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***The Future of the Regulatory State:
Adaptation, Transformation or Demise?***

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The Future of the Regulatory State: Adaptation, Transformation or Demise?

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Introduction

This short paper is meant to provide for some background ideas to motivate discussions during our workshop. It therefore seeks to make a few short (and hopefully somewhat provocative) points. The idea of the 'regulatory state' is one that has occupied social scientists for at least two decades, given the growing interest in the changes of statehood that went hand-in-hand (at least in Western Europe in the late 1980s) with programmes of privatisation and liberalisation. These trends were summarised in Majone's diagnosis of the 'rise of the regulatory state' (Majone 1994, 1996, 1997), at the EU-level (as the European Commission expanded its influence over content given budgetary constraints) and at the national level.

By the 1990s the regulatory state was very much an idea which time had come. The combination of new right public choice analysis of the state, political turns to the right, and the mounting cost of industrial policy and the welfare state provided the domestic drivers behind liberalisation and the increased focus on indirect regulatory tools. Internationally the EU's effort to establish a Single European Market combined with the wave of globalisation that followed the collapse of communism made fertile ground for the switch to regulatory policy tools. The 'regulatory explosion' (Levi-Faur 2006a) that followed cemented a shift to rule-based indirect governance at the national, regional and international level. By 2011, however, the regulatory state faces a less benign environment, in terms of concepts and ideas as well as domestic politics and the international political economy.

This 'age' of the regulatory state was characterised by two elements. One key element has been the reliance on private or market-type actors that provide 'public services'. The second element was an emphasis on oversight and control by regulatory agencies and through contractual, formalised devices. As such, the regulatory state could be

seen as a programmatic idea as well as a technology of governing that sought to introduce synoptic oversight and 'predictability' into the governance of an ever-increasing number of public spaces (Baldwin, Cave and Lodge 2010, Lodge 2008, Moran 2003). Underpinning these institutional-organisational changes were administrative doctrines that advocated the creation of free-standing organisations tasked with focused oversight, backed by justifications that concentrated on efficiency as core administrative value. Both elements are facing important challenges, conceptually as well as empirically.

These points have been made forcefully by Power (1997, 2006), who argued that the 'audit society' was leading to control systems that risked being little else than dangerous 'rituals of verification' given their questionable validity, and by Roberts (2010) who argued that changes associated with the regulatory state could be seen as an expression of a 'logic of discipline'. At the same time, the idea of the 'regulatory state' has been challenged by those who argue that the concept does not sufficiently account for wider ideas that can be more conveniently labelled 'regulatory capitalism'. Part of this critique involves the argument that the 'regulatory state' fails to take sufficient account of the 'de-centred' nature of regulation. Whereas the 'regulatory state' is said to be too 'state-centric' (in focusing in particular on the behaviour of regulatory agencies and control instruments), the idea of 'decentred regulation' points to the organisational fragmentation of regulatory regimes, the considerable (historical) reliance on non-state (i.e. private) regulation, and the growing significance of regulation involving state and non-state actors at the international/transnational/European level. However, we suggest that the idea of the 'regulatory state' as a programmatic idea and a technology of control is sufficiently 'stretchable' to include such developments.

On the one hand, the ideas of the regulatory state are said to have become embedded across national political economies. The institutions of the 'regulatory state' (i.e. primarily agencies) and its instruments (i.e. market-based regulatory tools such as performance-based and management-based standards, called 'new governance' by Carrigan and Coglianese 2011) have become institutionalised in being accepted in practice and having become a 'normal' focus of academic attention.

On the other hand, these ideas have come under increasing challenge, by various regulatory scandals throughout the Naughties and in the context of the financial crisis. In addition, there has also been an increasing awareness of the limits of particular regulatory strategies and emerging paradoxes. For example, there has been a growing awareness of the limits of management-based standards (Gunningham and Sinclair 2009), of the difficulties to deal with performance-based standards when the 'producer' is able to game output or outcome data, and there have also been contrasting views regarding the tensions between 'responsive' and 'risk-based' enforcement strategies.

