FROM INTERVENTION TO EMBEDDED REGULATION: A COMPARATIVE ANALYSIS OF ABUSE OF DOMINANT POSITION IN INDIA AND THE UNITED KINGDOM

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ABSTRACT

This research paper examines how modern governments have changed their approach to managing the economy. Historically, many countries followed an interventionist model where the government directly controlled businesses and industries. However, in recent decades, there has been a global shift toward becoming a regulatory state. This change is characterized by the disaggregation of the state, which means moving power away from a single central government body and giving it to specialized, independent regulators like the Competition Commission of India (CCI) and the Competition and Markets Authority (CMA) in the UK. The study focuses on the legal regulation of economic activity to ensure fair competition. By comparing India and the UK, the paper analyses how these two jurisdictions handle market power. In the UK, scholars like Giandomenico Majone and Karen Yeung describe the regulator as a "thick" and specialized institution designed to keep the market efficient. In contrast, the Indian context is often explored through the work of Navroz Dubash and Bronwen Morgan, who argue that India acts as an "embedded" regulatory state. This means the CCI must often balance strict legal rules with local social and political pressures. Furthermore, the research uses William Twining's theory on the "reception" of law to explain that India did not just copy the UK's system. Instead, India adapted these "legal transplants" to fit its own unique needs. The paper concludes by evaluating whether these regulators are truly independent or if they are still influenced by the states that created them.

I. Introduction

As the global economy moved from the state-regulated markets towards the "regulatory state" of late twentieth-century governance, overseeing the market through independent bodies such as the United Kingdom's Competition and Markets Authority (CMA) and the Competition Commission of India (CCI), the presumption about the universality of this approach proved erroneous. Whereas Western countries describe their regulatory bodies as "thick" and technocratic, this is hardly the case in the Global South. This essay looks at the jurisprudence of abuse of dominant position to illustrate why the Indian "regulatory state" remains an "embedded" one.

Drawing upon the works of Giandomenico Majone and Karen Yeung, which identify characteristics of a Western regulatory approach, and Navroz Dubash and Bronwen Morgan's models of regulation in developing countries, this essay examines the peculiarities of managing market power in emerging markets. Additionally, using the notion of legal reception from William Twining, this essay will show that India did not adopt the UK competition legislation as is, but rather adapted its principles to the socio-political realities, history, and economic priorities. Through comparative analysis of the way CMA and CCI tackle the issue of dominance, this essay will explain the extent of regulatory independence in practice.

II. The Disaggregation of the State and the Regulatory State

In order to comprehend the marked difference in approach towards competition regulation in the UK and India, an understanding of the theoretical foundations of the concept of the regulatory state becomes imperative. With globalization, deregulation, privatization, and liberalization being the order of the day, the need arose for regulatory governance to overcome market failure and to monitor the anti-competitive behaviour in the markets. In Giandomenico Majone's view[1], the shift in Europe was made necessary by the requirement of "credible commitment." In view of the problem of "time inconsistency," politicians cannot simultaneously commit to providing long-term market stability to the investors and be politically motivated in arbitrarily interfering in the market to reap short-term benefits for themselves.

The CMA, which serves as the embodiment of Majone's theory of the regulatory state in action,

[1]Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994)

is described by Karen Yeung[2] as belonging to thick institutional designs that possess great technical expertise and strong quantitatively-driven economic efficiency, and are entrenched within a mature free market system. Operating within an advanced milieu, the primary responsibility of the CMA lies in maintaining the competition in the market through advanced econometric techniques and highly mathematical models for market definition.

In contrast, Navroz Dubash and Bronwen Morgan contend that such an approach is unsuitable for the Global South due to the crucial idea of the "embedded regulatory state."[3] In countries such as India, regulation cannot be a “tabula rasa" based upon neoclassical economics but instead must coexist alongside a backdrop characterized by a legacy of heavy governmental involvement, socio-economic inequality, poverty, and development objectives. Despite being formally independent, regulatory bodies continue to exist in contexts where their work is embedded in the political, social, and industrial goals of the state. They cannot conduct themselves in isolation but have to reconcile economic requirements with practical demands, and thus remain "embedded" in the state framework.

