

## Theories of Regulation

### 1 THE RISE OF REGULATORY CAPITALISM

Since the 1980s, regulation gained a central place among the repertoire of approaches used by the government to influence, orient, steer and—in some sense—control sectors of the economy and portions of the society. The diffusion of regulatory reforms across Western countries, Latin America, East Asia and developing countries led many scholars to formulate the concept of regulatory capitalism as a new mode of capitalism where regulation plays a fundamental role in mediating the relationships among producers, consumers and the state. Regulatory capitalism is related to the emergence of regulatory governance, a term that encompasses institutions, tools, and practices that center on the use of regulation both within the state (i.e., as a way of administering activities of the government), in the relationship between the state and the private sector, and in the private sector itself (i.e., as a way of self-administering activities carried out by business actors “in the shadow of the state”). Features of regulatory governance include a new division of labor between state and society (especially marked by increased privatization of economic activities), an increase in delegation, a proliferation of new technologies of regulation, an intensification of formalization of regulations, and a growth in the influence of experts, especially embedded in international networks (Levi-Faur 2005, 2011).

At least two features of regulatory governance are especially noticeable. First, regulation as a mode of governance has spread—and, one could argue, is still spreading—around the world. Several regulatory reforms have been made during recent decades in various countries and sectors of the economy. While some reforms aimed to install regulatory systems in place of traditional “command-and-control” approaches (i.e., state-ownership as a way of directing economic activities), others intended to reconfigure existing regulatory systems (i.e., “re-regulation”) and others meant to make regulatory systems less invasive (i.e., “de-regulation”). Often, these reforms were made within a political and ideological climate that was favorably inclined towards so-called “neo-liberal” approaches to political economy, which included greater reliance towards market-based mechanisms for coordinating economic activities.

Second, regulation as a mode of governance has resulted in very complex webs of relationships among actors across multiple levels of government. Rules and regulations are ordinarily produced by both national public authorities and super-national ones, such as the EU; by international public organization, such as the World Health Organization; by international private organizations, such as the International Accounting Standard Board and the International Organization for Standardization; and so on. Rules and regulation made within any particular country and policy domain, moreover, affect rule-making activities in other countries and sectors, especially because of increased technological interdependences and connectivity of international networks of experts (so-called epistemic communities; Adler and Haas 1992).

The global diffusion of autonomous regulatory authorities is the hallmark of the rise of regulatory capitalism. Governance through autonomous regulatory authorities is no longer a peculiarity of Western countries. It is now widely believed that the appropriate way to govern certain economic sectors and to limit some social risks is through the creation of autonomous regulatory authorities. This new approach consists of a delegation of power from central governments to arms-length bureaucracies that are staffed and governed by technocrats and professionals. More generally, regulatory policy is increasingly delegated to experts who are embedded in transnational professional communities and share similar perceptions of the problem of late-modern societies.

## 2 EXPLAINING REGULATION

Why has regulation been adopted across so many countries and sectors—especially, including infrastructure and utilities? What are the rationales that underpin its adoption? There are several theoretical approaches to regulation. Generally, they justify regulation on the basis of two main rationales (Lodge and Wegrich 2012):

- Economic rationales: regulation serves the purpose to fix market failures, which result when scarce resources are not put to their highest valued uses. This typically happens when goods or services are provided under monopoly conditions, or clients do not have adequate information about quality and prices of goods or services, or prices do not signal the costs of the consequences of production or consumption because of externalities, or issues arise in the production of public goods or the preservation of common-pool resources;
- Social rationales: regulation serves the purpose to attain socially relevant objectives that are deemed important within a given historical and political context, such as equity, fairness, access, transparency and accountability.

Several theories help explaining how regulation arises, develops and performs. Most approaches take a positive stance, in the sense that they aim to account for observed features of regulation and of the working of regulatory systems. Some approaches, instead, tend to adopt a normative stance, in the sense that they offer some views about how regulation should be designed and managed in order to attain desired economic and/or social objectives. The main theoretical approaches to regulation are discussed below.

