Mimicking Northern approach in Southern context without understanding larger governance context is a recipe for disaster.

In what ways can we level the differences of Northern and Southern regulatory states? Firstly, we accept and appreciate regulatory concerns with redistribution. Secondly, we provide measures to arrest unwritten social networking norms and relationships by offering the regulatory agency its own regulatory space, entirely outside the political pool.\textsuperscript{178} Clearly, these two trajectories seem inherently diverging. The questions of redistribution can be tackled by political actors, who are the very elements that pollute a neat regulatory space. This means an approach which can optimally wed the two solutions is required. Multi-stakeholder approach does exactly that.

The multi-stakeholder approach keeps a check on whether the agency is sinking deeper or is afloat higher than the optimally designed waterline. It achieves by bringing in two important stakeholders: judiciary\textsuperscript{179} and civil society\textsuperscript{180}. Together, the two help the regulatory agency to optimally embed itself into the political quicksand. They ensure that the autonomy of the agency is maintained, as well as its agenda strikes an appropriate balance between attracting investments and addressing redistributive challenges of the society.\textsuperscript{181}

\textbf{5.1. Judiciary}

Judiciary and civil society emerge as active solutions to regulatory failure in the South. Judiciary constructs its contribution to regulatory state by interpreting the framework of regulation under

\textsuperscript{178} Note that the third source of difference: informational constraints, has a very obvious and unanimous solution. With increase in per capita income, literacy rate, international trade, entrepreneurship, information flow will improve in time. And as the source of third difference erodes in time, we will observe the stakeholder approach getting implemented organically. The basic motive manifests itself in imposing strong checks and balances at both public and private level. This is possible by creating active stakeholders who push and pull the agencies in order to retain it in the desired regulatory space. Heterogeneity needs to find solutions in heterogeneity itself.


\textsuperscript{180} See Strang, H., & Braithwaite, J. (Eds.), \textit{Restorative justice and civil society}, Cambridge University Press, (2001)

\textsuperscript{181} Two assumptions are in order, however. There is no reason to believe that judicial system of the South will be honest, efficient, resilient and actively empowered. But I assume so more for my firm belief in the fact that no regulatory reform can actually happen unless courts are not sufficiently powerful in any country. Second, this approach suggests that initial institutional design of the agency will become immensely important, because the regulatory space is defined and conceptualized in the initial design itself. Hence, institutional design needs to be carved out very creatively with active foresight.
the ethos of Constitution of the country. It keeps a fine balance between proceduralisation (due it its own stint with procedural nuances), redistributive politics and upholding the rule of law above private capture.\textsuperscript{182} Courts are finely tuned devices of political maneuvering since their existence is impregnated in social realities themselves. No wonder that judiciary’s importance has been echoed in many reports of World Bank and the same multilateral institutions that advocated for regulatory state to emerge in the South.\textsuperscript{183} Judiciary fits the framework of developmental state by ensuring contract and property rights are not hijacked by powerful elite discretion at helm of political interests.\textsuperscript{184} Courts, by virtue of their formation, remain independent of the executive and the legislature. Over time they gradually stretch their bounds to subsume most issues that impact the dynamics of social inequality and frameworks based on rights, under their domain, constantly interpreting and reinterpreting the law.\textsuperscript{185} Judiciary has sensitivity and expertise to take cognizance of alarming social costs of political decisions or when public opinion is hugely anti-government. Dubash rightly notes that ‘[s]ometimes an increased role of judicial power may occur in tandem with the contentious political mobilisation highlighted above, as when relatively informal, quasi-judicial procedures at local levels play an important role in channelling direct protest into sustained and more routine political leverage.’\textsuperscript{186} In this process, judiciary particularizes and makes very general rules\textsuperscript{187} that serve as model for society to base their decisions on.

