

RESEARCH ARTICLE

The legitimacy gap in borrowed laws: a case study of competition law transplants in South Asia

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Abstract

The success (or failure) of ‘borrowed’ or ‘transplanted’ laws is largely attributed to the extent of compatibility between them and the contexts of their host countries. This paper draws upon legal philosophy, legal transplant, and new institutional economics literature to argue that while compatibility is both relevant and important, legitimacy is equally – if not more – critical for shaping the extent, quality and direction of enforcement of legal transplants in their adoptive contexts. This is especially true for the more technical economic transplants that are often considered to be context independent. To establish this argument, the paper explores the concept of legitimacy and its relevance for legal transplants; why it may be mistaken for compatibility; and why it is distinct from it. It also compares the Indian, Pakistani and Bangladeshi experience of transplanting modern competition laws to demonstrate how the legitimacy quotient of these economic transplants has impacted their subsequent enforcement.

Keywords: enforcement; legal transplants; legitimacy; compatibility; competition law; South Asia

Introduction

Although laws have been transplanted across national boundaries throughout history, the reasons for transplantation, the political-economic context in which it takes place and the types of laws that are transplanted, have evolved considerably over time. Whilst, historically, transplantation was associated with conquest, force, and the often wholesale displacement of legal systems,¹ modern transplantation takes place in an atmosphere of mutuality and consultation. Other than in exceptional circumstances,² it is intended to resolve specific legal, social and, especially, economic problems rather than introducing entirely new legal systems. However, this also means that modern transplants cannot command obedience the way their historical counterparts could, and must earn their space, within the host country legal system and with regard to the public, on their own credentials.

Among these modern transplants, economic legal transplants – that is statutes, rules or institutions that regulate economic activity in a country (hereafter referred to as economic transplants) – are both prevalent and interesting. Post World War II, many newly independent countries were advised by multilateral agencies, such as the World Bank, the International Monetary Fund (IMF), and later the World Trade Organization (WTO) to adopt economic transplants based on laws and institutions of

¹D Berkowitz et al ‘The transplant effect’ (2003) 51(1) *American Journal of Comparative Law* 163 at 172.

²See for instance the US-led efforts at law reform in Afghanistan and Iraq: G Swenson ‘Why US efforts to promote the rule of law in Afghanistan failed’ (2017) 42(1) *International Security* 114; A Christova ‘Seven years of EUJUST LEX: the challenge of rule of law in Iraq’ (2013) 9(3) *Journal of Contemporary European Research* 424.

developed Western countries to achieve higher economic growth and development outcomes. The foreign bases of these transplants was not a cause of concern because both multilateral agencies and host countries expected them to easily integrate into host country contexts even when these contexts were constructed on very different principles from their countries of origin.³ However, this optimism was largely misplaced, as economic transplants did not always produce the intended results. In some cases, they remained only on the books while in others they were captured by local elites and enforced to serve their private interests.⁴

In time, multilateral agencies – and the law and development scholars that had encouraged them to promote these economic transplants – came to recognise that the ‘one-size-fits-all’ approach had to be replaced by a more ‘context-specific’ strategy.⁵ This new approach was in alignment with the views of many comparative law scholars who had long argued that legal transplants, including economic transplants such as competition laws, could only succeed if they were compatible with the context of the adopting country.⁶ However, comparative law scholars and multilateral agencies did not entirely agree on what this context-specificity entailed. They also did not define context-specificity or compatibility; did not specify the nature or extent of context-specificity or compatibility necessary for successful transplantation; differed on factors in the host country context that the transplant must align with to achieve these qualities;⁷ and only cursorily addressed how context-specificity and compatibility may be created.⁸

In essence, therefore, context-specificity or compatibility were rendered little more than catchwords that, though cited frequently, were not fully understood even by those who advocated for them. The vagueness in the concepts allowed multilateral agencies and host countries considerable discretion in declaring an economic transplant to be context-specific and compatible. Therefore, economic transplants could be declared compatible and context-specific when their substantive provisions were agreed upon by technocrats entirely behind closed doors or when these were shaped by extensive and wide-ranging discussions with stakeholders. However, despite following their preferred strategy, host countries often remained unsuccessful in meaningfully enforcing economic transplants and bringing about the hoped for economic transformation in their contexts. In recent decades this failure of enforcement has been particularly noticeable with respect to modern competition laws: since the 1980s, competition laws have spread from 12 to more than 130 jurisdictions, thereby becoming the most widely transplanted laws in the world.⁹ However, only few countries have been able to meaningfully progress these laws to enforcement.

In this paper I seek to understand why, despite the emphasis on context-specificity and compatibility, host countries have so often failed to translate economic transplants from laws on the books to laws in

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

⁴D Trubek ‘The “rule of law” in development assistance’ in DM Trubek and A Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) pp 76, 78–79.

⁵*Ibid*, p 92.

