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Adoption of Competition Laws in India and Pakistan

2.1 INTRODUCTION

India and Pakistan offer an excellent opportunity to explore the links between the adoption and implementation of competition legislation in South Asia. The two countries had first enacted anti-monopoly laws – the Monopolies and Restrictive Trade Practices Act in India and the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance in Pakistan – in 1969 and 1970 respectively. By the early 2000s, however, both countries were engaged in consultations for replacing these anti-monopoly laws with modern competition legislation: India was the first to do so by enacting the Competition Act 2002 and Pakistan followed suit by promulgating the Competition Ordinance 2007.[1] In enacting modern competition legislations India and Pakistan in effect declared to their domestic audiences their commitment to achieving greater economic efficiency and consumer welfare[2] and to the international community, their willingness to align with international best practices in competition regulation in an effort to not only to join a rapidly growing international competition network[3] but also to become integrated in the global economy.

This chapter traces the process through which India and Pakistan adopted their competition legislations to understand the scheme and ambit of these legislations and to evaluate the extent of their compatibility with and legitimacy in their respective contexts. It appraises the pre-conditions of transfer in India and Pakistan focusing on the legal and political institutional landscapes and evaluates factors that motivated both countries to adopt modern competition legislation, the

[1] Hereafter 'the Indian Act' and 'the 2007 Ordinance' respectively.

[2] These goals are declared in the preambles of the Indian Act and the 2007 Ordinance.

[3] Until the mid-twentieth century there were less than ten competition regimes worldwide. However, after World War II, more and more countries adopted competition laws. Presently are over 110 competition regimes in place, of which over 80 were created after 1980.

https://doi.org/10.1017/9781009247184.003 Published online by Cambridge University Press

transfer mechanisms they employed in the adoption, and the interplay of the legal and political institutions they engaged in this regard.

To this end, this chapter is organised as follows: Section 2.2 evaluates the legal and political context in India and Pakistan in which they adopted their anti-monopoly and competition legislations. Section 2.3 explores India and Pakistan's motivations for adopting competition laws, evaluates the mechanisms employed by them for the adoption,[4] and examines the nature and range of institutions engaged by them in this regard; Section 2.4 considers how India and Pakistan's adoption strategy has evolved over time and identifies the impact of the further institutions added into the mix in this process; Section 2.5 discusses how the adoption processes in the two countries have shaped the substance of their competition legislations, and Section 2.6 assesses the extent of the compatibility and legitimacy generated in the course of adoption in the two countries.

2.2 INDIA AND PAKISTAN: THE PRE-CONDITIONS OF TRANSFER

This section establishes the pre-conditions of transfer in India and Pakistan focusing on the Indian and Pakistani legal and political institutional landscape in a three-dimensional perspective, that is to say, evaluating not only the design and mandate of these institutions but also how these have evolved over time. To this end the section focuses on three distinct milestones, in the evolution of the legal and political institutions inherited by the two countries: when they became independent dominions on 14 August 1947;[5] when they adopted their first anti-monopoly legislation in 1969 and 1970 respectively; and in 2002 and 2007 when they adopted their respective modern competition legislations.

2.2.1 *1969: India Adopts its First Anti-monopoly Legislation*

In 1969, when India enacted the Monopolies and Restrictive Trade Practices Act, the Indian Constitution had been in force for nearly twenty years,[6] and the political

[4] See Chapter 1, Section 1.2.2.

[5] The independent states of India and Pakistan were carved out of the British Empire in pursuance of section 1 of the Indian Independence Act 1947<www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf> accessed 3 September 2021, prior to which both were governed by the legal and political institutions established under the Government of India Act 1935 <www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf> accessed 3 September 2021. Even after independence and until such time as the countries adopted their respective constitutions, they continued to be governed by the 1935 Act. They also inherited all British laws that had been in force in undivided India immediately prior to independence.

[6] India adopted its Constitution on 16.11.1949 ('the Indian Constitution'). Although some Articles of the Constitution came into force on 26.11.1949, the Constitution became fully effective only from 26.01.1950. CL Anand, *Constitutional Law and History of Government of India* (8th ed, Universal Law Pub Co 2008) ch 2.

https://doi.org/10.1017/9781009247184.003 Published online by Cambridge University Press

and legal institutional framework constituted under it had remained reasonably stable and operational throughout this time.[7]

Under the Indian Constitution, legislative powers were exercised by the parliament which comprised an upper house, 'the Council of States', and a lower house, 'the House of the People'.[8] Both houses had the authority to initiate a bill,[9] and a bill could only be passed into law with the agreement of both houses and with the assent of the president.[10] The federal legislature had the power to legislate in respect of all matters listed in the 'Union and Concurrent Legislative Lists'.[11] The executive power of the federation was vested in the president, who was assisted in his affairs by a 'Council of Ministers' headed by the prime minister.[12] The president also had the power to legislate by promulgating ordinances. However, the president could do so only if the parliament was not in session, and if he was satisfied that the situation warranted immediate legislative action. Ordinances promulgated by the president took effect as 'Acts of Parliament' but lapsed if they were not submitted to the parliament for approval within six weeks of its re-assembly.[13]

The Indian judicature was headed by the Supreme Court which heard disputes between the federation and the provinces or between one province and another. It also heard appeals from orders of the high courts sitting in their civil or criminal jurisdiction.[14] Each Indian state had a high court, which was subordinate to the Supreme Court and had the power to issue writs to any person or authority (including a governmental authority) operating within its jurisdiction.[15] Each high court was also mandated to supervise all subordinate courts and tribunals operating within its jurisdiction.[16] Judges of the Supreme Court and high courts were appointed in accordance with the qualifications and procedures stipulated in the Constitution and[17] the decisions of the Supreme Court were binding on all courts below it while those of the high courts were binding on all courts and tribunals below the high courts.[18]

The Indian Constitution did not expressly provide for regulation of monopolies. Therefore, in enacting the Monopolies and Restrictive Trade Practices Act the parliament relied on Articles 38 and 39(b) of the Indian Constitution read with

[7] Indian Constitution, Article 1.
[8] ibid Article 79.
[9] ibid Articles 109–10. This includes all bills other than a money bill.
[10] ibid Articles 107, 111.
[11] ibid Articles 245 and 246.
[12] ibid Articles 52–53, 76.
[13] ibid Article 123.
[14] ibid Articles 130, 132–34.
[15] ibid Article 226.
[16] ibid Article 227.
[17] ibid Article 123, 217.
[18] ibid Article 14.

items 42 and 52 of the Federal Legislative List. Article 38 empowered the federation to promote 'the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all institutions of the national life' while Article 39(b) affirmed that the federation was committed to directing its policy towards ensuring 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good'. Items 42 and 52 of the Federal Legislative List conferred on the federation the power to legislate in respect of 'inter-state trade and commerce' and 'industries, the control of which ... is declared by the Parliament by law to be expedient in public interest'. The Monopolies and Restrictive Trade Practices Act was substantially based on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 and the jurisprudence that had developed around it.

2.2.2 1970 *Pakistan: Promulgating the Anti-monopoly Ordinance*

In 1970 when Pakistan promulgated the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, its institutional landscape was vastly different from that of India. Pakistan had framed its first Constitution in 1956, nine years after independence, broadly along the lines of the 1935 Act.[19] However, this Constitution was abrogated in October 1958 in the wake of a military takeover and all fundamental rights guaranteed under the Constitution were suspended.[20] In 1962, while still under military rule, Pakistan had framed its second Constitution which established a unicameral legislature, provided for a presidential form of government, and conferred extensive powers on the president. However, in 1969 this Constitution was also abolished pursuant to a second military takeover. As before, the military regime suspended the fundamental rights provided in the Constitution while directing the new regime to govern the country, as far as possible, in accordance with the abrogated Constitution.[21] Although Pakistan had established a Supreme Court as the apex court of the country to hear petitions on fundamental rights as well as appeals from the four provincial high courts, the powers of the judiciary with respect to enforcing fundamental rights and entertaining writs, were curtailed each time the Pakistani Constitution was suspended.

