

**REGULATION THROUGH THE
BACK DOOR:
UNDERSTANDING THE
IMPLICATIONS OF
INSTITUTIONAL TRANSPLANT**

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Regulating Through the Back Door: Understanding the Implications of Institutional Transplant

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Abstract: This paper explores ideas of regulatory diffusion and transplant. I suggest that the existing literature, which focuses on channels of diffusion and macro-contextual variables of sectors and countries, insufficiently accounts for how the nature of institutional outcomes are shaped by the way regulatory agencies are adopted and embedded into national political economies. In particular, using the case of Indian electricity regulation, this paper suggests that when adoption is driven less by national policy choices, and more by the role of external actors, such as multilateral donor agencies, there is little scope for ex ante deliberation of the role regulatory agencies can and should play within national governance systems. Instead, the functioning of regulatory agencies are better explained by ex post adjustment, as agencies seek to accommodate existing political pressures, accompanied by efforts to explain and justify the foundational myth on which regulator adoption was based. Regulatory outcomes are then incompletely explained by macro-context and institutional form alone, but instead require understanding micro-details of local political and institutional arrangements.

This argument is explicated with reference to the process through which regulatory agencies entered the Indian electricity sector, and further detailed with reference to tariff setting and public participation processes in three Indian states. While tariff setting illustrates ex post rationalization of decision making that remains deeply politicized – in contradiction to the founding narrative when regulatory agencies were created – public participation processes show that the introduction of regulators can introduce a ‘policy irritant’ that stimulates creation of a new political space in Indian electricity governance. Based on these discussions, the paper argues for attention to micro-politics and local specificities of the process through which regulatory agencies are embedded in national political contexts. This argument serves as a corrective to the literature that currently focuses dominantly on ex ante country and sector conditions in seeking to explain regulatory transplant and performance.

Key words: regulation, India, electricity, institutional transplant, utilities, administrative procedures, public participation

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Introduction¹

Independent regulatory agencies have entered India through the back-door, little remarked upon and even less understood. Strongly promoted by international donor agencies, regulators have been viewed primarily as a mechanism to insulate decision making from politics. Drawing on sub-national case studies of electricity regulation, I suggest the Indian experience sheds new light on how we understand theories of regulatory diffusion and transplant. Specifically, I suggest that a more complete understanding of how regulatory agencies are transplanted and subsequently operate in the developing world requires attention to the specifics of the transplant process and of the local institutional context. Examined from this perspective, regulators can operate less as agents of depoliticization and more as agents of re-politicization through a different institutional avenue.

There is now a substantial literature on the process of regulatory diffusion and transplant, some of which has particularly focused on developing country contexts. The early emphasis on rational design – notably Levy and Spiller’s (1994) foundational story of the rational construction of regulatory institutions as a functional solution to the problem of signalling credible commitments – has increasingly been complemented by a rather more sociological understanding. Thatcher and Stone Sweet (2002), for example, find that to fully explain the adoption of regulatory agencies in Western Europe requires complementing a principal-agent analysis with ideas of isomorphism from sociological institutionalism. More recently work by Levi-Faur and Jordana has taken further the sociological roots of the diffusion of the regulatory state, and explored the empirical record outside Western Europe, and

¹ This paper is written as part of a larger project on “The Regulatory State in the South.” I am grateful to Bronwen Morgan and participants in a workshop in New Delhi in January 2011 for comments. This work was carried out with the aid of a grant from the International Development Research Centre, Ottawa, Canada. I gratefully acknowledge their generous support.

particularly in Latin America (Levi-Faur and Jordana 2005; Levi-Faur 2005; Jordana and Faur 2006).

However, existing approaches leave important elements of the story untold. For example, Jordana, Levi-Faur and Marin (2011) focus on identifying channels of regulatory diffusion across and within sectors and countries in a self-declared emphasis on the diffusion process itself. They do this by focusing on macro-variables, such as the proportion of regulators in a given sector in all countries, or a given country across all sectors, as explanatory variables for further diffusion of the model. This approach provides a framework for exploration of multiple pathways of diffusion and interaction across those pathways. But it largely fails to engage with the micro-detail of regulatory diffusion, to ask whether beyond coarse indicators such as existence and timing of creation of regulators, details of regulatory context matter.

Of course, that local context matters to the viability of a regulatory institution is an old, if often underplayed, theme in the literature. Indeed, Levy and Spiller's (1994) nuanced approach to identifying necessary conditions for regulation to be undertaken by regulatory agencies (as opposed to by contract or executive action) have been all but forgotten in the subsequent rush to enshrine regulatory agencies as international best practice. A few recent papers have returned to and developed this theme. Pollitt and Stern (2011), for example, review the dismal state of human resources, and argue this is a serious obstacle to effective regulatory institutions in electricity. Taking issue with Jordana et. al.(2007), Jarvis (2009) draws on a case study of Thailand's electricity regulator to suggest that the diffusion model neglects institutional capacity and assumes institutions are "simply transplanted, capacity and all." He suggests that the thin capacity of the institutional substrate in developing countries makes this a highly problematic assumption, an argument that the Indian evidence presented here supports.

While the re-discovery of local context is welcome, the exploration of diffusion can and should be taken much further than it is by either the channels of diffusion approach or by those emphasizing shortfalls in local institutional capacity. While there may be multiple pathways of diffusion and multiple obstacles to that diffusion, the literature suggests that the same institutional outcome results, albeit with greater or less degrees of success.

By contrast, here I explore whether and how the manner of diffusion and process of embedding regulatory agencies into national political economies can also shape the nature of the institutional outcome itself. I suggest that it can, and that the role newly transplanted regulatory agencies play in domestic political economies – as agents of depoliticization or as institutional sites for the re-articulation of political interests in locally specific ways – is likely to vary across contexts. Consequently, I argue for attention to both the micro-details of diffusion process and the manner in which diffusion carries implications for the subsequent embedding of regulators within national contexts.