The success of efforts to establish depoliticised solutions to political questions depended on a degree of policy consensus, and it was always possible that developments on the ground might undermine this in any given case. Indeed short term success has, in some sectors, given way to medium-term scepticism toward the achievements of regulatory regimes. Although the regulatory state may have become a form of new consensus inasmuch regulation as set of policy tools has become widespread and less contested in principle than it was twenty years ago, the very variety of regulatory regimes has prompted a research agenda oriented to the empirical challenges of the regulatory state (also Levi-Faur 2006b).

Challenges

Empirical challenges to the regulatory state (i.e. control failures) and the growing awareness of the inherent paradoxes and potential limitations of regulatory instruments have been the animating idea for this workshop. The diagnosed age of the regulatory state has come under increasing challenge. Three challenges are particularly prominent and all three point to potential limitations of the regulatory state to offer sufficient problem-solving capacity.

The limits of regulatory regimes: One of the key arguments over the past decade or so has been that the initial regulatory regimes for liberalised markets have proven to be inappropriate or have generated considerable undesirable side-effects. For example, instruments that emphasised efficiency were said to have neglected the importance of incentivising investment into infrastructure modernisation. Arguably, the regulatory state was only a 'fair-weather' state that did not have any solutions once the going got tough.

Elsewhere, a reliance on self-regulation (private certifications schemes) has also been questioned in terms of their legitimacy and actual information-gathering and enforcement capacity. Furthermore, much of the literature and attention has focused on single regulatory interventions or aspects of regulatory regimes, whereas the cumulative effect and the fragmented nature in which different organisations (at different levels of government). Politically, it might also be said that regulatory regimes have become increasingly contested, both in terms of interest constellations and in terms of value-basis.

The limits of market-based problem-solving: One of the most disturbing elements of the pre-financial crisis era was the arrogance in which particular regulatory instruments were praised as being the technocratic holy grail. Instruments such as 'risk-based regulation' were promoted as enforcement elements that offered the technocratic solution to limited resources, while also suggesting that societies would come to accept that regulators were not able to secure against all risks. Whereas the scandals of the late 1990s (for example, BSE) could be seen as failures of 'old' regulatory regimes, the failures of the late 2000s (especially in financial regulation) were the failures of these supposedly high-intelligence, light-touch instruments. Unfortunately, in the UK at least, these instruments could not deal with the institutional conflicts between a blame-avoiding Chancellor, a central banker keen on avoiding 'moral hazard' and an agency wedded to light-touch regulation. Elsewhere, too, the idea of introducing HACCP into food regulation have been far from unproblematic: food inspectors do not wish to protocolise their judgements. In other words, in their obsession to provide for 'mechanic' procedural and protocolised instruments, the advocates of 'modern' regulatory tools forgot the strain such instruments would place on inter-organisational relations and on the regulatory/bureaucratic frontline.

The limits of national regulatory capacity: Issues of risk, anxiety and uncertainty have challenged the capacity of regulators (both national and transnational) to advise on and decide in highly politicised domains. Regardless of trends of growing societal anxiety, there have been calls for growing regulatory capacity at the transnational level, at least in terms of standard-setting and in terms of mutual monitoring. Such regimes also include private regimes (such as certification regimes). These developments raise

issues as to how different aspects of increasingly transnational regimes can be 'joined up' with the actual regulatory enforcement 'on the ground', and how national regulatory regimes can be adjusted to reflect the transnational nature of much of the contemporary economy. However, calls for internationalisation and standardisation are also challenged by popular distrust that shaped much of contemporary 'risk society' (Beck 1992, Chalmers 2005).

There are also some intellectual challenges. In a forthcoming review of the Oxford Handbook of Regulation, Mick Moran suggests that the study of regulation threatens to become increasingly irrelevant for three critical reasons. One is the intellectual dominance of 'northern hemisphere' (with some Australian accents) in terms of concepts and assumptions. This is not to say that the 'south' is not interested in these concepts, but in its interest in following intellectual concerns, we may be missing some important or interesting debates. Second, Moran notes the intellectual dominance of 'econocrat' concepts and discourses. Even those arguments that seek to find a non-economic 'defence' of other ideas (such as the 'public interest') are undertaken from a defensive standpoint. Third, he also argues that there has been too much of a focus on the 'national' level. There are answers to these challenges: much of regulation is about economic activity, the national level is of continued importance, regardless of the significance of the transnational although the set of questions may arguably require some adjustment, and the dominance of particular centres of knowledge generation is inherent in scientific production.

