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**APPLES AND ORANGES:
PROBLEMS IN THE ANALYSIS
OF COMPARATIVE
REGULATORY GOVERNANCE**

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INTRODUCTION

Interest in regulation as a mode of governance is now a central feature of the literature on regulation in developed economies. Extending this area of study to developing and transitional economies gives rise to problems in comparative analysis which are explored in this paper. Four categories of problem are considered:

- the problem of contested *concepts*, arising in part from the intervention in the traditionally economic literature of disciplines such as law and political science
- The problem of *scope,* which remains ambiguous because of the difficulty of separating out regulation from the normal range of state activities
- The problem of *comparisons*, in which cross-sectoral or cross-national studies display familiar weaknesses
- The problem of *measurement,* where quantitative studies too often rely on weak data and untested assumptions, and qualitative studies are rarely in evidence

The paper emphasises the crucial significance of legal, political and administrative structures in determining the design, implementation and outcomes of regulatory reforms, and brings into sharp focus the analytical problems set out above in relation to the application of this approach to regulation in developing countries, in particular in relation to the notion of 'independent' regulation.

THE DEFINITIONAL PROBLEM

'Concepts of regulation are ….legion' (McGregor et al. 2000:1)
'Governance has too many meanings to be useful' (Rhodes, 1997, p.52)

According to the OECD (1997), regulation refers to the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulation includes laws, formal and informal orders and rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies, which enjoy delegated regulatory power: 'Constitutions, parliamentary laws, subordinate legislation, decrees, orders, norms, licenses,

plans, codes, and even some forms of administrative guidance can all be considered as "regulation" (OECD Council document, quoted in Black, 2002, p.9). In this approach, regulation is straightforwardly based on rules which may give strict directives, or be broadly enabling in ways which permit further negotiation; rules may also be framed in ways which concede discretion over their detailed application. Any enquiry into rulemaking must establish what are the institutions of rule-making, who are the rule-makers, how rules are implemented, and by whom, and the forms that compliance and accountability take (Ogus, 2002, 639-45).

Another simple yet broad definition (Hood et al., 1999) takes regulation to be 'the use of public authority to set and apply rules and standards' (p.3). The authors, however, make a distinction between the regulation of business (private, non-state activities) and regulation inside government (within and between government agencies, and between different levels of national government).These authors, representing a mix of legal and policy science disciplines, essentially regard the principles of regulation to be the same in either the public or the private sectors, or indeed in any combination of these sectors as represented , for example, by public-private partnerships, or contracting arrangements, or situations where there may be some form of regulation common to both sectors (e.g. medical professional self-regulation). This view is reinforced and extended in Hood and Scott (2000).

These straightforward definitions seem to lead to a simple set of research or analytical questions, but in relation to the governance and policy processes even of developed countries they are questions to which we frequently do not have clear answers; and this absence of clarity is even more disabling in attempts to apply to the economic, legal and political systems of developing countries models of economic reform rooted in the ideological preferences and policy systems of developed countries.

The problem here is that there are different approaches to the notion of what constitutes regulation. As Ogus makes clear, much of the literature provides a formal and legalistic definition which focuses on the construction and application of rules, while for many economists, regulation is primarily the means by which private firms are constrained from anti-competitive behaviour. Corresponding to the legalistic approach is the traditional view of government as a command and control regime operating in a precisely defined public interest, while the second view leads to a focus on the way in which regulation creates the conditions for efficient markets. The definition offered by a leading analyst of European

regulation of 'sustained and focused control exercised by a public agency, on the basis of a legislative mandate, over activities that are generally regarded as desirable to society' (Majone, 1996, p.9) appears to take in both meanings, but is still too narrow since regulation is often derived from sources other than a legislative instrument, and because the definition still leaves a question mark about who makes formulations of what is regarded as desirable for society, i.e. the public interest. Since 'regulation is seen both as a form of public policy and as a means of constituting markets' (Wilks, 1996, p.536), we need an approach which on the one hand captures the multi-layered nature of institutionalised regulation, and on the other leads us into an exploration of the way in which 'the dark world of politics sullies the purity of markets' (McGregor et al., 2000 p.2). Even the narrower approach concedes that 'because regulation redistributes resources and rents, politicians often use it to secure political gains rather than correct market failures' (Guasch and Hahn, 1999, p.137).

At this point it is worth setting out in some detail an argument presented by Black (2002) because this analysis, while based on European and American literature and practice, raises many of the conceptual issues which this paper seeks to assert as highly significant in dealing with regulatory frameworks and practice in developing countries. This also impinges on the 'policy transfer' issues discussed later, for if there turns out to be considerable conceptual and indeed empirical variation in the treatment of regulation in developed economies, serious questions arise about the nature and viability of 'best practice' models of regulation based in those economies, but recommended for application in developing economies.

Black is primarily concerned with 'quite fundamental questions of the nature and understanding of regulation…[and]…the consequent role of the state'. She judges that the answers given to these questions in the literature on regulation are 'at best contested and at worst incoherent', not least because 'once regulation is not seen as something tied exclusively or even predominantly to the state, it is not clear where its boundaries lie either as a social practice or as an academic discipline' (Black, 2002, p.1).