Attention to the dynamics of adoption, including the role of intermediating agencies that act as vectors for the various channels of diffusion, and to the process of embedding, is particularly important to understanding institutional outcomes. To stretch a metaphor, if regulatory bodies are not adopted whole cloth, then attention to both the nature of the fabric and the tailoring process are required.

I develop this argument with reference to a single case -- Indian electricity regulation and its variants at the state level – to inductively build a picture of how the role of transplanted regulations institutions is shaped by the process of transplant and the micro-context within which transplant occurs. This leads me to argue for limits to a positive political theory of regulatory diffusion.

Drawing on the Indian case, I also make a more direct claim about aspects of the diffusion process that are particularly noteworthy. In developing country contexts such as India, intermediary organizations such as the World Bank play an important role as vectors of global best practice (Henisz, Zelner, and Guillen 2005) acting through a mixture of coercive and normative isomorphism (Christensen and Laegreid 2007; DiMaggio and Powell 1991). I use the metaphor of the “back door” to suggest that, in such cases, there is less *ex ante* domestic engagement with the idea of regulation and internalization of its definitional attributes, and rather more *ex post* justification of regulation and adjustment to the transplant of regulatory institutions. This process of attenuated *ex ante* engagement and extended *ex post* justification limits the ability of regulatory agencies to act in a classic Majone (1994) sense of regulating decisions affecting efficiency drawing on a legitimacy founded in technical expertise, in part because the distinction between efficiency and redistribution is not

discussed, debated, internalized and operationalized. Drawing a page from the development literature, the transplant of regulatory agencies suffers from the classic problems of a lack of ‘ownership’ over transplanted policies and institutions. This is not, of course, to suggest that there is no impact of the introduction of regulatory agencies, but rather to buttress the idea of treating regulatory institutions as a ‘policy irritant’ (Levi-Faur and Jordana 2005) that can lead to surprising and unpredictable outcomes that diverge even across different sub-national regulators.

In this paper I develop this argument inductively with reference to the introduction of regulatory agencies in the Indian electricity sector. The section that follows provides relevant context on the Indian electricity sector and the introduction of regulatory agencies. I then examine in more detail the process of regulatory transplant, with attention to the role of intermediary agencies and develop the implications of a ‘back door’ route for regulatory agencies. The following section explores two particular implications of this form of diffusion for the subsequent process of embedding electricity regulators within Indian political context with reference to the cases of three state level regulators – in Andhra Pradesh, Delhi and Karnataka.

Regulation through the Back Door

Electricity regulatory agencies, I suggest, entered India through the back door as an accompaniment to a larger process of restructuring Indian electricity in keeping with the accepted reform prescription of the time.² An important motivation for reform was a quest for private, especially foreign, investment into the sector, and a consequent need to de-politicize decisions in the sector. As a result of this ‘back door’ entry, there was relatively little domestic discussion about the implications of creating regulatory agencies, nor of the role they would play in governance of India’s electricity sector. Below, I provide a potted history of the introduction of regulatory agencies to provide relevant context for the discussion that follows, and also to begin drawing out the implications of regulation through the back door.

² This section draws on Dubash and Rajan (2000), which reviews the recent political economy of India’s electricity sector.

By the 1990s, India's electricity sector was sliding into deep crisis. The roots of the crisis need not bother us here, but it is relevant to note that opposing and balancing political interest groups were instrumental in creating and reinforcing an unsustainable financial situation in the sector. In brief, the interaction between farmers hanging on to politically inspired electricity subsidies, industrialists rebelling against higher tariffs needed to support those subsidies, and affluent and increasingly mobilized urban consumers chafing against the poor service that resulted from a bankrupt sector locked Indian electricity into a downward spiral. Reform required political, and not just technical, and institutional resolution.

Financial pressures to act coincided with the rise of a seismic shift in the global conventional wisdom on organizing the electricity sector. Electricity 'restructuring' -- 'unbundling' publicly owned and managed monopoly electricity utilities, privatizing, and introducing competition between the newly created entities -- coalesced into a standard prescription for electricity sector reform.³ Emerging at a time of a larger global ideological shift toward the virtues of private investment, electricity restructuring became the accepted precondition for attracting foreign investment. Independent regulatory agencies are a key part of this prescription. In functional terms, regulators are intended to regulate the residual monopoly segment of the 'unbundled' electricity sector (the wires), establish and enforce the rules of market functioning, and set tariffs in the lead-up to competitive markets. Most significant, however, they are intended to excise politically motivated and therefore arbitrary decision processes, and replace them with technocratic and hence predictable decisions.

Through its ability to leverage public investment in the power sector, the World Bank served as the dominant vector for transmission of 'electricity restructuring' to India. An internal 1993 World Bank policy document makes explicit the objective of depoliticizing decision making through creation of regulatory agencies: "...the Bank will require countries to set up transparent regulatory processes that are clearly

³ Patterson (1999) provides a very readable introduction to the topic. Dubash and Singh (2005) critically review these ideas and locate the debate in Indian context.

independent of power suppliers and that avoid government interference in day-to-day power company operations” (World Bank 1993, p. 14).⁴

In the same year the policy was issued the World Bank explicitly invited Indian states to take up the bargain in a meeting with state Chief Ministers.⁵ Five states initiated discussion, but only one state, Orissa, saw the process through (World Bank 1996). The Orissa loan document from the World Bank clearly articulated the role of the regulator: “...to ensure the sustainability of tariff reform... inter alia to attract sufficient private investment and protect the interests of consumers” (World Bank 1996, p. 7). A key contribution of the regulator to achieving these goals was “...to insulate Orissa's power sector from the government and ensure its ... autonomy” (World Bank 1996 Annex 5.3, p. 2). In other words, the fundamental purpose of electricity regulation was to create an apolitical space for electricity decision, in large part to send a signal of credibility to investors.⁶

