Researching Regulatory Governance for Privatisation of Public Utilities:
Issues and Reflections

Kuo-Tai Cheng*

ABSTRACT

The purpose of this paper identifies five issues arising from governance changes in the privatisation and regulatory process in the public utilities. This paper provides the research methodology to structuring the complexity of governance arrangements in order to building in “publicness” into privatisation and regulation. Given the variety of statements in the field of public management, it can be argued that the institutional analysis to privatisation policy and regulatory governance provides a more effective response than narrow “traditional” notion of NPM to deficiencies of privatising public utilities. This paper insists that regulatory governance for privatising public utilities should be developed, and that the evolution of regulatory system has been consistent with regulatory governance and hence it is equally applicable to all network utilities regulation.

Key words: regulatory governance, privatisation, institutional approach, participation, accountability, transparency, independence

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1. Introduction

“Regulation as an art and craft of governance, as an institutional reality, as a field of study, and as a public discourse is more salient and celebrated nowadays than ever before. However, the challenges are as great as the achievements. Not least, the degree of change in the ways governance through regulation is exercised can hardly be exaggerated” (Jordana & Levi-Faur, 2005, p.2).

Several challenges faced in investigating privatisation and regulatory governance. Firstly, governance mechanisms for regulation in the public utilities which follows the introduction of market mechanism into previously monopolistic “public” utilities need to be unbundled (Ogus, 2001, 2002a; Stern & Holder, 1999). Secondly, there is a need to explore the paradox of liberalisation and privatisation on one hand, and “re-regulation” or regulation on the others (Lodge & Stirton, 2000; Loughlin & Scott, 1997; Newbery, 2001; Stirton & Lodge, 2002). However, many aspects of privatisation and regulation are not obvious enough to be observed (Stern & Holder, 1999). These unobservable aspects, unfortunately, are often the most critical elements in the process of privatisation and regulation. For instance, “institution” is assumed as the “black box” in the economic literature (Lane, 2000). Furthermore, research into privatisation and regulation is multidisciplinary. It is incorporated in studies in a variety of academic disciplines such as politics, economics, sociology, organisational theory, and management even culture studies. Nevertheless, it is more difficult to investigate regulatory mechanisms in the context of developing countries (DCs) because regulatory governance is relatively new in DCs and is generally viewed as the product

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of the post-privatisation (Minogue, 2002). Given the variety of statements in the field of public management, it can be argued that the institutional approach to privatisation policy and regulatory governance provides a more effective response than narrow “traditional” notion of NPM to deficiencies of privatising public utilities. This paper insists that regulatory governance for privatising public utilities should be developed, and that the evolution of regulatory system has been consistent with regulatory governance, in that it is generic, and hence equally applicable to all public utilities regulation.

2. Approaching Privatisation And Regulatory Governance

Privatisation and regulation are both complicated concepts that can carry many different meanings depending on the context they are used. Too many studies of privatisation and regulation used economic approach and assumed there is good governance incorporated into (Minogue, Polidano, & Hulme, 1998; Paliwala, 2001). In fact, “the incremental transfer of regulatory knowledge and institutions from economic to social spheres is encouraging to the extent that regulatory institutions have some clear advantages over ministries, and that the mere fact of reform opens new possibilities for effective governance. Yet it is also a cause for concern, since social regulation is advancing slower than economic regulation” (Jordana & Levi-Faur, 2005, p.2). In other words, these economic studies assumed social regulation can be achieved by economic regulation and that competition is the best regulator.

The work of professor Ogus (2002b) offers an assessment of the status of the economic theory of regulation. In the 1970s and 1980s the economic theory of regulation, with seminal contributions from Stigler and other members of the Chicago School (private interest regulation), provided some major insights into the origins and nature of regulation. The principal hypothesis that regulation benefited, and was therefore sought by, the regulated industries rather than other interested groups was an important antidote to the familiar public interest models. This paper was complemented by that of the Virginia School, with its focus on rent-seeking behaviour. Professor Ogus examines how well the economic theory of regulation has survived in an era of deregulation and regulatory reform. His conclusions is that the revitalised
public interest approach to economic analysis, sometimes associated with the Yale School of law-and-economics (public interest regulation), offers necessary tools for researching contemporary regulatory policy-making.

The contemporary literature identified four possible approaches. These are economic, political, social, and institutional approaches. Table 1 summarizes the key features. We can see that only one of the approaches is sufficiently robust to investigate privatisation and regulatory governance in the public utilities. It is for this reason this paper uses the institutional approach. This paper also sees the advantage that it allows to explore five interrelated aspects (Clarity of roles; Participation; Independence; Accountability; Transparency) of regulatory framework which capture the main governance mode of regulation and privatisation.

