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No: 05 | July 2011

COMPETITIVE REGULATION
Stepping Outside the Public/Private Policy Debate

By Dr. Jean-Paul Gagnon



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Competitive Regulation

Stepping Outside the Public/Private Policy Debate

By Dr. Jean-Paul Gagnon*

The central aim of this work is to try and detail the argument that governmental regulation can move beyond the public versus private policy debate. This argument depends largely on Kant's and J.S. Mill's works regarding the harm principle (see Ripstein, 2006; and Mertens, 2007, for further reading). In contemporary political philosophy, we see the focus turning to equality and justice within the framework of international peace and individual sovereignty (see Krasner, 1988; Guardiola-Rivera, 2010; Campbell, 2010; and Smith, 2008 for more). This discourse is central to my argument because I feel the literature supports my point that accountability, transparency and the right to question the public and private spheres wheresoever they may cause harm to be a right for any individual. It might be that, for many, this is simply part of democratic governance (see Hanberger, 2009; Meijer, 2009; Steffek, 2010; Tallberg, Uhlin and Bexell, 2010). This, in cumulative terms, manifests as the right for the pluralities composing citizenries to collectively challenge public and private industries and institutions if their activities cause harm or are suspect. This in turn may lead to the expectation that our representatives or leaders in civil society should champion this democratic right. If we do not have this right, the public and private spheres may operate in the dark: away

from accountability, away from transparency, and away from popular knowledge and scrutiny.

A contemporary example could be the recent financial crisis. Since the 1970s and 1980s, we have seen the growth of deregulation or casting away ill-framed and, perhaps in some circumstances, poorly fitting or illogical regulation limiting the dynamic growth of business (see Fenili, 2011; Yang, 2010; and Marshall, 2009, for example). But this of course led to arenas of operation beyond our democratic control and this violated the harm principle. We only need to consider the hundreds of millions of individuals around the world that have suffered great hardships as a result of the deregulation of financial markets (to go into this further the reader may want to consider Mayer, 2010, as hers is a good and robust gateway into this large body of literature). We might also consider the growth of violent crimes in countries with dramatic socio-economic inequality like the USA (this literature too is wide but the reader may wish to consider Loury, 2010; Pettit, 2010; and Stewart, 2011 for a start). This is why I am proposing that we are in need of *competitive regulation*. This form of regulation is meant to push industries and institutions forward: to detail where these bodies (public or private) can operate freely and what they must not do so as to avoid causing harm socially, politically, economically, ethically and environmentally.

Before we proceed any further however, a first priority is to stipulate exactly how I conceive “competitive regulation.” The term is used in the literature (see, for example, Fitzpatrick and Davison, 1997; Varoudakis and Rossotto, 2004; and Cooke, 1992) to theorize or analyse a specific role for government-derived regulation. The normative argument is that regulation must not oppress the growth of the economy, but must be proactively engaging and promoting as vigorously as possible the chance for the private or public economy to compete *with each other*. This is often a topic brought about regarding telecommunications or utilities, be they owned privately or publicly. We see in Canada, Australia, and in certain African as well as Asian countries that governmental regulation is needed to break apart monopolies and other such anti-liberal economic practices. But my concept goes further than this. It argues that regulation must take a cosmopolitan methodology in its formation so as to be globally competitive in itself (if we were to compare it with other similar regulations), not just economically, but socially, politically, and environmentally as well.

Beginning in 2007, many U.S. industry associations radically adjusted their national political lobbying strategies to support legislative enactment of social regulatory policy, policy that is primarily designed to address issues related to health, safety, and the environment. The regulations that are derived from such policy are generally limited to a specific issue, but they also have the power to regu-

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late across industry boundaries. The normative justifications for environmental, health, and safety regulation often include the impact of negative externalities generated from a manufacturing process on employees and the natural environment and/or the existence of "information asymmetries" between business and the consumer concerning potentially harmful physical qualities associated with products. (Dudley, 2005: 33)

Taking the argument in this quote into consideration, especially its focus on regulating across boundaries might also have us thinking that business and government might also do well to incorporate boundary crossing elements in politics and economics. For instance, we can reason that accountability, transparency, anti-corruption, and blind accounting should be present in all bodies whether they are public or private (this of course changes if we take into consideration the Ministry of Defence or trade secrets: there are limits to transparency but these still have to be better defined).