In countries around the world, judiciary act as reservoirs of public faith and allow consolidation of legitimacy of government’s decision.\textsuperscript{188} Cases of judicial activism in southern countries are replete with how judiciary’s proactive role helped implement policies in public interest.\textsuperscript{189} Courts mediate between conflicts that arise in State’s relation to its subjects and therefore find themselves in an advantageous position of non-interested party in decision-making yet interested party in larger goals of public policy that affect citizens at large. They reflect upon inter-dependency of institutional bodies as espoused in the fundamental texts that are meant to govern a country: constitution to begin with and statutory guidelines to navigate through. In societies

\begin{itemize}
\item\textsuperscript{182} Surprisingly however, judiciary fails to find its mention in influential literature, say, of Spiller and his co-authors.
\item\textsuperscript{184} See, Trubek, supra 2008
\item\textsuperscript{186} Dubash and Morgan (2012), supra n. at 271.
\item\textsuperscript{187} Morgan (2011), supra n.
\item\textsuperscript{188} Levasseur, Alain A., \textit{Legitimacy of Judges}, American Journal of Comparative Law 50 (Autumn): 43–85 (2002)
\item\textsuperscript{189} See for India’s example, Sathe, S. P., \textit{Judicial activism in India}, Oxford University Press, USA (2002).
\end{itemize}
where faith in executive and legislature is limited, judiciary emerges as the only other institution to provide credible commitments. Judiciary attempts to rebuild that faith by passing judgments in favor of public interest, thereby lending the impression that it has the ability to insulate pressure groups from sensitive decision-making. At the same time, it interrogates moot points on law, and the judgment’s strict reading of the law helps build credible commitments to the private entity too. Judiciary, in doing so, it develops an aesthetic charm towards its judgments, which segregate winners and losers. By creating consciousness of losers and winners, judiciary sends credible commitment to one section of the society against the other, and helps build up trust in government institutions, or sometimes, force the reform of public institutions. In times of crises, such periodic interjection of trust-capsules can be hugely uplifting for the social morale. Courts may become tools of social change, which inevitably will also affect how regulatory institutions are managed.

I do not want to celebrate judiciary in this article. Governance of judiciary is a major problem plaguing most Southern nations. Access to justice is largely for the privileged, administration is painfully slow and there are evidences of widespread judicial corruption and lack of accountability. Yet, my basic premise is, that in order to create institutions for regulatory society to emerge and sustain itself, judiciary is the second best alternative, when the first best of state’s executive has failed. Judiciary in several Southern counties has been extolled as the hallmark of modern democratic foundations, and rightly so. In other instances, I argue that if judiciary cannot be given the baton to fix underlying problems in creating a regulatory state, they should be reformed so that they can. Courts accord legitimacy to a functional approach to institutional health.

5.2. Civil Society

With respect to developing world, strong and urgent need for media attention and civil society’s role in carving out regulatory state has not received enough attention. Stakeholder models

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191 I show in this next section, in discussing the case of telecom regulation in India.
194 Ibid
195 For judicial activism in India, see Sathe (2002), supra. For Latin America, see Rodríguez-Garavito, C., Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America, Tex. L. Rev., 89, 1669 (2010). For South Africa, see an earlier account of why judicial activism is required, Berat, L., Courting Justice: A Call for Judicial Activism in a Transformed South Africa, Louis ULJ, 37, 849 (1992). For South Asia,
propose such a move and have been a recurring theme of some valuable policy analysis. These models propose the presence of third parties (aside from the regulator and regulated) who have as much information and are equal stakeholders in the regulatory process. The approach to tripartism allows incorporating civil society and public interest groups into the equation.

Defining civil society is a complex task. It could comprise of academic institutions, NGOs, public interest groups, and/or simply media houses. Members of civil society, even though ostensibly well outside the formal regulatory structure, have potential to contest the centrality of stakeholdership of the regulatory State. Installations of civil society rest on citizenry that could be consumers, customers or workers of the utility industry. Their relatively high motivation in analyzing the prices and voicing their opinion about governance of utilities, and their fountainheads located in the host countries’ cultural soil makes them appropriate to address the problems of independence and accountability of regulatory institutions. They may choose to present their perspectives purely on their expert grounds and that may explain their legitimacy and even desirability to be included in institutional design. Or they may simply be instructive to voice and represent a section of the population that would otherwise be silently bearing the brunt of impending policy. The second group, usually more numerous in the South, in form of consumer advocacy groups hinges its success of mobilization and bringing large number of

