

USER'S VOICES IN REGULATORY PROCESS: A CASE FOR REGULATORY IMPACT ASSESSMENT

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ABSTRACT

The need to ensure that regulatory decisions reflects users' needs such as price, quality and protection from harm should be at best, an ongoing basis for regulatory institutions. This study assumes that direct user participation through RIA rather than representative bodies alone will lead to better policy outcome, resolve some of the information asymmetries involving regulators, firms, and end users. Moreover, RIA based decisions would avoid regulatory capture or bias by regulated firms or regulators themselves. Using interviews the study sought to explore how users/consumers in Tanzania engage with regulatory agencies in shaping the content and scope of new regulations. Particularly, this study sought to find out how RIA practices in Tanzania have hindered or facilitated users' engagement in regulatory process. Findings indicate that the practice of RIA is largely inconsistent although currently there seem to be promising improvement. With regards to representative bodies, results show that these bodies have sparingly represented consumers in regulatory process due to among other reasons, lack of neutrality and poor coordination between themselves, the regulators and consumers. Apparently, while it is assumed that RIA would be more fruitful in facilitating consumer-focused model, this has not been the case. This is a result of inconsistencies in the practice of RIA as a consultative process.

Keywords: Regulatory Impact Assessment, User's voices, regulatory processes

INTRODUCTION

The need to ensure that regulatory decisions reflects users' needs such as price, quality and protection from harm should be at best, an ongoing basis for regulatory institutions. This study is founded on the premise that quality Regulatory Impact Assessment (RIA) can be effective in representing users' voices in regulatory process. Regulatory Impact Assessment (RIA) is a systematic framework used to examine and measure the positive and negative effects of existing regulation (ex-post) as well as potential impact of proposed regulatory measure (ex-ante) (Kirkpatrick & Parker, 2004; Kirkpatrick, 2001). Regulators become accountable by providing demanded outcomes to the society they serve. However, one cannot deliver an outcome focused approach if she/he does not know what the people to be served think, need and want. Hence, RIA ensures that regulations are clear and honest and that users' interests have not been 'captured' by the regulators themselves or the regulated business/industry. (For the purposes of this paper, I am using consumer and user as synonyms).

Literature holds that the more citizens are engaged in regulatory process the more advanced economic prosperity (Vallbé and Casellas 2014; Torriti 2007; Radaelli 2003; OECD 2009). In fact the more advanced economies around the world, the government, though in varying degrees consult their citizens on the content and the likelihood costs and benefits of the proposed regulation (Diergarten and Krieger 2015; Gurin 2014). Similarly, policies that engage citizens have also proved to improve economic prosperous in developing countries (Adams and Atsu 2005; Denhardt and others 2009; Fishkin 2008). A study examining the effects of regulation on income inequality in 26 Sub-Saharan African countries from 1970 to 2005 shows that government transparency and quality regulation are positively and significantly correlated with economic growth (Adams and Atsu 2005). Likewise, studies by Jalilian, Kirkpatrick and Parker (2006) in developing countries suggest a close relationship between regulatory quality and economic performance. Another study focusing on economic and social development in Asia suggests that government systems with high state administrative capacity and state legitimacy—including those with public involvement in rulemaking processes, strong rule of law and programs to combat corruption—lead to strong gains in social development, such as reductions in income poverty and inequality (Sen, 2014). The study also ascertains that overall individual poverty is lowered by quality regulations due to improved government effectiveness.

The creation of regulatory institutions as an outcome of New Public Management (NPM) are said to play a significant role in the operation of a modern economy. Regulatory institutions perform functions none of which the legislature, the government, or the courts have the time, or the mandate to perform (Warren, 2015). Regulation is also seen by the OECD (2010) as one of the three key levers of state power and of critical importance in shaping the welfare of economies and society, support growth, investment, innovation, market openness and uphold the rule of law.

However, mere establishment of specialized regulatory institutions is not satisfactory. The need to see regulatory institutions are achieving policy goals is paramount. Emphasis on the need to ensure effective designing of regulations, enforcement and evaluation is overriding. Particularly, OECD (2013) underscores the requirement to determine who shapes the designing of regulations, better strategies for enforcement and both ex-ante and ex-post evaluation of the regulations. Indeed, one of the important stakeholders affected by regulations is the end users of service delivery. Hence, taking into account their views in regulatory process is inescapable. However, the question in mind is how users can be effectively engaged in regulatory process.

