

OBSTACLES TO CONVERGENCE IN ADMINISTRATIVE LAW: LESSONS AND QUESTIONS FROM THE BRAZILIAN EXPERIENCE

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Abstract

In the last decades, Italian Administrative Law has been going through significant changes related to a variety of topics such as the citizens' protection vis-à-vis the public administration, and liberalization, privatization and regulation of public utilities. A great deal of these changes is part of larger transformations that are taking place in Europe, and most (if not all of them) have been spearheaded by the European Union. One aspect of this phenomenon seems to deserve special attention by comparative administrative law scholars. As Giacinto della Cananea has suggested, these changes recommend that a comparative legal analysis has to consider not only commonalities and differences among national legislation in European countries, but should also consider commonalities and differences between national and supranational legislation and principles. The purpose of this article is to discuss how comparativists could include this new dimension in their analyses by using a non-European country as a point of contrast. The country that will be analyzed here is Brazil, which has some similarities to Italy and other European countries.

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Introduction

In the last decades, Italian Administrative Law has been going through significant changes related to a variety of topics such as the citizens' protection vis-à-vis the public administration,¹ and liberalization, privatization and regulation of public utilities.² A great deal of these changes is part of larger transformations that are taking place in Europe, and most (if not all of them) have been spearheaded by the European Union.³

¹ G. Pastori, *Recent Trends in Italian Public Administration*, 1 I.J.P.L. 1-27 (2009).

² G. della Cananea, *The regulation of public services in Italy*, 1 Int'l Rev. Adm. Sci. 81-102 (2002).

³ C.J. Bennett, *Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability*, 3 *Governance* 213-33 (1997). C Hood et al. *Regulation Inside Government* (1999). C Knill, *The Europeanisation of National administrations* (2001). M Green Cowles et al, (eds.) *Transforming Europe* (2001). D Pretis, *Italian Administrative Law Under The Influence Of European Law*, 1 I.J.P.L. (2010).

From the point of view of public law scholars, these changes raise a series of important questions.⁴ Are these changes desirable? Are they legitimate? What are their implications for other areas of the law, such as constitutional law? Another set of interesting questions raised by these changes is relevant for comparative law scholars. Are we observing a convergence of administrative law throughout the European Union? What are the existing commonalities and differences between national systems? Are these changes only formal, or are they also modifying practices and institutional culture in European countries?

There is, however, one aspect of this phenomenon that seems to deserve special attention by comparative administrative law scholars. As Giacinto della Cananea has suggested in a paper recently published in this journal, these changes suggest that a comparative legal analysis has to consider not only commonalities and differences among national legislation in European countries, but should also consider commonalities and differences between national and supranational legislation and principles. In other words, a new dimension – the European Union – has been added into the picture, and it needs to be included in comparative legal scholarship also.⁵ In Giacinto's words:

[New regional institutions] override the concept of national borders, thereby reshaping administrative law. (...) All this, it is argued, adds a new dimension to the study of administrative law. The comparative method should not be used only to identify the distinctive features of a specific legal order or to elaborate general theories. Comparative legal analysis should also be used to identify those general principles of administrative law that reflect common traditions and may therefore be applied throughout the European

⁴ There is a vast literature on this topic. For an overview of the literature, see M Lodge, *From Varieties of the Welfare State to Convergence of the Regulatory State? The 'Europeanisation' of Regulatory Transparency*, ESRC Centre for Analysis of Risk and Regulation, Queen's Papers on Europeanisation No 10/2001. For one of the most recent edited volume covering a number of these questions see D Oliver, T Prosser, R. Rawlings, *The Regulatory State: Constitutional Implications*, (2010).

⁵ G. della Cananea, *Administrative Law In Europe: A Historical And Comparative Perspective*, 2 I.J.P.L. 209-210 (2009).

legal space, in the absence of explicitly contrary national provisions. (...) In any case, not only the distinctive features, but also the similarities require further analysis. Whether at least some general principles common to European legal orders may be considered as shared by most, if not all, other legal orders, is still another fascinating question.”⁶ (*footnotes omitted*)

The purpose of this article is to discuss how comparativists could include this new dimension in their analyses by using a non-European country as a point of contrast. The country that will be analyzed here is Brazil, which has some similarities to Italy and other European countries: it has a civil law system, and it is trying to implement reforms that do not always match with the existing legal culture in the country. Thus, some of the challenges and obstacles in this process may be similar. However, the most relevant reason to include Brazil in this piece is the contrast between the Brazilian experience, where reforms are not being implemented in the context of supranational authorities and regional integration, and European countries' experiences in implementing reforms in the context of the European Union. Because of this contrast, Brazil is a useful case to illustrate what kind of questions comparative law scholars could be asking if they are to emphasize the importance of this supranational dimension in the process of legal convergence.

The article is divided in three parts. I start by identifying some concepts and ideas that may be of interest to comparative administrative law scholars concerned with the phenomenon of convergence. The second part analyzes a series of reforms in a non-European country - i.e. outside of the context in which supranational institutions play an important role in the creation and implementation of these reforms. By using the case of Brazil I intend to show how this dynamic may take place outside of the European Union, and identify what kind of questions would be raised if we were to include a new dimension in the picture, as suggested by Giacinto della Cananea. In conclusion, the article discusses some of the theoretical implications and risks of the analysis proposed here.

⁶ Id.

I. Obstacles to Convergence in Administrative Law Reforms

Comparative law scholars can engage either with a static or a dynamic analysis of legal systems in different jurisdictions. A static analysis takes a snapshot of a particular legal issue and compares it across systems. A dynamic analysis, on the other hands, tries to account for changes that occur in a system over a period of time. This dynamic analysis can compare a system with itself overtime, but it can also compare the changes that have taken place in different systems over time, searching for commonalities and differences. It is the latter that I am most interested here.

Recently, different countries have engaged in significant regulatory reforms. These have started in Europe, particularly the U.K., and have quickly spread to other countries, becoming what some now regard a global phenomenon. This has led many authors to argue that there is a great deal of convergence among countries in their administrative law provisions.⁷ Some argue that these countries have increasingly gravitated towards what became known as the “Regulatory State”.⁸ Some have gone one step further and claimed that these legal changes are just one aspect of a multifaceted trend on the global political economy called “Regulatory Capitalism”.⁹ Others have associated these changes with specific economic and social reforms, such as privatization or consumer protection.¹⁰ For the latter, legal convergence would be happening as a result of policy convergence, i.e. agreements around a particular set of policy reforms that require a unique set of legal tools to operate.

The idea that national legal systems may converge, however, has generated some disagreement in the academic literature. One

⁷ Supra n. 4.

⁸ G. Majone, *From the Positive to the Regulatory State – Causes and Consequences from Changes in the Modes of Governance*, 17:2 J. of Public Policy 139-67 (1997). G. Majone, *The Regulatory State and its Legitimacy Problems*, 22:1 West European Politics 1-24 (1999).

⁹ D. Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598:1 The Annals of the American Academy of Political and Social Science 12-13 (2005).

¹⁰ G. della Cananea, *The regulation of public services in Italy*, cit at 2.

illustrative example revolves around privatization reforms.¹¹ One could suggest that the privatizations in the 1980s and 1990s worldwide were a result of policy convergence. This argument could be supported by the fact that such reforms were taken up both by left and right wing governments around the globe during roughly the same period. Despite this “policy convergence”, however, there have been significant differences in the manner in which privatization has been implemented and played out. These divergences often manifest themselves in the regulatory reforms that accompany the privatization process and can be attributed to at least three causes: the effect of the broader institutional environment, conflicting policy goals, and resistance of interest groups. Cognizant of its limitations, I will rely on the example of privatization reforms to provide examples of each of these obstacles.

a) Broader Institutional Environment

Privatization can be defined as the sale of state-owned companies and has been argued to be a strategy to solve two problems at once: reduce the government’s fiscal deficit by generating revenues, and improve the efficiency and quality of services delivered by transferring state-owned companies to private hands.¹² The advocates of privatization also claimed that successfully pursuing these goals largely depends on credible commitments by the government. Thus, governments were advised to assure private investors that there would be no subsequent expropriation of private investments. If there was no such commitment, efficiency would be negatively affected because investors would not improve services, expand the network or bring new technologies. This commitment was also considered relevant for the goal of raising revenues – without a credible commitment against expropriation, investors

¹¹ As Cananea indicates, regulatory reforms are not only associated with nor exclusively linked with privatization. Id. Indeed, privatization has largely fallen out of favour nowadays, but it provides an illustrative example for the purposes of this analysis.

¹² J. Vickers & G. Yarrow, *Economic Perspectives on Privatization*, 5:2 J. Econ. Persp., 111, 118 (1991).

would apply a discount rate and pay less for the companies.¹³ In this regard, the broader institutional environment (political system, independent judiciary, etc.) largely determined a country's ability to provide a credible commitment against expropriation to investors.

