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Article

Scaping the Regulatory State?

¿Escapar del Estado regulatorio?

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ABSTRACT
The regulatory state is inescapable in liberal democracies and republics around the world. With similar ubiquity, it is criticized in various ways: for growing without limits, not meeting its objectives and benefiting certain groups to the detriment of society. In this article, we considered measures to reduce its social costs.

Keywords: State, Regulation, Goods and services, economy

RESUMEN
El Estado regulatorio es inescapable en democracias y repúblicas liberales alrededor del mundo. Con similar ubicuidad es criticado en diversos sentidos: por crecer sin límites, no cumplir sus objetivos y beneficiar a ciertos grupos en desmedro de otros. En este artículo, evaluamos medidas para reducir sus costos sociales.

Palabras clave: Estado, regulación, bienes y servicios, economía

Introduction

The regulatory state is a ubiquitous institution in the West and *West like* countries (Moran, 2002; Scott, 2017; Dudley, 2021). Some countries —like the US— started as free-market economies and then derived to a regulated one. Other countries in Europe and Latin America, transited from planned economies to freer but regulated ones. Nevertheless, at the end, every constitutional democracy or republic has a version of the regulatory state. In this type of country, most of the economic activity is private, but it is understood as a public good or service or to have public consequences in the broader sense. This is why, the public or collective intervention is deemed necessary almost always. In the same sense, critics to the regulatory state are common ground within regulatory experts (Sunstein, 1990). There is less consensus about the best solution for this problem (Lawson, 1994, and for a broader discussion see the entire Deadalus issue presented by Tushnet, 2021). Some argue for the reform of the regulatory state and some for a radical paradigm change. We are part of this second group. For us, given the pervasive and self-serving nature of the regulatory state, that is embodied in the core of the nature of the regulatory process

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(at least, us understood —mostly— by the Chicago school), the regulatory state should be replaced by and alternative way to conduct the relations between the Government and its citizens.

In this article, we will review the reasons behind the existence and extend of the regulatory state; but also, how to *escape* a regulatory state (Calabresi, 1982), in the sense of reducing the costs of cumulative regulations (Mclaughlin *et al*, 2016). At the end, we will acknowledge that there is not a good way to reduce the underlying structure of an ever-expanding regulatory state (Lawson, 1994), so creative alternatives should be looked at. In the last part, we mention two possible alternatives to the problem of a pervasive regulatory state that are based on the idea that the regulatory state is a substitute for: on the one hand, free market (and its legal expressions like civil liability and contracts); and, on then one hand for a planned economy (state ownership and subsidies). So, our preliminary hypothesis is that the regulatory state is reduced when we rely more in its alternatives; *i. e.*: civil liability and state provision of goods. Nevertheless, we also acknowledge the limitations of these alternatives and conclude that the regulatory state is —in a great extend— inescapable.

1. Different explanations of the rise of the regulatory state

The general accepted idea behind regulations is that they are the consequence of a rational, dynamic process, in which different agents compete for rents, based on the same incentives that explain the behavior of economic agents in the marketplace (Stigler, 1971). Another idea behind the idea of regulation is that it focuses on "guaranteeing coverage and attention to public interests in services that have been handed over to market rules and competition among operators. attention of some public interests in some services that have been delivered to the rules of the market and competition among operators" (Esteve, 2015).

Being so, the explanation of why there is more regulation being offered is related with the demand for regulation. Of course, being the process of regulation so complex, it relates with various layers of reality. In the next paragraphs, we will explain how different phenomena —at least partially— explain the increase of the demand for regulations.

1.1 Economic and political, local and international pressures

1.1.1 The US case

The Progressive Movement and the Great Depression both had a significant impact on the development of the regulatory state in the US. The evolution of regulation in the United States was significantly impacted by the Great Depression, which started in 1929 and lasted for more than a decade. Greater government action was demanded to solve economic and social issues as a result of the Depression's economic collapse and widespread unemployment. This involved the founding of new regulatory organizations as well as the enlargement of the authority of already existing ones.

The Progressive Movement, which was active in the late 19th and early 20th centuries, contributed to the development of the regulatory state as well. The Progressives supported the establishment of regulatory bodies as a means of fulfilling their belief in the use of government action to address social and economic issues. The Progressives were also in favor of the idea of employing scientific and expert information to guide regulatory decision-making, and many of the regulatory bodies that were established during this time were created with this in mind.

1.1.2 Europe and most Latin American countries

The late 20th century marked the beginning of the shift from welfare states and state ownership to the regulatory state. Many industrialized nations saw considerable economic and political transformation during this century, changing the function of the state in society.

The rise of neoliberalism, a political and economic ideology that emphasizes free markets, restrained government interference, and individual responsibility, was one important driver in this transformation. In the 1970s, neoliberalism evolved as a reaction to what was seen as the shortcomings of welfare state and Keynesian economics, which had dominated post-World War II policymaking.

According to the welfare state concept, the government was responsible for sharing money through transfer payments and progressive taxes, as well as for providing social services. However, when the economy shifted and budgets grew tight, many governments started looking for ways to cut back on the money they spent on social programs. At the same time, there was a growing understanding that the private sector might contribute to the provision of products and services and that the government could not resolve all of society´s issues.

Neoliberalism was only one story and ideal, even if it was significant, and it had to fight with others like the importance of the rule of law and the preservation of government responsibilities. Therefore, *neoliberalism* could partially explain how nations veered away from a form of state planning, but not the regulatory state. The regulatory state, in a way, represents a compromise between the highly interventionist past and the desire for economic liberalization.

These changes led to the emergence of the regulatory state. In a regulatory state, the state plays a more indirect role by establishing guidelines and expectations for the private sector to adhere to, as opposed to directly delivering goods and services or redistributing wealth. The use of independent organizations, such as regulatory commissions, to supervise and implement these laws is frequently used to describe the regulatory state. The development of the European Union has made this procedure much more difficult.[3]

1.2 Regulators bias

One way to explain the cumulative nature of regulation is to resort to law makers' bias. Justice Stephen Breyer contends that lawmakers frequently have prejudices that might result in poor regulation (Breyer, 1993). He argues that these biases can manifest as an overreaction to a risk that is perceived, an underreaction to a risk that is actually present, or a failure to weigh the pros and disadvantages of a proposed rule.

