

Discovering Current Challenges Looking at Path Dependency : A comparative analysis on RIA program in Mongolia with earlier eastern-European transition states

Saruul Tovuusuren*

〈Abstract〉

Regulatory Impact Assessment (RIA) was introduced to Mongolia in the early 2000s. However, since then, RIA policy has stagnated. In understanding why, it is essential to analyze RIA as a component of the democracy consolidation process. Given its geopolitical context, it is instructive to compare Mongolia's RIA implementation with that of post-communist eastern European states. Analysis shows that those states with a higher degree of democratic experience enjoyed greater success in legal and administrative reform, and therefore in RIA implementation. So, successful RIA can be attributed to historical path dependency specifically, to the level of democratic experience of states. For example, Mongolia and Bulgaria participated only in the last democratic wave. Other states, namely Poland and the Czech Republic participated in several waves. So what can we learn from their success? Firstly, that the importance of RIA-specific centralized authority is vital. Secondly, that an integrated approach to RIA methodology cannot be overstated. A thorough review of policy and implementation, an emphasis on an integrated approach and the consolidation of RIA institutional authority will

* Policy Researcher, National Legal Institute of Mongolia

invigorate a reverse impact strategy that will accelerate the rate of positive reform in legal and administrative area in Mongolia.

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- I. Introduction
 - II. Comparing current situations and previous experiences
 - III. Path dependency a factor in RIA program strategy
 - IV. Conclusion
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I . Introduction

This paper analyzes regulatory impact assessment in Mongolia in the hopes of finding lessons from which other developing countries might learn in reforming their own regulatory programs.

Since 2000, the strengths and weakness of RIA policy in developing countries have been studied and summarized in research reports and in survey findings by multiple authors.¹⁾ This is somewhat surprising, given that, although RIA is in its early stage of development in Mongolia it has been applied since 2001. The concept of RIA was first

1) Compare Lee Norman 2002, Kirkpatrick Colin and Parker David 2003.

introduced in the law on the Procedure of Elaboration and Submission for Consideration of a Proposed Law and Other Decisions of the Great State Khural. Eight years later, an RIA guideline was introduced which covers the most general criteria of ex ante, ex post and cost–benefit analysis. Although five years have passed since the publishing and application of RIA guidelines, there has been virtually zero quantitative or qualitative response in the creation of laws and statutes. Since the law adopted in 2001, it has been produced with RIA related documents fewer than ten out of over 500 laws and regulations. The reason for this crawling pace of development can, at first glance, seem to be a result of poor quality guidelines or a limited capacity of the performers. However, comparative study points to a more complex picture.

II. Comparing current situations and previous experiences

In the early 2000s, RIA policy was widely applied in OECD countries and initiated in some developing countries. Mongolia and other post–communist transformation states in Eastern Europe began to implement this policy simultaneously, with very differing results. Looking back at the challenging issues of RIA policy facing Eastern Europe in early 2000, one can see similarities to Mongolia's present situation. In other words, Eastern European states have experienced progress while Mongolia's RIA has remained stagnant since 2001 with the passing of the law of the Procedure of Elaboration and Submission for Consideration of a Proposed Law and Other Decisions of the State Great Khural.²⁾

2) The Parliament of Mongolia (the State Ikh Hural) is a unicameral parliament consisting

To begin to understand the reason for this, let us first refer to general RIA analytical trends as defined by Scott Jacobs, probably the leading international expert on RIA. He has observed two main streams in RIA implementation strategy used in developed countries: firstly, RIA as an integrated framework tasked with the complexities of modern public policy; and, secondly, fragmented and partial forms of RIA particularly in assessing administrative burdens on businesses.³⁾

Jacobs concludes that these parallel trends pose risks and opportunities for the future contributions of RIA to policymaking in developed states in the following way⁴⁾:

While it might make sense to emphasize selected impacts in the RIA, partial methods should be contained within larger and more integrated methods of RIA, such as soft benefit–cost analysis. so that regulators can identify and make beneficial trade–offs between goals and impacts.