Users' representation in Tanzania is still in its infancy. In a snapshot, users inadequately influence regulators due to insufficient knowledge on regulatory matters (Oscar, 2014). Users/consumers are intended to be the ultimate beneficiaries of competition, and where competition does not function effectively, regulation. However, there has been debate about how the voice of consumers should be incorporated into the regulatory process and the dangers of a 'regulator knows best' model. The importance of effective public participation when developing regulatory policy had attention drawn to it by the concept of 'Responsive Regulation' (Braithwaite and Ayres, 1992; Braithwaite, 2011). In fact, studies on how to engage the users are hardly novel. What are unique lies in the direct interaction with end users in regulatory processes. As Littlechild, (2014a) aptly put, this mechanism may determine what users want and this information can be integrated in the outcomes of regulation.

Numerous models of consumer input have been proposed including a body within the regulator or consumer representatives. In Tanzania for instance, it is legally mandatory for regulatory institutions

to have in place Consumer consultative councils (CCCs). The fundamental role of these councils is to advocate for consumer protection rights and interests through consumer education and outreach. However, these consumer consultative councils are at the mercy of the regulatory authorities in terms of funding. Similarly, members of CCCs are appointed by the respective minister constraining their neutrality. It is therefore obvious that users' voices scarcely influence regulatory decisions. Another model is consumer organizations which are bodies outside the regulator for ensuring the protection of users' interest and that their voices are heard in regulatory process. Nevertheless, of unease is the extent to which these consumer organizations are backed by the state and have formal recognition in the regulatory process (NAO, 2004; Page and Bakker 2005).

The enactment of the Fair Competition Act, 2003 which is the main consumer protection law in Tanzania amongst others is yet another formal mechanism for protecting consumers. The Fair Competition Commission is an independent government body established under the Fair Competition Act, 2003 to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. Nevertheless, the extent to which consumers are engaged in the process of designing these regulations is debatable.

At the same time, it is worth recalling that users/consumers are also citizens (Lunt and Livingstone, 2011). Even without a direct input into the regulatory process consumers can have indirect impact on the regulatory landscape through their political power. At the most elementary level, legislatures set the mandates of regulators and may determine the importance regulators attach to consumer versus producer interests (Baron, 1988; Hanretty, 2013). But, politicians are prospective to pursue their own interest at the expense of consumers particularly in comparatively less democratic countries like Tanzania. The notion of consumers as citizens also provides a link to the discourse on public service obligations (Heritier, 2001; 2002) and the accountability of regulators when they are unelected. Effective consumer representation in policy making renders consumers as a group of distinct and primary significance. The central question is the weight regulators place on consumers' views when taking practical decisions.

Hence, problems with the aforementioned approaches led scholars and practitioners to search for improvements to the regulatory framework. One recent development in the regulatory landscape is a paradigm shift from regulator-focused regulation toward a more user-focused regulation (Littlechild, 2014a; Bush and Earwaker, 2015; Heims and Lodge, 2016). This study argues that with a quality regulatory impact assessment (RIA) users are fundamentally assured of direct engagement with policy makers rendering effective policy outcomes. The basis of this is that RIA-based consultation will improve the inherent quality of regulatory interventions, and of the rules themselves. Knowing this, most stakeholder interests will mobilize to engage in consultations and influence the thinking of regulatory authorities on RIA-related issues at an early stage. Generally, it is probably best to think of RIA-based consultation as an ongoing activity, starting early and continuing through the entire regulatory development process and on into the implementation phase. Early engagement with stakeholders is helpful in aiding regulatory authorities improve their knowledge about problems and how they might be addressed through regulatory and non-regulatory measures.