The abrogation of the 1962 Constitution meant that in 1970 when the then president of Pakistan promulgated the Monopolies and Restrictive Trade Practices

[19] See n.5.

[20] Upon taking over the governance of Pakistan, the military issued the Laws (Continuance in Force) Order 1958 which provided that the country should be governed as nearly as possible in accordance with the abrogated Constitution except for fundamental rights which remained suspended.

[21] These terms were stipulated in the Provisional Constitution Order 1969.

(Control and Prevention) Ordinance so in exercise of his powers *in accordance with* rather than *under* the Constitution. Further, given the absence of a specific article in the Constitution mandating the regulation of monopolies, in promulgating the anti-monopoly ordinance the president invoked the more general Article 131(2) which allowed the federation to legislate in respect of a matter necessary for the 'economic and financial stability' of the country.[22] Like its Indian counterpart, the Pakistani anti-monopoly ordinance was substantially based on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 and the related jurisprudence.

2.2.3 *The Context at the Time of Adopting Modern Competition Legislation*

Despite the different paths that India and Pakistan had followed since their creation as independent states in 1947, at the time they adopted their modern competition legislations their institutional landscape appeared remarkably similar.

2.2.3.1 The Indian Legal and Political Landscape in 2002

When India enacted the Indian Act, its political and legal landscape was not very different from what it had been in 1969 when it had enacted the Monopolies and Restrictive Trade Practices Act.[23] The Indian Constitution had been in force for more than fifty years and the country's legal and political infrastructure had remained substantially unchanged.[24] Elections had by and large been held regularly at five-yearly intervals in accordance with the procedure stipulated in the Constitution and each time power had been transferred without any military intervention. The legislature, executive, and the judiciary continued to exercise their respective powers uninterruptedly and in accordance with the Constitution.[25]

2.2.3.2 The Pakistani Scenario in 2007

Unlike India, Pakistan had experienced considerable political and legal turmoil since 1970 when it had adopted the Monopolies and Restrictive Trade Practices

[22] Amber Darr, Khozem Haidermota, and Munib Akhtar, 'The Competition Commission Ordinance 2007: A Critical Analysis' CLD 2008 Journal 37.

[23] Although the Indian Act was notified on 14.01.2003 it is titled the Competition Act 2002.

[24] Between 1949 and 2002 the Indian Constitution was amended more than eighty times and the Indian government had exercised its right to declare an emergency on more than one occasion. However, as per the ruling of the Indian Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru and others v State and Kerala and another (AIR 1973 SC 1461)*, these amendments or emergencies did not alter the basic institutional structure of the country.

[25] With the exception of the Emergency (1975–77) which was a major interruption and broke the five-year election cycle.

(Control and Prevention) Ordinance. In 1971 Pakistan had lost its eastern wing[26] and had re-incarnated its western wing as an independent federation with four provinces. In 1973 Pakistan had framed its third Constitution.[27] Under this Constitution, the president was the head of state and the prime minister the head of the executive.[28] The parliament, comprising the upper house, Senate, and the lower house, National Assembly comprised the legislature,[29] however, the president had the power to dissolve the parliament.[30] Each house had the power to initiate a bill (except a money bill), however, this bill could only be made into law when passed by both houses and after receiving presidential assent.[31]

The federal legislature had the power to legislate on all matters listed in the Federal and the Concurrent Legislative Lists.[32] If legislation was required urgently and the parliament was not in session, the president had the power to promulgate an ordinance provided that it related to a matter listed on the Federal or Concurrent Legislative List. An ordinance promulgated in this manner lapsed after 120 days unless approved by the parliament within this period.[33] Interestingly, regulation of competition was not listed in either the Federal or the Concurrent Legislative List. However, Article 18 of the Constitution indirectly recognized the right of the State to regulate competition[34] and Article 151 empowered the State to regulate inter-provincial trade.[35]

The Pakistani Constitution also established the Supreme Court as the apex court of the country and high courts in each of Pakistan's four provinces. The Supreme Court had original jurisdiction in respect of disputes arising between governments and for the enforcement of fundamental rights, and appellate jurisdiction in respect of all decisions of the high courts.[36] The high courts also had original and appellate jurisdiction as well as the jurisdiction to issue writs against the government in

[26] In the aftermath of the 1970 general elections, Pakistan had partitioned with East Pakistan declaring independence as the People's Republic of Bangladesh and West Pakistan being renamed 'Pakistan'.

[27] The Constitution of the Islamic Republic of Pakistan 1973 ('the Pakistan Constitution') came into force on 14.08.1973 and remains in force till today.

[28] Pakistani Constitution, Articles 50, 90.

[29] ibid Articles 51, 59.

[30] ibid Article 58(2)(b).

[31] ibid Articles 70, 73.

[32] ibid Article 142.

[33] ibid Article 89.

[34] In terms of Article 18 of the Pakistani Constitution every citizen has the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. However, Article 18(b), clarifies that this right does not prevent the state from regulating trade, commerce, or industry in the interest of free competition.

[35] Article 151 states *inter alia* that whilst trade, commerce, and intercourse throughout Pakistan shall be free, the Parliament may by law impose such restrictions on the freedom of trade, commerce, or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest.

[36] Pakistani Constitution, Articles 184–85.

appropriate cases.[37] Decisions of the Supreme Court were binding on all courts and those of the high courts on all courts and tribunals subordinate to them.[38] The Constitution also provided for the qualifications and mode of appointment of Supreme Court and high court judges.[39]

The Pakistani Constitution was suspended twice: from 1977 to 1981 and from 1999 to 2002. In both periods the country was brought under military rule, the legislature was dismissed, and the judiciary co-opted by the incoming military regime.[40] Even otherwise when the Constitution had been restored and the legislature allowed to operate as per the Constitution, the country continued to be governed by military chiefs turned presidents for three distinct periods from 1981 to 1985, a few months in 1988 and from 2002 to 2007. Throughout these periods the legislature and judiciary remained deferential to the military and on occasion even allowed the military president to amend the Constitution.[41]

The process of adopting a competition legislation for Pakistan was initiated in 2006 by a quasi-military government. Although the Supreme Court had initially endorsed the military takeover[42] and had subsequently supported the government established by the military chief, the relationship between the judiciary and the executive had become deeply strained over time. In March 2007, the military chief turned president had suspended the chief justice of Pakistan from his office on grounds of misconduct. The president's action had been challenged before the Supreme Court, and in July 2007, the Supreme Court had re-instated the chief justice.[43] This struggle between the president and the judiciary strained the relationship between all three organs of state with the tension reaching a peak towards October 2007 just as the competition legislation was introduced in the country.

2.3 INITIAL ADOPTION IN INDIA AND PAKISTAN: MOTIVATIONS, MECHANISMS, AND INSTITUTIONS

The similarity between the Indian and Pakistani institutional landscapes as the countries commenced the process of adopting their respective competition

[37] ibid Article 199.

[38] ibid Articles 189, 203.

[39] ibid Articles 175–76, 193. In 1980 Pakistan amended its Constitution to provide for a Federal Shariat Court the limited mandate of examining whether a Pakistani statute or provision of law was 'repugnant to the injunctions of Islam'.

[40] Throughout these periods the judiciary was restrained from hearing fundamental rights petitions and operated under an oath to support the military takeovers.

