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Regulatory capitalism

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1. Introduction

Governance in capitalist polities is increasingly evolving as a patchwork of regulatory institutions, strategies and functions. This patchwork varies widely across regions, nations, regimes, sectors, issues and arenas, but the increase in the role of regulation in shaping policy and politics is evident almost everywhere. Regulatory processes condition the operation, manipulation and deployment of political, social and economic power. The penetration of regulation as an institutional design, as a practice and as a discourse to all spheres is captured by the concept of regulatory capitalism (Levi-Faur 2005; Braithwaite 2008). Regulatory capitalism tells us simply that capitalism is a regulatory institution—one that is being constituted, shaped, constrained and expanded as a historically woven patchwork of regulatory institutions, strategies and functions. It asserts that regulation made, nurtured and constrained the capitalist system and capitalism creates the demand for regulation. In doing so, the concept reasserts the inseparable, intimate and interdependent relations between politics, society and the economy. This, in turn, allows us to think about basic institutions of capitalism such as the corporation (Parker 2002) and explore risk management as a public function that both constitutes and mediates capitalism (Moss 2004; Shearing 1993).

1 Sections of this chapter draw on Levi-Faur (2005, 2011b). I acknowledge with thanks comments from Peter Drahos, Christine Parker and Colin Scott.

Capitalism is understood in this perspective not simply as a system of commodity accumulation via markets, in which things with use values are converted into things that have exchange value. Instead, it is understood as a patchwork of institutions that constitute and govern the triplet of markets, society and state and the imaginary borders between them.

Shifts in commodity accumulation depend on redefinitions of property rights, the latest and most important of these being the evolution of intellectual property rights (property rights are constitutive regulation). Constraining and empowering regulation are ways in which capitalism stabilises and adapts to the consequences of its main mission of commodity accumulation—for example, limiting patent duration means that monopolies over medicines come to an end. However, this is not a restraint on commodification, but rather eliminates one type of commodification (the patent on the invention) while allowing other property rights (for example, a trademark over the medicine, the property in the tangible product) to continue.

The concept of regulatory capitalism builds on and extends the observations on the rise of a particular form of state—the *regulatory state* (Majone 1997; Levi-Faur 2014)—and social governance via rule making, rule monitoring and rule enforcement (Braithwaite 2000; Scott 2004). At the same time, it strives to do more—namely, to embed the notion of the regulatory state in the literature on the capitalist state (Offe 1984; Jessop 2002; Hay 1999) and the literature on the autonomy of the democratic state (Dryzek and Dunleavy 2009; Nordlinger 1987). While the regulatory state literature captures the extent, scope and direction in which regulation shapes national-level institutions, the concept of regulatory capitalism allows us to explore the relations between the state, on the one hand, and the capitalist order, on the other. When we say or write 'regulatory capitalism', we look beyond the state as a domestic political institution, and, at the same time, make a theoretical judgement about the relations between states and markets. This, in turn, helps advance a 'constitutive interpretation' of the role of regulation—a perspective that focuses on the role of regulation in the continuing expansion, adaptation and transformation of capitalism. In this interpretation, states constitute markets and markets constitute the state. The chicken starts with the egg and the markets with the state. Not only are the state and its regulation necessary conditions, they are also the causal factors behind the creation and institutionalisation of markets. Commodification via new regulatory designs that shape incentives and choice—rather than deregulation—is the major characteristic of our changing politics, economic and society.

Redistribution is increasingly determined in the regulatory arena and, thus, we should think about the welfare state and about redistribution as a system of regulatory rather than fiscal transfers (Levi-Faur 2014; Mabbett 2011; Leisering 2011; Haber 2011). The expansion of capitalist governance is primarily regulatory rather than simply and solely via fiscal means. This means that the expansion of the welfare state (and the state more generally) is best captured via measures of regulatory impact rather than via accounts of state budget.[2]