Especially relevant for this article is the *tunnel vision* or *last 10 % bias*, by which every rule maker or administrative official thinks that his legal or constitutional mandate is more important than others. The asbestos example is critical to understand this. According to Breyer, one type of asbestos is easier to

[3] The process of European integration, which has been ongoing since the 1950s, has involved the transfer of certain policy areas from the member states to the European Union (EU) level. This has led to the creation of a range of EU regulatory agencies and other bodies with the authority to adopt and enforce regulations in a wide variety of policy areas. One of the key drivers of European integration has been the desire to promote economic cooperation and integration among the member states. This has led to the creation of a single market within the EU, which requires the harmonization of a range of economic and regulatory policies. This has in turn led to the creation of a number of EU regulatory agencies with the authority to adopt and enforce regulations in areas such as competition policy, financial services, and consumer protection. The process of European integration has also been motivated by a desire to address cross-border issues that cannot be effectively addressed at the national level. This has led to the creation of EU regulatory agencies with the authority to adopt and enforce regulations in areas such as environmental protection, food safety, and public health.

remove than the other and is cause of most of the damage. Nonetheless, regulators are prompt to reduce the 100 % of asbestos, which ultimately leads to an unreasonable and costly policy.

1.3 Risk society, massification and standardization of production

Mass production, standardization and regulatory standards come hand to hand, but is product standardization the cause of a rise of regulatory standards? Not really. Mass production calls for standardization itself but does not explain the urge to regulate production. On the other hand, mass production is related to economics of scale that births big companies that, in turn, have incentives and resources to lobby for more regulation.

So, while massification and standardization of production does not explain regulations, it does explain the surge of conditions for a regulatory space occupied by powerful agents that demand regulation.

1.4 The economics of regulation: bootleggers and Baptists, and the California and Brussels effects

There are some dynamics in which the competition for *regulatory resources* occurs. One of them is the *bootleggers and baptist* (B&B) dynamic, by which well-intentioned groups and opportunist work along to promote a given regulation. In more detail, different groups have incentives to regulate the economic activity. For example, some people are interested in promoting healthy eating. Of course, they can promote healthy eating without promoting standards for food production or labeling or advertising or other types of regulations, but sometimes they think using collective decisions (Calabresi, 1982) is a better way to promote their interests. At the same time, there are economic agents —legal or not— that would benefit by a given regulation, even when it appears to be the opposite.

A pertinent question by Viscusi *et al* (2005). As they noted, the answer has evolved over the years. In a first period, the approach was normative, first framed as a *public interest theory* and then a more *technical* approach, as a *market failure theory*. In both cases, the idea was that regulation should improve the functioning of markets. Of course, in reality, it was evident that regulations seldom achieve —or even try to achieve— this end, so a more positive —pragmatic— approach was necessary. So, the capture theory was developed. But, in a similar fashion than its predecessors, the *capture theory* would give us little information to predict when a regulation will be enacted. The latest stage of this academic endeavor is the *economic theory of regulation* (Stigler, 1971; Peltzman, 1976; Beyer, 1983; Olson, 1965, among others).

The theme of this article relates with the B&B dynamic, which is a particular way in which the regulatory competition produces results. On the one side, we have bootleggers that gain for prohibitions because they reduce competition or give them rents in general. On the other side, we have Baptist, that want regulation for ideological or altruistic reasons. As noted by Yonk (2010) there is also a sort of *political entrepreneur* that connects both groups, using Baptist to achieve bootleggers' political goals (Simmons *et al*, 2010).

To this *equation*, we added the idea that regulation often occurs when the *progressive narrative* is involved. We have noticed that -—contrary to the intuition behind public policy— SSBs regulation was not passed in most cities in the US even when consumption was lower. Regulation was only passed in cities that are defined as *liberals* or *progressives*. In this sense, is not enough to have B&B or a reduction in the consumption of a good but you need the support of the progressive narrative.

As we already see, the Peruvian case is the opposite and reinforces our point. National regulation was passed against the consumption of SSBs, even when its consumption was in its higher levels. Our hypothesis is that this was possible thanks to the support of a progressive narrative.

1.5 The progressive narrative

A progressive can be defined as someone who embraces the *identity politics* narrative (Dunt, 2021). They tend to be cultural and moral relativistic but at the same time perceive themselves as justice and equality *warriors*. They have a collectivistic way to understand the relationship between people in a society and thus rely on a lot in state intervention. Demographically, they tend to be urban, educated and wealthy. In the case of Peru, this is associated with the term *caviar*. They are a group that advocates for equality but sometimes is dissociated with the people they allegedly represent (Renfrew Colloquium, 2022) (CERS).[4]

Defining someone as *progressive* also has an impact in the way they think about food related issues, as The International Food Information Council (IFIC) Foundation's *2016 Food and Health Survey*: *Consumer Attitudes Toward Food Safety, Nutrition & Health* shown. For example, "[l]iberals are more likely than conservatives to cite the government as a top source of trust for information on the safety of food and ingredients (58 percent vs. 46 percent) (Food Insight, 2019).

Progressive groups are divided into two groups: sometimes they are Baptists, but sometimes they are *political entrepreneurs* (Simmons *et al*, 2010). As a group, progressives have an advantage in the political arena. First, they are richer, more urban, educated and connected that any other group (Luca *et al*, 2023). Because of this, they are overrepresented in the political debate. They have more presence in social media, mass media, the academia (Maranto & Woessner, 2012), and have more direct access to politicians. As a result of this, they can also influence more in the public.

