

Centre for Law, Economics and Society

Research Paper Series: 6/2018

**The Role of Institutions in Generating
Successful Legal Transplants:
a Comparative Analysis of the Adoption of
Competition Laws in India and Pakistan**
Amber Darr

Centre for Law, Economics and Society

**CLES
Faculty of Laws, UCL**

Director: Professor Ioannis Lianos



LAW, ECONOMICS & SOCIETY

**CLES Research Paper Series
6/2018**

**The Role of Institutions in Generating
Successful Legal Transplants:
a Comparative Analysis of the Adoption of
Competition Laws in India and Pakistan**

Amber Darr

September 2018

Centre for Law, Economics and Society (CLES)
Faculty of Laws, UCL London,
WC1H 0EG
The CLES Research Paper Series can be found at
www.ucl.ac.uk/cles/research-papers

All rights reserved.

No part of this paper may be reproduced in any form without permission of the author.

Pre-published version of Amber Darr 'Role of Institutions in Generating Successful Legal Transplants: a Comparative Analysis of the Adoption of Competition Laws in India and Pakistan' Asian Journal of Comparative Law (2018)

ISBN 978-1-910801-20-8
© Amber Darr 2018
Centre for Law, Economics and Society
Faculty of Laws, UCL
London, WC1H 0EG
United Kingdom

The Role of Institutions in Generating Successful Legal Transplants: a Comparative Analysis of the Adoption of Competition Laws in India and Pakistan

Amber Darr*

In recent years, several developing countries have adopted regulatory laws to remain relevant in an increasingly globalized world and to make a successful transition from protected to market economies. Whilst developing countries and multilateral organizations supporting them, are aware that in order to succeed, adopted laws must be compatible with the context for which they are intended, there is less clarity as to the processes through which compatibility is generated. This article draws upon comparative law and development economics literatures to argue that the compatibility of a transplant is shaped by the interplay of institutions through which it is adopted. The article also argues that in addition to compatibility, a transplant must enjoy a degree of legitimacy to be effective in the adopting country and the institutions which generate compatibility may also enhance such legitimacy. In order to understand the compatibility and legitimacy generating potential of the interplay of institutions in developing countries, the article examines and compares the adoption of competition laws by India and Pakistan in 2002 and 2007 respectively. The article also examines the manner in which legitimacy impacts the post-adoption interpretation of transplants and highlights its significance for the implementation of the transplants in either country.

With the advent of the World Trade Organization in the mid-nineties and increasing globalization in its wake, a number of developing countries have thought it incumbent upon themselves to upgrade their regulatory infrastructure. Whilst certain developing countries have sought technical assistance from multilateral organizations for borrowing laws, others have examined regulatory laws in force in other countries to identify ones most appropriate for their needs. In both instances, developing countries appear to increasingly understand that if the adopted laws are to be successful, they have to be compatible with the contexts in which they are injected. However, a closer look at the adoption processes employed by certain developing countries suggests that developing countries are less clear as to the specific factors in the adopted laws and the contexts that need to be compatible with each other as well as to the manner in which the requisite compatibility may be generated and enhanced.

In this article, I draw upon comparative law and development economics literatures to understand the nature of compatibility and to argue that it is shaped by the interplay of institutions through which developing countries adopt laws. I also argue that in addition to compatibility, it is important that adopted laws enjoy a degree of legitimacy in the countries that adopt them. I explore the concept of legitimacy and its relationship with compatibility to the extent that the very interplay of institutions that generates compatibility may also generate the necessary legitimacy for adopted laws. To examine the manner in which the interplay of institutions shapes the compatibility and legitimacy of adopted laws, I compare the interaction amongst Indian and Pakistani legal and political institutions in the adoption of their competition laws. To assess the significance of legitimacy, I examine the manner in which legitimacy, in conjunction with compatibility, impacts the interpretation, and, therefore, the implementation, of the adopted laws in the two countries

To this end, this article is organized as follows: in section I, I outline the theoretical underpinnings of compatibility and the role of institutions in generating it with reference to comparative law and development economics literatures. I also define legitimacy and discuss its significance with reference to political philosophy and explore the manner in which institutions that generate compatibility may also create legitimacy. In section II, I examine the interplay of formal and informal legal and political institutions engaged in the adoption of competition laws in India and Pakistan and evaluate their compatibility and legitimacy generating potential. In section III, I examine the manner in which the compatibility and legitimacy of the adopted Indian and Pakistani competition laws informs the manner in which these laws are interpreted in their respective contexts and highlight the significance of interpretation for the overall implementation of these laws. In the final section, I conclude particularly drawing attention to the relevance of this analysis for other developing countries seeking to adopt regulatory or indeed any other laws that rely heavily on foreign models.

* PhD Laws (University College London), Barrister (England & Wales) and Advocate Supreme Court (Pakistan). Senior Research Fellow, UCL Centre of Law, Economics and Society.

UNDERSTANDING COMPATIBILITY AND LEGITIMACY

Both comparative law literature, which is generally invoked to study the borrowing of laws from one country to another, and development economics, which in the post-Washington Consensus has increasingly focused on institutions, place considerable emphasis on the importance of compatibility of the borrowed law (or 'economic institution' as per the terminology used in development economics literature), with the context of the country for which it is intended and considered it to be a critical factor in the 'success' of the borrowed law.

1. Compatibility with Context and the Success of Borrowed Laws

Comparative Law scholars such as Montesquieu writing as early as 1748, underscored the significance of compatibility when he cautioned that 'whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law'.¹ However, it was Kahn-Freund, writing more than two centuries later, who explicitly linked compatibility with success of the borrowed law when he argued that 'any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection' because legal rules 'which organize constitutional, legislative, administrative or judicial institutions and procedures...are... "organic" [to the context of the country of origin and, therefore,]...are most resistant to transplantation'.²

Alan Watson became a significant outlier in this discussion by arguing that 'a foreign rule can be successfully integrated into a very different system... which is constructed on very different principles from that of the donor'³ because 'usually legal rules are not peculiarly devised for the particular society in which they now operate'.⁴ However, Watson was not as dismissive of the importance of compatibility as it first appears as he too recognized that the law of one country may diverge from that of another due to the impact of 'the Spirit of a People' on the law.⁵ Watson also noted and that for a borrowed law to be successful, it must continue to 'grow in' and become 'part of' the borrowing country.⁶ Arguably this would only be possible if the borrowed law was compatible with the context of the country in which it was injected.⁷

Scholars specifically discussing borrowed competition laws also highlighted the need for compatibility of the borrowed law with the context of the adopting country. For instance, Trebilcock and Iacobucci, urged the need for a 'locally optimal substantive law...' because '...no single institutional model of a competition agency will be optimal for all countries...given particularities of history, initial conditions, institutional traditions, and political economy considerations'.⁸ Similarly, Gal while discussing the Israeli competition law experience, argued that 'the receiving state's knowledge, commonality with the state of origin...' are essential pre-conditions for it to be receptive to the legal transplant.⁹ Shahein corroborated these views and confirmed that competition laws, like most other laws, were embedded in a specific political, economic and social environment and must be appropriately 'contextualised' for the purposes of the adopting country.¹⁰

Development economics literature approached the idea of compatibility through its discussion regarding factors that contribute to the success of economic 'institutions'.¹¹ Trubek, in discussing the failure of the 1960's Law and

¹ Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (Cambridge University Press 1989) 8, 610.

² Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law*' (1974) 37 *The Modern Law Review* 1. 12, 13.

³ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn. University of Georgia Press 1993) 55, 56.

⁴ *ibid* 95, 96.

⁵ Alan Watson, *The Evolution of Law* (Johns Hopkins University Press 1985) 42.

⁶ Watson (n.3) 21.