## 3 PUBLIC INTEREST THEORIES

Public interest theories of regulation build on the assumption that regulation is made to pursue some desired economic or social objectives that benefit the society on the whole (rather than any particular group, sector, or individual). According to this view, individuals who design, approve and administer regulatory systems are benevolent towards the society: they perceive a “problem” in the working of unregulated

industries or sectors and aim to fix it. A typical problem is the economically inefficient and socially undesirable effects that result from monopolies. Monopolies occur when a single seller occupies the whole market, the goods or services sold are unique and without any close substitute, there are barriers to entry, and exit is hampered by high sunk costs in highly specialized and immobile assets. The monopolist can extract consumers' surplus by charging higher price and providing less output than would be otherwise attained in competitive markets.

Other problems that regulation can fix are (Baldwin et al. 2012; Hood and Ogus 1996):

- Externalities effect that result when the price of a good or service does not reflect the “true cost” to society of producing it, with the effect that consumption is excessive;
- Information asymmetries that impede the consumers to be adequately well informed to evaluate competing goods or services;
- Uncertainty of continuity and availability of service, that arises when producers do not guarantee that goods and services are produced and available for consumers (e.g., to serve peak demand);
- Anti-competitive behavior and predatory pricing, which arise from the abuse of dominant positions in the market and that hamper competition;
- Production of public goods, which cannot be reserved exclusively for those who pay for them and that pose the issue that “free riders” may benefit from others' costs. Similarly, the preservation of common-pool resources poses the issue of coordinating access and use to shared resource pools;
- Unequal bargaining power, that puts one party of negotiation (e.g., workers) in a weaker position than another one (e.g., business companies);
- Scarcity and rationing, that calls for the exercise of public authority for allocating scarce goods or services to the most socially desirable uses;
- Rationalization and coordination of economic activity, especially when high transaction costs hamper the formulation, agreement and enforcement of contracts among private actors;
- Long-term planning, especially in relation to the interests of future generations who have no active voice in the present market.

Public interest theories of regulation suffer various shortcomings. First, issues arise about how public interest is defined, and how policy-makers and regulators resolve the tensions among alternative formulations of economically and socially desired objectives. Second, regulators may act in the pursue of their own benefit rather than in the public interest (e.g., they may be interested in the protection or expansion of their institutional role), or they may lack the expertise to understand how to affect the behavior of the regulated, or they may have insufficient tools and resources to perform regulation effectively. Third, policy-makers and regulators may fall prey to the same regulated, who may offer bribes or other forms of reward for having regulation serve their partisan interests rather than those of the wider public.

#### 4 PRIVATE INTEREST THEORIES

Private interest theories of regulation reject the assumption that policy-makers and regulators act in the public interest. Rather, all actors are assumed to rationally pursue their own interests, especially including the transfer of wealth and the attainment of rent positions. According to this view, regulation is not really intended to protect the consumers from monopolists or to prevent socially undesirable outcomes, but to pursue the goals of powerful industrial actors. Business companies are interested to induce policy-makers to pass legislations that regulate industries for the benefit of dominant incumbents, and to persuade regulators to make decisions that safeguard the market position of the existing industry players. Policy-makers are interested to gain votes for re-election, and business companies can provide them with financial support for electoral campaigns. Regulators are interested to be re-appointed or to secure a job after the termination of their appointment, and business companies can sponsor them (albeit informally) with relevant politicians or offer them the prospect of consulting or other positions in the future.

#### 5 THE CAPTURE THEORY OF REGULATION

One of the most prominent theories within the private interest approach is the capture argument. The capture theory of regulation is mainly associated to the work of George Stigler, who argued that: “As a rule regulation is acquired by the industry and is designed and operated primarily for its benefit” (Stigler 1971: p. 3). The regulated industry

is interested to influence the regulator in order to attain a “regulatory rent”. Typically, the regulated industry is characterized by concentrated interests, which mobilize and coordinate their efforts to protect their common stakes more easily than the consumers or citizens at large. Refinements of the capture theory included the works of Gary Becker (who argued that, once an industry had successfully lobbied the regulator, countervailing interests will mobilize in order to contest the acquired rent; Becker 1983) and Sam Peltzman (who argued that the regulatory rent tends to dissipate over time, and that the regulated industry may find it advantageous to de-regulate rather than acquiring more regulation; Peltzman 1976).