What was regarded as necessary to secure credible commitments? At the time of privatization reforms, the literature pointed to the enforcement of contracts and protection of property rights, the two pillars of the credible commitment for private investment in general. In the specific case of infrastructure sectors, where a great deal of privatization happened, there was another layer of protection required: stability of the regulatory framework. This meant that in addition to not breaching concession contracts opportunistically or taking control of companies by fiat, governments needed to offer guarantees that they would not change regulations that determined utility rates or statutes governing taxes in regulated sectors just to please consumers when election time approached. In this regard, an important aspect of the reforms to secure credible commitment to investors was for the Executive branch to delegate its regulatory powers to independent regulatory agencies (IRAs).¹⁴

The assumption was that IRAs¹⁵ enjoy “autonomy” from elected politicians, thereby reducing the risks of expropriation, political manipulation, or short-term considerations related to the electoral cycle that could adversely affect private investment

¹³ D. Newbery, *Privatization, Restructuring, And Regulation Of Network Utilities* 62, 73 (2001) (noting that the “costs [of private ownership] may take the form of a high rate of return required to reward investors for the high perceived regulatory risk”).

¹⁴ For an exploration of the idea of regulatory commitment, see Newbery, *id*; B. Levy & T. Spiller (eds.), *Regulations, Institutions and Commitment: Comparative Studies of Telecommunications* (1998); P. T. Spiller, *Institutions and Regulatory Commitment in Utilities' Privatization*, 2 *Indus. & Corp. Change* 317 (1993); P. T. Spiller, *A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law or Regulatory Specificity?*, 69 *S. Cal. L. Rev.* 477 (1996). See also, J. Elster, *Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact?*, *E. European Const. Rev.* 66-67 (1994); M. A. Melo, *A Política da Ação Regulatória: Responsabilização, Credibilidade e Delegação* [The Politics of Regulation: Responsibility, Credibility and Delegation], 16 *Revista Brasileira de Ciências Sociais* 55-68 (2001).

¹⁵ The terms IRAs, agencies, and regulatory agencies will be used interchangeably in this paper.

incentives in relevant sectors.¹⁶ As a result, the creation of IRAs became one of the central institutional issues in the context of privatization reforms worldwide.¹⁷ In fact, the World Bank and the Organization for Economic Cooperation and Development (OECD) recommend that countries promoting regulatory reforms and privatizations should create IRAs.¹⁸ Advocates of these reforms believed that IRAs could create credible regulatory commitments, thereby increasing the value of the state-owned companies to investors and attracting more private investment.

¹⁶ G. Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, cit. at 8, 152–55.

¹⁷ See generally J. Jordana & D. Levi-Dafur, *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, cit. at 19. (analyzing the “restructuring of the state in Latin America and the consequent institutionalization of a new regulatory order”).

¹⁸ See, e.g., Org. for Econ. Cooperation & Dev. [OECD], *The OECD Report on Regulatory Reform: Synthesis* (1997) (recommending regulatory reform and setting forth the reasons for this solution). Also, see OECD, *The OECD Report on Regulatory Reform: Volume II: Thematic Studies* (1997); OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002); World Bank, *Concession for Infrastructure: a Guide to their Design and Award: World Bank Technical Papers* N. 399 (1998), online: <http://rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf>; World Bank, “The World’s Bank Role in the Electric Power Sector: World Bank Policy Paper” (1993), online: <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101911183588/Rendered/PDF/multi_page.pdf>; OECD, *Independent Regulators in South East European Countries* (2003), online: <<http://www.investmentcompact.org/pdf/9thPTMtgIndependentRegulators.pdf>>; World Bank, “How to Strengthen Regulatory Framework/Agencies”, Document presented at the Water Forum (2002), online: <http://siteresources.worldbank.org/EXTWSS/Resources/337301-1147283821774/0508_framework.pdf>; World Bank, “Regulatory Governance Background”, Note presented at the African Forum for Utility Regulation (2002). At quite an early stage in the debate, the idea was also supported by WTO. World Trade Organization [WTO], “Negotiating Group on Basic Telecommunications: Reference Paper” (Apr. 1996), online: <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm>.

During the 1990s, United States-style IRAs were adopted in many European and Latin American countries,¹⁹ becoming one of the primary means of regulatory governance worldwide.²⁰ However, in many countries these agencies did not perform as expected. For instance, in Brazil, the design of the IRAs was inspired by the American experience, but the effectiveness of IRA guarantees of independence in Brazil (to insulate IRAs from political influence) was very different from the United States. One of the reasons for that is the fact that there is a different institutional environment in Brazil. Because of that the guarantees of independence performed differently from the way they performed in their country of origin, the United States. More specifically, the institutional features that were meant to guarantee the financial autonomy of agencies were not as effective in Brazil as they are in the United States, as I discuss in greater detail later (Part II). As a result, institutional guarantees that characterize IRAs in other countries, especially the United States, were not enough to insulate Brazilian IRAs from the political and legal sphere.²¹

The Brazilian case illustrates the need to adapt transplants to the local conditions and particularities of the reforming country, and the difficulty in doing so. The differences in the broader institutional environment may offer obstacles to convergence, and may be a reason for policy makers and reformers to deviate from the policy consensus. In other words, a particular narrow set of reforms may be not feasible if the appropriate institutional environment is not in place, generating either dysfunctional institutions or incentives for reforms to deviate from the reform consensus in order to reach certain policy outcomes.

¹⁹ J. Jordana & D. Levi-Faur, *Hacia Un Estado Regulador LatinoAmericano? La Difusión de Agencias Regulatoras Autónomas por Países y Sectores* [Towards a Latin American Regulatory State? The Diffusion of Independent Agencies in Countries and Sectors] (2005); G Majone, *The Rise of the Regulatory State in Europe*, cit. at 8.

²⁰ See OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* cit. at 18; (One of the most widespread institutions of modern regulatory governance is the so-called independent regulator).

²¹ M. M. Prado, *The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil*, 41:2 *Vanderbilt Journal of Transnational Law* (2008). Available at SSRN: <http://ssrn.com/abstract=983807>.

b) Conflicting Policy Goals

As mentioned earlier, privatization was perceived to be a solution to fiscal deficits and inefficiencies in the delivery of public services. Sometimes these two goals could be pursued simultaneously without significant tradeoffs. However, in certain cases the goals of promoting efficiency and raising revenues could not be pursued simultaneously. In these cases, policymakers needed to deal with significant tradeoffs: raising more revenues could come at a cost of undermining efficiency, and vice-versa. The most basic example, and a rather simplistic one, is the government that needs to choose between either privatizing infrastructure sector companies as monopolies to maximize the sale price, or breaking up the company and creating competition that improves the quality of the services delivered, though potentially reducing the revenues collected by the state at the time of the sale.

A more complex example is provided by Sunil Tankha, who argues that privatization policies were seriously flawed in their design.²² He dismisses the idea that political resistance served as an impediment to the proper implementation of these policies, and concludes that it was a problem of incompetence, not on the side of developing countries but rather on the side of the international institutions that design these policies, such as the World Bank. Using the Brazilian electric power reforms as a narrative tool, Tankha shows that “many privatization policies and the economic stabilization programmes within which they were embedded were not mutually reinforcing in the way that policymakers had expected”.²³

By calling attention to the fact that the goals of privatization policies may conflict with the goals of other policies, Tankha’s article calls attention to a fact that is often neglected in the academic literature on privatization. Many privatization processes were motivated by three core goals: raising revenues to reduce fiscal deficits, increasing efficiency in the delivery of infrastructure services, and macroeconomic stabilization. In these cases, policymakers often

²² S. Tankha, *Lost in Translation: Interpreting the Failure of Privatization in the Brazilian Electric Power Industry*, 41 J. Lat. Amer. Stud., 59-90 (2009).

²³ Id.

faced significant tradeoffs, and faced significant obstacles in coordinating these policies due to conflicting policy goals. In the Brazilian case, the macroeconomic policies influenced the privatization process in ways that were detrimental to the other two objectives of increasing efficiency and raising revenues. As Tankha states, “macroeconomic concerns underpinning most large scale infrastructure privatization programmes inevitably subordinate sectoral concerns and create tensions between citizens and investors that are difficult for policymakers.”²⁴

These conflicting policy goals are another reason why convergence may not happen. When confronted with tradeoffs, reformers are forced to choose their preferred outcome and the choice will not always be the same. Thus, these conflicting policy goals may serve as another obstacle to convergence.

c) Political Resistance

Policymakers are likely to face resistance to reforms from interest groups that benefit from the *status quo*. Depending on which groups are resisting and the strength of their resistance, different reforms may take place. Indeed, divergences in privatization across countries have been attributed to groups of interest that have resisted reforms.²⁵ For instance, in Latin America civil society resisted the reforms proposed by the government,²⁶ politicians resisted the reforms proposed by technocrats,²⁷ and unions resisted reforms proposed and supported by economic elites.²⁸

Why do interest groups resist reforms? Some analysts suggest that self-interest may guide resistance to or support for reforms,

²⁴ Id.

²⁵ M. V. Murillo, *Political Bias in Policy Convergence: Privatization Choices in Latin America* 54:4 *World Politics*, 462-493 (2002).