However, a key weakness is that the institutional approach is not clear that how far particular lessons can be generalised for other developing countries (DCs), especially where privatisation and regulatory policies have been shaped by international agencies and influenced by the economic literature. In other words, privatisation public utilities needs an institutional analysis. In order to strengthen the study, design, implementation and evaluation of public management reforms, more research is needed for the linkage between institutional analysis and privatisation. Even more, the study of institutions can help to understand how public management reforms, mainly in those contexts with strong legalistic tradition or where informal institutions (customs or habits) are equally relevant to formal institutions. Of course, institutional analysis is not a magic crystal ball showing a complete image about how changes are done. It is a supporting mechanism for analysing process of historical changes or stability in multiple systems. This analytical framework also enhances to understand why some public management reforms fail; even with an “optimum” programme and why policy transfer does not achieve expected results. This places reforms as part of political process and not just a question of “automatic” transfer or adoption-adaptation cycles of reforms.

On the other hand, privatising public utilities is required linking to regulatory governance, where institutional analysis can constitute its basement. In fact, much of the study of privatising public utilities is oriented to the analysis of multiple regulatory issues (for instance, regulatory reforms, regulatory improvements, deregulation,
re-regulation, and other). Generally, any type of regulatory analysis is universally based on economic theories. There is not a proper explanation of regulatory governance itself. It is necessary to develop a theoretical framework that helps to study, analyse, design and reform regulation.

Table 1  Summary of approaches to studying privatisation and regulation

<table>
<thead>
<tr>
<th>Approach</th>
<th>Key Features</th>
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<tr>
<td>Economic</td>
<td>Concerns the pricing and incentive system; competition; capture problem; cost-benefit analysis; impact assessment;</td>
</tr>
<tr>
<td>Social</td>
<td>Focus on “the public interest”, such as health, safety, the environment, and labour issues.</td>
</tr>
<tr>
<td>Political</td>
<td>Legislation; bureaucracy; power; political systems; conflict and bargaining.</td>
</tr>
<tr>
<td>Institutional</td>
<td>Rules of game and law; governance capacity and mechanisms; policy actors; institutional design; the regulatory state;</td>
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Having identified the needs for privatisation policy and regulatory governance to improve economic performance and to protect the society, we need to consider the appropriate institutional framework of privatisation and regulatory governance within which these objectives will be implemented. An institutional framework of privatisation policy and governance mechanisms for regulation is critical to ensure that objectives are achieved, otherwise there is a risk of policy or regulatory failure.

This paper employs an innovative methodology, which namely, an “institutional approach” to study the case of privatisation and regulatory governance. The institutional approach absolutely is the study of institutions. Rhodes (1995) described it as “a subject in search of a rationale” (p.55). It is also “a subject matter covering the rules, procedures, and formal organisations of government” (Rhodes, 1997, p.68), but institutions are no longer equated with organisations (Lowndes, 2002, p.91). “Institution is understood more broadly to refer to a stable, recurring pattern of behaviour” (Goodin, 1996, p.22), as Peters (1999) calls new institutionalism as a broad approach. Studies of policy network also show informal mechanisms for policy-making may exist alongside formal mechanisms as a parallel institutional framework (see Lowndes, 1996). In other words, the institutional approach highlights formal constitutions, organisational structures as well as informal conventions that add
breadth as well as depth to an understanding of institutions.

Crucially, it concerns not just with the impact of institutions upon individuals, but with the interaction between institutions and individuals (Lowndes, 2002; Peters, 1999; Williamson, 1996). The restructuring of the welfare state via NPM led to renewal of interest in “the institutional arrangements for the provisions of public services” (Hood, 1987, p.504). The institutional approach seeks to unearth the institutional arrangement through which policy-making took place. This study focuses on the study of mechanisms for governance. It is evident that a new perspective on privatisation and regulation is emerging. It derives from the desire to open or explore the “black box” of institutions that is assumed in the economic literature that focuses on concepts from the fields of public choice, NIEs, new institutionalism, and the new economics of organisations.

Based on the concept of institutions as “the rules of the game”. Institutions are conceptually the same as regulations. Institutions include formal constraints, notably laws, constitutions and rules, as well as informal constraints such as norms of behaviour, customs and conventions (Parker, 2001). Regulations, as institutions, establish rules for agents; and create structures of incentives and constraints (Ogus, 2001, 2002a). In addition, both formal and informal institutions and their enforcement qualities are fundamental, and enforcement depends heavily on informal rules, such as norms, customs, and conventions (North, 1990).

The main significance in utilising such an approach is its “holism” (Peters, 1999). It considers privatisation policy as one part of a whole system and can be understood within the context of development only in terms of the whole system. As a result, the research has been constructed in a way that accommodates the historic, social, political, and economic dimensions that comprise the whole system (Perri6, Leat, Seltzer, & Stoker, 2002). In this way this paper represents a different view from the universal laws that stamp the analysis of privatisation and regulation in many studies. Studying privatisation and regulation in isolation can lead to the neglect of many main economic and non-economic factors that affect the unavoidably dynamic required in a development study. In other words, studying privatisation and regulatory policies without considering the whole system could result in judgements without focusing on all the relevant factors. The main objective of employing this methodology is its ability
to “explain” rather than to predict specific results. This requires a continuous reference to observations and events. The holistic methodology forms an integral part of the work of this research.