## 6 INTEREST-GROUP POLITICS THEORIES

Other theories within the private interest approach include the interest-group politics argument. According to this view, regulation results from the interaction between groups of actors within the regulated industry and the regulator. Following this view, Marver Bernstein developed a dynamic theory of regulation, where features and behavior of the regulator change over time (Bernstein 1955). Bernstein (1955) provided a “life-cycle” theory of the regulatory process. Regulation typically begins as a policy response to the requirement to protect the public from unwelcome activity. The first stage of the life-cycle model—gestation—results in the creation of a regulatory body. The second stage—youth—is when the inexperienced regulatory body is outmaneuvered by the regulated. Over time, political support for the regulatory agency fades away. In the maturity stage, regulators start paying more attention to the needs of the regulated. The regulatory body becomes less and less entrepreneurial. In the final stage—old age, the regulatory declines and gives more importance to the interest to the regulated than of the public.

Instead, James Q. Wilson argued that regulation depends on the degree of concentration (or dispersion) of the benefits and costs of regulation (Wilson 1984) (Table 1). The regulated are captured when regulation entails concentrated benefits and diffused costs (e.g., price regulation of a monopoly). Interest-group politics happens when groups of actors within the regulated industry contend the allocation of concentrated benefits and concentrate costs. If benefits of regulation are diffused while costs are concentrated, regulation results from entrepreneurial politics (e.g., a smoking ban, that benefits the public at large at

**Table 1** Variants in interest-group politics (Baldwin et al. 2012)

	<i>Concentrated costs of regulation</i>	<i>Diffused costs of regulation</i>
Concentrated benefits of regulation	Interest-group politics	Client politics (capture)
Concentrated costs of regulation	Entrepreneurial politics	Majoritarian politics

the expense of tobacco and cigarette producers). If both benefits and costs of regulation are diffused, regulation originates from majoritarian politics.

## 7 REGULATION AND COMPLEXITY

Other approaches to regulation reject the assumption that regulation plays the function to serve either the public interest or the private one. Rather, regulation is conceived as a social practice that takes place within a specific cultural and institutional context. Much of the interaction between the regulated industry and the regulators consist of making sense of what regulation is, what effects it produces, and how to react to it in an adaptive fashion. According to this view, regulation can hardly be designed to fit an intended purpose. The regulated industry is so complex that the regulators cannot understand all drivers of behavior, collect and process all relevant information, and anticipate likely consequences of regulatory interventions. Accordingly, we are left with a sense that regulatory systems provide only the “appearance” of the capacity of the state to steer industries and sector.

Various factors contribute to the complexity of the regulated industry. First, regulations are made within a context that includes past regulations and institutions, which can interfere with the new regulations in unpredictable ways. Second, regulations made for a specific industry may bear implications for other industries or sectors of the economy in an unanticipated way. Third, regulations may not bear immediate effects on the regulated industry, but they can exert some influence on the long term in less evident ways. A related argument is that regulation always “lags behind” the behavior of the regulated industry. When a regulation

**Table 2** Grid-group cultural theory (Douglas 1986)

		<i>Grid</i>	
		Low	High
Group	High	Fatalism	Hierarchism
	Low	Individualism	Egalitarian

is made, actors of the regulated industry may adapt their conduct to changed features of the regulatory system in such a way as to circumvent the new rules. After some time only, it becomes apparent to the regulator that the regulated industry found out how to bypass the regulation. A new regulation is made, but again the regulated industry may change its behavior to outmaneuver the regulatory system. Furthermore, regulations require conversations between spheres of interest and policy expertise that build on different epistemological traditions and material concerns. Issues that arise from the translation among spheres of interests make regulation a continuous process of re-negotiation rather than a stable framework for governing industrial behavior.