III. Legal Transplants, Institutional Capacity, and Twining’s Reception Theory

Formal creation of the Competition Commission of India (CCI) in 2003 (and operational only in 2009), marks a definitive break from the earlier approach of government interference in India. Over decades, markets were regulated under the Monopolies and Restrictive trade practices act of 1969, which sought to ensure that wealth remained in the hands of many people, not just a few wealthy families. The transition to the Competition Act of 2002, which borrows significantly from the laws in the UK and EU countries, qualifies as "legal borrowing."

Nevertheless, referring to the process simply as a “legal transplant” is too reductionist. According to Twining[4], this analogy fails to acknowledge that transplants do not have an easy time adapting because the transplant metaphor suggests that it will automatically take root and flourish like the rule being transplanted. In contrast, Twining prefers to use the term "reception," which entails active processes of adaptation through engagement with the new

[2]Karen Yeung, *The Regulatory State*, in THE OXFORD HANDBOOK OF REGULATION 64 (Robert Baldwin et al. eds., 2010)
[3]Navroz K. Dubash & Bronwen Morgan, *Understanding the Rise of the Regulatory State of the South*, 6 REGUL. & GOVERNANCE 261 (2012)
[4]William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge Univ. Press 2009).

legal context of the host state.

Also, in Twining's reception theory, one must note that the efficacy or mutation of a law is greatly dependent on the ability of the receiving state. The CMA of the UK, for instance, has benefited from years of antitrust jurisprudence, expert economic consultants, and a well-developed corporate sector. However, CCI entered an economy where there is a prevalence of 80% informal labour and increasingly mature, yet often bypassed, norms of corporate governance. For such a context, there needs to be a level of pragmatism that is missing in a "thick" regulation model.

India's reception of the UK and EU's model of abuse of dominance exemplifies Twining's reception theory. Prohibition of dominance, which is codified under Section 4 of the Indian Competition Act, reflects almost verbatim the provisions of Chapter II of the UK Competition Act 1998 (and Article 102 of the TFEU). It prohibits the abusive practices of enterprises that have achieved a dominant position such as charging unfair or discriminatory prices, restricting production or technical development, refusing market access, or exploiting dominance in one market to establish dominance in another market. Although the statutory wording appears similar, their execution varies considerably.

IV. The UK Model: The CMA and the "Thick" Regulation of Dominance

In the UK, market power regulation pursuant to Chapter II of the Competition Act 1998 employs an approach of rigidity and relentlessness, focusing on consumer welfare, deadweight loss, and allocative efficiency. The CMA operates strictly as a "thick" institution, considering only consumer welfare when determining whether there is an abuse of a dominant position.

In order to prove an abuse of dominance in the UK, the CMA is required to follow a highly rigid procedure. First, the CMA is required to carefully demarcate the market, both geographically and in terms of the products sold. Next, the CMA must prove the existence of a dominant position; such a position is defined under European case law as one of economic strength, allowing the firm substantial freedom from competing firms, customers, and consumers. Finally, the CMA examines whether the behaviour of the dominant firm is either exclusionary (exclusion of equally efficient competitors from the market) or exploitative (charging high prices to a captive consumer group).

The method of action by the CMA can be termed as being highly technical and steeped in legality. This is evidenced by the fact that in relation to the matter dealing with exploitation through excess pricing involving Pfizer and Flynn Pharma in the form of Phenytoin sodium capsules, the CMA used complicated economic analysis to establish any abuse in pricing. Applying the principle of *United Brands* test, the CMA performed extensive cost-plus analysis to find out whether the price paid was highly disproportionate compared to its actual economic worth.[5] Even when faced with appeals at CAT for their rulings, the legal jargon still focuses on economic factors.

Apart from the use of exploitative behaviour, the treatment of exclusionary practices by the CMA provides further evidence of the institution's thick identity. For any case that involves margin squeeze and loyalty rebates, UK regulators depend heavily on the As Efficient Competitor (AEC) approach. For instance, in the case of Royal Mail, there were heavy fines imposed upon Royal Mail because of abuse of its dominant position.[6] It introduced discrimination charges that caused Whistl, the only other major competitor in the field of wholesale mail deliveries, to be excluded. Here again, the sectoral regulator, Ofcom, conducted extensive and technically detailed cost/price modelling. What is important is that the regulator ignored social considerations regarding the importance of having a unified postal service in the entire nation and did not even take into consideration whether the loss incurred would affect the jobs of the postal workers in the event that Royal Mail loses their dominance.