⁷ William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *The American Journal of Comparative Law* 489, 491, 509. Ewald explained this apparent dichotomy in Watson's writings by drawing a distinction between 'Strong Watson', who took the rigid position that there is no 'interesting relationship to be discovered between law and society', and 'Weak Watson', who argued that compatibility between the legal transplant and the context of the borrowing country must be examined with 'cautious awareness of [its]...complexity...'.
⁸ Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions' (2002) 25 *World Competition* 361, 471.

⁹ Michal Gal, 'The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant' (2007) 9 *European Journal of Law Reform* 467 473.

¹⁰ Heba Shahein 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in Richard Whish and Christopher Townley (eds) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar 2012) 51, 55.

¹¹ The literature defined 'institutions' broadly to include both formal and informal rules that organize social, legal and

Development movement traced the causes of its ‘failure’ to the misplaced belief on the part of developed nations and multilateral organisations, in the workability of generic legal transplants. He noted that the movement had encouraged countries to transplant laws without requiring them to adapt these to their particular contexts. He further stated that this failure to contextualise generic laws meant that some laws did not ‘take at all’; others ‘promoted by the reformers remained on the books but were ignored in action’; whilst others still ‘were captured by local elites and put to uses different from those the reformers intended’.¹²

2. Creating Compatibility

Whilst both comparative law and development economics literatures are in agreement about the importance of compatibility between borrowed laws or institutions and those pre-existing in the context of the country, comparative law literature is somewhat vague about the manner in which compatibility may be generated. Whilst Kahn Freund indicates that institutions may have a role to play in determining compatibility, Montesquieu, despite his emphasis on the ‘spirit of the people’ in shaping the laws of a country, views adoption almost as a disembodied process and makes no reference to the specific impact of the ‘spirit’ or thinking of the actors, or the manner in and mechanisms through which it may impact the adoption process.¹³ Watson refers to the role of actors rather than of institutions, however, he appears to be more interested in their role in the post-adoption stage rather than in generating compatibility in the course of adoption.¹⁴

Compared to comparative law, development economics literature is far clearer as to the processes through which compatibility may be generated. According to North, economic institutions, or laws (which are included in North’s definition of ‘institutions’) are more likely to be compatible with the context of a country if they evolve organically from its context, through an evolutionary process.¹⁵ He argues that laws or institutions that are introduced by ‘a discontinuous change’—that is, a change brought about by revolution or conquest rather than through organic evolution—are likely to be incompatible with the context of the country and, therefore, not able to perform in a way that yields economic growth in that country.¹⁶

Rodrik further investigates the impact of possible processes and pre-existing institutions through which a country may acquire economic laws. He is of the view that economic laws are a form of ‘technology’. This technology may be ‘general purpose ... codified and ... readily available on world markets’,¹⁷ or it may be ‘highly specific to local conditions’ and containing ‘a high degree of tacitness’ due to the fact that ‘much of the knowledge that is required [about the technology] is in fact not written down...’.¹⁸ He argues that if the desired ‘technology’ is of the generic variety, a country simply imports it through a ‘largely top down’ approach which relies ‘on expertise on the part of technocrats and foreign advisors’. However, if the technology is highly specific to context, it had to be adopted through ‘bottom up’... mechanisms for eliciting and aggregating local information in devising the technology.¹⁹

Rodrik also explains that the generic or highly specific categories were ‘only caricatures’, and that ‘an imported blueprint [required] domestic expertise for successful implementation’ whilst even ‘when local conditions [differed] greatly, it would be unwise to deny the possible relevance of institutional [or legal] examples from elsewhere.’²⁰ Rodrik, therefore, suggests that even when a country acquired a blueprint from another country, it was incumbent upon it to adapt it for local context, in light of local knowledge, aggregated through bottom-up

political aspects of a society and ‘any form of constraint that human beings devise to shape human interaction’ whether formal or informal, created or evolved over time. See in particular, Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), ch 1 p 4.

¹² David M. Trubek, ‘The “Rule of Law” in Development Assistance: Past, Present, and Future’ in David Trubek, Alvaro Santos eds. *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006), 79.

¹³ Montesquieu and others (n 1).

¹⁴ Watson *Evolution of Law* (n 5).

¹⁵ Although North uses the term ‘compatibility’, he does not define it. I, therefore, understand it to have been used in its ordinary dictionary meaning of ‘able to exist or occur together without problem or conflict’ <https://en.oxforddictionaries.com/definition/compatible> (accessed 13 June 2017).

¹⁶ Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), 101.

¹⁷ Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton University Press 2007), ch 5.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

participatory institutions. Rodrik further stated that although the institutions through which a country may elicit and aggregate local information may be ‘as diverse as the institutions they help create...the most reliable forms of such mechanisms are participatory political institutions’,²¹ because whilst authoritarian regimes are not restricted from or incapable of using local knowledge, ‘nothing compels them to do so’.²²

Acemoglu and Robinson are of the view that in addition to being participatory and bottom up, it is also desirable that institutions engaged in the creation or adoption of economic institutions must also be ‘inclusive’ rather than ‘extractive’.²³ They argue that extractive political institutions concentrate power in the hands of a narrow elite and create economic institutions that also extract resources from the rest of society. In contrast, inclusive political institutions, which distribute power more broadly in society are able to create economic institutions that distribute resources more equitably.²⁴ In effect, Acemoglu and Robinson’s ‘inclusivity’ is a factor in the creation of compatibility to the extent that it calls for a greater number of participatory domestic institutions to engage in the process of institution-creation and thereby, allows the new institution to be contextualised in light of local knowledge and information.

3. Legitimacy: an Underexplored Dimension of Success of Borrowed Laws

The interplay of institutions that creates compatibility between a borrowed economic law and the context of the country for which it is intended is also capable of generating legitimacy for the borrowed law in that country.

According to political philosophy,²⁵ ‘legitimacy’ is ‘the *belief* that a rule, institution or leader has the right to govern’.²⁶ ‘Legitimacy’, therefore, is essentially a subjective concept which may derive from the ‘legality’²⁷ or ‘authority’²⁸ of the procedure through which the rule or institution is created or from the ‘justness’ or ‘fairness’ of the rule or institution.²⁹ However, there is some disagreement amongst political philosophers as to the appropriateness of including ‘justness’ and ‘fairness’ in the ambit of legitimacy: whilst some scholars argue that fairness (or justice) is a component of legitimacy,³⁰ others suggest that legitimacy is a *weaker* idea than justice and that laws or decisions made by particular political institutions may be legitimate without being just.³¹

Accepting the broader definition of ‘legitimacy’ for the present purposes, it may be possible to distinguish between *procedural legitimacy* which relates to a belief in the legality of the procedures through which the rules or institutions are created and in the authority of the creating institutions, and *substantive legitimacy*, which relates to a belief in the justness of the rule or institution.³² It follows, therefore, that whilst a rule or institution may only be truly legitimate when it has both procedural and substantive legitimacy—ie it embodies fairness (or justice), efficiency, expertise and accountability, (where fairness relates to the substantive goals of a policy, law or legal system and efficiency, expertise and accountability relate to its effectiveness) and has been created through

²¹ *ibid.*

²² *ibid.*

²³ Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers 2012). ch 15, 429-430.

²⁴ *ibid.* (emphasis added)

²⁵ Peter, Fabienne, "Political Legitimacy", The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/> (accessed 14 August 2017) and Ian Hurd, ‘Legitimacy’ <<http://psd.princeton.edu/?q=node/255>> (accessed 14 August 2017); Routledge, ‘Authority v. Legitimacy’ <<http://cw.routledge.com/textbooks/alevelphilosophy/data/AS/WhyShouldIBeGoverned/Authorityandlegitimacy.pdf>> (accessed 14 August 2017).

²⁶ Ian Hurd (n. 25).

²⁷ *ibid.* It is argued that not all legal acts are necessarily legitimate and not all legitimate acts are necessarily legal because there is always the possibility that rulers might legally impose laws which the followers *find* illegitimate.