Within Orissa, there was substantial support for a thorough reform of the electricity sector from the political leadership and elements of the bureaucracy. This support for a broad reform agenda did not translate, however, to clarity on the role of regulatory agencies within a reform agenda, nor to debate and discussion on their role as part of the larger reform process. In the opinion of an Indian consultant involved in the process, many officials saw regulatory agencies as a necessary hurdle imposed by funding institutions, or as a relatively costless diversionary tactic to signal seriousness about reform (Dubash and Chella Rajan 2000). The creation of regulatory agencies was, therefore, a somewhat formulaic appendage to a larger sector reform process, one focused on financial restructuring, attracting private investment, and putting place

⁴ The other conditions -- commercialisation and corporatisation, importation of services, and encouragement of private investment – would soon become intertwined with the emergent model of competitive electricity markets emanating from the UK, to become a standard model of electricity restructuring applied to the developing world (Williams and Dubash 2004).

⁵ Electricity is a “concurrent” subject under the Indian constitution, which means it is jointly governed by the federal level and the states. The electricity sector is historically, however, organized around state level electricity boards, the dominant operational entity for utility provision.

⁶The goal of insulation from political process led to interesting design debates. According to Indian consultants, foreign consultants were naïve about how to achieve this outcome. For example, it was at the insistence of Indian consultants that the Orissa reform act explicitly prohibited elected officials from ever assuming office as a regulator.

de-politicized decision structures. The regulatory agency was the key mechanism intended to achieve this last objective, but with little critical reflection on whether and how it would do so.

In practice, unsurprisingly, the Orissa regulatory experiment was well short of being a success in its early years, particularly with respect to its ability to actually depoliticize decision-making. Contrary to the expectation of the domestic reformers and the World Bank, who sought rapid tariff increases, the Orissa Electricity Regulatory Commission decided that the public should not bear the burden of past mismanagement and limited tariffs to moderate increases. In other words, far from depoliticizing the sector, the Orissa regulator actively internalized political sentiments in its decision-making.

Despite these deviations from design, at least with regard to the regulator's ability to depoliticize and thereby signal credibility to investors, the Orissa approach to regulation has rapidly spread to other states. To avoid a proliferation of state acts, the central (i.e. federal) government passed a Central Electricity Regulatory Commissions Act (1998) to provide an alternative legal basis for state regulators. This was followed by an omnibus Electricity Act (2003) that enshrined in law the restructuring and regulation formula. Despite the Orissa experience to the contrary, the underlying presumption that it is indeed feasible to create an apolitical regulatory sphere simply by legislating one was retained more or less intact.

In a repeat performance of the Orissa experience, throughout this sequence of events extending the reach and scope of electricity regulators, there was remarkably little national discussion of whether and how regulators would, in fact be able to play their expected role within the larger framework of electricity governance. Only in 2006 (leading to publication in 2008), almost a decade after the Orissa experiment, did India's Planning Commission initiate a discussion around regulatory agencies that explored institutional design and capacity issues, questions of accountability, and mechanisms to safeguard independence (Planning Commission 2008).

The process through which electricity regulatory agencies entered India was remarkably devoid of reflection on whether and how these bodies would be able to achieve their core design objective of depoliticizing decision making in the sector.

The model has been widely propagated despite early experience in Orissa demonstrating that entrenched political interests and path dependencies are obstacles to depoliticization. While regulators entered through the back door, assisted by donor agencies, local reformers were certainly willing to hold open the door, in the interests of achieving their larger objectives of attracting investment. However, this willingness to embrace regulatory agencies was not arrived at after deliberation or consideration of the suitability of the model, but rather as a taken for granted appendage to the reform agenda. Instead of an intentional and considered response to the problem of credible commitment, regulatory agencies took on the nature of what Meyer and Rowan (1991) call a “rationalising myth” that had become central to signaling credibility to foreign investors.

Regulatory Practice: The Contingent Outcomes of Shallow Transplant⁷

As the discussion above suggests, the mechanism through which the independent regulatory agency model was adopted in India did not prioritize reflection on the role regulators could and should play in governing Indian electricity. Nor was there a subsequent process at the state or national level of generating shared expectations, and building the institutional conditions to realize these objectives. Instead the context of privatization-oriented reform encouraged by the World Bank and supported by domestic reformers assumed uncritically the viability of regulatory agencies as agents of depoliticization, based on a shallow process of institutional transplant.

In this section, I inductively explore the implications of this process of regulatory transplant, drawing on the experience of three Indian states. I examine the process of regulatory creation, and the functioning of the regulator in its early years in each state, to derive three themes that help describe regulatory practice. These themes are by no means exhaustive; more aspects such as these could be unearthed by looking at details of regulatory experience. But by laying bare how regulation actually functions, and

⁷ This section draws on a compilation of empirical material in Dubash and Rao (2007).

how it deviates from the presuppositions of those who designed the transplant process, I seek to buttress the arguments that the process of embedding matters to future regulatory outcomes, as do the micropolitics of this process.

The Fallacy of Depoliticization through Institutional Transplant: The Case of Tariff Setting

De-politicizing decision making through creation of regulators was always going to be a challenging construct. The Indian electricity sector was deeply enmeshed in a crisis of governance. Consumers from all categories had little patience for tariff increases without credible promises of improved service quality and reliability. Improved services were unlikely to materialize unless the financial health of the sector also improved. Regulators were ill-placed to cut through this Gordian knot, since doing so would inevitably have created winners or losers. Instead, state governments had to take the lead in balancing the interests of different groups and often, in doing so, encroaching on terrain that had been delegated to regulators. For their part, regulators struggled to maintain a façade of apolitical decision making based on technocratic criteria, even while finding themselves constrained in various ways, explicit and subtle. Creating the appearance of de-politicization while allowing for active consideration of political stakes in the decision-making process, is a useful example of ex post adjustment when regulatory agencies enter through the back door.