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196 Dubash, 2008; Ayres and Braithwaite, Responsive Regulation: Transcending the De-regulation Debate, Oxford University Press (1992) and Prosser, 1999
197 Ayers and Braithwaite, 1992, supra note at 146
200 The dominant view is that civil society’s contribution to social capital, political and economic development is indeed high, and scholars posit several theories to show where civil society develops from (government/market failure, supply side, trust, welfare state and interdependence). However there is merit in viewing sources of civil society in state-society relationship. See Salamon, L. M., & Anheier, H. K., Social origins of civil society: Explaining the nonprofit sector cross-nationally, Voluntas: International Journal of Voluntary and Nonprofit Organizations, 9(3), 213-248 (1998). (For social capital, see the seminal work of Robert Putnam, Putnam, R. D., Bowling alone: America's declining social capital, Journal of democracy, 6(1), 65-78 (1995))
masses to invoke participatory sensitivity in the political process. Civil society emerges through the gaps that exist between theorized and idealized regulatory state.

Civil society also balances the power symmetry against competing pressures from other interest groups. More importantly, since the South is relatively new to the concept of independent regulatory agencies, the foreignness of the model compels eruption of civil society groups in the society. In situations like this, questions of accountability must emerge with greater emphasis, and civil society helps achieve exactly this.

Participation of civil society is more regular and long-term driven, compared to agencies made of informal setups. However, involvement of civil society in regulatory state depends on the constitution of the regulatory agencies, which needs to have sufficient space – in form of discussion forums, public hearings, soliciting comments and the like – for civil society groups to step in. Most regulatory designs do offer such possibilities, even in developing countries. And if not, such spaces could be forced out by civil societies themselves. Depending upon the force with which civil society exerts itself on the government, participatory outcomes are possible. Civil society interests may not be taken seriously, but their presence catalysis citizens to resist decisions made by the government or regulatory agencies. These resistances could be powerful articulations of sentiments of people, which may vote the incumbent government out of power in the next elections or may sometimes sensitize the courts which have statutory voices.

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206 Bakker 2007, supra note at 151


209 Ibid


211 See, for Thailand, Jarvis (2001), supra n.
The natural confusion of understanding the role of civil society as a complement or substitute of state agencies is worth exploring.\textsuperscript{212} I contend that both roles are instructive in cases of poor countries. Much of contemporary literature has explored the existence of civil society basing its utility on blocking the policies using protests and ‘elite rallies’.\textsuperscript{213} This includes adversarial approach, reactionary participation, coalition threats against the government and visible attraction. It also attracts international civil society groups to the fore and attempts to question the credibility of promises government is making to the larger developmental goals. Although such forms of engagement are usually devoid of long-term agenda, academic inputs, expert insights, Levi-Faur notes\textsuperscript{214} this can be viewed as complementary to state action particularly when civil society groups try to make up for state omissions in the technical standards. The other clear modus operandi of civil society groups could be what is called ‘regulation understood as collaboration.’\textsuperscript{215} In this approach, focus lies around dialogue, civic engagement and cooperative mode of participation. Indeed, such activities are largely missing in media stories, popular public perceptions, lack of international outreach\textsuperscript{216} and visible participation. But in long run they crystallize into concrete pieces of policy advises. While this enables civil society members to engage much more deeply and meaningfully with state actors, there is an inherent risk of civil society agenda to be swallowed by the agencies’ interested parties. Such risks I believe are rare, since they may pose existential crises to civil society group in question. More importantly, in a fertile environment, society will always welcome emergence of another group to replace the appropriated one. The embedded relations that civil society can have with regulatory agencies can help elicit more information, understand systemic requirements and limitations, and therefore help in sculpturing policy making much more effectively.

The stakeholder approach of making judiciary and civil society central rests on evening out these differences at functional level. Elements of active judiciary and civil society constructs policy making tipping towards redistribution, checks informal links and possibilities of capture at the political level and ensures that institutional bottlenecks have endogenously evolved (same) institutional solutions. In societies where a huge gap exists between theoretical claims of independence with little congruence to reality, judiciary and civil society emerge as important and essential safeguards. When Spiller warns us about possibilities of third party opportunism\textsuperscript{217} in the stakeholder approach, he also suggests the limiting criteria in form of appropriate

\begin{itemize}
  \item Hochstetler (2012), supra n.
  \item Levi-Faur (2005), supra n, at 7.
  \item Hochstetler and Keck (2007), supra n.
  \item Ibid.
\end{itemize}
safeguards. Such safeguards sprout from endogenous institutions, like strong judiciary, independent media and civil society. This sets the tone of how the two solutions I propose in this paper are intertwined with the source of the third difference between North and South, the informational channels. Civil society and judiciary complement each other, and feed on outcomes of each other’s actions. But for civil society to be strong enough, information channels need to be equally strong. With media revolution taking place in the South through penetration of communication technology, my optimism remains high.