[41] By this time the Pakistani Constitution had been amended seventeen times, of which the 8th and the 17th amendments were introduced by military chiefs turned presidents. The latter being made under the authority of the Supreme Court as given in *Syed Zafar Ali Shah v General Parvez Musharraf, Chief Executive and others* PLD 2000 SC 869.

[42] ibid.

[43] *Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v The President of Pakistan through the Secretary and others* PLD 2010 SC 61.

legislations masked the very different trajectories along which these institutions had evolved over time and therefore the manner in which institutions in the two countries interacted with each other in the adoption process. This section compares the motivations and the interplay of the institutions at the deliberation and enactment phases in the two countries with the aim of identifying their adoption strategies.

2.3.1 *Motivations for Acquiring Modern Competition Legislation*

In deciding to adopt modern competition legislations both India and Pakistan were motivated by a combination of internal factors (such as the country's assessment of its economic and regulatory needs) and external factors (such as international economic developments and the recommendations of multi-lateral agencies). However, each country struck a different balance between these internal and external factors.

2.3.1.1 Domestic Self-reflection and Needs-Assessment in India and Pakistan

When India decided to revisit its anti-monopoly regime, it established a committee to determine whether it should amend its existing legislation or acquire an entirely new one. This move was in keeping with India's long tradition of establishing indigenous committees to evaluate its law reform proposals. The Monopolies and Restrictive Trade Practices Act 1969 was itself the culmination of recommendations made in the Hazari Committee Report 1965, the Mahalonobis Committee Report 1964, and the Report of the Monopoly Inquiry Committee.[44] In 1977, the Indian government had established the Sachar Committee to recommend measures to enhance the effectiveness of the 1969 Act,[45] and in 1984 the parliament had amended the Act in light of the recommendations of the Sachar Committee.[46] In 1991, the parliament had further amended the 1969 Act to bring it into alignment with India's economic liberalisation programme. By 1999, however, these amendments were deemed inadequate, and the Indian government established the Raghavan Committee with the mandate to propose the most appropriate competition law for the country.[47]

Pakistan, like India, had adopted its Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970 primarily in response to domestic factors

[44] S Chakravarthy, 'Why India Adopted a New Competition Law' (CUTS International 2006) www.regulation.org.uk/library/india/CUTS-Why_India_Adopted_a_new_Competition_Law.pdf accessed 13 September 2021,

[45] Amitabh Kumar, 'The Evolution of Competition Law in India' in Vinod Dhall (ed) *Competition Law Today: Concepts, Issues, and the Law in Practice* (OUP 2007), 486–89.

[46] ibid 488.

[47] Chakravarthy (n.43) 19.

and in consultation with domestic institutions. In the 1950s Pakistan had seen rapid economic growth. By the early 1960s, however, nearly two-thirds of Pakistan's industrial assets, 80 per cent of its banking sector and 70 per cent of its insurance industry had become heavily concentrated in the hands of only twenty family groups. In response to these developments in 1963 the Pakistani government constituted an 'Anti-Cartel Laws Study Group' to study the trade, commerce, and industry of the country. This group reported the prevalence of monopolies, cartels, and vertically integrated businesses throughout the country and recommended the adoption of anti-monopoly legislation. On 28 June 1969 the government sought public comments on a draft anti-monopoly bill and on 26 February 1970 the president promulgated this bill as an Ordinance, which while not placed before parliament was subsequently given constitutional cover which allowed it to remain in force well beyond its ordinary constitutional life of 120 days.[48]

The 1970 Ordinance was amended four times, however, each time without public consultation:[49] in 1972, the government curtailed the scope of the 1970 Ordinance as part of its nationalisation process; in 1976 the government further curtailed its scope allegedly to promote and protect foreign private investment in Pakistan; finally in 1981, the government merged the anti-monopoly authority established under the 1970 Ordinance with the then newly formed Corporate Law Authority.[50] Therefore, by 2005 when Pakistan first considered the possibility of adopting a modern competition legislation, the domestic understanding of monopolies had shrunk considerably and the need to regulate them had receded considerably from the forefront of governmental priorities.

2.3.1.2 Impact of International Developments on Competition Legislation in the Two Countries

After joining the World Trade Organisation (WTO) in 1995[51] India had become increasingly pre-occupied with the idea of introducing a domestic competition regime both to safeguard the Indian economy from the threat of international cartels,[52] and for the country to remain relevant and attractive as a destination for foreign investment.

[48] Joseph Wilson, 'At the Crossroads: Making Competition Law Effective in Pakistan Symposium on Competition Law and Policy in Developing Countries' (2006) 26 Northwestern Journal of International Law & Business 565, 567–68.

[49] The 1970 Ordinance was amended twice in 1980 (by Ordinance No. XXVI of 1980 and Ordinance No. LVI of 1980) and once each in 1982 and 2002 (by Ordinance No. XIV of 1982; and in 2002 by Ordinance CI of 2002 respectively), however, there is no information or record of any public consultations for any of the amendments.

[50] Wilson, 'At the Crossroads' (n.47), 583.

[51] India joined the WTO on 01.01.1995. <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 22 June 2021.

[52] Report of the High Level Committee on Competition Policy & Law 2000 ('the Raghavan Report') <https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf> accessed 13 September 2021, para 1.22.

Pakistan had also joined the WTO at the same time as India.[53] However, just before formally acceding to the WTO, and perhaps partly due to developments in India, the Pakistani government had expressed an interest in bolstering laws relating to companies, securities, and exchange and so on, However, even at that time it had not considered reviewing the 1970 Ordinance.[54] By the late 1990s, due to its extensive interaction with the WTO and with multi-lateral agencies,[55] and its participation in international comparative competition studies,[56] Pakistan had realised that if it wanted to integrate successfully in an increasingly globalised world it needed to improve the competitiveness of its domestic markets.[57] Therefore, in the aftermath of the Doha Ministerial Conference in 2001, Pakistan sought assistance first from the United Nations Conference on Trade and Development (UNCTAD),[58] and later from the World Bank for developing a new competition law and policy framework.[59]

2.3.2 *Mechanisms and Institutions at the Adoption Stage in India and Pakistan*

The adoption stages in both India and Pakistan comprise two distinct phases: in the first phase the countries consider adopting the legislation – this may also include preparing the draft for submission to the government – and in the second they formally adopt the legislation in accordance with their respective legislative procedures.

[53] See n.50.

[54] ibid 589.

[55] Eric David Manes, 'A Framework for a New Competition Policy and Law: Pakistan' (The International Bank for Reconstruction and Development 2007), paras 1.5, 1.6 ('the Manes Report'). Pakistan had recently completed the first-generation reforms under the guidance of and with technical assistance from 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 globalised world'.

[56] 'Competition Regime in Pakistan: Waiting for a Shake-up' (CUTS 2002) <https://d4ynnvjs6l34j.cloudfront.net/9db88fd87a46d6405284ff195f7f38.pdf> accessed 13 September 2021.

[57] Manes Report (n.54). Executive Summary, para (iii), (viii).

[58] After the Doha Ministerial Conference in November 2001, Pakistan seriously considered revamping its anti-monopoly regime. Business Recorder 'Monopoly Trade Practices Law Being Revamped' 2004 <https://fp.brecorder.com/2004/04/20040428133601/> accessed 13 September 2021. However, its ambitions at this stage were limited to capacity building and technical assistance within the existing infrastructure with the help of a loan from the World Bank <https://documents1.worldbank.org/curated/en/857811627555757196/pdf/Announcement-of-World-Bank-Discusses-Roadmap-for-Assistance-to-Pakistan-Approves-Five-Hundred-Million-Dollars-to-Support-Ongoing-Reform-Program-on-June-11-2002.pdf> accessed 13 September 2021.

[59] ibid. Acknowledgment.