⁶See for instance, Charles de Secondat Montesquieu et al *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) pp 8, 610; O Kahn-Freund ‘On uses and misuses of comparative law’ (1974) 37 *Modern Law Review* 1 at 12–13; Watson, above n 3, p 21; C Ewald ‘Comparative jurisprudence (II): the logic of legal transplants’ (1995) 43 *American Journal of Comparative Jurisprudence* 489; U Mattei ‘Efficiency in legal transplants: an essay in comparative law and economics’ (1994) 14 *IRL International Review of Law & Economics* 3; and P Legrand ‘The impossibility of legal transplants’ (1997) 4 *Maastricht Journal of European and Comparative Law* 111. With regard to competition laws see MJ Trebilcock and EM Iacobucci ‘Designing competition law institutions’ (2002) 25 *World Competition* 361; MJ Trebilcock and EM Iacobucci ‘A comparative analysis of antitrust law regimes: designing better institutions for deciding antitrust issues’ (2010) 41(3) *Loyola University Chicago Law Journal* 455; M Gal ‘The “cut and paste” of Article 82 of the EC Treaty in Israel: conditions for a successful transplant’ (2007) 9 *European Journal of Law Reform* 467; H Shahein ‘Designing competition laws in new jurisdictions: three models to follow’ in R Whish and C Townley (eds) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Cheltenham: Edward Elgar, 2012).

⁷For transplants generally, see Montesquieu, above n 6, Kahn-Freund, above n 6, and Mattei, above n 6.

⁸More fully discussed in Section 1(a) below.

⁹See ‘OECD competition trends 2020’ (Paris: OECD Publishing), https://www.oecd.org/en/publications/oecd-competition-trends-2020_3dd79899-en.html (accessed 15 October 2025) and DI Waked ‘Competition law and policy in the Global South: power, coercion and distribution’ (2023) 76 *Current Legal Problems* 375 at 378.

action and argue that in the case of economic transplants, or indeed any other modern legal transplants that are not introduced through force, context-specificity and compatibility can only yield success if it is also supported by legitimacy. To develop this argument I revisit the concepts of context-specificity and compatibility as discussed in legal transplant and new institutional economics literature, and compare these with the concept of legitimacy as explained in legal philosophy and applied in different legal disciplines. I also argue that although there are enough similarities and overlaps between context-specificity and compatibility on the one hand and legitimacy on the other, the concepts are fundamentally different and have a distinct, discernible impact on the success of a transplant. I further argue that though relevant for all modern legal transplants, legitimacy is particularly important for economic transplants because scholars have deemed these to be a form of technology that is largely indifferent even to the requirements of context-specificity and compatibility.¹⁰ To substantiate these arguments I compare the adoption and enforcement of competition law transplants in three South Asian countries, namely India, Pakistan and Bangladesh – not only because they adopted modern competition transplants in close succession, but also because the similarities and differences in their contexts make for an instructive analysis. While the three countries are distinguished by the size of their economies, they are at comparable levels of development;¹¹ share a common legal culture;¹² and have similar legal and political institutions which stem from a common source. However, the three countries have enacted their modern competition laws through distinct strategies which makes it possible to evaluate and compare their legitimacy quotient.¹³ I analyse the experience of adopting and enforcing competition laws in light of the literature and demonstrate that the difference in competition enforcement in these countries is in large part attributable to this difference in the legitimacy quotients of their competition laws.

To this end, this paper is organised as follows: **Section 1** locates economic transplants in the framework of legal transplants generally, outlines the requirements of context-specificity and compatibility as discussed in the legal transplant and new institutional economics literature especially in relation to economic and competition law transplants. The section then explores the concept of legitimacy as detailed in legal philosophy literature and explained through its application to different types of laws. It outlines the parameters of legitimacy and highlights the points at which it both connects with and departs from context-specificity and compatibility. **Section 2** examines and compares the adoption of competition laws in India, Pakistan and Bangladesh to understand the extent, nature and quality of legitimacy generated in the process through which the countries adopted these laws and explores its impact on their enforcement. **Section 3** discusses the broader implications of the idea of legitimacy for all modern legal transplants and the challenges that countries are likely to face in enhancing the legitimacy of transplants. It also suggests strategies for ensuring that transplants enjoy both compatibility and legitimacy in their adoptive contexts. The paper ends with a brief conclusion.

1. Economic transplants and the factors of their success

Comparative law scholars have defined law as ‘a national construct – an expression of national sovereignty that reflects and constructs a unique social and political climate’.¹⁴ Transplants, whether historic or modern, lack this organic connection with the context of the host country and are therefore

¹⁰D Rodrik *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton: Princeton University Press, 2007) ch 5.

¹¹As per World Bank country rankings, India since 2007, Pakistan since 2008 and Bangladesh since 2014 fall within the lower middle (LM) income category: ‘World Bank country and lending groups’, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (accessed 15 October 2025).