6. Case Study: India

Indian political economy posits it as one of the typical developing state. While independent regulatory institutions were established in India for electricity (and also telecom, ports, airports, petroleum and natural gas and water sectors) more than a decade ago, little remains understood as to their dynamics and institutional governance. Rudolph and Rudolph make an irresistible comment about what happened in India: “a centralized, tutelary, interventionist state whose political and administrative elites were committed to the notion that they knew best and could do best was challenged by an increasingly decentralized regulatory state and market economy whose politicians and entrepreneurs turned to voters, consumers and investors for ideas and actions.” The following presents very brief overview of regulatory agencies involved in two pivotal infrastructure sectors in India, electricity and telecommunication. The aim of this section is to observe problems and applicability of multi-stakeholder approach in the two sectors. Also, since telecom regulation has been generally considered to be successful at multiple levels, electricity regulation falls short of such achievements, there is an interesting contrast that the study will provide.

6.1. Electricity

19 See Eric Busey and Kimberley Gregson (2001), supra
20 For general understanding of legal institutions in India and the contextual environment in India, see T.C.A. Anant & N.L. Mitra, The Role of Law and Legal Institutions in Asian Economic Development: The Case of India (1998).
23 Mukherji, R. 2004, ibid.
24 The analysis here is based on, inter alia, studies by Dubash and his co-authors. See, Dubash, Navroz and D. Narasimha Rao, Regulatory Practice and Politics: Lessons from independent regulation in Indian electricity, 16 Utilities Policy 321 (2008), See also, Dubash and Rajan (2000), supra n.; Dubash, Navroz and D. Singh, Of Rocks
Before 1991, Indian electricity sector conformed to the then-prevailing global model of vertical integration and publicly owned and operated power utility. The influence of Western institutions coupled with financial losses and falling supply gave rise to a new approach of independent regulation. World Bank’s loans enticed the Indian state of Orissa, the first to reform electricity, in mid 1990s. Orissa’s example was emulated by other states, notably by Delhi and Karnataka. In 1998, Electricity Regulatory Commissions Act was passed, ushering India’s electricity sector into (expected) apolitical spaces of independent regulatory agencies. In 2003, this translated into a new and sweeping Electricity Act 2003. The statute is ill conceived, and while I do not intend to cover the legal analysis, there is little doubt that by the centrality of regulators hasn’t been able to address the woeful problems of electricity market in India.

However, given the interventionary presence of donor agencies, the Indian model borrowed from Levy and Spiller’s approach quite scrupulously. It didn’t result however, as expected. The electricity sector was in ailing financial situation, and required an urgent need to raise tariff. Creating an independent regulator was expected to insulate the politically unpopular decision from the ruling government. But as discussed above, both because of paramount importance to redistribution and because of close nexus between politicians and regulators, under-cutting of authority was rampantly observed. In Karnataka in particular, government was a de facto parallel regulator along with the agency allowing investors to bypass the agencies for cost increases. This intervening role of the state government undermined the regulator’s authority


For instance, The Act lays down clear procedure for appointment and chairman and members of Commission, which institutionalizes state’s involvement by bringing in Minister of Power’s recommendation necessary for selecting the top officers (Section 70, Electricity Act 2003). See Mehta and Goyal (2015), supra n.

A discussion of the Electricity Act is beyond the scope of this paper. For detailed analysis see Phadke, A., Rajan, S.C., Electricity reforms in India e not too late to go back to the drawing board, Economic and Political Weekly 38 (29) (2003), 3061e3072, Godbole, M., Electricity Act, 2003: questionable wisdom, Economic and Political Weekly 38 (39) (2003), Purkayastha, P., Power sector policies and new electricity bill: From crisis to disaster, Economic and Political Weekly 36 (25), Rao (2003) supra

Dubash and Rao (2008), supra n.

Ibid at 323

See generally Dubash and Rao (2007), supra n.