The cases below represent a range of political contexts for regulatory functioning: strong political support for reform and the regulator in Andhra Pradesh; efforts to politically marginalize the regulator in Delhi; and active efforts to undercut the regulator in Karnataka. In all cases, however, the outcome was similar: a swing back to politically controlled tariff setting. These cases suggest that tariff setting outcomes are over-determined by the underlying political context, and insertion of a regulator, whatever the relationship between the regulator and the executive, is inadequate to change this dynamic.

Andhra Pradesh: The state of Andhra Pradesh in the south of India represents the strongest case of deep commitment to a reform agenda. While electricity reform was

supported by a World Bank loan, as in Orissa, the reform effort was strongly owned and driven by the then Chief Minister of the state, Chandrababu Naidu. By contrast to the Orissa case, where the government created the immediate conditions, but subsequently stepped back, the AP government remained in the driving seat. Mr. Naidu personally supervised weekly meetings with the top management of utilities, at which bread and butter management reforms were hammered out, such as re-aligning staff incentives around performance, and striking a wage-for-results deal with labour. The result was an impressive turn-around in several key outcome indicators.

Despite political support at the highest levels in the state for the reform template, pressures for political accommodation on the issue of tariff reform began to infuse the process, with these pressures centered on the newly created regulator. In order to ensure the commercial viability of the utilities, a necessary step before unbundling and privatizing, the World Bank loan document specified that utilities were required to file regular requests for tariff increases and the regulator should then issue the regulator relevant tariff orders (Dubash and Rao 2007, p.49, fn 7). The overarching purpose of the regulator was to ‘reduce the interference of the state government, minimize the politicization of key sector decisions ... and balance the interests of various stakeholders’ (Dubash and Rao 2007, p.49, fn 8).

The regulator began by setting tariffs by the book – based on a calculation of revenue requirement of the utilities given allowing prudential costs and a prescribed rate of return –leading to a steep 15% tariff hike in its first tariff order. This announcement was met with substantial street protests, and reportedly with nervousness within the political leadership, who announced a countervailing public subsidy to mitigate the effect of the tariff increase. This outcome marked an improvement from earlier practice, in that the state government provided an explicit budgetary subsidy, instead of simply placing the burden on the utility, resulting in the accumulation of losses on its books.

However, in subsequent years, the regulator has been more circumspect and resorted to some sleight of hand, leading to an outcome reminiscent of pre-reform times. In order to keep tariff hikes in check the regulator has taken to setting an efficiency based “performance target” for the utilities to meet, which, for several years subsequent to the first tariff order, was set at levels that obviated the need for a tariff

increase. In essence, this measure placed the burden of under-recovery of tariffs back on the utility, risking undercutting its commercial viability, much as in the pre-reform era. This approach brought obvious political benefits to the government, which avoided public anger at tariff increases. But, it also forced the tariff review process back within political constraints, albeit disguised within a thin technocratic veneer. The AP regulator maintained a thin façade of independence from political pressure, but only by creating a technocratic construction that allowed it to re-interpret pre-determined tariff outcomes within the given regulatory rules of the game.

Delhi: Delhi's reform context was a high stakes effort to privatize right from the start. After Orissa, the pressure was enormous; failure in Delhi would have signaled that privatization of Indian electricity was a lost cause, and cause investors to be even more wary of entering the country's electricity sector. As with other states, the central objective was to increase sector efficiency, in particular by limiting commercial and non-commercial losses, and thereby nurse the sector back to financial health. As in other cases, tariff setting was critical to ensure the confidence of private investors.

By contrast to both Orissa and AP, Delhi's effort was home grown, albeit drawing on the global reform model, but did not explicitly involve the World Bank. The Delhi government established an independent regulator in 1999 and privatized the utilities in 2001-01, but during the process sought to severely constrain regulatory jurisdiction through a government directive that established a form of regulation by contract for an initial five-year period. During the period, the regulator did not have the ability to set performance targets for loss levels or adjust the rate of return. While the regulator did have control over year-by-year tariff setting, the privatization template included a set of assumptions about the sequence of tariff increases, which aggregating to a 44% increase over the initial five year period, amounting to a form of indirect pressure on the regulator.

Due to this circumscribing of regulatory power, the early relationship between regulator and executive was fraught. Yet, in its exercise of tariff-setting, the regulator was curiously conciliatory; perceptions among regulatory consultants, utility staff and within government was that regulatory tariff decisions were influenced by communication with government. Whether true or not, these perceptions suggest the existence of a credibility problem.

Jerusalem Papers in Regulation & Governance

In terms of actual decisions, the regulator uniformly set tariffs well below the trajectory of tariff hikes assumed by government at the time of privatization. While state-owned utilities, such as in Andhra Pradesh, might have been willing to bear the loss-making associated with inadequate tariff increases, it was harder to persuade private utilities to do so. In reaction to utility protests, the regulator proposed two accounting mechanisms to help square the circle. First, the regulator argued that collection of past arrears, which the privatization agreement had earmarked to pay down past liabilities in order to avoid imposing these costs on taxpayers, should be retained within the sector and used to lower the revenue requirement, thereby requiring lower tariff increases. In essence, this measure shifted the burden of adjustment back onto taxpayers instead of ratepayers. The government resisted this sleight of hand, but since it also had an interest in limiting tariff hikes, chose not to rein in the practice entirely. As one former bureaucrat put it, they chose to protest at the bureaucratic level, but not at the political level.