Second, progressives, by definition, are collectivist ("the personal is political"). They have an appetite for collective decisions. This makes natural for them to use the political process to channel their request and gaining resources to achieve their goals. Take healthy food for example. Eating is a very personal decision, but now —trough a bad definition of *externality*— is a public issue. Of course, economic theory predicts that every rational person will use the political process to satisfy their preferences, but this is especially true if your preferences are —by definition— identified with collective decisions.

Third, progressives in liberal democracies have a tool that is not in the hands of other groups and is particularly useful in the *battle of ideas* that defines some public policies: they use "cancel culture" (Norris, 2021). Take for example discussions about covid. Some ideas were vetoed, or even taboo. Some experts were banned from social media and even from their institutions because they opposed the *accepted true* about the origins of Covid-19, the necessity of lockdowns, the use of mask, the effectiveness of vaccines and so on.

Finally, some of the progressive ideas are superficially aligned with the interest of society. People may fail to see how regulating something is not the same as delivering a good. Also, thanks to a *commons* problem, they could fail to realize the costs that these regulations impose on them. In the case of the tax on SSBs, 52 % of the Peruvian population was in favor of this measure (Redacción RPP, 2018).

[4] In the case of SSBs regulation, is obvious it has a major impact on people with less resources, but they insist on considering them the major beneficiaries: as people with less resources will be more impacted by the increment of prices, they will buy less unhealthy food.

1.6 The failure of civil liability

Is difficult to say is this is a cause or a consequence, but a decline in civil liability is correlated with more regulations (Glaeser & Shleifer, 2003). Of course, torts are an alternative to economic regulation, so the lack of it is expected to influence regulations or other alternatives.

In general, in countries like Peru, the role of judges is subordinate to the role of legislators and more recently to regulatory agencies. Although judges have the power to declare regulations void, they have a formalistic way to apply the law, which is a consequence of seeing the judicial branchs as a second-order power. This tendency has reverted in some way, thanks to the *constitutionalization* of law, with the creation of constitutional courts. Now regulations can be interpreted more creatively which —ideally— makes less room for new regulations. But the process is new and complex.

1.7 Economic theory (maximization vs. behavioral economics)

In order to comprehend how individuals make decisions better, the subject of economics known as *behavioral economics* combines ideas from sociology, psychology, and other academic fields. It is founded on the premise that, contrary to what orthodox neoclassical economics assumes, people do not always make rational decisions in economic affairs but, instead, are subject to a variety of cognitive biases and heuristics that might result in irrational or unfavorable choices.

Neoclassical economics, in contrast, is a traditional economic theory that bases decisions on the idea that people are self-interested and rational. It also presumes that humans can make judgments with no cognitive biases or constraints and with perfect information.

By demonstrating that elements like emotions, social norms, and framing effects frequently influence people's decision-making, behavioral economics contradicts some of the fundamental tenets of neoclassical economics. For instance, behavioral economics research has demonstrated that even when the net outcome is the same, people are more likely to behave in order to prevent losses than to achieve gains. The *loss aversion* bias is what's behind this.

Behavioral economics has had a significant impact on policy-making and has been used to design interventions that are more effective at achieving desired outcomes. For example, it has been used to design retirement savings plans that are more effective at increasing participation and to develop policies that encourage people to adopt energy-efficient technologies.[5]

While the use of behavioral economics is generally understood as a positive influence in public policy, it is not critic-free. Authors like Adams sustained that behavioral economics —translated into *paternalism* in regulatory terms—; on the one hand, is not a sufficient justification for *strong* regulations, but on the other, if restrained to its more suitable function, it leads to trivial policies like flies in the bathroom of airports (Foster, 2014).

[5] *Example of the influence of behavioral economics: OIRA.* Within the Office of Management and Budget (OMB) of the US federal government is the Office of Information and Regulatory Affairs (OIRA). It is in charge of overseeing and coordinating the executive branch's regulatory initiatives, including those pertaining to the environment, public health, personal safety, and economic development.

2. Is less regulation better?

2.1 The optimal amount of regulations

Which number of regulations is optimal? It will depend on the preferences of a given society and the goals of regulation. Some regulations will have economic goals and others extra-economic goals. In general, you can say that a good regulation is one that have more benefits than costs and achieves a valuable social goal.

Not necessarily having less regulation is better. As with any other *good*, there is an optimal number of regulations. Nonetheless, it is apparent that the number of regulations in almost any liberal democracy is bigger than the optimal, because of some of the triggers of regulation enumerated in part I. The economic literature is vast in exemplifying how regulations almost inevitably serve the interests of those in power or private interests, different from society (Stigler, 1971). Economic regulation that serves the public is uncommon and it often fails to achieve its goal (Sunstein, 1990). Also, the regulatory dynamic tends to be self-serving which makes it pervasive.

2.2 Economic justifications

Generally, we considered *market failure* (*i. e*. externalities or adverse selection) as an economic justification for government intervention, at least from a normative perspective, given that the cost of the intervention is smaller than the cost of the failure itself. The problem with economic justifications is that they hardly ever are verified in reality but are nonetheless used rhetorically to justify interventions. Certainly, state intervention cannot be arbitrary, much less disproportionate; therefore, all intervention goes hand in hand with the principles of law, which are based on necessity or subsidiarity, effectiveness and efficiency, proportionality, legal certainty, transparency, impartiality and participation (Moreno, 2019).

As we will prove in our main example here, tertiary education regulations in Peru are a good example of this. Some economists justified the regulation based on information asymmetry (adverse effect) and positive externalities. Regarding the first, they said that people was unable to distinguish between high quality and low-quality universities (*i. e*. that there is a *market of lemons* situation). Nevertheless, if you see in some detail the market of universities in Peru, you encounter a lot of competition, different levels of quality and differentiated prices. Regarding the second, if there are positive externalities, you should expect less universities than the optimal and the government making efforts to increase the number. But the opposite was true: the government was devoted to reducing the number of universities. At the end, the universities act was approved (2013). Now we have less universities, less competition, higher prices, and —at least if we measure it in the same fashion as them— the same level of quality.