Black notes a range of meanings given to regulation, starting with 'the core understanding that many have 'of control-and-command regulation, seen as 'regulation by the state through the use of legal rules backed by (often) criminal sanctions' (ibid:2).The well-known failures of this model are rehearsed: instrument failure, information and knowledge failure,

implementation failure, motivation failure, and capture failure. Black is concerned to counterpoint this model with one of 'decentred regulation', dependent on notions of 'complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private' (ibid, p.3). The characteristics of this approach are presented:

- Fragmentation of knowledge goes beyond 'information asymmetry' to the idea that 'no single actor has all the knowledge required to solve complex, diverse and dynamic problems' (ibid, pp.3-4).Moreover, information is itself a social construct, there are no objective social truths. Fragmentation of power implies that control and power are dispersed between a range of social actors, including the state. Therefore regulation will invariably produce unintended consequences
- the form of regulation may depend upon the attitude to compliance of those regulated
- no single actor can dominate the regulatory process: all actors are restricted by the limits of knowledge and autonomy of others

In short, regulation is a complex interactive process which is 'co-produced (Offe, 1984, p.310 cited in Black ibid, p.5). All actors have needs and capacities and 'solutions' emerge from a mutually dependent relationship. This complexity is further affected by changes in the public-private set of relationships so that 'Governance, and regulation, is seen by some to be the outcome of the interaction of networks…which operate in the absence of formal governmental or legal sanction. '(ibid, p.6). A gloss here would be that this would often be so even in the presence of formal sanctions, since usually a whole set of interactive influences and relationships determines how formal authority is operated in practice.

Black, usefully for our purposes here, derives three 'text-book 'definitions from the existing literature

1	rules enforcement and monitoring, typically by a specialist public agency
2	any form of direct state intervention in the economy
3	all mechanisms of social control of behaviour

Clearly the first two meanings involve state activities, and correspond to widely accepted meanings, although the majority of economists currently working on regulation would be

caught under the first meaning. Equally clearly the third meaning is difficult to pin down because it has virtually no boundaries or restrictive limitations. Yet Black uses a telling illustration from the UK Better Regulation Task Force (an 'independent' advisory body linked to the UK Cabinet Office) which defines regulation as 'any government measure or intervention that seeks to change the behaviour of individuals or groups' (BRTF, undated). In principle, this seems to cover almost any area of economic and social activity, both public and private, and it might be added here that the Regulatory Impact Unit of the Cabinet Office takes a wide view of its remit, covering both public and business sectors, the whole of European Union regulation, and a range of social activities such as health, education, policing and criminal justice (RIU, 2003).

But Black concedes that 'there is also frequently an implicit or explicit assumption that the target of regulation is an economic actor' (Black:2002:10) and argues that this is true even of the 'regulatory state' literature which is used to describe the shift in the style of governance from the direct provision of public services to their provision by others under government supervision. In contrast, other literatures broaden the social scope of regulation to 'any sphere of social action (e.g. the family, reproduction) that employs a range of both state and non-state actors; and to other factors such as social cultural norms. This 'opens up pretty much the whole of social science', and for regulation specialists 'a seemingly endless territory ripe for colonisation' (ibid, p.11).

This raises the inter-related issues of intentionality and outcomes. Behind these lies the question: who regulates? By the narrower definitions of regulation, the main province is markets, and actors (including state actors) in the market. Black here alludes to Ogus's (1994) 'politico-economic 'concept of regulation, and contrasts this with a 'politico-social' concept where forms of social behaviour are regulated (e.g. dangerous dogs, dangerous doctors). She does not wish to go so far as to propose that 'social' or 'economic' forces of themselves 'regulate', but argues that these forces 'affect the outcome of the interactions that constitute regulation'(ibid, p.16). She strongly endorses the benefits of a broad definition, commenting that the narrow economic-based definitions 'led to the …futile 'regulation', 'de-regulation' and 're-regulation' debates of the 1980s' (ibid, p.16). This dismissiveness might give pause for thought to those who are still conducting those debates

Black approvingly cites Hood's 'cybernetics' approach (Hood, 1998) in which a regulatory system sets standards, gathers information, and modifies behaviour. This applies whether

design or intentionality exist or not. Social norms or culture are potentially as 'regulatory' as legal rules. Black interestingly suggests that the real test here is an empirical one; where regulation is effective, it exists; where it is ineffective it does not exist. Regulation ultimately has to be 'proved'. Functional definitions are merely 'de-contextualised, generalised abstractions', while what she terms a 'conventionalist' definition is 'embedded in current practices rather than abstracted from them' (Black, 2002, p.19). Recognising that there is a danger that the broad approach to regulation may be so wide-ranging as to produce incoherence, Black now proposes a definition which re-introduces the notion of intentionality but decouples this from the state and from purely economic activity. Hence, 'regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification' (ibid, p.19). Black concludes that the question of intentionality differs according to how protagonists define the objectives of regulation. For economists the principal aim is the correction of market failure but this discussion has now added in the management of a risk society and the achievement of social justice.

The problems created by confining regulation within a narrow definition are illustrated by an interesting comparison by Vogel (2001) of regulatory trends in the EU and the US over the past four decades. Vogel argues that EU regulation was relatively weak in the 1960s to 80s, while US regulation was strong and authoritative; yet in the past two decades the positions have virtually reversed. Vogel suggests that the nature of regulatory politics, therefore, demonstrates convergence, with some borrowing by the EU of earlier American principles, yet the two systems show diverse policy outcomes, largely because of the two differences in the two regulatory cultures about what constituted the types of risks to be regulated. For our purposes, two points need to be noted from Vogel's study. First similar policy outcomes do not inevitably result from institutional convergence. Secondly, Vogel's study, focussing on two major arenas of regulatory policy and practice, gives relatively little weight to economic issues, but a considerable emphasis on a regulatory politics which reflects social concerns and values, as well as social perceptions (degrees of trust or mistrust) of government.