2.3.2.1 The Deliberation Phase: Between the Raghavan and the World Bank-Led Committees

In response to its particular combination of internal and external factors, in 1999 the Indian government set up a nine-member 'High Level Committee on Competition Law and Policy' under the chairmanship of Mr S V S Raghavan, a retired senior Indian government official (hence the Raghavan Committee),[60] to advise whether amendments to the anti-monopoly and consumer legislations would suffice or if there was need for a new law.[61] Over the next two years the Raghavan Committee engaged with and obtained evidence from various chambers of industries and commerce, professional institutes, consumer organisations, experts, academics, and government officials.[62] The committee also consulted competition laws of nearly eighty countries – including those of the European Union, the United Kingdom, the United States, and Japan – and examined competition reports and texts authored by leading Indian and international competition experts. In 2000 the committee submitted its report to the government.[63]

Rather than establishing a committee as in the case of India, the Pakistani government requested the World Bank to form and lead a team to recommend a new competition law and policy framework for the country; to draft the appropriate competition legislation, and to design a new competition agency for enforcing it. The team set up by the World Bank in response to this request comprised World Bank officials, international consultants, and chartered accountants as well as Pakistani economists, lawyers, and academics. In arriving at its recommendations the team consulted 'perception indicators' and 'broad indicators from the market' in Pakistan[64] and drew upon its experience and understanding of competition regimes and models in developed and developing countries.[65] The team also engaged with the Ministry of Finance, the anti-monopoly authority, and a few international and

[60] Members of the Raghavan Committee included the chairman of a large consumer goods manufacturing company, a consumer activist, an economic journalist, a chartered accountant, an advocate, and a government secretary from the Department of Company Affairs dealing with competition law. The Hindu 'Competition Law for the New Millennium' <www.thehindu.com/2000/06/22/stories/06220000d.htm> accessed 13 September 2021.

[61] Raghavan Report (n.51), 1.2.2.

[62] Chakravarthy (n.43), 21.

[63] Raghavan Report (n.51).

[64] Manes Report (n.54), ch 1, paras 1.15–1.17.

[65] ibid para 2.2 n.8. In addition to the usual EU, UK, and the US models, the team also consulted competition laws of Brazil, Canada, Italy, India, Mexico, Republic of Korea, and Russia. The team also evaluated competition models from developing countries whose economic conditions matched those of Pakistan and which were at a similar stage of development, however, it did not consider the political and legal institutions or environment of these countries.

Pakistani experts other than those officially part of its team.[66] In May 2006 it organised a Growth and Competitiveness Conference in Lahore as well as some other public consultations.[67] By January 2007 the team had completed its deliberations, and had commissioned the Brussels-based law firm, Jones Day to prepare a draft competition law for Pakistan. Once finalised it submitted the report and the draft to the Pakistani Ministry of Finance.[68]

2.3.2.2 Formal Enactment of Competition Laws in India and Pakistan

India formally enacted the Indian Act 2002 on 14 January 2003 in accordance with the long-form legislative procedure prescribed in the Indian Constitution. The government introduced a bill in parliament, outlining the objects and reasons for its enactment. The parliament remitted the bill to the relevant standing committee for scrutiny, and the standing committee, after consulting with representatives of financial institutions, chambers of industry and commerce, consumer organisations, professional institutes, experts, academics, and relevant ministries of the government, 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. The bill was then submitted to the president for his assent, which was granted on 13 January 2003.[69]

Pakistan also followed constitutional procedure in introducing its competition legislation however, instead of placing the draft bill before parliament, the Pakistani government submitted it directly to the military chief turned president, who in October 2007 promulgated it as an ordinance.[70] Legislation through ordinances is not unusual in Pakistan, however, the 2007 Ordinance was different in two respects: first, because it was not clear whether the president was competent to legislate in this regard given that competition was not listed in the Federal or Concurrent Legislative Lists[71] and second because it did not lapse at the expiry of the prescribed 120 days.[72] and remained in force due to a controversial Presidential order passed in

[66] ibid. Acknowledgments.

[67] ibid. Although the exact number of consultations held is not known, the report suggests that these were all held in the month of May and in the same city. There is no record of who attended these consultations or how these were advertised.

[68] 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' (UNCTAD 2013). <http://unctad.org/en/PublicationsLibrary/ditcclp2013d4_overview_en.pdf> ch 1, 1, para 5, accessed 14 September 2021.

[69] Chakravarthy (n.43), 22.

[70] Voluntary Peer Review (n.67), ch 1A, 2, para 7.

[71] See n.33 and text thereto.

[72] For the president's power to promulgate Ordinances, see n.32 and text thereto. Laws made through ordinances in Pakistan include the Securities and Exchange Ordinance 1969, Companies Ordinance 1984, National Accountability Bureau Ordinance 1999, Insurance

response to the political developments in the country in the immediate aftermath of its promulgation.[73]

2.3.3 *Transfer Mechanisms and Interplay of Institutions in Adoption*

India and Pakistan employed different mechanisms and institutions in deliberating and enacting their respective competition legislations. The dominant mechanisms employed by each country and the institutions through which these were delivered shaped not only the substance the legislation but also its compatibility and legitimacy and thereby its potential to deliver results at the implementation stage.

2.3.3.1 India: A Case of *Socialisation*

India was motivated to adopt modern competition legislation to achieve domestic economic goals and as well as to gain international legitimacy. By the mid-1990s when India embraced economic liberalisation it had periodically reviewed its anti-monopoly legislation and understood that it needed a modern competition law to achieve greater economic efficiency and consumer welfare. Further, India's membership of the WTO and its participation in the Doha Ministerial Conference had helped it appreciate that a modern competition regime was necessary for its international legitimacy and for it to retain its competitive advantage in the global economy.

India adopted a consultative strategy to engineer the law reform necessary to realise its aspirations. The Raghavan Committee established to re-evaluate India's anti-monopoly regime[74] not only reviewed international competition models but also engaged with a broad range of domestic stakeholders and future users of the law to understand India's needs in this regard and to tailor its recommendations

Ordinance 2000, and National Reconciliation Ordinance 2007. The number of ordinances promulgated between 2002–07 was far greater than in any previous period: the president promulgated 134 ordinances during the National Assembly's five-year term as compared to eighty-eight bills presented to the Parliament during the same period. See *A Five-Year Report on Performance of Women Parliamentarians in the 12th National Assembly (2002–2007)* (Aurat Foundation Pakistan 2009).

[73] In November 2007 Pakistan's military chief turned president issued the Proclamation of Emergency and Provisional Constitutional Order No. 1 of 2007 declaring an emergency in the country and suspending the Constitution. Three weeks later, the president issued the Constitution (Amendment) Order 2007 amending the Constitution and validating and saving 'all actions taken and all Ordinances promulgated by him in the weeks leading up to the declaration of emergency'. The president's actions were in response to growing political unrest in the country and the need to 'save' the National Reconciliation Ordinance 2007 (NRO) promulgated on 5 October 2007 – three days after the 2007 Ordinance – to pardon political rivals turned allies. The 2007 Ordinance was saved simply for having been introduced simultaneously with the NRO rather than for any of its own attributes.

[74] See n.46 and text thereto.

accordingly. Despite these efforts, Raghavan Committee's investigation of international models was essentially an elite discourse and reflected bounded rather than rational learning to the extent that it was based almost entirely on textual analysis of preferred and readily available foreign models rather than through an objective or incisive empirical analysis of the outcomes that these models had achieved in their respective contexts. Its limitations notwithstanding, India's effort to understand and adapt foreign models before adopting them means that it acquired its competition legislation through *socialisation* albeit with elements of *emulation*[75] and *regulatory competition*.[76]

India's transfer strategy of *socialisation* strategy was further deepened by its engaging bottom-up, participatory, and inclusive institutions, drawn from the executive and the legislature, both in deliberating and enacting the Indian Act. The deliberation phase, led entirely by the executive acting through the Raghavan Committee, had first aggregated local knowledge by consulting a reasonably wide range of stakeholders from different sectors of the Indian economy, academia, and consumer groups. It had then analysed this local knowledge in light of international models and expert opinion before presenting its recommendations to the government. The government had then prepared a draft bill on the basis of the recommendations made in the Raghavan Report and in its own policy objectives and had then placed it before the parliament for enactment. The enactment phase had fallen exclusively within the purview of the legislature, which had further adapted the draft competition bill after another round of consultations led by its relevant standing committees (Table 2.1).

