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between Enacting and Implementing
Competition Law in India**

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THE INTERPLAY OF INSTITUTIONS
Linkages between Enacting and Implementing Competition Law in India

Amber Darr

Abstract

This paper explores the impact of the diffusion strategy adopted by India for acquiring its competition law on the manner in which the competition law has and is being implemented in the country. It argues that the diffusion strategy has a direct as well as an indirect impact on the implementation of the competition law. The direct impact of the diffusion strategy derives from the manner in which the strategy shapes the content of the law particularly the provisions relating to the structure, mandate and composition of the implementing institutions created by the law. This impact directly affects the decision making of the implementing institutions and thereby directly charts the implementation trajectory of the law. The indirect impact derives from the impact of the strategy on the legitimacy of the law. The competition law may be challenged before general courts in India on grounds of legitimacy and the decisions of these courts indirectly impact the manner in and direction along which the law is implemented.

Key Words

antitrust, competition, courts, developing country, diffusion, implementation, India, institutions, legal transplants, legitimacy, regulatory law, South Asia

JEL Classification

F420 F540 K21 K4 L4 O1

I. Introduction

In early 2003, after nearly four years of deliberations, India enacted the Competition Act 2002 and simultaneously repealed the anti-monopoly law that had been in force in the country for more than thirty years.¹ In doing so, India not only became the first country in the South Asian region to acquire a competition law that was in line with international best practices but also joined the ranks of more than one hundred countries throughout the world that had adopted similar laws in recent years.²

In drafting this law, India had consulted several foreign models while at the same time taking care to ensure that the competition principles it proposed to adopt for the Indian context were compatible with the country's stage of economic development and its economic goals. Consequently, whilst the competition law, both as it was first enacted in 2002 and later amended in 2007, shared commonalities with a number of competition regimes throughout the world, it also differed in material respects from these models and, more importantly for the purposes of this paper, followed an implementation trajectory unique to the Indian context. In this paper, I propose that these differences in the substance and implementation trajectory of the Indian competition law are attributable, in large part, to the diffusion strategy adopted by India for acquiring its competition law.

I argue that India's diffusion strategy for acquiring its competition law has shaped the subsequent implementation trajectory of the law in the country in one of two ways: First, by shaping the substance of competition law, in particular the provisions relating to the structure, mandate and composition³ of the institutions of competition implementation⁴ ('the Implementing Institutions') and thereby, their decisions. I refer to this as the 'direct impact'. And second, by influencing the legitimacy of the competition law in the country and thereby creating grounds for challenging the law itself as well as the actions, possibly even the existence, of the Implementing Institutions. I refer to this as the 'indirect impact'.

I evaluate the direct impact of diffusion strategy on the implementation trajectory of competition law in India by an analysis of the decisions of the

¹ I refer to the Indian Monopolies and Restrictive Trade Practices Act, 1969.

² The term "South Asian" refers to member countries of the South Asian Association for Regional Co-operation (SAARC), established on 8th December 1985, namely, Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Of the initial 7 SAARC countries (Afghanistan had joined only in 2007), India, Pakistan and Sri Lanka were the only countries that had a history of laws for the regulation of competition prior to the adoption of modern competition laws. In 2003, Sri Lanka enacted the Consumer Affairs Authority Act to safeguard consumers and regulate competition in its markets followed in 2007 by Pakistan when it promulgated a Competition Ordinance for similar purposes.

³ The term 'composition' as used throughout this paper refers to the requisite qualifications of natural persons who form the Implementing Institutions as well as the mechanism provided in the competition law for their appointment and removal.

⁴ i.e. the Commission which is the first tier implementing institution, the Competition Appellate Tribunal (COMPAT), the second tier implementing institution and the Supreme Court in its competition appellate jurisdiction, the third and final tier implementing institution.

Implementing Institutions and an evaluation of the extent to which these are determined by the structure, mandate and composition of the Implementing Institutions as shaped by the country's diffusion strategy. For assessing the indirect impact I examine the number and nature of challenges filed against the competition law before the implementing authorities pre-existing in India ('the General Courts')⁵ and the response of the General Courts to these challenges.

II. India's Diffusion Strategy for Acquiring its Competition Law

In order to understand the diffusion strategy employed by India to acquire its competition law it is first necessary to identify the possible strategies available to it in this regard. These include:

- (a) *Emulation* which, in the sense I refer to it in this paper, is synonymous with lesson-drawing, cost-saving and problem solving. In the typology presented by Morin and Gold⁶ the process of emulation is based on impressions of the foreign model and of the prestige of the country in which it may have originated. It generates a 'cost-saving' transplant;⁷
- (b) *Regulatory competition* takes place when lawmakers adopt foreign rules, whether or not they are effective in addressing domestic issues, in order to better position their country in a competitive world.⁸ This strategy yields a 'legitimacy-generating transplant';⁹
- (c) *Socialization* is a process directed towards the internalization of the principles, beliefs and norms of a foreign community. A state is more likely to adopt a foreign rule if it is persuaded of its appropriateness ie if the legal rule in question resonates with established social norms and fits with the collective identity of the adopter country.¹⁰ Socialization implies a deeper understanding and penetration of the ideas borrowed from the foreign country than emulation. The process leads to an 'entrepreneurial transplant';¹¹

⁵ These include the High Courts and the Supreme Court sitting in their inherent writ jurisdiction.