²⁶ B. Morgan, *Comparative Regulatory Regimes in Water Service Delivery: Emerging Contours of Global Water Welfarism?* *Comparative Research in Law & Political Economy* 4:7. Research Paper 33/2008 (2008).

²⁷ M. V. Murillo, *Political Bias in Policy Convergence: Privatization Choices in Latin America* cit. at 25.

²⁸ M. Riethof, *Changing Strategies of the Brazilian Labor Movement: From Opposition to Participation*. 31 *Latin American Perspectives* 31-47(2004).

indicating how groups' preferences are determined by the fact that they may incur in significant costs (or at least they think so), or accrue significant benefits as a result of the reforms.²⁹ Others suggest that there may be also ideological opposition to reforms, as certain groups have diverging views about the role of the state in the economy and especially the role it should play in the delivery of public services.³⁰ Finally, there may be technical resistance, in which certain groups do not believe that the proposed reform is the best solution to the shortcoming in the delivery of public services, and may even claim that reforms can make matters worse. It is important to note that this typology is oversimplified³¹ and is not meant to suggest that the

²⁹ G. S. Becker *A Theory of Competition Among Pressure Groups* 98 *Quarterly Journal of Economics* 371-400 (1983). D. G. Hartle, M. J. Trebilcock, R. S. Prichard & D.N. Dewees *The Choice of Governing Instrument Study prepared for the Economic Council of Canada*. Economic Council of Canada, Ottawa (1982).

³⁰ M.V. Murillo, *Political Bias in Policy Convergence: Privatization Choices in Latin America*, cit. at 25. But Trebilcock manifests skepticism towards the idea that ideological shifts can motivate policy changes, i.e. be the reason behind a government's decision to privatize or not. M. J. Trebilcock *Journeys Across the Divides* in F. Parisi, C.K. Rowley (eds.) *The Origins of Law and Economics: Essays by the Founding Fathers* 436 (2005). M. Shirley, *Institutions and Development* 112 and ff (2008) (showing how such beliefs had an impact on water system reforms around the world).

³¹ Each of these reasons can be broken down into sub-types or sub-categories. For instance, self-interest can be used to describe politicians seeking electoral benefits with the reforms, but it may also include corruption. While the first manifestation of self-interest is not illegal, the second one is, although both can be described as self-interested reasons to resist reforms. By the same token, ideological resistance can take many different forms. Politicians may have strong beliefs about the size of the state and the relationship between state and market (some support a minimalist government, whereas others do not) and this may influence the implementation of reforms M.V. Murillo, *Political Bias in Policy Convergence: Privatization Choices in Latin America*, cit. at 25. This is one form of ideological resistance. Another form is rights-based resistance, which can be found in the processes of water privatization. Some civil society groups often claim that access to water is a human right, as it is essential to life. Therefore, it should either be freely provided, or at very low prices. M. Shirley, *Institutions and Development* cit. at 30.

reasons mutually exclusive: they can simultaneously influence the resistance of one single interest group.³²

Brazil offers an interesting example of the relevance of the domestic political resistance as an obstacle to convergence. At the time of privatization, there was significant bureaucratic resistance to regulatory reforms in the electricity sector, while there was considerable bureaucratic support for reforms in the telecommunications sector. These different reactions had important consequences for the design of regulatory agencies and the sequencing of privatization vis-à-vis regulatory reforms.³³ This illustrates that this type of resistance will not only serve as an obstacle to convergence among different countries, but it may also serve as an obstacle to convergence among different sectors within the same country.

II. Case Study: Obstacles to Convergence Outside the European Context

The previous section analyzed potential obstacles to legal convergence, bringing examples of a somewhat dated but still illustrative case, privatization of public utilities. Building on the Brazilian example, this section will discuss in greater detail what kind of questions a comparative analysis of reforms outside of the European context could potentially bring to illuminate the changes

³² Murillo provides an interesting example about the reasons why politicians resisted privatization reforms in Latin America. On the one hand, electoral incentives could have been driving the politicians interested in obtaining political benefits from privatization. On the other hand, politicians could have also been guided by ideology, i.e. beliefs on the relationship between state and market. Murillo suggests that each of these reasons influenced the resistance regarding different aspects of the reforms. M.V. Murillo, *Political Bias in Policy Convergence: Privatization Choices in Latin America*, cit. at 25.

³³ M M Prado, *Bureaucratic Resistance to Regulatory Reforms: The Contrasting Experiences in Electricity and Telecommunications in Brazil*, Paper prepared for the project *Understanding the Rise of the Regulatory State in the South*, coordinated by Navroz Dubash and Bronwen Morgan, May 16, 2011 (unpublished manuscript, on file with the author).

that are happening in European countries in general, and in Italy in particular.

a) Isolated versus Integrated Institutional Reforms

Between 1996 and 2002, the Brazilian government established independent regulatory agencies (IRAs) for electricity, telecommunications, oil and gas, transportation, and other infrastructure sectors as part of a very ambitious privatization program.³⁴ Following the formulae advocated internationally, Brazilian IRAs were designed to have fixed terms of office for commissioners, Congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy.³⁵ These and other institutional features were implemented to guarantee that these agencies were not subordinated to the President's directive authority or to any other branch of government. These features aimed to provide a high level of independence to Brazilian agencies.³⁶

³⁴ In this period, nine regulatory agencies were implemented in Brazil: Agência Nacional de Energia Elétrica - ANEEL (Electricity); Agência Nacional do Petróleo - ANP (Oil and Gas); Agência Nacional de Telecomunicações - ANATEL (Telecommunications); Agência Nacional de Vigilância Sanitária - ANVISA (Sanitary Vigilance/ Health Inspectors); Agência Nacional de Saúde Suplementar - ANS (Private Health Care Services); Agência Nacional de Águas - ANA (Water); Agência Nacional de Transportes Aquaviários - ANTAQ (Water Transportation); Agência Nacional de Transportes Terrestres - ANTT (Ground Transportation); Agência Nacional do Cinema - ANCINE (Cinema).

³⁵ See W Smith, *Utility Regulators - The Independence Debate*, Pub. Pol'y Private Sector 3 (World Bank Group, Oct. 1997), online: <<http://rru.worldbank.org/documents/publicpolicyjournal/127smith.pdf>> (providing a summary of the "strong consensus on the formal safeguards required [by independent agencies]").

³⁶ See G Oliveira, *Desenho Regulatório e Competitividade: Efeitos Sobre os Setores de Infra-Estrutura* [Regulatory Design and Competition: Impact on Infrastructural Sectors] (2005), online: <http://www.eaesp.fgvsp.br/AppData/GVPesquisa/P00338_1.pdf> (designing an index to measure the independence of agencies, and indicating that Brazil has one of the highest levels of independence in the world).

However, things did not go as planned, for a series of reasons that I have discussed in greater detail elsewhere.³⁷ What I want to emphasize here is the financial autonomy of agencies, an institutional feature that was designed to guarantee the independence of agencies, but ended up not being effective in the Brazilian context due to the broader institutional environment in which these agencies were operating. If the Executive branch can control the agency's budget, the President may be able to politically influence the agency. The power to undermine an agency's financial stability and viability might be analogous to the power to dismiss the agency's directors. Thus, at the time of privatization, there was some consensus around the fact that one of the institutional guarantees of the IRAs' independence was alternative sources of income, which are not part of the Executive fiscal accounts.³⁸

Following the international consensus, the financial autonomy of Brazilian agencies was guaranteed by alternative sources of income. Brazilian agencies' main sources of income come from supervising fees and fines paid by regulated companies.³⁹ These funds are earmarked, meaning that the law forbids the use of these funds for purposes other than those related to the sectors in which

³⁷ M M Prado, *The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil*, cit. at 21.

³⁸ A Estache & D Martimort, *Politics, Transaction Costs, and the Design of Regulatory Institutions* 23 World Bank Policy Research, Working Paper No. 2073, (1999), available at <http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2073/wps2073.pdf> ("Relying on budgetary transfers decided by politicians is often viewed as a threat to the independence of the regulators since an easy way to reduce the effectiveness of a regulator would be to cut its budgetary allocation."); see also K S Johannsen, *Regulatory Independence in Theory and Practice: A Survey of Independent Energy Regulators in Eight European Countries* 60 Pub. Util. Research Ctr. 48 (2003). Available at <http://www.regulationbodyofknowledge.org/documents/031.pdf>. ("[I]t is generally assumed that an external source of funding is more stable than government funding").

³⁹ See, e.g., Lei No. 9.472, art. 47, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (authorizing ANATEL to collect regulatory fees); Lei No. 9.427, arts. 11-13, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (authorizing ANEEL to collect regulatory fees).

these companies operate.⁴⁰ The alternative funding mechanism has the potential to guarantee independence if the amount collected is sufficient to cover all the agency's operational costs.