¹²Before 1947 India and Pakistan were united under the British Empire and until 1971 Bangladesh formed the eastern province of Pakistan.

¹³See A Darr *Competition Law in South Asia: Policy Diffusion and Transfer* (Cambridge: Cambridge University Press, 2023) ch 1.

¹⁴M Cohn ‘Legal transplants: a theoretical framework and a case study from public law’ in M Siems and PJ Yap (eds) *The Cambridge Handbook of Comparative Law* (Cambridge: Cambridge University Press, 2024) pp 427–428.

constrained to construct it artificially. Over time, scholars and multilateral agencies have identified context-specificity and compatibility as the necessary tissue for building this connection. However, I argue – with reference to comparative law, new development economics and legal philosophy literatures – that legitimacy is an additional critical factor for the success of economic transplants.

(a) Evaluating context-specificity and compatibility

Comparative law scholars have constructed several different typologies for categorising legal transplants.¹⁵ However, for the purpose of this paper it is sufficient to understand the views of scholars regarding the transplantability of different types of transplants. At one extreme are scholars, such as Alan Watson, who claim that all transplants are easy,¹⁶ while at the other are those such as Pierre Legrand, who argue that transplants are altogether impossible.¹⁷ Between the two extremes are scholars who believe that transplants are possible, provided they are compatible with the context of the host country. These scholars think as Montesquieu did, that ‘civil’ laws should not be borrowed without taking into consideration the ‘institutions’ of their country of origin,¹⁸ or they agree with Kahn-Freund, who draws a distinction between ‘organic’ laws that ‘organize constitutional, legislative, administrative or judicial institutions and procedures’ and are ‘resistant to transplantation’ and all other laws that are not related to the organs of the state and may thus be transplanted, albeit with knowledge of the context from which they emanate.¹⁹ It follows that economic transplants are possible provided they do not affect the organisation of the state and are compatible with, and appropriate for, the context of the host country. This view is also echoed by scholars focusing specifically on competition transplants²⁰ and by new institutional economics scholars.²¹

However, notwithstanding the focus on compatibility, comparative law literature does not define compatibility, enumerate a precise, comprehensive list of host country factors that a transplant must be aligned with, or identify what may be an appropriate degree of compatibility. Scholars specifically discussing competition law transplants also cast a wide net in this regard. For instance, Trebilcock and Iacubucci, in arguing for a ‘locally optimal substantive law’, require it to take into account ‘particularities of history, initial conditions, institutional traditions, and political economy considerations’;²² Gal’s ‘commonality’ between the contexts of the originating and borrowing countries, encompasses ‘almost all issues which relate to the relationship between law and society’;²³ and Shahein views compatibility as an alignment between the ‘specific political, economic and social environment’ of the lending and borrowing countries.²⁴

Further, while the literature hints that compatibility is a dynamic value that can be created and improved, it does not clarify how this may be done. Watson suggests that compatibility may be achieved (and, by implication, enhanced) through ‘lawmakers’ who ‘as legislators, jurists, or judges’ allow and enable the ‘social economic, and political factors [of the host country to] impinge on legal

¹⁵Ibid, pp 430–441.

¹⁶Watson, above n 3. However, also see Ewald’s, above n 6, discussion of strong and weak Watson.

¹⁷Legrand, above n 6, argues that the ‘epistemological assumptions [of interpreters of a law] ... are ... historically and culturally conditioned’ to their country, which renders it impossible to transfer the meanings of laws.

¹⁸Montesquieu, above n 6.

¹⁹Kahn-Freund, above n 6.

²⁰See for instance, Trebilcock and Iacubucci (2002), above n 6; Trebilcock and Iacubucci (2010), above n 6; Gal, above n 6; and Shahein, above n 6.

²¹See particularly Rodrik, above n 10, ch 5. Also note that economists use the term ‘institutions’ rather than laws or transplants. However, as per Douglass C North, the term includes any form of formal or informal constraints that human beings devise to shape human interaction, and thereby includes laws: DC North *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990) p 3.

²²Trebilcock and Iacubucci (2002), above n 6; Trebilcock and Iacubucci (2010), above n 6.

²³Gal, above n 6.

²⁴Shahein, above n 6.

development’;²⁵ Legrand and Chen-Wishart highlight the important role of actors who interpret the law in the course of enforcing it,²⁶ while Sacco recognises the possibility of the cumulative impact of diverse actor-interpreters who engage with the transplant at different points in the course of its transplantation and enforcement.²⁷ Scholars of competition law transplants also recognise that compatibility may be achieved through ‘contextualisation’, but do not clarify how this contextualisation may be brought about.²⁸