⁶ Jean-Frédéric Morin and Richard E Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' [2015] *International studies quarterly* <http://www.researchgate.net/publication/259203702_An_Integrated_Model_of_Legal_Transplantation_The_Diffusion_of_Intellectual_Property_Law_in_Developing_Countries_Draft_version/file/9c96052a6e5c47774b.pdf> accessed 8 March 2014.

⁷ Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 *The American journal of comparative law : a quarterly The American Journal of Comparative Law* 839.

⁸ Morin & Gold n. 6.

⁹ Miller n. 7.

¹⁰ Morin & Gold n. 6.

¹¹ Miller n. 7.

- (d) *Contractualization* occurs when states bargain with one another (or, by extension, with multilateral agencies) in relation to a legal rule and those negotiations usually include trade-offs linking two or more issue areas which is then formalized by a bilateral or international treaty or contract. It is important to bear in mind, however, that contracting parties do not necessarily negotiate as equals and their contractual agreement does not always result in balanced outcomes.¹² Contractualization yields an 'externally dictated transplant';¹³ and
- (e) *Coercion* which occurs when a state (or a multilateral agency) promotes its rules through the use of material power, whether military or economic.¹⁴ As in the case of contractualization, coercion yields an 'externally dictated transplant'.¹⁵

The literature further collectively refers to strategies (a) to (c) as strategies of 'horizontal' diffusion and classifies strategies (d) and (e) as 'vertical diffusion'.¹⁶

Since its creation as an independent state in 1947, India has had an unbroken tradition of democracy and has created, nurtured and maintained this tradition with the help of strong institutions.¹⁷ These institutions were evidently at work at the time and the manner in which India acquired its competition law. They defined and shaped India's diffusion strategy, which in turn determined the substance of the competition law, particularly the provisions relating to the structure, mandate and composition of the Implementing Institutions, as well as its legitimacy. In the discussion that follows, I examine the diffusion strategy adopted by India by analyzing the interplay of institutions at each stage of diffusion.

The Stages of Diffusion of Competition Law in India

(a) *India decides to review its anti-monopoly regime*

In 1999, when the Indian government decided to take up the question of whether it should simply amend its anti-monopoly law or adopt a new competition law, it had the legal authority as well as the experience of setting up committees for the purposes of law reform. Further, the government had a strong tradition of re-evaluating its anti-monopoly legislation and had in place the necessary institutional framework within which to undertake the exercise.¹⁸ Establishing a nine-member committee (the Raghavan

¹² Morin & Gold n. 6

¹³ Miller n.7.

¹⁴ Morin & Gold n. 6.

¹⁵ Miller n. 7.

¹⁶ Morin & Gold n. 6.

¹⁷ The term 'institutions' used throughout this paper includes formal organizations as well as any form of constraint that human beings devise to shape human interaction whether formal or informal, created or evolved over time. (Douglass C North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press 1990).

¹⁸ The Indian Monopolies Act was enacted following the recommendations of the Monopoly Inquiry Committee, the Mahalonobis Committee Report 1964 (set up to examine the

Committee' or 'the Committee') comprising almost entirely of indigenous experts *inter alia* from business, government and legal sectors, was in accordance with this norm. The Indian government provided the Committee necessary powers to hold deliberations amongst its members as well as to consult with stakeholders. It also allowed the Committee sufficient time to prepare its report and to return it to the government for further action.

(b) India identifies parameters of the proposed competition law

In the course of its deliberations, the Raghavan Committee engaged with and recorded evidence from representatives of chambers of industries and commerce, professional institutes, consumer organizations, experts, academics and government officials. It also consulted competition laws of nearly eighty countries as well as competition reports and texts authored by Indian and international competition officials and scholars. On the basis of its discussions, the Raghavan Committee came to the conclusion that a mere amendment of India's anti-monopoly legislation would not allow the country to meet its long term domestic or international economic interests or aims, and that only a modern competition law drafted along the lines of international best practices would suffice in this regard.¹⁹

Further, the Committee was convinced of the need for a specialized competition implementing authority because it did not believe the judiciary to have the experience necessary for dealing with market problems. The Committee suggested that this authority be structured as an administrative and adjudicatory body divided into separate wings for its investigative, prosecutorial and adjudicative functions, with adequate powers for advocacy of competition policy, adjudication and effective implementation of its decisions. It further recommended that the authority have the mandate to check 'cartelization, price-fixing and other abuses of market power'. Further, although it included merger control in the authority's list of activities, it cautioned that given India's recent transition from a protected to a liberalized economy 'premature implementation of Competition Law in this area [merger control]' should be avoided as it 'could act as a disincentive for necessary mergers'.

In recommending the composition of the proposed authority, the Committee suggested that it be made autonomous and free from political influence. To this end, it proposed that the authority comprise eminent and erudite persons of integrity from the fields of judiciary, economics, law, international trade, commerce, industry, accountancy, public affairs and administration. Further, it emphasized the importance of instituting a transparent 'Collegium Selection Process' for appointing such persons, which would be binding on the

distribution and levels of income in the country and the Hazari Committee Report 1965 (set up to study industrial licensing procedure). In 1984, India had amended the Indian Monopolies Act in light of the Sachar Committee Report. In 1991 it further amended the law at the recommendation of the government.