²⁸ Routledge (n. 25). Authority too may exist independently of legitimacy. For example, a state has authority if it maintains public order and makes laws that are generally obeyed by its citizens. However, it is only when the citizens *perceive* these laws to be right, justified and supported by good reasons that the authority of the state (or indeed of a law made by the state) may be deemed to be legitimate.

²⁹ Ian Hurd (n. 25). Justice denotes adherence to an external moral standard.

³⁰ Rizwaan Jameel Mokal, ‘On Fairness and Efficiency. The Modern Law Review, 66 (2003) 452, 453.

³¹ *ibid.*

³² For instance, Tom Tyler argues that ‘the antecedents of legitimacy lie in people’s judgment about the procedures through which legal authorities make rules...people defer to rules primarily because of their judgments about how those rules are made, not their evaluation of their content’. Tom R Tyler and others, ‘Procedural Fairness and Compliance with the Law’ Swiss Journal of Economics and Statistics (SJES), 1997, vol. 133, issue II, 219 (1997) 225.

processes which have legality and authority,³³ it is possible that in actual fact, a rule or institution has procedural legitimacy without having substantive legitimacy and vice versa.

Although the concept of legitimacy of a borrowed law in the country in which it is intended to operate remains underexplored in comparative law and development economics literatures, it has considerable bearing on the implementation of the borrowed law in the adopting country. Whilst a borrowed law that is compatible with the context of the country is more likely to be understood, applied and utilised in the country,³⁴ only a law that has ‘legitimacy’ is more likely to engage productively with the ‘machinery of justice’ of the country³⁵ rather than being challenged through the machinery for justice for absence of authority, legality or indeed justness. Further, and more interestingly, legitimacy also bolsters compatibility because it allows institutions interpreting and implementing the law, to space to interpret the law with reference to the text of the statute rather than compelling them to harness greater legitimacy by preferring to focus on international precedents rather than the text of the statute.

Political science recognises harnessing international legitimacy as an important tool gaining domestic legitimacy. According to Weyland, the need to ‘look good before global public opinion’ and concern for ‘international legitimacy’ is an important factor that motivates a country to adopt outside influences,³⁶ whilst Marsh and Sharman assert that ‘emulation [of laws from the developed world] may be a deliberate ploy by governments to acquire legitimacy.’³⁷ Giraldi further highlights the link between international and domestic legitimacy and argues that states ‘are sensitive to the reaction of the international community because it can affect their domestic legitimation and power’.³⁸

However, Linos suggests an alternative route to legitimacy. She argues, much like Rodrik, that laws spread more effectively—and legitimately—when they are adopted through domestic democratic institutions rather than when introduced as foreign crafted blueprints through elite networks of internationally networked technocrats.³⁹ She is of the view that elected leaders rather than technocrats have a greater need to pay attention to the interests of ordinary citizens and domestic interest groups rather than blindly following their foreign colleagues or international organizations, because they need their support to win re-election. The need for elected leaders to gain the support of their voters, means that they are likely to encourage stakeholders to give their consent to the proposed legislative or policy measures, even if this consent is only formal constructive rather than actual.⁴⁰ Whilst Linos stops short of suggesting that laws spread that through democratic networks are ‘better’ than laws introduced through elite networks,⁴¹ she suggests that adoption of laws through democratic institutions and networks allows engagement of a broader range of stakeholders in the country and thereby confers ‘critical domestic legitimacy’ on the adopted law.⁴²

ADOPTING COMPETITION LAWS IN INDIA AND PAKISTAN

Both India and Pakistan engaged their legislatures, executives and judiciaries in the adoption of their respective competition laws. However, the nature of these institutions in either country and the manner in which they engaged

³³ Rizwaan Jameel Mokal, ‘On Fairness and Efficiency. The Modern Law Review, 66 (2003) 452, 453.

³⁴ D Berkowitz, K Pistor and JF Richard, ‘Economic Development, Legality, and the Transplant Effect’, *European Economic Review*, 2003, Vol.47(1)165’ 174.

³⁵ Ugo Mattei, ‘Efficiency in Legal Transplants: An Essay in Comparative Law and Economics’ (1994) 14 *IRL International Review of Law & Economics* 3, 17.

³⁶ Kurt Gerhard Weyland *Bounded Rationality and Policy Diffusion: Social Sector Reform in Latin America* (Princeton University Press 2006). 39-42.

³⁷ David Marsh and JC Sharman, ‘Policy Diffusion and Policy Transfer’ (2009) 30 *Policy Studies* 269, 272.

³⁸ Fabrizio Giraldi ‘Transnational Diffusion: Norms, Ideas and Policies’ in Walter Carlsnaes, Thomas Risse-Kappen and Beth A Simmons (eds) *Handbook of International Relations* (SAGE Publications 2012) 23.

³⁹ *ibid.*

⁴⁰ *ibid.* It is important to clarify that whilst elected leaders may have a vested interest in listening to their voters, this interest does not *dictate* the mechanism through which the law is adopted, which follows, in all likelihood, from the nature and quality of institutions pre-existing in that country.

⁴¹ *Ibid.* Indeed, Linos is of the view that when decision-makers are shielded from public opinion, they have the freedom to experiment and choose a model law that may be better suited for the needs of the adopting country. This is because voters are often more easily swayed by their media-based knowledge and impressions of a foreign country and are, therefore, likely to be pre-disposed to a model emanating from that country irrespective of its merit. Politicians are also more likely to present their proposals to voters only to the extent they consider necessary to obtain their votes and are likely to be motivated by the need to gather votes rather than to educate the voting public.

⁴² *ibid.*

with each other was remarkably different. In this section, I examine and compare the interplays of institutions in the two countries, in order to assess the compatibility and legitimacy likely to have been generated by these interactions. In order to do so, however, it is important to contextualize this analysis and to understand the constitutional landscape in which these institutions were operating.

4. The Institutional Context in India and Pakistan

5. Common Beginnings

At the stroke of midnight on 14th August 1947, India and Pakistan were created as independent ‘dominions’ of the British Empire. In terms of the Indian Independence Act 1947⁴³ the countries were to be governed by their respective constituent assemblies⁴⁴ and the Government of India Act 1935.⁴⁵ Other British laws in force in undivided India at the time of independence, were to remain applicable in both countries.⁴⁶

Under the 1935 Act, India and Pakistan were organized as federations divided into provinces.⁴⁷ The Governor General, assisted by a council of ministers,⁴⁸ led the executive.⁴⁹ The federal legislature comprised an upper house and a lower house⁵⁰ either of which could initiate federal legislation.⁵¹ If the federal legislature was not in session, the Governor General had the power to promulgate law in its stead.⁵² The provincial executives and legislatures mirrored those of the federation albeit with different remits.⁵³ Each country had an apex ‘Federal Court’⁵⁴ and provincial High Courts. Appeals from decisions of the Federal Court were referred to the King’s Privy Council.⁵⁵

6. Institutional Evolution in India

India adopted its Constitution on 16th November 1949 in terms of which the executive was led by the President, who was assisted, as before, by a council of ministers headed by the Prime Minister.⁵⁶ The legislature still comprised an upper house and a lower house,⁵⁷ Either house could initiate legislation (other than a money bill),⁵⁸ which could pass into law if both houses agreed and with the assent of the President.⁵⁹ If the legislature was not in session, the President had the power to promulgate an ordinance, provided he was satisfied that it was immediately necessary to do so. However, presidential ordinances lapsed if they were not submitted to the legislature for approval within six weeks of its reassembly.⁶⁰ The executive and legislatures of the provinces mirrored that of the federation,⁶¹ however, the matters in respect of which the federation and the provinces could legislate remained different.⁶²

The judicature comprised a Supreme Court and provincial High Courts. The Supreme Court had original jurisdiction (to hear disputes between the federation and provinces or between provinces and to enforce

⁴³ See <http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf> (accessed 3 September 2016).

⁴⁴ Section 8, 1947 Act.