Why regulatory capitalism? Why not work our way through the maze of social, political and economic changes with the help of perhaps more modest and more widespread concepts such as the state, capitalism or even the regulatory state? The concept of regulatory capitalism offers a broader and more rewarding understanding of what is going on around us—certainly, more than the idea that the current order is about the 'free market' or that liberalisation, privatisation and deregulation are about the retreat of the state or depoliticisation. In addition, it has the advantage over the concepts of both the regulatory state and regulatory governance in the sense that it requires us to think not only about institutions in general but also about capitalist institutions in particular. In other words, it brings capitalism back in (Streeck 2011). One should remember in this context that capitalism is rarely analysed from a regulatory governance point of view. It is the elephant in the room of scholarly literature on regulatory governance as much as regulation is the elephant in the room in the literature of the political economy of capitalism. The concept of regulatory capitalism aims to move beyond the walls that separate the two bodies of literature and the two scholarly communities. This move should make both capitalism and regulation more central and more legible than they are now.

2. Regulation, the state and beyond

The regulatory state is one morph of the capitalist state (Dryzek and Dunleavy 2009; Levi-Faur 2014). This means that one of its primary roles—perhaps secondary only to internal and external security—is to nurture a process of capitalist accumulation and commodification

2 Of course, longitudinal annual national accounts of regulatory impact—national accounts that will redefine and extend what a national budget really is and provide international statistics similar to those of gross national product—have not been developed so far.

via various regulatory means, but most critically via regulation for competition (Offe 1984; Levi-Faur 1998). Note that both internal security (policing) and external security (military might) depend on plenty. Therefore, the economic logic of capitalism and the security logic of the state go hand-in-hand—that is, power and plenty are interdependent (see Katzenstein 1977). The state depends on a process of accumulation, which, in turn, depends on its power and capacity to nurture the process of commodification, nowadays mainly by active promotion of competition and 'competitiveness'. To fulfil its role as guardian of the capitalist economy, the regulatory state has to be relatively autonomous. The resilience of the capitalist system itself, especially in times of rapid change, depends on this systemic autonomy, where the process of capitalist accumulation sets the limits on autonomy. The state has to protect the functioning of the capitalist system and even nurture it. In this sense, it is not fully autonomous but only partially so.

These limits on the autonomy of the state are sometimes taken for granted by analysts who focus on the interpersonal and intersocial interdependencies between the state's elected and nominated officials and business. The literature on the relative autonomy of the state contrasts these two dimensions of relative autonomy in conflicting terms as if one is more important than the other. In my account, these are two important dimensions of the relative autonomy of the regulatory capitalist state. Still, the interdependent relations between the state's elected and nominated officials, on the one hand, and the capitalists, on the other, are a secondary feature of a more systemic dependency of the state on the process of capitalist accumulation. When conflicts occur between the demands of capitalists (for example, subsidies or favourable regulations) and the demands of capitalism (for example, competition or creative destruction and economic transformation), autonomous state officials are expected to favour capitalism over the interests of the capitalist class. The autonomy of the state and its officials is nonetheless *relative*, since the requirements of capitalism will prevail over other demands and needs.

The autonomy of the regulatory state is expressed in its claim for a legitimate monopoly over the deployment and distribution of power through rule making, rule monitoring and rule enforcement. It is this *claim* of monopoly—which may be delegated or shared, practised or not, at will or under constraint—that matters. In this way, the regulatory state is distinguished from the police and warfare states that are defined by their claim of a legitimate monopoly on the means of violence; and from the welfare state, which is defined by its aim of welfare for all citizens. Of course, the claim of a monopoly does not suggest *actual* monopoly either now or in the past. A claim is just a claim, no more and no less, and there are gaps with regard to the *actual* monopoly over the regulatory distributional authority just as there are gaps with regard to the actual monopoly of the means of violence.

While it is tempting to focus the discussion on the regulatory state, it should be recognised that regulatory globalisation, on the one hand, and domestic centres of regulatory powers, on the other, augment and compete with the regulatory state (Braithwaite and Drahos 2000). Here, the concept of regulatory capitalism is useful as well. It suggests that regulation and rule making are major instruments in the expansion of global governance, and takes regulation theory and regulatory analysis beyond national boundaries (hence, also beyond the nation-state). The locus of the analysis is simply shifted from the state to capitalism and the perspective is expanded—up, down and to the side(s)—to envelop not only the capitalist state but also the capitalist society (or market society) and the capitalist economy (or simply the economy). The agents of objects of regulation are not merely state actors anymore, and the regulatory space is extended beyond national borders and traditional administrative law. The concept also moves regulatory analysis beyond formal state-centred rule making and therefore towards civil and business regulation and decentred analysis of regulatory systems (see Levi-Faur 2011a). It also denotes a world where regulation is increasingly a hybrid of different systems of control, where statist regulation coevolves with civil regulation, national regulation expands with international and global regulation, private regulation coevolves and expands with public regulation, business regulation coevolves with social regulation, voluntary regulations expand with coercive ones and the market itself is used or mobilised as a regulatory mechanism.