Second, the regulator found a way to side-step approving a massive 30% tariff increase requested by utilities by creating a “regulatory asset” that allowed the tariff hike to be spread over future years. A hike of this scale would have been politically ruinous, particularly given a public perception that some of the private companies were failing to deliver on promises of service improvements. While the utilities were unhappy with the concept, and successfully appealed this decision in the Appellate Tribunal for Electricity, by the time the case had been disposed of the purpose of postponing a difficult regulatory decision had already been accomplished.

While the Delhi government clearly had a strong interest in a successful reform outcome, and put in place regulation by contract that severely limited the discretion of the regulator, it nonetheless tacitly allowed the regulator to put in place measures that effectively limited tariff increases. Ownership over reform was no guarantee of tariff setting decisions stipulated by the reform template.

Karnataka: The Karnataka experience illustrates most explicitly the tensions between a regulator charged with being independent and an executive that has largely failed to internalize the logic of the model it has institutionalized. The Karnataka government and its regulator were at loggerheads for the first few years after inception. As with Delhi, the Karnataka executive sought to limit the ability of the Karnataka regulator to

complicate efforts at privatization, in particular by limiting the profit making opportunities in the sector. Following the establishment of the state electricity regulator in 1999, the Karnataka government designed a privatization strategy that would have allowed future utility owners of newly privatized utilities to essentially by-pass the regulator in the tariff setting process. This was the first salvo in a long sequence of hostile interactions during which the utility challenged the regulator's orders in court repeatedly. The executive continued efforts to undercut the regulator, putting in place effectively a parallel regulation by contract structure as part of a Financial Restructuring Plan for the state that included operational targets for the utilities (Dubash and Rao 2007, p.103). These actions prompted the Chairperson of the regulatory agency to write a sarcastic letter recommending that the regulator be "... placed in a state of suspended animation ... to avoid unnecessary expenditure ... on its maintenance and upkeep" (Dubash and Rao 2007, p.103).

In the tariff-setting the regulator did have control over, it engaged in a now-familiar process of following technical tariff setting methods while remaining within political limits. After popular opposition to an initial set of two tariff increases of 16% on average, in subsequent years the regulator managed to keep increases limited by deferring rises to subsequent years.

As with Andhra Pradesh, the privatization process was never concluded and utilities stayed in state hands. Once the objective of privatization faded, the executive completely changed its approach, undercutting regulatory authority with the objective of explicitly pandering to political pressures, rather than preparing the sector for privatization. In one case, the government simply instructed the utility not to follow regulatory orders to increase tariffs to subsidised customers (Dubash and Rao 2007, p.123), a tariff direction the regulator was charged with implementing under the Electricity Act. As the first Chair of the regulatory agency declared, 'the regulatory system is an unwanted child.' (Dubash and Rao 2007, p.105)

These three state cases, representing different levels and forms of commitment to the independent regulator model, illustrate the challenges, in practice, of depoliticizing tariff setting. The AP case suggests that, new regulatory institution and reformist leadership notwithstanding, political pressures to accommodate contending interests are not easily side-lined. The Delhi case, perhaps even more than the AP case,

suggests a process of creative accommodation in tariff setting. Regulatory decisions are often cast in the technocratic constructs the regulator is intended to be guided by, but the outcome remains accommodationist politics around tariff setting. In Karnataka, the government often did not even bother with supporting the perception of regulatory independence, but instead ruthlessly under-cut the regulator – sometimes seeking to suppress populist tariff setting, at other times encouraging it. In the context of shallow transplant, these examples suggest, when political constraints bump against regulatory independence (and this happens frequently), governments and regulators tend to find creative work-arounds, with lesser or greater degrees of nuance, and preserve the myth of regulatory autonomy and technocracy, even while allowing for accommodation of political pressures. The focus is on practical adjustment to a situation where the stated intent *ex ante* of introducing regulatory agencies – depoliticizing the sector -- is out of reach.

From Transplant to Irritant:

Creating Space for a New Regulatory Politics

The discussion above has suggested that a mechanistic transplant of the institution of the independent regulator is insufficient, at least in the context of Indian electricity, to achieve the intended goals of depoliticizing the sector. But it also shows that this transplant does not leave the decision-making processes and the rationale behind decisions untouched. Instead, while tariff decisions are only affected marginally, the argumentation behind them, and the forms and locations of negotiation over these decisions, does change.

The idea of regulatory transplant as a change that subsequently induces a set of reactions and responses, many of which are unexpected, is nicely captured in the metaphor of regulation as an “irritant” (Levi-Faur and Jordana 2005). In this section, I propose that one response to the irritant of regulatory transplant in India is the creation of embryonic new sites for democratic politics around service delivery.

The vehicle for creation of these sites is the introduction of procedural safeguards as part of the regulatory design, a theme that on which there is a rich tradition of work.

As far back as Majone (1994), procedures have been viewed as critical to building the legitimacy of the regulatory state. In his work, Prosser (1999) reflects critically on whether procedural safeguards automatically deepen legitimacy and calls for a form of reflexive proceduralism that examines the conditions under which participation in regulatory process does provide necessary safeguards and regulatory legitimacy.

The introduction of electricity regulators in India was accompanied by detailed procedural safeguards included in the regulatory acts. For example, the Orissa Act's procedures on participation specifies notice and comment procedures for licensing and passing of orders, specifying details such as time limits for notice in the Act itself. The "Conduct of Business Regulations" (1996) further detail procedures that guide hearings. Notably, a 1998 Amendment to the Conduct of Business regulations extended these procedures to additional significant decisions, notably tariff setting, approval of power procurement, and approval of power purchase agreements.⁸ Other state acts are similarly detailed.