However, this guarantee turned out to be ineffective because in Brazil the alternative sources of income are distributed through an appropriations process that is controlled by the Executive branch. Like all the expenditures made by Executive branch bodies, the use of an IRA's funds has to be previously authorized by the federal budgetary appropriations.⁴¹ As a consequence, the Brazilian President has substantial control over the IRAs' budgets due to his power to interfere significantly in the federal appropriations process. That process culminates with a statute that defines the actual budget allocations for one particular fiscal year (Lei Orçamentária Anual – LOA).⁴² The process to formulate the LOA starts with a budget proposal that is sent to Congress by the President.⁴³ This proposal is formulated by the Secretary of Federal Budget (Secretaria do Orçamento Federal–SOF), an Executive branch department that receives information from all agencies and offices of the Executive branch and analyzes and reviews this information.⁴⁴ After review by the SOF, the IRA's budget is incorporated in the presidential budget that is sent for congressional approval.⁴⁵ The preparation of this proposal is the first moment at which the President can influence the

⁴⁰ For instance, the President cannot use the fees collected from the electricity sector to invest in education or health.

⁴¹ Constituição Federal art. 165, para. 5 (Braz.) (indicating that indirect administration, which includes regulatory agencies, is subject to the same rules as the direct administration, such as ministries and non-independent agencies).

⁴² The LOA is preceded by two statutes. One establishes a plan for budgetary appropriations for a period of four years (Plano Plurianual–PPA) and the second defines the principles and guidelines for the public budget in one particular fiscal year (Lei de Diretrizes Orçamentárias–LDO). C.F. art. 165.

⁴³ Id.

⁴⁴ J M Sultani, *Autonomia Financeira e Orçamentária das Entidades Autárquicas em Regime Especial*, Universidade Federal do Estado do Rio de Janeiro, Institution de Economia 28(2005), available at http://www.cvm.gov.br/port/public/publ/ie_ufrj_cvm/Leonardo_Jose_Mattos_Sultani.pdf.

⁴⁵ Id.

agencies' budgets through the appropriations process.⁴⁶In 2003, for instance, the 202 million reais requested by the electricity regulator (ANEEL) was reduced to 162 million by a presidential proposal that was later approved by Congress.⁴⁷Consequently, despite the IRA's independent sources of income, the entity that controls these appropriations can influence the IRA's policy choices.⁴⁸ Thus, the guarantee exists and is designed to ensure independence, but it is not completely effective because it is not adjusted to other features of the Brazilian political and legal system.⁴⁹

In the 1980s, the United States faced the same problem that Brazil struggles with today. The U.S. Congress tried to reduce the discretionary interference of the Office of Management and Budget (OMB) by asking commissions to submit their budget proposals simultaneously to the OMB and to Congress.⁵⁰Before, Congress would get only the version of the proposal revised by the OMB. Now, Congress not only receives both versions, but it also has the power to change the proposal sent by OMB.⁵¹

⁴⁶ Id.

⁴⁷ *A Gestão nas Agências Reguladora – Fatos e Repercussões* [Managing Regulatory Agencies – Facts and Perceptions], at 18 (presentation of José Mário Miranda Abdo, Dir., ANEEL, before the Senate Commission on Infrastructure, June 25, 2003), available at <http://www.aneel.gov.br/arquivos/PDF/AudienciaPublicaSenado.pdf>.

⁴⁸ For literature on the manipulation of agency budgets by elected authorities in order to influence or control the decision-making process, see generally M. H. Bernstein, *Regulating Business By Independent Commission* 79–84, 128–34, 258 (1955); Anthony Downs, *An Economic Theory Of Bureaucracy* 52–74 (1957); K Meier, *Regulation: Politics, Bureaucracy And Economics* 26–27 (1985); and J. Q. Wilson, *Bureaucracy: What Government Agencies Do And Why They Do It* 214–15 (1989).

⁴⁹ For a study that highlights similar concerns in Europe and Africa, see Johannsen, *Regulatory Independence in Theory and Practice*, cit. at 38. See also A. Eberhard, *Regulation of Electricity Services in Africa: An Assessment of Current Challenges and an Exploration of New Regulatory Models* (paper prepared for World Bank Conference, June 2005), available at <http://www.gsb.uct.ac.za/gsbwebb/mir/documents/InfrastructureRegulationinAfrica.pdf>. at 27.

⁵⁰ T. M. Moe, *Regulatory Performance and Presidential Administration* 26 *Am. J. Pol. Sci.* 200, n.3 (1982).

⁵¹ Id.

As an attempt to give agencies more independence, this simultaneous submission could be implemented in the Brazilian system, but its effectiveness would be considerably limited. In contrast to the United States, congressional influence on the appropriations process is strongly limited in Brazil by constitutional and statutory provisions that allow for significant presidential control over the final outcome of the bill approved by Congress.⁵² First, the President's proposal will be used as law if the congressional statute is not enacted in timely fashion.⁵³ Second, the President may veto some of the provisions in the final statute approved by Congress.⁵⁴ Therefore, in Brazil, the President has a strong influence over the budgetary appropriations process.

In addition, the President also has control over the amount of funds that the agencies will actually receive, as the President can still modify the congressional appropriations (or the part of it that is available to the agencies) after their enactment, during the budget implementation phase, according to his or her own discretion.⁵⁵ These modifications are made through presidential decrees,⁵⁶ which are unilateral acts of the President not subject to any congressional control.⁵⁷ Thus, in Brazil, there is no guarantee that the resources

⁵² A. C. Figueiredo & F. Limongi, *Incentivos Eleitorais, Partidos e Política Orçamentária* [Electoral Incentives, Parties, and Budgetary Policy], 45 *Dados—Revista Ciências Sociais* 303, 313 (2002), available at <http://www.scielo.br/pdf/dados/v45n2/10790.pdf>.

⁵³ This has been the practice, given the silence of the constitution on this matter and the fact that no budget is approved on time in Brazil. But it is important to note that the President's proposal is implemented on a monthly basis until the statute is approved. *Id.* at 314.

⁵⁴ *Id.* at 315.

⁵⁵ The LOA defines only the maximum expenditures the President and the Executive branch are authorized to make in a particular fiscal year. Thus, the President cannot surpass the limit approved by Congress, unless Congress authorizes him to do so.

⁵⁶ In Portuguese, these decrees are called *Decretos de Execução Orçamentária*.

⁵⁷ The Ministers of each sector also have this power. For instance, the Minister of Telecommunications can reduce the budget of the telecommunications agency. Since the Ministers are appointed and dismissed at the President's will, the Author is assuming here that they would manage the budget of the agency according to

appropriated by Congress and allocated to the agency will necessarily reach the agency in question. In contrast, in the United States, the presidential power to impose delays or to cancel budget resources (both of which are called impoundments) is subject to congressional control.⁵⁸ In sum, the Brazilian President controls, determines, or administers the amount of funds the agencies will in fact receive, and can deeply affect the financial autonomy of those agencies.

The electricity agency (ANEEL) had its appropriations reduced by 22% in 2002 and 50% in 2003.⁵⁹ These reductions were determined by presidential decree.⁶⁰ The President took similar action with respect to the telecommunications agency ANATEL; he reduced its budget in 2001, 2002, and 2003,⁶¹ with the last reduction being 25%. In fact, in 2005, six infrastructure agencies received only 16% of their appropriations for that year.⁶² These reductions show that the President can decrease the amounts allocated to the IRAs by

Presidential preferences. Thus, the distinction between reductions imposed by the President himself or the Minister of the sector is not relevant.

⁵⁸ The Congressional Budget and Impoundment Control Act of 1974 regulates these impoundments and establishes procedures that do not allow the President to abrogate the intention of Congress. 2 U.S.C.A. §§ 601–688 (West 2008).

⁵⁹ See Abdo, *A Gestão nas Agências Reguladora – Fatos e Repercussões*, cit. at 47. (This report informs that in 2002, the 174 million reais approved by the LOA was reduced to 145 million reais by a presidential decree and only 137 million was effectively transferred to ANEEL. In 2003, the 162 million reais approved in the LOA was reduced to 70 million by presidential decree. In May 2003, an additional 12 million was added to the 70 million, bringing the sum to 82 million for 2003.)

⁶⁰ Decreto No. 4.708, de 28 de maio de 2003, D.O.U. de 29.5.2003. (Brazil); Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil).

⁶¹ Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil); Decreto No. 4.051, de 12 de dezembro de 2001, D.O.U. de 13.12.2001. (Brazil); Decreto No. 4.031, de 23 de novembro de 2001, D.O.U. de 26.11.2001. (Brazil); Decreto No. 3.878, de 25 de julho de 2001, D.O.U. de 27.7.2001. (Brazil); Decreto No. 3.746, de 6 de fevereiro de 2001, D.O.U. de 7.2.2001. (Brazil).

⁶² L. Vargas, *Agências Fazem ato Contra o Governo [Agencies Protest]*, Folha De São Paulo, May 6, 2003, at B1; R. Pereira, *Governo Lula Corta Verbas e Asfixia Agências [Lula's Administration Cuts the Budget and Suffocates Agencies]*, O Estado De São Paulo, July 3, 2006.

Congress to amounts originally proposed by the President or even lower amounts.