Williamson’s three-layer schema is salient to the discourse of NIEs, particularly in the explanation of governance mechanisms that have influenced the institutional changes and have focused on linking the institutional environment, governance to the individual as applied to the privatisation process and regulatory governance. Before exploring the importance of interdisciplinary-institutional approach to research on privatisation and regulatory governance, we shall to explain and summarise the meaning of Williamson’s three-layer schema.

![Williamson's Three-Layered Schema](image)

Adopted from (Williamson, 1996).

**Figure 1  Williamson’s Three-Layered Schema**
Williamson’s three-layer schema in Figure 1 dramatises the linkage, influenced by transaction\textsuperscript{1} cost\textsuperscript{2}, that exists between governance forms and the individual. The schema underlines a basic feature of institutional economics, where macro (the institutional environment) and micro (the individual) features are presented to analyse social and economic issues. The governance structure is affected by a locus of shift parameters which affects the comparative governance costs (Williamson, 1996). Institutional changes in the form of contract laws, norms, property rights, and customs can induce a reconfiguration of the governance structure. By the same token, behaviour attributes of individuals can also influence the forms of governance. Human behaviours are assumed to be subjected bounded rationality\textsuperscript{3} and opportunism. Bounded rationality and opportunism\textsuperscript{4} needs secondary changes ranging from governance to the individuals as changes in the institutional environment force revisions of the governance structure. Professor Williamson presents the example of protectionist trade barriers as representative of secondary, “strategic” changes that move from governance to the institutional environment\textsuperscript{5}. Individual responses to governance changes are related to the external environment in the “endogenous preference are the product of social conditioning” (Williamson, 1996, p.214).

Williamson’s holistic approach to explaining governance structure evolving from transaction costs shows how institutions and individuals (through their environment) influence the type of governance forms. Secondary effects from these relationships are

\textsuperscript{1} The microanalytic unit of analysis in transaction cost economics. A transaction occurs when a good or service is transferred across a technologically separable interface. Transactions are mediated by governance structure (markets, hierarchies, hybrids).

\textsuperscript{2} The ex ante costs of drafting, negotiating, and safeguarding an agreement and, more especially, the ex post costs of maladaptation and adjustment that arise when contract execution is misaligned as a result of gaps, errors, omissions, and unanticipated disturbances; the costs of running the economic system.

\textsuperscript{3} This refers to behaviour that is intendedly rational but only limitedly so; it is a condition of limited cognitive competence or receive, store, retrieve, and process information. All complex contracts are unavoidably incomplete because of bounds on rationality.

\textsuperscript{4} Self-interest seeking with guile, to include calculated efforts to mislead, deceive, obfuscate, and otherwise confuse. Opportunism should be distinguished from simple self-interest seeking, accordance to which individuals play a game with fixed rules that they reliably obey.

\textsuperscript{5} The rules of the game that define the context in which economy activity takes place. The political, social, and legal ground rules establish the basis for production, exchange, and distribution.
represented in strategic, instrumental or endogenous preferences. Williamson’s figure presents my thinking route throughout the research journey. It is useful to sketch out the process of looking for the interdisciplinary approach on privatisation and regulatory governance.

In Lodge’s work (2003), “the institutional approach points to the constrains involved in the selection of regulatory design ideas and, by assessing …institutional factors that structure relationships between the policy domain and its environments” (p.159). Moreover, levels of analysis can be divided into two different and related layers. The first layer is the institutional environment of privatisation and regulatory processes, which is more a macro-perspective and is concerned with the political, economic and legal rules of the game. The second layer is the institutions of governance, which is more a micro-perspective and deals with government-market relations in order to make institutions and process act as to achieve a fair balance between the interests of government, firms and consumers (Williamson, 1996).

Majone (1999) concludes that in developing an effective regulatory state the key variables are: the extent to which decisions are delegated to an independent agent rather than taken by the political principal, the nature of the structure of governance itself particular in determining the agent’s degree of independence from the political process, the rules that specify the procedural framework e.g. reason giving requirements, consultative processes, the scope for political principals to overrule agency decisions, the relative autonomy of financial resources, the extent of ex post monitoring, e.g. legislative oversight, judicial review, citizen, complaints procedure. It shall be recognised to move between the narrower conception of regulatory instruments and procedures, and the broader conception of politics. Therefore, it may be useful to bring these two approaches together under the label of “governance” (Minogue, 2001). To attain this purpose, a governance-based analysis was used to develop the good governance framework for successful regulation and privatisation policy.
3. Debating Agenda of Privatisation and Regulatory Governance

The introduction of liberalisation and PMR have arguably resulted in a shift from “the positive state” towards “the regulatory state” which is said to involve a shift from governmental to private ownership of public utilities and other social service infrastructures (Majone, 1994, 1996; Minogue, 2001, 2002; Moran, 2001, 2002). An increasing emphasis is now on pro-competition regulation by quasi-autonomy independent bodies (Loughlin & Scott, 1997; Stirton & Lodge, 2001).