Ibid

Dubash and Rao (2008), supra n. at 325
by monitoring rate filings, proposals and appeals and issuance of orders concerning tariffs. In Delhi, while the roles were clearly demarcated, the expectations were unstated and ambiguous, leaving several hotly contested issues between government and regulator untouched giving rise to institutional confusion.

In Andhra Pradesh however, reform was faster and more pervasive and is considered to be much more successful that other states. Notice this happened even when government handpicked leaders in regulatory agency as well as the utility, undermining the standard approach of how institutional design should give weight to faceless systems. This is because of active presence of public interest groups like People’s Monitoring Group on Electricity Regulation (PMGER), which had a ‘quasi-stakeholder’ engagement there. As a civil society public interest group, PMGER arrested inappropriate behavior of the regulator through a series of measures, like filing litigation against suspected tariff rising, scrutinizing Power Purchase agreements for contractual hazards, and engaging closely with electricity regulators. Indeed, Andhra Pradesh’s example shows that civil society groups can mobilize regulatory policies in favor of their objectives.

This shows that even though the appointment of regulatory officials is tainted by government involvement, appropriate checks and balances from civil society can foster accountability and transparency. In terms of appointment however, another problem plagues the sector. The pool from where most of the recruitment for regulatory agencies is done is the same: the group of retired and elite Indian Administrative Service officers. Post liberalization India has seen a regulatory capture of a different kind: capture is by the retired civil servants, who are heading nine of the twelve economic regulators opened in last twenty years, including electricity. To make matters worse, much of this hiring takes place from the public utility itself. Regulatory

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233 Ibid
234 Ibid
235 Ibid
237 Ibid.
238 A detailed illustration of PMGER’s work can be explored on their website, [http://www.pmger.org/](http://www.pmger.org/)
239 Dubash and Rao (2008), supra n. at 325
240 See generally for India, Mehta and Goyal (2015), supra n.
staff therefore share, close networks and links with the public utility, and ‘bring to their job a mindset shaped by career within the public utility.’

In practice, there is wide latitude available in regulatory provisions for the diverging approaches of regulators, all credited to lack of systematic and sustained procedures for tariff setting, inter alia. Each state level Commission runs along the perspective of individual regulator running the show. The social relationship embedding into the formal regulatory arrangements give such dramatically diverging color to functioning of the regulator. Informal modes of persuasions and communication to renegotiate are very common in Indian regulatory landscape. Guidelines do little to change the hard-wired mindset that reflects personal experiences rather than performing one’s duty with propriety. The bigger picture is usually lost in details, which concern the regulator more than larger interests of the people. So while attention to some details like data collection is done, little effort is made to synchronize the data collection with addressing their dependence on political interests. Internalized norms related to authority and relationship with the government carry themselves inside the regulatory agency through the employees, which had been working in government owned utilities hitherto.

Powers in the hands of regulators are high on paper, but seem insignificant in reality, since they have never been invoked. The reasons lie both in institutional design (low penalty) and in informal norms that bind utilities and regulators (undermining relations with regulated utility). Since government wields sufficient powers over regulators, little discretion do regulators have in deciding overall merit of the project in the first place. There are also reasons to believe that tariff setting – which appears to be the main goal of electricity regulatory agency – is also not free of political influence. In all three states studied, Dubash and Rao convincingly show how regulators indeed factor in public sentiment while deciding on issues related to tariff. In addition, regulators’ budget is determined by the government – Kotwani’s interviews with the Commissions revealed that this has material impact on regulators’ ability to take independent decisions. The communication is usually one way, no proper database and record making is kept and procedures of transparency in certain areas remain murky, ill-defined and