⁴⁵ See <http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf> 3 September 2016).

⁴⁶ Section 18, 1947 Act.

⁴⁷ Section 5, 1935 Act.

⁴⁸ Section 9, 1935 Act.

⁴⁹ Section 7, 1935 Act.

⁵⁰ Section 18, 1935 Act.

⁵¹ Section 30, 1935 Act.

⁵² Section 42, 1935 Act. An ordinance promulgated by the Governor General took effect as an act of the legislature, however, it lapsed unless ratified by the legislature within six weeks of its re-assembly.

⁵³ Sections 46 to 90 and section 100 of the 1935 Act.

⁵⁴ Section 203, 1935 Act.

⁵⁵ Section 207, 1935 Act.

⁵⁶ Articles 52, 53, 76, Indian Constitution.

⁵⁷ Article 79, Indian Constitution.

⁵⁸ Articles 109, 110, Indian Constitution.

⁵⁹ Articles 107, 111, Indian Constitution.

⁶⁰ Article 123, Indian Constitution.

⁶¹ Part IV, Chapters 1-IV, Indian Constitution.

⁶² Article 245, Indian Constitution. Whilst the federation had the power to legislate in respect of matters listed in the Federal and Concurrent Legislative Lists, the provinces had the power only to legislate in respect of matters listed in the Provincial Legislative List and an option to legislate in respect of matters listed in the Concurrent Legislative List.

fundamental rights provided in the Constitution) and appellate jurisdiction (in respect of orders of the High Courts).⁶³ The High Courts also had original, appellate and writ jurisdiction within their territories,⁶⁴ and each High Court was also required to superintend subordinate courts and tribunals in its territory.⁶⁵ Judges of the Supreme Court and High Courts were appointed in accordance with the qualifications and procedures stipulated in the Constitution.⁶⁶ The law as declared by the Supreme Court in its decisions was binding on all courts and that declared by the High Courts was binding on all courts and tribunals below the High Courts.⁶⁷

The Indian Constitution was partially suspended on three occasions: from 1962 to 1968 and from 1971 to 1977 due to a war with China and Pakistan respectively and from 1975 to 1977 due to alleged internal disturbances. On each of these occasions, some of the fundamental rights provided in the Indian Constitution were suspended, however, there was no martial law in the country and the judiciary was not formally co-opted to support the emergency. At the end of each period of emergency, the Indian Constitution was fully restored. This not only had the effect of extending the life of Indian Constitutional institutions but also of strengthening their legality and authority within the country. These very institutions were in force and operation in 2002 when India adopted its Competition Law.

7. *Developments in Pakistan*

Pakistan's first Constitution was not adopted until 1956, nine years after the country's creation. In 1958, within two years of its adoption, the first Constitution was abrogated in the wake of a military takeover and replaced in 1962 by a second Constitution framed by the military establishment.⁶⁸ However, even this Constitution was abrogated in 1969, pursuant to a second military takeover.⁶⁹ While still under military rule and without a Constitution, Pakistan's eastern and western provinces went to war with each other in 1970. This resulted in the eastern province being created as an independent 'Bangladesh' and the western province succeeding as 'Pakistan'. In 1973, a somewhat diminished Pakistan adopted its third and final Constitution.⁷⁰

The third Pakistani Constitution is similar to the 1935 Act and the Indian Constitution to the extent of the institutions it creates. It restores the bicameral legislature comprising the upper house, 'Senate', and the lower house, 'National Assembly';⁷¹ each house has the power to initiate a bill (except a money bill) which may be made into law when passed by both houses and upon receiving Presidential assent.⁷² The President is designated the head of state and the Prime Minister, head of the executive.⁷³ The President has the power to promulgate ordinances provided the Parliament is not in session and he was satisfied that immediate action is required. However, any ordinance promulgated in this manner has a life of only 120 days unless approved by the Parliament within that period.⁷⁴ The political and legislative structure of the provinces mirrors that of the federation,⁷⁵ albeit with distinct legislative powers.⁷⁶

The Pakistani Constitution also establishes the Supreme Court as the apex court of the country and sets up High Courts in each of the provinces. The Supreme Court has original jurisdiction in disputes arising between governments as well as for the enforcement of fundamental rights. It has appellate jurisdiction in respect of all decisions of the High Courts.⁷⁷ The High Courts also have original and appellate jurisdiction as well as the jurisdiction to issue writs against the government in appropriate cases.⁷⁸ Decisions of the Supreme Court are

⁶³ Article 130, 132, 133, 134 Indian Constitution.

⁶⁴ Article 226, Indian Constitution.

⁶⁵ Article 227, Indian Constitution.

⁶⁶ Article 123, 217, Indian Constitution.

⁶⁷ Article 14, Indian Constitution.

⁶⁸ Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press 2001) ch 9.

⁶⁹ *Ibid.* Chapter 12.

⁷⁰ The Constitution of the Islamic Republic of Pakistan 1973 came into force on 14th August 1973.

⁷¹ Articles 51, 59, Pakistani Constitution.

⁷² Articles 70, 73, Pakistani Constitution.

⁷³ Articles 50, 90, Pakistani Constitution.

⁷⁴ Article 89, Pakistani Constitution.

⁷⁵ Articles 101-140, Pakistani Constitution.

⁷⁶ Article 142, Pakistan Constitution.

⁷⁷ Articles 184, 185 Pakistani Constitution.

⁷⁸ Article 199 Pakistani Constitution.

binding on all courts and those of the High Courts on all subordinate courts.⁷⁹ The Constitution also provides for the qualifications and mode of appointment of judges.⁸⁰

Notwithstanding the similarities between them, the Pakistani Constitution had a very different fate from its Indian counterpart: it was suspended twice (from 1977 to 1981 and then from 1999 to 2002) in the wake of military takeovers justified on the basis of internal disturbances in the country.⁸¹ In both these periods, fundamental rights provided in the Constitution were suspended and the judiciary was required to take a fresh oath of office in support of the takeovers. The majority of the judiciary not only took these fresh oaths of office on military orders but also provided legal cover to the takeovers by issuing judgements justifying these on the basis of the ‘doctrine of necessity’.⁸² The combined effect of these oaths and the judgements was evident in the judiciary’s continued deference to the executive especially in the periods when it was led by military chief turned Presidents.⁸³

However, by 2007 the relationship between the judiciary and the executive had become deeply strained. In March 2007, President General Musharraf who occupied the dual offices of the military chief and the President suspended the Chief Justice of Pakistan on grounds of professional misconduct. This led to protests from the legal community and political parties and in an unprecedented display of independence on the part of the judiciary, the Chief Justice was restored to office in July 2007, by a judgment of the Supreme Court.⁸⁴ This tension between the judiciary and the executive had reached a boiling point in October 2007 just as the Competition Ordinance 2007 was introduced. In November 2007, President General Musharraf declared an emergency and once again required the judiciary to take an oath of office in support of the military takeover. This time, however, the majority of the judiciary did not comply and the ongoing tussle between the judiciary and the executive kept the fate of Competition Law (as well as of several other laws) hanging in the balance until 2009 when the judiciary asked the executive to place the Competition Ordinance (and other laws) before Parliament for ratification.⁸⁵

By 2010, when the third Competition Ordinance was finally ratified and approved by the Pakistani Parliament, and enacted as the Competition Act 2010, the legal and political landscape of the country had changed once again. The country had held general elections and had replaced the military chief turned President, by a constitutionally appointed President. Although the legislature was no longer accountable to an all-powerful President (and by extension to the executive), the judiciary’s relationship with the executive and the legislature remained complicated, at times even hostile which continued to impact the judiciary’s attitude towards legislative and other initiatives taken by the executive.