This type of analysis lends support to Black's case for a broad rather than a narrow definition of regulation; the concerns and characteristics which dominate in Vogel's version of European regulation, for example, seldom appear in the literature on economic

regulation. Yet the two have something in common: the current pressures for regulatory reform emerge from past regulatory failures.

This review of definitions concludes, then, that there are alternative and therefore contested definitions. We are free to choose between these, but our choices are likely to be determined by disciplinary settings and preferences, rather than by some neutral process of agreeing on one 'best' definition. Economists will mainly choose a narrow definition which reduces the complexities to be handled and focuses almost exclusively on economic agents and economic outcomes. This leads to a stance on regulatory reform which deals primarily in *ex ante* interventions, since *ex post* interventions are much too complex to allow rigorous (read 'quantitative') analysis. Moreover, the focus will be overwhelmingly on economic policy issue rather than social policy issues, though it is no means easy to maintain such a clear distinction. For example, current regulation of GM crops in Europe is driven by social concern over food issues together with a public distrust of contemporary science. These values (together with other food related disasters such as BSE) have produced a political response which supports the most restrictive possible approach to regulation i.e. the precautionary principle. Economic concerns and priorities have been pushed well down the political pecking order (Moran, 2001).

We might, then, see disciplinary approaches placed along a continuum (from narrow to broad) of definitions of regulation.

Command and control regulation	Rules and institutions	Institutions and Policy Process	Social Processes and Social Interests
Narrow…………………………………………………………………………………..Broad			
Economists	Lawyers	Political Scientists	Social scientists

This is quite schematic, representing main groupings; individual economists, lawyers political and social scientists might be found at any point along the continuum.

This reminds us that political and social scientists interested in regulation can be expected to prefer the broader, more inclusive definition referred to earlier. This does not just mean that such an approach will restrict analysis to social issues such as health, welfare,

protection against environmental risk and so on. Nor does it involve restriction to specific political arenas (the regulation of food, the regulation of medicine). If we take the most obviously economic form of regulation, for example, the regulation of public utilities such as energy, water, etc. the inclusive definition is still needed. At the policy level, the analysis of specific sectoral regulation, to be complete, requires consideration of the *processes* involved. Essentially, these are standard processes of public policy, which involve examination not only of policy design and decisions, but of implementation; while studies of implementation require consideration not only of *impact*, but of *results* and *outcomes*. Invariably, such studies demonstrate an implementation gap or deficit together with a range of unintended consequences which produce outcomes at variance with those expected or intended. In a textbook policy system an evaluative procedure would close these gaps and adjust policy objectives to learned experience; but in real policy systems this rarely happens. Generally a process of incremental adjustment takes place over quite long time-scales. As Hood (1972) has demonstrated, such adjustment is principally conditioned by political factors.

THE SCOPE OF REGULATORY GOVERNANCE

Recent literature on regulation in developed economies, more particularly in Europe, reflects this type of policy based conceptualisation and has produced the prevailing terminology of 'regulatory governance', 'regulatory politics' the 'regulatory state', and 'regulatory space' (see especially Majone, 1999, 1997; Hansher and Moran, 1989; Wilks 1996; a more detailed survey of this literature is in Minogue 2001). What are the implications here for the *scope* of studies of regulation? Put in the simplest way, regulation (within any of the meanings examined earlier) must operate within some sort of governance framework, which in turn becomes part of the necessary scope of enquiry. This framework will incorporate institutions and processes of both public and private decision-making, the assumption being that at many points the private domain is subject to control, intervention and influence by the public domain. This gives rise to some uncertainty about the precise scope of regulation itself, the problem being to distinguish it sufficiently clearly from the rest of what government does.

Hood and Scott (2000) coin the term 'the regulation of government' as one that links the 'regulatory state' and the 'new public management' state, defining a regulatory state as 'one that puts heavy emphasis on rule-making, monitoring and enforcement…rather than on subsidies, direct ownership or state operation (p.2). They concede that 'the link between 'regulation' and other activities in government is admittedly a fine one' (p.5), but assist us

greatly by providing a definition of 'regulation inside government' as one that must satisfy three main criteria:

1. one public organisation (or part of it) is attempting to shape the behaviour of another public organisation (or part of it)
2 there is some form of arms-length separation between the two (i.e. there is no co-existing managerial or hierarchical relationship)
3 the regulating body has some formal authority for its regulatory oversight

On this basis they identify seven types of oversight organisation inside government, constituting a 'web of regulation over government' (p.7). These are:

* international bodies like WTO
* bureaucratic agents of legislatures, like the National Audit Office in the UK
* grievance-handlers, such as Ombudsmen, outside the normal public law framework
* bodies independent of both legislature and executive, but with public responsibilities, e.g. committees on merit in public appointments or standards of conduct in public life
* quasi-independent executive bodies e.g. inspectorates
* bodies that regulate across public and private sectors e.g. regulation of health and safety at work
* independent private bodies with the ability to affect states e.g. credit rating organisations

Hood and Scott suggest that the regulatory problems inside government are much the same as for independent regulation, particularly in terms of information asymmetries, relational distance, and compliance costs; but conclude that 'the effectiveness of that regulatory process will be a critical success factor for the working of a managerial state' (p.13). Perhaps provocatively, they argue that this 'new managerial bargain' (p.12) is not such a revolutionary change from traditional government as it appears at first to be: earlier structures may have been replaced but this 'has been in the direction of writing down the rules of the game and setting up more formal structures for applying them' (p.17); and elsewhere they have pointed to the paradox that 'increasing regulation of the public sector has been accompanied by attempts to reduce the burden of regulation on the private sector' (Hood et al., 1999, p.x).