¹⁹ SV. Raghavan, 'Report of High Level Committee on Competition Policy and Law' (2000) <http://www.globalcompetitionforum.org/regions/asia/India/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf> accessed 6 March 2014.

government. It also recommended that the government only be able to remove persons appointed to the authority with the concurrence of the Supreme Court.

(c) *India enacts and amends its Competition Law*

In early 2003, India enacted its competition law in accordance with the procedure prescribed in the Constitution. The government introduced a bill on the proposed law in the Parliament, outlining the objects and reasons for its enactment. The Parliament remitted the bill to its Standing Committee for detailed scrutiny. The Standing Committee in turn 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, the Parliament, after considering the recommendations of the Standing Committee and effecting some amendments thereto, passed the competition law and submitted it to the President for his assent.

However, even before the competition law had become fully operational, writ petitions were filed *inter alia* before the Supreme Court on the grounds that certain provisions of the law were contrary to the constitutional principle of separation of powers.²⁰ Whilst hearing the petitions filed before it, the Supreme Court observed that 'it might be appropriate for the government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognized by the Constitution'.²¹ The Supreme Court dismissed the petitions in early 2005 after the government had given it necessary assurances that it would amend the law in accordance with the recommendations of the Supreme Court.

On 9th March 2006, acting on the assurances given by it to the Supreme Court, the government introduced a competition amendment bill in Parliament in terms of which it introduced *inter alia* the concept of an independent Competition Appellate Tribunal ('COMPAT'). The Parliament once again referred the bill for examination to the relevant Standing Committee, which in its report suggested certain changes to the government draft. On 9th August 2007, the government re-submitted the competition amendment bill to the Parliament and on 24th September 2007 the Parliament enacted the government draft as the Competition (Amendment) Act 2007.

Identifying the Indian Diffusion Strategy

The fact that in the course of its deliberations, the Raghavan Committee consulted a number of foreign texts and laws of other countries sporting competition regimes, suggests a certain element of *emulation* in its approach whilst the pressure felt by the Raghavan Committee due to the ongoing WTO

²⁰ Brahm Dutt v. Union of India (2005) 2 Supreme Court Cases 431.

²¹ Statement of Object and Reasons appended to the Indian Competition (Amendment) Act 2007.

negotiations suggests that India was at least partially acting out of the need for *regulatory competition*. It is important to note, however, that throughout the exercise of formulating a competition law suitable for India, the Committee consulted extensively with local stakeholders in a determined effort to tailor the foreign models to suit India's unique needs. Also, in doing so, it acted without any apparent technical assistance from any other country or multilateral agency. This suggests not only an absence of *contractualization* or *coercion* but in fact a high degree of *socialization*. The latter being made possible, in large part, by the country's strong democratic traditions and institutions which played an active role in the steps leading up to the enactment of the competition law. The Indian Supreme Court's review of the competition law almost immediately after its enactment and the subsequent amendment of the law at the recommendation of the Supreme Court, by yet another act of Parliament, only enhanced the degree of *socialization*. Both actions enabled the legal community and the superior judiciary to become acquainted with the substance and structure of competition law and increased the awareness, if not understanding, of Parliamentarians and stakeholders of competition related issues.

How the Indian Diffusion Strategy Shaped the Commission

A review of discussions at successive stages of the process adopted by India for the diffusion of competition law suggests that the mandate of the Commission as provided in the law when it was finally enacted was substantially the same as the Raghavan Committee had first suggested it. This observation further suggests that in acquiring the provisions related to the mandate of the Commission, India pre-dominantly employed the diffusion strategies of *emulation* and *regulatory competition*. The rationale for this choice is likely to be twofold: Firstly, the mandate of the Commission, more than its structure and composition, is firmly embedded in universally recognized set of competition principles. Secondly, India needed to convince its lawmakers that the competition principles advocated by it for adoption in the Indian context were derived from prestigious sources and, and would, therefore, have the requisite authority in the country. However, the fact that India arrived at the mandate of the Commission only after extensive consultations with stakeholders and also developed an India specific epistemology related to these competition principles reflects the presence of a significant degree of *socialization*.

Similarly, the final structure of the Commission and especially the manner in which India arrived at it, also suggests that *socialization* was India's dominant diffusion strategy. The structure of the Commission evolved successively as different institutions, including but not limited to the Committee, the Parliament, the Standing Committee and the Supreme Court, engaged with it and put forward their recommendations in this regard. These institutions also played a similar role in determining the composition of the Commission—particularly the manner in which the members of the Commission and COMPAT may be appointed and removed from office. Composition of the Implementing Institutions, may, therefore, also be deemed to be a product of *socialization*.

It is important to note, however, that whilst the strategy of *socialization* allowed for greater interaction between institutions, the adoption of the strategy itself was likely made possible by the fact that India had strong and sustained democratic tradition and institutions.²² Each of the institutions that interacted at successive stages of the diffusion process and shaped to varying degrees, the structure, mandate and composition of the Commission, represented an aspect of democratic traditions and institutions pre-existing in the country. The strategy also allowed for a relatively transparent debate even on potentially sensitive issues such as the inability of the General Courts to deal with complex competition matters and, therefore, the need to limit their jurisdiction in this regard and to guard against the government propensity to appoint bureaucrats to positions, which should properly be occupied by experts.