The purpose of this study is to develop the framework of how the sectors of privatisation policy and regulatory governance perform in terms of each of the criterion given below. As Helco and Wildavsky (1981) declared the importance of these policy makers that "to understand how political administrators behave, we must begin by seeing the world through their eyes. The world looks different depending on whether the participant is in parliament or government … the participant is the expert on what he does, the observer's task is to make himself expert on why he does it…” (p.ixvii). Moreover, how have they reacted under the current institutional framework of privatisation policy and governance mechanisms for regulation? It also raises the important aspect required to explore by this study. This declares the importance of their experience and involvement in the process of privatisation and regulatory programme.

An important catalyst for improvement in policy analysis and regulatory governance was the publication of the “Principles of Good Regulation” by the government’s Better Regulation Task Force (BRTF)\textsuperscript{6} in 1998. Part of the on-going search for improved government, their great advantage was their simplicity and intuitive appeal as a rational basis for decision-making. At the same time they effectively encompassed both principles and practice; a high level regard for the objectives of regulatory policy, complemented by process disciplines to help ensure that good policies are achieved in practice. A notable example is the development of the Regulatory Impact Assessment (RIA) which now has to accompany regulatory

proposals, a subject on which the National Audit Office has reported\textsuperscript{7}. An example of its application is given by the Office of Water Services (OFWAT)\textsuperscript{8} guidance on its use of regulatory impact assessments. The OECD\textsuperscript{9} had equally been promoting such principles, most notably in a series of studies on regulatory reform since 1997. It has also published best practice examples\textsuperscript{10}. The European Union\textsuperscript{11} has taken a number of recent initiatives too. First, its white paper on governance published in 2001. Secondly, a series of communications in 2002 on better regulation practice, evolving out of the Mandelkern report\textsuperscript{12}. The principles state that regulation and its enforcement should be: transparent; accountable; targeted; consistent; proportionate (see Vass, 2002).

At the same time, questions of legitimacy, accountability and transparency in governance mechanism have gained an increasingly prominent place in researches. International organisations, such as the World Bank, the International Monetary Fund, the OECD as well as the European Commission (EC) have increasingly made their development policies conditional on “good governance”. These issues have also been a “growth business” in the literature concerning decision-making exploring the relationships between implementing and regulatory agencies and parliament, ministers and firms (see Baldwin & Cave, 1999; Graham, 1995, 2000; Lodge & Stirton, 2000; Majone, 1996).

After the analysis of privatisation policy within the broader context, the study of Asia Development Bank and its fellows build up the framework based on some criteria of regulatory governance for some public utilities (Asian Development Bank, 1995; Stern & Holder, 1999). Most of these variables have been analysed in the study of governance and regulatory governance as well, such as the World Bank, OECD, ADB, NERA, IMF, and many researchers. However, this paper has identified some

\textsuperscript{7} National Audit Office (2001), Better Regulation: making good use of regulatory impact assessments, report by the Comptroller and Auditor General, HC 329, HMSO.
\textsuperscript{8} OFWAT (2002), How we use regulatory impact assessments, (July), www.ofwat.gov.uk/
\textsuperscript{11} European Commission (2001), White Paper on European Governance (Com/2001/0428 final), Brussels.
\textsuperscript{12} European Commission (2001), Mandelkern group on better regulation, final report, 13 November 2001, Brussels.
interrelated aspects of regulatory framework which capture the main governance mode of regulation and privatisation in terms of literature reviews. The governance criteria of this paper are outlined as follows:

3.1 Clarity of Roles

The first criterion concerns the following issues: whether there is a clear definition of functions and duties of implementing agencies of privatisation and regulation; whether there is a clear distinction between implementing agencies and their supervising Ministry; whether there are any “shared” responsibilities between implementing agencies and other governmental departments; the degree to which the functions and duties of implementing agencies of privatisation and regulation can be easily redefined by the central government (Stern & Holder, 1999).

Where privatisation policy and regulation is perceived as being necessary, the first stage is to outline the objectives of policies and roles of sectors, particularly between government and privatisation and regulatory agencies. This should make governance mechanisms more effective, by removing any possible confusion about which roles and functions are carried out by agencies and which are carried out by Ministers or others (National Economic Research Associates, 1998). Agencies should have a clear statement of both their roles and their objectives in carrying out those functions by which these are to be achieved in a way that will minimise costs. Under the traditional “command and control” regime, strictly defined objectives and decision-making processes should incorporated into the legislation (Majone, 1996; Minogue, 2002; Ogus, 2001). The implication is that there is certainty and tight control by government over the objectives, which could otherwise be compromised if the provisions were opaque and did not give agencies freedom and decision-making power.

Furthermore, unlike economic indicators of performance, socio-political goals of privatisation and regulatory policies are not as easy to define and vary according to the preferences of society. Too much discretion in the hands of agencies or regulators

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13 Minogue (2002a, p.6) states that, “conceptually, NPM is a response to perceived failures of the ‘command and control’ state, which its Keynesian philosophy of stabilisation and distribution, and strong internal values of public interest and public accountability”.

could jeopardise these values, since decisions of agencies may not meet their expectations. On the other hand, the democratically elected government is better placed to make these judgements and therefore the legislative framework should give clear guidance in this field, removing or minimising the scope of administrative discretion.