2.3.3.2 Pakistan: A Study in *Coercion*

In the case of Pakistan external influence, exerted primarily through the WTO and Pakistan's relationship with the World Bank, outweighed the faint domestic impulse to adopt a modern competition law. The relative weakness of Pakistan's domestic impulse was in part due to Pakistan not having periodically reviewed its anti-monopoly regime and, therefore, due to the government not fully understanding and appreciating the country's needs in this regard,[77] while its interest in adopting the law may have been spurred by India, Sri Lanka, and Nepal among other similarly situated developing countries having recently enacted some version of a competition legislation. Finally, and most importantly, Pakistan only actively engaged with the possibility of acquiring modern competition legislation after it

[75] India's ongoing negotiations with the WTO are likely to have influenced it into adopting a competition legislation that conformed to international competition principles.

[76] At the time it was considering adopting a modern competition law, India was aware of the possibility of its neighbours and other similarly situated developing countries doing the same and, therefore, of the need to remain regulatorily competitive.

[77] See n.48.

TABLE 2.1. *Tracing the adoption processes in India and Pakistan*

Steps in the Process	India	Pakistan	Steps in the Process
PRE-CONDITIONS OF TRANSFER			
	Strong tradition of: • Parliamentary governance; • Constituting domestic committees for law reform; • Independent judiciary.	• Military chief turned president; • Young and fragile parliament; • Judiciary weakened by repeated military takeovers; • Strained relationship between executive, parliament, and judiciary.	
DELIBERATION PHASE			
Motivations	• Changes in domestic economic policy; • Realisation of changing external environment.	• Limited domestic realisation; • Persuasion on part of the World Bank	Motivations
Strategy	• Review of existing law; • Review of international models; • Extensive consultations with relevant stakeholders. • Law drafted internally.	• Advice by the World Bank team; • Internal consultations with the government; • Limited public consultations; • Law drafted by a Brussels firm.	Strategy
Institutions	• Drawn from the executive; • Domestically formed and led committee.	• Drawn from the executive; • Committee led by the World Bank	Institutions
ENACTMENT PHASE			
Strategy	• Draft tabled before parliament; • Referred to parliamentary standing committee; • Further input obtained from domestic stakeholders; • Passed by parliament.	• Draft submitted to the president; • Passed by the president without parliamentary or public consultation.	Strategy
Institutions	• Executive. • Legislature.	• Executive.	Institutions

had been persuaded by the World Bank that such a law was a necessary component of its first- and second-generation reforms and by its offer of financial and technical assistance to Pakistan for this purpose. While the influence of the WTO and the World Bank indicates that indirect *coercion* was the dominant factor in the transfer of competition legislation in Pakistan, the fact that Pakistan's preferred to adopt a law that reflected international best practices suggests that Pakistan sought this law more for its normative rather than its substantive value and to gain international legitimacy rather than for achieving domestic legitimacy or even economic efficiency, implies a strong element of *emulation*. Further the need to remain competitive with its developing world counterparts also hints at elements of *regulatory competition* in its adoption strategy.

The dominant element of *coercion* in Pakistan's adoption strategy was re-inforced by both the deliberation and enactment phases of the adoption stage being handled by top-down, exclusive institutions drawn only from the executive. The Pakistani executive had set the adoption process in motion when it had outsourced the deliberation and drafting of the competition legislation to a World Bank team, which by its very nature was more attuned to foreign models. Its engagement with Pakistani stakeholders was expected to contextualise these deliberations, however, these engagements were limited and select and did not materially influence the thinking of the core World Bank team. It is no surprise, therefore, the legislation drafted at the instruction of this team by a Brussels-based law firm was drawn almost entirely from international models and was only superficially adapted for the Pakistani context.[78] The World Bank team had submitted its report and the draft law to the Ministry of Finance, which instead of placing it before the legislature had submitted it to directly the president for promulgation.

2.4 ADOPTION CONTINUES: AMENDING THE INDIAN AND PAKISTANI COMPETITION LAWS

The adoption processes in India and Pakistan continued beyond the adoption of their respective competition legislations as both India and Pakistan amended their competition laws soon after initial adoption. In the course of these amendments, the countries not only engaged different transfer mechanisms and institutions and, thereby, not only but also re-adjusted the compatibility and legitimacy of the adopted legislations and thereby their potential to perform at the implementation stage.

2.4.1 *Amendments to the Indian Act*

Soon after its enactment, the Indian Act was challenged before the Indian Supreme Court on the ground that it did not conform with the principle of

[78] See n.66 and text thereto.

https://doi.org/10.1017/9781009247184.003 Published online by Cambridge University Press

separation of powers and was, therefore, unconstitutional.[79] On 20 January 2005, the Supreme Court disposed of this challenge on a commitment provided by the government that it would take appropriate steps to separate the adjudicatory and regulatory functions of the Competition Commission of India (CCI) established in pursuance of the Act.[80] On 9 March 2006, in compliance of the order of the Supreme Court, the Indian government introduced the Competition (Amendment) Bill in parliament, which, among other amendments, provided for the establishment of an independent Competition Appellate Tribunal (Indian Tribunal) to hear appeals from the CCI's decisions. As before, the parliament referred the bill to the relevant standing committee, which recommended further amendments. On 9 August 2007, the government re-submitted the bill to the parliament and on 27 September 2007, after having received presidential assent, the bill was enacted as the Competition (Amendment) Act 2007.[81]

On 31 March 2017, India further amended the Indian Act, however, this time the amendments were introduced through the Finance Act 2017 which was passed by the parliament through a short-form procedure and without stakeholder consultations[82] and amended only sections 2(ba) and 53A of the Act to replace the Competition Appellate Tribunal with a 'National Company Law Appellate Tribunal' (NCLAT). The NCLAT had been established in 2016 initially only to hear appeals from Company Law Tribunals.[83] However, after this amendment it was given the additional mandate to hear with effect from 26 May 2017 competition appeals from CCI's interim and final orders.[84]

[79] The petitioner in *Brahm Dutt v Union of India (2005) 2 Supreme Court Cases 431* challenged the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003 on the ground that the appointment procedure provided in these rules violated the principle of separation of powers provided in the Constitution and argued that given the CCI's adjudicatory powers, the procedure for appointment of its members should be the same as the procedure prescribed for the appointment of judges in the Constitution. In response the government argued that CCI was a specialist body that could not be operated by generalist judges. The government further argued that as long as the Supreme Court's and the high courts' power of judicial review remained in place, the government's power to appoint members to the CCI could not be challenged on the grounds of separation of powers. However, during the proceedings the government agreed to amend the Act to provide for a select committee to recommend CCI members as well as for a tribunal to hear appeals from the CCI's decisions (*Brahm Dutt Case*, pp 434–35).

[80] ibid.

[81] ibid. The amended Act was brought into force in stages: provisions relating to anti-competitive agreements and abuse of dominant position came into force on 20.05. 2009 by notifications no. S.O. 1241(E) and S.O. 1242(E) both dated 15.05.2009 and provisions relating to mergers or combinations were brought into force in 2011. By a further notification no. S.O. 1240(E), also dated 15.05.2009, the government established the Tribunal to hear appeals from the CCI's orders.

