The Role of Legal Process in the Redesign of Indian Government-Business Relations

Chiranjib Sen
Indian Institute of Management Bangalore (IIMB)

Anil Suraj
Indian Institute of Management Bangalore (IIMB)

Center on Democracy, Development, and The Rule of Law
Freeman Spogli Institute for International Studies

About the Center on Democracy, Development and the Rule of Law (CDDRL)

CDDRL was founded by a generous grant from the Bill and Flora Hewlett Foundation in October in 2002 as part of the Stanford Institute for International Studies at Stanford University. The Center supports analytic studies, policy relevant research, training and outreach activities to assist developing countries in the design and implementation of policies to foster growth, democracy, and the rule of law.
I. INTRODUCTION

The institutional context of economic activity in India has undergone tremendous change in the past 15 years. The Government of India’s launch of market-based economic reforms in 1991 was a response to a macro-economic crisis emanating from a deficit in the balance of payments. The economic dynamism that ensued thereafter has surprised many observers. Though high economic growth rates have attracted the most attention, concurrent changes in economic institutions have been no less important. During the 1980s, the Indian economy was characterized by pervasive controls on all aspects of market-functioning of industrial enterprises—entry, capacity expansion, exit, pricing and distribution. During the initial phase of the reforms, policy attention focused on stabilization of the macro-economy. It would be fair to state that there was no coherent institutional road-map that Indian reformers had in mind when the process began. The overall policies were shaped by the “Washington Consensus” model. This meant focusing on reducing the fiscal deficit and downsizing the all-encompassing role of government in economy. The original intent of industrial and trade policies was abolition of controls and trade liberalization, and these were pursued vigorously. It was

† Indian Institute of Management Bangalore. This paper was presented at the Center on Democracy, Development and the Rule of Law, Stanford University, in March 2008. We thank Professors Thomas Heller and Erik Jensen for their support. Our colleague Prof. N.Balasubramanian, the Stanford Rule of Law programme participants, and Prof. Aditya Bhattacharjea provided useful detailed comments on the earlier draft of the paper. We also benefitted from comments by participants at the workshop on Law and Economy organized by the Stanford Law School and the Centre for Policy Research, New Delhi in March 2009. These are gratefully acknowledged.

The ‘Washington Consensus’ model gained currency during the 1990s as a set of policy recommendations and road-map for market-based reform in developing and transition economies. These policies were backed by the World Bank, the IMF and the US Administration. The initial variant of the model emphasized stabilization policies, and decontrol. Institutional changes were a later focus as many countries experienced market failures during reform.
only during the mid-90s that institutional change relating to government-business relations came into the policy radar. The need for better regulation in several infrastructure sectors became apparent after the failure of efforts to disinvest in and to privatize some large public sector infrastructure enterprises. Policy makers began to refer to regulatory institution building and associated legislative enactments as “second-generation” reforms. Since then, there has been a steady focus on the institutional dimension—in particular with respect to the establishment of a number of regulatory institutions.

Our paper seeks to explain the ongoing process of regulatory evolution, and the crucial role of legal process. The institutional framework governing the regulation of business enterprises may well take a decade to attain mature stability. It is important to appreciate the fact that this process of institutional reform is not being driven by any particular political agenda. It has acquired a momentum of its own. Different political coalitions have ruled the Central government since 1991 without substantially reversing the direction of institutional evolution. This paper attempts to provide an explanation of the process of evolution of a regulatory framework. In this paper, we examine the case of the Indian telecommunications industry in detail, but we believe that our basic explanatory framework is valid more generally.

There are two major aspects of government-business relations—(a) the ‘rules of the game’ with regard to market competition, and (b) the regulatory institutions that define and maintain these rules. In this paper we argue that the regulatory structure that emerges can be explained as the outcome of a complex interplay of conflict, competition, and strategic maneuvering. When underlying conditions change, adjustments in the regulatory framework do occur. Consequently, even if the overall movement towards a market system is uniform across sectors, one should expect that the speed and content of change will vary from one industry to another because there are significant differences in the conditions facing different industries. Since the process of institutional evolution is one of conflict and contestation, it is not obvious that the outcome would be stable, or efficient in a systemic sense. We argue that legal process, spearheaded by the judiciary,

---

2 The attempt to introduce private sector participation ran into difficulty and political controversy in both the power and telecommunication sectors.
plays a key role in channeling the evolution towards a stable and rational regulatory framework.

The telecommunications industry provides a unique vantage point through which to study the role of the judiciary in the evolution of government business relations for several reasons. First, the industry is emerging from total control by the government as a public sector industry. Second, it is a technologically dynamic industry that has attracted significant private sector interest within India as well as abroad. Third, it has experienced dramatic growth, even as the market structure has altered considerably. The telecommunications sector is generally touted as one of the most successful examples of market-oriented reform of the Indian public sector. At the same time, the industry is not the exclusive domain of the private sector and market competition because the government continues to play a major role. For example, the public sector continues to be a major telecommunications service provider (through the Bharat Sanchar Nigam Limited—BSNL). The Ministry of Communications in the Central Government continues to have important (and costly) development and social policy objectives—such as rural telephony. Moreover, the industry relies on a highly capital intensive network that acts as a barrier to market entry, that are characteristic of a “natural monopoly”. Therefore, there have been continuing efforts to establish a regulatory framework in this sector. The experience of the new regulator the Telecommunications Regulatory Authority of India (TRAI) has been contentious. The policy framework and the regulatory institutional structure have both changed over time. The establishment of the Telecom Dispute Settlement and Appellate Authority (TDSAT) was a major landmark. Finally, the judiciary has played a crucial role in shaping the structure and functioning of the regulatory apparatus by resolving disputes, demarcating jurisdictional boundaries and setting the rules of the game.

The remainder of the paper is organized as follows. Section II presents our analytical framework. We identify the principal stakeholders whose actions and strategic decisions affect the evolution of the industry.

---

3Our research is based on secondary sources, which have been duly cited. See Desai India’s Telecommunications Industry—History, Analysis, Diagnosis, Sage Publications 2006, for a comprehensive account of major characteristics. Our information in this section is drawn from his analysis.


5 Desai, op.cit., Chapter 4.
interactions determine the regulatory structure. Section III focuses on the trends in the Indian approach to policy on competition. This section provides the wider context of regulation and competition, and explains how the position of the competition regulatory authority has been transformed in the period of market reform. We highlight the impact of shifting ideologies and interests of the key actors, and the role of the judiciary in reshaping the jurisdiction of the Monopoly and Restrictive Trade Practices Commission (MRTPC). Section IV explains how the judicial process operates in India, and how it has been applied to balance the interests of contending groups as well as to restrain the powers of government agencies in the “public interest”. Section V provides the detailed analysis of the evolution of regulatory structure in the telecommunications in terms of the political economy of the key actors. We highlight the role of the judiciary and legal process. Section VI concludes the paper.

II. ANALYTICAL FRAMEWORK

The evolution of government-business relations in Indian Industry can be understood in terms of the interactions and activity of the following set of actors:

i. The political executive (e.g. cabinet ministers) of the Government of India

ii. The Department/Ministry that has been directly involved in policy-making (and governance) of the particular sector, (i.e., the civil service officials).

iii. Private firms participating in the sector.

iv. The regulatory institution and the appellate authority, where such bodies have been established.

v. The judiciary (and, in particular, the Supreme Court)

vi. Consumers

vii. Citizen Groups & Media

The market liberalization process and the functioning of Indian democracy have sharply reduced the hierarchy within and among government structures. Ministries,

---

Not all of the above inclusive list of stakeholders is equally active in any particular context. Nor do they wield equal influence. Thus in the cases discussed empirically in this paper, the last two categories of stakeholders have not been active, and hence we do not explicitly consider their behavior.
independent commissions and regulatory bodies, as well as the courts constitute relatively autonomous centres of influence within government. The objectives and actions of these actors can be (and often are) in conflict, and hence they adopt strategic positions in order to further their interests and/or ideological objectives. For this reason, the outcome of these interactions is a result of the relative power of the different actors.

We hypothesize that the strategic approach adopted by each of these actors depends on two broad determinants: (a) Ideology; and (b) Interests. The ideology and economic interests of each set of actors can be broadly identified. While these are in general stable, these are not immutable. In times of systemic transition—when the fundamental economic ground realities are changing, both ideology and interests are subject to change. We argue that in the new context created by globalization and market liberalization, both ideology as well as economic interests, of each of these above groups changed.

Among the exogenous factors that affect ideology and interests, two are most important—(a) integration into the world economy, and (b) technological change. Both these have had significant impacts on the telecommunications industry. Global economic integration changes the competitive environment for business completely. In India, the dramatic shift away from protectionism has triggered change in the ideology of regulatory bodies (such as the competition authorities) and the courts. Multilateral institutions such as the World Bank and the WTO have also sought to change official ideologies by exerting pressure on governments to adopt market-friendly liberalization policies. The second important factor is technological change, which can radically alter the nature of competition. These factors have altered the approaches of all the key actors. The approaches of policy making ministries, the government operating departments, the regulatory bodies, the private sector and even the judiciary have changed significantly after 1991.

The institutional framework of the rules of competition and regulation is determined by a dynamic and contentious process among the key actors. Lobbying, litigation, administrative actions and market competition together shape the emergent

---

business-government framework. No single group is quite able to establish its preferred “rules of the game”. There are continual turf-battles for markets, policy space, and administrative action. Through political processes, contending economic interests are re-evaluated and reconciled. A legal process through which aggrieved parties can seek remedy provides a different rules-based mechanism for resolving conflict among the contestants. Here, the judicial system’s stabilization of the system, resolution of disputes and establishment of systemic rationality by upholding rule of law is crucial. The central argument of our paper is that the judiciary, through legal processes, is playing a major role as a catalyst towards the emergence of a new framework of government-business relations. For this reason, we devote special attention to the evolving jurisprudence in the cases relating to competition and telecommunications industry. In succeeding sections, we delineate the instrumentalities and processes through which the judiciary redefines rules of market competition and functions of regulatory bodies and government agencies.

Chart 1 provides a schematic representation of how a regulatory institution evolves. There is an initial regulatory framework that represents an initial institutional ‘equilibrium’ which implies a set of stable institutional structures and ‘rules of the game’. This equilibrium rests on a particular articulation of the “public interest” that is tacitly accepted by economic, political and legal actors. This equilibrium, however, can become unacceptable, and hence the institutional configuration begins to shift.

The underlying change drivers—ideological change, technology, global integration of the Indian economy and shifting economic interests—impact two basic processes that shape the evolution of the regulatory framework. These are (i) the Policy Process and (ii) the Legal Process. The policy process operates primarily through political and administrative actors, while the legal process is dominated by the judiciary. These processes effect a redefinition of the public interest. In turn, this causes a change in the policy content in the sector.

The legal process gives institutional form to these changes within the regulatory framework. It provides operational content to the changes in policy and the redefined public interest. The legal process, through court decisions in cases having systemic significance, clarifies the role of the regulator in the changed policy context. In particular,
it redefines and emphasizes upon: (a) the jurisdictional bounds of the regulator, (b) the division of responsibilities and powers of the policy making agencies of the government, and (c) the role of dispute resolution and appellate mechanism. This is further validated by the fact that if and when a new distinct appellate authority is created, the legal process accordingly clarifies its role as well. It then facilitates the regulatory institutions to set new “rules of the game” for both, the market participants and the policy makers.