However, new institutional economists offer insight in this regard. Among them, Rodrik is particularly accepting of the possibility and prevalence of economic transplants. He is of the view that economic institutions are a form of ‘technology’ that may either be ‘a general purpose one’ or one which is ‘highly specific to local conditions’. While the former is often ‘codified and ... readily available on world markets’, the latter ‘contains a high degree of tacitness’ because ‘much of the knowledge that is required [in relation to the technology] is in fact not written down ...’.²⁹ He argues that if countries are seeking generic economic transplants they may simply import a blueprint from more developed economies by following a ‘largely top-down’ approach which relies ‘on expertise on the part of technocrats and foreign advisors’. However, if they require a context-specific transplant they must rely on ‘bottom up’ mechanisms for eliciting and aggregating local information.³⁰ Most importantly, Rodrik explains that the categories of generic or context-specific transplants are ‘only caricatures’, and in practice it is likely that even ‘an imported blueprint requires domestic expertise for successful implementation’.³¹ He further explains that although there are several mechanisms through which a country may elicit and aggregate local information to adapt economic transplants for context, ‘participatory political institutions’ are the most reliable, and transplants adapted through these mechanisms are most likely to yield economic growth.³²

Certain other economists and comparativists explain the effect of compatibility and context-specificity in relation to economic transplants, beyond the binary of ‘success’ or ‘rejection’ often favoured by comparative law scholars. For instance, Berkowitz et al argue that where the meaning of specific legal rules or legal institutions is not apparent, they will either not be applied at all or applied in a way that may be inconsistent with the intention of the rule in the context. However, when these rules and institutions are adapted to local needs, people, including legal intermediaries, would not only use them but also want to allocate resources for enforcing and developing them.³³

(b) Significant factors beyond compatibility and context-specificity

A closer reading of some of the literature discussed in the preceding section hints at factors beyond compatibility or context-specificity that influence the success of laws and, by extension, of legal transplants, whether economic or otherwise. For instance, Montesquieu identifies the ‘spirit of laws’ – ie the abstract quality that animates the words of the law – as one such factor.³⁴ Kahn-Freund alludes to the political power of all groups present in the country and capable of exercising such power as another important factor in determining the extent to which a law may be ‘accepted’ or ‘rejected’ in a country.³⁵ Legrand echoes both Montesquieu and Kahn-Freund in emphasising

²⁵Watson, above n 3.

²⁶Legrand, above n 6; M Chen-Wishart ‘Legal transplant and undue influence: lost in translation or a working misunderstanding?’ (2013) 62 *International and Comparative Law Quarterly* 1.

²⁷R Sacco ‘Legal formants: a dynamic approach to comparative law (installment II of II)’ (1991) 39 *American Journal of Comparative Law* 343 at 385.

²⁸Shahein, above n 6.

²⁹Rodrik, above n 10 and text to n 21, pp 163–164.

³⁰Ibid.

³¹Ibid, p 164.

³²Ibid, pp 166–168.

³³D Berkowitz et al ‘Economic development, legality, and the transplant effect’ (2003) 47(1) *European Economic Review* 165 at 174.

³⁴Montesquieu, above n 6.

³⁵Kahn-Freund, above n 6.

subjectivity of the context and interpreters of the law as critical factors in shaping the meaning of the words of the law.³⁶

Gal, writing specifically of competition law transplants, speaks of the perception of a subjective benefit as an important condition for the success of these transplants. She argues that for a competition transplant to be successful, it is not enough that it is ‘a good idea’ that provides ‘a suitable solution for a legal problem’; there should also be a group of organised persons in the host country ‘who believe that a benefit would result from a practicable change in the law’.³⁷ She identifies a second factor of subjective need for the law and argues that ‘[t]he more society perceives itself as needing the change embodied in the legal rule, the higher the chances that it will be applied in practice’.³⁸ The element of subjectivity is further elaborated in the discussions of Berkowitz et al and North: the former argue that compatibility is not valuable only for itself but for the ‘implications [it has] for the perception and trustworthiness of the institutions applying legal transplants’³⁹ while the latter cites ‘ideological continuity’ with the ‘values’ of the adopting country, or lack thereof, as an important factor in the success, or failure, of transplanted economic institutions.⁴⁰

In summary, it is evident that scholars across the spectrum recognise that in order to succeed – ie to be understood, applied and utilised by the persons it is intended to govern – a law, whether organic or transplanted, not only needs to be compatible with context, but also to be *perceived* as compatible. Their discussions further suggest that though the perception of compatibility is related to compatibility, it is, of necessity, distinct from it. They also identify various dimensions of the abstract, subjective, and subtle quality that gives rise to the positive perception of the law – whether organic or transplanted – but, ultimately, do not give a name to it. I argue that these dimensions point towards the umbrella concept of ‘legitimacy’, which while relevant for all laws, is particularly critical for transplants, economic or otherwise, precisely because they lack the organic connection with the context of the country they are intended to operate in.