In addition to the power to reduce the allocations provided by Congress, the President can also impose limits on specific types of financial expenditures, thereby delineating financial obligations and commitments of a particular administrative office during a specific fiscal year. In 2003, for instance, a presidential decree limited the travel expenses of the employees of all Executive branch bodies (including ministries) to 60% of the total amount spent in 2002.⁶³ The agencies, as bodies of the Executive branch that belong to the ministries, were also subject to these limits.⁶⁴

In conclusion, alternative sources of funding do not effectively guarantee independence for IRAs in Brazil due to presidential control of the budgetary allocations process. Ultimately, IRAs do not receive the amount assigned to them by the LOA; instead, they receive the allocation approved unilaterally by the President. After the LOA's enactment, there is still much uncertainty as to the amount that will be allocated to IRAs.⁶⁵ The President may use his power to unilaterally control the agencies' financial resources as an incentive for agencies to adopt his preferences, under the threat of a budget reduction.

This example illustrates how in Brazil the creation of IRAs with alternative sources of funds that are not connected to the Executive branch fiscal accounts ignored important institutional interdependencies. The appropriations process in Congress, and the role the Executive plays in this process – i.e. the broader institutional framework in which these IRAs would operate – was not contemplated at the time of the reforms, rendering the guarantee of financial autonomy for IRAs rather ineffective. This type of institutional interdependencies is an important – but often ignored --

⁶³ Decreto No. 4.691, art. 2, de 8 de maio de 2003, D.O.U. de 9.5.2003. (Brazil).

⁶⁴ Id.

⁶⁵ This is a problem for all executive offices in Brazil – not only IRAs. World Bank, *Relatório Sobre A Avaliação Do Sistema De Administração E Controle Financeiros Do Brasil* [Report On The System Of Financial Administration And Management Of Brazil] (2002), available at http://www.planejamento.gov.br/arquivos_down/sof/Texto_CFAA.pdf.

aspect of any legal and institutional reform.⁶⁶ Transplanted institutions will operate in a legal and political environment that differs from the environment in their country of origin, and they need to be adapted to the particular conditions of other countries.

This raises a series of questions to comparativists who are studying administrative law reforms in European countries. If we are to contrast the case of Brazil with reforms in the context of the European Union, one could ask whether the fact that the reforms in the European context are broader, and more integrated with other reforms than the ones implemented in Brazil, results in a smaller risk of lack of convergence due to institutional interconnections. Moreover, it would be interesting to investigate to what extent the existence of a regional or transnational institution allows for better coordination between different set of reforms. In other words, to what extent is the European Union able and willing to account for institutional interconnections? In sum, whereas institutional interconnections may operate as an obstacle to convergence in other countries, it seems interesting to ask to what extent the European Union offers mechanisms to deal with such interconnections, thereby increasing the probably of convergence in the European context.

b) Setting up Policy Priorities and Dealing with Tradeoffs

As I mentioned earlier, privatization of state-owned companies was often justified in terms of efficiency, i.e. privatized companies were regarded to be more efficient than state-owned companies (which is a belief that was strongly qualified after numerous failures in privatization experiences).⁶⁷ Another oft-cited rationale for privatization is to raise revenues. Some countries may face two major tradeoffs involving these rationales. Although not intrinsically incompatible, there are circumstances in which governments might

⁶⁶ M. M. Prado & M. Trebilcock, *Path Dependence, Development and the Dynamics of Institutional Reforms*, 59:3 *University of Toronto Law Journal* 341-380 (2009).

⁶⁷ There is little evidence that ownership has any impact on levels of efficiency. J. Vickers & G. Yarrow, *Economic Perspectives on Privatization*, cit. at 12. See also Y. Zhang, D. Parker & C. Kirkpatrick, *Electricity sector reform in developing countries: an econometric assessment of the effects of privatization, competition and regulation*, 33:2 *Journal of Regulatory Economics*, Springer 159-178 (2008).

need to choose between raising revenues and promoting efficiency, as the Brazilian case illustrates.

Privatization might increase efficiency in the delivery of infrastructure services. Two basic factors are thought to contribute to this. One is ownership, i.e. the assumption that the principal-agent relationship is more effective in pressing managers for results when there are shareholders, instead of a diffuse body of taxpayers who do not necessarily press the government for results. The other factor is competition. The assumption is that under a competitive market structure, companies have to show results in order to survive and this would create incentives for them to be more efficient.⁶⁸ In sectors where there is no free market, like infrastructure sectors, the sale of state-owned companies will be more effective in promoting efficiency if there is a regulatory framework that replicates competitive outcomes or imposes restraints on companies in non-competitive sectors.

In addition to increasing efficiency, one incentive that countries have to implement regulatory frameworks is the belief that investors are more likely to invest if the regulatory framework is well defined *ex ante*, reducing uncertainties. As mentioned earlier, this depends not only on the actual rules applicable to the sector, but also on whether the broader institutional framework provides an environment that secures a credible commitment to reforms.

Despite these incentives, there are circumstances in which countries are forced to make difficult tradeoffs. Implementing regulatory frameworks before privatization takes time, and some countries have other pressing needs. For instance, in cases of major macroeconomic crisis and rampant fiscal deficits, governments may be in such desperate need to resources that they will not have time to wait until the regulatory framework is defined and implemented. If a government cannot take the time to design and implement reforms as it needs the cash immediately, governments may choose to move forward with privatization without a proper regulatory framework to avoid a greater loss.

⁶⁸ A. Smith & M. Trebilcock, *State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Measures*, Eur. J. L. & Econ. 12 (2001).

This is exactly what happened in Brazil.⁶⁹ The government used privatization to support a macroeconomic plan.⁷⁰ Indeed, privatization was mainly conceived as a mechanism to deal with the urgent need for immediate cash, which was intrinsically linked to a macroeconomic stabilization plan. This might explain why the government went ahead with privatization, despite knowing of its limited positive impact (if any) on the infrastructure sectors. An urgent need for resources also made the country adopt costly strategies to protect investors, so as to increase the price paid for the companies. Brazil has done so by providing public financing to private investors, shifting the risk of default to the government.⁷¹ The macroeconomic concern may also help explain why Brazil offered public financing for privatization.

In 1993, Brazil implemented a macroeconomic stabilization plan (Plano Real)⁷² that relied on an exchange rate anchor to stabilize inflation.⁷³ An overvalued currency put pressure on domestic

⁶⁹ M. M. Prado, *Policy and Politics: Privatization of the Electricity Sector in Brazil*. J.S.D thesis, Yale Law School (2008, unpublished).

⁷⁰ Id.

⁷¹ This is as illustrated by the cases involving AES in Brazil. For a detailed discussion, see Id.

⁷² The plan contained: US\$ 6 billion cut to government spending (9% of federal government spending), a tightening of tax collection, and a recasting of financial relationships with state governments, which owed US\$ 36 billion to the federal government in 1993, and were approximately US\$ 2 billion in arrears. E. Amann & W. Baer, *The Illusion of Stability: The Brazilian Economy Under Cardoso*, 28:10 World Development 1806 (2000). V. Ramalho, 'Plano Real: The End of Hyperinflation in Brazil', in Harry Costin & Hector Vanolli, (eds.), *Economic Reform in Latin America*, 175 (1998). (indicating that unlike either the Collor or Cruzado Plans, the changes would be gradual, and the *Plan* would not involve prize freezes, seizures of assets, or government-imposed breaches of private contracts). F. Ferrari-Filho & L. F. de Paula, *The Legacy of the Real Plan and an Alternative Agenda for the Brazilian Economy*, LXII: 244 *Investigación Económica* 61 (2003). (In the original version of the plan, these two elements (fiscal adjustment and indexing system) were implemented in three phases. First, the government adjusted the short-term fiscal deficit. Second, the central bank introduced a price index, the URV, to stabilize inflation. Third, monetary reform was implemented, introducing the *real* as legal tender, and disindexing the currency).

⁷³ The system operated as follows. The value of the real was kept artificially high, and trade restrictions were lessened. This increased the ability of the country to

producers not to increase the prices, but it also generated a current account deficit, which led to borrowing.⁷⁴ Borrowing at high interest rates in turn generated a rising public debt, rising debt interest payment, and an increasing current account deficit.⁷⁵ Although the anchored exchange rate mechanism proved effective at halting inflation in the short-run, in the longer-run a more fundamental fiscal adjustment was required.⁷⁶ Nevertheless, fiscal adjustment did not come until 1998.⁷⁷

Between 1995 and 1998, over 80 state-owned companies were sold, providing revenues of US\$60.1 billion, and a transfer of debt to

import, and by doing so put pressure on domestic producers to limit price increases. A subsequent result of an overvalued exchange rate is a current account deficit: the country imports more than it exports. To cover up the current account deficits that resulted from an overvalued exchange rate, Brazil needed capital inflows (i.e. money to pay for the increased imports). This capital came from two primary means: borrowing and foreign investment. Borrowing was done by keeping domestic interest rates higher than their foreign counterparts throughout 1994-1998. Investment came due to the end of inflation, ongoing economic liberalizations (including privatizations), and a president who encouraged markets and private investment.