In this manner, the institutional structure of regulation adapts. However, the initial new configuration should be accepted by all the major stakeholders, before a new stable “equilibrium” is attained. If this does not happen, the lingering disputes lead eventually back to the policy and legal processes, and the cycle starts again. Thus, we would observe an iterative process of institutional evolution.

In this paper, we use this framework to examine the regulatory dynamics in the cases of regulation of competition, and also in the telecom sector.
Chart 1: How a Regulatory Institution Evolves

- **Ideology**
- **Technological Change**
- **Integration with Global Economy**
- **Economic Interests**

**POLICY PROCESS—INITIATE CHANGE**

**LEGAL PROCESS**

**REDEFINE PUBLIC INTEREST**

**POLICY CONTENT**

**OPERATIONAL RULES OF REGULATOR’S FUNCTION**

**REDEFINE OR SPECIFY**

**JURISDICTION OF REGULATOR**

**POLICY MAKER VS. REGULATOR FUNCTION**

**DISPUTE RESOLUTION AND APPELLATE MECHANISM**

**'EQUILIBRIUM'? NO**

**YES**

**NEW REGULATORY INSTITUTION**

Integration with Global Economy
Our analytical framework sketched above assumes that the institutions such as the judiciary adapt to changing policy circumstances. We draw support for this assumption from recent important studies that note that in this period of transition, all the actors identified above, are in a state of flux. Their roles and status are fluid. Take the judiciary, for example. In Pratap Bhanu Mehta’s assessment, its approach reflects the changing policy climate:

“The Judiciary in India is a deeply paradoxical institution…..The judiciary has also become an institution of governance. In recent times it has, in the absence of parliamentary legislation, routinely made law; it has made public policy pronouncements; and has taken over the supervision of executive agencies…..On the other hand, with the partial exception of the Supreme Court, most of the institutions of the Judiciary remain in a permanent state of crisis.”

He goes on to argue that:

“The courts have used their powers to facilitate a modus vivendi rather than articulate clear constitutional principles. The terms of this modus vivendi is greatly determined by the courts’ estimates of the prevailing political fissures and is likely to shift as the judges’ interpretation of Indian public opinion shifts.” 8

But the powers of the courts are also limited. The courts must tread with caution. There are loud cries against “judicial activism” from politicians and administrators, when courts are seen to have transgressed their authority. Hence, even the judiciary—arguably the most rules-based, long established and insulated of Indian Institutions, faces pressures and demands from civil society, the press and the political system. These cannot be ignored. This is the result not of any inherent flaw in our judicial institutions, but rather from the ground level realities of governance in Indian democracy. Policies have changed rapidly, the role of government has altered fundamentally with market liberalization, and the competitive environment for business has also changed. It seems hardly surprising

that judicial interpretations of the duties and responsibilities of the regulatory authorities have also changed. Even so, our paper highlights the stabilizing role being played by the judicial bodies in the evolution towards a new institutional equilibrium.

As a second example of the fluid state of Indian institutions, consider the record of Indian regulatory institutions since 1991.9 This will provide the wider context in which our subsequent detailed examination of the regulatory bodies for telecommunications can be understood. These institutions came into existence because of the diminished role of government in the Indian economy after the economic reforms. They are supposedly independent regulatory institutions. In India, such institutions have emerged mainly in two sectors—the financial sector and in the hitherto publicly owned infrastructure sectors. They include the Securities and Exchange Board of India (SEBI), the Insurance Regulatory and Development Authority (IRDA), the Central Electricity and Regulatory Commission (CERC), the State Electricity Regulatory Commissions (SERCs), the Petroleum and Natural Gas Regulatory Board (PNGRB), the Tariff Authority for Major Ports (TAMP), and of course, the Telecom Regulatory Authority of India (TRAI). The most significant feature of Indian regulatory institutions arises from the fact that the government and the public sector incumbents continue to exercise great influence on the behaviour of these regulators. Bhattacharya and Patel reach the conclusion that these regulatory institutions have, at best, met with limited success. The reasons for this outcome are several. These include faulty design, lack of adequate powers, and impact of technological changes on competition. But they note another key feature of the Indian scene:

“An important barrier for effective regulation has been the pervasive presence of public institutions which have used their incumbent advantages to delay the progress of competition in many sectors.”10

Hence, we observe that the independent regulators in India are constrained in their ability to promote competition as compared to their counterparts elsewhere, because of

---

10 Kapur and Mehta, 2005, p.455
the combative posture adopted by powerful incumbent public sector agencies. The roles and powers of regulatory institutions are under challenge, due to the strategic maneuvering among the major actors.

In general, we find that in the post-reform period, the actual behaviour of economic institutions in India concerning business-government relations do not conform to some ‘ideal’ form. Nor do they exactly reproduce any particular international model from the advanced market economies. Rather, they appear to be involved in an evolutionary process, in which they attempt to define their role and cope in a contentious environment. As noted earlier, their behaviour is driven by their ideology and their interests. These factors are in turn modified by the changing political-economic context resulting from exogenous forces such as globalization and technological change. In the following section, we explain the changing macro-context of government-business relations in India, by focusing on the emergence of a competitive market environment. Subsequently in the paper, we shall examine how these tendencies play out in the specific case of the telecommunications industry.

The movement towards more competitive markets in India was the result of sharp change in policy that was championed by the major economic ministries. These reforms hurt the interests of industries that had benefited from the protectionism of the past. The liberalization reform also weakened the clout of the regulatory agencies that used to administer the industrial control regime. In Section IV of this paper, we shall also examine the role of the Supreme Court in paving the way for a competitive business environment and analyze its major decisions and pronouncements on economic matters during the post-reform period and observe how the Supreme Court’s approach has changed compared with the pre-reform era. Today, it is playing a major systemic role in defining the boundaries of government entities that play a role in government-business relations and new regulatory institutions. In some cases, the Supreme Court has intervened when the regulators have conceded their powers too easily under pressure from the government and the incumbent public sector entity. The Court has also sought to ensure that the new independent regulatory and appellate authorities fulfill their functions in accordance with their legislative mandate.
The introduction of competitive environment for business has been high on the Government’s institutional reform agenda. In this section we analyze the process through which a new set of “rules of the game” of market competition is institutionalized. This analysis seeks to provide the macro-context of institutional change. We shall focus on the role of the judiciary. This will serve as background for the micro-level discussion of the telecommunications industry. We shall draw attention to several inter-related aspects of this process. Changing the rules of competition through liberalization involves a clash of economic interests. Industries that have been protected from domestic and foreign competition stand to lose, while importers and export industries gain. As depicted in Chart 1, these conflicts are resolved through (a) the political process from which the policy intent is crystallized as law; and (b) through a legal process that creates operational rules of the game. The political process creates regulatory and appellate institutions. The legal process demarcates the jurisdiction and clarifies the powers of the regulatory and appellate authorities. We discuss below the nature of the interdependent trajectories of these two processes with regard to competition policy. Initial policy shifts triggered economic conflicts which then led to court cases in which the actions of regulatory authorities were challenged. These court judgments sought to align the actions of regulatory authorities to the new policies of the government. Over time, there arose the need for a legislative action to create a new comprehensive competition policy framework and to create a new competition authority for regulation. Thus the Parliament enacted the Competition Act 2002, which has been significantly amended and brought into effect in 2007\(^\text{11}\). A new Competition Commission of India (CCI) has been created to replace the four decade old Monopolies and Restrictive Trade Practices Commission (MRTPC).

The policy environment in India during the early decades of independence reflected the state-dominant, anti-market ethos of the times. In this respect, India was not

\(\text{11 A full discussion of competition policy in India is beyond the scope of this paper. For a recent discussion with insights from key practitioners, see Subhashish Gupta et.al., “Competition Law and Policy: Discussion,” IIMB Management Review, Vol. 19 No 4, December 2007.} \)
alone. The entire capitalist world, and particularly Britain, also allowed the state to seize the “commanding heights” of the economy. In India, this meant a dominant role for the government in the task of bringing about economic development by means of public investment. Newly created public enterprises received the lion’s share of investment funds. The economy was largely closed to foreign trade and investment. The private sector’s role in the industrial sector was greatly circumscribed.

The general approach of regulatory bodies towards private industry during this period was to protect against monopolistic behaviour. The MRTPC was the key agency for regulating monopolies, and used licensing and controls over industry as the principal tools for ‘equitably’ allocating market share to private enterprises. Essentially the system created a segmented market structure, with a quota-like demarcation of domains for different categories of enterprises. There was hardly scope for market competition. Many analysts point to this system as the key driver of Indian industry’s poor productivity. Overall, the economy witnessed rising inefficiency in the use of capital resources, and inability to compete internationally. “Getting the government off the backs” of Indian entrepreneurs became a popular slogan among reform-minded Indian politicians. However, for most of the pre-reform era, Indian business was a willing partner in state-dominance over the Indian economy. The well-known “Bombay Plan” authored by a group of leading Indian business persons around the time of independence spelt out a vision of public investment not too dissimilar from what was actually adopted by the Nehru government. Indian business leaders of the time felt that the government should lead the way for development by investing in infrastructure, and other capital-intensive and risky industries that have strong forward and backward linkages. This is not surprising from our analytical perspective—both dominant ideology and the economic interests of nascent Indian entrepreneurs of the time were consistent with such an approach.

12 For an absorbing account see Daniel Yergin and Joseph Stanislaw, *Commanding Heights—The Battle between the Government and the Marketplace that is Remaking the Modern World*, 1998
13 J. Bhagwati, *India in Transition*, Oxford University Press, 1993, is a good example of the neoclassical critical perspective that helped shape reform thinking in India.
With economic reform, ‘bringing competition back in’ became a pillar of the new policy approach. However, in the earlier system, though the domestic firms’ operations were restricted, their condition was not altogether uncomfortable. Desai has aptly characterized the business-government relationship during the era of controls as a “cosy straitjacket.” The relations between large firms and the government were built around several mechanisms. The government controlled capital flows through its command over the financial system, including the large network of public sector banks. It also was the conduit for foreign capital flows. The government’s financial stake in large private enterprises was significant, and hence its potential clout over them was considerable. The Companies Act 1956 aimed at limiting the growth and scope of private enterprises. Meanwhile, the government built up large public sector enterprises to occupy some of the market spaces. While there may have been tensions and conflicts, Desai argues that over time the larger private enterprises developed a modus vivendi with the regulators during the control period. Those firms that were able to acquire licenses gained them from stable and predictable markets without the insecurities of open competition. The regulatory authorities in turn worked to reduce market uncertainty and tolerated the implicitly collusive arrangement among the market actors. Thus, in Desai’s words:

“Underneath this overt aggression was much covert cooperation; as often happens when powerful forces collide but cannot overcome each other, an informal cooperation grew up”

We should note, however, that such tacit cooperation between government controllers and business was by no means a feature unique to India. Aditya Bhattacharjea notes a similar pattern in the industrial history of Britain, France and Germany of the late nineteenth and early twentieth centuries. These countries tolerated restrictive practices and cartels tolerated in the early phase of their industrial experience.