The importance of such an exercise becomes more evident when compared with the fact that it was almost absent in Pakistan, which had adopted a broadly similar competition law almost contemporaneously with India. Although Pakistan had adopted a largely similar competition law almost concurrently with India it had done so predominantly through the vertical diffusion strategies of *contractualization* and *coercion* and without extensive debates with local stakeholders.²³ These strategies had allowed certain patterns of conduct embedded in the Pakistani context to seep into the competition law without explicit discussion and thereby affect not only the structure, mandate and composition of the Pakistani implementing authorities but also the legitimacy of the Pakistani competition law in the eyes of the Pakistani public and perhaps also the Pakistani judiciary.²⁴

III. The Operation of the Commission and the Direct Impact

An Overview

The website of the Indian Commission reports the number of different orders it has passed in the years since it was established and became operational. Although the Commission was somewhat slow in starting to implement the competition law (it only became fully operational in 2010, three years after the 2007 amendment act was passed) it grew progressively more active in each successive year of its operations, except for 2013 when there appears to have been a minor dip in the number of orders passed by the Commission.

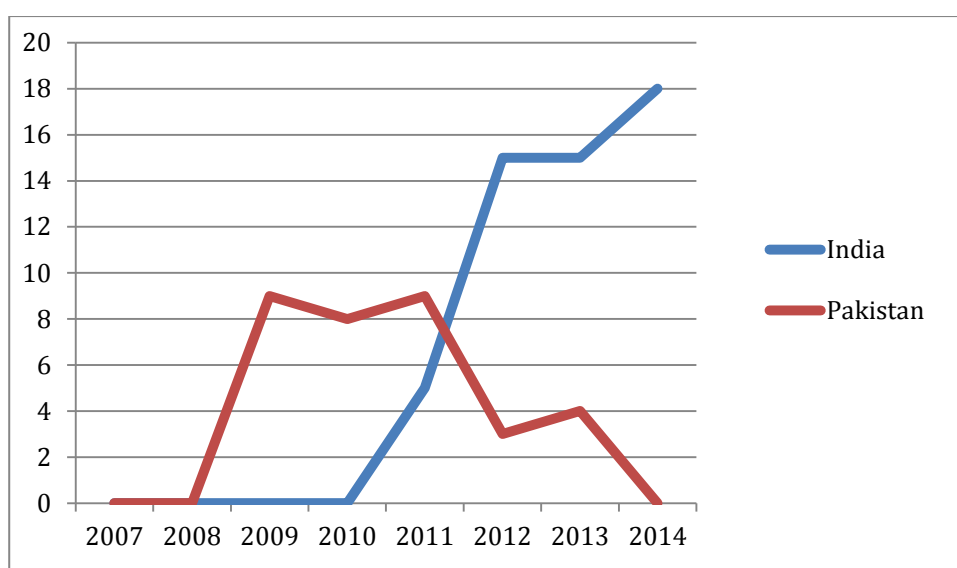
²² Katerina Linos, 'A Theory of Diffusion Through Democratic Mechanisms'.

²³ The Pakistani Competition Ordinance was first promulgated in October 2007 and has been part of the Pakistani legal system since then in one form or another. Unlike India, however, Pakistan had acquired its competition largely at the behest and with the assistance of the World Bank.

²⁴ I refer in particular to the mechanism for appointing and removing members of the Commission. The Raghavan Committee recognized the implicit patterns in India and sought to guard against them, whilst the World Bank team leading the initiative in Pakistan allowed the pre-existing patterns of appointment and removal to seep through without much attention to likely impact on the autonomy of the Commission.

The significance of the progress of the Indian Commission is thrown into greater relief when compared with the performance of the Pakistani Commission over the same period, (which, as I have earlier noted, was brought into existence predominantly through the diffusion strategy of *contractualization* and *coercion*). In the figure below, I compare number of cases pertaining to abuse of dominance and anti-competitive agreements decided by the Indian and Pakistani Commissions in each year of their existence.

Figure 1: Comparison of number of decisions of the Indian and Pakistan Commissions in cases of abuse of dominant position and anti-competitive agreements



Features of the decisions: Reliance on Domestic and Foreign Case Law

A closer examination of the decisions of the Indian Commission in cases of abuse of dominant position and anti-competitive agreements further reveals that in the period 2011-2014, the Commission relied upon case law, whether domestic or foreign, in twenty-four out of the fifty-three cases that it decided. The cases it relied upon and cited, ranged from those of the Commission itself to those of the erstwhile Monopoly Control Authority, the Indian High Courts and Supreme Court as well as foreign competition authorities, most notably those of the European Union and the United States (including the US Supreme Court). In 2011 and 2012, the Commission relied on diverse domestic and foreign resources in the majority of its cases. In 2013, however, the Commission cited case law in only six out of fifteen cases it decided and even in these it relied more on domestic rather than on foreign cases, referring only to one EU decision in one matter that it decided. In 2014, the Commission relied upon case law in only eight out of its eighteen judgments,

once again preferring domestic to foreign cases.²⁵ Interestingly, the cases in which the Commission relied on judgments, whether domestic or foreign, are neither clustered in any particular sector or area of competition, nor can the citations be explained on the basis that the Commission was tackling a particular sector for the first time.