It is a common belief that these opposing trends have been developed effectively in countries like the US, Australia, Ireland and New Zealand, as might be predicted by the existence of more advanced legal basis and interactive public policy. This was not the case in early post–communist societies. Simultaneous integrating and fragmenting trends of RIA hardly observable in developing states, especially in the early phase of RIA policy. It is worth noting that the second trend was adopted in developing states in the early 2000s, as attested to by

of 76 members. Members are elected by direct vote from 76 electoral districts

3) Jacobs Scott, 2006. pp.3–4.

4) *ibid.*

various authors. For example, Kolin Kirkpatrick from Manchester University, suggested an RIA development strategy to post–communist countries based on the fragmented trend. He claimed that due to the failed policy of the Washington consensus in the financial markets, the need for RIA application on financial regulatory improvement should be a priority in those countries.⁵⁾ In other words, RIA implementation in transformation societies should focus on economic benefits and costs. However, examination of RIA implementation experiences in the early period of Eastern European transition states suggests that Dr. Kirkpatrick's recommendation may be untenable.

Undoubtedly, financial regulation reform was a primary goal during the economical, social and political transformation in post–communist states. However, in retrospect, RIA application based on such a core principle could not achieve sustainable RIA policy development. For instance, a comparative study published in 2012 by Staronová Katarína and others documents the pilot area taken by the Czech Republic, Slovakia and Slovenia: namely, that of the administrative burden on enterprises. Staronová concluded that, the pilots have not demonstrated the potential benefits of RIA to the civil service, which, with limited capacity and interest, still regards RIA as an additional burden.⁶⁾

In revisiting Jacobs' observation above, we recognize that this RIA pilot area practiced in these states is identical to the area pursued in developed countries. The matter here is not the specific pilot area itself. The focus on any single area would not have brought success to the post–communist states. In a practical sense, it is perhaps

5) Kirkpatrick Colin, 2001, p.5.

6) Katarína Staronová, Jan Pavel & Katarina Krapež. 2007, p.280.

preferable to go beyond the recommendations of research papers and look at the lack of clear methodology, inadequate institutional arrangements, etc.

III. Path dependency a factor in RIA program strategy

Leaning on researchers specializing in transformation policy⁷⁾, one can credibly state that the pre-communist historical path created common challenges for Eastern European states in pursuing RIA. As RIA programs began in the Eastern European post-communist states, RIA application and methodology lagged behind those of Western European countries. This was not only due to geography but also to the original legal and public administrative systems that confronted political and economic transformation. Together the chain-reactions of a transition society created a Pandora's Box. The situation became more dramatic when post-communist states began to implement administrative governance reforms inspired by new public management reforms that originated in Anglo-Saxon system countries.

New public management reforms, as Francesca Bignami indicated, have been less extensive in Eastern European compared to the United States.⁸⁾ This is due, he explained, to the civil service tradition greatly influenced by Roman-Germanic legal systems. As Bignami noticed, German public administration corresponds strictly to the Rechtsstaatmodel. Civil servants are trained in law and their function is expressed in law as formal procedures.

7) Compare: Wolfgang Merkel 2010, Offe Claus 1997, Willfried Spohn 2002.

8) Bignami Francesca, 2011, p.26.

But, in states like the US or Great Britain where the common law system dominates, the civil servants' active role in evaluating policy-making underpins both new public management reform and RIA policy initiation. The new public management task was implemented as mandatory reform in governance. The legislative rules from which administrative acts and consequently administrative governance derive from the civil servants' authority in policy evaluation.

So the varying concepts of the role of civil servants in public administration within different legal systems was apparently a factor that impacted the challenges to reform and consequently to RIA program implementation in the Eastern European states. So, what can be concluded from the arguments above is that the legal system, public policy reform and RIA application should be complementary and coherent to achieve the greatest effectiveness. This is observable in the RIA programs in Eastern Europe where those programs were successful.