3.2 Participation

Participatory approaches to democratic theory see democracy is a hollow set of institutions if they only allow citizens to vote on representatives to far away political institutions and protect those citizens from government abuse (Young, 1996). “In many countries, an absence of rule of law and a lack of transparency both weaken the economy and undermine participatory processes…the rich and powerful have special access to the seats of political power and use that influence…for themselves special favours and exemptions from the rules…also “buy” special access to the legislative and executive branches of government, thereby obtaining rules and regulations that are of benefit to them” (Stiglitz & Chang, 2001, p.224). This criterion concerns the degree to policy stakeholders are permitted to participate in the privatising and regulatory process, especially within the context of political economy.

It can be realised that “participation” and “involvement” may become catch-phrases rather than real solutions. Participation has become fashionable in the current debate about the quality of modern society, because many interest groups do not share in making decisions and there is a large and potentially dangerous gap between the governors and the governed (Hill, 1970). Participation is present when all relevant stakeholders contribute effectively to the process of privatisation and regulation, that improves the quality of decisions and increases the likelihood of the agencies receiving both support and co-operation from firms, consumers and others. Participation or at the very least consultation of the relevant interest groups is important as determining economic and social issues, in order for accurate evaluations to be made. In the absence of this, there is no guarantee that decisions are truly representative of the public interest in terms of an essential service. It is also significant that the agencies give reasoned decisions to ensure that there is substantive fairness. Ultimately, the benefits of strictly defined procedures to ensure fair
decision-making must be weighed up against the cost of administering these procedures.

Full participation, however, may be inappropriate in the case of economic regulation in the public utilities given the nature of the decisions being made and the need in most cases for swift action to be taken. Moreover, decision-makers would be obligated to take account of the whole network of alternatives before making a decision. There is also the danger that if the formal participation of the firms was allowed, there would be too much opportunity for it to dominate the measures that are introduced, increasing the risk of capture.

### 3.3 Independence

It is apparently evident that the outcomes of “rent-seeking” behaviour by interest groups and regulators take advantages in the introducing and expansion of government regulation\(^{14}\). As a result, “there is the detectable change of emphasis in official and semi-official documents which now point out the advantages of ‘self-regulation’” (Blundell et al., 2000, p.v). The emphasis of independence has been facilitated by the widespread perception that government powers are too concentrated, that public policies lack credibility, and that accountability by results is not sufficiently developed in the public sector (Majone, 1996). However, a pure self regulation is unusual. In practice, there is a complex variety of modes of self regulation which, whilst not involving a governmental agency, often involve the government in some way. Modes of self regulation can be different on several dimensions such as the degree of formality of organisational structures, the level of legislation and the extent of outsider participation. The variety of modes is manifested in a wide array of cross-sectoral and cross-national differences (Bartle & Muller, 2000, p.3). Therefore, independence criterion relates to the degree to which implementing agencies are insulated from other influences, particularly from political pressures and specific interest groups. It concerns: the degree of independence of implementing agencies from the political and

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\(^{14}\) Regulation by government can take many forms, ranging from the extreme of central planning of economic activity, to forms of planning without coercion (“indicative planning”), to market-improving measures intended to make the outcome more like that of the neo-classical economist’s ideal of ‘perfect competition’ (Blundell, Robinson, & Barry, 2000, p.2).
governmental process; e.g. whether the regulatory body is a decision-making body or supervising by the Ministry. In consequence, the critical feature of independence is independence from government intervention.

If the agency or regulator has a direct relationship with government, it could be argued that its decisions are more likely to be compatible with government objectives. On the other hand, this delegation of rule-making power or independence to these specialised institutions ensures political impartiality, promoting confidence in the privatisation and regulatory regime, through the avoidance of political interference (Stern & Holder, 1999). Keeping agencies or regulators from political intervention will help to ensure that agencies are free to carry out their functions in the way they consider best satisfies their stated objectives. It is not surprising, since political independence is generally considered essential for the credibility of implementing and regulatory agencies. Resultantly, the delegation to a politically independent agencies is an important means whereby governments can commit themselves to policies that would not be credible in the absence of such delegation (Majone, 1996). This also ensures that there is greater continuity and stability in policy-making and implementation. Independence is also more suitable if it relates to a very specialised field where specific technical knowledge is critical.