Hood and Scott call for cross-national studies of regulation inside government, and have demonstrated the light that particular case studies might shed on the regulatory state in their analysis of the UK (Hood et al., 1999). Here they broadly define regulation inside government as 'arm's-length [denoting some degree of organisational separation] oversight involving the setting or monitoring of standards [shaping the activities of another department], and based on some element of authority [official mandate]' (p.21). They point out that we are not used to thinking of government as "regulating" itself, though in the last two decades, regulation inside UK government has become an expanding 'industry', as large as the institutions of regulation for the private sector. There has been an increase not only in size but also in formality, intensity and specialisation. They point out that regulation inside government can be distinguished in five different ways: functionally, territorially, sectorally, institutionally and presentationally. It is functionally diverse since regulatory bodies belong to distinct regulatory "families", oversee government activities in different dimensions, and use different toolkits. It is territorially and sectorally diverse since different regulators operate in different regions and different sectors. These regulators are diverse institutionally in terms of their mandated authority and according to whether they are rule-bound or formula-driven. They are presentationally different with respect to the degrees of limelight they enjoy in the media.

Hood et al. (1999) try to define the parameters of regulation in UK with reference to the classification of regulatees. They conclude that it is better to think of this expanding empire in terms of "concentric circles", ranging from a minimal core at the centre to a maximum at the edges. The regulatees can be seen in terms of legal power, state ownership or public financing. Hood et al. (1999) restrict their analysis of regulation inside government to the core circle of the public sector plus the more public part of the mixed sector. The latter includes organisations in the public dimension under both the central government and local bodies. This is the minimalist or conservative approach to regulation inside government. The authors point out that had they adopted a juridical approach, half a dozen regulators of privatised utilities would have entered the population, together with more than seventy administrative tribunals. They also excluded all the EU regulators of the British government, private sector regulators of the public sector, and regulators operating at local-government level.

On this basis the number of regulatory organisations at the national level was shown to be between 130-200, with direct running costs ranging from £700m. to around £1.0bn.

According to this study, the UK government invests far more resources in regulating itself than it does in regulating the privatised utilities. The costs do not include the cost of compliance which the authors calculate is as much as the direct cost of regulation.

Hood et al. (1999) also compare the regulation of government and the regulation of business. They highlight their common characteristics as well as point out their distinctive features. Firstly, unlike their business counterparts, regulators in government cannot prosecute their regulatees. However, the authors point out that the former often do not invoke their prosecutorial powers in practice. While some key business regulators lack powers of criminal prosecution, some regulators in government such as auditors or the Health and Safety Executive have powers to instigate action for illegal behaviour. Furthermore, even though they may lack teeth, they do enjoy power and leverage how indirect that may be. Secondly, ownership makes the responses of regulatees different in government and business. However, ownership in government is dispersed and fenced in by procedural restrictions. Therefore, they too, like their business counterparts, have to resort to indirect methods such as competition (league tables).

COMPARISONS AND METHODS

'We have only reached the point where we know what we don't know about comparative patterns' (Hood and Scott, 2000, p.22)

Undertaking a case study of this depth and detail in a developed country, where substantial prior knowledge and information about governance systems and institutions is readily available is one thing; undertaking a similar exercise in typical developing countries, where such resources are relatively scarce, and often unreliable, is another. We do not even have much in the way of cross-national studies to give a solid grasp of what is often rather loosely referred to as 'international experience' of regulation. Hood and Scott, pointing to the absence of 'any systematic cross-national survey of regulation in government' (2000, p.18) set out a range of research parameters for such an exercise that is daunting in its requirements, and in any case is aimed at comparison in developed countries. The rigorous benchmark they offer simply could not be satisfied in relation to developing country systems of governance.

Attempts to set up basic research frameworks for regulation and governance in developing countries are being pursued. Levi-Faur (2003) agrees that 'the general advance of

regulatory reforms …is beset by temporal, spatial, sectoral, national and international …variations' (p.2) and proposes that a range of methods to provide systematic analysis of these variations can be extracted from a literature (much broader than that attached to regulation) in international comparative studies. He argues that such methods will give a rigorous research framework for case-oriented analysis. Four methods are identified:

*   a *national patterns approach*, comparing national systems, assumes that specific national characteristics exert a major impact on regulatory policies, variations being determined by the embeddedness of specific state traditions

*   a *policy sector approach* comparing a specific sector (e.g. electricity regulation) across national systems may predict convergence within a sector even where there are significant differences between national systems

*   an *international regime approach* predicts that national and/or sectoral activity will be determined by variations in the strength and scope of international regimes (e.g. in trade, finance, labour standards)

*   a *temporal patterns approach* suggests that current activity will be best explained by the shaping influence of past events (war, crises, scandals)

While these are suggestive categories, Levi-Faur does not attempt to argue the relative merits of the four approaches to the analysis of regulation, implying that all are equally valid. Nor does he consider specific problems of their application to developing countries. It might be argued that a limiting weakness is that the choice of any one method would predetermine the findings (in terms of causality) since the researcher would already have decided what was the crucial explanatory variable (sector, nation, international regime, history); while common sense tells us that all of these will be influential, and cannot be neglected in any particular case.