Once again the reliance of the Indian Commission on case law in arriving at its decisions, particularly that of foreign jurisdictions, is placed into perspective when compared with that of the extent of reliance of case law on the part of the Pakistani Commission in the same period. The following table compares, for each year of their existence, the number of cases in which the Indian and Pakistani Commissions relied on domestic and foreign case law, expressing these as percentages of total number of cases decided by the two Commissions in each year.

Table 1: Comparison of reliance on domestic and foreign judgments expressed as percentages²⁶

Year	India			Pakistan		
	Total Number of Cases in which case law cited	Domestic Case Law (% of total)	Foreign Case Law (% of total)	Total Cases in which case law cited	Domestic Case Law (% of total)	Foreign Case Law (% of total)
2008				3	33.3	100.0
2009				7	57.1	71.4
2010				6	33.3	100.0
2011	4	50.0	75.0	6	16.6	100.0
2012	5	80.0	20.0	2	50.0	100.0
2013	6	50.0	16.6	3	66.6	100.0
2014	8	62.5	25.0			

The differential in the respective reliance of the Indian and Pakistani Commission on case law is sufficiently significant to suggest that the explanation for it may lie in something other than the possible differences in the complexity of cases brought before the two Commissions. I argue that as

²⁵ In addition to the foreign judgments, in a few cases the Commission also relied upon reports of the OECD, Conferences held in the EU and Competition authorities of certain other countries. However, this trend also declined in each successive year of the Commission's operations.

²⁶ These percentages are intended to be approximate rather than accurate. Also, these percentages do not add up to 100 due to the fact that on a number of occasions the Commission cited domestic and foreign case law in a single judgment. The blank spaces in these tables indicate the years in which the Commission(s) did not decide any cases. Nevertheless, the citation trend I intend to demonstrate is evident even allowing for a slight margin of error.

the Indian Commission evolved over time, it grew more comfortable in its enforcement function and, therefore, decreased its reliance on case law in arriving at its decisions. The Pakistani Commission, however, continued to rely on judgments at a steady pace suggesting thereby that such reliance was more a question of strategy and preference rather than legal necessity. It is further interesting to note that even when it did rely on case law, the Indian Commission cited domestic judgments, at a fairly constant, if not escalating pace and preferred its own decisions to any other single category of decisions that it cited.²⁷ More often, however, the Indian Commission relied on its common competition sense rather than on legal precedents, suggesting thereby that it viewed itself primarily as a regulatory rather than judicial body.²⁸

Relating Operation of the Commission to Diffusion Strategy: The Direct Impact

The diffusion strategy employed by India is not only an important factor in understanding the manner in which the Commission operated but also its initial inertia. India's strategy of *socialization* made it incumbent upon it to take along a host of institutions, which is likely to have rendered it more difficult for the government to set up and operationalize the Commission. However, this very strategy allowed the Commission, once it had become operational, to progress with the explicit approval and knowledge of the Parliament, the government and the judiciary. The Indian Commission not only stood on sure constitutional ground but also did not encounter operational obstacles due to any subsequent changes in the elected government or, had it been set up at the behest of a multilateral agency, from the withdrawal of the agency's support. This is again particularly evident in comparison to Pakistan: the Pakistani strategy of *contractualization* and *coercion* allowed it to act decisively in setting up and operationalizing its Commission. However, the operation of the Pakistani Commission was subsequently hampered due to interference from the institutions that had not been consulted in the initial stages,²⁹ and possibly also due to a change in priorities at the World Bank.³⁰

The strategy of *socialization* and the manner in which it impacted the structure and composition of the Indian Commission, also helps explain the Commission's decreasing reliance on case law in general and foreign precedents in particular in arriving at its decisions. Further, the Indian

²⁷ Although this may partly be due to the fact that several cases taken up by the Commission were directly connected with, if not emanating from, its earlier decisions, it also displays a growing confidence in its decision-making.

²⁸ These are preliminary observations and a closer examination of the data is necessary to arrive at more nuanced conclusions in this regard.

²⁹ The superior judiciary suspended the competition law on constitutional grounds, the Parliament was slow to pass formally enact the competition law and the new government itself reluctant to appoint members and grant funds to the Commission.

³⁰ The World Bank had led and partly funded the initiative of drafting the Pakistani competition law.