What most post-communist states had in common was that they had been applying RIA for ten years. If we look at the OECD evidence-based instruments report published in 2014, we can see that some post-communist states began RIA reform relatively recently: Czech Republic (2011), Estonia (2012), Latvia (2013) and Poland revised methodology and reconstructed their RIA implementation body (2011). Generally speaking, it is found that the establishment of a more authorized central body is the determining factor in successful RIA reform. Such reform can help RIA evolve from a singular or fragmented assessment to a more integrated framework to deal with the complexities of modern public policy. That means that, on the one hand, where such evolution occurred, post-communist states came into the

mainstream trend simultaneously with developed countries in a relatively short period of time. On the other hand, international bodies like OECD, WTO and the European Commission have supported the modernization of public administrative management in accordance with their legal reform and have consequently influenced RIA-related policy-making. However, such external trade administration has a negligible effect on some of the states under consideration here. Unlike the Czech republic or Poland, some post-communist states like Bulgaria, Romania or Hungary have yet to be evaluated by the OECD. Why might this be?

Today, most observers recognize in reference to the pre-communist period, that East Germany, Hungary, Poland, the Baltics and Slovakia are more modernized than Bulgaria or Mongolia. The general characteristics of the former countries are shaped by their historical path to a capitalist economy and by their experience of democratic governance in the pre-communist period. As Huntington claimed, experience varies among post-communist countries in accordance with the frequency of their participation in the democracy waves.⁹⁾ For instance, democracy transition was attempted in Czechoslovakia and Hungary in all three waves. In Poland and the Baltics, two waves. In comparison to those relatively industrialized countries, the less modernized (traditional, agrarian) countries like Mongolia, Bulgaria and Romania, democracy transition was attempted for the first time only during the third wave. If we consider that democratic consolidation and public administration policy are correlated, we might argue that those countries that have participated in several democratic waves seem to have more success in their public administration reforms.

9) Cited in Merkel, 2010, p.130.

The table below argues for a conceptual framework wherein democratic participation is recast as a positive determinant in RIA performance where integrated public administrative reform is the goal.

Table 1. Correlating democratic experience and RIA performance in post-communist democracies.

Former communist states	RIA performance on a scale from 10 (best) to 1 (lowest) ¹⁰⁾	Participation in democracy waves (1828–2004) ¹¹⁾
Czech republic	8 scores	3 waves
Estonia	8 scores	2 waves
Latvia	8 scores	2 waves
Poland	8 scores	2 waves
Lithuania	7 scores	2 waves
Romania	6 scores	1 wave
Slovenia	5 scores	1 wave
Bulgaria	5 scores	1 wave

10) SGI. 2014.

10–9 RIA are applied to all new regulations and to existing regulations which are characterized by complex impact paths. RIA methodology is guided by common minimum standards.

8–6 RIA are applied systematically to most new regulations. RIA methodology is guided by common minimum standards.

5–3 RIA are applied in some cases. There is no common RIA methodology guaranteeing common minimum standards. 2–1 RIA are not applied or do not exist.

11) Merkel 2010, p.130.

From the table it is apparent that the RIA performance score correlates to democracy participation: the higher the RIA performance score, the more extensive the experience in democratic participation. Exploring the extent to which the experience with democratic governance directly influenced the development of RIA policy in Eastern European states will require more rigorous analysis. However, for the limited purpose of this paper this perception might have explanatory power. Hence, the differences between post-communist Eastern European states seem to be products more of historical circumstances than of RIA program design. For this reason, it was necessary to step back and focus on the pre-transition circumstances that have certainly contributed to RIA performance.