3. Regulation of/for/and/with commodification

As noted at the beginning of this chapter, governance in capitalist polities is increasingly designed as a regulatory system—that is, as a patchwork of regulatory institutions, strategies and functions. One of the most useful ways to understand the relations of regulation and capitalism is via the concept of commodification. Commodification is increasingly taking over key concepts such as accumulation, exploitation and alienation in the lexicon of critical theory.

Commodification was first systematically introduced into the social sciences by Claus Offe in the 1970s (Offe 1984). Inspired by both Marx and Polanyi (1944), Offe's work uses commodification to refer to processes of the transformation of non-wage labourers into wage labourers. In a more general manner, it refers to the transformation of social relations to commodity relations. The term suggests its meaning is being extended from the properties or characteristics of labour to a set of human relations, which encompasses all human relations without regard to their class or status. Thus, commodification specifies the conditions under which *every* citizen becomes a participant in commodity relationships (Offe 1984). Offe goes on to discuss—indeed, develop—two more concepts: decommodification and recommodification. Decommodification is 'the withdrawal and uncoupling of an increasing number of social areas and social groups (surplus labor power) from market relations' (Offe 1984: 61). Recommodification is the administrative and political reform of human commodification processes where they become obsolete (Offe 1984: 124).

True to critical tradition in the social sciences, the current literature on commodification emphasises the commodification of labour and, more recently, that of nature itself. Implicit in this critical approach is the idea that capital and investment are natural commodities or at least that some institutions, subjects and objects are less 'fictitious commodities' than others. At the same time, this tradition has a tendency to assume away or limit the analysis to the commodification of everything but capital. I contend, however, that 'capital' and 'accumulation' processes are not inherently 'commodities'. There is no reason to assume that capital keeps a dynamic form and investment and innovation logically follow from the profit motive. The role of regulatory organisations in promoting the commodification of capital itself is critical. Forms of capital failure and stagnation of investment are abundantly captured by concepts such as rentier capitalism, crony capitalism and monopoly capitalism. Rentier capitalism is a term that denotes profits and investment that are generated by the privileged position of having capital without contestation of position, rights and gains (as is also the case with the terms monopoly capitalism and crony capitalism). De/re/commodification should be conceived as institutional strategies that are directed at capital as much as they are at labour, meaning they ought to be adopted in the context of domestic developmental aims as well as in the context of international economic competition. The design of regulatory regimes in general and the regulatory state in particular should allow public actors, inside and outside the state, to opt for commodification, decommodification and recommodification strategies according to autonomous preferences.

A key element in the theory of regulatory capitalism depends on the relations between regulation and commodification. To fully grasp these relations, we need to make some conceptual distinctions between strategies and types of regulation. Regulation is a form of bureaucratic legalisation (Levi-Faur 2011a). As such, and not unlike commodification, it has two conceptualisation siblings: deregulation and *re*regulation. Deregulation became the favoured strategy for economic and political renewal by neoliberals in the United States. It often conveys the idea that regulation is a major problem and that deregulation—that is, the removal and elimination of regulation—is the solution. Reregulation, on the other hand, suggests that the content, instruments and outcomes of many of the reforms that were put in place in the name of deregulation reflect a new mixture and balance between the political, the economic and the social—that is, new types of regulation rather than simply deregulation.