242 Dubash and Rao (2008), supra n. at 326
243 Ibid at 328
244 Ibid at 325
245 See generally Dubash and Rao (2007), supra n.
246 Dubash and Rao (2008), supra n. at 327
247 Regulators in India have powers of a civil court. See Dubash and Rao (2008), supra n. at 327
248 Dubash’s interviews elicited out these perspectives. See ibid.
249 Dubash and Rao (2008), supra n. at 328
250 Kodwani, Devender, Infrastructure Regulation and Institutional Endowments in India: Comparative Analysis of Telecom and Electricity Regulation Policies. Available at http://regulation.upf.edu/bath-06/10_kodwani.pdf
uninformed. Indeed, no surprise that, regulatory agencies have largely been impervious to stakeholders’ demands. Evidence suggests regulatory bodies view civic engagement in a very perfunctory manner, there is an uneven implementation of useful procedures and reasoning for decisions are weak. There is a need for enhanced capacity to bring in the stakeholders actively inside the regulatory decision-making net. In short, the experience with regulating electricity in India remains (a) unfulfilled its promise of separating political and regulatory decision-making, (b) unable to create an independent regulatory space free from entrenched interest, (c) committed to develop transparency norms and stakeholdership, but has been able to do this only in theory, (d) unable to exercise judicial power, (e) weakly institutionalized and (f) limited in capacity.

6.2. Telecom

While electricity reforms were marred in political dealings and inadequate involvement of active stakeholders (except Andhra Pradesh), telecom regulation is usually hailed as a great success in India, barring the recent 2G spectrum allocation scam. In a span of ten years (1998-2009), telephone connections increased from 14.9 million to 420 million, tariffs were lowered significantly and cellular service ushered in a mini-revolution. Although the regulatory experience started with distasteful impressions about distortionary and inefficient pricing network, it has meandered its way to a more reasonable network access-pricing regime. The highlight of telecom story in India has been the Indian judiciary, which, through a series of initial judgments, helped pave way for an efficient design of the institution. Judiciary, as I contend above, has a remarkable potential to shape the growth of regulatory institutions in the South, because of its advantageous location with respect to other branches of the government, its tenacity in making efforts to legitimize state functions that it thinks augur well with a

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251 Dubash and Rao (2008), supra n. at 327
252 Ibid at 328-329
253 Ibid at 328
254 Ibid at 330-331
255 This section, inter alia, shows importance of judiciary in India as one important explanatory variable for the successful telecom regulation story in India. I base this study on Arun Thiruvengadam and Piyush Joshi, Judiciary as Crucial Actors in Southern Regulatory Systems: A Case study of Indian telecom regulation, 6 Regulation and Governance 327 (2012)
256 Mukherjee (2004), supra n.
258 Desai, (2006), infra n. 194
259 Rekha Jain, Interconnection Regulation in India: Lessons for Developing Countries, 30 Telecommunications Policy 183 (2006)
260 Thiruvengadam and Joshi (2012), supra n.
developmental state and its constructive intervention with capacity to understand the traditional norms of a nation alongside forces of modernity that are necessary to be imbibed with.

Reforms in telecommunications sector began in mid-1980s and some literature has also evolved towards explaining its trajectory.261 For four decades after independence, and public monopoly over telecom, the sector was characterized by low tele-density, inefficient performance, financially woes and poor penetration.262 Department of Telecommunications (DoT) was the dominant policy maker and service provider in Indian telecom. It wielded considerable political power, and instances of corruption opportunities noted,263 explain part of the reason why was DoT resistant to regulatory regime change.

Indian story of telecom regulation presents a divergence from the usual practice of avoiding judiciary in regulatory matters.264 There is no general principle here: literature that builds case for checking judicial power has been rich and influential,265 perhaps just like the scholarly work on need for expansive powers of judiciary to uphold constitutional values of a nation266. Yet, telecom regulation experience in India lauds the efforts of judiciary. Although concern still remains as to provision of services in rural areas and predatory behavior of private investors,267 telecom has been a relative success. Formulation of National Telecom Policy (NTP) in 1994 expressed the commitment of the government to improve access and efficiency, but with little institutional guidelines to govern these changes.268 There was no mention of creating independent regulator thereby leaving with DoT with considerable flexibility to create its own

267 Desai, 2006 supra note at 194
self-serving rules. Two important cases settled by judiciary in India helped check the hijacking of regulatory agenda by DoT to serve its own territory.

The Tata Cellular Case in 1992 was the first one. In 1992, DoT distributed eight licenses to mobile services in four cities in India. However, the process of selecting the winners amongst the bid was ambiguous reflecting DoT’s corrupt practices of favoritism. Four of the unsuccessful bidders to challenge DoT’s decision, fuelling the dispute until it reached the Supreme Court of India. While Court approved several actions of DoT, they struck down others, thereby signaling that DoT had to conform to legal principles and propriety in implementing the ethos with which national telecom policy be pursued. The first cellular services became operational in 1995, largely owing to the Court’s timely and responsible intervention in a case imparting legitimacy to the processes that would be taken up in implementing telecom policy.