3.4 Accountability

Recent changes in patterns of privatising public utilities, sometimes associated with the “regulatory state”, have been said to have eroded citizenship and diminished accountability (Stirton & Lodge, 2001, p.471). However, Blundell, Robinson, and Barry (2000) argued that, “the regulatory state leads to the accumulation of layers of regulation, one effect of which is to reduce democratic accountability” (p.1). Stiglitz (2003) argues that, “accountability requires that: (1) people are given certain objectives; (2) there is a reliable way of assessing whether they have met those objectives; and (3) consequences exist for both the case in which they have done what they were supposed to do and the case in which they have not done” (p.111). In this research, accountability addresses the question of “accountable to whom”: what are the implications of the delegation for democratic legitimacy and accountability, and to what extent are institutional mechanisms of accountability ethically desirable or even
ethically necessary in the process of privatisation and regulation. Whether accountability mechanism is incrementally lost by privatisation, Majone (1999) pointed out to take a pragmatic look at the problem of holding privatisation implementing and regulatory agencies accountable, recognising the persistence of the political-economic realities that have given rise to a regulatory state. In particular, Stirton and Lodge (2001) argue that any approach to accountability mechanism in the new institutional setting must recognise the increased diversity of arrangements for service provision.

“In a very general sense, a person is accountable if they have to give reasoned justifications for their decisions to some other person or body who has a reasonable right to require such justifications” (Graham, 1995, p.3); further, Minogue, Polidano and Hulme (1998) states that, accountability involves the existence of mechanisms which ensure that public officials and political leaders are answerable for their actions and use of public resources, and will require transparent government and a free media towards “good governance”. This is particularly problematic in public institutions because, in fact, different participants in the process of privatisation and regulatory governance have different goals. As they represent the views of the members of society, public institution almost inevitably involves a multiplicity of objectives (multiple accountability) (Stiglitz, 2003). In other words, accountability can take a number of forms and the legislation which set up some possible governance arrangements, such as annual reports and duties to give reasons in certain circumstances. In addition to ex ante government control and on-going procedural controls of the privatisation and regulatory decision-making process, agencies can also be accountable for the decision it makes. Accountability ensures that the institution is understandable to the public even after action is taken. We should address two implications as considering the form of accountability. Firstly, it is important to define the matters for which privatisation and regulatory agencies must be accountable and secondly, it is necessary to identify the appropriate institutions that should be responsible for overseeing privatisation and regulatory activities. Accountability encompasses not only the due process of consultation, but a meaningful process in which a response to consultees’ submissions is published by the regulator, and a clear line of supportable argument pursued as to the reason for the final decision. Such accountable evidence is a necessary element in
improving the safeguard of judicial review, and should help define a little more closely the idea of “reasonable” decisions by regulators. Accountable decisions are likely to be proportionate in the sense of being balanced and taking all interests into account (Vass, 2002).

Rhodes (1988) stated that, “system of accountability” “focused upon institutions and their processes of decision making and implementation. Here lies the fundamental problem: to call one institution to account for how it has operated is to disregard key features of the differentiated polity. Policy is the responsibility of no one institution but emerges from the interaction of several” (p.404). The utilities regimes established on privatisation and liberalisation of the public utilities have been criticised for the deficiency of their accountability mechanism. Substantive accountability is often the issue neglected by traditional review institutions, either due to lack of expertise or fear of undermining the equity and weight of initial decisions. This raises an important question: whether a specific institution should be created and entrusted with the task of supervising agencies or more specifically utility regulators to ensure that they are achieving their objectives. Decisions of agencies can be challenged in an effective way, as those are thought to be unfair or incompetent, but decisions cannot be challenged to a degree which renders regulation ineffective. This would encourage a greater degree of openness in the decision-making process and ensure there was less opportunity for abuse and capture. In other words, lack of control and accountability would create the opportunity for inconsistency and unpredictability, resulting in uncertainty amongst those actors who are affected by the privatisation and regulatory decisions. It also could undermine the investment potential and trust of actors and affect their ability to formulate long-term business goals.

3.5 Transparency

International organisations such as OECD and World Bank have come to treat transparency as a requirement of good governance in developed and developing countries (World Bank, 1994). Clearly, transparency is closely related to notions of accountability, though the two are not identical. This criterion is dealt with: whether major documents (licences, codes, etc) are publicly available; whether major decisions are published; whether access of participation is open and clear; to what extent are
institutional mechanisms of transparency ethically desirable or even ethically necessary in the process of privatisation and regulation.

It means that the policy objective is clearly stated, but a corollary flows from this. Clear expectations and understanding should be cultivated in the minds of the public and the customers on whose behalf the regulation is done. For example, in an incentive-based regulatory system driven by profit, then it makes sense for the government generally to explain that profit has a purpose – and to distinguish legitimate profit from efficiency improvement from illegitimate profit derived from the abuse of monopoly power. Too often the public’s pejorative sense of profit has been used by politicians and commentators (particularly with regard to utilities and network industries) to undermine confidence in the regulatory system and call for inappropriate reforms, whether through ignorance or for self-interested reasons (Vass, 2002).