[82] Indian Constitution, Articles 110 and 117.

[83] National Company Law Appellate Tribunal <www.mca.gov.in/content/mca/global/en/about-us/affiliated-offices/nclat.html> accessed 14 September 2021.

[84] ibid.

2.4.2 *Pakistan: Two Ordinances and an Act*

In time the efforts of the Pakistani executive to 'save' the life of the 2007 Ordinance proved insufficient. In early 2008, soon after Pakistan had held general elections and replaced the military chief turned president with a civilian president,[85] a petition was filed before the Supreme Court seeking the annulment of the declaration of emergency and all orders issued by the president in pursuance of the declaration, including the order saving among others the 2007 Ordinance.[86] In its decision in this petition the Supreme Court directed the government to place all saved ordinances, including the 2007 Ordinance, before the legislature within 120 days.[87] However, instead of doing so, the government promulgated a new Competition Ordinance on 26 November 2009, immediately before the expiry of the period stipulated by the Supreme Court.[88]

The government also did not place the 2009 Ordinance before the legislature and allowed it to lapse in March 2010. On 20 April 2010 the government promulgated yet another ordinance – the 2010 Ordinance – which would remain in force until early August 2010.[89] Immediately before the expiry of the 2010 Ordinance, the government placed a draft competition bill before the legislature[90] and on 13 October 2010 the legislature finally enacted the Competition Act 2010.[91] This Act was similar in substance to the Ordinances that had preceded it except that it provided for a Competition Appellate Tribunal – the Pakistani Tribunal – to hear appeals from orders of the CCP and limited the role of the Supreme Court to hearing appeals from orders of the Tribunal.[92]

2.4.3 *Evolution of Indian and Pakistani Adoption Strategies*

In drafting the 2007 amendments to the Indian Act, as at the time of initially enacting it, India appeared to continue its strategy of *socialisation*. Although the government did not set up a committee to consult with stakeholders before recommending amendments as it had done in first considering the Indian Act, it not only examined and adapted foreign models for segregating the CCI's regulatory and adjudicatory functions but also engaged with the legislature and the judiciary in

[85] In November 2007, several judges of the superior courts in Pakistan refused to accede to the demand of military chief turned president to support his declaration of emergency and therefore, were dismissed from office. After considerable political struggle, the civilian government restored these judges to office, however the relationship between the judiciary and the executive remained strained for some time after.

[86] See Section 2.3.2.2.

[87] *Sindh High Court Bar Association v The Federation of Pakistan* PLD 2009 SC 879. Para 22(vii).

[88] The Competition Ordinance 2009 (Ordinance No. XLVI of 2009).

[89] The Competition Ordinance 2010 (Ordinance No. XVI of 2010).

[90] This 2010 Ordinance lapsed in August 2010 without an Act to replace it. Wilson (n.67), 108–09.

[91] Hereafter 'the Pakistani Act'.

[92] Pakistani Act, sections 2(1)(p), 42–44.

this regard. The legislature aggregated local information through its elected representatives and standing committees and the Supreme Court utilised its institutional memory and expertise to appropriately adapt the proposed amendments for the Indian context. By 2017, however, when the government amended the provisions relating to the Indian Tribunal it appeared to have exchanged the *socialisation* strategy and the desire for international alignment with domestic expediency: instead of consulting international precedents, and socialising these for the Indian context, it took the decision to replace the Indian Tribunal with the NCLAT purely in response to the domestic need for re-organising and consolidating its independent tribunals. Further, in introducing this amendment through the Finance Act, which under the Indian Constitution may be passed without parliamentary scrutiny,[93] India narrowed the range of institutions engaging with the proposed amendment and exchanged any benefits that it may have derived from consultation for the speed and ease of legislation.

Pakistan, on the other hand, extended the mechanism of *coercion* and continued to avoid bottom-up, participatory, and inclusive institutions by adopting the 2009 and 2010 Ordinances, as it had adopted the 2007 Ordinance, by the order of the president without public consultations and parliamentary scrutiny[94] and by largely replicating the provisions of the 2007 Ordinance in the 2009 and 2010 Ordinances. In enacting the Pakistani Act, however, Pakistan engaged the parliament and through its standing committees, various stakeholders in the country, thereby moving towards a strategy of *socialisation* delivered through relatively more bottom-up, participatory, and inclusive institutions. However, this late attempt at *socialisation* could not displace the early effect of *coercion* and had a limited impact on the Act which remained similar in substance to the Ordinances that had preceded it. This may also partly be attributed to the fact that although the parliament was *designed* as a bottom-up, participatory, and inclusive institution, it lacked institutional capacity due to its chequered and interrupted history. It is likely that in introducing provisions for establishing the Pakistani Tribunal and prescribing an appellate trajectory substantially along the lines adopted by India in 2007 and the UK some years prior Pakistan was also engaging in *emulation* or and *regulatory competition*.

2.5 INDIAN AND PAKISTANI COMPETITION LEGISLATION: AN UNEXPECTED OUTCOME?

Although the very different mechanisms and institutions engaged by India and Pakistan for adopting their competition legislations suggest that the content of

[93] Indian Constitution, Article 198.

[94] The 2007 Ordinance and the 2009 Ordinance were almost identical and provided for appeals from the CCP's orders to be made directly to the Supreme Court. However, the 2010 Ordinance directed appeals from the CCP's orders to high courts.

Indian and the Pakistani Act must also be different, a comparison of the texts of these statutes reveals that this is not the case. This section explores factors in the adoption processes in the two countries that may have created this unexpected outcome.

2.5.1 Socialisation *and the Content of the Indian Act*

In India, the strategy of *socialisation* through an interplay of the executive, legislature, and the judiciary allowed an opportunity for a wide range of institutions to participate in the adoption process and for the draft competition legislation to be adapted for the Indian context in light of the information aggregated through these institutions.

This impact is evident from the evolution of the content of the Indian Act through the successive phases of the adoption stage. For instance, in the deliberation phase, the Raghavan Committee noted that 'the judiciary may be inexperienced in dealing with free market problems' and recommended the establishment of a single competition implementation authority,[95] sometimes referring to it as the 'Competition Law Tribunal' and at others as 'the Competition Commission of India'[96] and describing it varyingly as 'a specialised court/tribunal',[97] ' multi-member body', 'independent and insulated from political and budgetary controls of the government'.[98] The committee further recommended that the proposed authority be divided into investigative, prosecutorial, and adjudicative wings,[99] and be responsible for competition advocacy, adjudication, and implementation of its decisions.[100] The parliament incorporated the recommendations of the committee as endorsed by the government, in the Indian Act by providing for the establishment of the competition authority – CCI – as a single, multi-member, autonomous, statutory corporation with perpetual succession.[101] This authority was also to include at least one 'judicial member' who had either served or was qualified to serve as a judge of a high court. However, when the Indian Act was amended in 2007, in pursuance of the interaction between the government and the judiciary in the *Brahm Dutt* case,[102] the requirement of a judicial member was repealed, the CCI was re-designated as regulatory body only albeit with an adjudicatory function which was to be overseen and reviewed by the independent and quasi-judicial Indian Tribunal.[103]

The Raghavan Committee had also recommended that CCI be 'comprised of eminent and erudite persons of integrity from the fields of judiciary, economics, law,

[95] Raghavan Report (n.51), para 6.1.2
[96] ibid para 2.9.7.
[97] ibid para 6.1.4.
[98] ibid para 4.8.4 at 2 and 3.
[99] ibid para 4.8.4 at 4, para 6.1.8.
[100] ibid para 4.8.4.
[101] Indian Act, section 7.
[102] See n.78.
[103] Amendment Act 2007 Section 17.