The second case is popularly called as Delhi Science Forum case. After the first four cities, DoT began with the process of initiating bidding process for cellular licenses in 21 circles. There were concerns raised both within and outside of the government that such process should be run by an independent regulatory authority. This was continuously resisted by DoT, in its efforts to retain the power within its offices. Soon, two rounds of litigation were initiated: one by parties which were part of bidding process and another by NGOs who opposed liberalization policies in telecom in general. The Supreme Court firstly, rejected the claims of the NGOs suggesting against judges having to rule against economic policy making. Secondly, and more importantly, the Court noted the importance of independent regulatory authority as a precursor to efforts of attracting private parties in telecom, citing comparative experiences from different countries. Interestingly enough, the Court invoked and emphasized independent regulatory agency so much that government announced its plan to set up Telecom Regulatory Authority of

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269 Thiruvengadam and Joshi, (2012) supra n. at 333.
270 Tata Cellular v. Union of India, 1994 (6 S.C.C. 651)
271 Thiruvengadam and Joshi 2012, supra n. at 333
272 Ibid.
273 Ibid. at 334
274 Ibid. at 334
275 Delhi Science Forum v. Union of India 1996 (2 S.C.C. 405)
276 Circle is usually a technical term for state boundaries, except the four metropolitan cities.
277 Thiruvengadam and Joshi 2012, supra note at 334
278 Ibid
279 Ibid
280 Ibid
281 Ibid
India (TRAI), even before concluding the case.\textsuperscript{282} In essence therefore, judiciary was instrumental in creating appreciation of regulatory culture in India.

The TRAI Act was promulgated in 1997, with not only rather limited adjudicative powers\textsuperscript{283} but also weak empowerment to intervene in DoT’s prerogative to issue and cancel licenses or to allot radio spectrum.\textsuperscript{284} Several structural changes took place thereafter both in TRAI\textsuperscript{285} and DoT\textsuperscript{286} to offer strength to TRAI.\textsuperscript{287} All these structural changes attracted institutional confusions, and clarity on hierarchical and technical responsibilities was urgently needed. This clarity was afforded by Supreme Court of India again.\textsuperscript{288} This was due to a case filed by Cellular Operators Association of India (COAI) after having lost it at the Telecom Dispute Settlement and Appellate Tribunal (TDSAT).\textsuperscript{289} The case challenged government’s offer to issue cheap license to CDMA driven technology of wireless-in-local-loop (WLL) that sought to give significant power to one particular investor.\textsuperscript{290} TDSAT, after one year of deliberations had expressed its inability to intervene in a policy decision of a government, quashing the challenge of COAI purely on administrative reading of its limited role and powers.\textsuperscript{291} Interestingly enough, the Supreme Court did not grant judgment towards enabling or disabling WLL technology, but indicated in no uncertain terms that TDSAT has “unfettered jurisdiction to adjudicate the dispute raised as well as to decide the legality of an order of the Central Government, or even the opinion of TRAI or any other expert body,”\textsuperscript{292} thereby cementing the prominent administrative role of TDSAT that

\textsuperscript{282} This is not to say that Supreme Court was the first institutional thrust towards creation of TRAI, but it was definitely a major catalyst. See, Mukherjee, (2005), supra n.

\textsuperscript{283} Thiruvengadam AK, \textit{Regulation of Utilities: A Case Study of the Liberalization of the Indian Telecommunications Sector}, Unpublished LL.M dissertation, National Law School of India University, Bangalore. (2001) See also, Mukherjee, (2005), supra

\textsuperscript{284} Thiruvengadam and Joshi 2012, supra n. at 335

\textsuperscript{285} Telecom Policy 1999 was one such infusion, which helped raise the FDI in telecom after its promulgation. Rahul Mukherjee, \textit{The politics of telecommunications regulation: State-industry alliance favouring foreign investment in India}, 44 Journal of Development Studies 1405 (2008).