“Transparency in its fullest sense that requires that citizens be able to exert an influence on (to “control”) the way that public services are provided, based on their views or preferences about how they are provided, as well as knowing about the decisions that are made” (Stirton & Lodge, 2001, p.476). In other words, when the agency makes decisions, it must be sufficiently transparent and an informed and reasonable decision by taking into account all the relevant issues and ensuring that fair, equal and consistent treatment is provided to all those affected by the decision. A transparency mechanism is important in its own right, since a requirement on privatisation and regulatory agencies to explain their decisions and processes should reduce the likelihood of unfairness or incompetence (Stern & Holder, 1999). Transparency enhances individual autonomy by involving citizens directly and indirectly in the process of making decisions which affect their lives and interests. It also enhances individual autonomy to the extent that transparent institutions are predictable, allowing individuals to order their own private choices knowing the way that these are affecting by public decisions (Stirton & Lodge, 2001, p.476).

“Information”, therefore, should be the first factor to explore transparency mechanism, especially the issue of “information asymmetries”. “Without information, consumers are bound to make “lemon” choices, leading not only to dissatisfaction but also to a decline in trust” (Lodge & Stirton, 2000, p.5). In the field of utility regulation and privatisation, information is provided by the regulated firms, themselves,
privatisation implementing agencies, regulatory bodies and consumer groups (policy actors). The regulatory link between inputs and outputs can usefully be captured in the words, cost-effective, and the cost-benefit test is an essential part of regulatory practice, whether for a regulator in deciding to collect more information from the regulated companies (the regulatory burden versus the public benefit) or in deciding on the appropriate level for the security of supply. The concept of proportionality in this sense of targeted is well-enshrined in the European Union’s legislation, and particularly so in relation to competition policy, the single market and the constraints on member states to be able to make exceptions for industries which are judged to provide “services of general economic interest” (Vass, 2002). Requirements to offer information are included in licence conditions and have been part of an increased interest in ensuring quality standards. These requirements can include disconnection numbers, repair responses, agreed codes of practices as well as financial information. This information offers the regulator not only an insight whether the utility operator maintains commitments to its obligations (such as investment into network modernisation), but also, in financial terms, whether the former monopolist abuses its market position (Lodge & Stirton, 2000).

Furthermore, transparent decisions made by the agencies must meet public interest goals but in doing so must adopt open and consistent approaches to ensure that there is stability and predictability about decision-making (National Economic Research Associates, 1998). It also means that firms can be reasonably confident that the “rules of the game” will not suddenly change, either through a change in the overall legal and regulatory framework, or through a change in the way that regulators behave within this framework (Newbery, 2001).

In addition, “trust” is a fashion term and mechanism in current studies, but its behaviour characteristics make it somewhat intangible. Fukuyama15 (1995), at the

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15  Francis Fukuyama (1995) takes the matter of trust beyond the boundaries of the organisation. He states that, the prosperity of societies depends on relationships of trust which reach beyond the family and organisation. He believes that, because Italy’s and China’s familial societies are hard to put their confidence in anyone outside the family, this situation has prevented these countries creating truly global organisations. However, it is important to note that, each state has its own ‘culture’ and that means “policy transfer” should be more carefully and suitable for its own state’s condition instead of fully copying.
broader level, regards trust as necessary to the efficient operation of markets. At the level of regulatory institutions, “trust is at the heart of regulation” (McGregor, Prosser, & Villiers, 2000, p.234). The spread of PMR has led to both opportunities and problems in relation to the establishment of trust-based behaviour. Fukuyama (1995) has sought to distinguish between “high-trust” and “low-trust” societies. High-trust societies offer more effective regulatory systems while low-trust societies (characterised by fewer civil society associations, formalistic relationships, and primary social loyalties e.g. to family) exhibit an “implementation deficit” (Minogue, 2001, pp.18-9). This paper, however, does not include “trust” as a variable because it is too subjective and difficult to measure and more importantly, because trust between the various stakeholders involved in regulation is built up over time as a result of predictable decisions having been made in a clear and transparent way. The eventual goal of this paper is to understand and build up network amongst governance mechanisms towards “high-level trust”.

4. Reflections and Conclusion

Research agenda of privatising public utilities needs to be reinforced with institutional analysis in order to strengthen its potential for explaining regulatory governance and also as a policy instrument for regulatory reform. Too often it has been implicitly stated, rather than explicit, but that is being progressively remedied by the new management disciplines now being imposed on the machinery of government to ensure that the principles and practice of good governance are achieved. However, the political forces that sustain, promote, and diffuse the regulatory state, and the benefits and costs that it imposes on business, are still unclear (Jordana & Levi-Faur, 2005). The consequence, therefore, is not a need for reform, but for a sense of re-acquaintance with regulatory governance which has served us well to date, and which can continue to do so. The dangers are otherwise clear, because the current evidence of reform initiatives is too often of fragmentation and incoherence, rather than well-founded development in the light of experience (Vass, 2002). For example, the processes of selecting, appointing (including re-appointing) and removing regulators must strike a delicate balance between ensuring the accountability of regulatory authorities and their
independence. The methods chosen should ensure that persons with the requisite expertise and/or experience are appointed to be regulators. It is important that their tenure be secure enough to diminish the possibility of their being subject to undue pressures. It is also important that their tenure be dependent on their continued suitability for office.