⁷⁴ Amann & Baer, *The Illusion of Stability*, cit. at 72 , 1811.

⁷⁵ F. Anuatti-Neto, , M. Barossi-Filho, A. G. de Carvalho & R. Macedo, *Costs and Benefits of Privatization: Evidence from Brazil*, in A. Chong & F. López-de-Silanes (eds.), *Privatization in Latin America: Myths and Reality*, 169 (2005).

⁷⁶ Amann & Baer, *The Illusion of Stability*, cit. at 72 , 1811. A. de Souza, *Cardoso and the Struggle for Reform in Brazil* 10:3 *Journal of Democracy* 54 (1999). (...keeping interest rates attractively high for foreign investors required balanced public accounts lest the internal debt explode. Thus the core strategy was to reform public finance through reforming social security, the civil service, and the tax system, through privatizing state owned companies and eliminating deficit spending at all levels of government. Over the long haul, the stability of the *real* hinged on the credibility of fiscal policy.)

⁷⁷ Amann & Baer, *The Illusion of Stability*, cit. at 72 , 1811. . (The failure of the government to secure rapidly badly needed fiscal reforms...resulted from deep divisions within Congress. Discipline among pro-government parties was weak while the exercise of local as opposed to national interests over members of Congress remained strong....Congress in general proved very reluctant to accede to thoroughgoing fiscal reform, especially that which would have restricted the fiscal autonomy of the states and municipalities or would have adversely affected...employment in the public sector.)

the private sector of US\$ 13.3 billion.⁷⁸ These revenues from privatization played a role in temporarily tackling the current account and the fiscal deficits in two ways. First, they helped fund the deepening current account deficit by attracting private investment.⁷⁹ Second, they helped reduce fiscal deficit and thus public debt (which increased but would have been much higher by 1999 in the absence privatization).⁸⁰ In sum, by increasing investment flows, privatization served as a short-term adjustment mechanism for the economy.⁸¹

The main conclusion is that the primary reason for the strong privatization efforts from 1995-1998 was the need to sustain the Plano Real.⁸² The pace of privatization is evidence that privatization was

⁷⁸ A. C. Pinheiro, R. Bonelli & B. R. Schneider, *Pragmatic Policy in Brazil: the political economy of incomplete market reform*, Texto para discussão 1035, at 21 (2004). Online: <http://www.ipea.gov.br/pub/td/2004/td_1035.pdf>.

⁷⁹ R. Macedo, *Privatization and the Distribution of Assets and Income in Brazil*, Carnegie Endowment Working Papers: Global Policy Program, No. 14, at 20 (2000) Available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=368> .

(“Although not an official objective, the privatization program [of the mid 1990s] was...assigned the role of financing a major part of the external disequilibrium, by means of the foreign direct investment it was to attract.”) From 1997-2000, the ratio between FDI inflows associated with privatization and the current account deficit averaged approximately 25 per cent. Pinheiro, Bonelli & Schneider, *Pragmatic Policy in Brazil*, cit at 78. In fact, net portfolio investment rose from US\$ 0.62 billion/year from 1990-1992 to US\$ 4.5 billion/year from 1995-1997. Also, net direct investment rose from US\$0.3 billion/year from 1990-1992 to US\$ 16.3 billion/year from 1996-1998. Amann & Baer, *The Illusion of Stability*, cit. at 72 , 1806-1812.

⁸⁰ A. C. Pinheiro, F. Giambiagi & M. M. Moreira, *Brazil in the 1990s: A Successful Transition?*, BNDES Discussion paper number 91, at 11 (2001).

⁸¹ A. Averbug & F. Giambiagi, *The Brazilian Crisis of 1998-1999: Origins and Consequences*, BNDES Discussion Paper, at 10. Online: <<http://www.bndes.gov.br/english/studies/td77i.pdf>> (“[I]t seemed reasonable, therefore, to imagine that the sum of ‘pure’ direct investment plus privatization would suffice to finance a substantial part of the current account deficit in the following years, while the country ‘saved time’ to promote a graduate real devaluation of its currency and stimulate exports through non-exchange rate mechanisms...”).

⁸² A. C. Pinheiro, *The Brazilian Privatization Experience: What’s Next?* University of Oxford Centre for Brazilian Studies Working Paper Series, CBS-30-02, at 22, 26 (2002). Online:

intrinsically connected with the plan. To be sure, Brazil privatized some state-owned companies from 1991 to 1994, but the bulk of privatization was from 1995 to 1998 (a period in which privatization was broadened and expedited). Specifically, in 1997, after the Asian financial crisis, privatization assumed a vital role in the survival of the plan. It was between 1997 and 1998 that a significant number of companies, particularly in the electricity and telecommunications sectors, were sold. Similarly, after the exchange rate was allowed to float freely in 1999 the priority ascribed to privatization declined,⁸³ and the revenues from privatization decreased significantly, until the privatization program was officially abandoned by the Lula government in 2002.

The Brazilian case illustrates that when pressing need for resources (such as a macroeconomic problem) are added to the picture, the exercise of setting up policy priorities changes radically and tradeoffs become even more complex. The concern with macroeconomic instability also had an impact on the regulatory framework, i.e. on the goal of improving efficiency and quality in the delivery of infrastructure services. This impact was relevant, but it was rather different in distinct moments of the privatization process. In some moments, macroeconomic concerns were aligned with efficiency concerns and in other moments they were not.⁸⁴ This partially explains why in some cases privatization was preceded by regulation (such as the telecommunications sector), but in others it was not (the electricity sector).

This analysis raises a series of important questions for those analyzing reforms in the context of the European Union. The first question is to what extent countries are likely to rush through

<<http://www.brazil.ox.ac.uk/workingpapers/CastelarPinheiro30.pdf>>. See also Pinheiro, Bonelli & Schneider, *Pragmatic Policy in Brazil*, cit at 78.

⁸³ When the exchange rate was allowed to float freely in 1999, the result was to reduce the twin deficits: the primary fiscal balance went from a deficit to a surplus and the current account deficit fell, while at the same time flows of non-privatization FDI went up. This “[reduced] the importance of privatization finance of the external deficit.” Pinheiro, Bonelli & Schneider, *Pragmatic Policy in Brazil*, cit at 78., 26.

⁸⁴ Prado, *Policy and Politics*, cit. at 69.

reforms due to the need for cash. Does the existence of a supranational entity that is both able to provide financial resources and interested in the quality of the reforms being implemented put aside this potential dilemma? Does the existence of this same entity provides some assurance and guarantees to investors that reduce the burden on reforming countries to offer guarantees against expropriations and other unforeseen events (such as political and economic crises)? Finally, one may be tempted to say that international financial institutions, such as the IMF, perform exactly the same role as the European Union, and therefore the differences between the context of reforms in Brazil and in European countries would not be so stark. However, one may need to ask if both institutions face the same incentives, or whether the fact that the European Union depends on the success of its members countries to thrive may change the set of incentives it faces both to offer financial support and/or to press for certain reforms.

c) Overcoming Political Resistance to Reforms

In the Brazilian electricity sector, there was a delay in setting up regulation and sectoral institutions. While the specialized literature recommends regulating before privatizing, in the Brazilian electricity sector privatization preceded regulation and regulatory institutions. A considerable number of the companies were in private hands before there was a regulatory agency and a stable regulatory framework settled.⁸⁵ Selling companies without a regulatory framework has had negative effects on the functioning of the market, slowing the process to establish the new regulatory framework, compromising the credibility of the regulatory agency (ANEEL), and

⁸⁵ A. Oliveira, *Political Economy of the Brazilian Power Industry Reform*. In D. Victor & T. Heller (eds.) *The Political Economy of Power Sector Reform: The Experiences of Five Major Developing Countries* 31-75 (2007). In fact, the privatization process started only one week after a first and rough statute regulating the sector (Statute 9.074/95) was enacted. The first company to be privatized, Escelsa, was in the hands of investors two years before the creation of the regulatory agency Agência Nacional de Energia Elétrica (ANEEL). After the creation of ANEEL, a total of 18 companies were sold before the system operator and the electricity exchange for the wholesale energy market (MAE) were legally established.

helping to make regulation more ad hoc.⁸⁶ There was no clear separation of competencies between ANEEL, the Ministry of Mining and Energy, the system operator and the state-owned electricity holding company (Eletrobrás), which led to much confusion in the regulation of the sector.⁸⁷

The main reason for the delay was political economy problems. In the electricity sector, there were many conflicting interests involved: the holding company Eletrobrás has been a consistent opponent of privatization and of increased competition in the sector and technocrats from the Ministry of Mines and Energy and the National Department of Water and Energy (DNAEE) have remained committed to a strong state role in the sector.⁸⁸ On the other hand, the Brazilian Development Bank (BNDES) has been a proponent of privatization on pragmatic, fiscal grounds. As a result of these conflicts of interest, and outright resistance to the reforms, the government decided not to privatize all companies in a coordinated fashion, as it did in the telecommunications sector. Instead, it started with the subsector that faced less resistance: electricity distribution.⁸⁹ The response of the Brazilian government to these pressing but conflicting concerns was to do what was feasible to minimize costs while addressing the most pressing need at the time, preserving macroeconomic stability.⁹⁰

Political economy problems also determined different institutional designs of Brazilian independent regulatory agencies,

⁸⁶ Id..