Such strict reliance on economic models guarantees predictability and legal certainty, which characterize a system whose only measure of effectiveness can be seen in market efficiency. This way, the heavy hand of regulation serves to diagnose any malfunction within the market, being fully shielded from any normative discussion about wealth distribution or social welfare concerns. Even though the United Kingdom government defines the regulatory and strategic framework within which operations are run, it does not typically interfere with specific cases that are to be judged. The CMA does not have to consider social concerns and is therefore perfectly in accordance with Majone's definition of the objective non-majoritarian umpire.

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[5]Competition and Markets Authority, *Unfair Pricing in Respect of the Supply of Phenytoin Sodium in the UK*, Case No. CE/9742-13 (Dec. 7, 2016).
[6]Royal Mail PLC v. Office of Commc'ns, [2019] CAT 27, ¶ 12 (UK).

V. The Indian Approach: The CCI and the Embedded Regulatory State

In striking contrast to the academic nature of the UK's regime for enforcing competition laws, the CCI functions in a very different context that serves as a very real example of the theory of the "embedded regulatory state" articulated by Dubash and Morgan. Under Section 4 of the Competition Act, 2002, the CCI has the power to investigate and penalize businesses that have been found to be abusing their dominant positions, just as under the law in the UK. Upon closer inspection, however, one sees that the CCI is often required to take socio-economic concerns into account and deal with highly politically sensitive situations, especially those involving large SOEs and the creation of local industries.

For much of its history, the Indian state had been the main driver of industrialization, actively creating state monopolies in sectors like mining, transportation, aviation, and energy. While in the UK the harsh reality of privatizing industries occurred well before the introduction of the current regulatory framework, in India the formation of monopolies came before the creation of the CCI. In such a scenario, enforcing Section 4 of the act is far from a theoretical endeavour.

VI. Analysis: The CCI and State-Owned Monopolies

An exemplary case of the embeddedness of the CCI is that of Coal India Limited (CIL), which has come up before the Commission in highly publicized proceedings. This company is a huge state-owned monopoly that supplies almost all the coal mined in India, which is responsible for powering the entire electricity grid in India. In the case of Maharashtra State Power Generation Co. Ltd. vs Coal India Ltd.[7], a number of serious allegations against Coal India were levelled by the power generators before the Commission alleging that the dominant firm abused its dominant position by placing very discriminatory terms within its FSAs.

In terms of technocracy, or "thick" regulation, equivalent to that of the CMA, this particular case was exceptionally simple. CIL was an undeniably clear monopoly, using its monopolistic power to extort unfair contracts from consumers dependent upon it, making it a blatant breach of Section 4. The CCI, indeed, did pronounce CIL guilty of abuse of dominance, and took bold steps by imposing on it a heavy fine of ₹1773.05 Crores, which was unprecedented. But the real proof of the regulatory state can be seen in the broader socio-political backdrop and what

[7]*Maharashtra State Power Generation Co. v. Coal India Ltd.*, Case Nos. 03, 11 & 59 of 2012 (Competition Comm'n of India Dec. 9, 2013).

happened after that.

While defending itself in the trial, CIL strenuously asserted that the company was not engaged in any maliciously motivated commercial exploitation or profiteering from its operations. Rather, CIL argued, it was acting within the scope of the mandatory instructions issued by the Ministry of Coal, for the larger purpose of securing equal distribution of subsidized coal throughout a country characterized by its developmental needs and lack of energy supplies. It may be said, then, that while CIL was not acting like a regular business entity, it functioned rather as an extension of the welfare state of India. When the case was eventually brought before the Competition Appellate Tribunal (COMPAT), the penalty imposed on CIL was greatly decreased, and COMPAT explicitly instructed CCI to reevaluate its socio-economic considerations.

The case is illustrative of the serious conflict that exists between the state in India. The CCI is responsible for ensuring that the rules of competitive capitalism are applied strictly in a transition country where the state continues to depend on public corporations in order to attain developmental aims. There is no way in which the CCI can be insulated from this kind of political economy. Its subsequent cautious approach in other cases involving public undertakings shows that it is quite aware of these developmental challenges.