A further set of matters raised in discussions related to non-economic regulatory questions. There are already a number of governmental agencies dealing with questions such as health and safety, conditions of employment and environmental control. It would be administratively inefficient to duplicate the work of the existing agencies dealing with such matters. However, in particular circumstances, there may be a case for consultation or other appropriate co-operation by the sectoral regulators with the authorities that have primary responsibility. This paper can be extended in several directions:

Firstly, the comparative study of privatisation and regulation is much less developed (such as policy transfer and culture perspective). The comparative method in the social sciences is well established and enables analysts to gain understandings, make generalisations and test hypotheses in ways which single case studies cannot.

Secondly, when we turn to an examination of DCs, both internal and external regulatory governance to government appears to be weak in general. The reasons for this weakness need to be explored, and are hypothesised to lie partly in low levels of government legitimacy, partly in government inefficiency and partly in “political capture”. There is therefore a link between privatisation and regulatory reform. Political factors may be taken to represent an opportunity for commitment to effective regulation as well as a potential source of inhibition, or resistance.

Thirdly, regulators need to have access to reasonably accurate information on the costs and revenues of the regulated firms, their capital investments, consumer demand and the costs of raising capital. There is a need to study how to enhance regulators to obtain the necessary information to regulate effectively for privatising public utilities asymmetries in the specific context of Taiwan and how they might be best addressed.

Fourthly, regulatory practice for privatising utilities needs to be addressed, as should the comparative roles of market failure and regulatory and political capture, so that it is known which concerned attributes of “good” regulation and the implications
for regulatory reform in the network utilities can be realistically achieved in Taiwan.

Fifthly, there is a great need to conduct an in-depth analysis of the institutional framework’s factors and privatisation and regulation in terms of their constraints and impacts.

Sixthly, it is important to understand and investigate the interface between the public and private sectors created by privatisation and regulatory governance through contracting and public-private partnerships in Taiwan.

Finally, this research has shown that there will be a continuing need to re-assess prevailing theories of PMRs to develop privatisation and regulatory policies that address changes in government-market relationships. We need to understand better how political and bureaucratic factors impede effectiveness and implementation in the process of privatisation and regulation. Researchers need to do more comparative research and incorporate “globalisation” issues in their studies. This will entail a redefinition of PMRs and reveal the importance of relevant governance capacities and mechanisms in Taiwan (or DCs). The most important research possibility related to the above, needs to focus on the concept of trust to cement public and private actors in the process of privatisation and regulatory governance.

As a result, regulatory governance shall be viewed to cover: the whole range of government institutions involved in rulemaking and implementation, the public policy processes which involve this set of institutions, the interactions between regulatory actors, the significance of political will and leadership, the interactions of political and economic elites, political interventions in rule adjudication (especially in the actions of judicial or other regulatory actors), and the use of political relationships either to achieve regulatory capture or to build trust relationships which underpin effective informal regulation, the system of public values which provides the setting for privatisation, regulation and competition. It is at once evident, then, that a governance approach implies examination and analysis not only of the institutions and policies, but of the politics of privatisation, regulation and competition (Cook, Kirkpatrick, Minogue, & Parker, 2004).

The objective of this paper was to construct a methodological framework and research methods suitable for the study of privatisation and regulatory governance in DCs like Taiwan. Given the difficulties and limitations of researching privatisation and
regulatory governance for public utilities, the research methodology and methods took into account five inter-related governance mechanisms for privatisation and regulation. This paper also highlighted the importance of bearing institutional environment in mind from some critical perspectives when doing the fieldwork. It provides the research methodology to structuring the complexity of governance arrangements in order to building in “publicness” into privatisation and regulation. At present, privatised public utilities need some degree of intervention in order to ensure the continued provision of services that are not economic to the network industries, but which have associated external benefits that make their provision desirable. In circumstances where competition rules alone do not address all customer concerns about loss of welfare and public services, or services of general economic interest, these can be addressed by developing the healthy regulatory governance. However, implementation of measures within regulatory governance to give effect to the general policy framework will differ from sector to sector.

REFERENCES


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析論公用事業民營化之管制治理：
研究議題與省思

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摘要

本文旨在確立公用事業民營化政策過程，管制治理建構之重要性；作者主張
以制度分析途徑來研究公用事業民營化政策及其管制治理。本文認爲政府應儘速
思考在制度設計上進行管制革新或再管制治理的加強。在民營化之效應衝擊下，
政府早應加強其治理能力及角色的確立，該去除管制的產業，政府應讓市場自
治，要再管制的事業（特別是網絡型產業），政府則應審慎地思考其應有角色及
作法。作者強調「治理機制之建構」的重要性，及政府應重新定義其切確的管制
角色，完全分割其服務供給角色和再管制角色；在此同時，建構管制治理機制，
確立其清晰的治理目標與明確的課責機制，及其治理過程的公開透明化，並且應
加諸管制治理之建構，以防止管制失靈所可能造成之公共面向衝擊。

關鍵詞：管制治理、民營化、制度途徑、參與、課責系統、透明化、獨立

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