(c) *The concept of legitimacy*

For Katarina Pistor, legitimacy is the cornerstone of effective enforcement of all laws, and therefore also of transplants. She argues that:

To be *effective*, a legal order must enjoy sufficient authority so that most people will *respect* the outcome it produces, even if they lose. In short, law must be *legitimate*. Law that empowers without accountability, creates rights without obligations, and enriches without levying liabilities, is neither *legitimate* nor *just*. It may be kept in place by a mix of ideology and coercion, but it loses its greatest asset, and that is *voluntary compliance*.⁴¹

In this section, I turn to legal philosophy and its applications⁴² to explore the idea of legitimacy and its relationship with the connected concepts of compatibility and justice. I also discuss legitimacy in relation to legal, especially economic transplants.

³⁶P Legrand, ‘What “legal transplants”?’ in J Feest and D Nelken (eds) *Adapting Legal Cultures* (London: Bloomsbury, 2001) p 55.

³⁷Gal, above n 6, at 472.

³⁸Ibid, at 473.

³⁹Berkowitz et al, above n 33.

⁴⁰North, above n 21, pp 102–103, argues that the North American revolution yielded economic growth, and the adoption of liberal economic institutions in Latin American colonies failed to do so, because while there was ‘ideological continuity’ between American values and the institutional framework introduced by the British, there was a clash between imperial institutions and pre-existing Spanish and Portuguese values.

⁴¹K Pistor *The Law of Capitalism and How to Transform It* (New Haven, CT: Yale University Press, 2025) p 5 (emphasis added).

⁴²F Peter ‘Political legitimacy’ in EN Zalta (ed) *Stanford Encyclopedia of Philosophy* (Summer 2017 edn) (Stanford University, 2016), <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/> (accessed 15 October 2025).

(i) Understanding legitimacy

Legitimacy is defined in the literature as a 'normative belief by an actor that a rule or institution ought to be obeyed' or 'a subjective quality, relational between actor and institution'.⁴³ It is, therefore, essentially a *perception* that a person, or group of persons hold regarding an institution or law and can only be estimated through appropriate proxies rather than observed and measured as an objective fact.

In the literature, legitimacy is often described in terms of its sources and attributes. For instance, scholars hold that in certain instances legitimacy may derive from the charisma or authority of the person articulating the law. They refer to this as 'charismatic legitimacy' and associate it with kings, dictators, populists, and even conquerors. In other cases, legitimacy may derive from the legality of the process through which the law is constituted. This is referred to as 'traditional legitimacy' and may co-exist alongside charismatic legitimacy. Both charismatic and traditional legitimacy are deemed to be of a weaker order because though they can *command* obedience, they cannot generate the belief that obedience is *warranted*.⁴⁴ Legitimacy may also stem from confidence in a system of 'consciously made rational rules' and in the 'legality' or 'formal correctness' of the law. This is referred to as 'rational legitimacy' and may overlap with traditional legitimacy. However, some argue that charismatic, traditional, and rational legitimacy are inherently incomplete, as legitimacy can only properly accrue from 'morality',⁴⁵ or 'a minimal threshold standard of justice' or recognition of 'basic human rights' in the law.⁴⁶ However, Rawls disagrees with this point of view and argues that legitimacy is a lesser value than justice. Therefore, while legitimacy may be regarded as a part of justice, justice cannot be deemed to be component of legitimacy.⁴⁷

The relationship between legitimacy and justice has also been considered in relation to economic laws. For instance, Finch, while discussing legitimacy of insolvency laws, suggests fairness or justice to be one of its many dimensions. She argues that a law may be 'acceptable', or have legitimacy, if it is collectively believed to have the attributes of 'efficiency, expertise, accountability, and fairness ...'.⁴⁸ She defines 'efficiency' as the ability of the law to secure its mandated ends at the lowest cost; 'expertise' as the proper exercise of judgement by specialists; 'accountability' as the control by democratic bodies or courts of insolvency participants through transparent processes; and 'fairness' as the capacity of the law to bring about substantive justice and distribution.⁴⁹ However, Mokal critiques Finch's view of legitimacy on three inter-related points: he argues that her four attributes of legitimacy are, in fact, its goals or outcomes. He further categorises 'efficiency', 'expertise' and 'accountability' as procedural goals of legitimacy, and deems 'fairness' to be its substantive goal. Most importantly, he argues that the procedural goals of 'efficiency', 'expertise' and 'accountability' can only make sense when connected with or subordinated to the substantive goal of fairness.⁵⁰

Locke adds further nuance to the concept of legitimacy and argues that rather than stemming from the internal attributes of a law, legitimacy is conferred externally by the 'consent' of persons who interact with it.⁵¹ However, the idea of consent is not only intricate but is also not entirely divorced from the internal attributes of the law. For instance, some argue that consent is only truly given when people recognise that the rules, institutions or laws are, or may be, of benefit to them⁵² or are just, fair and

⁴³I Hurd 'Legitimacy and authority in international politics' (1999) 53(2) International Organization 379.