⁸⁷ J. C. Pires, *Os desafios da reestruturação do setor elétrico brasileiro*, BNDES, Discussion Paper, 76 (2000).

⁸⁸ P. Kingstone, *The Long (and Uncertain) March to Energy Privatization in Brazil*, Baker Institute Energy Forum: Critical Issues in Brazil's Energy Sector, at 38 (2004). Online: <<http://www.rice.edu/energy/publications/brazilenergysector.html>>.

⁸⁹ Pinheiro, Bonelli & Schneider, *Pragmatic Policy in Brazil*, cit at 78. (mentioning that this resistance also absent in the telecommunications sector, where regulatory reform preceded privatization).

⁹⁰ P. Kingstone, *The Long (and Uncertain) March to Energy Privatization in Brazil*, cit at 88, 39. (In addition to opposing interests "[i]f we add to the mix the government's exceptionally complex reform agenda,...a series of macro-economic shocks, and an energy crisis, it is not hard to understand that the government has largely reacted to circumstances.")

especially in the telecommunications and electricity sectors. Earlier in this paper, I indicated that at the time of the privatizations there was a common belief that independent agencies could create a secure environment for private investment in infrastructure sectors. This belief seems to be the predominant reason why Brazil implemented IRAs in both sectors, but circumstantial factors caused the design of these two agencies to be quite different.⁹¹ And among all the factors playing a role, political economy problems were especially relevant.

President Cardoso (1995-2002) assigned to the ministry of each sector the task of formulating the new regulatory agency's structure for that particular sector.⁹² In each of the sectoral ministries, the specialized bureaucrats managed the process of creating IRAs differently, leading to different outcomes in the telecommunications and electricity sectors. In the electricity sector, where there was strong resistance to privatization and regulatory reforms, bureaucrats in charge of designing the agency rejected any external advice,⁹³ and the bill prepared by them did not include measures to secure the new regulatory agency's independence.⁹⁴ Instead, the bill would replace

⁹¹ Prado, *The Challenges and Risks of Creating Independent Regulatory Agencies*, cit. at 21.

⁹² Id.

⁹³ Despite the fact that external consultants were involved, they were not able to influence the proposed design, and the bureaucracy retained the final word in the process. For instance, the consulting firm Coopers and Lybrand was formally involved in the process and it highlighted its disagreement with the institutional design proposed by the Ministry but was not able to implement changes. E-mail interview with Edvaldo Alves de Santana, Director of ANEEL (Feb. 3 & July 20, 2006) (on file with author). Also, some independent consultants were invited to discuss the proposal informally, but again, their suggestions were not taken into consideration. The most influential players in this process were the bureaucrats of the previous regulatory body, DNAEE. Three of them (José Mario Miranda Abdo, Luciano Pacheco, and Eduardo Henrique Ellery Filho) became the first directors of ANEEL. Other people who were very influential in the process were José Said Brito (former director of DNAEE, before Abdo), Peter Greiner (National Secretary of Energy), and Reginaldo Medeiros (Chief of Staff of Greiner).

⁹⁴ Representative Aleluia declared that the original bill proposed by the Executive branch was "timid" in guaranteeing independence. R. C. Nunes & S. P. Nunes, *Privatização e Ajuste Fiscal: A Experiência Brasileira*, 17 Planejamento e Políticas Públicas 192 (1998).

the existing regulatory body (Departamento Nacional de Águas e Energia Elétrica or DNAEE) with another non-independent entity.⁹⁵

The President did not want to implement a non-independent body, and to avoid confronting the specialized bureaucracy he decided to transfer the debate to Congress,⁹⁶ sending them a bill that included no guarantees of independence.⁹⁷ Before that, however, the President negotiated the bill's revision with party leaders and assembled a coalition in Congress to implement the changes that would make the regulatory agency independent.⁹⁸ Thus, the Congressional changes in the bill were actually a Presidential initiative.⁹⁹ The bill was enacted as Statute 9,427/96, creating ANEEL, which regulated the electricity sector.

In contrast with electricity, the telecommunications bill submitted to Congress already guaranteed a very high level of independence for the regulatory agency.¹⁰⁰ Two circumstantial conditions largely contributed to this. First, the telecommunications Minister took a strong leadership position in promoting the

⁹⁵ It would be an *autarquia*. Different from DNAEE, this new body would be located outside of the Minister, but would not necessarily have institutional guarantees of independence to avoid political influence.

⁹⁶ Interview with Sergio Abranches (Nov. 2005).

⁹⁷ Projeto de Lei No. 1.669/96 (Mensagem n. 234/96).

⁹⁸ See Interview with Sergio Abranches (Nov. 2005) (reporting a private conversation with Fernando Henrique Cardoso in 1996).

⁹⁹ Representative José Carlos Aleluia, from one of the parties of the governing coalition, drafted the new version that would guarantee the agency's independence. The reports of the discussions in the House of Representatives show that the author of the reforms, Representative Aleluia, was in close consultation with the Cardoso Administration. *Diário da Câmara dos Deputados*, July 25, 1996, at 21155–61 available at <http://www2.camara.gov.br/publicacoes>; see also José Carlos Aleluia, *Speeches at the House of Representatives*, July 9 & 24, 1996, in *Diário da Câmara dos Deputados*, July 10, 1996, at 19647; July 25, 1996, at 21177, 21185, available at <http://www2.camara.gov.br/publicacoes>.

¹⁰⁰ The bill proposed by the Executive branch was PL 2,648/96, which was incorporated into an existing legislative proposal (PL 821/96) and later became Statute 9,472/97. Interview with Carlos Ari Sundfeld, Former Legal Advisor for the Cardoso Administration on the Privatization of Telecommunication Companies, and Member of the Commission that Designed the Regulatory Agency (Jan. 2006).

reforms.¹⁰¹ Second, the telecommunications bureaucracy was not only more open to international trends and to external advice,¹⁰² but the bureaucracy's leadership was actually supportive of the privatization reforms and advocated for an IRA in the sector.¹⁰³

The differences in the bill sent to Congress, which later translated into actual differences in the institutional design of agencies, can be largely ascribed to political economy problems. More specifically, the bureaucratic resistance to reforms in the electricity sector radically changed the way in which institutional reforms were conducted. The outcome is two regulatory agencies, whose creation can be ascribed to the same governmental concern with attracting private investment, that have fundamentally different institutional designs.

¹⁰¹ R. Marinzoli *et al.*, *Lessons of Telebrás: The Leadership of Sergio Motta*. Latin America III Article no.:12. Global Privatisation and Telecommunications Group - Lehman Brothers, USA (1998). Available at <http://www.connect-world.com/index.php/white-papers/item/2155-lessons-of-telebras-the-leadership-of-sergio-motta>.

¹⁰² Interview with Renato Guerreiro, Former Secretary of the Ministry of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006).

¹⁰³ Interview with Carlos Ari Sundfeld, Former Legal Advisor for the Cardoso Administration on the Privatization of Telecommunication Companies and Member of the Commission that Designed the Regulatory Agency (Jan. 2006); Interview with Renato Guerreiro, Former Secretary of the Ministry of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006). Guerreiro himself is the clearest example of that because he was supportive of privatization reforms. In the telecommunications sector, the bureaucrats not only had a lot of contact with international institutions and were aware of international trends in the sector, but they also knew that a process of privatization would not threaten their jobs. This was not necessarily the same in the electricity sector. Privatization brought the threat of a potential shift from hydro generation to thermo generation, a technology that was not the expertise of the specialized bureaucracy. Also, in the pre-privatization period, these bureaucrats, who alternated between periods in government offices and periods in state-owned companies, dominated the regulatory bodies. Many resisted privatization and independent agencies because both would cause them to lose power in the sector. The Author is grateful to Sergio H. Abranches for calling her attention to this point.

This analysis raises a series of interesting questions for comparative law scholars who are analyzing reforms in the context of the European Union. The central question is whether there are mechanisms employed by the Union that can reduce political resistance to reforms and easily overcome the obstacles that other countries may otherwise face. For instance, are some of the European Courts, such as the European Court of Justice, able to overcome such resistance by imposing obligations to certain principles, as it did when it established that national procedural autonomy may not encroach on general principles such as the duty to give reasons and the right to seek judicial protection?¹⁰⁴

Moreover, it would be interesting to explore to what extent the European Union fosters or facilitates the creation of transnational regulatory networks that may become interesting -- albeit complex -- vehicles for regulatory reforms.¹⁰⁵ The question is whether the European Union is creating conditions for collaboration between national actors and the formation of networks, which may in turn facilitate reforms by reducing resistance ex-ante. Indeed, there is a complex set of interactions between domestic and foreign actors in transnational regulatory networks,¹⁰⁶ which are "networks of national government officials exchanging information, coordinating national

¹⁰⁴ The example comes from G. della Cananea, *Administrative Law In Europe*, cit. at 5, note 41 and accompanying text.