---

15 Desai 2006, p. 222.
16 Ibid, p.224
17 Aditya Bhattacharjea, “Indian Competition Policy: An Assessment,” Economic and Political Weekly, 2003, 38 (34), 3561-3574. He points out that in Britain, the promotion of competition was done under a rather flexible approach. “Public Interest” was defined in a nuanced manner, and included many goals. Among these goals were efficiency, export promotion, building ‘national champions’, full employment, balanced distribution of industry, technical improvement and price control. The most important objective of British competition policy was to provide legitimacy to operation of the market. (See also a more recent paper by him, “India’s New Competition Law: A Comparative Assessment”, Journal of Competition Law & Economics 4(3), 609-38, 2008.)
One area in which the interests of many Indian industries coincided with government agencies was with respect to protection from international competition. India’s adoption of competition laws follows a trend set in motion by leading capitalist countries and multilateral institutions. It is part of the larger “Washington Consensus” agenda of establishing harmonized rules of the game for the global economy. India has been merely a follower seeking to conform. It was only when trade and investment liberalization were firmly established that the nature and objectives of competition policy altered. Other concerns, such as the welfare of consumers, subsequently became the justification for ensuring a competitive business environment. This in turn led to the necessity for a new role for the competition authority in conformity with the liberalization policy.

As the Indian economy became increasingly integrated with the world economy, some elements of Indian industry began to seek shelter from competition from cheap imports under the provisions of the MRTP Act.\textsuperscript{18} The MRTPC’s interpretation of the concepts of ‘predatory pricing’ and the ‘public interest’ tended to favour domestic industry. Thus, there was a conflict between the macro-economic and trade policy directives of the economic ministries, and the administrative actions of the MRTPC, that sought to extend protection to Indian industry. The MRTPC, being an independent commission, could not be reined in by ministerial directive. However, the courts provided an arena of contest. Some of these orders of the Commission came to be legally challenged. It is through the ensuing judicial process that the Supreme Court established the limits of administrative actions by the MRTPC.

The systemic, rule-setting function of the Supreme Court operates in two ways. First, the Courts settle the contests over the administrative domain of between different agencies. The possibility of legal challenge provides a mechanism for establishing the jurisdictional boundaries and responsibilities of different agencies. For example, the court demarcated the role of the regulator (in this matter the MRTPC) vis-à-vis the policy making role of the Government Ministry. Second, the Courts help determine the balance between contending claims in a manner consistent with current policy goals. As we note

\textsuperscript{18} Ibid.
below, the courts balance the interests of domestic producers, importing firms and the consumer in a manner that reflects the objectives of the new policy.

In two cases,\(^{19}\) the Supreme Court overturned the verdicts of the MRTPC, citing lack of MRTPC jurisdiction to restrict imports. In both these cases, Indian industry groups had argued that imports should be restricted. The Court made its decision, not on the merits of the complaints, but on the grounds that the MRTPC lacked the jurisdiction to decide on these matters, in particular, that the MRTPC could not restrict imports. These cases exemplify a pattern of defining the boundary of regulatory authorities. The Supreme Court’s decision in these cases also established a new meaning of “public interest.”

The Court’s interpretation of the term differed from the pre-existing concept in that it assigned higher weight to consumer interests, and thereby conformed more closely to the new import liberalization policies. In the earlier policy scenario, the interests of domestic producers were synonymous with the “public interest”. As Bhattacharjea points out, during the legal dispute the Chairman of the MRTPC had clearly identified the “public interest as that of the investors and workers in the Indian float glass industry. This interest should always prevail over consumer interest.”\(^{20}\) The Supreme Court’s observations on these cases reveal a very different interpretation of public interest and a stance against protectionism: “What seems to have happened here is that monopolistic Indian undertakings are now having to face competition.” Also, it comments that “the Indian importer obtaining goods at a low price does not contravene any law. He has obtained a good bargain.” (Float glass case). Again, “It is to be borne in mind that public interest does not mean only of the industry.”(Soda ash case).

These examples demonstrate changing attitudes to competition in the country during the first decade of the economic reform. The tension between the Supreme Court and the MRTPC is symptomatic of this transition in ideology and attitude towards global competition that accelerated after 1991. With the coming into effect of the Competition

---

19 See Aditya Bhattacharjea (2003), op. cit. for a detailed account. One case concerned a disputed order by MRTPC against the American Natural Soda Ash Corporation on a complaint by the Alkali Manufacturers of India. The other concerned a dispute between an importer of float glass from Indonesian companies (Haridas Exports) and the All India Float Glass Manufacturers’ Association.

20 Ibid, p. 4.
Act 2002, the CCI has become the new authority to consider such cases. It is necessary to understand the reasons for this basic shift in attitude of policy makers and the Supreme Court. Taking a longer perspective, official attitudes towards competition have been evolving gradually since the 1980s. Successive Industrial Policy Statements of the Government of India (in 1980 and again in 1991) have pointed to the need for introducing competition as a means for modernizing technology and achieving international competitiveness.

We have argued that the design of regulatory institutions is the result of parallel actions by the concerned Government Ministry and the Judiciary. The Ministry often attempts to make a case for the policy in question based on objective principles, thus attempting to resolve underlying conflicts of interest and redefine the ‘public interest’. Scientific and technical expertise is mobilized to illuminate the issues. The political process typically involves public debate, which generates the social and economic rationale for major policy changes. These ideas of public interest are in turn adopted by the courts during the legal processes, as they interpret the policy intent of laws. This pattern of development is evident in the arena of competition policy. The Government of India initiated a serious examination of competition policy after the Singapore Ministerial declaration of WTO. The Ministry of Commerce constituted an expert group in 1997 to study the relationship between international trade and competition policy. This expert group recommended the pursuit of international harmonization of competition principles and policy. The Finance Minister in his budget speech of 1999 declared that the Monopolies and Restrictive Trade Practices Act had “become obsolete in the light of international economic developments relating to competition laws.” Shortly thereafter, a High Level Committee on Competition Policy and Law was appointed, whose report was submitted in May 2000. This document spelt out the need for new legislation to replace

---


22 Bimal Jalan (edited), The Indian Economy: Problems and Prospects, Penguin-Viking, 1992, contains insightful essays on the economic policy context at the start of the economic reforms. The papers discuss the emerging macro-economic crisis, as well as the low productivity of the major sectors. Rural-urban income disparity had been increasing, and the incidence of poverty remained large. Four decades of planning appeared not to have delivered adequate results. Market competition seemed to present an attractive alternative.
the MRTP Act, based on different principles. These principles are efficiency in the allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. The central objective of competition policy, according to the report of the High Level Committee, should be the preservation and promotion of the competitive process.

These recommendations were embodied in the Competition Act 2002, which commits the CCI to (a) prohibit anti-competitive agreements; (b) prohibit abuse of dominant position by an enterprise; (c) regulate combinations exceeding threshold limits; and (d) promote competition advocacy, create awareness and support training about competition issues. Though it took about half a decade to be brought into effect, the Competition Act has now emerged to create a legal framework that is more suitable for a globally integrated market economy. However, it still has within it elements that are vague and open to subjective interpretation. A legal process is thus required to develop clarity and precision at the operational level. We can anticipate how and in what context the legal process will be needed. It is likely that these will lead to legal challenges and will need to be settled by the Court. In this way, the judicial process will bridge the gap between the new legislation and operating ground realities of business. Certain features of the Act give scope for debate and deliberation in the application of the Act. One is the principle of what Bhattacharjea terms “Rule of Reason”—which implies case by case determination of whether a particular combination or agreement is subject to action under the Act. Mere size or dominant position would not in themselves constitute violation of the Act. Hence, much would depend on how jurisprudence actually develops over time.

The language of the Competition Act has left open several ambiguities, which hold the potential of compromising its rule-based, objective orientation. These are likely to open the door to legal challenges. Certain criteria have been proposed for exempting enterprises from the charge of being ‘anti-competitive’. For example, the criterion of ‘contribution to economic development’ can be used to exempt a large dominant enterprise from being anti-competitive. Similarly, the formation of joint ventures that

---

23 *Infra.*, f.n. 29. The process was delayed due to differences over the composition of the Commission itself. A key issue has been whether the Chairman should have legal or administrative expertise.

24 Aditya Bhattacharjea (2003), “Indian Competition Policy: An Assessment,”, op.cit..
enhance *efficiency* would be excluded from the presumption of having an adverse effect on competition.\(^{25}\)

There are certain other loopholes that may well be open to exploitation by firms. In Section 4 of the Act (concerning abuse of dominant position), there is the notion that ‘unfair’ pricing (i.e., below cost) would be condoned if it is done ‘to meet the competition’. This provision could effectively legitimize predatory pricing.\(^{26}\)

The Competition Act of 2002 also increased the powers of the regulatory authority. The CCI (unlike the MRTPC) is empowered to issue temporary injunctions even against imports, if it deemed that these imports may contravene the Act’s sections on anti-competitive agreements, abuse of dominance or combinations.\(^{27}\)

These features have the potential to pave the way for domestic dominant firms to misuse these provisions for non-competitive ends. However, the 2007 amendment of the Competition Act removed the power of the CCI to restrain imports. This provides an example of the iterative process of reaching an “institutional equilibrium”.

Thus, India’s approach to competition has changed drastically during reform period. The major driver for this transformation is India’s integration into the global economy. The MRTP Commission managed the business environment by segmenting the domestic market and limiting competition from within and outside the country.\(^{28}\) In a resource scarce context, competition and excess capacity might have been deemed wasteful and destabilizing. Whatever might have been the image of the MRTP Commission as an anti big business agency, the reality was that there was tacit cooperation between them. After 1991, the basic configuration of competition changed. Domestic industry turned to the MRTP Commission as the trade barriers fell. But the new policy deprived the MRTP Commission of the main instruments of intervention, such as licensing and subsequently the Supreme Court weakened its ability to intervene and restrain imports. Later, the MRTP Act itself was replaced by the new Competition Act 2002, which signaled a new regime for governing the competitive conditions of business. The key elements of India’s competition policy are in conformity with patterns

\(^{25}\) Ibid.  
\(^{26}\) Ibid.  
\(^{27}\) Ibid  
\(^{28}\) Of course, the high tariff and non-tariff barriers were the main instruments of protection.
established elsewhere—particularly the OECD countries, and they have clearly been influenced by these trends. The objectives of competition policy have been spelt out in broader terms, which clearly go beyond the interests of particular segments of producers. Larger issues of efficiency, consumer welfare, and technological dynamism have been introduced. The legislation has been championed by the most powerful economic ministries. The Finance Ministry in particular has been the champion of market reforms. However, the high principles of competition policies must interface with ground realities. In this aspect, the Competition Act has left open a significant number of issues. These would need to be settled pragmatically over time. In this process, the role of the courts and their interpretation of the law would be crucial.

In this context, we observe that the institutional evolution of regulation does not proceed in linear fashion, flowing smoothly from policy process to a judicial rule-making process involving the public. There are iterative interactions between the policy and legal processes. This may happen in the legislative process itself, in which the Courts play a role. As will be seen in our discussion of the telecommunications sector, the process may also cycle back from the judicial to the policy deliberation. The Courts may be called upon to review a legislative act before it can be made operational, and cause legislative amendments.