It is useful to distinguish between three types of regulation: constraining, empowering and constitutive. Regulation as a constraint is probably the most intuitive and frequent way in which we think of it. Regulation as a set of prescriptive rules specifies prohibitions and mandates behaviour. It is expected that failure to comply will be followed by punishment as a deterrent or will incur a social and political extraction of payment by the rule maker. Yet, regulation is sometimes, and in important ways, also about empowerment or the allocation of rights. Regulation may empower and thus acquire positive associations with values such as liberty and freedom, rather than the negative association with constraints. Yet, constraining someone is often empowering others and vice versa. Boundaries are blurred and can be distinguished with reference to primary and secondary effects. This is also true for constitutive regulation that constitutes categories of action, entitlements, identity and normative behaviour. Some regulations do not merely regulate but also create or define new forms of behaviour, rights and identity. This is, indeed, the basis of Kant's distinction between regulative and constitutive rules. The regulative rules overlap in constraining and empowering regulation.

What is interesting is the notion of the constitutive rules as developed by Searle. Let me start with a borrowed example before defining the constitutive type of rules. The rules of chess, Searle tells us:

> do not merely regulate an antecedently existing activity called playing chess; they, as it were, create the possibility of or define that activity. The activity of playing chess is constituted by action in accordance with these rules. Chess has no existence apart from these rules. (Searle 1964: 55)

While regulative rules regulate activities whose existence is independent of the rule, constitutive regulation constitutes forms of activity whose existence is logically dependent on the rules. Rules of polite table behaviour regulate eating, Searle further suggests, but eating exists independently of these rules and therefore the regulation of eating should be considered regulative rather than constitutive.

The distinctions between different types of regulation allow us in turn to distinguish between regulation *of* capitalism and regulation *for* capitalism. The first reflects the common understanding of regulation as inherently different and exogenous to capitalism. Regulation here is either an external constraint or an external empowerment—in other words, the first two types of regulation described above. The term 'regulation for capitalism' refers to a more endogenous understanding where regulation is a constitutive element of capitalism. As in chess, here, capitalism and its rules are inseparable. So far, I have distinguished between three of the manifestations of regulation and decommodification: de/re/regulation and de/re/commodification. I have also distinguished between regulation *of* and *for* capitalism and between three types of regulation: constraining, empowering and constitutive. It is now time to link them together. Table 17.1 brings capitalism and regulation together but distinguishes between them via the notions of de/re/commodification. Note that the distinctions made in Table 17.1 are much harder to draw clearly in reality and require detailed case analysis. For example, limiting patent duration means that monopolies over medicines come to an end. One can treat this action as decommodification. However, this is not a restraint on commodification but rather eliminates one type of commodification (the patent on the invention) while allowing other property rights (the trademark, the property in the tangible product) to continue. Thus, it is better to understand this action as recommodification. Still, the action itself should also be understood with reference to the larger context of the economic value of the trademark. If the trademark is protected strongly and widely, the balance tends towards recommodification, but, if it is not, the balance tends towards decommodification.

Table 17.1 Regulatory capitalism as a variegated approach

		Commodification	Decommodification	Recommodification
Constraining regulations	Regulation *of* capitalism	Regulation that limits the scope and depth of commodification—for example, gender equality rules are enforced on employers	Regulation that limits the scope and depth of decommodification—for example, compulsory leave rights are enforced on employers	Regulation that revises limits on the scope and depth of de/commodification processes—for example, revision of rights for annual leave
Empowering regulations		Regulation that extends the scope and depth of commodification via empowerment of labour—for example, eligibility for pension rights via corporate pension plans	Regulation that extends the scope and depth of decommodification—for example, eligibility for maternity or paternity leave determines the rights of employees	Regulation that extends the scope and depth of de/commodification processes—for example, redrawing eligibility rules for retraining programs for mothers of grown-up children who withdraw from the labour market
Constitutive regulation	Regulation *for* capitalism	Regulation that defines categories of eligibility and accountability—for example, categories for working mothers entitled to tax breaks or corporate pension plans	Regulation that defines categories of eligibility and accountability outside the labour or capital markets—for example, defining paternity leave for students	Regulation that redefines categories of eligibility and accountability and therefore redraws the boundaries between commodification and recommodification processes—for example, revision of paternity leave rules

Source: Author's research.