THE 'MEASUREMENT' PROBLEM

The discussion so far, of definition and scope, is based largely on the literature of regulation and governance as it relates to developed economies. The problems identified are considerably compounded when examined in the economic, political, administrative and legal contexts of developing countries. Inevitably the breadth and complexity of

'underdevelopment' itself makes generalisation difficult here, but a principal characteristic might be labelled *institutional* underdevelopment. A principal mantra in the literature on economic reform in the last two decades has been that institutions 'matter' and that effective change involves 'getting institutions right', principles that have been substantially pursued by aid donors not only in relation to financial and market institutions, but also in relation to institutions of law, governance and public management. A relatively neutral, and partly critical literature (see e.g. McCourt and Minogue, 2001; Schraeder, 2002: Leftwich, 2000; Grindle, 1997; Turner and Hulme, 1997) still badly needs to be strengthened by good case studies, not least because much of the substantial donor contribution is more committed to prior principles than to a balanced critique, and is frequently characterised by an absence of evaluation.

But a problem for any empirical work in relation to institutions of governance is the problem of information; how much is available, how much of it is of dubious quality (especially in the matter of official statistics), the extent to which information-hungry quantitative methods of analysis can be relied upon in situations marked by extreme information-deficit. A review of some attempts to develop rigorous approaches to public sector institutions, capacity and governance demonstrates the problems.

MEASURING INSTITUTIONS

Manning et al. (2000) provide a good example of such an attempt. They assume that the actions of public officials, and consequently the performance of their organisations, depend on the institutional environment in which they operate. With this premise in mind, they bring out the strengths and weaknesses of the public sector. They define institutions as 'humanly devised constraints, or [a] set of relational contracts that guide public officials' activities. They [institutions] are made of formal constraints (e.g. rules, laws, constitutions), informal constraints (e.g. norms of behaviour, conventions, codes of conduct), and their enforcement characteristics' (pp.3-4). The authors try to understand the dynamics of the public sector by measuring government officials' expectations of the incentives and constraints on three dimensions of institutional environment – rule credibility, policy credibility, and resource adequacy and predictability; and construct indicators as shown in Table 1.

Table 1: Indicators of institutional environment

Components	Indicators
Rules Credibility	Covers the existence and perceived quality of formal rules in four areas: record management, internal audit, performance appraisal, and project evaluation
Policy Credibility	Covers three aspects: whether policies are consistent, coordinated between different government administrative units, and the extent of political interference/micro management.
Resource adequacy and predictability	Covers six dimensions: unpredictable seasonal absences of personnel due to severe weather conditions, anticipated supply of necessary skills, and general anticipated capacity

Source: Manning et al. (2000)

An official's response and expectation would correspond with the extent of credibility in the application and enforcement of policies and rules.

Manning et al. (2000) also try to construct indicators to measure the performance of public sector organisations. These organisations, by the nature of their work, face severe problems in quantifying their performance. Firstly, performance indicators in the public sector are distinctly organisation or service-specific, though they can be applied over a time period. Secondly, public sector organisations often deal with goods of low contestability and measurability. Despite these impediments associated with the public sector, the authors suggest new approaches in measuring performance: 1) how focused officials have been on results, 2) accountability for adherence to formal rules, and 3) employee morale. These three measures, being a function of institutional environment, are then used to construct performance indicators (see Table 2)

Table 2: Construction of Indicators for Performance

Components	Indicators
Result focus	Whether the organisation was geared towards its objectives, whether it was considered efficient, and whether it had a merit based reward and punishment system.
Accountability	Indicators were with reference to enforceability of regulations, delegation of powers, and accountability to the public at large and to civil society and parliament.
Employee morale	Indicators constructed were job satisfaction and orientational and attitudinal distance and detachment that may develop between managers and staff.

Source: Manning et al. (2000)

The authors construct overall institutional environment and organisational performance indicators on a scale of 0 to 10 (0 being the worst and 10 indicating the best performance). They calculate these indicators separately for different countries. The relationship between performance and institutional environment is assessed by regressing three components of aggregate performance as given in Table 1 on institutional environment. Empirically based results (the Bolivian public sector) show that there is a statistically positive relationship between institutional environment and performance indicators.

The authors argue that the public sector can be grouped in three related ways: firstly, what can be done at the government level; secondly, what can be done to make a particular group of people perform more effectively; and thirdly, how some public sector organisations can be made to improve their performance.

MEASURING PUBLIC SECTOR CAPACITY

Polidano (2000) points out that the use of numerical indices to compare national performance is well-established . There are many indices (the UNDP human development index, indices in the statistical appendices of World Development reports, Transparency International's corruption perception index, the world competitive rankings, OECD, UN and WB's good governance indicators and different commercial and business indicators of country risk) which are widely cited. Though crude and often highly subjective, these indices play important roles in highlighting relative variations in a given attribute for making systematic comparison. However, in their attempt to cover a lot of ground, indices tend to high levels of generalisation and invariably over-simplify complex realities. None of them,

including the good governance indicators, looks at the capacity of state apparatus or permanent administrative machinery of the government. Surveys, prepared by commercial risk-assessment organisations, have clear limitations due to the subjective nature of the responses on which they are based, and the socio-political and cultural leanings of the organisations compiling and undertaking them (a similar critique might be made of donor analyses of this type e.g. the egregious credibility index in the 1997 World Development Report (World Bank, 1997). Despite these shortcomings, the companies who compile these assessments insist that they are reliable and credible; but, of course, they have a commercial interest in making such a judgement.

Polidano therefore attempts to construct a "policy-neutral" index of public sector capacity, restricting this to central government. This index (see Table 3) attempts to underline the enforcement or implementation dimension of policy rather than policy prescriptions or decision-making. The author defines capacity as the ability of an organisation to act effectively on a sustained basis in pursuit of its objectives, while public sector capacity is broadly defined in terms of policy capacity, implementation authority and operational efficiency. However, the author does not limit his discussion of a public sector capacity index within the confines of the bureaucratic machinery of the state but also includes those factors which are external to the public sector but still play an important role in defining and cultivating public sector capacity. He calls this the "enabling environment" (see Table 4).