2.3 Non-economic justifications

In the same case, one of the justifications of the regulation of universities in Peru was that they —allegedly— want the system to be more fair or equitable. That should mean that people have more access to education but —as we sai— now there is less access to education in Peru. Economic regulation is hardly ever a good way to achieve equality. A much more direct way to do it is trough subsidies or state delivering of the good.

Another problem with extra economic justifications is that they tend to be mistaken with economic justifications. For example, when talking about interoperability, the proponents of this type of intervention talk about "network effects", that sounds like an economic justification, but at the end they are trying to achieve some kind of fairness ("equitable interoperability") (Morton *et al*, 2021). Even the Peruvian

central bank, when mandated interoperability among digital wallets, talked about "safety", "fair access", "non-discrimination", and "transparency",[6] showing that the justification behind this policy were non-economic.

3. Ways to reduce the number of regulations or scaping the regulatory state

We have divided the ways into four categories: i) *procedural*, in which we emphasize the convenience of adding procedural difficulties to create new regulations; ii) *regulatory quality*, which refers to ways to revise or analyze the quality of regulations, ex ante or ex post, and the way different regulators can compete between them; iii) *nudging tools*, in regard to more cosmetic or superficial interventions that can alter the number of regulations, and iv) *alternatives to regulation*, that refers to ways to intervene in public policy different from standards or tariffs.

3.1 Procedural

Having a more difficult process to enact regulations: two chambers, qualified voting, internal *commissions* approval

The first obvious critique of these measures is that they are directed only through congress but —as everybody knows— most regulations do not come from congress, but rather from the executive branch or regulatory agencies.

In relation to having two chambers instead of one, this is a straightforward way to difficult the enacting of new regulations. Nevertheless, on the one hand, this is contingent upon that different parties controlling the chambers. If the same party controls the two chambers, legislation will be easy to pass anyways. On the other hand, there are easiest (and cheapest) ways to achieve the same end.

One of these ways is rising the number of votes needed to pass an act. The number of votes is either dependent on the congress itself or is a constitutional norm. In the first scenario, congress can alter the number of votes at any time, so is not a real barrier to legislation. In the second scenario, such a rule can prove to be too static and prompt constitutional rupture or change (Rebaza, 1993).[7]

In the case of special *commissions* that evaluates regulatory quality inside congress, I think this measure is intrinsically insufficient. If congress wants to pass an act, for political reasons or corruption, a commission is not going to stop them.

Revisiting delegation powers and limiting agencies powers:

Congress or courts can revisit the powers of administrative agencies as a way to reduce the number of regulations (Walker, 2022). We have a recent example of this in West Virginia vs. Environmental Protection Agency (EPA). In this case, the Supreme Court reviewed a challenge to a rule issued by the EPA under the Clean Air Act brought by a number of states and business organizations. The Clean Power Plan law, which is at question, established standards for states to adhere to when regulating carbon dioxide (CO2) emissions from operating fossil fuel-fired power plants. The states and business associations claimed that

[6] See the article 3 specially.

[7] In this article, Professor Rebaza argues —following the public choice doctrine— that constitutions must be ideologically neutral and flexible, so it can last. A constitution that is too inclined to either side of the ideological spectrum will conflict with the policies of a government with an opposite ideology.

the EPA exceeded its legal power under the Clean Air Act when it issued the rule and that it placed an excessive burden on the states and the energy sector. In the end, the Supreme Court found in favor of the challengers, concluding that the EPA had exceeded its authority by adopting the regulation.[8]

In the case of Peru, we find the opposite. Our Constitutional Court mandates that the regulatory bodies have an active regulatory presence. According to the Court, they have "special duties" in the protection of fundamental rights. They fulfill this mandate by regulating and enforcing rights.[9]

In general, different entities compete for regulatory power in what Scott called the "regulatory space" (Scott, 2001). They can be more or less inclined to government intervention, but in any case these preferences will be only circumstantial. This competition is not guarantee of less regulation but only a redistribution of power among regulators (Quintana, 2005).

As a part of this discussion, we can talk about *federalism*. Competition between different localities can also contribute to having fewer regulations. The mechanism is called the "Delaware effect", according to which states will compete to attract more investment through fewer regulations (Daines, 2001). Nonetheless, this effect is not pervasive and is contrary to the California Effect, that predict the exact opposite, *i. e.*, that interest groups would lobby to implement the same regulations in different states (Vogel, 1997).[10] In the same sense, some people think that international regulatory convergence could make regulatory compliance simpler. Yet, it can also lead to the Brussels Effect (Bradford, 2021), which is similar to the California Effect.

3.2 Regulatory quality

3.2.1 Regulatory impact assessment

Following the steps of US executive orders on regulatory quality and recent developments by OECD in 2016, the executive branch of Peru issued a Legislative Decree on administrative simplification (The George Washington University, 2018). This Decree includes regulations on regulatory quality (RIA or regulatory impact analysis) applicable to regulations that establish procedures -with a lower rank than the law. This Decree is part of a larger policy of the Executive Branch to, on the one hand, achieve greater administrative simplification; and, on the other, adhere to the OECD recommendations. This policy was received with great enthusiasm. Nevertheless, it is far from perfect:

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[8] The Court relied on the "Chevron deference" concept, which states that courts must accept an agency's interpretation of a statute if it is reasonable and does not contradict the statute's plain meaning. The EPA had overstepped its bounds in issuing the Clean Power Plan, according to the Court, since its reading of the Clean Air Act was not reasonable. The Court's decision invalidated the EPA's Clean Power Plan and forbade the agency from putting it into effect. This ruling restricts the EPA's capacity to regulate CO2 emissions from current power plants and could have wider repercussions for the agency's ability to control other types of pollution.

[9] Leyler Torres Del Águila vs. Telefónica Del Perú (2004). Case Number: 0858-2003-AA/TC. For a more comprehensive review of the case law of the Constitutional Court of Peru, we recommend Kresalja (2015) and Sumar & Iñiguez (2017).