The Competition Act, as noted above, was initially enacted in December 2002. It received Presidential assent in January 2003. However, the implementation of the Act by the newly created CCI was delayed by a legal challenge. The Supreme Court ultimately decided the case, and this also led to a series of amendments to the legislation in 2007, including the formation of the Competition Appellate Tribunal.29

---

Chart 2 provides a generalized depiction of the argument of this section concerning the institutionalization of policy change, and explains how a new codified
policy (such as new legislation governing regulation) emerges. The process of institutional change is initiated through the political process, which redefines the balance of interests, and re-orient the dominant ideology. Stakeholders seeking to change an existing policy framework engage in a lobbying process. Though primarily political, this process typically also includes challenges before the Courts. Often, a technical evaluation of the policy is entrusted to a specially constituted High-Level Expert Committee. Their recommendations serve to provide a social rationale. This ensures that the realignment of interests is not merely an exercise of power. This stage culminates in a legislation that creates the foundation for new government-business relations. However, legislation alone is not sufficient.

The process of institutional change is further deepened and made operational at the grassroots level by means of a judicial process (as shown in Chart 1). Here the courts play a key rule-setting role that demarcates jurisdictions and responsibilities of policy making and regulatory agencies.

In Chart 3, we illustrate the way in which the legal progress shapes the regulatory structure. Court challenges to regulatory rulings arise because of conflict of interests among economic stakeholders. The Judiciary provides a legal verdict based on its interpretation of the policy intent of the government and the public interest. Rather than ruling on the economic or technical merits of the disputes, these decisions often focus on the matters of jurisdiction or propriety of processes followed. Consequently, the rulings clarify the boundaries of policy making and regulatory authority, validate the balance of contending interests in line with the new notion of the public interest, and enable the regulator to set new rules of the game for market participants in alignment with new policy.
Chart 3: How the Legal Process Shaped Regulatory Domains

Regulatory Institution

Regulatory Ruling

Conflict of Interests among Stakeholders

Challenge in Court of Law

“Policy Intent” of the Government

The Judiciary

Judicial Interpretation of the Public Interest

Court’s Ruling

Redefine Role & Jurisdiction of Regulatory Institution

Policy maker – Regulator Role Demarcation

Operationalize Policy for Regulator

Validate the Balance of Contending Interests
What are the precise means and instruments through which the Indian judicial process works towards this institutional goal of determining the rules of the game? Our discussion in the following section explains how the judicial process works to settle contests and balance conflicting claims that arise in the course of regulatory evolution.

**IV. AN INTRODUCTION TO THE JUDICIAL PROCESS IN INDIA**

This part shall provide an understanding of the working of the Judiciary and the process of judicial review in India and discuss the basic features of India’s judicial system and the remedies that it can provide. Once acquainted with the judicial process, it would be possible to appreciate the evolution and powers of the independent regulatory institutions as established by law.

The Indian Constitution has charged the judiciary with the primary task of promoting the rule of law. Limiting the power of the political executive; reviewing the rationale of the law made by the legislature; declaring remedies to those who have taken recourse to judicial process – are some of the several facets that judicial enforcement of ‘rule of law’ entails. Rule of law requires the supremacy of law as opposed to the supremacy of the government or any political party.30

Through fundamental charters nations guarantee the rights of individuals, regulate relations between individuals and the state, distribute power among the branches of government, and establish an integrated judicial system to protect and guarantee the legitimacy of the Constitution’s provisions and values. Within this framework, adjudication plays a role of utmost importance as the means for safeguarding, through due process, the rule of law and the supremacy of the Constitution.

One of the most unique features of the Constitution of India is that it provides for a fundamental right to approach the Supreme Court for Constitutional remedies against

---

30 To the noted English jurist A. V. Dicey, rule of law was “in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.” A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 120 (Indianapolis: Liberty Fund, 1982).
the State.\textsuperscript{31} Given the constitutional mandate to enable “complete justice”\textsuperscript{32}, this fundamental right to access judicial remedies assumes a lot of significance in the form of opportunities to the Supreme Court to constructively respond to the promise of access to justice. Furthermore, every High Court is vested with the plenary power of writ jurisdiction.\textsuperscript{33} This power of the High Courts is wider than that of the Supreme Court, since the High Courts are empowered to exercise this jurisdiction not only for the guarantee of a fundamental right, but also for the enforcement of any other statutory right. Considering the extent of powers vested to dispense with constitutional remedies, the Supreme Court and the High Courts are referred to as the “Constitutional Courts”.

\textbf{A. \textit{Emerging Role of Judicial Review}}

The primary objective of any legal system ought to be the guaranteed enforcement of rights as vested by the Constitution and the laws made thereof. The maxim “\textit{ubi jus, ibi remedium}” “where there is a right; there is a remedy” captures the purpose of a legal system. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. It becomes essential to first prove that a right exists; then that the particular right has been violated; and therefore present justifiable claims that a remedy is warranted. Practically, what this process means is that a petitioner or the claimant is required to prove \textit{locus standi} (refers to the standing of the petitioner being in significant connection with the cause being disputed) to be eligible for the appropriate legal remedies.

A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test that is applied in such cases is to see whether it really satisfies the test of reasonableness. Various relevant factors are comparatively weighed and brought to bear upon a complex process of evaluating the content of reasonableness in any given matter. The process tends to be more “discretionary” in matters that manifest a direct conflict between private rights and public interest. From what one could gather from the judicial systems worldwide, one rule of the thumb is that greater the infraction of the rights of an

\begin{flushright}
\textsuperscript{31} Article 32 of the Constitution.
\textsuperscript{32} Article 142 of the Constitution.
\textsuperscript{33} Article 226 of the Constitution.
\end{flushright}
individual, the more substantial must be the countervailing public interest warranting it. The Courts, while exercising supervisory review, are required to quash such executive decisions that are “so unreasonable that no reasonable authority could ever have come to it.”

For instance, the Supreme Court of India has reasoned the denial of renewal of maritime licenses by the government on the ground that “[w]hile the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule, is wide enough, what is imperative and implicit in terms of Article 14 (of the Constitution) is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria.” It was made clear that all actions are amenable, in the panorama of judicial review, only to the extent that the State must have acted validly for a discernible reason, and not whimsically for any “ulterior purpose.” In a dispute regarding nationalization and the compensation payable thereof, the Supreme Court opined that the – “economic cost of social and economic reforms is amongst the most vexed problems of social and economic change.”

In response to the changing socio-economic conditions, the Supreme Court, creatively introduced the concept of “Public Interest Litigation” (PIL) through a set of decisions rendered in the late seventies and early eighties [most notably in the matter of S.P. Gupta v. Union of India (1982)] In these cases, because of the peculiar facts and the prevalent social and economic circumstances, the Court reasoned that the petitioner approaching the Constitutional Courts may not be in a position to meet the burdensome requirements of the judicial procedure and process of remedies. To enable the enforcement of fundamental rights the Court thus gradually diluted the principle of locus standi, on broadly the following reasons:

- It is the primary obligation and duty of the Court to protect, promote and enforce fundamental rights,
- In the larger interest of the administration of justice,

---

35 Union of India v. International Trading Co. – AIR 2003 SC 3983
37 Courts and jurists world-wide have appreciated this innovative measure undertaken by the Indian Supreme Court and much has been written about the benefits of PIL, though in recent times, the subject of much debate within India has been the abuse of this jurisdiction by vested interests.
- For the purpose of enforcing public duty and redressing public injury,
- Protecting public interest in the form of social and collective rights.

The Apex Court implicitly has accepted the inevitable consequences of economic reforms. Having agreed that the development of economic choices forms an indisputable part of achieving social welfare, the logical option for the Supreme Court would be to prescribe the Constitutional parameters within which such economic policy reforms could be undertaken in order to protect public interest.

B. Interpreting the domain of Public Interest

While the PIL has certainly contributed to the procedural aspect of securing public interest, the Constitutional Courts in India continue to struggle with the substantive attributes of interpreting public interest. In a matter involving the Reserve Bank of India (RBI) the Supreme Court rejected the challenge against certain directions issued by the RBI, which provided for manner of investment of deposits by residuary non-banking companies and manner of its disclosure in the books of account of companies. In pursuance of its reasoning, the Supreme Court went on to state that – “[t]he directions were designed to ensure that the interests of the Subscribers/depositors is secured at all times” and that “there is a reasonable nexus between the regulation and the public purpose, namely, security to the deposit money and the right to replace repayment without any impediment, which undoubtedly, is in the public interest.” The impugned directive was thus held to be constitutionally permissible and within the power of the RBI with the purpose of having to provide stable and identifiable method of operations.

This decision reflects the intent of the Supreme Court in relying upon and reinforcing the powers of a Regulatory authority towards achieving “public purpose.” In certain instances, the Court has even gone a step further and normatively laid down that the State and its instrumentalities must adhere to certain Constitutional principles in undertaking transactions that have a “public element.” In a matter relating to the Life

---

38 This part of the paper relies on the observations made in: A.B. Suraj, “Public Interest in Globalization: Role of the Judiciary” a paper presented at the International Seminar on PUBLIC INTEREST LITIGATION AND GLOBALIZATION, organized by the Institute of Human Rights, Colombo and sponsored by the Asia Foundation, at Colombo, Sri Lanka, 10-12 March, 2006.

Insurance Corporation, the Supreme Court was faced with the question as to whether a term-based insurance policy could be restricted to a class of persons, like Government employees, and thereby denying its benefits to persons not belonging to that category. Declaring that such exclusion would be unconstitutional, the Supreme Court reasoned that although an insurer was free to evolve a policy based on business principles and conditions before floating the policy to the general public, “the insurance being a social security measure, it should be consistent with the Constitutional animation and conscience of socio-economic justice as enumerated in the Constitution.” Continuing further, it was stated that “every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest.”

Understandably, the Supreme Court emphasizes on “public interest” with a twin objective – firstly to put a check on the power of the political executive or the Government of the day, and secondly to make the Government bear the responsibility of securing public interest through the implementation of its policies. However, with the onset of economic reforms and the allied imposition of policy mandates upon the government, the Judiciary too has shown a perceptible change in its attitude towards the Constitutional imperatives of such economic policies.

The recent trend of the judgments has been towards a “hands-off” approach on the aspect of decisions relating to economic policies and regulatory mechanisms. The reason given is that there ought to be respect to the independence of the government or the concerned regulatory body to decide as to what is a suitable economic policy.

In an intensely contested matter, wherein the Indo-Mauritius Double Taxation Avoidance Treaty was examined for its Constitutionality, the Supreme Court has clearly stated that the power to enter into a Treaty is an “inherent part of the Sovereign power of the State” and that the “Court cannot examine the merits or the demerits of a policy.” Furthermore, the Supreme Court has ruled that an “act which is otherwise valid in law cannot be treated as non-est merely on the ground that the underlying motive could result in economic detriment or prejudice to national interest.” Stating that such Treaties

---

40 LIC v. Consumer Education and Research Centre – (1995) 5 SCC 482  
and “forum shopping” policies are essential to provide incentives for attracting Foreign Investments, the Supreme Court has reasoned that “(T)he loss of tax revenues could be insignificant compared to the other non-tax benefits to the economy.”