¹⁰⁵ See, for instance, C. F. Sabel, J. Zeitlin *Learning From Difference: The New Architecture of Experimentalist Governance in the EU*, in C.F. Sabel & J. Zeitlin (eds.), *Experimentalist Governance in the European Union*, 1-28(2010).

¹⁰⁶ A more precise term is transgovernmental regulatory networks. R. O. Keohane & J.S. Nye *Transgovernmental Relations and International Organizations*, 27:1 *World Politics* 41 (1974) distinguish between two types of networks. "Transnational" refers to non-governmental actors, while "transgovernmental" to refer to sub-units of government that act relatively autonomously from a higher authority. As Slaughter explains, the terminology has not been very precise, as these transgovernmental networks have been described as policy networks, regulatory networks or government networks interchangeably. A. M. Slaughter *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 *Mich. J. Int'l L.*, 1041-1075 (2002).

policies, and working together to address common problems.¹⁰⁷ These networks may exist outside of any formal framework, but they may also exist within an established international organization. Indeed, international organizations may create the conditions for collaboration among national regulators, by providing arenas for interaction and opportunities for contact that turn tacit or potential transnational coalitions into explicit coalitions.¹⁰⁸ The question is whether the European Union is doing that.

III. Conclusion: The Promises and Perils of Legal and Academic Transplants

The previous section has indicated that Brazil has faced numerous constraints to implementing privatization and regulatory reforms. These illustrate the obstacles to convergence identified in the first part of this paper. The section also provided a series of questions to comparative law scholars as to the role that the European Union could play in pushing for similar reforms in European countries. The contrast with the Brazilian case suggests that there may be reasons to suspect that the European Union may be a powerful agent in increasing convergence, influencing and determining the outcomes of reforms in a way that does not happen in countries outside the Union.

Even if comparative administrative law scholars reach this conclusion – that the European Union is a powerful agent increasing convergence – they need to be aware of the conceptual and theoretical framework that they are using to formulate this distinction. The dynamics of reforms are often classified as either top-down (outsiders pressing insiders to adopt reforms) or bottom-up (insiders taking the lead regardless of outsiders' manifested preferences).¹⁰⁹ However, some authors have questioned this

¹⁰⁷ A. M. Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, cit. at 106, 1042-1043.

¹⁰⁸ R. O. Keohane & J.S. Nye *Transgovernmental Relations and International Organizations*, cit. at 106, 50-51.

¹⁰⁹ G. della Cananea, *Administrative Law In Europe: A Historical And Comparative Perspective*, cit at 5.

distinction, claiming that in most of the cases reforms fall somewhere in the middle. Peerenboom, for instance, argues,

In some cases it is possible to describe a particular institution, rule, or practice as a foreign transplant or the result of a top-down/deductive or bottom-up/inductive process. In most cases, however, these metaphors fail to capture the complexity of the situation. Indeed, most reforms will involve a mixture of foreign and domestic inputs that interact in complicated ways, as well as attempts to deduce successful approaches from both general principles and local circumstances and induce possible solutions from experiments.¹¹⁰

This is especially true if we account for the existence of regulatory networks. Indeed, with these networks scholars may not be able to classify reforms as either top down or bottom up. One may say that it remains top down to the extent that networks are influencing reforms at the national level. However, what are the mechanisms through which these networks are influencing reforms? Taking into account the reasons for resistance mentioned earlier, there are at least three hypotheses as to how these networks could influence domestic actors. First, they may be modifying interests, by showing to groups that could potentially resist reforms how they can attain significant benefits, as reforms may open up the opportunity for them to significantly increase their salaries and benefits. They can also make these groups more aware of new technologies, preparing them to adapt for changes, and offering support for professional training that will allow them to effectively adapt to the reforms. Second, they may change ideological resistance by changing ideas and mindsets. If they operate as epistemic communities,¹¹¹ they may

¹¹⁰ R. Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27:3 Mich. J. Int'l L. 823-871 (2005-2006).

¹¹¹ Hass has defined these communities as "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" P. M. Haas, *Introduction. Epistemic communities and international policy coordination*. 46:1 International Organization 3 (1992). While not all transgovernmental networks are epistemic communities, they can potentially become epistemic. Keohane and Nye

redefine how relevant actors think about their roles, their interests, and the rules according to which their interactions with other actors should be governed.¹¹²Third, these networks can operate by modifying both ideas and interests simultaneously, which may help reduce technical resistance. Transnational networks offer a forum for professionals to exchange ideas. This forum can be useful to “test” the idea. In other words, with an open dialogue, it is more likely that both parties will be able to find a common ground where the technical concerns are properly addressed without dismissing entirely the agenda for liberalization.¹¹³These hypotheses suggest that until we unpack the mechanisms through which these networks influence reforms at the national level, it is not possible to determine which level (national or international) is influencing the other.

Thus, comparative administrative law scholars should not rush to classify reforms as top down or bottom up. These scholars should be concerned in determining the complex dynamics of political resistance to reforms in the European Union, without trying to place them in a particular moment in time. This resistance may be happening at the time of the formation of the policy consensus, or afterwards. It may also be happening at both moments. In any event, the concept of top down or bottom up reform seems to be too

suggest that coordination among sub-units of national governments can change their behaviour over time. Moreover, collegiality creates flexible bargaining behaviour, facilitating agreements over goals and policies. The conditions for this to happen, however, are very strict. The members of such networks need to have broad and intense contact, and they need to share a great common interest. R. O. Keohane & J.S. Nye *Transgovernmental Relations and International Organizations* cit. at 106, 45-46.

¹¹² However, not all transnational governmental networks can be characterized as epistemic communities, as these require more than just regular contact between its members. Indeed, epistemic communities have four defining characteristics: (1) a shared set of normative and principled beliefs (rationale for action); (2) shared causal beliefs (which determine policies to achieve desirable outcomes); (3) shared notions of validity (criteria to validate the knowledge that serves as basis for action); and (4) a common policy enterprise (shared set of problems to which their professional competence is directed) P. M. Haas, *Introduction. Epistemic communities and international policy coordination*, cit. at 111.

¹¹³ R. O. Keohane & J.S. Nye *Transgovernmental Relations and International Organizations*, cit. at 106, 44.

simplistic to capture the rich and complex dynamics guiding these actors.

Another important question that scholars may need to ask – if they reach the conclusion the European Union a powerful force for convergence -- is to what extent the analysis above assumes too much of a theoretical framework that is not applicable to the European context. The concern here would be not only that countries are transplanting legal institutions, but also legal scholars would be transplanting theories from foreign jurisdictions to explain the realities in their own countries. And the question is whether these theories are adequate to explain such realities. Indeed, comparativists need to be careful with what we are implicitly assuming, because we can be inadvertently importing theories that do not apply to the reality they are analyzing.

In this regard, I have shown how the application of the principal-agent theory in the Brazilian context does not allow us to conclude that the theory of congressional dominance (Congress is the principal and IRAs are the agent) applies to Brazil. The Brazilian Presidential system has unique characteristics. Indeed, Brazil has one of the strongest presidencies in the world and a President with stronger legislative powers than the American President. Due to the peculiarities of Presidential systems in Latin America in general and Brazil in particular, the theory of congressional dominance that is largely used in the US fails to capture the reality of Brazilian IRAs, where the President – not Congress – is the principal. Thus, I propose a theory of presidential dominance to describe that Brazilian reality.¹¹⁴Comparativists concerned with European countries need to ask the same question. Does the principal-agent theory describe the European reality accurately? Who is the principal in a parliamentary system of government? Are agencies indeed agents?

Most importantly, if comparativists are to include the transnational dimension in their analyses, they need to ask whether a principal-agent framework is appropriate to describe the dynamic of

¹¹⁴ M. M. Prado, *Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil* in S. Rose-Ackerman & P. Lindseth, *Comparative Administrative Law* (2010).

reforms in Europe. The argument that the European Union is a driver of convergence raises the question of whether this idea that there is one driver (the Union or the nation states) is accurate. Indeed, a recent book by Peter Lindseth suggests that the nature and legitimacy of European governance comes from administrative governance. Indeed, he suggests that supranational regulatory authority should properly be seen as 'delegated' from national constitutional bodies.¹¹⁵ This suggests that the principal-agent theory is applicable to the European context, but the agents are the transnational bodies, not the other way around. The idea that administrative forms of governance may prevail at the transnational level calls for a reformulation of the principal-agent theory as it is often applied in the American regulatory context. But it also questions that idea that comparativists should be focusing only on explaining where national reforms are coming from. As Lindseth argues it may as well be the case that transnational reforms originate in domestic arrangements, and vice-versa. Again, this questions the idea that we could accurately describe the reforms in the European context as top-down or bottom-up, which only makes the intellectual challenge even more interesting for comparativists.

¹¹⁵ P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010).