The deregulations of the 70s and onwards internationally were perhaps spurred by an over-simplistic, probably even romantic, ideology of small government. Deregulation, in my mind, is a failure of reason, the triumph of naiveté and elitism over democracy as well as individual sovereignty, and ultimately the ineptitude and laziness of those in positions to regulate (this perhaps includes us to some degree). Deregulation does not make sense. Should we encounter a flawed piece of regulation, we must *re*-regulate and not *de*-regulate. The arguments of "trust," "faith," "it is too complicated for you to understand," are excusive, elitist, and ultimately unbelievable. They represent paltry political arguments which, to any critical theorist, would be seen through immediately. As we have seen, deregulation casts darkness over certain arenas which can cause wide-scale harm and as such should not be permissible. What is required is better regulation, perhaps even the best possible regulation based on a cosmopolitan methodology researched by policy analysts or framers, to challenge both private and public industries to improve their competitiveness.

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However, there have been important arguments in the literature asking us if, for example, environmental regulation is bad for business. Although this is an on-going debate, we should return to the harm-principle and ask ourselves what will cause the most damage: slightly less income to investors, stock-holders, executives and (imaginably) higher product prices or unsustainable environmental degradation leading (as some probably rightly claim it to be) to deforestation, desertification, species extinction, pollution, human illness, and global warming? In this case the greatest harm is caused by not adhering to tough environmental policies and subsequently by not demanding other country-specific industries to be doing the same. This brings about the importance of international standards and that we might

do well to try and get certain standards to promote this idea of competitive regulation.

I stipulate that we need highly-skilled and knowledgeable individuals, preferably with PhDs, to produce this research in a way that is as transparent, accountable, and inclusive of the public in its dialogical processes as possible. What is needed is a type of regulation that champions democracy, social justice and environmental protection. This regulation must ensure accountability, transparency and questionability in a way highly accessible to whosoever in the public is interested. This is especially important in private realms where certain activities, like trading home-loan derivatives, may cause great harm.

It might be useful to consider regulation to be something increasingly derived from the pluralities of individuals influencing various tiers of government which lends a particular democratic emphasis to both public and private realms. We are seeing that “small” government is not a panacea. It leads to “big business” which poses its own needs for regulation if only to maintain stability in the market, promote some small semblance of social justice and to curb short-term gains for the preference of long-term and *pluralist citizen-derived* goals. We also saw that “big” government and “small” business had its own similar, if not the same, problems that required better (or more competitive) regulation.

Because of this, it is of central importance to move past this perhaps now illogical debate about private and public holdings as both inevitably do, and will, require ever refined and better regulation. We might view this as the need to remove ourselves from neoliberal or neoconservative rhetoric as the market-policies and foreign policies that have come out of these mainly imperial discourses (from thinkers in countries such as the USA, England, and France for example) have failed. We see that the Reagan and Thatcher privatization policies have decreased social justice, have suppressed democracy in various ways and have led to anthropogenic environmental degradation never before seen (this of course does not take into account human rights abuses and war crimes committed during this period by country and corporation). In the context of US-led “free trade agreements” (they should really be called “free trade agreements” because the US government will walk all over you after the deal is made) we have seen countries like Canada and Mexico being held legally accountable (see Soloway, 1999; Gagné and Roch, 2008; as well as Kibel and Schutz, 2007, for work related to this) to corporations controlled substantively by an elite few as stock-holders are still weak in normative corporate power scales (see Abbasi, 2008).

We might take into consideration questions of competitive tender for the privatization of public transportation (see Hensher et al, 2007). Instead of

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entering the debate on whether transportation would be best serviced in private or public hands, we should rather be thinking about how government regulation must consider both bodies as needing not only regulatory guidance, but also needing to be challenged through regulation for the industry's own good. If we consider the debate in this manner, it does not matter whether public transportation is in public or private hands. The entire impetus falls on the government's ability, and the needed push from civil society, to provide legislation that will keep this service internationally competitive by ensuring, inter alia, a capital-returning investment plan, decent wages for decent work, fleet maintenance, infrastructural development, environmental impact assessments and protection, the closure of certain infrastructures to cars and opening these new avenues solely to affordable buses, trams, bikes, or feet (as we are beginning to see happening in several urban centres internationally).