The notion of regulation *of* capitalism captures regulation as a reactive response that sets ex-ante rules and institutions that either constrain or empower actors. These rules basically accommodate and moderate the negative and positive externalities and internalities of capitalism. Both constraining and empowering regulation fall within the category of regulation *of* capitalism. Constitutive regulations, by contrast, are part of a second category, regulation *for* capitalism, where regulation serves not just as a moderating affect, but also as the set of constitutional rules of capitalist institutions and as a facilitative force—framing, nurturing and steering capitalism. When this happens, the disciplinary and allocative functions of regulation are secondary to its constitutive functions. The constitutive approach to the regulation of capitalism requires rules whose constitutive effects are the building blocks of capitalist institutions. The intersection between these different dimensions allows us to point to nine different ways in which regulation and capitalism are linked and, in effect, to demonstrate how variegated order is made possible. These links provide much more room for regulation than the analytical 'market failure' approach because there is room for 'empowering regulation' and for applying it in a constitutive manner.

The emphasis here on the many faces of regulation helps us to understand not only the variegated nature of the current order but also that regulation is both a progressive policy instrument (for example, empowering minorities) and a regressive policy instrument (for example, various forms of conditionalities and caps that aim to discipline the poor). Change in capitalism is strongly linked to the progressive and regressive uses of both regulation and commodification. The term itself should be seen—much like the notion of the regulatory state—as a constitutive element of other morphs of capitalism rather than as a competing morph. It is possible to use regulatory institutions—state, civil and economic—to extend the other institutional morphs of capitalism such as the developmental, the welfare, the financial and the risk; such extension and expansion do not necessarily represent trade-offs but may represent trade-ins. This applies not only at the level of the so-called tensions between equality and efficiency, growth and welfare and development and regulation. It also holds with regard to the relations between global and regional regulation and can expand where there is a good infrastructure of regulation via the state. This also is the case with private and public regulation—which can expand in tandem to enhance the effectiveness of regulation or simply to enhance the legitimacy and powers of the regulators and regulatory institutions. Because regulation entails the delegation of power and has distributive implications, the expansion of regulation to global and private realms can also simply represent a system of checks and balances by which the reproduction of regulatory controls allows a wider number of actors and institutions to keep some control over processes of rule making, monitoring, enforcement and interpretation.

4. Conclusions

Regulation changes the way politics is carried out, how society is organised and the governance of economic production and exchange. Thus, the term 'regulatory capitalism' denotes the importance of regulation in defining and shaping the capitalist systems of governance in a way that the regulatory state or the concepts of 'free markets' or 'capitalism' do not. It points to: a) the intertwining of society, the economy and politics via regulatory instruments and institutions; b) the growth in scope, importance and impact of regulation at the national and global levels; c) the growing investments of political, economic and social actors in regulation in general and regulatory strategies in particular; d) the emergence, extension and consolidation of hybrid forms of regulation that shape diverse and more complex forms of regulatory regimes; and e) the critical role of regulation in the constitution of other forms of states and capitalism—for example, the welfare state and welfare capitalism. So, regulatory capitalism is about regulation as a defining feature of the capitalist mode of production and about the mutual embeddedness of the social, economic and political (Polanyi 1957). The concept interlinks economics and politics, the market and the state and allows us to understand them all as spheres of power. Power, both in its structural and in its relational dimensions, is embedded in and operated via regulatory designs—that is, systems of rule making, rule monitoring and rule enforcement. So important is regulation that even alternatives to power such as rational, traditional and charismatic forms of authority are mediated and conditioned by a regulatory discourse and regulatory institutions.

To demonstrate and extend the theoretical arguments about the role of regulation in capitalism—an interpretation that might best be called 'constitutive'—we need to build up an analytical space for the study of the relations between regulation and capitalism, suggesting the distinctions between de/re/regulation *of/for* de/re/commodification, de/re/regulation *of/for* capitalism and de/re/regulation *of/for* capitalists. These distinctions extend our analytical terminology and therefore may help liberate our imagination as to what are capitalism and the relations between capitalism and regulation. Regulation is not necessarily 'socialist' (decommodifying), 'mercantilist' (recommodifying) or 'neo/liberal' (commodifying), but it is an instrument that can be used by various actors for diverse purposes: neoliberal as well as social-democratic, risk-taking and risk-averse, sustainable growth and unsustainable growth. It can be used for private interest purposes and for public interest purposes. Whatever your purpose, you need regulation.

Further reading

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