

Regulatory Capitalism: Policy Irritants and Convergent Divergence

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The concluding part of this volume may be the right place to discuss the issue of the outcomes of regulatory capitalism. The analysis so far has only touched on the outcomes, and even here we cannot offer more than some suggestions on how to approach the issue. Not only is the new order still in the making, but its outcomes are unlikely to be straightforwardly positive or negative. The greater the change, the more difficult it is to control and capture its outcomes. Consequently, what may seem at first to be a victory of one side or of a certain idea may develop into an ambiguous outcome that shifts the balance of power in unforeseen ways. Outcomes in the center (or wherever the process of diffusion begins) may differ remarkably from outcomes in the periphery; and convergence on the general framework of regulatory capitalism may be accompanied by significant divergence in practices, applications and analyses across both sectors and nations. In short, one should not expect the ideas and institutions of regulatory capitalism to fall on fertile ground and be welcomed by caring guardians in all countries and sectors.

To be sure, at a fundamental level the evaluation of the outcomes rests on certain values and expectations of economic and social progress. To ask, like Voltaire, “why can’t the laws that guarantee British liberties be adopted elsewhere?” is to define an implicit agenda for political, economic and social change in which we all become “British”.¹ But is it desirable and possible? As a liberal, Ian Buruma tells us, Voltaire had to assume that these British laws could be adopted elsewhere. A conservative would be more skeptical towards the idea that “British liberties”, or by extension “regulatory capitalism”, could be adopted everywhere. Indeed, Voltaire anticipated the objections of his opponents. They would say that you might as well ask why coconuts, which bear fruit in India, do not ripen in Rome. Voltaire’s answer? Well, that it took time for coconuts to ripen in England too. “There is no reason”, he said, “why they shouldn’t do well everywhere... So let’s start planting them right now”. Voltaire’s liberal optimism is still evident in many of the efforts to create

¹ The reference to Voltaire draws on Baruma (1999).

liberal and prosperous states around the world and in the transfer of regulatory institutions across countries and sectors. Even if the experience of the world over the last two centuries should guide us away from Voltaire's optimism, it should not make us pessimists. A mixture of optimism and pessimism, or "pessoptimism",² may be the best basis from which to evaluate its outcomes. Let us elaborate on these issues with regard to the unforeseen implications of change and the expectation of convergence on regulatory capitalism.

Regulatory Capitalism in Foreign Jurisdictions: A Transplant or an Irritant?

One of the inherent weaknesses of the literature on diffusion and policy transfer is the tendency among their proponents to think about the object of diffusion in mechanistic terms. This is reflected explicitly as well implicitly in thinking of the objects of policy transfers as "policy transplants" into different policy landscapes, with the expectation of positive effects once they have been integrated into the new milieu. In a simple-minded interpretation of the outcomes of regulatory capitalism, the rules, institutions and practices that have been developed in core countries and sectors will be diffused in a mechanistic way to peripheral countries and sectors. However, the alternative conception of "policy irritant" may be more useful. Drawing on this volume's contributions to the issue, we can clearly conclude that most cases of diffusion are based not on rational learning but on a myriad of mechanisms in which the rational component, if any, remains small. Thus, it seems that insertion of the "diffused" institutions does not necessarily have to be perfect and well-adapted to the existing institutional context - on the contrary, as "irritants" they can produce many unexpected effects. Yet this notion, derived from the concept of "legal irritant",³ suggests a different process of change and implies different outcomes. To introduce the notion in the original words of Teubner:

² To borrow Habibi's term (2001).

³ The notion of "transplant" comes from studies of comparative law (in which the notion is expressed in narrower terms such as "legal transplant" rather than more generally as "policy transplant"). The notion reflects the understanding that law was always "global" and that those national and cross-national (for example, common and civil law) systems of law were always tuned to developments in other systems (Watson 1974).

I think “legal irritant” expresses things better than “legal transplant”. To be sure, transplant makes sense in so far as it describes legal import/export in organismic, not in mechanistic, terms. Legal institutions need careful implementation and cultivation in the new environment. But transplant creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself, playing its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration. However, when a foreign rule is imposed on a domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as fundamental irritation which triggers a whole series of new and unexpected events. (Teubner 2001, 418).

In other words, the notion of “policy irritant” could suggest that the expectations that the tenets of regulatory capitalism will have the same meaning and will serve the same functions and interests in different systems, national or sectoral, domestic or international, is based on a misleading biological and mechanistic metaphor of “subsystem” of the social order. There are no good enough reasons to assert that these subsystems will have the ability to be cognitively open but normatively closed and thus to significantly transform the legal norms, mechanisms and institutions that they import (Scott 2004, 151). This leads us to revise the expectation of convergence in outcomes and to discuss the assumptions about causality that are prevalent in most of the thinking about the new capitalist order.