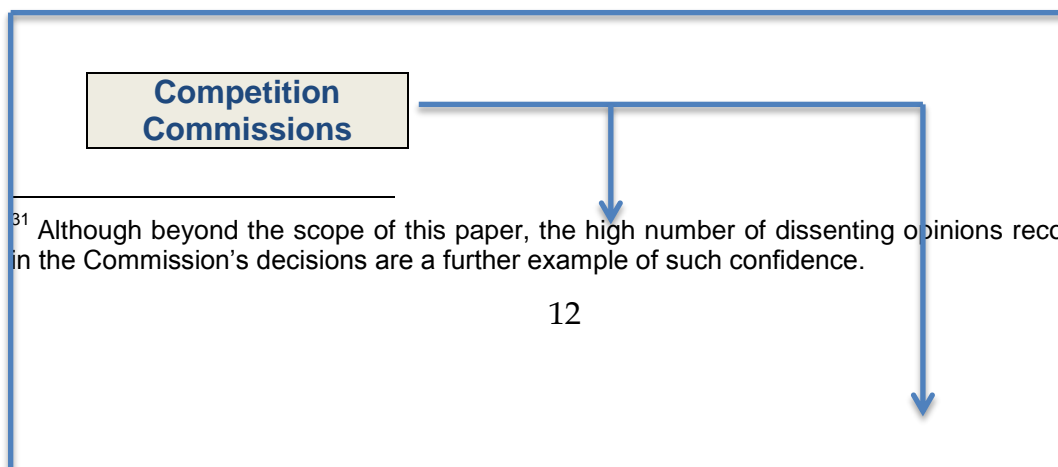
Commission’s self-definition as a regulatory rather than judicial body being an outcome of the interaction between the government, the Supreme Court and the Parliament in the wake of the writ petition filed before the Supreme Court, is also firmly rooted in *socialization*. The fact that the Indian Commission was established and became operational only after extensive interaction between multiple institutions over a considerable period of time, allowed for the growth of a knowledge base and a degree of competence with respect to competition principles. This in turn gave the actors engaged with the Indian Commission the confidence to decide cases without necessarily referring to case law.³¹ It is also highly likely that it was this very confidence that allowed the Commission to let go of the need for *emulation* and *regulatory competition* in implementing the competition law, even though it had engaged both these strategies in devising its mandate at the time of adoption.

IV. Intervention from the General Courts and the Indirect Impact

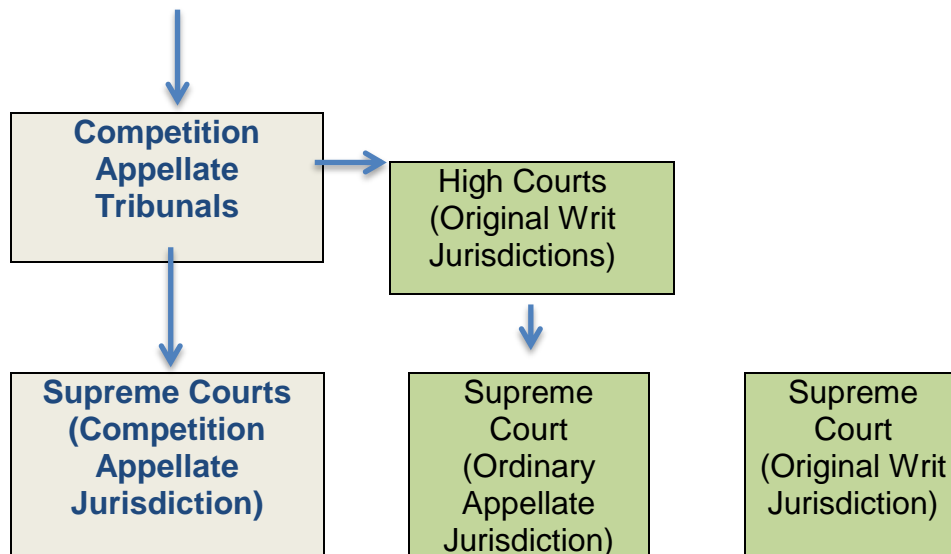
Interconnections between General Courts and Implementing Institutions

If implementing the competition law was only in the domain of the Implementing Institutions, the implementation trajectory of the law, even if slow and punctuated, would remain relatively linear: a party to a decision of the Commission would either comply with it or appeal it before the COMPAT. Similarly, a party to a decision of the COMPAT could either comply with it or appeal it before the Supreme Court sitting in its competition appellate jurisdiction as conferred upon it by the competition law. In actual fact, however, the implementation trajectory of competition law in India may potentially veer away from this linear path. This is made possible due to the fact that under the Indian Constitution, the General Courts have the inherent jurisdiction to entertain writ petitions that may challenge, on constitutional grounds, the decisions, authority, and even the very existence of the Commission. The decisions the General Courts in respect of these challenges have the potential of re-directing or disrupting the operation of the Commission, if not completely nullifying its impact, and thereby re-drawing the implementation trajectory of competition law in the country. In order to understand the manner in which the General Courts may interfere with the operations of the Commission, it is necessary to understand the interconnections between the Implementing Institutions and the General Courts.

Figure 2: Interconnections between the Implementing Institutions and General Courts in India



³¹ Although beyond the scope of this paper, the high number of dissenting opinions recorded in the Commission’s decisions are a further example of such confidence.



Legitimacy and its Links with India's Diffusion Strategy

Challenges against the competition law or the Commission, its actions and decisions (or the COMPAT as the case may be) that may be brought before the General Courts are likely to be challenges to the legitimacy of the law or the Commission, its actions and decisions. Therefore, in order to evaluate whether there is a link between India's diffusion strategy and the nature and extent of interventions on the part of the General Courts, it is important to understand the manner in and extent to which the country's diffusion strategy impacts the 'legitimacy' of the competition law and, by extension, of the Implementing Institutions it creates.

The concept of 'legitimacy' derives from political philosophy, political science and sociology and is defined as 'the belief that a rule, institution or the leader has the right to govern.'³² It is essentially a subjective concept. The literature suggests that in order for a people to *believe* that a law is legitimate, it must, at the very least, be believed to have legality. Legality lends authority to the law, which adds to the belief of its legitimacy. However, a law may only be considered fully legitimate, if in addition to legality and authority, it fulfills an objective standard of justice and morality.