In the much debated decision of the Supreme Court in the matter of disinvestment in Bharat Aluminium Company (BALCO), it was held that the Government was like any other shareholder and could dispose of its holding at will. This decision further established the autonomy of the political executive to chart the course of the economy.

To aid a better understanding of judicial interpretation of public interest in the regulatory domain, we could refer to a matter before the Supreme Court, wherein the role of the RBI and its responsibility as the chief banking Regulatory Authority was questioned. A Bank that had applied for a license to the RBI in 1987 continued with its activities, despite there being no communication from the RBI regarding the status of its application for the grant of a license. After a gap of nine years, in 1996 the RBI pointed out certain operational deficiencies in the working of the Bank and it was called upon to cure those deficiencies before a license could be issued. By 1998 it was found that the Bank had incurred a huge amount of net losses. In 1999, the Government of India issued an Order notifying a Scheme of Amalgamation and by this scheme the Bank was amalgamated with a profit making Bank and under the scheme all the depositors were to be paid on a pro-rata basis and were required to surrender their fixed deposit receipts.

The depositors petitioned the Supreme Court challenging the Amalgamation Scheme. The Petitioners claimed that the RBI erred in not warning the public about the financial weakness of the Bank. It was contended that the whole purpose of a license was to build confidence in the eyes of the public, and by allowing the Bank to continue its activities, the RBI had implicitly assured the public of the Bank’s credit-worthiness.

Having considered the comparative and competing judgments from different jurisdictions, the Supreme Court held that the principles of negligence and consequent liability could not be extended to the RBI. While agreeing that public interest ought to be the chief objective of the RBI in its functioning as a statutory body, the Supreme Court reasoned that the RBI shall also have to bear the responsibility to balance general public

42 BALCO Employees Union v. Union of India – (2002) 2 SCC 333
interest with the interests and need of Banks and financial institutions. Thus reiterating that competing interests have to be weighed and balanced and that there cannot be any easy decisions as to which of such interests shall prevail.

The trend of the decisions is clear in its intent – the interests of the general public are not sacrosanct when in direct competition with the commercial interests of the banks and financial institutions. Thus, while the regulatory institutions are held accountable to provide primordial attention to consumer welfare and the interests of general public, they also bear the duty to encourage the service providers, and address their concerns.

V. REGULATORY EVOLUTION IN THE TELECOMMUNICATIONS INDUSTRY

Our discussion thus far has presented a macro-perspective of the role of the legal process in the redesign of government-business relations after 1991. We turn now to an examination of the regulatory institutional evolution process in the case of a specific industry, telecommunications. The transformation of government-business relations in the telecommunications industry demonstrates how the courts and the legal processes interface with policy formulation, and shape the business environment during market reform.

Following the analytical framework outlined in Section II, we note the following key actors in this industry, and analyze some aspects of their strategic posture:

i. The political executive of the Government of India
ii. The Department of Telecommunications (DoT) and its parent Ministry of Communications and Information Technology (MoCIT).44
iii. Private firms and service providers participating in the sector.
iv. The regulatory institution the Telecom Regulatory Authority of India (TRAI) and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).
v. The Judiciary (and in particular the Supreme Court).

---

44 Before December 2001, the DoT was a part of the Ministry of Communications. Since then, the Ministry of Communications and the Ministry of Information were merged, to form the new parent Ministry.
As mentioned earlier, the telecommunications industry has been traditionally within the public sector. But as part of the economic reform process, the structure of the industry has altered significantly. The involvement of the private sector—both domestic as well as foreign capital, has been notable. It is a network-based activity. The network forms the backbone through which firms can participate. Technological dynamism in this industry has been remarkable. The role of the Ministry of Communications and Information Technology remains very central, but it has changed radically with private sector participation. It now has to share the telecommunications services market with several private companies. The Ministry has been restructured. Key divisions dealing with service provision have been corporatized. An independent regulatory structure has been created. There are, however, important development and policy goals that continue to engage the government. The emergence of market competition in a sector that has been traditionally not only been a “natural monopoly,” but also fully within the public sector raises new issues for regulation because of the need to create a level playing field for both public and private enterprises operating in the same industry. The role of a regulator is essential, but now the task is not that of “hands-off” regulation of private firms. Instead, it is far more complex. The regulator, created by government, must now regulate a sector where the government-owned incumbent is the dominant market player. Both regulatory and appellate bodies have been created to set rules and adjudicate disputes. Finally, because of the contentious nature of the interaction between the above-mentioned actors, the Supreme Court has been playing a key role. In the absence of a coherent roadmap for this transition, there are conflicts of interest between the public sector service provider and the new private sector entrants. These have resulted in disputes. Decisions of the regulator have been challenged in the courts. Thus the process of institutional evolution of the market and its regulation has been marked by conflict, negotiation and bargaining. The judiciary has stabilized the institutional evolutionary process.


46 For an account of the issues surrounding competition relating to this sector, see Anjan Dasgupta, “Competition Policy in Telecommunications—the Case of India,” Faculty of Law, University of Toronto, 2005, available at http://ssrn.com/abstract=651681
A. New Telecom Policy and the Strategic Response of the MoCIT and the DoT

Since the 1991 economic reforms began, the MoCIT has been under pressure to reorganize, and to permit entry of the private sector.\textsuperscript{47} The quality of service before reform was poor, and there was a long waiting list for telephone connections in the early 1990s. The main driver for liberalization in the telecom sector has been the top political leadership of the Government. The process actually began during the 1980s, with Prime Minister Rajiv Gandhi’s support. Pressure has come also from international sources, as well as domestic private industry eager to enter the market.\textsuperscript{48} In addition, the World Bank has supported the government initiatives for private participation.\textsuperscript{49} Private participation in this sector has come in stages, as a result of pressure and bargaining. However, the Ministry, confronted with a diminution of its role, has been an unwilling partner in this project. Hence there has been a continual tension between the MoCIT and the reformist elements of the Government.

The shift to new market-oriented policy has not been smooth because of its faulty design that created inadequate incentives for private service providers. As discussed below, the initial Telecom Policy 1994 (NTP 1994) had to be substantially modified within a few years. Because of strong private sector resistance to the very high license fees imposed by the DOT, the government replaced it with NTP 1999 which altered the incentive structure by introducing a revenue-sharing mechanism for license fees. The intention of the Government to liberalize telecom services was evident from 1992 onwards, when private participation was permitted in a few selected value-added services. The value-added services included electronic and voice mail, data, audio and video-text messages, videoconferencing, radio paging and mobile telephones. This signaled the entry of the private sector into cellular and paging services. Subsequently, government opened up basic landline telephone services to the private sector.\textsuperscript{50} For

\textsuperscript{47} Desai, 2006, Chapters 1 and 2 provide detailed information. \\
\textsuperscript{48} Desai, 2006, Chapter 3. \\
\textsuperscript{49} Ibid., p. 71 \\
\textsuperscript{50} A competitive bidding process was held. Following this, licenses were awarded to six basic service operators, eight cellular operators in the four metro cities, and fourteen cellular operators in 18 state circles. See ICRA Industry Watch Series (Telecommunications Industry), Chapter 3.
reasons explained below, the NTP 1994 came under criticism. Private sector participants found the operating conditions of NTP 1994 difficult, and their interest in entering the sector eroded. The Government’s targets of telecom growth thus remained unfulfilled. In short, market reforms were in trouble. The Government found it necessary to review the policy. The NTP 1999 modified the terms of the licenses, as well as key elements of the regulatory framework that were embodied in NTP 1994.\footnote{Desai, 2006}

The Ministry and the DoT embody several features that help explain their approach to telecommunications policy and regulation.\footnote{For details, see Desai, 2006. See also Anjan Dasgupta, op.cit.} First, it is a large organization with nearly half million employees. Second, the unions are influential. Third, the management cadres include an engineering civil service. In general, the Ministry has been “allergic” to the idea of competition from the private sector. They have held that the playing field is not level, and is in fact tilted against them. Finally, apart from the burden of having to function with inadequate operational flexibility compared with private companies, they also have to bear the brunt of the government’s public policy objectives. These involve engaging in unprofitable segments of the business—such as rural telephony.

The Ministry originally resisted entry of private industry in the core services that public monopoly providers supplied. These were the basic “wire-line telephone services.”\footnote{Ibid, Desai, 2006.} However, it permitted private enterprises to enter “value-added services.” The MoCIT took a series of steps outlined below to retain its dominant position as a telecom service provider.

The Department of Telecommunications (DoT) was the licensing authority that issued to private entrants. The terms and conditions of the license that the DoT imposed on private firms seeking entry into both cellular and wire-line services were very tough. It has been claimed that these were designed to have the “effect of ensuring their unviability.”\footnote{Ibid, p. 47 gives information about the conditions of these licenses.} The fees charged for the licenses were so high that the phone operators were compelled to charge very high rates per call. Further, the interconnection terms for the use of the telephone networks were very high, and were imposed by an administrative
order. A system of “receiving party pays” made it uneconomical for wire-line customers to receive calls from cellular phones. With regard to wire-line operators, the DoT’s initial efforts to conduct bidding for award of contract to provide wire-line service for the 21 “circles” was badly designed. The process failed. In short, the DoT, using the advantages of incumbency, made it very difficult for private operators to survive in the telecom market.

There had been an excess demand in the telecom market under the old regime of public sector monopoly. When the entry of private operators was about to receive permission, the DoT adopted an aggressive and competitive posture in confronting potential competition to its core wire-line business from mobile operators. They sharply increased the supply of new phone connections to pre-empt the market from the new private entrants. This action certainly was an instance of strategic use of their existing dominant position.

The Ministry also faced the prospect of major restructuring since the mid-1980s. The operating segments were separated from the policy making entities of the Ministry. The goal was to make them face the discipline of the market place. However, only two activities were separated and converted into corporate entities. The MTNL (Mahanagar Telephone Nigam Ltd) was created to manage the telecom businesses of the two largest metro-cities—Mumbai and Delhi. Also, VSNL (Videsh Sanchar Nigam Limited) was created to run international trunk services. However, the corporatization exercise did not succeed in freeing MTNL and VSNL from the de-facto control of the DoT. In 2000, the Government of India created the BSNL (Bharat Sanchar Nigam Limited) from the DoT. A corporate entity wholly owned by the GoI, the BSNL’s role is to manage the remaining telephone services. However, the BSNL too remains effectively under the control of the DoT.

To sum up, the DoT and the MoCIT remained the dominant organization in the provision of telecom services, despite efforts to restructure them, and despite permitting private sector participation in basic and cellular services.