This argument also places a certain impetus on civil society, interest groups and active citizens to express our collective expectations of what governments should be "providing" in regards to regulation. We might see that John Keane's (2009) monitory democracy has a role here. His emphasis on accountability, questionability (this is more from Ramin Jahangebloo), and transparency by civil society groups and inter-governmental bodies might allow for the argument that a company owned publicly or privately must be regulated competitively regardless as to who owns it.

To end this specific point, regulation should meet a defined set of parameters that would ensure the policy itself is competitive. This would force public and private industry to operate within those progressive constraints and could, perhaps, have a positive effect on democratization, social justice, environmental preservation and sustainable economic growth.

What is this Idea of the 'Competitive'?

Perhaps it would be best to borrow from biology in a manner similar to Whitehead (2010). Darwin left us with the survival of the fittest and our colleagues researching biological systems have come to see that much of this depends on competition and adaptation. My thinking was that this could be similar with public or private institutions: that changing the 'state of nature' of the system(s) these bodies operate in to something that demands "better" would result in a necessary adaptation by these bodies.

If "better" were to mean social, political, ethical, environmental, and economic justice argued using a cosmopolitan methodology and perhaps shown through various case studies to be the "best" humans have to date, then forcing these on institutions and industries through regulation could strengthen them and ultimately make them more competitive. It is a simple idea but hopefully one that requires a great deal of further examination.

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and economic justice argued using a cosmopolitan methodology and perhaps shown through various case studies to be the “best” humans have to date, then forcing these on institutions and industries through regulation could strengthen them and ultimately make them more competitive.

To not do this could leave us with perhaps no direction to take regulation forward. Yes, we do see a great deal of focus in the literature and in practice regarding the improvement of bureaucracy, the growth of accountability, transparency, anti-corruption, and the reduction of financial waste for example. But what conceptual framework is this work being done in? I reason that the proposal made here could work for all societies and that it is perhaps much less parochial than other frameworks in small geographic regions for example. I feel certain that every example I offered in this paragraph could also apply internationally, but do people working to improve regulation think this way as well? Or are we still engaging this public versus private holdings debate with deregulation and small government still on the table?

As was argued above, this public/private debate probably does not conform to second modernity and in the ways I argued it does not make sense. It seems then that perhaps competitive regulation is a way to move forward for all regulatory reform and that we should study this option in greater depth.

The Need for a White Paper?

In order for the call made above to move in a manner that could yield practical results, perhaps in the form of a white paper, it is necessary to engage one of the concepts aforementioned to a greater degree. We need to look at what this cosmopolitan methodology is: what does it mean and how is it different from what we are already doing?

To answer this question, we should consider a recent work by Ulrich Beck and Edgar Grande (2010).

The mainstream of social theory still floats loftily above the lowlands of epochal transformations (climate change, financial crisis, nation-states) in a condition of universalistic superiority and instinctive uncertainty. This universalistic social theory, whether structuralist, interactionist, Marxist or systems-theoretical, is now both out of date and provincial. Out of date because it excludes a priori what can be observed empirically: a fundamental transformation of society and politics within Modernity (from First to Second Modernity); provincial because it mistakenly absolutizes the trajectory, the historical experience and future expectation of Western, i.e. predominantly European or North American, modernization and thereby also fails to see its particularity. (Beck and Grande, 2010: 410)

This informs an emergent position in social theory, that of post-universalism. We are required to understand that there is no triumph of ide-

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ology except perhaps in the idea that everyone's ideas count for something and that this collective of ideas may lead us not exactly to the "truth" or "solution" but rather closer to something like that. It argues the need to go beyond understanding other points of view and to considering their merits as well as actively seeking those out to strengthen our arguments and better inform our investigations.

And this is by no means something new to a lot of people as we are (hopefully) taught to do this in our daily discourses with other individuals, especially if there is a need to resolve a conflict. We can see, for example, that in some ways scout bees do this when trying to decide which new nest site the swarm should move to (Seeley, 2010). We must, however, go further and adopt this in international relations, in academic thinking, in the kind of evidence we draw upon to make our arguments, in the formulation of public policies and the way in which we go about public administration. That is, we need to do this in a way that goes beyond voices in one country or one geographic region. It is ultimately the need to remove parochialisms from our work, to go beyond protecting the interests of our neighbours at the expense of others in this world, and to look passed the idea that such a thing as nation-states still exist (there are perhaps very few left), and that we are a collective of individuals living in many different tiers and types of polities.