⁴⁴Hurd, *ibid.*, at 391. In several of his writings, Joseph Raz draws a distinction between 'authority' and 'legitimate authority' and emphasises morality as an important determinant of law's legitimacy. See, for instance J Raz 'Hart on moral rights and legal duties' (1984) 4 Oxford Journal of Legal Studies 123 at 131.

⁴⁵Raz, *ibid.*

⁴⁶A Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) p 43.

⁴⁷Peter, *above n 42*.

⁴⁸V Finch *Corporate Insolvency Law – Principles and Perspectives* (Cambridge: Cambridge University Press, 2002) p 50.

⁴⁹*Ibid.*

⁵⁰RJ Mokal 'On fairness and efficiency' (2003) 66 Modern Law Review 452 at 453.

⁵¹Peter, *above n 42*. Although Locke speaks of legitimacy of political authority, his ideas are equally applicable to legitimacy of laws created by the exercise of such authority.

⁵²*Ibid.*

moral.⁵³ Others, however, are of the view that it is entirely possible for people to consent to a law even if they are not aware or convinced of the benefit they may derive from it.

Legitimacy may, therefore, be summarised as a multi-dimensional construct which can be described in terms of its sources (both internal and external), attributes, and effects, and which has a substantive as well as a procedural dimension. In its substantive dimension, legitimacy's relationship with justice, whether understood in terms of fairness, morality or human rights, is particularly complex. Raz, for instance, claims justice simultaneously as a source, an attribute, and an aim or goal of legitimacy, while Rawls considers justice to be a superior value and suggests that legitimacy may exist without justice. In its procedural dimension, the idea of consent is particularly interesting. Locke, for instance, recognises that legitimacy may derive from the express or tacit consent of the people, while others clarify that true consent cannot be content-independent. The variation in the attributes of legitimacy and in the nature of consent that gives rise to it, suggests, in turn, that the nature and extent of legitimacy may itself vary, and may range from perfect legitimacy, which encompasses the widest and deepest interpretation of its substantive and procedural dimensions, to imperfect legitimacy which derives from their narrower versions.

Before leaving this discussion, it is important to briefly discuss the categories of 'domestic' and 'international' legitimacy, referred to particularly in political science literature. Domestic legitimacy, in this context, is the legitimacy that exists within the framework of the state and is desired for its ability to generate the moral 'obligation to obey' a law,⁵⁴ while international legitimacy refers to the recognition that the state receives from the international community for enacting the law.⁵⁵ Domestic and international legitimacy are interdependent to the extent that the state may leverage one to gain the other.⁵⁶ The discussion in this paper focuses primarily on domestic legitimacy and refers to international legitimacy only to underscore the impact of international recognition of a transplant once it has been formally introduced in the host country.⁵⁷

(ii) Legitimacy and legal transplants

Although legitimacy is desirable for all laws, whether organic or transplanted, it is particularly significant for legal transplants because, like compatibility and context-specificity, it helps forge the missing connection between a transplant and the host country context and, in doing so, contributes to its success in that context. However, to assess the precise contribution of legitimacy to the success of a transplant it is important to understand where its legitimacy falls on a scale which ranges from imperfect legitimacy at one end to perfect legitimacy at the other.

It follows from the discussion in the previous section that the most basic form of legitimacy that a transplant may have, ie legitimacy closest to the imperfect end of the scale, is *formal legitimacy*. This derives from the host country having adopted the transplant through persons, processes and institutions that are recognised as legal and authoritative in the country or from the formal correctness of the law. It may also derive from the transplant being based on an authoritative foreign model that the country respects, admires or otherwise seeks to emulate. Formal legitimacy is, therefore, akin to charismatic, traditional and rational legitimacy or any combination thereof and is not an indication or guarantee of the fairness, justness or morality of the transplant, or of the extent to which it is compatible with the host country context. However, this is not to say that a transplant may not have these additional attributes but rather to emphasise that people are likely to have consented to the transplant for attributes other than its justice or compatibility. It follows that while a transplant that has formal legitimacy may be able to

⁵³Raz, above n 44.

⁵⁴J Raz 'Authority and consent' (1981) 67 Virginia Law Review 103.

⁵⁵KG Weyland *Bounded Rationality and Policy Diffusion: Social Sector Reform in Latin America* (Princeton NJ: Princeton University Press, 2006) pp 39–42; D Marsh and JC Sharman 'Policy diffusion and policy transfer' (2009) 30 Policy Studies 269 at 272.

⁵⁶F Giraldi 'Transnational diffusion: norms, ideas and policies' in W Carlsnaes et al (eds) *Handbook of International Relations* (London: SAGE, 2012) p 23.

⁵⁷See particularly Section 2(c)(i) below.

command obedience, it is not likely to either generate the belief that obedience is *warranted* or, particularly in case of economic transplants, yield the hoped-for economic benefits.