An assessment of the actual or perceived legitimacy of the competition law in India is beyond the scope of this paper. I, therefore, limit myself to identifying the existence of possible *sources* of different aspects of legitimacy in a country and consider an evidence of the existence of one or more of these sources to be an evidence of the existence of the aspect of legitimacy that may be created through these sources. Further, in view of the fact that

³² The concepts of legality and authority are themselves closely linked in that legality implies that an action has been taken (or in this case, a law has been enacted) in accordance with the law of the country, which in turn lends it authority within the national context.

challenges against the competition law that may be brought before the General Courts are likely to be on the basis of two aspects of legitimacy, the legality or authority of the law, rather than on its adherence to an objective standard of either morality or justice, I only focus on identifying the possible sources of the former two aspects of legitimacy.

In order to understand the sources of legality and authority it is important to understand the process through which a law may attain the perception of having these attributes of legitimacy. In terms of the literature, a people may believe that a law has legality if (a) they trust that the substance of the law is in accordance with the law ('*lawfulness*'); (b) they believe that the law has been made in accordance with the procedure prescribed ('*procedure*'), and (c) they have consented to the law ('*consent*'). Whilst belief in the legality of the law confers a degree of authority upon it, authority may also be derived from two additional sources (a) people have faith in a particular political or social order, because it has been there for a long time ('*tradition*'), and (b) they have faith in the rulers ('*charisma*').³³ It may, therefore, be argued in the case of competition law in India that it is likely to be deemed to have legality if its substance and the procedure through which it is enacted, is in accordance with the Indian Constitution and also that the procedure for enacting the law is based on the consent of the electorate ie is democratic. Further, the law is likely to be deemed to have the necessary authority if there is a strong tradition that laws (particularly those substantively similar to the competition law) will be enacted in the same manner as the competition law was enacted and also if the Indian electorate has faith in its representatives.³⁴

Applying this understanding of sources of legality and authority to the Indian situation, it may be observed that India's primary diffusion strategy of *socialization* has substantially contributed to the legitimacy of the competition law. An analysis of the strategy suggests that the competition law may be deemed to have legality due to lawfulness and procedure by having been enacted in accordance with the principles of policy and legislative procedures prescribed in the Constitution. The strategy of *socialization* further suggests that the electorate had participated in the enactment of the competition law and the law may, therefore, be deemed to have the consent of the electorate both at the time of its initial enactment and subsequent amendment.³⁵ The existence of authority of the law may be inferred from the Indian tradition of enacting laws through a similar process (for the present purposes this is particularly evident in India's debates and reform of the monopoly control law) and the general faith of the Indian public in the elected government. The

³³ The literature cites an evaluation of the 'benefit' of the law as a further source of legitimacy, however, I do not consider it here, as it does not neatly fit into the categories of either legality or authority.

³⁴ Once again, an assessment of the actual faith of the Indian electorate in their representatives is beyond the scope of this paper. For the present purposes I assume the existence of faith on the basis of tradition, which is more easily observed in a society.

³⁵ This argument may be stretched to state that even the voters have indirectly consented to the enactment of this law because their representatives would have likely taken the matter to them in the course of elections. However, this aspect of the argument whilst theoretically sound would require further investigation on election manifestos which is beyond the scope of the present discussion.

strategy of *socialization* had allowed for both of these sources to remain constant in the enactment of the competition law.³⁶

General Courts Response to Competition Law Challenges: The Indirect Impact

Over the years, a number of entities against which the Indian Commission had either initiated investigations or which it had sanctioned for engaging in anti-competitive practices or abusing their dominant position, have invoked the inherent constitutional jurisdiction of the General Courts to challenge these actions, operations and decisions of the Commission. I cite the following cases by way of example of the nature of these challenges and the attitude adopted by the General Courts in response thereto:

- (a) *Kingfisher Airlines Limited v. Competition Commissions of India and others.*³⁷

Kingfisher had challenged before the High Court, the investigation into its affairs ordered by the Commission citing as a ground the Commission's lack of jurisdiction. The High Court dismissed the petition and allowed the Commission to proceed with the investigation.

- (b) *Amir Khan Productions (Pvt.) Limited v. Union of India.*³⁸

Amir Khan Productions (Pvt.) Limited had challenged the show cause notice issued by the Commission on the ground that it was tantamount to the Commission pre-judging and prejudicing the case against it. However, the High Court held that the Commission had the jurisdiction to form a preliminary view of the case at the time of issuing a show cause notice and doing so was not tantamount to pre-judging or prejudicing the case.

- (c) *Interglobal Aviation Limited v. Secretary Competition Commission of India.*³⁹

In this case Interglobal had challenged the powers of the Commission to assume jurisdiction in cases, which had been initiated by the Monopoly Control Authority. The High Court had held that the Commission had jurisdiction in all matters that had previously been pending before its predecessor Monopoly Control Authority.

- (d) *Gujarat Guardian Limited v. Competition Commission of India and others.*⁴⁰

³⁶ It may be argued that India's secondary diffusion strategies of emulation and regulatory competition further bolster the authority of the competition law as both represent tradition and charisma to the extent that they suggest a strong connection between the competition law and international best practices in respect of competition laws.