Table 3: Typology of Indicators of State Capacity

Component	Indicators	Description
Policy capacity	Completeness of a country's data in international publications.	Measures the ability of bureaucracy to collect information.
	Technical competence or bureaucratic quality.	Measures the ability to provide policy advice
	Political intrusiveness/policy conditionality	Measures institutional weight of the bureaucracy
Implementation Authority	Effectiveness of implementation of government decisions	General indicator
	Corruption in the public sector	Measures the effective implementation of government decisions.

	Net primary enrolment in school	Measures the state's ability to enforce rules.
	Tax revenue mobilisation/ Tax evasion	Ability to enforce tax laws and combat evasion.
	Percentage of labour force working in the informal sector	Ability to enforce labour laws
Operational efficiency	Wages and salaries as a percentage of central government expenditure	High percentages indicate overstaffing levels
	Net financial flows from government to public enterprises as a percentage of GDP	Measures the overall efficiency of the public enterprise sector.
	Spending on teaching materials as a percentage of total public spending in education	Measures the quality of education that is delivered in state school.
	Bureaucratic red tape/ delays	Measures the quality of service.

Source: Polidano:2000

The index of "enabling conditions" is defined as socio-political and economic conditions and highlights those external factors which profoundly affect public sector capacity. These are given in Table 4.

Table 4: A Typology of Indicators of 'Enabling Environment'

Component	Indicator	Description
Ethnic/ regional fragmentation	Ethnic linguistic fractionalisation/ tensions	Measures the extent of cleavages and political impact
Civil society	Daily newspaper circulation, no. of radios per thousand people	Measures the extent of public interest in public affairs.
	democratic accountability/ political responsiveness	Measures the extent of public concern in politics.
Political instability	Political instability/ orderliness of regime transfer/ military influence on politics	Direct indicators of political instability.
Economic crisis	overall deficit/surplus as percentage of GDP, central government expenditure, rate of inflation, central government expenditure	Pressure on government finances, coupled with impact of prolonged wage restraint.
Aid dependency	Aid as a percentage of GDP	Direct indicator.

Source: Polidano (2000)

MEASURING 'CAPTURE'

Hellman et al. (2000) try to estimate how firms exert influence on the state. They analyse the relationship between state and firms in transitional economies within the framework of state capture, defined as the 'capacity of firms to influence the formation of the basic rules of the game (i.e. laws, rules, decrees and regulation) through illicit and non-transparent private payments to public officials' (p.2). They assume that firms can interact with the state in three distinct, but potentially overlapping, ways. Firstly, the firms can be the victim of the "grabbing hand" state where public officials use their position to extract undue economic rents (bribes), called administrative corruption. Secondly, the firms can attempt to shape the legal and regulatory framework to its own advantage either through private payments to public officials, called state capture; or thirdly, without necessarily resorting to these forms of rent-seeking, simply exert influence.

The authors develop a cross-country and multi-pronged measure of the extent of state capture by dividing countries into "capture economies" where the purchase of state policies and laws is pervasive, and those where it is not. The analysis is based on data from the

1999 Business Environment and Enterprise Performance Survey (BEEPS), a firm level survey to assess obstacles in the business environment across 22 transition economies. The survey has significant methodological advantages over previous governance and corruption indices in that it relies on the direct experience of firms rather than external assessments and individual perceptions. An index of state capture has been constructed on the basis of the firms' responses on the extent to which different forms of corruption in different categories have had a direct impact on their business:

➢ sale of Parliamentary votes on legislation to private interests;
➢ sale of Presidential decrees to private interests;
➢ Central Bank mishandling of funds;
➢ sale of court decisions in criminal cases;
➢ sale of court decisions in commercial cases;
➢ illicit contributions paid by private interests to political parties and election campaigns.

Finally, an index of the capture economy for each country is constructed by taking the average across all the categories. The authors argue that on this evidence state capture is a strategy of new and dynamic firms trying to compete with powerful incumbents who retain substantial control over state resources. However, state capture for private gains is clearly associated with substantial costs both in terms of overall economic performance and the capacity as well as commitment of the state to provide critical public goods for the development of the market economy. Kaufmann and Kraay (2002) supports this finding; they point towards a survey where well over 30 percent of firms in countries such as Moldova, Russia, Ukraine and Azerbaijan reported that they had been significantly or very significantly affected by the prevalence of state capture in their industry.

MEASURING GOVERNANCE-DEVELOPMENT RELATIONSHIPS

If we look at the growing body of literature on governance, we find that researchers have sought to establish (and claim to have found) a close association between high-quality of governance and public institutions and growth in per capita incomes, higher levels of investment, and other positive development outcomes (Hellman et al., 2000; Kauffmann et al., 2002, 2000; Kaufmann et al., 1999a; Knack & Keefer, 1995). Kauffmann et al. (2000) take this correlation even further when they contend that similar types of association can also be seen at sub-national level, though they   point out that most of this evidence is

anecdotal rather than systematic, and there is a need to methodically measure governance, its determinants and its consequences for economic and social development