8. Institutional Interplay in the Adoption of Competition Laws

9. The Indian Experience

The Indian executive and legislature were instrumental in India’s adoption of its Competition Act 2002, whilst the executive, legislature and the judiciary are responsible for the Competition (Amendment) Act 2007 which substantially brought the 2002 Act into the form that it is in force in the country today. The proverbial ball was set rolling by the executive which had a tradition of establishing committees to evaluate India’s domestic economic and legislative needs especially in light of external developments. Prior to adopting the 2002 Act the Indian government had extensively reviewed its monopoly regulation regime.⁸⁶ This process gained momentum after India joined the World Trade Organization in the mid-90s and India seriously considered a domestic competition regime to protect the Indian economy from infiltration by international cartels and to ensure its

⁷⁹ Articles 189, 203 Pakistani Constitution. In 1980 Pakistan amended its Constitution to provide for the establishment of a ‘Federal Shariat Court’ with the limited mandate to examine whether a Pakistani statute or provision of law was ‘repugnant to the injunctions of Islam’. Decisions of the FSC are appealable to an especially constituted bench of the Supreme Court and do not interfere with mainstream law enforcement in Pakistan. (Articles 203C, 203D, 203F Pakistani Constitution).

⁸⁰ Articles 175, 176, 193 Pakistani Constitution.

⁸¹ Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press 2001) chs 25 and 36.

⁸² This doctrine was first utilised by the Federal Court in *Federation of Pakistan v. Maulvi Tamizuddin Khan PLD 1955 FC 435* and continues to inform political and judicial debate in Pakistan despite being declared ‘dead’ by the judiciary in *Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789*.

⁸³ See for instance, *Syed Zafar Ali Shah v. General Parvez Musharraf, Chief Executive and others PLD 2000 SC 869* in which the Supreme Court authorized the military chief to amend the Constitution.

⁸⁴ Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan through the Secretary and others 2007 PLD 578.

⁸⁵ See n. 82.

⁸⁶ In particular through the Sachar Committee 1977

relevance as a destination for foreign investment. Consequently, in 1999, the Indian government set up a ‘High Level Committee on Competition Law and Policy’ to propose to the government the most appropriate competition law for the country.⁸⁷

Members of the Raghavan Committee ranged from former government and World Bank officials, to lawyers to academics. And whilst they belonged to different epistemological communities they were all of Indian origin, the majority also being Indian nationals. In the course of its deliberations, which lasted for nearly two years, the Raghavan Committee engaged with, and obtained evidence from, representatives of chambers of industries and commerce, professional institutes, consumer organizations, experts, academics and government officials.⁸⁸ The Raghavan Committee also consulted competition laws of nearly 80 countries—including competition/antitrust laws of the European Union (EU), the United Kingdom (UK), the United States (US), and Japan—and examined competition reports and texts authored by leading Indian and international scholars and competition experts. In 2000, the Raghavan Committee submitted its report to the government.

The Indian legislature arrived on the scene when the government introduced the competition bill in Parliament, outlining the objects and reasons for enacting the Law. The Parliament remitted it to the relevant Standing Committee for scrutiny. The Standing Committee met with representatives of financial institutions, chambers of industry and commerce, consumer organizations, professional institutes, experts, academics and relevant ministries of the government and presented its report to the Parliament. In December 2002, after considering the recommendations of the Standing Committee, the Parliament passed the bill with some modifications. On 13th January 2003 the President granted his assent and the Competition Act 2002 stood formally enacted.⁸⁹

The judiciary joined the competition debate soon after, when a petition was filed before the Indian Supreme Court challenging the 2002 Act for not conforming with the constitutional principle of separation of powers.⁹⁰ On 20th January 2005, the Supreme Court disposed of the petition on the basis of assurances and commitments of the executive/government that it would form a tribunal to hear appeals from decisions of the Competition Commission of India (CCI). On 9th March 2006, in compliance of the order of the Supreme Court, the government introduced the Competition (Amendment) Bill, which, among other amendments, provided for the establishment of a Competition Appellate Tribunal with the mandate to hear appeals from CCI’s decisions. On 27th September 2007, after considerable deliberations, the legislature/Parliament enacted this as the Competition (Amendment) Act 2007.⁹¹

The Competition Law that emerged as a result of this interplay of institutions, reflected the contribution of each of them. Provisions related to CCI’s mandate, which had initially been adapted for the Indian context by the Raghavan Committee, remained substantially as recommended by the Committee. The structure of the competition implementation authority, was informed by deliberations in Parliament and by the judiciary: it evolved from a single authority with separate investigative, prosecutorial and adjudicative wings,⁹² and adequate powers of advocacy, adjudication and implementation of its decisions,⁹³ to a collegial, regulatory body with its adjudicatory function transferred to the Tribunal. The composition of the authority (including the mechanisms for appointing and removing members) also changed dramatically due to the interplay of institutions: although the Raghavan Committee had recommended a ‘Collegium Selection Process’, that would ensure that qualified persons

⁸⁷ Raghavan Committee comprised Mr. S V S Raghavan (Chairman), Ms. Mala Banerjee, Dr. S. Chakravarthy, Mr. K B Dadiseth, Dr. Rakesh Mohan, Mr. Sudhir Mulji, Mr. P M Narielvala, Ms. Pallavi Shroff and Mr. G P Prabhu. <<http://www.thehindu.com/2000/06/22/stories/0622000d.htm>> accessed 6 December 2016.

⁸⁸ S Chakravarthy, http://www.cuts-ccier.org/pdf/Why_India_Adopted_a_new_Competition_Law.pdf (accessed 9 May 2018) 21.

⁸⁹ Chakravarthy (n 88), 22. The Competition Act 2002 came into force in stages, certain sections coming into force on 31st March 2003 and others on 19th June 2003. The government established the Competition Commission of India by notification no. S.O. 1198 (E). dated 14.10.2003.

⁹⁰ *Brahm Dutt v. Union of India (2005) 2 Supreme Court Cases 431* at page 434 (b), (c), (d), (e) (f) and (g) and page 435(h) and 436(a)].

⁹¹ The amended Competition Act was also brought into force in stages: provisions relating to anti-competitive agreements and abuses of dominant position came into force on 20th May 2009 by notifications no. S.O. 1241(E) and S.O. 1242(E) both dated 15th May 2009; provisions relating to mergers or ‘combinations’ came into effect only in 2011. On 15th May 2009, the government established the Tribunal by notification no. S.O. 1240(E). On 26th May 2017 the Tribunal was abolished (in pursuance of the Finance Act 2017) and replaced by the National Company Law Appellate Tribunal, however, that development does not impact the present discussion.

⁹² *ibid.* para 4.8.4 at 4 and para 6.1.8 .

⁹³ *ibid.* para 4.8.4 .

would be appointed,⁹⁴ the Parliament initially vested the power of appointing CCI members exclusively in the government,⁹⁵ reverting to a version of recommended ‘Selection Committee’ in the 2007 Amendment.

10. *The Interplay in Pakistan and its impact on legal content*

Whilst a cursory review of the interplay of institutions in Pakistan suggests that the Pakistani executive, legislature and judiciary have all participated in the adoption of the Pakistani Competition Law, the histories of these institutions and of their relationships *inter se* were remarkably different from those in India, and, therefore, their interplay and impact has also been different.