Curiously, the explicit articulation of administrative procedures in legislation is a significant departure from past precedent in Indian administrative law. As Baxi (2008) forcefully states, the "central reality" of Indian administrative law is that it is "wholly judge-made" and lacks an overarching legislative codification. One interpretation for this departure is simply to view procedural safeguards as part and parcel of a larger, somewhat uncritical process of transplant. If regulators are imported institutions, then the administrative procedures have also been directly imported, with international consultants serving as the vector of transport into Indian law. Administrative procedures could then be understood to be functional to the larger aims of importing regulation, and particularly to providing investors a defence against arbitrary administrative action. Participants in the process of framing the Orissa law suggest a more deliberate process through which these procedures were put in place that sought to unearth and make more "explicit" principles of natural justice that were already enshrined in Indian case law.⁹

⁸ Government of Orissa, "Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 1996", Available at <http://www.oriec.org>

⁹ Telephone interview with MG Ramachandran, lawyer and legal consultant, 30/12/2007.

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Procedural safeguards, therefore, were introduced into regulatory processes through some combination of isomorphism and local adaptation. However, the transplant story does not suggest any hint of deliberate creation of a new political space through which contending interests could seek to represent, and participate in the governance of the sector. Yet, as the cases below illustrate, this is exactly what has happened.

Andhra Pradesh: In Andhra Pradesh, the regulator has established a procedural framework enabling access to information about the sector, a required process of public hearings in particular for tariff orders, and a mechanism for filing petitions and pleadings. For example, the Andhra Pradesh Electricity Regulatory Commission (APERC) has a well functioning and useful website, diligently holds hearings that are well attended, including in locations outside the capital city, has translated regulatory materials into the local language, and has established an Advisory Committee including labor, agricultural and consumer representatives.

There remain, of course, some substantial holes in full implementation of the spirit of these procedures. For example, in one case the APERC convened a hearing on an issue only after substantial external pressure, and once it did so, issued a sixty-page order the very next day, which clearly could not have incorporated insights from the hearing process (Electricity Governance Initiative – India, 2006). In addition, there remain grey areas on information disclosure, such as on investment plans, where the APERC has no clear policy and procedure, and by default withholds access to these materials.¹⁰ Hesitation and confusion on such matters has a great deal to do with the newness of the institution and its staffing by individuals who bring parochial and paternalistic attitudes characterized by former monopoly state utilities. There is little doubt, however, that under external pressure, the institutional space for regulatory governance is slowly but certainly becoming more open.

Regulatory procedures on information and participation have expanded the regulatory space in AP, to include labor groups, political parties, consumer groups, individual consumers, industry associations, farmers, and other public bodies such as

¹⁰ This observation is based on a personal visit, during which the authors were allowed to open and view files on investment plans on the premises, but only after initial denial followed by a personal appeal to the Chairperson.

municipalities. A scan of the tariff order for 2006-07 suggests that these opportunities are, in fact utilized. A total of 46 different individuals or institutions filed a total of 330 objections to the tariff orders of the three distribution companies in the state.¹¹ Of these, 302 were “substantive” pertaining to issues that had to do with details of the tariff process, as compared to 28 “grievances” that were related to more narrow concerns that affected only the complainant or contained little or no substantive argumentation. Not surprisingly the largest number, 106, were by individual consumers, but substantial numbers of comments, in each case between 25 and 70, were filed by political parties (42), public entities (28), industry (36), unions (68) and consumer organizations (43). Interestingly industrial buyers and others with deep pockets are not disproportionately represented in these comments.

The flurry of public engagement stimulated by creation of the APERC has begun to re-shape regulatory politics at three levels. First, consumer groups have actively worked to broaden and deepen the procedural rules. For example, they have demanded hearings at district levels, requested and won local language translation of orders, and forced broader and transparent review of power purchase agreements.

Second, they have somewhat disrupted and injected themselves into the triangular negotiation between APERC, the Government and the utility. The main avenue for doing so is forcing release of information, and forcing public, documented, responses to raised objections, thereby limiting the extent to which adjustments in key parameters can be made behind the scenes. For example, farmer and consumer groups sought release of the agricultural census to measure rural power use conducted by the APERC. They have also sought and obtained public disclosure of the dispatch order of generating plants to ensure that one generator is not unfairly favoured over another.

Finally, they have achieved some substantive gains, most significantly in the area of power purchase and approval of new generating plant investment, which accounts for the majority of total electricity cost.¹² Significantly, this is truly a public interest issue,

¹¹ Based on analysis conducted by the authors using data from tariff orders supplemented with information from APERC. This analysis excludes local language petitions.

¹² Interview with senior management of APTransco, 19/5/06.

as savings in power cost accrue to all consumers, and cannot be captured by any single group. Gains in power purchase were achieved by forcing open the issue for debate before the regulator. In addition to arguments made by consumer groups, the resultant opportunities allow powerful actors such as the utility (for whom lower costs mean healthier finances) to pursue the issue to a greater extent than they otherwise would have. Indeed, in one case the process has led to strange bedfellows, with a petition jointly filed by the utility, an NGO called the Peoples Monitoring Group on Electricity Regulation, and a journalist with Communist Party affiliation acting in his individual capacity. The expanded scope of regulatory governance has created new strategic opportunities for diverse actors in the sector.

Delhi: In Delhi too, the statutory requirements for hearings, access to information and mechanisms of recourse have created an important new space for regulatory governance in Delhi. However, the weaknesses in the practical application of these procedural requirements are also considerable. For example, the DERC website is incomplete and ill-organized, which along with the lack of an effective library or an organized index of documents makes accessing documents extremely difficult in practice. The hearings are not open to the public, but only to those who have submitted comments. This said, the wide availability of detailed tariff orders to the public, and the ability of consumers and interested parties of all sorts to present their views before the DERC, and obtain an answer from the distribution companies, represents an entirely new institutional space for public deliberation.