In Tanzania RIA was introduced as part of much wider program 'Business Environment Strengthening for Tanzania' (BEST) which received funding from developed countries and international agencies (Welch 2007). General studies on RIA in developing and transition economies that included Tanzania show that RIA was introduced in 2004 and is a legal requirement in Tanzania

(Kirkpatrick, C. and Yin-Fang Zhang 2004; Adelle et al., 2014). RIA is particularly mentioned as a tool to assist the transformation of historically socialist systems to market driven economies. In 1998 the government of Tanzania showed commitment to regulatory good practices by issuing principles of good regulation while indicating that RIA is a tool for policymaking that helps the government to apply these principles. The document indicates the need for RIA to include among others: ascertain whether the new regulation would have desired impact, identify side effects to affected parties, cost of compliance as well as sharing of stakeholders' views (The World Bank Group, 2010). Dunlop et al, (2012) add that RIA can be used as an instrument of control, assessing regulatory authorities and a mechanism to ensure wider participation of stakeholders in decision-making. This study assumes that direct user participation through RIA rather than representative bodies alone will lead to better policy outcome, resolve some of the information asymmetries involving regulators, firms, and end users. Moreover, RIA based decisions would avoid regulatory capture or bias by regulated firms or regulators themselves.

Therefore, the study sought to explore how users/consumers in Tanzania engage with regulatory agencies in shaping the content and scope of new regulations. Particularly, this study sought to find out how RIA practices in Tanzania have hindered or facilitated users' engagement in regulatory process. The assumption is that if decision-makers are provided with RIA-related information, they will make better decisions. Transparency of the process and of the basis for regulatory decisions is essential to maintaining credibility and increase public legitimacy of government regulatory decisions hence improve compliance with rules. Questions in this study revolved around how regulatory agencies communicate with users about proposed regulations, how CCCs are engaged in regulatory process and how they communicate with their stakeholders and role of Tanzania consumer association in representing consumers.

METHODOLOGY

This is a case study that focused on household utilities such as water, electricity and telephone. As such data were collected from regulatory agencies regulating these utilities such as Energy and Water Utilities Regulatory Authority (EWURA), Tanzania Communications Regulatory Authority (TCRA) and Fair Competition Commission (FCC) together with their Consumer Consultative Council (CCCs). Consumer organizations such as Tanzania Consumer Advocacy Society and individual users of these utilities also made part of the sample. The study also read websites of the regulatory agencies under study. Interviews were conducted with the regulating authorities (EWURA and TCRA) together with their CCCs. Information was also sought from a Fair Competition Commission which seeks to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. Interviews were also conducted from Tanzania Consumer Advocacy Society officials and the National Consumer Advocacy Council (NCAC). Thematic content analysis was used to analyze qualitative data where interviews were transcribed and coded to ease data management and categorized until themes were identified.

FINDINGS AND DISCUSSION

RIA Practice in Tanzania

In Tanzania RIA was introduced as part of much wider program 'Business Environment Strengthening for Tanzania' (BEST) which received funding from several governmental aid agencies

from the developed world (Welch, 2007). However, by 2010 RIA under BEST program was mainstreamed into Better regulation section (BRS) under private sector development and empowerment in the office of the Prime Minister. The main functions of BRS are initiation of modern approaches to regulations such as RIA, regulatory simplification and regulatory guillotine among others. Overall, the practice of ex-ante RIA in Tanzania is practiced as a consultative process and not as both an analytical and consultation tool. At the same time, although there is mandatory stakeholder consultation in the regulatory process, the practice shows that consultation is still low (Mkunde, 2018). Similarly, the practice in ex-post evaluation in Tanzania is still inconsistent as there are no published guidelines on how and when evaluations should be carried out. Nonetheless, currently, there is considerable positive progress in the implementation of RIA. This is evidenced in the Blue Print document (2018) that repeatedly underscores the need to implement RIA in the upcoming proposed regulations particularly those impacting the business sector. Again, the current more to review about 120 existing regulations which were perceived to be obsolete, conflicting and overlapping cannot be downplayed (Blueprint, 2018).