## 8 REGULATION AND THE ROLE OF IDEAS

Other approaches to regulation hold that actors make decisions by taking into consideration alternative courses of action that are conceivable according to certain ideational frames of mind. Rather than assuming actors rationally pursue well-defined objectives, an ideational approach argues that dominant ideas of the time (e.g., economic policy paradigms) affect the type and extent of regulation that actors consider desirable and acceptable. A variant of this approach relates to the assumption that individuals favor ideas that conform to a taken-for-granted set of values and associated worldview about cause-and-effect relationships. Grid-group cultural theory (Douglas 1986), for example, holds that individuals are inclined towards alternative worldviews, which relate to different assumptions about one's identity (self-referential vs. community-based) and one's standard of conduct (autonomous vs. rule-bound).

Ideas about regulation vary across the resulting four "polar types" of individualism, egalitarianism, hierarchy and fatalism (Table 2). For example, an individualist worldview tends to favor market-based mechanisms of coordination and to reject 'command-and-control' style of industry regulation. An egalitarian worldview would advocate for the inclusion of

principles of participation, transparency and public accountability in regulation. A hierarchical worldview would lean toward regulation based on the execution of top-down flows of instructions that emanate from public authorities. Finally, a fatalist worldview tends to support the adoption of randomized checks and other similar devices.

## 9 REGULATION AND THE ROLE OF INSTITUTIONS

Finally, other approaches to regulation highlight the importance of institutions. A central concern of this approach is that the regulatory system should satisfy some fundamental requirements that relate to the minimization of information asymmetries, the provision of credible commitments, the avoidance of blame and the preservation of reputation. Issues of information asymmetry in regulation arise because politicians and the public are not fully aware of what the regulator does (e.g., does the regulator pursue the institutional mandate or any partisan objective?), and because the regulator is not fully aware of the activities the regulated industry performs and to what effect (e.g., does the regulated industry operate at an efficient level of production?). Issues of credible commitment relate to the provision of guarantees that the regulator (or the policy-makers) does not behave opportunistically and “expropriate” the regulated industry of their profits after they make sunk investments. Finally, issues of blame avoidance and preservation of reputation pertain to a politician’s tendency to shift public responsibility for poor performance of regulated industries on the shoulders of the regulators and to intervene to fix manageable regulatory problems and take merit for it.

Regulatory institutions play a fundamental role in providing commitment that assures investors that they would get the expected return on investments. Levy and Spiller (1994) argued that the main problem of regulation centers on transaction-cost economics and the view that the regulator and the regulated fundamentally differ in terms of their interests towards investment, performance and return on investments. Political institutions play an important role to affect the conditions to expropriate or manipulate performance and return on investments. If the regulator can make credible commitments that they would not extract return on investment from the regulated, then the regulated may be inclined to invest into the regulated industry. Otherwise, the regulated may hold back from investing and the resulting effect is that the regulated industry would not improve (or would, rather, decrease) the

performance over time. To the view of Levy and Spiller (1994), regulatory systems should include mechanisms to contain the arbitrariness of the regulator, especially through (a) substantive restraints on the discretion of the regulator (b) formal or informal constraints on changing the regulatory system, and (c) institutions that enforce the above formal—substantive or procedural—constraints.

## 10 THE PROBLEM OF INVESTMENT IN A MONOPOLY

The regulation of infrastructure and utilities is primarily concerned with the issues that arise from natural monopoly. In such industries, economies of scale—that arise when average or unit costs of a firm fall as volume increases—result in advantages for larger producers. Economies of scale can relate to the presence of network economies, which consist of advantages that larger infrastructure networks have in connecting a greater number of clients at cheaper cost than smaller ones. In addition, in such industries durable and immobile investments establish tremendous barriers to entry, because any potential competitor anticipates that sunk costs would be lost if the incumbent monopolist engages in a price war.