international trade, commerce, industry, accountancy, public affairs and administration' and had specifically warned against 'staffing [the institution] … with civil servants on deputation'.[104] The Committee had, therefore, recommended a 'Collegium Selection Process', that would help weed out political favourites and allow competent and qualified persons to be appointed to the CCI.[105] It had further recommended that persons so appointed only be removed on the recommendation of the Supreme Court.[106] In enacting the Indian Act, the parliament, contrary to the recommendation of the Raghavan Committee, had allowed high court judges to be appointed to the CCI,[107] and had vested the power of appointment exclusively in the government.[108] While it is unclear whether the decision to disregard this recommendation came from the executive, or was introduced during parliamentary consultations, it had the effect of rendering the CCI and its members vulnerable to political influence. The parliament further compromised the CCI's independence by allowing the government to control its budget[109] and to supersede the CCI in certain circumstances.[110] Interestingly, when the Act was amended in 2007 it reverted to a number of recommendations made by the Raghavan Committee: it deleted the provision allowing high court judges to be appointed to the CCI;[111] inserted a provision requiring members to be appointed upon the recommendation of a 'Selection Committee', comprising the chief justice of India, secretaries of the Ministries of Corporate Affairs and Law and Justice, and two experts from fields related to competition law and policy;[112] and restricted the CCI from meeting its expenses from monies received by it as costs of proceedings.[113]

In certain matters the parliament followed the recommendations of the Raghavan Committee very closely. For instance the committee's insistence that consumer welfare be adopted as a guiding principle in competition enforcement

[104] Raghavan Report (n.51), para 4.8.6.
[105] ibid para 6.3.3, 6.3.4.
[106] ibid para 6.3.6.
[107] Indian Act, section 8(2).
[108] Indian Act, sections 8(1), 9. In terms of these sections the power to appoint members was vested in the government, and in terms of the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003 made in pursuance of the Act, the government was to constitute a committee 'for the selection of Chairperson and other Members of the Commission'. However, this provision, fell short of recommendations of the Raghavan Committee because the recommendations of the appointing committee were not binding on the government, and because the government had the power to amend the rules and thereby to do away with the committee altogether.
[109] Indian Act section 51(b) established a Competition Fund to pay salaries of CCI members and to meet its operating expenditures. The Competition Fund comprised of grants received by the CCI from the government as well as monies collected by it by way of costs or fees received by it in discharge of its functions under the law.
[110] Indian Act section 56.
[111] Amendment Act 2007, section 6.
[112] Amendment Act 2007, section 7.
[113] Amendment Act 2007, section 41.

in India was reflected in the preamble to the Act; its recommendation that the competition authority 'act as a [competition] watchdog', 'promote the introduction of required changes in the policy environment', 'perform a proactive advocacy function',[114] and check 'cartelisation, price-fixing and other abuses of market power',[115] were incorporated in the provisions relating to the CCI's advocacy and enforcement roles, and in the powers conferred upon it to investigate anti-competitive agreements and check abuses of dominant position. The committee's concerns regarding the future of India in a globalised economy were given expression in CCI powers in respect of international acts that impacted domestic Indian competition.[116] The committee's cautionary note that the 'premature implementation of Competition Law in [the area of mergers]', 'could act as a disincentive for ... mergers necessary to complete India's transition from a protected to a liberalized economy'[117] was addressed by the government delaying the bringing into force of the merger-related provisions.[118]

2.5.2 *The Effects of* Coercion *in Pakistan*

The adoption of its competition legislation through *coercion* and top-down and exclusive institutions had such a strong stabilising impact on the content of the Pakistani competition regime, that even the inclusion of the parliament in enacting the Pakistani Act could not displace it. This also suggests that bottom-up, participatory institutions can only dislodge the effects of *coercion* if they have historical depth and experience of aggregating local information and of working productively with the executive to adapt the content of the legislation for the domestic context.

The lingering effect of the early *coercion* in Pakistan is evident in the number of recommendations of the Manes Report that were retained in the 2007, 2009, and 2010 Ordinances as well as in the Pakistani Act. For instance, the Manes Report had envisaged Pakistan's national competition authority as a 'quasi-autonomous, quasi-judicial institution ... capable of applying severe penalties on private business in the case of violations of the law whilst remaining accountable to the government's competition policy, the law and the public ...'[119] It had further emphasised that the authority be a collegial body with a minimum of five and a maximum of seven members[120] and had recommended that orders of the authority be appealable to an 'internal Appellate Bench,' subject to judicial review to the Supreme Court.[121]

[114] Raghavan Report (n.51), paras 1.1.9, 2.9.7.
[115] ibid.
[116] Indian Act, section 32.
[117] Raghavan Report (n.51), para 4.7.8.
[118] See n.80.
[119] Manes Report (n.54), para 4.1.
[120] ibid para 4.6.
[121] ibid para 5.5.s

https://doi.org/10.1017/9781009247184.003 Published online by Cambridge University Press

The 2007 Ordinance reflected nearly all these recommendations: it established the CCP as a collegial body corporate with perpetual succession and with not less than five and no more than seven members;[122] it also constituted an 'Appellate Bench' within the authority to hear appeals from orders of a single member or authorised officers;[123] and allowed appeals from orders passed by two or more members of the authority or of the Appellate Bench to be brought before the Pakistani Supreme Court.[124]

The 2007 Ordinance also reflected several recommendations of the Manes Report regarding the mandate of Competition Commission of Pakistan–CCP– including the recommendation that it be granted the power to check prohibited agreements, abuses of dominant position, deceptive marketing practices, and to regulate mergers and acquisitions.[125] The 2007 Ordinance provisions relating to competition enforcement were in accordance with the report's recommendation that the proposed authority treat enforcement as its highest priority and be given extensive investigation and sanctioning powers for this purpose,[126] while its provisions relating to advocacy reflected the recommendation that the authority it may also in advocacy as part of a two-pronged approach to improving competitiveness in the country.[127]

The Manes Report had also highlighted the importance of the 'quality of appointments' and the security of tenure of the appointed members for bolstering the authority's autonomy[128] and its ability to perform its functions in a robust manner.[129] To this end, the report had recommended that persons appointed to the authority be drawn from diverse but relevant professional backgrounds; be awarded appropriate remuneration packages, and if necessary, be removed through a transparent process.[130] However, the Manes Report did not prescribe a procedure for the appointment or removal of members of the authority.[131] The 2007 Ordinance incorporated the express recommendations of the Manes Report by stipulating that only persons known for their 'integrity, expertise, eminence and experience of not

[122] 2007 Ordinance, sections 12(2), 14(1).
[123] 2007 Ordinance, section 41.
[124] 2007 Ordinance, section 42.
[125] Manes Report (n.54), ch 3 was reflected in sections 1(3), 3, 4 (read with sections 5, 7 and 9), 10 and 11 of the 2007 Ordinance.
[126] 2007 Ordinance chapter IV, particularly sections 31, 38, 39.
[127] 2007 Ordinance section 29. The Manes Report had also recommended that the Pakistani competition authority, exercise autonomy in its day-to-day work, follow due process, and remain accountable for its actions. However, these recommendations were not expressly included in the 2007 Ordinance. Manes Report (n.54), paras 3.2.3, 4.1, 4.12, 4.2, 4.8.
[128] Manes Report (n.54), para 2.18, 4.4–4.7
[129] ibid paras 4.2, 4.6.
[130] ibid.
[131] ibid paras 4.6, 6.38. While the Manes Report was silent as to the procedure for appointment of members, for removals it stated that the government may adopt the '[p]rocedure specified by Article 209 of the Constitution (ie.Supreme Judicial Council) [which] provides for a clear and transparency [*sic*] procedure'.