In Pakistan, as in India, it was the executive that led the initiative to adopt a Competition Law. However, although Pakistan, like India, had an anti-monopoly legislation on its books, it had not systematically reflected on the importance and appropriateness of regulating monopolies. In 1993, the Pakistani government expressed some interest in competition matters, however, this interest gained momentum only after the Doha Ministerial Conference in 2001,⁹⁶ when Pakistan actively sought assistance from UNCTAD for developing its domestic competition law.⁹⁷ Subsequently, Pakistan approached the World Bank for technical assistance for developing a new competition law and policy framework.⁹⁸ The World Bank set up a team in response to this request which was led by the World Bank and comprised World Bank officials and international consultants along with some Pakistani economists, lawyers, academics, and chartered accountants.⁹⁹ The team submitted its report the Pakistani government in 2007.¹⁰⁰

In the course of its deliberations, the World Bank led team relied on ‘perception indicators’ and ‘broad indicators from the market’ rather than on sectoral surveys primarily due to lack of necessary data for such surveys.¹⁰¹ The Team also drew upon its experience and understanding of competition regimes of the EU, UK and the US,¹⁰² and also consulted competition laws that had been designed for other developing countries.¹⁰³ Throughout the process, the team worked closely with the Pakistani government (Ministry of Finance) and with the anti-monopoly authority. The Team also consulted a number of international and Pakistani experts who were not part of its core team,¹⁰⁴ and held public consultation workshops in May 2006 and a Growth and Competitiveness Conference in Lahore in December 2006.¹⁰⁵ In January 2007, the Team commissioned a Brussels based law firm based to prepare a draft based on its recommendations.¹⁰⁶

⁹⁴ *ibid.* para 6.3.3, 6.3.4.

⁹⁵ Sections 8 (1) and 9, Competition Act 2002.

⁹⁶ Pakistan had become a WTO member on 1st January 1995 <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (accessed 12 October 2016).

⁹⁷ Even after the Doha Ministerial Conference Pakistan’s ambitions were limited capacity building and technical assistance within the existing infrastructure. (See ‘Communication Submitted by Pakistan to UNCTAD 20th June 2002’ <<http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/unpak.pdf>> accessed 22 June 2017).

⁹⁸ Eric David Manes, ‘A Framework for a New Competition Policy and Law: Pakistan’. ©2007 The International Bank for Reconstruction and Development, Acknowledgments. Pakistan had recently completed the first-generation reforms under the guidance and with the technical assistance of the World Bank. By 2005, it was once again engaged with the World Bank for the second-generation reforms, which were geared *inter alia* towards improving Pakistan’s ‘international competitiveness in an increasingly globalized world’.

⁹⁹ *ibid.*

¹⁰⁰ Manes (n. 98)

¹⁰¹ Manes. (n. 98) ch 1, paras 1.15, 1.16, 1.17.

¹⁰² *ibid.*, para 2.2 n.8. The Team also consulted competition models of Brazil, Canada, Italy, India, Mexico, Republic of Korea and Russia.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.* Acknowledgments. The persons consulted included Dr. Asad Sayeed (The Collective for Social Sciences Karachi, Pakistan), Paolo Coerra (The World Bank) who formally reviewed the World Bank Report, Anjum Ahmed, Guiliiana Cane, Mark Dutz, R. Shyam Khemani and Peter Kyle (The World Bank), John Preston, Karen Ellis, Haroon Sharif and Tim Hatton (DFID). Interestingly, Mr. Khemani had also been consulted by the Raghavan Committee.

¹⁰⁵ *ibid.* Although the exact number of consultations held is not known these could not have been too many or too wide ranging given that the Report suggests that these were all held in the month of May and in the same city.

¹⁰⁶ Joseph Wilson, ‘Crossing the Crossroads: Making Competition Law Effective In Pakistan’ (2011) 8 Loyola University Chicago International Law Review 105, 111.

Also ‘Voluntary Peer Review of Competition Law and Policy—Pakistan’ published by UNCTAD in 2013. <http://unctad.org/en/PublicationsLibrary/ditclp2013d4_overview_en.pdf> ch 1, 1, para 5 (accessed 23 June 2017).

Once the Pakistani government had received the draft, instead of submitting it to the Parliament, the it submitted it directly to the military chief turned President, who promulgated it as the Competition Ordinance 2007.¹⁰⁷ In the ordinary course, the Competition Ordinance, would have lapsed in 120 days unless approved by Parliament during the period. However, a month after the promulgation, the military chief/President declared an emergency in the country which led to the Competition Ordinance being saved from lapsing. The judiciary engaged with the Competition law in 2009, after the military chief/President had left office, and the Supreme Court in deciding a petition filed before it directed the then government to place all ‘saved’ ordinances for approval before Parliament. Interestingly, however, this order of the Supreme Court only dealt with the Competition Ordinance generally as part of a group and not individually on its own merits.

The Parliament engaged with the Competition Law for the first time in 2010 when the executive finally placed the third Competition Ordinance before it for ratification. Although the Parliament did debate the provisions of the proposed law and also referred it to the relevant Standing Committee for discussions with stakeholders, its deliberations were circumscribed, of necessity, by the Competition Ordinances already in the field. Consequently, the Competition Act 2010 bore the unmistakable stamp of the World Bank led team both in what was included in it and what remained excluded.

The structure and mandate of the Competition Commission of Pakistan reflected the express recommendations of the World Bank Team. The World Bank Team had recommended that CCP be structured as a ‘quasi-autonomous, quasi-judicial institution’; ‘a collegial body with a minimum of five and a maximum of seven members’.¹⁰⁸ Each of the three successive Competition Ordinances, and after these the Competition Act 2010, followed this recommendation and established CCP as a collegial body corporate with perpetual succession and with not less than five and no more than seven members.¹⁰⁹ Similarly, the successive Competition Ordinances and the Competition Act adhered to the mandate and composition of the CCP that had been recommended by the World Bank Team. The only change in this regard was made by the Parliament when it introduced the Competition Appellate Tribunal in the Competition Act 2010.

On the other hand, the CCP’s composition reflected the omissions of the World Bank team. Interestingly, although the World Bank Team had highlighted the importance of the ‘quality of appointments’ to CCP and prescribed the qualifications that members may demonstrate, it had not prescribed a mechanism for the appointment or removal of such persons.¹¹⁰ Consequently, whilst each successive Competition Ordinance and the Competition Act adopted provisions reflecting the recommendations of the Team with regard to the necessary qualifications, it followed the established Pakistani practice for appointing and removing members by simply entrusting the government with all powers to make appointments,¹¹¹ and also conferred upon the government the power to remove a member from office on any of the grounds for which such person may have been ineligible for appointment in the first place,¹¹² upon an inquiry conducted by an ‘impartial person or body of persons.’¹¹³ Neither the Parliament nor the judiciary made any observations in this regard.¹¹⁴

¹⁰⁷ Voluntary Peer Review. (n . 106). ch 1A, 2, para 7.

¹⁰⁸ *ibid.* para 4.6.

¹⁰⁹ Section 12(2) and section 14(1), Competition Ordinance 2007.

¹¹⁰ Manes. (n. 98). paras 4.6, 6.38.

¹¹¹ Section 14(5), Competition Ordinance 2007 and the Competition Commission (Salary, Terms and Conditions of Chairman and Members) Rules, 2009.

¹¹² Section 14 (6), Competition Ordinance 2007.

¹¹³ Section 19 Competition Ordinance 2007.

¹¹⁴ In 2013, the government had an opportunity to rectify the appointment mechanism when the Pakistani Supreme Court directed the government to establish an independent commission for selecting persons to be appointed to regulatory bodies (*Khawaja Muhammad Asif v. The Federation of Pakistan and others* 2013 SCMR 1205). The government first resisted this decision and later challenged it on the grounds that directions of the Supreme Court were tantamount to interference in the government’s constitutional duty to exercise the ‘executive authority’ of the state, and that the statutes under which a number of regulatory bodies had been established did not require appointment through a commission. In deciding this second challenge, the Supreme Court clarified that its direction in the first case was discretionary rather than a mandatory and allowed the government to proceed with making appointments in accordance with the parent acts of these regulatory bodies ie at the government’s discretion. CCP was included in the list of authorities in which the government was allowed to retain its powers to make appointment as conferred upon it under the Act of 2010 (*Ghulam Rasool v. Government of Pakistan* PLD 2015 SC 6).