The literature attempting to measure governance can be classified into two main categories. In the first category appears research that tries to determine the relationship between governance and development, and concludes that it is poor governance more than anything that is responsible for poor economic development in the less developed economies. In the second category appears efforts to develop governance indicators in support of such a view. Such indicators are argued to guide policy makers in choosing policies that promote rather than retard economic development (Kauffmann et al., 2000; 2002; 1999a; 1999b). Kaufmann and Kraay (2002) describe and analyse a database containing over 300 governance measures, allowing a comparison between 155 and 173 countries. The data has been collected from different sources, including international organisations, political and business risk rating agencies, think tanks, and NGOs. The methodology includes both polls of experts and cross-country surveys of firm managers or citizens in general. The authors construct six governance clusters, each representing a set of different variables, corresponding to six fundamental governance concepts. The authors prefer to use aggregate over individual indicators drawn from a wide range of sources. These aggregate indicators are likely to be less precise, and are measured in different units but can be converted to a single comparable scale, and allow formal statistical testing of hypotheses regarding cross-country differences in governance (Kaufmann et al., 1999a). The six governance clusters are described as follows:

Table 5: Typology of Governance Clusters

Governance Clusters	Governance Indicators	Description
Authority	Voice and Accountability	Measures various aspects of political processes, civil liberties and political rights.
	Political Instability	Measures the perception of the likelihood that the government in power will be destabilised or overthrown by unconstitutional and/or violent means.
Government Capacity	Government Effectiveness	Measures perception of the quality of public service provision, the competence of civil servants, their independence from political pressures, and the credibility of government commitment to policies.

	Regulatory Burden	Measures the incidence of market-unfriendly policies as well as perceptions about excessive regulations, especially in foreign trade and business environment.
Respect of Citizens and State for Institutions	Rule of Law	Measure the extent to which agents have confidence in and abide by the rule of society.
	Control of Corruption	Measures the perception of corruption, defined as the exercise of public power for private gain.

Source: Kauffman et al 1999a

Such a broad dataset has certain disadvantages in that it is likely to hinder cross-country comparability and universal application of results. Firstly, the countries with good economic indicators are likely to receive a more favourable ranking; secondly, it will be difficult to account for regional variations (transitional economies for example), and lastly, the rating is likely to be influenced by the political or ideological agenda, bias or preferences of the organisations or authors For example, some studies *assume* that democratic governance must be a developmental preference, despite clear evidence that in many countries, e.g. China, non-democratic governance correlates with exceptional levels of economic growth; similar assumptions underlie studies on corruption and economic performance.

Kauffmann et al. (2000; 2002) use a "traffic light" approach, and divide the selected countries into three broad categories: countries in "governance crisis", countries "at risk", and countries "not at risk". This approach flags vulnerabilities and points towards the need for reform in those countries that face severe governance challenge without going into needless discussion on the precise ranking/score of individual country. Though imprecisely estimated and despite wide variations across the cross-section of countries, the empirical results show a strong positive causal relationship from improved governance to better development outcomes. Kauffmann et al. (2002) develop a revised governance database similar in terms of their earlier work developing composite governance clusters and methodology, but derived from additional sources including two new polls of experts (namely the Columbia University State Capacity Study (CUD) covering 109 countries worldwide, and the PriceWaterhouseCoopers (PWC) Opacity Index covering 35 countries), and two recent surveys (one conducted by the World Bank, and a private survey). These additional sources have served to expand the country coverage and make the governance index more reliable and representative. This approach allows them to identify extreme cases of good governance or bad governance but still fails to sort countries into other than very broad governance categories.

Knack and Manning (2000) call the governance indicators discussed above 'first generation' indicators. They criticise the inability to determine an association between institutions and performance, i.e. they cannot show whether a particular type of reform will lead to specific performance improvement. Secondly, they are too broad and generalised to be of any value in identifying the underlying causes of particular governance problems and in suggesting practical reform targets. These limitations direct us towards 'second generation' governance indicators that attempt to respond to these limitations and try to measure the performance of government processes and institutional arrangements. Different World Bank business surveys have collected information on the quality of service delivery such as frequency of power outage or disruption in water supply. Similar types of information has been gathered by Manning et al (2000) in the case of public officials, whose performance is judged with the help of indicators such as accountability, employee morale, and a focus on results. Rauch and Evans (2000) construct several indices such as an internal promotion and career stability index, and a civil service compensation index and find a strong relationship between these indicators of a well institutionalised bureaucracy and effective development performance. Beck et al. (2001) use a database of political institutions assembled by the World Bank staff for 113 variables and 177 countries for the period 1975-98. The database is designed for studying issues such as political conditions for economic reform, the political and institutional roots of corruption, and the appropriate and institutionally sensitive design of economic policy. The variables provide information on elections, electoral rules, type of political system, presence of military officers in government, and party composition of the opposition, government, and coalitions. It must be said that such constructs involve a host of prior and often unstated assumptions about the character and significance of these various political institutions which remain substantially under-researched and poorly understood. They appear to be operating at much too high a level of generality to be of any practical assistance to reform decisions in the area of regulatory policy.

THE IMPLICATIONS FOR POLICY TRANSFER

'Regulation is not a concept that travels well' (Black, 2000, p.2).

The public policy mode of analysis is particularly useful for identifying the problems which arise when regulatory policies and institutional forms are "transferred", by some process of emulation, from one policy culture to another. Policy transfer between national systems has a long history, but has been given new impetus recently through the use of conditionality by

multilateral and bilateral aid donors to impose policy and institutional changes upon the governments of transitional and developing economies. Since aid donors are likely to bring pressure to bear on developing country aid recipients to introduce regulatory systems and methods which characterise the economic policy systems of developed countries, issues of appropriateness and adaptability arise. These attempted transfers generally reflect donor values and preferences relating to economic structures and behaviour (structural adjustment policies), to systems of state management (new public management), and to types of political institution and regime (good governance).