less than ten years in any relevant field including industry, commerce, economics, law accountancy or public administration' be appointed as the CCP's members (or chairperson).[132] However, also in accordance with the Manes Report, the 2007 Ordinance left it to the government to devise a scheme for the appointment[133] and removal of members.[134] In respect of removal of members the 2007 Ordinance included the additional stipulation that members be removed only after an inquiry conducted by an 'impartial person or body of persons'[135] however, it neither identified persons who may conduct such an enquiry nor stipulated a criteria for their selection. The Ordinance also left it to the government to prescribe rules for calling and conducting such inquiry.[136]

The 2007 Ordinance also departed from other recommendations of the Manes Report to confer more powers on the government and thereby undermined the independence of the CCP. For instance, even while declaring the CCP to be independent,[137] it gave the government control over CCP's budget; granted it the power to exempt certain categories of entities or agreements from the ambit of the Ordinance;[138] gave it the power to issue directives to the CCP;[139] authorised it to make rules for the CCP's governance and operations.[140] The 2007 Ordinance also allowed the CCP to utilise penalties to meet its operational expenditures thereby weakened its enforcement credibility.[141]

The fact that the majority of provisions of the 2007 Ordinance were in accordance with the Manes Report or supplied the gaps left by it and that these provisions remained unchanged in the 2009 and 2010 Ordinances and are still part of the Pakistani Act is indicative of the power of *coercion*. Although Pakistan engaged in *socialisation* in enacting the Pakistani Act (which led to the revocation of provisions

[132] 2007 Ordinance, section 14.

[133] 2007 Ordinance, section 14(5) stipulated that appointments to the CCP were to be made 'in such manner as may be prescribed'. The term 'prescribed' refers to rules that may be made under a primary legislation. Under section 55 of the Ordinance, the CCP had the power to make its own rules albeit with government approval. However, in terms of section 17 the government had the power to make rules regarding the salary, terms, and conditions of service of the CCP's chairman and members. Although the government made the Competition Commission (Salary, Terms and Conditions of Chairman and Members) Rules, 2009 these only stated that 'the government would appoint members in consultation with the chairman of the Commission' (Rule 3 sub rule 2).

[134] Ordinance 2007 section 14 (6).

[135] Ordinance 2007, section 19.

[136] ibid.

[137] 2007 Ordinance, section 12(3).

[138] 2007 Ordinance, section 52.

[139] 2007 Ordinance, section 54.

[140] See n.132. In terms of 2007 Ordinance, section 55 the CCP also had the power to make rules albeit with the approval of the government.

[141] 2007 Ordinance, section 20 stipulated that CCP was to fund its activities from the Commission Fund, which comprised inter alia the penalties collected by it.

allowing the CCP to utilise penalties towards meeting its expenditures[142] and to the insertion of provisions for establishing the Pakistani Tribunal and stipulating that appeals from orders of the Appellate Bench or of two or more members of CCP, lie directly to the Supreme Court) it not only failed to displace the earlier *coercion* nor deepened the understanding of competition principles amongst stakeholders.[143]

2.5.3 *The Effects of* Emulation *and* Regulatory Competition

A possible explanation for the remarkably similar substantive provisions of the Indian and Pakistani competition legislations that remained unchanged even as the laws progressed through the successive phases of the adoption stage and despite the countries engaging different transfer mechanisms and institutions (*socialisation* through bottom-up, participatory, and inclusive institutions in India and *coercion* through top-down and exclusive institutions in Pakistan) may lie in the countries having employed elements of *emulation* and *regulatory competition* in conjunction with their respective dominant strategies of *socialisation* and *coercion*. As has already been discussed, both India and Pakistan had engaged in *emulation* and *regulatory competition* due to their need for international legitimacy and their desire to remain competitive with similarly situated countries. It is also likely that both countries leveraged the pedigree, authoritativeness, and international acceptance of the substantive provisions of the competition legislation to convince members of the legislature or of the executive, as necessary, that it was in the country's interest to adopt these terms without amendment and to strengthen their domestic legitimacy. However, the fact that the countries remained unable to *socialise* and adapt these provisions for their contexts may be attributed to the lack of capacity in both and the absence of a meaningful discourse about internationally prevalent competition principles in their respective pre-existing legal systems. Arguably, the lack of discourse and its attendant lack of capacity was more pronounced in Pakistan in this period than in India where scholars had independently started commenting on competition law soon after the Raghavan Committee was constituted and certainly after its report had been made public.

2.6 COMPATIBILITY AND LEGITIMACY OF THE INDIAN AND PAKISTANI COMPETITION REGIMES

The transfer mechanisms and institutions engaged by India and Pakistan in adopting the Indian and Pakistani Acts respectively not only shaped their content but also

[142] Pakistani Act, section 20.
[143] Pakistani Act, sections 42, 44.

determined the extent of their compatibility with their respective contexts and their international and domestic legitimacy.

In adopting and later amending the Indian Act, India had engaged a wide range of bottom-up, participatory, and inclusive institutions drawn from all three branches of the state. These institutions had the capacity not only to aggregate knowledge from a relatively broad spectrum of domestic stakeholders but also to utilise this knowledge to appropriately 'Indian-ise' the competition blueprint for the Indian context. In sharp contrast, Pakistan's adoption, particularly of the 2007 Ordinance, was driven by the World Bank and executed through a limited number of exclusive and top-down institutions which had neither the capacity nor the inclination to aggregate local information or to meaningfully adapt international blueprints for Pakistan's local needs. The difference in the institutions engaged by the two countries in the adoption process meant that the Indian Act was likely to be relatively more compatible with the Indian context than the Pakistani Act would be for the Pakistani context. This compatibility (or lack thereof) was discernible from the very language of the two Acts: while the form of expression employed in the Indian Act is suited for the Indian context (sometimes at the cost of clarity as will be discussed in Chapter 5), that of the Pakistani Act closely mirrors the models on which it is based at the risk of being alien in its domestic context.

Further, the fact that the institutions engaged in the adoption and adaptation of the Indian Act were drawn from all three branches of the state, that is, the executive, the legislature, and the judiciary which were also able to interact with each other in the course of adoption allowed a relatively wide spectrum of stakeholders in India to be introduced to the proposed legislation and contributed to the domestic legitimacy of the legislation and made the CCP less concerned about asserting its international legitimacy by overt reliance on foreign competition materials and precedents in its decisions. In Pakistan, however, the institutions engaged in the adoption, particularly of the three Ordinances, were drawn exclusively from the executive and had only limited and curated interaction with other institutions in the country and with future end-users of the legislation. Pakistani stakeholders, therefore, remained largely uninformed about the rationale for adopting this legislation or its potential benefits for the economy, and were not in a position to meaningfully or even otherwise consent to its adoption. This meant that while these Ordinances had some formal and functional legitimacy in the country, the CCP was constrained to leverage its international legitimacy by overt and express reliance on foreign materials and precedents for establishing its domestic legitimacy.

The relatively higher compatibility and the legitimacy of the Indian Act makes it more likely that the Indian Act would be meaningfully enforced in the implementation stage rather than merely remaining a law in the books; that it would be understood and utilised by end-users and be applied by the CCI; and would not only enjoy a more productive relationship with the pre-existing legal authorities in the country but would also steadily integrate with the country's legal system. On the

other hand, Pakistan's relatively weaker compatibility and legitimacy suggests that the CCP would face obstacles in enforcing the competition legislation: even if the CCP proved vigilant in applying the law to competition violations in the country, the users were not expected to understand or invoke the legislation or to approach the CCP with their grievances; the interactions between the CCP and the country's pre-existing legal system would likely be complicated and difficult; and the legislation would fail to integrate into the country's pre-existing legal system and would remain law on the books rather than transforming into a law in action.