11. Assessing the Compatibility & Legitimacy of Indian & Pakistani Competition Laws

It is evident from the preceding that in adopting and amending the Competition Act 2002, India engaged a wide range of bottom-up, participatory and inclusive institutions drawn from all three branches of state. The fact that these institutions were bottom-up, participatory and inclusive allowed India to aggregate local knowledge and to adapt and 'Indian-ize' the language and content of foreign blueprints to construct a Law that would be compatible with its particular needs. Further, the fact that these institutions were drawn from all three branches of state, enabled the participation of a considerably diverse and significant segment of Indian society in the adoption process and thereby garnered their constructive, if not actual consent for the adoption of the Law, which combined with the legality and authority of the institutions, bolstered the legitimacy of the Competition Act 2002.

In sharp contrast, Pakistan adopted its three Competition Ordinances through exclusive and top-down institutions drawn only from the executive. The institutions engaged for the initial adoption were neither equipped nor made an effort to aggregate local information and adopted the content and language of international blueprints without any real concern for compatibility. Further, the fact that the institutions through which Pakistan adopted the Ordinances had legality and authority, were drawn from a branch of state that did not have a mechanism for garnering the consent of stakeholders, suggests that the Ordinances enjoyed only limited legitimacy. Whilst Pakistan did eventually engage a somewhat wider range of more bottom-up, participatory and inclusive institutions in the adoption of the Competition Act 2010, the ability of these institutions to enhance the compatibility and legitimacy of the Law remained circumscribed by the content of the Ordinances and their own institutional infancy.

RELATIONSHIP BETWEEN COMPATIBILITY AND LEGITIMACY

According to the interplay of institutions in the adoption of competition laws in India and Pakistan, the Indian Competition Act 2002 is more compatible with and enjoys greater legitimacy in the Indian context than its counterpart, the Pakistani Competition Act 2010, does in Pakistan. However, the actual compatibility and legitimacy of these Laws, are not measurable except through their effects on the implementation of these Laws in either country. Whilst a full-scale review of these effects is beyond the scope of this article, I examine the more limited issue of the effect of legitimacy upon compatibility: does it enhance compatibility, reduce it, or is there no discernible impact? To address these questions, I review CCI and CCP's interpretation of comparable provisions of their respective Competition Acts.

12. Relevant provisions of the Indian and Pakistani Competition Acts

Section 3 of the Indian Competition Act 2002 empowers CCI to take action against anti-competitive agreements whereas section 4 of the three Pakistani Competition Ordinances (of 2007, 2009 and 2010) and the Pakistani Competition Act 2010 enables CCP to take action against prohibited agreements. The concept and prescribed treatment of 'anti-competitive agreements' in the Indian Competition Act and that of 'prohibited agreements' in the Pakistani Competition Laws are comparable. Both section 3(1) of the Indian Competition Act 2002 and section 4 of the Pakistani Competition Act 2010 address agreements that relate to the production, supply, distribution, storage, acquisition or control of goods or provision of services in the country, India prohibits them if they cause or are likely to cause '*an appreciable adverse effect on competition within India*', Pakistan proscribes them if they have '*the object or effect of preventing, restricting or reducing competition within the relevant market*'.

The distinction in the analytical tests reflects the interplay of institutions in the two countries: A closer reading of section 3 of the Indian Competition Act 2002 reveals that it combines elements from the US Antitrust Law, Article 81 of the EU Treaty (now Article 101 TFEU) and the OECD-World Bank Model Competition Law, 'indian-ized' through the interaction of Indian institutions. A similarly close reading of section 4 of the Pakistani Competition Act 2010 reveals that it almost exactly reproduces Article 101 TFEU. This reflects the absence of a meaningful engagement of Pakistani institutions and a wholesale adoption of foreign blueprints without a discernible attempt at making it compatible with context. Further, whilst not evident from the text of the provisions, these provisions also reflect the overall legitimacy of the statutes of which these form a part. The Indian provision has greater legitimacy for having been scrutinized and consented to by a range of institutions than its Pakistani counterpart.

13. CCI and CCP's strategy for interpreting these provisions

A review of final orders of the CCI from the commencement of operations up to December 2017 suggests that, in interpreting section 3 of the Competition Act 2002, CCI places very limited *express* reliance on foreign precedents

and materials,¹¹⁵ and the precedents and materials it does cite are derived from diverse competition jurisdictions. However, this review reveals that CCI *implicitly* relies on foreign precedents and materials and adopts foreign analytical strategies for its use without expressly acknowledging these. In its implicit reliance CCI appears to especially lean towards an EU style of reasoning: it prefers to examine allegedly anti-competitive agreements in their economic and legal context and in light of their objectives; it acknowledges and applies the *de minimis rule* in respect of vertical agreements,¹¹⁶ and often balances anti-competitive and pro-competitive factors even in respect of agreements presumed to be anti-competitive within the scheme of section 3.¹¹⁷

In contrast, in the majority of its final orders, CCP relies *expressly* and extensively on foreign precedents and materials and draws most of its citations from EU and US precedents with far fewer from other jurisdictions. Also, despite its textual leanings towards EU Competition Law, CCP explicitly follows the analytical approach adopted by the EU and the US, often conflating the two. The EU effect is evident when, in a number of its orders, CCP asserts that it is incumbent upon it to examine ‘the object or effect’ of an agreement and that ‘object’ and ‘effect’ are disjunctive concepts, whilst the US influence is manifest when CCP interprets ‘object’ to mean ‘per se’;¹¹⁸ when it refers to an effect based enquiry as a rule of reason enquiry;¹¹⁹ when in a majority of its orders it does not consider the context or possible legitimate objectives of an agreement,¹²⁰ and when it does not allow a *de minimis* style exception in any of its orders.¹²¹

Over time CCI’s interpretation of the analytical test for anti-competitive agreements has become increasingly consistent and predictable,¹²² provided the sector¹²³ or practice¹²⁴ under review, merits a flexible or novel approach. In the majority of its final orders, CCI begins by considering whether there is an agreement. If it establishes that an agreement exists, it considers whether it is horizontal or vertical with reference to the economic and legal context within which the agreement operates. In case of horizontal agreements, CCI most often requires the respondent to rebut the presumption of appreciable adverse economic effect with reference to factors listed in section 19(3) of the Competition Act 2002, whereas in respect of vertical agreements, it considers the effect of the agreement itself taking into account possible pro-competitive factors. CCI also allows for an exemption from the operation of section 3 on the basis of the *de minimis rule*.¹²⁵

¹¹⁵ For instance, CCI’s order in Case 33/2011 decided 03.07.2012 *Automobile Dealers Association v. Global Automobiles & others*; Case 3/2011 decided 25.08.2014 *Shri Shamsher Kataria v. Honda Siel Cars India Limited & Others*.

¹¹⁶ For instance, in its order CCI’s order in Case 33/2011 decided 03.07.2012 *Automobile Dealers Association v. Global Automobiles & others*.

¹¹⁷ For instance, CCI’s orders in Case 5/2009 decided 02.12.2010 *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Others*; Case 1/2009 decided 25.5.2011 *FICCI v. United Producers/Distributors Forum & others*; MRTP Case No. C-127/2009/DGIR (4/28), decided 11.06.2012 *Varca Druggist & Chemist and others v. Chemists & Druggists Association Goa and others*; Case 38/2011 decided 03.04.2014 *Indian Sugar Mills Association & Others v. Indian Jute Mills Association & Others*; Case 24/2011 decided 19.03.2013 *Shri Sonam Sharma v. Apple Inc. USA & Others*.

¹¹⁸ See particularly CCP’s decisions dated 10.04.2008 in *Pakistan Banking Association & Others*; 04.12.2008 in *Institute of Chartered Accountants of Pakistan Case*; 18.03.2009 in *Karachi Stock Exchange Case*; 23.04.2009 in *All Pakistan Newspaper Society and Others* and 27.08.2009 in *All Pakistan Cement Manufacturers Association (orders re price fixing agreements)*, 13.05.2011 in *PESCO Tender Order/Amin Brothers Engineering et al Case (for bid rigging agreements)* and 30.04.2013 in *LDI Operators Case (for market allocation orders)*.