Policy transfer becomes a problematic issue once we accept that 'regulation is embedded in distinctive cultural and institutional complexes … [and that] it is an organic regime rather than an autonomous set of rules' (Wilks, 1996, p.549). The notion that regulatory models established in developed economies can be transferred into a contextless environment is clearly a dangerously naïve conception, and there may well be a need to adapt idealised models of regulation to particular variations between national, political and administrative cultures, so that an adaptive process must be specific to each national regime (Majone 1991). It is even the case, as Wilks has argued, that there are diverse forms of capitalism, and potential therefore for a variety of interactions of capitalism and regulation. Such complexity is inevitably daunting both for national decision-makers, and for aid donors concerned to promote more efficient economic policy and practise. The tendency for both to grasp at idealised blue-prints is unsurprising, but likely to produce the 'implementation deficit' characteristic of many public policies in developing countries. There is a clear need for research into such problems of adaptation and implementation in order to elucidate the probable constraints upon regulatory innovation, including systemic weakness and political resistance.

But as this paper has argued, researchers are faced with difficult terrain. The choice of an appropriate definition of regulation is beset by the conceptual variations discussed in the first part of this paper. The use of a simplified working definition has obvious appeal, and is more likely to produce theoretically neat models or formulations. But in failing to capture the complexity of real-life governance, this approach is unlikely to make much of a contribution to empirical understanding or to more effective public policies. The argument for a broader working definition is that this compels engagement with the difficulties of real practice, and at least will produce a better understanding, both for researcher and practitioner of the real limits to theory.

Comparison is an equally unreliable tool of analysis. An emphasis on cross-national similarities tends to produce poorly founded claims of policy convergence across states and sectors. An emphasis on variations is used to suggest predictive scenarios which, when tested against specific cases, often turn out to have low explanatory value. Well-founded cross-national studies demand levels of information that for most developing countries simply do not exist. It is this problem also which undermines many existing attempts to construct rigorous methods of measurement in relation to systems of governance. An enduring weakness of such efforts is the assumption that 'the only things that count are those that can be counted', ensuring that the outcomes will be distorted representations of reality.

WHAT IS INDEPENDENT ABOUT INDEPENDENT REGULATION?

It is clear that in developing countries, regulatory systems both internal and external to government appear to be weak in general. The reasons for this weakness need to be established, and are hypothesised to lie partly in low levels of government legitimacy, partly in government inefficiency and partly in 'political capture'. Research in these significant areas is particularly prone to the weaknesses of definition, comparison, and measurement discussed in this paper; so, therefore are the economic policy reforms dominant in current reform agendas. These points are seen to have particular relevance in relation to the idea of 'independent regulation'. This is a phrase much in use but one which appears to produce considerable misunderstanding. Coined in the policy systems of developed economies with apparently well defined separations between economic, legal, administrative and political institutions, it begins to show strain even in this context when subjected to detailed analysis, as demonstrated in the arguments cited earlier from Hood et al. (1998) and Hood and Scott(2000). The developed economy literature on regulation generally conceives regulation to be 'independent' where an agency is created with specified powers, and means to enforce these powers. In many cases such agencies are administratively separated from executive government, as in the USA, or have constitutionally specified powers, as in France. The UK system of 'separation of powers' is altogether more ambiguous and productive of a range of agency types. But even in these systems it is possible to argue that the political executive retains fundamental control through the power of appointment, notoriously exercised in the current American administration to neuter the intended operation of regulatory powers by placing a politically compliant head of agency . Less controversially, in the UK the railways regulator was notably 'independent in word and deed, but was quite unable to influence or prevent regulatory policy changes by the responsible Minister. In France, constitutional

separation is neutralised by the closely integrated bureaucratic culture, rooted in the common recruitment and training ground of the 'Grandes Ecoles'. If we apply this more politically sensitive analysis to developing countries we simply cannot expect the creation of arms-length agencies that can hope to establish any real 'independence' of the dominant political and bureaucratic institutions of the central state, especially where partisan organisation itself may depend on the careful exercise of political patronage. In short, where regulators, and even in many cases judges, owe their positions to the political-bureaucratic elite, the possibilities for the exercise of independent judgement and action are considerably reduced, or may be non-existent. Since privatisation and regulatory reforms are largely concentrated in public utilities where there is a strong public interest factor, and therefore political sensitivity to both policy reforms and to regulatory practice (see, for example, Mitlin's (2004) discussion on the water sector), it is difficult to envisage what 'independent regulation' could possibly mean, or how it might be somehow insulated from overriding political considerations. It would make more sense if regulatory reforms deliberately recognised these realities and incorporated them in to agency models, rather than constantly attempt to create an unlikely autonomy. There is increasing evidence now that arms-length state agencies are characterised by complex cultural responses and unintended effects, both in developed and developing economies. (Hood, Talbot and Pollitt 2004); but this is set of arguments that falls on deaf ears where the major aid donors are concerned. This makes all the more important that research should focus on identifying and describing local variations in the dominant model of 'independent' regulation. A recent analysis by Chakrabarty (2000) suggests that developing countries are to be found in the 'waiting room of history', as they seek to emulate the modernity first revealed to them by a universalising Eurocentric culture, in a form of mimicry which entails a dismissal and rejection of more traditional values. He quotes a character in V.S. Naipaul's novel 'The Mimic Men': 'My first memory is of taking an apple to the teacher. This puzzles me. We had no apples on Isabella. It must have been an orange, yet my memory insists on the apple'. In this metaphor, local culture is edited out by the cultural imposition of the coloniser; yet it is the orange that represents reality. We might say, more prosaically that apples and oranges cannot be compared; we can have either one or the other, but a hybrid simply will not work.

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