[10] The California effect refers to the influence that a state with a lot of regulations has had on the development and adoption of regulatory standards and policies, particularly in the areas of environmental protection and consumer safety. California is often seen as a leader in these areas, and its regulatory standards are often more stringent than those of the federal government or other states. As a result, the adoption of a heavily regulated state regulatory standards by other states or the federal government or even other countries can have a significant impact on the regulatory landscape. For example, California has adopted stricter vehicle emissions standards than those required by the federal government, and many other states have chosen to adopt these standards as well. Similarly, California has established a number of regulations designed to protect consumers, such as regulations on the use of toxic chemicals in consumer products, and these regulations have often been adopted by other states or the federal government.

i) The Decree creates a kind of the last filter is being created to review the standards issued by other entities. Notwithstanding the convenience of this *last filter*, the regulatory quality analysis —ideally— is much more complete and begins before having thought of a specific draft standard. The mistake of thinking that the regulatory quality examination is done on a bill is common. Actually, to have effects beyond the censorship of certain projects, it must be done before having a specific alternative. That is, a proposal is only *good* or *bad* if it is compared with its alternatives. So, after identifying a problem, you should think about all the possible solution alternatives and then compare them with each other. In that sense, the analysis is typically conducted after the decision regarding which policy to follow has already been made, which poses a fundamental challenge for the capacity to use the RIA as originally intended (Carrigan & Shapiro, 2016, p. 208). Additionally, a comprehensive regulatory quality policy would include prior consultation with citizens and an ex post analysis of the regulation.

ii) Another common mistake is to confuse the cost-benefit analysis with merely budgetary or redistributive issues. The cost of a rule is not the direct cost to the State or even to the citizen. The relevant cost in economic terms is the opportunity cost. In the case of a procedure requested by the State, it is very difficult to measure the economic benefit. Usually, the benefit is calculated based on the reduction in the price of a good. But state procedures do not have a *price*, *per se*. In this sense, many times the *reasonableness* of the procedure will be measured more in the sense that it does not appear to be an excessive burden for the citizen and has a tangible utility for the administration (Guerra-García & Jauregui, 2008, p. 16).[11] Therefore, it is recommended that more than an economic analysis, a pragmatic analysis be undertaken that adapts to the circumstances of each project. The quality analysis should tend to make the regulation rational, not necessarily to make it efficient.

iii) In the same sense as the above, the regulatory quality analysis cannot be thought of as a template, but as an almost artistic process where the regulatory analyst must think of the best tool depending on the standard or the stage of development. process in front of you. Any analysis must take into account a number of factors that are drawn from the artisan's expertise, such as the unique aspects of the issue, the accuracy of the data, the capabilities of the tools at hand, and the audience's expectations. To choose a suitable path between the suggested perfection that turns out to be useless and the methodological anarchy, the producer or consumer of the analysis needs to carefully examine the components of the analyst's assignment, operating as a craftsman (Majone, 1992). Circumscribing the quality analysis to the CBA (cost-benefit analysis), is a measure that will not necessarily be fulfilled and not necessarily because of the quality of the future experts, but because a tool is being chosen before knowing the material or the product at hand. that you want to reach. As expressed by Ashford, there are no easy formulas, there are no shortcuts, or simple correction indexes in regulation. The pursuit of a facile decision rule —one that requires the regulator to perform an analysis that is over-quantitative and restrictive— will in practice absolve regulators of liability rather than force them to make difficult decisions. What can be expressed in cost-benefit analysis is only a small part of the picture (Ashford, 1981).

[11] Based on this, it has been said that Guerra & Jaúregui (2008) said, in the introduction of its cost-benefit guide that:
We consider that in the conventional application of the CBA to the norms, an attempt is being made to apply to all bills a methodology that serves to evaluate investment projects where there is clearly the possibility to project their profitability in economic terms. However, there are projects that may contain economic material and, therefore, be measured quantitatively, but others in which only a qualitative analysis can be carried out, where the equivalent transfers are relevant because they are affecting different people and interest groups or people with better law than others. In other words, at the regulatory level, since what is regulated are the behaviors of people in society, it is not possible to convert all the important effects into costs and benefits and, in many cases, it is not justified to invest large resources in analyzes that do not they add more arguments to the decision makers in Congress. For this reason, the emphasis of this guide is to identify all the relevant effects in order to facilitate decisions to approve, reject or adapt regulatory proposals and, thus, determine if a standard is viable or not, based on the advantages and disadvantages that these effects produce.

iv) Finally, we must take care of the risk of politicization of the CBA. Although this tool has often been understood as neutral, the truth is that it has an anti-regulation bias (Driesen, 2006). This, added to the *expertise risk* (Vermeule, 2013) can make a commission of people who think basically the same, have an economic bias and anti-regulation end up disappearing procedures that —if they were seen in a more objective or multidimensional way— might be considered necessary in the public administration.

3.2.2 Ex post control

Regulations that have already been implemented are subject to ex post control, which is the process of analyzing and assessing them to ascertain their effectiveness and decide whether to modify or repeal them. Different organizations, including governmental agencies, independent regulatory commissions, and judicial bodies, may undertake ex post control.

Ex post control can be used for a variety of things. It can assist in ensuring that laws serve their intended purposes and don't add additional costs to society. Additionally, it can aid in identifying and reversing any unintended effects of legislation, such as detrimental effects on innovation or competitiveness. There are a variety of strategies available for ex post regulation control. These consist of:

- Periodic review: Many rules call for the issuing agency to examine the rule at predetermined periods to see if it is still relevant and useful.
- Sunset provisions: Some regulations have a sunset clause that establishes an end date after which the regulation will become ineffective unless it is specifically extended. This gives the chance to study and assess the regulation ex post.
- Judicial review: Regulations may be contested in court on a variety of grounds, including that they are unconstitutional or exceed the power of the originating agency. An ex post control mechanism for rules can be provided by judicial review.
- Congressional oversight: By using its oversight powers and examining the conduct of regulatory agencies, Congress can also contribute to the ex post control of rules.
- Indecopi's bureaucratic barriers control: Peru´s competition authority has the mandate to eliminate barriers to commers. Nevertheless, this process is limited to regulations excluding acts. Also, a process against a regulation can last years and be difficult to enforce against the authority that enacted it. Also, the pace of new regulations is much faster than the speed in which they can be expel from the system.