55 MTNL and VSNL were staffed by retired DoT employees or employees on deputation from DoT. Desai, op. cit., claims that the DoT “siphoned off” three-quarters of MTNL’s borrowings, and “hive(d) off” most VSNL’s surplus.
B. Regulator versus Incumbent—the Conflict between the TRAI and DoT

Under such conditions of de-facto opposition by the incumbent public sector provider to private entry despite the government policy allowing such entry, it is hardly surprising that there were pressures to set up a regulatory framework for a sector that could function independently of the government departments. It took several years, during which the DoT carried out its licensing activities, before the Telecom Regulatory Authority of India (TRAI) was established through a law and started functioning in 1997. The delineation of its powers reflected the balance of contending influences of the Government’s policy directives, the public provider’s interests and the interests of private sector telecommunications firms. As explained below, the process of implementation of the new regulatory framework has not been smooth—indicating the need for iterative modifications to the institutional structure. There have been several jurisdictional disputes with the DoT arising from inconsistencies between the TRAI Act and earlier procedures that established the powers of the DoT. Several key functions were kept outside the purview of the TRAI, including grant and renewal of licenses. The latter continues to remain as the DoT’s responsibility. With regard to controlling of monopolies, this continued to be the domain of the competition authorities (earlier the MRTPC, and now with the CCI) and the TRAI is not empowered to restrain anti-competitive behaviour, by the DoT/BSNL or by the private service providers. Finally, the Ministry and the DoT have the powers of policy-making for the telecommunication sector.

The TRAI, in order to carry out its functions as an independent regulator, requires autonomy and authority. This implies that it must have the power to enforce its decisions, and also to be protected from external influences and interferences. On both these counts, the actual position of the TRAI is weak vis-à-vis the Government, partly because of operational requirements, and in part because of some provisions of the law through which the TRAI was established. First, the TRAI must depend on the government and its

---

56 The TRAI, created by an Act of Parliament in 1997, is an autonomous body, independent of the MoCIT and the DoT. The Act empowered the TRAI to facilitate interconnection and technical interconnectivity between operators, regulation of revenue sharing, ensuring compliance with licence conditions, facilitation of competition, and settling disputes between service providers. It is also responsible for fixing telecommunication tariffs. A retired Judge—Satwinder Singh Sodhi was the first head of the TRAI.

57 These disputes concerned powers relating to dispute resolution, regulation of interconnection, setting the terms for interconnection and licensing procedures.
machinery for implementation its orders operational and implementing them. The TRAI’s effectiveness is eroded if it cannot command cooperation from the government. Moreover, the law has actually empowered the Government to provide periodic ‘policy instructions’ and guidelines, which shall mandatorily direct the approach of regulation undertaken by the particular authority. The TRAI Act does provide for a semblance of a safeguard in the form of a compulsory consultation with the TRAI by the Government before any such binding policy instruction is issued. Furthermore, the Government may issue instructions based on broad grounds such as, sovereignty and integrity; public order; decency and morality and other such grounds of public interest. The nature of governmental interference is certainly enlarged and facilitated by such clauses.

The TRAI almost immediately after its creation ran into conflict with the DoT, when the DoT challenged some of its early decisions that sought to modify the terms of payment that the DoT had imposed on private providers. In the early rounds, the government incumbents won the battles. The process illustrates how the courts shaped the regulatory system in the telecom sector. However, there was a more complex iterative process that occurred, involving both the policy process as well as the legal process. The legal challenges exposed the political and economic weaknesses of the earlier policy. Consequently, the policy itself was substantially revised.

In this initial phase, some crucial decisions of the Delhi High Court severely damaged the TRAI’s definition of its role as an independent regulator, which were on the basis of the un-amended laws that existed at the time. This led to the delineation of the TRAI’s powers reflecting the balance of contending influences as they evolve over time.

The TRAI had taken up the issue of tariff structure, and attempted to rebalance the tariff structure in order to help the struggling private operators. In particular, it sought to reduce the cross-subsidy that DoT gave to certain customers, and also to share more revenue with the mobile operators. Similarly, in a matter involving the MTNL (the Mahanagar Telephone Nigam Limited), the TRAI ruled against its plans to start a

58 Section 25 of the TRAI Act, 1997
59 Ibid.
60 Ibid.
61 Open defiance of the regulator by government incumbents is not confined to the Telecom sector. It is part of a more general phenomenon. Rao and Gupta, op.cit., point to several instances of defiance within the Indian power sector.
CDMA-based cellular phone service. The TRAI’s rulings were challenged by the DoT and the MTNL, and the matter went to the Delhi High Court.

The main contention against the TRAI was that it had very limited functions and powers and that the final decision in all matters of telecom policy thus continued to remain with the Central Government (i.e., the DoT) and the TRAI could not give directions to the DoT, which was the statutory licensing authority. The Delhi High Court upheld this contention against the TRAI by making a distinction between the recommendatory and the non-recommendatory functions or the regulatory powers of the TRAI, and by holding that the regulatory powers are to be exercised only to govern the service providers and not the government as a licensing authority. On the other hand, it was stated that the advisory powers were to be addressed to the government and as intended by the law they would not have any binding force. Therefore, relying on the well accepted legal principle that ‘what cannot be done directly, cannot be done indirectly’, the Court found that the TRAI cannot either directly or indirectly vary the terms and conditions, which are laid down by the Government in a license to a service provider. From a bare reading of the provisions of the TRAI Act, the Court came to the conclusion that the Central Government had retained the overall power, including the power to issue directions to the TRAI. This led to the conclusion that the law did not intend the TRAI to impose its directions on the Central Government.

An interesting form of reasoning by the Court, discussed in greater detail in Section V (E) of this paper, was that one single authority cannot have both legislative as well as adjudicative functions. Therefore, if the TRAI is to bind the government with its directions, and also have the power to adjudicate over disputes pertaining to the service providers and/or consumers, then it would amount to saying that the TRAI would adjudicate on disputes arising from or as a result of its own regulations/directions. The High Court observed that this could not be held as the intention of the law.

The position of the TRAI as a regulator was rendered very precarious. The significance of an institutional regulator was lost in the mire of the exercise of the writ

---

62 MTNL sought to start a CDMA based cellular phone service, which was more economical on the use of spectrum. The complaint to the TRAI was by the Cellular Operators’ association of India (COAI), who had been restricted by the own licenses to use only GSM technology.

63 Mahanagar Telephone Nigam Ltd. v. The TRAI – AIR 2000 Delhi 208
jurisdiction and the power of judicial review. This set the stage for the introduction of the TDSAT as the appellate authority and the resulting change in the judicial approach towards regulatory authorities and tribunals.

Chart 4: Decision-Making in the Regulatory Framework—Phase 1
C. The Private Sector’s Strategy vis-à-vis the DoT

While the DoT did whatever it could to handicap the private sector entrants through high license fees and other terms of license, the latter had its own strategies to fight the incumbent. They used their new found clout with the top echelons of the political executive. As Desai observes, “none of the private operators paid their license fees”64(!). Instead, they went on the offensive and complained about the DoT and its delays. The DoT threatened to cancel licenses and invoke the bank guarantees that they had received while granting the licenses. This action backfired on the DoT, because the private sector entrants comprised a powerful combination of forces. They included some very large Indian business groups who had partnered with foreign telephone operators and financiers. They had also been financed by major Indian financial institutions. As the conflict brewed, the matter began to attract the attention of the highest levels of government. After a series of changes of the Minister in charge of telecommunications, the Prime Minister himself temporarily took charge of the Ministry. The business interests lobbied at the highest level. At that time, a high inter-ministerial group—the Group on Telecommunications was constituted with the deputy chairman of the Planning Commission at the helm. In other words, the decision-making mechanism reached the highest political level, and went beyond the control of any single Minister, and of course, beyond the control of the bureaucracy of the DoT.

Out of this process emerged the New Telecom Policy (NTP) 1999. The document reflected the set of compromises that were worked out between the contending parties. It contained ideas for bailing out the private sector operators from their license obligations, separation of the government’s policy making entity from that in charge of the telecommunications business. Last, but not least, it contained proposals for the resurrection of the regulator.65

---

64 Desai, p. 54
The decision making process in the newly created Telecom regulatory structure in relation to the Judiciary may be understood in two phases. Phase 1 refers to the period before a separate appellate body has been created, and Phase 2 the period subsequently. It has undergone a significant change with the establishment of an Appellate Authority. Chart 4 explains the nature of the process as analyzed above, prior to the existence of a telecom appellate body. The chart shows that in Phase 1, the regulatory rulings, if disputed by stakeholders, would be referred directly to the High Court or the Supreme Court. If the High Court/Supreme Court’s ruling validated the regulator, then this would strengthen the position of the regulator and stabilize the regulatory structure. If, on the other hand, the decision went against the regulator, this could destabilize the regulatory structure. This, as described above, was what actually transpired in the MTNL case discussed in the previous section of the paper. The position of TRAI was weakened substantially by the strict interpretation of the decisions by the Delhi High Court. This led to the restarting of the policy process, and eventually led to the NTP 1999.

During this time, the government decided to establish a separate appellate body, through an amendment to the TRAI Act itself, to decide on matters emanating from the TRAI rulings—the TDSAT (Telecom Disputes Settlement and Appellate Tribunal). The appeals from the TDSAT would only be heard by the Supreme Court, thereby virtually removing the jurisdiction of the High Courts. This move brought the Supreme Court squarely into the institutional development of the Telecom sector. As a result, the regulatory apparatus was suitably fortified from the need for repeated recourse to the routine and writ-based judicial proceedings. This, as argued in part E of this Section, has given the regulatory institutions a greater measure of independence.

D. Towards an Oligopolistic Market Structure

Competition Policy and Independent Regulation are often justified on the grounds of ensuring fairness to market participants—regardless of their competitive clout. This may well be the case in contexts where the regulatory authorities are able to operate freely and can expect their rulings to be respected. But in the ‘messy’ conditions such as the one that we have observed in India, we see that the process is decided by contestation
based on power—either administrative, or market-based or financial power or political power. In these circumstances, we should expect to find that the emerging market structure will reflect the survival capacity of the powerful. In other words, the market structure would end up being oligopolistic. A few firms would remain, as others quit the field. This in fact seems to have happened in India.66

From the outset of the bidding process through which private sector entities were allocated licenses, the evaluation process gave weight to the financial clout of the bidders. Hence the entities that emerged with the highest number of licenses, particularly at the end of the decade of the 1990s, were large Indian business houses. Throughout the 1990s, many of the firms that had won the bids for licenses in the early rounds, actually failed—partly due to the onerous conditions of license—fees, interconnection charges and spectrum charges. The New Telecom Policy created some openings for the smaller firms to survive—license conditions were improved, and the fees to be paid to DoT were made proportional to the revenue earned. However, the new policy also made it possible for all private operators to enter more freely in the cellular telephone market. They no longer had to use the official incumbents’ network. This unleashed tremendous price competition in the cellular service market. Only the larger firms (including Bharti, Reliance, Idea, Tatas, Escorts and Hutchinson) with network economies could survive. The industry witnessed a bout of concentration, as the larger houses acquired most of the licenses from exiting firms.67

E. Emergence of Judicial process within the Regulatory structure

One of the changes in the legal system that could be witnessed since the onset of liberalization in India is that of the emergence of several laws towards regulating the sphere of commercial activities. These laws have sought to replace the traditional form of discretionary, public-interest based and inherently political policy-making processes with a more certain and rule-based procedure. The new look of the laws could be attributed to the need for better recognition of rights and for sharper enforcement mechanisms.