A body within the regulator model: Role of Consumer Consultative Councils and National Consumer Advocacy Council

EWURA-CCC and TCRA –CCC were established under the Energy and Water Utilities Regulatory Authority Act, 2002 and Tanzania Communications Regulatory Authority Act No. 12 of 2003 respectively. The council members are appointed by the respective ministers. The government's rationale for the establishment NCAC and the Consumer Consultative Councils of TCRA, EWURA was to reinforce organized consumer power in the market. Main sources of funding come from parliamentary appropriations and the respective agency. Their role is to represent the interest of consumers by making submissions and to providing views and information to and consulting with the respective regulator and minister. It should be put in mind that legally, RIA process compels regulators to engage affected stakeholders and the public through consultative process. Regarding the council's involvement in regulatory process, an interview from TCRA-CCC and EWURA- CCC revealed that their respective agencies send documents to CCCs for comments. Similarly, feedback is given in consultative meetings between the agency and the council. However, there is limited linkage between consumers and the council as the council has no mandate to call public meetings. The only available avenue is during dissemination of information on consumer rights awareness through meetings, brochures and social media. Additionally, CCCs have no power to petition regulations in court, they only have advisory powers.

Similarly, officials from Tanzania Consumer Advocacy Society (TCAS) argue that CCCs do not fully represent consumers' interests because council members are essentially members of business communities or representatives of private sector interests. Seemingly, as members of the business community they are more likely to pursue business-friendly regulations at the expense of the users. It is therefore apparent that consumers through CCCs cannot fully advance user's views in regulatory process. CCCs are also biased due to lack of independence as they are appointed and funded by the appointing authority and the respective agency. Besides, the councils do not have offices in all regions of Tanzania. This calls for the need of users to have a platform for advancing their views for shaping the scope of the proposed regulation.

The National Consumer Advocacy Council (NCAC) was established under Fair Competition Act, 2003. The council is vested with wide powers ranging from provision of speedy redress to consumers

complaints to seeking ways and means of removing or eliminating from the markets hazardous products and causing offenders to replace such products with safer and more appropriate alternatives. The council also plays a consultative and information dissemination role to the consumers. Similar to CCCs, the main function of the NCAC is representing the interest of the consumers by making submission to providing views and information and consulting with the council commission, regulatory authorities and government ministries. It also receives and disseminates information and views on matters of interest to consumers. However, unlike the CCCs, it has mandate to establish regional and sector consumer committee and consult with them, consult with industry, government and other consumer groups on matters of interest to consumers. Nonetheless, findings from end users and TCAS reveal that NCAC has barely made a significant impact in representing consumers. Firstly, consumers are barely aware of its existence. Secondly, the council is equated to a toothless dog as it has neither force of law nor can it represent consumers before the court. It has therefore remained as advisory body just like the CCCs. Generally, these findings indicate that RIA has not fully been utilized to facilitate the engagement of consumer bodies in representing users. This is because of the weaknesses in the consultative process particularly the timing of consultation, inadequate feedback and poor coordination between users and the councils.

Consumer Organization Model: Role of Tanzania Consumer Advocacy Society

TCAS is a private, voluntary, non-governmental, nonpartisan and nonprofit making organization registered in 2007 under the companies Act, 2002. TCA's mission is to provide advocacy platform that make consumers' voices heard, raise consumer's awareness of their rights, build consumers' ability to claim their rights and make markets accountable and more responsive to user's needs and interests. As noted from the weaknesses of CCCs and NCAC in representing user's interest in regulatory process, it is essential to have consumer's organizations actual involvement in regulatory decision making, particularly, the making of regulations that affect users such as quality, price and protection from harmful product/service. Consumer organizations need to truly be seen as equal participants along with other interested parties and be involved at the same and earliest stage of the decision making processes. As emphasized by Trisha McAuley (2016) consumers need to know who is acting on their behalf and what they are doing. It is a prerequisite for consumer organizations to have equal access to information from the regulator and the regulated and make themselves accountable to consumers. Findings from this study indicate that overall, user's organizations ie. TCAS is patchily engaged in making regulations in regard to household utilities such as water, electricity and telephone. TCAS director through an interview confirmed that the organization is sparingly consulted in regulatory process. At most they are invited in stakeholders meetings when documents are complete limiting constructive inputs. Similarly, there is no feedback given in response to their inputs. However, the director also acknowledged that they have been engaged in making regulations beyond the auspices of Tanzania. He elucidated that under the International Telecommunication Union (ITU) through consumer forums they were engaged in discussing TCRA regulations jointly with consumer organization representatives from Southern African Development Community (SADC) countries. At this juncture TCAS was able to represent user's voices in regulatory process.