Next on the legitimacy scale is *functional legitimacy*. This may exist either in addition to, or instead of formal legitimacy and stems from a collective belief, expressed through the consent of the people, that the transplant will achieve the procedural goals of efficiency, expertise, and accountability. As in the case of a transplant that only has formal legitimacy, functional legitimacy does not indicate or guarantee that the transplant is based on the principles of justice and fairness or will achieve these when implemented. However, a transplant with functional legitimacy is more likely to be compatible with the host country context than a transplant with only formal legitimacy, because efficiency, expertise, and accountability are contextual factors and indicate a degree of connection, if not alignment, between the transplant and the context. Such a transplant is also more likely to *warrant* obedience than a transplant that only has formal legitimacy and, in case of economic transplants, is also more likely to yield the economic benefits for which it was adopted.

Beyond functional legitimacy lies *substantive legitimacy*. A transplant that has substantive legitimacy is not only based in the principles of justice, fairness or morality but also embraces and perpetuates these values as its goals. People who consent to this transplant do so with understanding of the benefit (in the sense of justice and fairness) it may bring to them, and are also more likely to voluntarily obey it. Such a transplant is also likely to be compatible with context and yield the economic outcomes it promises. A transplant may have substantive legitimacy even if does not have formal or functional legitimacy, but the absence of either of these is likely to interfere with its outcomes.

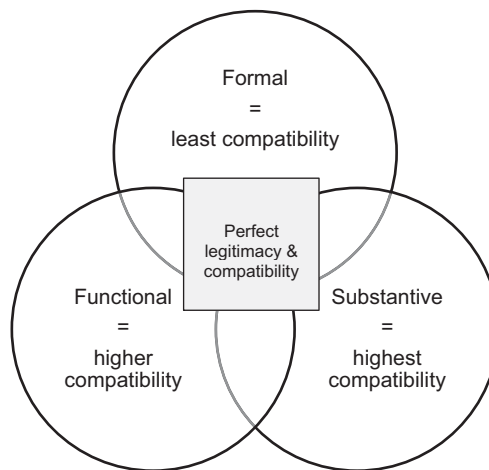


Figure 1. Forms of Legitimacy and relationship with compatibility.

The highest order legitimacy that a transplant may have, ie legitimacy that is closest to the perfect end of the legitimacy scale, is *perfect legitimacy*. Such a transplant has formal, functional and substantive legitimacy and is also perfectly compatible with the context of the country. It, therefore, delivers both justice and, in case of economic transplants, economic benefit and it not only *commands* obedience but also *warrants* it.

(iii) Assessing legitimacy and the echoes of compatibility

The inherent subjectivity and unobservability of legitimacy, and the difficulty in telling apart forced obedience from voluntary obedience, makes it important to identify appropriate proxies through which the nature and quality of legitimacy may be deduced and measured.

Katerina Linos affirms the significance of (domestic) legitimacy in relation to the spread of health-related laws and suggests that legitimacy may be recognised and assessed by observing the institutions

and processes through which a host country formally introduces the laws in its context.⁵⁸ She seems to be alluding to multilateral agencies when she recognises the possibility of the idea of adopting a particular law being introduced through ‘elite networks of technocrats’.⁵⁹ However, she also seems to call for the legitimisation of any such laws when she emphasises the importance of adopting these through democratic institutions capable of aggregating public consent. She argues that consent is not only important for elected leaders who need to maintain their popularity and gain ‘critical domestic legitimacy’ to win re-election, but also for the people who are only likely to consent to it if they recognise its value and merits.⁶⁰ Linos, therefore, makes two important points: first, that if transplants are to obtain the consent of the people through votes then they should at least have *functional legitimacy*, and ideally *substantive*, or even *perfect legitimacy*;⁶¹ secondly, that such legitimacy can only be generated when transplants are adopted through democratic institutions that are capable of and do actually aggregate consent from a wide cross-section of the public.

Linos’ emphasis on the aggregation of consent through democratic institutions as a means of generating the necessary level of legitimacy echoes Rodrik’s discussion of the aggregation of knowledge and tacit information through bottom-up participatory institutions to create compatibility between a transplant and its adoptive context. This suggests not only a close link between legitimacy and compatibility but also that if an economic transplant is to be obeyed and yield economic benefit it must be adopted through democratic institutions which provide the only meaningful assurance for legitimacy and compatibility. However, upon reading Linos and Rodrik together it is clear that even though legitimacy and compatibility are connected they are qualitatively distinct: legitimacy is a purely subjective phenomenon which exists only in the eyes and minds of the public, whereas compatibility is an objective fact that can be assessed and verified independently. The two are also grounded in entirely different sources: for instance, legitimacy, whether *formal*, *functional*, *substantive* or *perfect*, may flow from authority or legality (including that of a foreign model on which the transplant is based), justice or fairness, or be conferred by public consent (whether or not it is based in the content of the transplant), whereas compatibility derives from the alignment of the transplant with factors present in the context of the host country. Finally, although it is desirable that legitimacy and compatibility be created through bottom-up, participatory institutions that can aggregate both consent and tacit knowledge, they may equally be created through other sources: for instance, formal legitimacy may be generated through authority or legality and compatibility through shallow assessment of a transplant by top-down institutions.