Ex post regulatory review can be a useful tool for ensuring that rules are practical and serve the public interest, but it's crucial to carefully weigh the potential downsides and make sure the review procedure is impartial, open, and unbiased.

3.3 Nudging tools

3.3.1 Taxing regulations

The concept of taxing regulations is not new (Sumar & Méndez, 2022). Theorists of public choice have attempted to develop *public interest* regulations. It can be accomplished, according to Tullock *et al.* (2004), by requiring unanimous consent when voting on public policies. Making special interest groups pay for the expenses of legislation that benefit them, however, comes in as a close second:

> One means of modifying the organizational rules to produce results akin to those produced under indeed "general" legislation would require that those individuals and groups securing differential benefits also bear the differential costs (Tullock *et al.*, 2004).

The problems with taxing regulations are two: i) it depends on the ability to create such rules in a scenario where public policy is dominated by interest groups and ii) is difficult to implement. Regarding the first point, if an interest group could force rule-makers to create a regulation that benefit them, is unlikeable that the same regulators (or others, for that matter) will make this same interest group pay for it. Regarding the second point, its is difficult to calculate the exact number of the benefit, so it will be implemented with a tick brush approach.

3.3.2 One-in, one-out

Governments can adopt a *one-in, one-out* approach, under which any new regulation that is enacted must be offset by the repeal or modification of an existing regulation. It is an interesting tool against cumulative regulations, yet it has some issues. One more time, this approach will not necessarily reduce the number of regulations,[12] but rather create a bias towards the adoption of new —potentially better— regulation. Also, one regulator could outwit this rule be expanding the scope of the enforcement of current rules or creating lower-level regulations that *interpret* existing rules, creating *de facto* new regulations.

3.4 Alternatives to regulation: self-regulation

Self-regulation is the act of a group or industry policing itself as opposed to being governed by a governmental authority or other external entity. In some situations, self-regulation might be viewed as an alternative to governmental regulation. In short, self-regulation implies a consensus among the agents participating in a market with a view to developing "specifications or setting quality levels for products or services, in such a way that it can be a complement to government intervention" (Laguna, 2011).

Self-regulation has a number of possible benefits. Since self-regulation is not subject to the same bureaucratic procedures as government regulation, it can, for instance, be more adaptable and responsive to the demands of the industry or group that is engaging in it. Self-regulation also saves money because it doesn't need the resources of a government body to enforce it.

Self-regulation activities, however, are typically supplements to governmental regulations rather than substitutes for them. Overall, self-regulation is generally unable to totally replace government regulation due to its constrained scope, lack of external enforcement, and reliance on voluntary compliance, even though it can be a useful supplement in some circumstances.

4. Transiting the regulatory state backwards

As we already noticed, there is no good way to effectively countering the pervasiveness of a corrupted regulatory state. Nevertheless, some alternative ways could be word thinking off. On the one hand, we have civil liability as a substitute for regulations. On the other hand, we have state owned services also as a substitute, but on the other side of the regulatory spectrum.

[12] Depending on its implementation, are all agencies, localities and the congress are bounded by this rule?

4.1 Civil liability

In countries like Peru, civil liability is not a good remedy for accidents. Cases tend to last too much, and victims are undercompensated. Also, we do not have a good system of class actions. As per today, there is no a clear way to collectively litigate a case.

Nevertheless, effective class action lawsuits can be a potent instrument for resolving systemic problems, preventing misbehavior, and lessening the need for specific deterrence. Here are a few explanations as to why class action lawsuits can replace economic regulations (Rosemberg, 2002):

Deterrence and corporate responsibility: Companies may be dissuaded from unfair or damaging conduct by class action lawsuits because they risk severe financial penalties. By encouraging enterprises to self-regulate and adhere to legal requirements, this deterrent effect can lessen the need for more economic controls. Due to the potential legal and financial repercussions of non-compliance, class lawsuits might encourage businesses to implement better procedures and become more accountable. Class action litigation can help level the playing field for companies that uphold moral and legal standards by encouraging corporate responsibility (Coffee, 1986).

The cost of litigation: Class actions let many people who have suffered similar harm band together and file a lawsuit against a single defendant. Individual lawsuits, which may be excessively expensive or time-consuming for individual plaintiffs, may not be as efficient and cost-effective as this collective method. By combining several individual claims into a single proceeding, class action lawsuits can also save on judicial resources. The need for regulatory action may be reduced because of this consolidation since legal outcomes may be more effective and uniform. Class action litigation can address enforcement gaps that may occur due to constrained government resources, thereby obviating the need for further economic restrictions by empowering individuals to seek redress (Backhaus *et al*, 2012).

Public awareness: Raising public knowledge of systemic problems and unethical behavior. This can result in increasing pressure on businesses to address these issues. High-profile class action lawsuits can do this. The demand for further economic rules may decline because of this raised awareness of the issue.

Relying on class action lawsuits to lessen economic rules has a number of disadvantages, such as inefficient resource allocation, uneven results, a limited scope, access barriers, a reactive character, a propensity for spurious cases, and insufficient deterrent. Because they might not sufficiently address systemic problems, offer equitable protection, or provide thorough inspection of market players, class action lawsuits may not be a useful replacement for economic regulations, according to these concerns.