66 Ibid, Chapter 3 provides details of the companies that survived.
67 Ibid, Chapter 3 provides details on the firms and their license holdings.
While the Telecom Regulatory Authority of India Act, 1997 led to the establishment of the Telecom Regulatory Authority of India (TRAI) as the sector-specific regulator, the National Telecom Policy of 1999 presented the policy vision of the government regarding the development of the telecom sector. It was in this legal and policy background that the Cellular Mobile service providers operated, joining the Basic Telecom operators (who are also referred to as Fixed Service providers), under the licenses issued by the DoT.

In order to understand the importance of distinguishing the roles of an independent regulator and the required form of judicial review, it would be relevant to discuss in detail the circumstances and content of a ruling of the Supreme Court in the matter relating to the introduction of Wireless in Local Loop (WLL) Limited Mobility technology into the telecom sector in India.

With development in the technology came the demand for introducing new forms of services with credible claims of reduced costs to the consumers. Soon after the New Telecom Policy came into effect, the WLL technology was mooted as a cost-effective addition to the bouquet of telecom services. Although the TRAI initially was not in favour of allowing WLL services, subsequently it responded positively to the government when asked for its expert recommendations on the issue. The TRAI conducted elaborate consultations with all stakeholders, including on the issue of possible impact on the Cellular Service providers and the expected conditions to ensure a level playing field, and cited consumer interest as the guiding principle of fair and open competition.

It is relevant to note here that at the behest of the then Prime Minister there was an Expert Group on Telecom and IT Convergence formed in April 2001 and the issue of introducing WLL technology was also referred to this elite Group, consisting of Cabinet Ministers, Planning Commission member, leading jurists and eminent bureaucrats. Meanwhile, the Cellular Mobile service providers were agitated by this turn of events and the Cellular Operators Association of India promptly challenged this move on the part of the government by invoking the original jurisdiction of the TDSAT.

As mentioned earlier, the TRAI reportedly had rejected an application made by Mahanagar Telephone Nigam Limited (MTNL) in 1999.
The TDSAT, which had deferred its decision on the matter awaiting the Expert Group report in this regard, also decided to uphold the TRAI recommendations and the Expert Group findings. It needs to be noted that the TDSAT made it clear that this decision was a policy prerogative of the government and that no other authority could interfere in this matter. Referring to the traditional restraint employed by the Supreme Court in reviewing economic policies of the government, the TDSAT claimed that it cannot enjoy any wider powers than that of the Apex Court. The TDSAT found that the concessions provided to Cellular Operators for a level playing field – reduction in the license fees and an entry provided into restricted sectors like that of Public Calling booths – were adequately compensatory for the introduction of WLL services. Upholding the guiding rationale as recognized by the TRAI and the Expert Group, the TDSAT noted the significance of multiple benefits to the consumers by the introduction of WLL services. Increase in the rural tele-density and the reduction of costs were cited as major benefits of the advance in technology.

Not being deterred by this adverse order of the TDSAT, the Cellular Operators decided to appeal against this decision to the Supreme Court. While admitting the appeal and restoring the matter for a fresh consideration by the TDSAT, the Supreme Court sought to clearly define the role and responsibilities of a statutory and independent sector-specific appellate tribunal. There a few other judgments of the Supreme Court as well as of the Delhi High Court (since the TRAI and the TDSAT are situated in Delhi) that have examined the powers of the regulatory bodies and the appellate tribunals.

One must appreciate the challenge that regulatory bodies pose to the doctrine of separation of powers. Is the act of regulation inherently adjudicatory in nature? Or is it more in the form of policy-making? Grievance redressal and dispute resolution is one of the most important tasks of a regulator across any sector or jurisdiction. Creating standards and norms also requires enforcement. However, as opposed to the regular system of administration of justice that the courts are involved in, the regulatory authorities are more concerned with the objectives that need to be achieved in the process of dispute resolution. To enable wide powers of demanding and collecting evidence, as

---

69 Cellular Operators Association of India v. Union of India – [Supreme Court, Civil Appeal Nos. 3092, 3123, 3214 & 3300 of 2002]
well as to ensure due respect to their orders, regulatory authorities are given the status of a Civil Court for the purposes of its procedures and with regard to the efficacy of its final order. For instance, the TRAI has been vested with the jurisdiction, powers and authority of a Civil Court in any of the disputes that it seeks to resolve. It could also involve a dispute between a service provider and a consumer or a group of consumers, which till recently, formed routine disputes before the Courts.

The doctrine of separation of powers delineates, more pragmatically than literally, the respective domains of activity that the judiciary, the executive and the legislature are charged with by the Constitution. The complementary role of the institutions is what ought to constitute governance. While reserving the right to purposively interpret the laws, the judiciary has been fairly restrained in interfering into the realms of fact-finding and consequent policy making decisions of the executive or the delegated bodies empowered to exercise executive powers.\(^70\)

The challenge posed by the regulatory bodies and their expected roles was taken up for discussion by the Supreme Court in the light of the constitution of the Competition Commission of India (CCI) under the new Competition Act, 2002. As mentioned earlier in the paper, the executive desired that the CCI be headed by an expert, preferably a retired bureaucrat or so, who could appreciate the nature of ‘public interest’ that needs protection in the new competition law framework. This move of the government was challenged as amounting to usurpation of judicial functions by an authority proposed to be headed by a non-judicial member.\(^71\)

In order to overcome this challenge, the government made necessary amendments to the Competition Act towards constituting an Appellate Authority, the Competition Appellate Tribunal, which is essentially a judicial body conforming to the concept of separation of powers.\(^72\) The Appellate Tribunal has been empowered to “hear or dispose of appeals against any direction issued or decision made or order passed” by the CCI, and

---

\(^70\) For an elaborate discussion, with extensive references, on the contentious issues in this regard, refer to the judgement in: *State of Uttar Pradesh v. Jeet Bisht* – [Supreme Court, Civil Appeal No. 2740 of 2007]

\(^71\) This matter, responsible for delaying the coming into effect of the Competition Act, 2002, was decided by the Supreme Court in: *Brahm Dutt v. Union of India* – (2005) 2 SCC 431.

\(^72\) The Competition Act, 2002 was amended significantly in the year 2007. The Competition Appellate Tribunal was constituted by the inclusion of Chapter VIII-A into the Act.
to adjudicate on any claims for compensation that may arise as a part of the proceedings under the Act.\textsuperscript{73}

Even prior to the formation of the Competition Appellate Tribunal, the telecom sector had witnessed similar legal and institutional dynamics.\textsuperscript{74} The TDSAT was constituted through the amendments made to the TRAI Act, 1997, in the year 2000. The amended preamble of the TRAI Act states that the interests of the service providers and the consumers need to be balanced, while also enabling the orderly growth of the telecom sector through a level playing field between the public sector service providers and the private operators. In formulating the judicial role of an independent tribunal established by a statute to govern disputes in a particular sector, the Supreme Court,\textsuperscript{75} discussed that it is with this objective that the TDSAT has been vested with both, the original and the appellate jurisdiction, whereby it could adjudicate directly on disputes between a licensor and a licensee, or between two or more service providers, or between a service provider and a group of consumers, and is also empowered to hear and dispose appeals against any direction, decision or order of the TRAI. This being the object for establishing an independent tribunal, the Supreme Court observed that the power of such a tribunal has to be adjudged only from the language of the law conferring that power and it would not be appropriate to restrict the same “on the ground that the decision which is the subject matter of challenge before the tribunal was that of an expert body.” The inference from this observation of the Supreme Court is that, considering the statutory ambit of the jurisdiction, the TDSAT is the appropriate authority vested with the power to question and review the decisions of the TRAI and to also judicially review the power of the government as a licensor on the basis of merits and with the requisite level of sector-based expertise.

In the WLL matter, the TDSAT had the unique advantage of considering recommendations and findings of two expert bodies – the TRAI and an Eminent Group

\textsuperscript{73} Section 53-A of the Competition Act, 2002 (as amended in 2007).

\textsuperscript{74} The financial securities sector in India, regulated by the Securities and Exchange Board of India Act, 1992, also has a similar institution in the form of Securities Appellate Tribunal, the composition of which was amended in 2002 mandating the Presiding Officer to be either a “sitting or retired Judge of the Supreme Court or a sitting or retired Chief Justice of a High Court”.

\textsuperscript{75} Unless cited otherwise, quotations attributed to the Supreme Court in this part of the paper are extracted from the judgment in the matter of \textit{Cellular Operators Association of India v. Union of India} – Civil Appeal, Supreme Court (December 2002) (also referred to as WLL matter).
constituted for this purpose. However, the Supreme Court lamented the fact that the TDSAT did not utilize this opportunity to appreciate the merits of the claims made in greater detail, and instead, citing the overwhelming eminence of the two reports before them, decided to directly uphold the findings therein. This suggests that the TDSAT is deliberately given a prominent position within the prevailing legal framework.

As discussed earlier in this paper, the Supreme Court has, in general, continued to recognize and reiterate the self-imposed principles of restraint on its wide power of judicial review. Citing precedents, the Court has reasoned that where legal issues are intertwined with those requiring determination of policy involving a plethora of technical issues, “courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws.” 76 However, even while stating so in the WLL matter, it was equally emphatic in finding that the TDSAT (and similar other independent statutory authorities) are not to be bound by such restrictive notions of exercise of their legal jurisdiction.

Even though the Supreme Court has, on different occasions, underlined the need to accord adequate deference to the legislative will and the policy instruments of the executive, there is no reason why statutory authorities like the TDSAT must import such restraints onto their powers. The tribunals, being special bodies created by law, are to operate within the limits as prescribed by the governing law. 77 This actually facilitates the special tribunals like the TDSAT to explore the extent of their powers as vested by the law. The philosophy behind the Supreme Court (and the High Courts) having to cast restraints upon their plenary powers of judicial review, relates to the Constitutional basis of such wide discretionary jurisdiction. Given the socio-economic realities and the political nature of governance, the Constitution vests the higher judiciary with wide amplitude of discretion to effectively intervene to protect and uphold fundamental rights foremost, and other legal rights as well. Whereas, a statute on the other hand, explicitly

76 Tata Iron & Steel Co. v. Union of India – MANU/SC/0623/2006 (this citation is from a subscription based online database)
77 As early as in the year 1898, the House of Lords in the United Kingdom had held that where a specific statutory remedy is present and an enforcement mechanism has been provided thereof, then that remedy should necessarily exclude all other possible remedies. Pasmore v. Oswaldtwistle Urban District Council – [1898] A.C. 387
lays down the context and conditions for the functioning of an authority, as established by its own provisions. Within such statutory framework, the particular authority is to be completely independent to employ the desired level of discretion towards achieving the avowed objectives of the governing law, which recognizes the expertise and subject-matter competence of the authority.\(^{78}\)

Prior to the establishment of the TDSAT, an order of the TRAI, which is akin to an order of a Civil Court, could necessarily have been appealed only before the High Court. Pursuant to the amendment, the TRAI Act has now provided for the TDSAT as the appellate authority and as well as provided for the second appeal to the Supreme Court from an order of the TDSAT.\(^{79}\) Reiterating the traditional appellate powers of a superior court, the TRAI Act refers to the Code of Civil Procedure, 1908 and directly incorporates the grounds of second appeal as those that shall apply to the appeals made to the Supreme Court as well. This essentially means that the Supreme Court shall be able to consider the appeal only on the ground of “substantial question of law.” Therefore, the power of judicial review is therefore allowed to be invoked in a limited sense, and only when the applicant is able to raise a legal issue of such importance that it goes beyond the significance of the immediate matter involved.