In 2004-05 the DERC received 212 objections to its tariff orders from 69 different objectors.¹³ Consumer groups or individuals accounted for about 40 of these while there were about 20 objectors from within industrial user groups. Of the total concerns expressed, by far the majority, (625 out of 683) were substantive complaints as compared to more narrow grievances.

By contrast to Andhra Pradesh, however, no small core of competent and knowledge interveners had appeared to win the respect of the regulators. For example, DERC staff say they do not find public submissions helpful in improving the quality of tariff

¹³ Based on analysis conducted by the authors using data in DERC tariff orders.

orders. And indeed the capacity base of interveners is thin. Thus, the apex body of Delhi's Resident Welfare Associations (RWAs) which includes the wide spectrum of neighbourhoods, including well to do areas, files petitions based on patched together pieces of information, without deploying any resources to obtain specialized knowledge or skills.¹⁴ Similarly, the Chamber of Commerce hires a single consultant to write their comments, with little involvement or feedback from the staff, or mechanism of either quality control or ensuring that comments truly represent member interests.¹⁵

However, Delhi consumers are extremely active and skilled in the broader political arena around electricity. The apex body of RWAs skillfully uses the media to directly critique the companies and the DERC and to force engagement and consideration of their appeals at the highest political levels. While it is an effective tactic in the context of any particular skirmish, this approach has the effect of de-valuing and delegitimizing the DERC as a forum for reconciling competing interests.

A political mapping of consumer voices in Delhi is also instructive and helps explain the emphasis on organized politics rather than on the DERC. The most vocal subgroup, the RWAs, speak for a distinct sub-section of Delhi's consumers self-identified as "middle class", but who include the top end of Delhi's income strata. They place themselves in opposition to small scale and illegal industry owned by local politicians and slum dwellings that contain those politicians vote banks. Both of these categories of consumers, they argue, receive free power at their expense. From this perspective, the DERC is relatively helpless; the problem and the solution, lies in the political process.

As a result of the dominance of the RWAs in the public discourse around electricity, the issues that have attained the highest profile in the DERC are questions of metering and billing and other consumer grievance issues, after an initial period when the DERC was seen to be non-responsive. Some of the upstream and more technically detailed matters also before the regulator, notably investment scrutiny, have tended to

¹⁴ Interview with consumer representative, 20/1/06.

¹⁵ Interview with Chamber of Commerce representative, 31/1/06.

be ignored. Another important consequence is that voices of lower income groups and especially slum dwellers are seldom heard within the DERC process.

In sum, the effect of creating a new institutional space for regulatory governance has had relatively little beneficial effect on the regulatory process in Delhi. To the extent there are any substantive wins, they are on the issues closest to middle-class consumers – metering, billing and grievance redressal. The more significant observation is that, if anything, consumer action has by-passed the DERC, to re-focus attention on organized politics.

Karnataka: The Karnataka regulatory experience is characterized by two unusual factors as compared to the other two states. First, the Karnataka Electricity Regulatory Commission (KERC) is the only regulator to have established an office of Consumer Advocacy, which serves as a conduit for stakeholder participation in the regulatory process. Second, farmers are particularly active in the regulatory process. For example, in 2002, 8000 objections were filed, of which 99% were from irrigation pumpset owners (Dubash and Rao 2007, p. 129-130). Yet the vast majority of these were duplicate submissions, indicating an organized effort to mobilize farmers to send submissions.

Regulatory staff members are frequently dismissive of public submissions, but identify a few key participants in hearings processes with whom they engage. In addition, the KERC has established a Commission Advisory Committee with representatives of key constituencies, and attributes to this group some important reform measures such as a differential tariff for urban and rural areas. In addition, there are indications that the KERC strategically uses consumer input on occasion to explain or defend their decisions. Taken collectively, Karnataka demonstrates considerable organization and engagement, particularly by farmers, but, as yet, little evidence of direct impact.

In all three states, a new arena for political engagement around provision of basic electricity service has emerged with the creation of the electricity regulator. However, the manner in which the arena has been used, and the interests that have mobilized in each case are quite different. In Andhra Pradesh, while the results are by no means uniformly positive, a curious assortment of actors have formed into a loose coalition

to address issues that have the potential, at least, to positively benefit a large cross section of the consuming public. In some cases, they have been partially successful, and in others the procedural safeguards have simply been sidelined. In Delhi, however, the most effectively mobilized groups represent the interests of relatively affluent consumers and have single-mindedly advocated their agenda. In this case, the establishment of the regulator has tipped the scales disproportionately toward providing voice to middle class residents, rather than slum dwellers or small scale industry. In Karnataka, mass mobilization of farmers has not translated into impacts on regulatory decisions. Interestingly, in none of the cases have large commercial interests, who might be assumed to have deep pockets, dominated engaged the regulatory process.

The broadening of regulatory space to include consumers of all sorts, public interest groups, and media may yet be the most far reaching change brought about by independent regulation. The creation of new political spaces, these examples suggest, can lead to highly contingent outcomes. The specificity of local micro politics determines whose interests are served by the establishment of regulatory agencies and associated procedures.

Conclusion

Understanding regulatory transplant is not just a matter of ensuring adequate capacity in the host environment, nor simply drawing out the process of transplant, in order to gradually get it 'right.' Instead, transplanting the institution of the independent regulator can lead to unexpected outcomes, which shape the very role of the regulatory agency in governance of the sector.

In India, the cases here suggest, introduction of the regulator introduced a language of technocracy and rational decision-making to the sector, but actual decisions on key issues such as tariff-setting changed little. Instead, a process of accommodation between the executive and the regulator, through explicit and implicit understandings, allowed the release of popular political pressure over tariff hikes.

