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## State capacity and utilities regulation in Brazil: Exploring bureaucracy

Bruno Queiroz Cunha <sup>a,\*</sup>, Ana Karine Pereira <sup>b</sup>, Alexandre de Ávila Gomide <sup>c</sup><sup>a</sup> Institute for Applied Economic Research (IPEA) and Federal University of Rio de Janeiro (UFRJ), Brazil<sup>b</sup> Federal University of Goiás (UFG), Brazil<sup>c</sup> Institute for Applied Economic Research (IPEA), Brazil

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## ABSTRACT

Different interest groups play a role in regulatory governance. One frequently neglected is the group of professionals that run regulatory agencies and pursue regulatory goals. The objective of this paper is to give “regulocrats” center stage. It interprets data from a survey conducted by Brazilian institutions, shedding light on the major preferences of the “regulocrats”, and on how they go about implementing policy and interacting with other actors. Data is combined with a state capacity perspective so as to elaborate on the findings. The paper concludes by articulating an idea of a particular kind of hybridism in the Brazilian “regulocracy”.

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## 1. Introduction

Programmatic and policy disagreements in the realm of utility industries in Brazil relate much more to the “how” question than to the “what”, meaning that instruments and institutions are normally the major aspects around which discussions revolve, rather than the need of substantial infrastructure upgrading, where consensus truly resides. This article turns again to the unresolvable “how” question. Nevertheless, it does so by inquiring into one frequently neglected although fundamental component for tackling infrastructure problems, namely, state bureaucracy.

Interest-group sort of analyses have frequently appeared in the literature, principally in relation to political leaders, businesses and civil society, and their respective stakes in the regulatory process. Nevertheless, a direct engagement with bureaucracy does not appear so often. This paper sets out to do so by shedding light on the relevance of, first, a contextual feature and, second, an analytical option. In the case of the latter it means to take on board the importance of high quality state bureaucracies for economic development and growth (Evans and Rauch, 1999). The former, in turn, has to do with a path-dependency aspect. Brazil has a long

history of meritocratic statist bureaucracy, and the areas of infrastructure, including regulation, are also rich in this regard (Gomide and Pereira, 2016; Iacoviello, 2006; Parrado and Salvador, 2011).

Bureaucracy is an indispensable element for understanding the utilities sectors in Brazil. As the article demonstrates, the adoption of a statist kind of bureaucracy in the area of utilities regulation has had distinct effects in Brazil, resulting in hybridism. Data presented in this paper show that Brazilian regulatory bureaucracies seem to largely respect the ideals of the managerial state reforms that bred them in the late 1990's, thereby subscribing to the “logic of discipline” of Roberts (2010).

However, the paper also points to the fact that as regulators carried on sustaining a firm conviction in the notion of independence from the day-to-day of policymaking and politics, bureaucratic ethos may have ended up being undermined. The idea of “depoliticization” of regulation (Flinders, 2004; Gilardi and Maggetti, 2011; Majone, 1997, 1994), if transformed into low intra-state or inter-organizational interaction, can harm cohesion in State action. Depoliticization and administrative independence have evolved so engrained in the Brazilian regulatory staff that they have seemingly contributed to fragmentation in the energy and transport/logistics sector, as data presented in this article suggests.

As a general premise, it is maintained that bureaucracy is a critical state resource that integrates the list of major elements for assessing state capacity. Even though state capacity has a long history as an analytical tool and has been examined in multiple

\* Corresponding author. SBS Quadra 1, Bloco J, Ed. BNDES/Ipea, 70076-900 Brasília, DF, Brazil.

E-mail address: [bruno.cunha@ipea.gov.br](mailto:bruno.cunha@ipea.gov.br) (B.Q. Cunha).

contexts, including in Brazil and Latin America (Boschi and Gomide, 2016; Gomide and Pires, 2014), it is not as usual to see that same framework being applied to regulatory policy and governance. State capacity has not so far impinged on the so-called “regulocracy” either (Gilardi et al., 2006; Levi-Faur, 2005; Levi-Faur et al., 2005). However, it seems high time to promote such a conceptual encounter since the performance of the Brazilian Federal Government in infrastructure policies in the last decade or more might be somewhat explained by the type of interaction between planning institutions and regulatory ones.

Methodologically, the article relies mostly on the analysis of quantitative evidence, using extensively empirical data collected from a research project run in 2015 by two Brazilian public foundations, the Institute for Applied Economic Research (Ipea, in Portuguese) and the National School of Public Administration (Enap, in Portuguese). Ipea’s and Enap’s project aimed to produce evidence on the profile, behaviors and performance of state bureaucracies in the area of energy and transport/logistics in Brazil. For reasons of space and scope, the analysis in this paper will focus solely on the regulocrats, although data from that project covers other sorts of official state careers as well.

The article is organized in the following way. We initiate, after this introduction, by revising the rise of the regulatory state and the assimilation of the regulatory agency model in Brazil. Subsequently, the analytical framework of state capacities is described, underlining the administrative and political-relational dimensions, which will then be correlated with data for the regulatory agencies’ staff members. Such data gets described thereafter, indicating the most relevant figures and interpreting them critically. We conclude by pointing out to the most relevant findings and this paper’s contribution.