4.2 State direct delivery of public services

In some Latin American countries, like Peru, public services are delivered by both, state owned and private companies. The private sector usually does a better job at providing the service. Nevertheless, in some markets, like education, the government still adopt a regulatory facet that trumps competition. At the same time, the pressure over the public sector is low, so the quality of public education is no better than private education and is even regulated at the same time. In countries like Sweden, all education is public. This has some advantages in reducing the need for market regulations:

Addressing market failures: By providing these services directly, the state can effectively address market failures like asymmetry of information that reduces quality below the optimal level or a public goods

problem that makes education less available. The government itself can decide the optimal quality level and the optimal offer to cover the social demand for education.

Universal access: State-provided services can guarantee universal access to essential services, such as healthcare and education, regardless of an individual's socioeconomic status. By ensuring that everyone has access to these services, the state can reduce the need for regulatory measures that are aimed at protecting vulnerable populations.

Achieving extra economic ends: When the State directly provides a service like education, it can also focus on extra economic goals, like high level research to cope with public issues like health problems or war technologies.

This policy has obvious problems as well. A *entrepreneurial state* can be as bad or even worse than a regulatory state. In the same sense as the later, the former can become self-serving and out of control. Even more clearly, the same incompetence showed in regulating, will be present when directly managing enterprises. Finally, citizens can become clients of the government, which can corrode society and the economy.

In this sense, rather than a solution per se, public provision of public goods and services, can serve the function of deterring the government to heavily regulate an industry.

Conclusion

In a great extent, the *regulatory state* is inescapable. Nevertheless, we do not want an ever-growing regulatory apparatus. That is why we think in ways to reduce the regulatory burden, to make good and reasonable regulations and to have optimal provision or good and services. In that effort, countries like the US and regions like Europe have created regulatory measures that could be classified as regulatory quality related, process based, relying of alternatives or structural changes, among others. None of these efforts could be deemed as successful.

Because of this, inspired in the work of Calabresi, we though in more radical alternatives, based on the way the regulatory states were born in the first place. In the case of the US, the regulatory state was a response to the Law expression of a free-market economy, namely, the common law of civil liability, property rights and contracts. We have considered the institution of the class action litigation, but finally concluded that is not a good alternative, because it suffers the same issues as civil litigation in general and even more, given the unwillingness to developed it in civil law countries.

In the case of Europe and Latin America, the regulatory state is a response to state ownership and direct provision of goods and services. In this case, we assert that public delivery of good should be understood as a scape valve for markets in which public interest is heavily present. If the state is a principal actor in such market, regulation is less important, so private firms should be left alone. As we already show, this alternative is not free of problems as well. Considering this, we do not trust on the public provision of goods and services as a solution per se, but we think that civil society should demand that when the government delivers a public service directly it cannot regulate it with the same intensity as if it was entirely privately provided.

References

Ashford, Nicholas (1981): "Alternatives to cost-benefit analysis in regulatory decisions", Annals of the New York Academy of Sciences, vol. 363, Nº 1: pp. 129-137. https://doi.org/10.1111/j.1749-6632.1981.tb20726.x.

Backhaus, Jürgen *et al* (2012): The law and economics of class actions in Europe: Lessons from America. Edward Elgar Publishing Limited.

Bradford, Anu (2019): Brussels Effect: How the European Union rules the world. Oxford University Press.

Breyer, Stephen (1993): Breaking the vicious circle: Toward effective risk regulation. Harvard University Press.

Calabresi, Guido (1982): A Common law for the age of statutes. Harvard University Press.

Carrigan, Christopher & Shapiro, Stuart (2016): "What's wrong with the back of the envelope? A call for simple (and timely) benefit-cost analysis", Regulation & Governance, vol. 11, Nº 2: pp. 203-212. https://doi.org/10.1111/rego.12120.

Coffee, John (1986): "Understanding the plaintiff's attorney: the implications of economic theory for private enforcement of law through class and derivative actions", Columbia Law Review, vol. 86: pp. 669-727. https://scholarship.law.columbia.edu/faculty_scholarship/26.

Daines, Robert (2001): "Does Delaware law improve firm value?", Journal of Financial Economics, vol. 62, Nº 3: pp. 525-558. https://doi.org/10.1016/S0304-405X(01)00086-1.

Dudley, Susan (2021): "Milestones in the evolution of the administrative state", Daedalus, vol. 150, Nº 3: pp. 33-48. https://doi.org/10.1162/daed_a_01858.

Dunt, Ian (2021): How to be a liberal: The story of liberalism and the fight for its life. Canbury Press Ltd.

Driesen, David (2005): "Is cost-benefit analysis neutral?", University of Colorado Law Review, vol. 77. https://dx.doi.org/10.2139/ssrn.663602.

Esteve, José (2015): "La Administración garante: una aproximación", Revista de Administración Pública, vol. 197: pp. 11-40. https://doi.org/10.18042/cepc/rap.197.01.

Moreno, Luis (2019): Teoría de la regulación - Hacia un derecho administrativo de la regulación. Universidad Externado de Colombia.

Food Insight (2019): Even on food issues - Politics divides Americans [Video]. https://foodinsight.org/Even-On-Food-Issues-Politics-Divides-Americans/.

Foster, Peter (2014): Why we bite the invisible hand: The psychology of anti-capitalism. Editorial Prensa Agradable.

Guerra-García, Gustavo & Jauregui, Greta (2008): Guía para la evaluación de proyectos de ley. Editorial Asociación Civil Transparencia.

Glaeser, Edward & Shleifer, Andrei (2003): "The rise of the regulatory State", Journal of Economic Literature, vol. 41, Nº 2: pp. 401-425. https://doi.org/10.1257/002205103765762725.

Kresalja, Baldo (2015): "¿Estado o mercado? El principio de subsidiaridad en la Constitución peruana", Publishing House - Fondo Editorial de la Pontificia Universidad Católica del Perú. https://doi.org/10.18800/9786123171407.

Laguna, José (2011): "Regulación, externalización de actividades administrativas y autorregulación", Revista de Administración Pública, Nº 185: pp. 89-112. https://dialnet.unirioja.es/servlet/articulo?codigo=3732677.