This is probably necessary for us to confront global problems, problems which have gone beyond the social, political and economic constructs of first modernities. And it is specifically this application of a cosmopolitan methodology that led me to understand the need to move passed the public/private regulatory debate and to see that what we perhaps really needed was better regulation and not de-regulation.

There has been an evident call in the extant literature for constructing new or modifying old frameworks and institutions so as to start or continue conforming to emergent global realities. We can see, for example, that transparency, accountability, anti-corruption, better representation, environmental preservation, and long-term goals derived from the citizenry are probably wants from every society, not just Western ones. Should this be shown correct through various theoretical and empirical analyses, we may then have an answer that is more legitimate and closer to being true than one based on research, thinking, and assumptions from the West or any other ideological locality.

One example of this changing reality is the idea of the "meta-power game" (Beck, 2011: 23) wherein previous international relations power structures between states are "replaced by a more complex, border transcending subpolitical and global political 'meta-power game', one that changes the rules of power, is full of paradoxes, unpredictable and open-ended" (Beck,

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2011: 23). This, should it be actual (which I reason it to be), would perhaps necessitate the restructuring of various political and civil institutions needed to meet these changing power frameworks. The mention of this work is a good segue into cosmopolitan theory, something which I argue most, if not all, should know about.

David Held is of course the greatest proponent of this theory. There is, however, a diverse literature on the subject which for the most part tries to understand how cosmopolitanism may be acting in this increasingly connected globe. The essence of the theory is that it calls for individuals from all societies to view each other equally, to communicate with each other in a respectful manner, to use what we in the social sciences often refer to as “critical intelligence” or that thinking uncompromisingly based on tough reasoning, and to understand that we must act together to conquer global problems (the emerging works of Daniel Bray would be good for further investigation).

And this returns us to the central topic: regulation. A white paper, addressing competitive regulation based on a cosmopolitan methodology and designed to challenge industry and institutions looks to be called for. Designing this study, conducting it, and analysing its findings is likely to be a large undertaking and may best be suited as a project for a think-tank already working in the areas of 2nd modernity and cosmopolitan theory. We would do well to review the literature and challenge our initial assumptions (for example, that challenging business through tough but fair and competitive regulation will promote its robustness and not its withering). This should also involve modelling via formal theory – once more, to promote internationally robust empirical studies.

Conclusion

As was seen, this paper has briefly engaged the idea of competitive regulation and how it may show the illogic of current public versus private debates in the extant literature. It is argued that both public *and* private bodies require better regulation (should regulation seem lacking) and not deregulation. The belief that private hands are more suitable at regulating itself and its network appears absurd, especially if we consider Wall Street and this world’s recent financial crisis. The same can be said for an un-checked government. I am uncertain as to how we came to be thinking that one or the other is trust-worthy: perhaps this form of thinking was possible when “easy” trust was a viable player in politics and society.

Today, however, I argue that we have something called “hard” trust. We must go through robust mechanisms of accountability, transparency, anti-corruption, blind review, and critical evidence to develop a rational trust which is perhaps not something that could ever become a belief. To achieve

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this is thought to be rather difficult, hence “hard.” It might be said that fifty or more years ago individuals were in the habit of “trusting” government, political parties or politicians, or that twenty or thirty years ago many were in the habit of “trusting” business, or family, or religion. Although I am certain there are strong and undeniable levels of trust between individuals, this is something typically hard earned and very fragile. But we cannot treat public or private holdings (like corporations or governments) like individuals and we cannot trust either body which is why they require the best possible regulation: a *competitive regulation*.

Notes:

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- 1) The reader should note that I consider civil society to have a strong role in governance and argue that governments should be far more inclusive of the unelected and willing participants.
- 2) This might form a cosmopolitan ethic or expectation.
- 3) Noam Chomsky is particularly skilled at providing vast amounts of evidence to support this argument. See his latest *Hopes and Prospects* (2010) for an example.
- 4) The affordability per capita and per “ride” concerning public transportation is important to analyse (if it has not already been done). Perhaps a comparative study of public transportation cost between countries would shed some light on methods to lower the price of these services and improve their regulation.

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