By the same token, if we open the Pandora's Box of Mongolia, we discover a situation very similar to the Eastern European post-communist states that enjoyed fewer democracy transitions, namely Bulgaria: low modernization in the pre-communist period, no democracy experience before participation in the third wave, slow democratic consolidation and inadequate legal reform leading to ineffective RIA policy. Points of similarity with Bulgaria include not only historical path dependency but also current RIA implementation process. Both states reflect the 2002 observation of Radaelli about RIA processes in developing countries¹²⁾:

[...] the policy process leads to impact assessment systems which crash against the walls of administrative feasibility, lack of legitimacy and proliferation of instruments badly assimilated by civil servants and politicians.

12) Radaelli, C.M. 2002.

Looking at Mongolian administrative reform, radical changes to the previous socialist system are easily observed, including decentralization (the empowerment of local authorities) and new public management reform. However, these two major attempts at public administration reform have been criticized for their inadequate theoretical background as well as for the tendency to apply “one-size-fits-all” solutions. As Dr. Ganbat Damba (Academy of Political Education) states succinctly, the reform did not emerge naturally from within the environment and could not gain the support or overcome the doubts, resistance or indifference of the civil servants and the citizenry.¹³⁾

While such ambivalent reform efforts in law and administration have perhaps placed Mongolia a decade behind other post-communist states vis-a-vis RIA application practice, it is possible that such a lag may permit Mongolia to learn from the past experiences of other states in order to advance a better RIA strategy. Looking back at the practices of Eastern European states, we may conclude the following:

- adopting a partial or fragmented RIA application strategy (according to Jacobs¹⁴⁾) poses a larger risk because it can systematically bias policy decisions;
- the social and political complexities of a transition state presents a double hindrance to establishing an effective RIA program.

The lesson learned by developing states from more developed states is that a simultaneous application of both integrated and fragmentary

13) Ganbat Damba 2006.

14) Jacobs Scott, 2006, p. 44.

is crucial to successful RIA programs. Additionally, the trend toward centralized RIA authority reflects the wisdom of learning from the experience of more developed states and their ten years of RIA practice.

What, then, will be a better strategy for RIA implementation look like in Mongolia where RIA has been stagnant for ten years? It is eminently practical for a developing country to learn from the experience of a more developed country in that it affords the opportunity to redefine concepts in a more integrated trend. This would seem to contradict the popular claim that public management reform determines successful RIA policy implementation.

We can design RIA programs in Mongolia that will resolve issues surrounded by political uncertainty and maximize institutional authority of the implementation body instead of waiting for reforms that might exipate RIA progress. Such an independent and centralized RIA institution should also raise awareness and understanding among the various stakeholders. In this way, high-level decision-makers responsible for legislative and administrative reforms will be obliged to support RIA development under pressure from other stakeholders, like citizens and mid-level public servants. While this may seem a rather abstract hypothesis, it has clear potential in Mongolia.

IV. Conclusion

This paper is an effort to present an empirical analysis of Mongolian RIA program development. Comparing the current situation in Mongolia with the early post-communist transitional situations of Eastern

European states allows the analysis of causality between RIA program stagnation and historical path dependency. Dissolving the effects of negative consequences that have accrued in the Mongolian Pandora's Box will clear the way to effective alternatives.

Overall, RIA application in post-communist countries presents its share of challenges as can be seen in the study of varying experiences. Consensus seems to hold that RIA, when well implemented, improves decision-making transparency and enhances reform success in developing states. This is supported by the recent reform experiences of Eastern European countries.

In the case of Mongolia, RIA program strategy can be from the standpoint of institutionalization, which fosters coordination among the various stakeholders. This strategy differs from the natural development in developed states where RIA appeared as a phenomenon grown from public administration reform. However, it provides a learning framework that actually benefits from the backward situation in Mongolia.

I conclude that in reaching a sustainable level of RIA quality, the Mongolian government needs a clear strategy aimed at the institutionalization of capacities and incentives within the machinery of government. Indeed, a centralized body for RIA is essential as it enhances consultation and participation of affected groups while raising awareness and support among key stakeholders.

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