According to Gómez-Ibáñez (2003: p. 9), durable and immobile investments constitute the core feature of infrastructure monopolies. The investments made by the infrastructure monopolist typically consist of relationship-specific assets, i.e., of capital inputs that have no other alternative use but the production of specific infrastructure or utility services. Once the investment in relationship-specific assets is made, the infrastructure monopolies are exposed to the threat of *ex post* opportunism from the side of consumers (who are interested to re-negotiate the supply contract) or the government (who may “expropriate” the monopolist of its profit) that acts on consumers’ behalf. Of course, the consumers also make relationship-specific investments, in the form of sunk costs incurred when setting up their lives in a certain place. Once consumers settle down in their home, they often cannot change the suppliers of infrastructure and utility services and cannot easily walk away to other places. Tiebout (1956) argued that consumers of infrastructure and utility services could “vote by feet” by moving to other places if they are dissatisfied with the services provided by the infrastructure monopolist. In practice, however, few consumers (individuals or families) are willing to conduct a peripatetic life driven by the search for cheaper water, electricity and gas bills.

The threat of *ex post* contractual opportunism may be reduced if the parties agree on a long-term contract, but such contractual arrangements may be too costly or cannot fully guarantee that all contingencies are stipulated. According to this view, the problem of regulation of infrastructure and utilities monopoly basically consists of taming the threat of *ex post* opportunism that arises from investment in relationship-specific assets. At least four solutions exist to this problem:

- Regulation through private contracts: infrastructure and utilities are regulated through private contracts between the infrastructure monopolist and the consumers, who negotiate price and service quality conditions;
- Regulation through concession contracts: infrastructure and utilities are regulated through a concession or franchise that the government awards to the infrastructure monopolist for providing certain services at a certain price for a limited period. In a sense, the government acts on behalf of the consumers by designing the concession contract, calling for tender offer competitions, selecting the winning bidder and monitoring the performance of the concessionaire;
- Regulation through discretionary regulation: infrastructure and utilities are regulated by independent regulatory agencies that hold the power to unilaterally establish tariffs and service standards of the infrastructure monopolist. In a sense, this is a way to deal with the inevitable incompleteness of concession contracts by delegating the independent regulatory agency to make ad hoc decisions (e.g., setting tariff caps) by taking account of the interest of both the general public and of the infrastructure monopolist;
- Regulation through public (or non-profit) enterprises: infrastructure and utilities are regulated through direct ownership and control of the infrastructure monopolist by the government (or a non-profit body).

Regulation through private contracts may not eliminate the threat of *ex post* contractual opportunism, especially if parties are not well informed of price and quality of infrastructure services, if they cannot write and enforce long-term contracts, and if there is no close substitute of the infrastructure service. Regulation through public enterprises may not eliminate inefficiencies that are typically associated to monopoly

positions, especially related to the lack of incentives to contain costs and improve productivity. Concession contracts and discretionary regulation may provide viable solutions to the problem of regulating infrastructure services. They both exhibit strengths and weaknesses, however, which will be discussed in the next chapter.

## 11 CASE STUDY: REGULATING WATER SERVICES IN BOLIVIA

Between December 1999 and April 2000, a series of protests erupted in Cochabamba, the third largest city of Bolivia. The protests originated from the privatization of the city's water services, which had been run by the municipal company SEPAMA since 1967. In 1999, SEMAPA was sold to Agua del Tunari, an international consortium led by International Water Limited (UK). After the privatization, the Bolivian government awarded a 40-year concession to Agua del Tunari for providing water and sanitation services to Cochabamba. The concession contract specified that Agua del Tunari would implement an infrastructure development program, which included the Misicuni Multipurpose Project (MMP) that consisted of a dam, a reservoir, and a hydroelectric power plan. Agua del Tunari would be allowed to raise water tariffs up to 35%, which would provide the repayment of debts of SEPAMA and a 16% rate of return on investment.