Lawson, Gary (1994): "The rise and rise of the Administrative State", Harvard Law Review, vol. 107, Nº 6: pp. 1231-1254. https://scholarship.law.bu.edu/faculty_scholarship/948/.

Luca, Davide *et al* (2023): "Progressive Cities: Urban-Rural polarisation of social values and economic development around the world", International Inequalities Institute. [Archivo PDF]. https://doi.org/10.1177/00420980221148388.

Majone, Giandomenico (1992): Evidence, argument and persuasion in the policy process. Yale University Press.

Maranto, Robert & Woessner, Matthew (2012): "Diversifying the Academy: How conservative academics can thrive in liberal academia", Political Science & Politics, vol. 45, Nº 3: pp. 469-474. https://doi.org/10.1017/S1049096512000352.

Moran, Michel (2002): "Review article: Understanding the Regulatory State", British Journal of Political Science, vol. 32, Nº 2: pp. 391-413. https://doi.org/10.1017/S0007123402000169.

Morton, Scott *et al* (2021): Equitable interoperability: The 'super tool' of digital platform governance. https://doi.org/10.2139/ssrn.3923602.

Mclaughlin, Coffey *et al* (2016): "The cumulative cost of regulations", Duke I&E Research Paper, Nº 2016-45. https://dx.doi.org/10.2139/ssrn.2869145.

Norris, Pippa (2021): "Cancel culture: myth or reality?", Political Studies, vol. 71, Nº 2. https://doi.org/10.1177/00323217211037023.

Olson, Mancur (1965): The logic of collective action. Harvard University Press.

Peltzman, Sam (1976): "Toward a more general theory of regulation", The Journal of Law and Economics, vol. 19, Nº 2: pp. 211-248. http://dx.doi.org/10.1086/466865.

Quintana, Eduardo (2005): "Los reguladores de electricidad, saneamiento y telecomunicaciones en su espacio: ¿Captura o administración de recursos dispersos? Themis-Revista de Derecho, Nº 52: 93–120. https://revistas.pucp.edu.pe/index.php/themis/article/view/8826.

Redacción RPP (2018): Más de la mitad de la población está a favor del alza del impuesto ISC, de acuerdo a datum. https://rpp.pe/economia/economia/mas-de-la-mitad-de-la-poblacion-esta-a-favor-del-alza-del-impuesto-isc-de-acuerdo-a-datum-noticia-1122585.

Renfrew Colloquium (2022): Populism, progressive elites and the notion of 'caviar left' in Peru. Youtube. https://www.youtube.com/watch?v=pVFiy0mYoVk.

Rebaza, Alberto (1993): "El régimen económico en una Constitución: ¿Solución o fuente de conflictos?", Ius et Veritas, Nº 7: pp. 55-60. https://revistas.pucp.edu.pe/index.php/iusetveritas/article/view/15393.

Rosemberg, David (2022): "The regulatory advantage of class action", in: Viscusi, W.Kip (ed.), Regulation through litigation. Brookings Institution Press & American Enterprise Institute.

Simmons, Randy *et al* (2010): "Bootleggers, Baptists and political entrepreneurs: Key players in the rational and morality play of regulatory politics", The Independent Review, vol. 15, Nº 3: pp: 367-381.

Sumar, Oscar & Iñiguez, Eduardo (2017): Economía y Constitución - Las libertades económicas en la jurisprudencia del Tribunal Constitucional. Editorial Jurídica Themis.

Sumar, Oscar & Méndez, Rubén (2022): "Tax the rich? Taxation as a way to discourage regulations", Religación - Revista de Ciencias Sociales y Humanidades, vol. 7, Nº 32. https://doi.org/10.46652/rgn.v7i32.882.

Sunstein, Cass (1990): "Paradoxes of the Regulatory State", The University of Chicago Law Review, vol. 57, Nº 2: pp. 407-441. https://doi.org/10.2307/1599951.

Scott, Colin (2001): "Analysing regulatory space: Fragmented resources and institutional design", Public Law: pp. 283-305.

Scott, Colin (2017): "The regulatory state and beyond", in: Drahos, Peter (ed.), Regulatory theory: Foundations and applications. ANU Press.

Stigler, George (1971): The theory of economic regulation", The Bell Journal of Economics and Management Science, vol. 2, Nº 1: pp. 3-21. https://doi.org/10.2307/3003160

Tullock, Gordon *et al* (2004): The calculus of consent: Logical foundations of constitutional democracy. Liberty Fund Inc.

Tushnet, Mark (2021): "Introduction: The pasts & futures of the Administrative State", Daedalus, vol. 150, Nº 3: pp. 5-16. https://direct.mit.edu/daed/article/150/3/5/102571/Introduction-The-Pasts-amp-Futures-of-the

The George Washington University (2018): A brief history of regulation and deregulation: Regulatory Studies Center: Trachtenberg School of Public Policy & Public Administration. https://regulatorystudies.columbian.gwu.edu/brief-history-regulation-and-deregulation.

Walker, Cristopher (2022): "A Congressional Review Act for the Major Questions Doctrine", Harvard Journal of Law & Public Policy, vol. 45, Nº 3: pp. 773-793. https://dx.doi.org/10.2139/ssrn.4230476.

Viscusi, W.Kip *et al* (2005): Economics of regulation and antitrust. MIT Press.

Vogel, David (1995): Trading up: Consumer and environmental regulation in a global economy. Harvard University Press.

Vermeule, Adrian (2013): The Constitution of risk. Cambridge University Press. https://doi.org/10.1017/CBO9781107338906.

Regulations

Circular N° 0024-2022-BCRP (06/10/2022). Aprueban el Reglamento de Interoperabilidad de los servicios de pago provistos por los proveedores, acuerdos y sistemas de pagos. https://www.bcrp.gob.pe/docs/Transparencia/Normas-Legales/Circulares/2022/circular 0024-2022-bcrp.pdf.

Case law

Tribunal Constitucional: 24 de marzo 2004. Exp. N° 0858-2003-AA.