Divergent Convergence

Outcomes of “policy transfers” and diffusion are often presented and discussed in terms of expectations of either convergence or divergence (see for example, Holzinger and Knill forthcoming). Convergence theories postulate that growing international integration will have direct implications for domestic political arenas. Divergence theories suggest that growing international integration will not deflect states from their historically rooted trajectories, so that policies and institutions will lead not to convergence but to constant and perhaps even increasing variations (Busch 2004). Diffusion theorists’ expectation of convergence reflects a scholarly bias that is not necessary implied and embedded in the logic of policy transfer and diffusion (cf. Jacoby 2000, 8). In particular, the process of policy diffusion may

involve convergence and divergence at the same time. Indeed, Gabriel Tarde (1903), one of the founding fathers of sociology and author of *The Laws of Imitation*, describes the process of diffusion as one in which agents simultaneously converge on a fashion and distinguish themselves from others.⁴ We occupy different sections of the bandwagon and quickly create new stratifications and differentiations within it. The bias inherent in some of the diffusion and policy transfer literature towards a sort of “convergence” might best be balanced by a notion of change that includes both convergence and divergence as important dimensions of the new order. Theoretically, the approach introduced here has a parallel in the reformulation of the objects of diffusion as “policy irritants”, as discussed above. It is hard to identify how the diffusion of multiple instruments and institutions across many sectors and countries fosters policy convergence and divergence. Probably we need more refined models and theories to make sense of how these “irritations” cause changes in outcomes that are more than “transitory” adjustments to the *Zeitgeist*.

A first issue to consider is how persistent tendencies towards convergence (or divergence) reflect different (or similar) causes. It might be useful to highlight the possibility of similar causes (the same diffused innovations) leading to different outcomes (in different sectors or countries) and of different causes leading to similar outcomes. The space of outcomes that this possibility opens is set out in Table 1. What we implicitly assume too often is that similar causes lead to similar outcomes (cell I) and that different causes lead to different outcomes (cell IV). Yet it may well be the case that similar causes result in different responses and different outcomes (cell II). This is a paradoxical result at least if one holds to an over-simplified ontology in which no additional variables and relations are considered (Hall 2003). The dangers of oversimplification are certainly great since we are susceptible to the influence of grand theories of social science and to the methodological dictates of parsimonious modeling (Ragin 2000). It is not a paradoxical result at all if, for example, timing is introduced into the analysis. Indeed, this is, for example, the argument behind the substantial literature on the divergent effects of industrialization on state-building (see Gerschenkron 1962) and behind the notions

⁴ It might well be that we all wear jeans to work; but we make an effort to distinguish ourselves from others either by the sort of jeans we wear or by adding accessories to them. We want to be similar to others and at the same time different.

of sequencing as developed by Collier (1975) and Pierson (2000). It is clear that the intensity of a certain cause may vary over time. Yet again, often the same outcome might be the result of different causes (cell III). In our case of diffusion, we can posit that one country establishes a regulatory agency because of internal pressures from professional groups while a second country does so only because the other one has already done so and emulates this previous action. Related to outcomes, we can find that a country improves its regulatory environment because of increasing delegation to independent agencies, while another country also improves its regulations but by strengthening its legislative assembly.

	Outcomes	
	Convergence in outcomes	Divergence in outcomes
Similar causes	I (too often assumed to be the case)	II (paradoxical result)
Different causes	III (too often ignored)	IV (too often assumed to be the case)

Table 1: Causality and Outcomes

Beyond the various notions of global integration that are embedded in the debate on the outcomes of policy diffusion are some important differences on what is trivial and what is profound in the changing patterns of the governance of the world economy. For some, convergence, to the extent that it occurs, is on trivial aspects, while divergence is evident on substance (see Table 2, cell III). For others the divergence is on trivial aspects while convergence is on the profound aspects of the policies in question (cell II). In between there are those who consider both convergence and divergence to be trivial phenomena and the debate on these issues misleading (cell I). Yet, depending of the approach, it might well be that some profound aspects of the policy converge while at the same time other aspects, no less profound, diverge (cell IV).

One of the difficulties in reaching consensus about the processes of change is that the criteria of what is trivial or profound differ across disciplines and even within them. For some, the mere global growth of schooling (educational institutions and participation in them) provides strong evidence of globalization. Others tend to assume it away and point to the divergence in cultural approaches to education. In the same manner the rise in the number and resources of regulatory agencies that deal with market failures may serve as a criterion of globalization, while the evidence of specific market failures in some countries may serve to support the view that there are divergent tendencies in this sphere. The convergence-divergence issue opens a debate on what is important and what is not in the making of the new order of regulatory capitalism. Is it privatization that should get most of the attention, or should it be the creation of new regulatory command centers at the core of the state? Does the conjunction of freer markets and more rules mean that the rules serve markets or that markets are the servants of the rules? What is less trivial in the change processes that manifest themselves in both rules and privatization of ownership?

	Convergence	
	On trivial aspects of the policy	On profound aspects of the policy
Divergence on trivial aspects of the policy	I Not interesting - misleading discourse	II Implicit argument of 'convergence theories'
Divergence on profound aspects of the policy	III The other side of policy - transfer?	IV These outcomes are often ignored or underestimated.

Table 2: Profound and Trivial in the Convergence/Divergence Debate

Regulatory Capitalism: Long live the Pessoptimist

There are, therefore, many difficulties involved in the evaluation of the effects of the new regulatory order, probably more than in the assessment and explanation of its diffusion during recent years. Not only is regulatory capitalism a moving target but,

it may also result in unexpected and even contradictory outcomes. Moreover, convergence on regulatory capitalism, if it occurs, may be the result of different causal processes in different sectors, nations and levels of analysis; and there are still some important disagreements among analysts about what is to be considered “trivial” and what “profound” in the making of the new order. Against this background, some healthy doses of both pessimism and optimism may be in order as one proceeds to evaluate the outcomes of regulatory capitalism. Long live the pessoptimist.

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