The Bolivian government expected that the privatization of water services in Cochabamba could help improve the sorry state of water infrastructure in the city. Before the privatization, only 57% of the population of Cochabamba was connected to the water network while others (generally the poorest) had to rely on private vendors. Losses amounted to about 50% of water, and about 5–10% of connections were illegal and not metered. The largest consumers of water, including the municipality and public-sector companies, persistently missed their payments. The financial performance of SEMAPA was severely hampered, and the municipal company was unable to access loan financing and carry out any infrastructure development. The population suffered from acute water rationing in the dry season, with the effect that some consumers had built private water tanks and others relied on private groundwater sources (that posed related environmental health problems).

After Agua del Tunari started operating in November 1999, riots against the concession contract, in general, and the tariff increase, in particular, broke out in the city. Road blocks, strikes and public

demonstrations were occasionally followed by fights with the police, that resulted in six deaths. The protest gathered angry water consumers, small farmers and water vendors, and was fueled by a broader sense of acrimony against the government's neo-liberal economic strategy that was diffused in the population. Widespread civil disorder and public protest induced the Bolivian government to push the water regulator (Superintendencia Sectorial de Saneamiento Básico or SSSB) to overrule the 35% tariff increase in February 2000 and then to cancel the concession contract in April 2000, when the provision of water services was returned to SEMAPA that regained the municipal company status (Nickson and Vargas 2002).

The episode of the "water war" in Cochabamba between November 1999 and April 2000 is exemplar of a number of issues that often arise in the provision of public services. Public sector companies may not be able to provide satisfactory services, in such terms as, for instance, coverage of the user basin, reliability and maintenance and upgrade of infrastructure. Private sector companies may charge increased tariffs and seek to attain profitability targets that may be perceived as unfair by the consumers. Normative and regulatory changes may threaten the interests of incumbent operators, such as, for instance, dominant market players or firms who had positioned themselves in market niches. Political considerations may induce the government to undo regulatory arrangements in face of public protest, with the effect of undermining the independence of regulatory authorities and the credibility of established regulatory institutions.

Regulating the provision of public services is not an easy task. When trying to understand how a policy domain (such as water services in a municipal area) is regulated, attention should be placed, at least, on the following components:

- Stakeholders: Who populates the policy domain? What are their roles, e.g., who are the producers, who are the consumers, who holds rights on natural resources, who has the power to change regulatory institutions? What are their interests? What are their ideological inclinations?
- Objectives: What is the aim to achieve by regulating the policy domain under consideration? What are the socially, economically and politically relevant issues that call for most of the attention?

What is ‘desirable’ for the stakeholders, taking account of their interests and/or ideological inclinations?

- Regulatory tools: How can the policy domain be regulated? What type of incentives, constraints and control mechanisms can affect the behavior of the regulated? Who has the power to enforce the rules?
- Initial conditions and context features: How do initial conditions affect the implementation of a new regulatory system? How does the broader social, economic and political context affect the management of a regulatory system?

Understanding the experience of the “water wars” in Cochabamba, for example, calls for an identification of the stakeholders involved in the episode, of their interests, and of their ideological inclinations. The government sought the privatization of water services in order to attain a political and economic agenda, which the protesters contested through various demonstrations. In such a scenario, anyone who is interested to better understand regulation of infrastructure and utilities should ask what explains the rise of the “water wars”, what are the alternative implications of providing water services through municipal companies or concession contracts, and how should the government ultimately regulate the provision of water services.

These factors—stakeholders, objectives, regulatory tools, initial conditions and context features—interact in complex ways. Stakeholders, for example, may hold conflicting interests and incompatible ideological inclinations. Their objectives may clash against each other, and may change over time depending on circumstances. The introduction of new regulatory tools may conflict with established practices and call for the development of novel administrative capabilities. Initial conditions and context features may interfere with the social dynamics of the regulated policy domain, possibly with the effect of hampering the efforts of public authorities to attain their policy objectives. Explaining regulation calls for the recourse to multiple theories, which can each shed some partial light onto the intricacies of stakes, interests, ideas and expectations that actors of the water sector hold.

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