\textsuperscript{286} DoT was also restructured to separate its policymaking function from licensing and operating function. Ministry of Communications, New Telecom Policy 1999, 26 Mar 1999. See the policy at http://www.trai.gov.in/Content/ntp_1999.aspx

\textsuperscript{287} TRAI’s power was increased, with impetus towards its recommending power to the government in addition to its enablement for adjudicating disputes between government and private service providers. NTP 1999 also changed the structure of TRAI, dividing it into two bodies with (a) regulatory function, called TRAI and (b) adjudicatory function, called Telecom Dispute Settlement and Appellate Tribunal (TDSAT). See Thiruvengadam and Joshi (2012), supra n. at 337.

\textsuperscript{288} Thiruvengadam and Joshi (2012), supra n. at 338

\textsuperscript{289} COAI v. Union of India, SC, paragraph 6 (2003 3 S.C.C. 186)

\textsuperscript{290} Thiruvengadam and Joshi (2012), supra n. at 338

\textsuperscript{291} Ibid

\textsuperscript{292} Ibid at 338-339.
TDSAT was itself blind to. This was a tutorial exercise by the Court\textsuperscript{293} to newly born regulatory agencies in enlightening them about their own powers and authority that explains both spirit and the letter of the regulation.\textsuperscript{294}

Telecom regulation in India has not been free of political contestations. It has been noted (and I have not discussed it enough for sake of brevity), that crises of falling FDI in 2003 was a result of partisan politics that took place during power change at New Delhi in 2004.\textsuperscript{295} While earlier ruling party, National Democratic Alliance (1998-2004) clearly passed orders and recommendations that protected the interests of companies running on CDMA technology, the subsequent United Progressive Alliance (2004-incumbent) party chose to explicitly make policy recommendations that benefitted GSM technology.\textsuperscript{296} More importantly, grand corruption\textsuperscript{297} has made its inroads into telecom too, when 2G corruption case deteriorated the image of telecom regulation significantly.\textsuperscript{298} This is explained through informal networks that operate in TRAI as well. But role of judiciary has been laudable. Today, India today boasts of having around 80% tele-density,\textsuperscript{299} world’s second largest mobile phone user base,\textsuperscript{300} third largest internet user base\textsuperscript{301} and a 7% telecom growth rate in 2011-12\textsuperscript{302}.

7. Conclusion

Regulatory institutions grew organically in the existing institutional relations of state and citizenship, and were hugely successful in Global North. With little acknowledgment to local institutions, the same model of regulation was directly transplanted in the South. Results were disappointing. Without any formal precedent in the thinly institutionalized structure of nonwestern regulatory agencies, decision-making rested on idiosyncrasies of political

\textsuperscript{293} Thiruvengadam and Joshi 2012, supra n.
\textsuperscript{294} The issue was later settled amicably by the parties between themselves. Raghavan V, \textit{Communications Law in India: Legal Aspects of Telecom, Broadcasting and Cable Services}, LexisNexis, New Delhi (2006)
\textsuperscript{295} Mukherjee (2008), supra n. at 212
\textsuperscript{296} Ibid
\textsuperscript{298} See Thakurta and Kaushal (2010), supra n.; Patra (2012) supra n.
\textsuperscript{300} Ibid
relationship and favoritism. This is elucidated in (a) its necessity in the desire to focus on questions of redistribution in addition to efficiency, and (b) informal social network that span the regulatory space underneath making it only half as much autonomous as expected. In addition, nonwestern nations also suffer from informational constraint that severely restrains flow of public information and rigorous feedback mechanism.

Crumbling infrastructure of regulatory institutions in Global South is a telling example of how can an effective organizational entity conceived by influential scholars and implemented by highly professional consultants, go wrong. Pinning down everything on single cause or relocating the debate in local unsuitable institutional framework will only explain part of the disappointing experience. Just like the growth story in the South differs from growth story in the North, so does the depression story. Divergence cannot be explained by singular factors, nor can it have a holy-grail treatise more complicated than the problem itself.

The paper attempted to confront these issues head on, and make a small step forward. The claim remains humble, yet poised for further scope of immensely valuable research. The direction this article illuminates is that of examining hidden patterns of original institutional design of a society, and then reclaim the regulatory design from those institutions. A bottoms-up approach is more suitable than a top-down methodology. This could be a costly process, but possibilities emerge from the changing nature of original design itself. With the change in technology and media revolution slowly being witnessed in poor countries, there are positive signs emerging. And therein lies our hope.