Another fruitful attainment by TCAS as claimed by the director is stopping the Sim card Tax in the 2013/2014 Tanzania national budget. In the 2013/2014 National Budget, the government introduced a TSh1,000 SIM Card monthly tax as one of the measures to increase government revenue collections. Despite public outcry and concerns from Members of Parliament, the Finance Act was

passed by the Parliament and later on assented to by the President. TCAS reacted and moved to court to represent user's interest by asking for order of injunction. With this concern coupled with continued public outcry the President of Tanzania decided to sign a certificate of emergency to amend the 2013/204 Finance Act in order to scrap the SIM card registration tax (Kimboy, F. 2013).

With regards to coordination between TCAS and users, it was revealed that TCAS communicate with consumers through public meetings, members' bi-annual and annual meetings and the media. TCAS has also created consumer clubs in secondary schools embarking on sustainable production and ethical production. Despite these few achievements, the organization is limited by its low technical capacity and equipment's. For instance, the association solely rely on information from Tanzania Bureau of Standards (TBS) and other agencies mandated with the role of gauging the quality of products because they do not have own equipment and capacity to test the product. At the same time, there is no coordination between the association and TBS particularly on how to articulate views regarding quality of products. Additionally, due to financial constraints the organization is not widely spread throughout the country. This implies that, citizens in the regions are hardly represented by TCAS in regulatory process.

In view of the above discussion, it is crystal clear that consumer's organizations cannot fully represent users in regulatory process. Similar to the weaknesses of the councils, users' organizations also indicate lacunas that this study felt that user-focused regulation would be more suitable in facilitating their engagement in regulatory process.

Users-focused regulatory Framework

User's engagement in regulatory process guarantee enhanced responsiveness, decentralization, public legitimacy and informed decision making. This section explores how individual users engage with the regulating agencies of household utilities in making regulations. The participatory approach to this kind of compliance framework has the advantage of allowing all parties to be involved in the design of standards and codes. It allows self-regulation but has a safety net of regulator intervention. Critical to this framework is consumer participation. Likewise, effective consumer participation is ineffective where consumers are not aware of their rights and responsibilities. In fact, consumer engagement is far beyond understanding of consumer rights and responsibilities such as right to safety, (Occupational Health and Safety Act, 2003), right to redress (Fair Competition Commission Act,2003) and right to health environment as enshrined in Environmental Management Act, 2004.

At this point the right to have consumer interests represented and expressed in the making and execution of regulation is of paramount importance. This implies that to be heard, consumers need not only require relying on consumer organizations and 'the councils' but also make self-presentation of their views in regulatory process.

Regulation process in Tanzania is viewed as a political process as it demands consultation process to take place (*Mwongozo wa Sera*, 2016). Legally the made regulations are published into government Gazette after the approval and signing of respective minister. Prior to publications a consultation process that engages stakeholders and the public is carried out. Interviews from ordinary users reveal that, at most, users are engaged in regulatory process indirectly as has been discussed in the previous models. This does not imply that there are no instances where consumers are directly

engaged in the process. As affirmed by officials from TCRA, EWURA and FCC through interviews, individuals are also given avenues to participate in making regulations. Practically, each regulatory authority has its own website where a public notice is posted requesting comments on proposed regulations via email or in writing. On the same footing, respective agencies call public hearings with stakeholders and the public to solicit inputs on the draft regulation. For instance, when making the Tanzania Online Content Regulations, 2018 by TCRA a public hearing was held in Dar es Salaam on 29th September, 2017 whereby the Permanent Secretary for the Ministry of Information, Culture and Sports held a meeting with the media stakeholders to obtain their views on the draft regulations.