VII. Balance of Powers: Social Setting within Private Enterprise Domination

The structural embeddedness of the CCI is equally manifested through its approach toward private enterprises that wield immense power. In what has become a historic case of intersection between consumer protection and antitrust laws[8], the CCI scrutinized DLF, the biggest and most dominant real estate firm in India, which had allegedly been dominating the market with conditions that were extremely unfair and one-sided to apartment buyers. For instance, the company would decide at will to increase the floor space and change the design of apartments even after making sales.

Whereas the UK's CMA may have approached the case narrowly based on the principles of contract law or misrepresentation or even specific market foreclosure, the CCI's decision in DLF's case was clearly influenced by the socio-economic condition of the Indian property market. At the time, the market was highly information-asymmetric, highly biased against

[8] *Belaire Owners' Ass'n v. DLF Ltd.*, Case No. 19/2010, [2011] CCI 49 (India).

consumers in favour of the builder-conglomerates, and did not have any sectoral regulator to look after the interests of consumers at large. The CCI took into account the gross inequality between ordinary consumers, who happened to be middle class Indians, and politically well-connected real estate conglomerates.

Indeed, in taking such a stance, the CCI has acted as a guardian of consumer interest rather than a cool, detached referee trying to maximize the allocative efficiency of the market. In effect, the CCI had used Section 4 of the Competition Act to forcefully fill in a critical void in social protection for a nascent economy, thus making the law work to address a critical social concern, just as predicted by Twining's theory of legal reception. Herein lies a classic example of using economic law to cure a social problem.

VIII. Digital Markets and Global Monopolies: The Google Android Story

In addition to this, the embeddedness of the Indian regulatory state is best captured by its aggressive actions in the digital market domain, especially concerning global technology monopolies. The historic decisions made by the CCI in 2022, against Google, especially relating to the Android smartphone market, offer an interesting insight into the reception theory espoused by Twining, but in the modern context of digital technology. Google faced a huge fine of more than ₹1,300 Crores for exploiting its dominant market position via mandatory conditions in MADA with OEMs.[9]

From a purely thick regulation perspective, there can be no denying the common genetic make-up between these two cases, both having been initiated by the same authority, the European Commission, against the same company, Google. Nonetheless, the legal philosophy and subsequent remedy applied by the CCI was intrinsically and irrefutably rooted in India's distinct developmental history. India is inherently a mobile-first country where billions of its inhabitants access the internet via affordable, cheap Android handsets. The CCI appreciated the impact that the anti-competitive behaviour had on digital inclusion and, more critically, on the survival prospects for Indian app developers, who lacked the substantial financial might of their Western rivals.

The order issued by the Commission was quite detailed and highlighted the absolute necessity of ensuring that the nascent local technology eco-system is not smothered by a relentless global

[9] *Umar Javeed v. Google LLC*, Case No. 39/2018, [2022] CCI 64 (India).

giant. While Western authorities tend to target the repression of competing operating systems, the directions issued by the CCI in its capacity as an embedded regulator were exceptionally comprehensive, behavioural, and local. The regulatory body insisted that Google enables users to remove pre-installed applications and hosts third-party app stores on its Play Store. Such a bold approach to interventionism illustrates a case of embedded regulation, where the regulator plays an active role in establishing fair competition in accordance with national development priorities.

IX. Analysis through Comparison: Independence versus State Intervention

The contrast between the CMA and the CCI can be made clearer when it comes to regulatory independence. According to Majone, regulatory independence entails that politicians should voluntarily bind themselves to demonstrate their commitment to the market. This is a scenario seen in the United Kingdom where there is independent legislation, stable financing, and technical decision-making that insulates the decisions made in the CMA from any sort of politics. However, when looking at India, regulatory independence does not remain constant because although there is legal independence, the Competition Act, 2002 makes regulatory independence dynamic and conditional for the CCI. One of the reasons behind this is Section 54 of the Act which empowers the Central Government to make exceptions regarding “public or national interest” in relation to enterprises. Even if this power may be used very rarely, the conditional nature of regulatory independence is still maintained. The result of this is that the CCI is not independent but pragmatic in its functioning in relation to economic and developmental issues in India.

X. Conclusion

In the end, it becomes clear that differences between CMA and CCI show us the truth about the “regulatory state” as a homogenous product. While the UK has “thick” and technical concerns for market efficiency, the Indian “embedded” method shows its ability to reconcile the need for competition regulation with development needs. As per Twining’s theory on the reception of legal culture, it would be right to say that India has managed to develop Western law into a socio-political instrument rather than just an unbiased umpire.