³⁷ Writ Petition No. 1785 of 2009, instituted before the Bombay High Court. Decided on 31st March 2010.

³⁸ WP No. 358 of 2010, instituted before the Bombay High Court. Decided on 18th August 2010.

³⁹ WP No. 6805 of 2010 filed before the Delhi High Court. Decided on 6th October 2010.

⁴⁰ WP No. 7766 of 2010 filed before the Delhi High Court. Decided on 23.11.2010.

Gujarat Guardian Limited had challenged the jurisdiction of the Commission on the basis that the case had been initiated by the Monopoly Control Authority. In this case as in (c) above, the High Court allowed the Commission to proceed with the matter.

Two points may be noted in respect of the challenges brought against the competition law and the response of the General Courts in respect of these challenges: First, that the challenges were limited to the manner in which the Commission could exercise its powers rather than on questioning its fundamental legality and secondly, that the General Courts decided these clearly, in favour of the Commission and within a reasonable time. Both these points may plausibly (if not exclusively) be linked to the diffusion strategy followed by India in acquiring the competition law and the impact of the strategy on the legitimacy of the law.

The fact that the challenges brought before the General Courts were few to begin with and remained restricted only to certain aspects of the operation of the Commission may in significant part be explained by fact that the strategy of *socialization* had created a sufficiently strong perception of the legality and authority of the competition law. The logic in this observation becomes more evident when the Indian situation is compared with that of Pakistan which had primarily employed the strategies of *contractualization* and *coercion* in acquiring its competition law: Not only were the challenges filed against the competition law before the General Courts in Pakistan far greater in number but also raised a greater variety of grounds including grounds challenging the very fundamental constitutionality of the competition law, the existence of the Pakistani Commission and the validity of its actions. The further fact that the General Courts in India decided these matters clearly, in favour of the Commission and speedily and thereby settled certain basic concerns regarding the legality of the Commission's actions may also, at least in part, be attributed to the strategy of *socialization* followed in India. Specifically, it may be argued that strategy of *socialization* had contributed to creating greater awareness of the legality and authority of the competition law amongst the legal community and the judiciary. Whilst these and similar decisions of General Courts in India do not mean that aggrieved parties do not and will not continue to lodge appeals against decisions of the Commission before the COMPAT (or from the decisions of the COMPAT, before the Supreme Court of India), it does mean that the indirect impact of the diffusion strategy adopted by India is likely to be aligned with and supportive of its direct impact and that the implementation trajectory will be charted in the manner envisaged by the government at the time of enacting the competition law.

Once again, the situation of competition law in India becomes clearer when contrasted with that in Pakistan. Not only are the challenges against competition law brought before the General Courts in Pakistan far greater in number but also they call into question the fundamental constitutional legality of the competition law. Further, the response of the General Courts in Pakistan to these challenges has been lukewarm, at best. The General Courts in Pakistan had stayed the operation of the Commission in most of the cases brought before them and at the time of writing this paper, had not finally

decided any of the challenges. Although the response of the Pakistani General Courts in respect of competition matters may, in part, be explained by the problem of endemic delay prevalent in the Pakistani legal system. However, given that delay is a problem in the Indian legal system as much as it is in the Pakistani legal system, it may also partially be attributed to the reluctance of the Pakistani General Courts to grapple with issues that by rights should have been settled at the time the law was first enacted or even re-enacted, perhaps because the strategy of *contractualization* and *coercion* adopted by Pakistan had failed to create a broad based understanding and therefore of acceptance of the law. In this way, it may be observed that the indirect impact of the diffusion strategy of *contractualization* and *coercion* followed in Pakistan is at odds with its direct impact to the extent that it interferes with the smooth and stable operation of the Commission.

V. Conclusion

The trajectory along which competition law has been implemented in India to date is determined as much by the strategy and process through which the country acquired its competition law as it is by the substance of the law itself. Diffusion theory provides the necessary framework for unraveling the manner in which India's strategy for adopting and adapting the competition law impacts the operation of the Implementing Institutions and thereby the implementation trajectory of the competition law in the country. In particular, an examination of India's diffusion strategy for acquiring its competition law, particularly when compared with the strategy adopted by its neighbor Pakistan in this regard, suggests that India's dominant diffusion strategy of *socialization* has played a distinct and recognizable role in shaping the structure, mandate and composition of the Implementing Institutions, particularly that of the Commission. The impact of the diffusion strategy on the structure, mandate and composition of the Implementing Institutions has, in turn, directly impacted the decision-making of the Implementing Institutions (especially the Commission). India's strategy of *socialization* has also had a recognizable, positive impact on the legitimacy of the competition law in the country. It is in significant part due to India's diffusion strategy that General Courts have had little or no hesitation on endorsing the operation of the Commission. It may, therefore, be concluded that when a country like India which has a strong tradition of democracy and the institutions to support it, adopts a strategy of *socialization* for adopting a law such as the competition law, and thereby includes its major institutions in deliberating and defining the specifications of the law, the direct and indirect impact of the strategy are aligned with and supportive of each other. This further suggests that a strategy of *socialization* is likely to allow the adopted law to proceed more smoothly and without major hindrances, along the lines envisaged by the law itself.