In selecting the themes for this workshop, we were mindful of such concerns, as reflected in the sessions on the 'regulatory state', on 'agencies', on the idea of the regulatory state operating in different 'habitats' and then, on the second day, on regulatory strategies and regulators at the national and the EU levels.

Tensions in the regulatory state

The process of institutionalisation of ideas associated with the regulatory state and the above challenges have led to considerable tensions. These tensions can be illustrated by the growing contestations regarding the regulatory state. Without claiming to offer an exhaustive or mutually exclusive account, we note three discussions below.

Does the growing colonisation of regulatory state ideas lead to growing homogenisation, differentiation and/or feedback processes in which the 'periphery' influences the core of the regulatory state? In other words, what have been the consequences of ever-more domains being included in regulatory state dynamics? Has there been an emergence of synoptic control, or are we witnessing differentiation? In the UK (and arguably elsewhere), liberalisation and privatisation were first applied to comparatively easy and uncontroversial sectors such as telecommunications, but ran into problems when applied to more difficult areas such as railways, let alone health and education. Likewise, is the application of the regulatory state logic to increasingly difficult (inappropriate?) sectors undermining the regulatory state and setting the stage for a backlash?

Is hybridity a tool for stabilisation or destabilisation? Hybrids have been widely seen as both a tool and an outcome of regulatory strategies. Understanding hybrids as a tool means that regulatory approaches draw on mixed approaches (responsive regulation is arguably such a hybrid). Hybrid instruments are said to provide for more stability and fewer side-effects than 'elegant' regulatory instruments. Hybridity as an outcome points to the irritant effects that any regulatory intervention has on existing understandings within particular regulatory settings. In other words, regulatory change, even at the transnational level, 'layers' onto existing formal and informal understandings. Such layering (for historical institutionalists at least) leads to considerable tension and pressure for adaptation - with uncertain outcomes. For system-theory oriented scholars such as Teubner, the end result of such processes is, at best, an 'irritant effect'.

Finally, the regulatory state is exposed to both centripetal as well as centrifugal tendencies (see also Black 2007). The logic of the regulatory state as a programmatic idea (and as technology) is centripetal: it seeks to centralise and makes things calculable. Indeed, much of the better regulation movement can be seen as being motivated in preventing the ever-growing scope of the regulatory state to become so differentiated and different that it lacks control. As a consequence, much energy has been spent on devising methodologies and organisations that provide for centripetal dynamics within the regulatory state. In contrast, there are also considerable centrifugal forces. For one, sector-specific dynamics need to accommodate regulatory state logics,

leading to differentiated patterns across sectors and states. Furthermore, different sectors witness also different degrees of attention. It might, therefore, be argued that the ideas underlying the regulation of European energy markets have changed considerably over the past ten years (seeing energy as a strategic good of geopolitical importance, contrasting with an earlier period where portfolio-based markets were seen as appropriate). Similar dynamics are increasingly likely to occur in other domains - where other issues may be of importance, such as demographic developments in health, or climate change or sustainability in environmental regulation. A third source for centrifugal dynamics is the asymmetric transnationalisation of different regulatory activities. All three dynamics point towards a repoliticisation of regulation: more political contestation over the appropriate goals of regulation than characterised the first two decades of the regulatory state.

Adaptation, Transformation or Demise?

We would not suggest that the practical importance of regulation for the daily operations of national and transnational governance is unlikely to decline. We are also not proposing a new manifesto for the study of regulation. However, the above challenges are of relevance both the scholars and practitioners of regulation. They offer a fascinating ground for the study of regulation. Nevertheless, for students of regulation (i.e. us), these dynamics raise the challenge as to whether our existing lenses are sufficiently adaptable to critically accommodate the changing nature of capitalisms/market economies (in all their forms), whether they require a radical rethinking as we are stuck in Anglo-centric, nation-centric and 'econocratic'-lenses in order to please the hegemonic ideas dictating our disciplines (and peer-review standards). If the latter interpretation is right, then we are either required to seek a transformation in the way we look at the substantive changes occurring in front of us, or the language of regulation and the regulatory state will become irrelevant as scholarly attention moves to other concepts.