Nonetheless, most of the interviewed users of the household utilities have never accessed these websites to shape the regulatory process. Additionally, most of them do not attend stakeholders meeting due to among others, lack of prior information. Consultation is essentially a two way rapport, in which information is demanded and supplied. The public sector is principally responsible for availing adequate information to other stakeholders. However, findings of this study indicate that there is inadequate published open public consultation that is provided at a single point. Public hearings also allow for dialogue. By discussion with the participants, the regulator can clarify issues, ask follow-up questions and potentially form a better understanding of stakeholder views. However, apparently public meetings have not been effective because participants and particularly external stakeholders do not have sufficient information with which to make informed contributions. At the same time, many important stakeholders may be unable to attend public meetings for various reasons. This makes it important to consider carefully where such meetings should be held and the timing. Largely, findings show that citizens are not interested in intangible issues, they are mostly concerned about their basic needs such as food and the rest does not matter. It was also reported that the means of communication in terms of language used and modality of airing views predominantly in meetings does not appeal people to leave their daily activities to participate. The results also suggest that, mostly citizens are of the view that there is somebody or a body that is endowed with decision making on their behalf.

For sustainable and constructive consultation, a well implemented RIA requires regulating authorities to put in place standardized format for engaging users and other stakeholders. An analysis of the stakeholders helps to identify the people, groups and organizations that have an important part in the projected regulations and may be either positively or negatively affected by the new regulation or in position to influence the outcome of the reform by supporting or opposing it. For instance, it is important to analyze how familiar the group/individual is with the regulation being proposed. How large the group is, how the group/individual is influential. Additionally, establish whether there are any deterrents that could lessen participation and how they can be supported. When research participants were asked whether there was a standardized format for engaging stakeholders in regulatory process an overwhelming majority of respondents agreed that there is no standardized format that guarantees all pertinent stakeholders are consulted in regulatory process. This denotes that RIA, particularly the consultative process does not fully grasp user's views as such it has no full impact.

With regards to publicly reporting on the results of consultation, findings indicate that there is hardly publicly report on the results of consultation. Similarly, users contend that their view barely change the shape of the ultimate regulation. At the same time, it was also disclosed that there is no specific specified duration for the public to give their views. For instance, in the process of making the Online Content Regulations, 2017 media stakeholders and the public at large were given only seven days

to submit their views in writing (Lamtey G., 2017). As a response, there was a public outcry demanding for ample discussions given the contentious provisions in the regulation such as requirement by media houses with online content to acquire licenses different from print media. Besides, the regulation requires online content owners are required to provide their source of information. The public and other stakeholders were of the view that the regulation if passed as it was would infringe people's rights to speak. In spite of the demand to change the regulation, it was finally passed. This implies that users and other stakeholders have neither adequate power to shape the content of a regulation nor are they effectively engaged in the process. This is cemented by the Legal and Human Rights Center (LHRC) who complained over the extent to which stakeholders and the public were engaged in the drafting of the regulation.

Meanwhile, there is also limited inclusiveness due to access to websites particularly those living in areas with limited electrical supply. Users also lamented on the lack of prior knowledge on debated regulations. For instance, in public meetings where stakeholders and the public are invited, documents are not given prior to the meeting rendering inability for users to give constructive views on the regulation. Hence, though RIA has been legally adopted and implemented in Tanzania for over two decades, its applicability has not made substantial impact in facilitating user's engagement in regulatory process.

Conclusions and Recommendations

In Tanzania, RIA has been adopted and implemented for over two decades. In spite of the few noted positive improvement in the implementation of RIA, it has not fully facilitated the full engagement of stakeholders and in this case, users in regulatory process. The findings of this study show that there is need for a participatory framework that involves the 'councils' and consumer organizations in regulatory process. Indeed, due to the lacunas in the representation of users by CCCs, NCAC and TCAS, the need to enhance user-focused regulation is of paramount importance. Of critical importance to user participation is education and access to information regarding the regulatory processes.

In view of the findings the study recommends the following; Respective ministries and their agencies should adopt a ministerial consultation policy that establishes a standardized format for consultation. To facilitate participation, they should make consultation accessible to all business, stakeholders and the users by use of various means of communication. Additionally, they should publish open public consultations announced at a single point where stakeholders can access information and give their suggestions and complaints. Likewise, sufficient time should be provided and results of open public consultation displayed on a single unified website. Additionally, feedback to stakeholder's' comments should be summarized in the final regulatory decision. The need to empower consumer organizations is also important to facilitate their representative role. Again, the need to have more independent and consumer-focused councils cannot be underrated.

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