The shift to a discourse of reason giving and technical justification, however, when added to a set of procedural safeguards that were quite new in the Indian context, also provided an opening for existing political actors to shape sector decisions. While in the past, various interest groups could only mobilize around large and blunt demands, the new regulatory political arena allowed them to mobilize around smaller scale decisions – approvals of particular plants, categorization schema for tariffs – with larger implications for distribution of costs and benefits.

In some cases, this can result in a relatively healthy process of injecting a democratic element into managing trade-offs that are often falsely construed as entirely technical. In other cases, as in Delhi, it can give a disproportionate voice to some better-off actors. The outcome of the political opportunity created by new regulatory agencies, this evidence suggests, is heavily contingent on local political patterns and mobilization. It also suggests that the ability of different interests to engage with newly created political spaces is an important variable in understanding regulatory outcomes.

The cases discussed here suggest substantial obstacles to developing a positive political theory of regulatory type and outcome. The over-determined nature of the fraught politics of Indian electricity led to similar tariff setting outcomes, despite very different relations between executive and regulator across states. But when it came to regulators as an arena for deliberative politics regulatory patterns have diverged across states in India, driven by local particularities. This is not to say there are no gains to comparative study of regulatory diffusion. But it is to suggest that tracing through the process by which regulatory institutions are embedded, the extent to which deliberative processes lead to shared expectations, and the case-specific nature of political mobilization all help understand not only the success of regulatory transplant, but the role the regulator can play in domestic political economies.

Bibliography

- Ahluwalia, Sanjeev S. 1999. *Tariff Reform in India: A Review of Directions and Issues*. In *Transition to a Liberalized Environment: Experiences and Issues in Regulation*, edited by L. Srivastava and S. Sarkar. New Delhi: Tata Energy Research Institute.
- Asian Development Bank. 1994. *Bank Policy Initiatives for the Energy Sector*. Manila, Philippines: Asian Development Bank.
- Baxi, Upendra. 2008. *The Myth and Reality of the Indian Administrative Law*. In *Administrative Law*, edited by I. P. Massey. Lucknow: Eastern Book Company.
- Christensen, Tom, and Per Laegreid. 2007. *Regulatory Agencies - The Challenge of Balancing Agency Autonomy and Political Control*. *Governance* 20 (3):499-520.
- DiMaggio, Paul J., and Walter W. Powell. 1991. *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*. In *The New Institutionalism in Organizational Analysis*, edited by W. W. Powell and P. J. DiMaggio. Chicago: University of Chicago Press.
- Dubash, Navroz K, and Sudhir Chella Rajan. 2000. *Power Politics: Process of India's Power Sector Reform*. *Economic and Political Weekly* XXXVI (35):3367-3390.
- Dubash, Navroz K., and D. Narasimha Rao. 2007. *The Practice and Politics of Regulation: Regulatory Governance in Indian Electricity*. New Delhi: Macmillan.
- Dubash, Navroz K., and Daljit Singh. 2005. *Of Rocks and Hard Places: A Critical Review of Recent Global Experience with Electricity Restructuring*. *Economic and Political Weekly* (December 10).

- Dubash, Navroz, and D. Narasimha Rao. 2007. *The Practice and Politics of Regulation: Regulatory Governance in Indian Electricity*. New Delhi: Macmillan.
- Henisz, Witold J., Bennet A. Zelner, and Mario F. Guillen. 2005. The Worldwide Diffusion of Market Oriented Infrastructure Reform, 1977-1999. *American Sociological Review* 70 (6):871-897.
- Jarvis, Darryl S. 2009. Risk, Regulation & Governance: Institutional Processes and Political Risk in the Thai Energy Sector. *Regulation & Governance* 1 (2):154-171.
- Jordana, Jacint, and David Levi Faur. 2006. Towards a Latin American Regulatory State: The Diffusion of Autonomous Regulatory Agencies Across Countries and Sectors. *International Journal of Public Administration*:335-356.
- Jordana, Jacint, David Levi-Faur, and Xavier Fernandez Marin. 2011. The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion. *Comparative Political Studies* 44 (10):1343-1369.
- Levi-Faur, David. 2005. Global Diffusion of Regulatory Capitalism. *Annals of the American Academy of Social and Political Science* 598 (1):12-32.
- Levi-Faur, David, and Jacint Jordana. 2005. Regulatory Capitalism: Policy Irritants and Convergent Divergence. *Annals of the American Academy of Social and Political Science* 598 (1):191-99.
- Levy, Brian, and Pablo T. Spiller. 1994. The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunication Regulation. *Journal of Law, Economics, & Organization* 10 (2):201-246.
- Majone, Giandomenico. 1994. The Rise of the Regulatory State in Europe. *West European Politics* 17 (3):77-101.
- Meyer, John W., and Brian Rowan. 1991. Institutionalized Organizations: Formal Structure as Myth and Ceremony. In *The New Institutionalism in*

Jerusalem Papers in Regulation & Governance

Organizational Analysis, edited by W. W. Powell and P. J. DiMaggio.
Chicago: University of Chicago Press.

Patterson, Walt. 1999. Transforming Electricity. London: Earthscan.

Planning Commission. 2008. Approach to Regulation: Issues and Options. Planning Commission, Government of India.

Pollitt, Michael, and Jon Stern. 2011. Human Resource Constraints for Electricity Regulation in Developing Countries: Developments since 2001. *Utilities Policy* 19:53-60.

Thatcher, Mark, and Alec Stone Sweet. 2002. Theory and Practice of Delegation to Non-Majoritarian Institutions. *West European Politics* 25 (1):1-22.

Williams, James H., and Navroz K. Dubash. 2004. Asian Electricity Reform in Historical Perspective. *Pacific Affairs* 77 (3):411-436.

World Bank. 1993. The World Bank's Role in the Electric Power Sector. Washington D.C.: The World Bank.

———. 1996. Staff Appraisal Report: Orissa Power Sector Restructuring Project. Washington DC: World Bank.