¹¹⁹ See CCP’s order dated 23.07.2010 in *Dredging Companies Case*.

¹²⁰ It may be argued that CCP prefers the orthodox approach of the EU Commission and the narrow interpretation of ‘object’. However, even if this were true, it is likely that it prefers this approach because of its seeming similarity with the *per se* rule.

¹²¹ See CCP’s order dated 10.04.2008 in *Pakistan Banking Association Case*.

¹²² For early exceptions in this regard see CCP’s decision in Case 5/2009 dated 02.12.2010 *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Others*; in Case 43/2010 dated 16.4.2012 *A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Limited* and in Case 6/2011 dated 16.4.2012 *Coal India Limited v. Gulf Oil Corporation & Others*.

¹²³ For instance see CCI’s decision in Case 29/2010 decided 20.06.2010 *Builders Association of India v. Cement Manufacturers Association & Others*; Case 24/2011 decided 19.03.2013 *Shri Sonam Sharma v. Apple Inc. USA & Others* (n. 117) (IT sector), and Case 3/2011 decided 25.08.2014 *Shri Shamsher Kataria v. Honda Siel Cars India Limited & Others*.

¹²⁴ See CCI’s decision in Case 43/2010 decided 16.4.2012 *A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Limited*.

¹²⁵ See CCI’s decisions in Case 33/2011 dated 03.07.2012 *Automobile Dealers Association v. Global Automobiles & others* and Case 24/2011 dated 19.03.2013 *Shri Sonam Sharma v. Apple Inc. USA & Others*.

In contrast, CCP's approach appears to be and remain less consistent and structured except to the extent that CCP prefers to align its interpretations with EU and US precedent rather than anchoring them in the wordings of the provisions of the Pakistani Competition Ordinances or Act. In its earliest orders, CCP first categorizes an agreement as anti-competitive by object (which term it regularly conflates with the per se rule), or by effect (which term it uses interchangeably with the rule of reason). CCP then analyses the agreement, most often with reference to EU and US precedents.¹²⁶ In time, however, CCP either skips the categorization step altogether¹²⁷ or categorizes an agreement without establishing or stating the basis for doing so.¹²⁸ CCP's approach towards bid-rigging agreements,¹²⁹ agreements for allocating market shares¹³⁰ and its stance towards the exemption provision (section 5) are some examples of the lack of consistency in its approach.¹³¹

14. Insights into the relationship between compatibility and legitimacy

A review of the manner in which CCI interprets section 3 of the Indian Competition Act 2002 suggests that the CCI's strategy is to continue to 'indian-ize' the language as well as the meaning of its provisions. In doing so, CCI enhances the pre-existing compatibility of the provision with the Indian context which in turn means that the provision is better understood, more utilised and perhaps better applied in the context. However, the review of the manner in which CCP interprets section 4 of the Pakistani Competition Act 2010 suggests that CCP keeps the provision suspended in a certain legal and linguistic limbo between the text of the Pakistani Competition Law and the international precedents it emulates, thereby, at best, keeping it only as compatible with the Pakistani context as it was at the time of adoption and certainly doing little to improving its understanding, utilization and application in the country.

Arguably, the relatively higher legitimacy of the Competition Law in India, generated through the engagement of a wide range of bottom-up, participatory and inclusive institutions in India, made the Law acceptable within the Indian context. Given that the Indian Competition Law and the implementing authority it had established (CCI), had acquired legitimacy through domestic institutions and therefore, did not feel constrained to *expressly* and overtly rely on international precedents to assert the Law's or indeed its own international legitimacy and leverage it to gain domestic legitimacy. The domestically generated legitimacy of the Law and of CCI, therefore, allowed CCI the leeway to adopt a more domestically comprehensible approach towards interpreting the provisions of the Law and, to rely upon foreign materials and precedents only to the extent it was necessary for it to do so for greater clarity.

The relatively lower legitimacy of the Pakistani Competition Law manifests itself in the CCP's almost compulsive reference to foreign precedents and materials in its orders. This need to draw support from EU and US competition and antitrust jurisprudence (as well as regulatory guidelines and precedents from the OECD and other jurisdictions), even when not strictly warranted by the nature of the case before it, reflects CCP's need to assert not only the international antecedents and pedigree of the Competition Law but also its international legitimacy, and by extension of the CCP itself. Regardless of whether and the extent to which it succeeds in apportioning domestic legitimacy for the Law, CCP's interpretive strategy fails to give precise and clear meaning to the text of the statute and, therefore, prevents it from being coherently and systematically understood, applied and utilised in the Pakistani context.

CONCLUSION

It is evident from the above discussion that the nature and interplay of institutions through which India and Pakistan adopted their respective Competition Laws had a clear, discernible impact on the compatibility of these

¹²⁶ For example, CCP's decision dated 10.04.2008 in Pakistan Banking Association & Others; 18.03.2009 Karachi Stock Exchange Case; dated 28.06.2012 1-Link Guarantee Limited & Member Banks Case and 23.07.2010 in the Dredging Companies Case.

¹²⁷ See for example the decision dated 23.07.2010 in the *Dredging Companies Case* which was followed in several other cases also.

¹²⁸ See CCP's decision dated 13.05.2011 in PESCO Tender Order/Amin Brothers Engineering et al Case.

¹²⁹ The CCP decided the *Dredging Companies Case* on the basis of rule of reason (albeit without economic analysis) whilst in the *PESCO Case*, it categorized bid rigging as a per se violation.

¹³⁰ In the *LDI case* CCP engaged in a rule of reason style analysis for market allocation after having identified the infringement as a per se violation in earlier orders.

¹³¹ Whilst in most cases CCP did not allow defendants to avail of a section 5 exemption in the main case (For instance *Dredging Companies Case* and *PESCO Case*) and directed them to keep these two proceedings separate, in others it not only allowed for the possibility of a hearing under section 5 to be held alongside the main case but also granted an exemption on the basis of such an application (For example *GCC Approved Medical Centres case*).

Laws with the contexts for which these were intended as well as their legitimacy in these contexts. In India, the interplay of a wide range of bottom-up, participatory and inclusive institutions generated a higher degree of compatibility and legitimacy for the Indian Competition Act 2002 compared to that created in Pakistan by the adoption of the Competition Ordinances and Competition Act 2010 through exclusive, top-down institutions which, for the most part, were drawn only from the executive.

The discussion further suggests a positive correlation between compatibility and legitimacy to the extent that legitimacy enhances the compatibility generated in the course of the adoption. For instance, the already higher compatibility of the Indian Competition Act 2002 was further bolstered by its legitimacy which allowed the CCI, the freedom and independence to interpret provisions of the Competition Law. In Pakistan, the absence of significant interplay of institutions from different arms of the state and the near exclusion of even such participatory institutions that existed, kept the Competition Law as well as its subsequent interpretation by the CCP, tethered to its antecedents and therefore, distant from the Pakistani context.

These findings have important practical implications in that they demonstrate that compatibility, whilst necessary, is not a sufficient condition for the meaningful implementation of an adopted law in a new context and especially for its gradual integration into the pre-existing legal system and the adopted law must also enjoy a degree of legitimacy to be truly successful in that context. Notwithstanding the significance of these findings, they are not intended to detract from the need for country's adopting laws based on foreign models and for the purposes of gaining or re-asserting a foothold in the international community, to strike a balance between their international and domestic legitimacy.

Overly focusing on maintaining domestic legitimacy, as appears to be the case in the interpretation of Competition Law in India, may have the effect of detaching and isolating the adopted law from international developments and, in worst-case scenario, distorting or confusing these principles on which the law is based. On the other hand, fixating on bolstering international legitimacy, as appears to be the case in the interpretation of Competition Law in Pakistan, may provide the competition regime international recognition but it will fail to create a body of competition principles that are firmly anchored in the domestic context and accessible to domestic users of the law, and worse still, may have little impact on enhancing its domestic legitimacy.