The Supreme Court further observed that while on the one hand statutory provisions may be designed in a manner such that there is a complete exclusion of a Court’s jurisdiction, on the other hand such exclusionary clauses may also be structured in a way that allow challenges to be made, but with strict limitations. The TRAI Act experiments with both these kinds of clauses. The jurisdiction of the Civil Courts is excluded so as to maintain the exclusivity of the TRAI in dealing with the disputes that are to be resolved through the exercise of its powers under the Act. Furthermore, the jurisdiction of the Supreme Court, upon the formation of the TDSAT, has been expressly limited by the statute to certain specific grounds of appeal. The Supreme Court made it clear in the WLL matter that the jurisdiction vested with the TDSAT is not of a supervisory review kind, which is what the higher judiciary exercises through the writ

---


\(^{79}\) However, it is to be noted here that the High Courts continue to retain their writ jurisdiction and, by virtue of certain landmark judgements of the Supreme Court, no statute can deny them the writ powers.
jurisdiction, but is instead of the purely judicial nature, wherein the TDSAT is charged with the responsibility to examine the correctness and propriety of the orders made by the TRAI or by the government in its role as the licensor or the policy-maker.

While there is no denying the fact that the Supreme Court has always respected the policy domain of the political executive, we must also recognize that it has also sought to scrutinize the policy on the grounds of reasonableness and to remove any trace of discriminatory intent. The nature of responsibility that is now cast upon the TDSAT, and similar such institutions, goes to an even further extent than that of the Supreme Court or of the High Courts. In addition to the enquiry on the reasonableness of the policy process, the independent tribunal is the only body legally empowered to, and which shall over a period of time be capable of, evaluating the merits of a sector based policy, proposed or adopted by the government. Mere procedural review of the government action, often taken through expert bodies or groups, would not sufficiently discharge the burden cast by the law on the TDSAT. The over-arching principle that is to be emphasized is the imperative need to creatively fashion legal criteria to control discretionary decision-making, without leading to a substitution or an intrusion based on merits, thereby placing an accent on judicial restraint too. The statutory limitation placed on invoking the appellate powers of the Supreme Court further emphasizes the significance of the role played by the TDSAT. It is in this context that the Supreme Court has called upon the TDSAT to function like a Court and render judgments containing “concise statement of case, points of decisions, the reasons for such decisions and decisions thereupon” and has warned the TDSAT that non-consideration of essential materials and evidence would amount to raising a substantial question of law for the Supreme Court to consider in the form of a second appeal.

There has been much debate surrounding the distinguishing factors between issues relating to private law and public law. From the kind of interests involved in a typical matter disputed before the TDSAT, it is difficult to strictly delineate the private law issues from the broader grounds founded on public law principles. A general principle of enforcement is that when a matter is based on public law, then an appropriate remedy shall be in the form of a result of the process of judicial review by the Constitutional Courts. However, given the judicial character of authorities like the
TDSAT, and coupled with the statutory powers vested in them, it should be possible to balance claims of private law with the concerns of public interest and decide on the basis of a firm grounding in the principles of public law. The Supreme Court has rightly asked the TDSAT to retain its judicial character and begin to function as a truly independent tribunal employing all the powers at its disposal. It is only when the sector specific tribunal does its task sincerely, can the Supreme Court also exercise its appellate jurisdiction fairly. Else, it may be compelled to interfere in the process of regulation even without there being a statutory basis for the same.80 Credit is to be given to the Supreme Court in the WLL issue for declining the claim of the appellants for the matter to be decided on merits by the Court itself instead of remitting it back to the TDSAT for reconsideration.81

In a dispute challenging the TDSAT order relating to interconnection agreements between a cable operator and a content provider, the Delhi High Court has recently reiterated the rationale followed by the Supreme Court in the WLL matter and refused to intervene through its writ jurisdiction by recognizing that the TDSAT has “gathered some institutional expertise” and that “its membership is also geared to facilitate the specialized dispute adjudication which it has to engage in.”82 In another matter challenging the jurisdiction of TRAI over the broadcasting sector, the Delhi High Court found that the TRAI does not suffer from “excessive delegation” as the formation of the TDSAT provides an institutional safeguard from the possible abuse or arbitrary exercise of power by the TRAI and that, in any case, there is also a further second appeal possible to the Supreme Court.83 Both these decisions do certainly convey a changing trend in the manner the regulatory authorities are being reviewed by the Courts.

---

80 Quoting on the nature of judicial review of regulatory authorities from the judgment of the US Supreme Court in the matters relating to the Permian Basin Area Rate [390 US 747, 20 L Ed 2d 312], the Supreme Court in the WLL matter has observed that – “Judicial review of the Commission’s (or a tribunal’s) orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.”
81 The Court categorically observed that – “(I)t would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter.”
The regulatory design and decision making process after the Appellate Authority is established as encapsulated in Chart 5. The new structure and associated process is
more complex, but also more effective, sophisticated and stable. Stakeholders can appeal against regulatory rulings, or seek judicial remedy in several ways. They may now (a) approach TDSAT directly, or (b) appeal against a regulatory decision to the TDSAT, or (c) file a writ petition before the High Court or the Supreme Court. They may also appeal to the Supreme Court against a ruling of the TDSAT itself. These judgments all provide input into the policy process, and lead to the strengthening of the policy. Successful adjudication also consolidates the regulatory structure. The Appellate Authority now acts as a buffer between the disputes and the Courts. Not all disputes need to reach the Constitutional Courts. The TDSAT also has the power as well as the responsibility to examine cases and issues on both judicial grounds and technical merits. The Supreme Court now focuses on procedural review and second appeal. Thus, the regulatory system has undergone a substantial institutional evolution towards a more effective and sustainable ‘equilibrium’.  

The jury is still out on the degree of deference that the judiciary has to accord to the policies of the executive and the policy-based decisions of the various regulatory authorities, and the objective conditions to determine the same. Constitutions the world over are given the status of “higher law,” when compared to statutes, legislations, executive orders and notifications, only so that the will of the people is not subordinated to the temporary whims of the government. Though the trend of pronouncements by the apex judiciary seem to accommodate an active pursuit of constitutional goals despite the diverse socio-cultural influences, the increasingly fragmented political framework and an economy that is now being founded on market forces, would exact considerable amount of judicial creativity to protect, promote and enforce public interest.

VI. CONCLUSION

This paper has examined the transformation of government-business relations in India that was triggered by the market-oriented economic reforms which started in 1991.

---

Since that date, Indian industry has moved from a system of deep-rooted and pervasive government controls to one in which markets and competition are increasingly important. Central to this transformation is the creation of a new institutional framework that specifies the new rules of the game—comprising rules governing competition, independent regulatory and appellate structures.

We have argued that this institutional framework emerges out of a complex process of contestation between key actors with agendas that differ sometimes conflict. In the Indian case, no single group is dominates the process, and the struggle and eventual accommodation amongst the influential actors ultimately creates the institutional framework. In this context, the judiciary and particularly the Supreme Court play a crucial role of ensuring the stability of the process of contestation within a democratic set-up. During the reform process, India had no coherent institutional road map. While there are strong external influences, such as the World Bank, that have suggested institutional templates, in actuality the process has been one of institutional ‘learning by doing’ embedded in political economy—i.e. conflict, negotiation and strategic maneuvering. The judicial system has provided a space for contestation. At the same time, it has bounded the conflict, and has nudged the system towards ‘equilibrium’.

We have provided an analytical framework for examining this process, with particular reference to the telecommunications industry. Several features make this industry interesting to study—its public sector origin, its natural monopoly and network-based character, the significant role of private sector firms in the post reform period, efforts to establish an independent regulator and finally, the crucial role of the judiciary. The main ‘actors’ that are relevant in the current Indian context and their major motivations are identified—the political executive, the government agency traditionally governing/making policy in the concerned sector; private business groups participating in the sector, newly established regulatory and appellate authorities, and the courts. Implicit in this framework is the idea that the government is no longer a monolithic organization, unified in its approach to the economy. We have also argued that the motivations of the key actors are context-dependent, and these do evolve over time during the transition process in response to changing ideology, interests and ‘autonomous’ economic influences (globalization, technology).
We have examined how competition policy has evolved in India after 1991. We noted the manner in which the Courts have acted to limit its domain of operation of the Monopolies and Restrictive Trade Practices Commission (MRTPC) after reform. In particular, the Supreme Court sought to consolidate a new definition of ‘public interest’ that emerged within the policy process, in which consumer interest and ‘efficiency’ were paramount elements. This was different from the MRTPC’s long-held identification of the public interest with the interest of domestic industry and workers. We noted the main features of the Competition Act, 2002 and its amendment in 2007. We concluded that the regulatory institution-building in this field is incomplete. There are certain implications of the Act that are open to ambiguous interpretation—and which no doubt would be clarified through future jurisprudence.

The subsequent section of the paper discusses the basic features of India’s judicial system and the remedies that it can provide to those who seek it from the courts. We explain the nature of the judicial remedies that are available, and note the special role played by the Indian Supreme Court in defining ‘public interest’ and in making legal remedies accessible to large numbers of people who may not otherwise be able to afford legal redress. We discuss the changing nature of the power of judicial review as exercised by the Constitutional Courts with respect to the content and working of economic policies.

Our examination of the telecommunications industry highlights certain key features. These include the sustained opposition by the Department of Telecommunications to private sector entry after liberalization, and the strategic steps taken by it. The conflict with private sector firms led to the establishment of the TRAI—the regulatory authority. We have studied how the early relations between the DoT and TRAI were of conflict. The initial verdicts of the High Court in the disputes led to serious undermining of the position of TRAI. We analyze also the private sector’s own strategic response. They refused to comply with the onerous terms of licensing agreement—creating an impasse which led to the entry of higher level political executives. To resolve the conflict a new Telecom Policy 1999 emerged. This laid the basis for a new TRAI and the creation of an Appellate Authority (TDSAT).
Subsequently, we show that the Supreme Court played a key role in defining the roles of the TRAI and the TDSAT, and also in insisting that the TDSAT, being a statutory administrative appellate tribunal, play its role as designated by the law. Thus, the Supreme Court has been instrumental in putting in place a ‘rules-based’ framework of regulation—in which the regulator is viewed as a ‘delegatee’ of the Political Executive, and the independence of the Regulatory Tribunal is upheld. The role of the courts in this process is also laid down by the Supreme Court and is limited to Constitutional form of judicial review and statutory form of appeal only on substantive questions of law. The idea is that the higher courts would not enter into specific technical matters of merit and involving subject expertise—which ought to be duly deliberated within the regulatory and appellate institutions formed specifically for the purpose.

Finally, we note that this process of institutional evolution is ongoing. In the meantime, since the process arises out of a contest among powerful players—including large enterprises in the private sector—there has been a trend towards an oligopoly market structure.