## 2. Regulatory state with statist characteristics

In the early 1990’s, with state owned enterprises (SOE) in utility sectors in Brazil showing the most drastic effects of years of underinvestment and mismanagement, in addition to serious financial deterioration as a result of their being used to compensate for public sector severe indebtedness, the Brazilian government decided to advance an agenda of privatization that would eventually align Brazil to the then rising regulatory state paradigm (Majone, 1997, 1994; Pacheco, 2006). Unlike previous state reforms in the country, which had generally a centralizing and pro-state nature, in this case institutional changes were pursued in an anti-state fashion (Fernandes et al., 2017; Mattos, 2006; Prado, 2013).

The relevance of regulation from the mid-1990’s on became truly superior in the country, as well as more consistent with the international mainstream. Given the new engagement with regulation, it can well be argued that Brazil has decided to buy in into the idea of “regulatory capitalism” (Braithwaite, 2008; Levi-Faur, 2005). Such a programmatic shift echoed the international trend with regard to agencification as well (Christensen and Lægread, 2006). In the span of less than a decade, ten independent regulatory agencies were set up by the Brazilian federal government, most of them linked to utility sectors, as Fig. 1 details.

Following the dominant rationale of the 1990’s, privatization and liberalization of markets would only be completed in Brazil with the setting up of coherent regulatory apparatuses, mostly via the creation of dedicated and single-purpose independent regulatory agencies. Through sustained independence regulators would be able to resist opportunistic interference from third parties and operate like “transmission belts” between political decisions and the deployment of technical knowledge, mostly economic, as policy implementation (Croley, 2008).

The literature on the rise of the regulatory state in the global

south has explored particularities of developing countries’ experiences (Coutinho, 2014; Cunha, 2016; Dubash and Morgan, 2013). In Brazil, regulatory state devices were mostly laid on top of the incumbent institution setting. Notwithstanding the large institutional overhauling which combined New Public Management (NPM) reforms with divestiture of public assets and regulatory reforms, the functioning of the new regulatory regime was in practice gradually mediated by the existing institutional and cultural aspects. Yet, such an institutional layering account, albeit greatly realist and sound, does not rule out the conventional idea of separating politics and technic in government intervention, which was strong as a reform motive in Brazil. Thus, the isomorphic element was indeed a great inspiration for the reform in the country as well (Cunha, 2017).

Therefore, in addition to the influence of national endowments, it seems correct to contend that the traditional “credible commitment” hypothesis still holds for the Brazilian case (Correa et al., 2008; Levy and Spiller, 1996, 1994). As a major mobilizing discourse, and regardless of its inherent normative value, regulatory reforms and agencification in Brazil had the objective of creating a better institutional environment conducive to private investment in the utilities sector, which would be carried out by means of committing the State to the “right” institutions (North and Weingast, 1989). Regulatory agencies’ emergence in Brazil is largely a product of this programmatic view (Bresser-Pereira, 2009; Cunha, 2016).

Nonetheless, independent regulatory agencies have been instrumental not only as transmission belts between ministerial political decision and the subsequent discharging of state-of-the-art economic regulation technic. Beyond narrowly defined technical expertise, Brazilian regulatory agencies have acquired policymaking roles, similarly to other parts of the globe (Lodge and Wegrich, 2014; Maggetti, 2009; Ossege, 2016). Regulatory agencies have become, in several instances, integral parts of the policy design cycle in areas of utility policies, thereby fulfilling more broadly their mission of informing political decisions. This movement may be interpreted as a necessary step for regulatory regimes to operate more effectively and harmonically particularly in the case of developing countries, where statehood is more diverse (Dubash and Morgan, 2013; Jarvis, 2012; Levi-Faur, 2013).

Thus, it is not particular to Brazil the fact that independent regulatory agencies have not ended up being restricted to the prototypical standard. Yet, one element that seems to be distinctive of the Brazilian experience is the remarkable statist trait of the existing regulatory apparatus. If it is true that Brazilian regulatory agencies are more autonomous than the usual state agencies (the so-called *autarquias*), other features clearly resemble traditional central State bureaucracies. Regulatory agencies’ personnel, or their “regulocracy”, following the term coined by David Levi-Faur (Levi-Faur, 2011, 2005; Levi-Faur et al., 2005), is a good example.

Regulatory agencies’ staff in Brazil is comprised almost exclusively of career civil servants whose work, rights and duties fall under the same legal system as top ministerial career bureaucrats. Regulocrats’ career progression and payment regimes too mirror central government’s careers. The mechanism of selection and admission, which is almost entirely dependent on open public contests (the notorious *concursos públicos*), and the general rules for mandatory or incentivized training are roughly the same as well.

Moreover, regulocrats are stable civil servants payed directly from the National Treasury, and not via revenues that, through fees and fines, regulatory agencies collect from the regulated industries. While these external resources generated from the industry do contribute to regulators’ operational budgets to some extent, they do not impact the regulocrats’ salaries, which are safeguarded by

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