The above discussion clarifies that while legitimacy and compatibility may co-exist in certain circumstances, the existence or achievement of one in the context of the adopting country does not automatically imply that of the other. However, the discussion also suggests that the existence and quality of legitimacy and compatibility may be observed and measured with reference to the nature and quality of institutions that a country uses to adapt and formally introduce a transplant in its context. This, in turn, means that the more a country engages bottom-up, participatory, democratic institutions in the course of adopting a transplant, the greater the likelihood of the transplant enjoying both functional – if not substantive or perfect – legitimacy and deep compatibility with the context of the country.

2. Competition transplants in South Asia

In 2002 India became the first South Asian country to adopt a modern competition transplant, followed by Pakistan in 2007 and Bangladesh in 2012. This section evaluates and compares the adoption and

⁵⁸K Linos *The Democratic Foundations of Policy Diffusion: How Health, Family and Employment Laws Spread across Countries* (Oxford: Oxford University Press, 2013) ch 2.

⁵⁹*Ibid.*, chs 1, 2.

⁶⁰*Ibid.*

⁶¹See Section 1(c)(ii) above.

adaptation of competition transplants in the three countries to assess their legitimacy and compatibility quotients and their impact on the enforcement of the competition transplants.

(a) The historic context of competition law reform in India, Pakistan and Bangladesh

When India, Pakistan and Bangladesh adopted modern competition transplants in 2002, 2007 and 2012 respectively, they introduced them in legal systems founded on historical transplants⁶² brought to the region by the East India Company and endorsed and developed by the British colonial government.⁶³ In the 90 years (1858–1947) that the colonial government remained in power, it enacted more than 196 laws that all but replaced the laws, institutions and norms pre-existing in the region. Although the colonial government made some effort to adapt these laws for the Indian context, it engaged only top-down institutions in doing so. Colonial laws were, therefore, enacted without the participation – let alone the consent – of native Indians for whom the laws were intended.⁶⁴ Consequently, these transplants suffered from a legitimacy and compatibility deficit, which prevented them from obtaining voluntary obedience from the public and deepened the already considerable divide between the colonial government and the Indian public.

However, notwithstanding this inherent deficit and the complications that arose from it, independent India, Pakistan, and Bangladesh all opted to build their formal legal systems on the foundations of the colonial transplants,⁶⁵ which also explains the considerable commonalities in the post-independence legal systems of the three countries. Over time, while these countries adopted several new laws they did not materially interfere with, let alone dismantle, the historic structure of their legal systems. Some of these new laws were enacted in response to internal demand, while many others, especially economic laws, were transplanted entirely at the recommendation or direction of multilateral agencies after varying degrees of contextual adaptation according to the institutional capacity and expertise of the adopting countries.⁶⁶

Competition transplants in India, Pakistan and Bangladesh belonged to the category of economic transplants that were adopted not in response to internal demand but on the persuasion of multilateral agencies. India, Pakistan and Bangladesh had joined the WTO in 1995 immediately after it was established and were, therefore, privy to the efforts to introduce an international competition policy into multilateral trade negotiations. Although the proposal for an international competition policy was shelved after the 2003 collapse of the Cancun talks, it helped India, Pakistan and Bangladesh realise the strong momentum behind the adoption of modern competition laws, and spurred them to develop these internally, even if only with the help of multilateral agencies.

⁶²India, Pakistan and Bangladesh are former British colonies. Also see n 12 above.

⁶³The East India Company had established the Supreme Court of Judicature in Madras through the Regulating Act 1773. The colonial government later introduced the Indian High Courts Act 1861, which replaced the Supreme Court in Madras with High Courts in Calcutta, Madras and Bombay. See the entry for 'Regulating Act' in *Encyclopedia Britannica*, <https://www.britannica.com/topic/Regulating-Act> (accessed 15 October 2025) and DS Chauhan 'The emergence and evolution of High Courts in India before the Constitution of India came into effect', <https://legalserviceindia.com/legal/article-7006-the-emergence-and-evolution-of-high-courts-in-india-before-the-constitution-of-india-came-into-effect.html> (accessed 15 October 2025).

⁶⁴The Indian Councils Acts 1892 allowed 39 native Indian citizens to sit in the legislature, though only in an advisory capacity. The Indian Councils Acts 1909 increased the number of Indians to 135 but still did not allow them the right to vote on proposed legislation: see UK Parliament 'Government of the Raj 1858–1914', <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/government-of-the-raj-1858-1914/#:~:text=Two%20Indian%20Councils%20Acts%2C%20of,and%20the%20provincial%20legislative%20councils> (accessed 15 October 2025).

⁶⁵The national Constitutions of India and Pakistan retained the institutional framework of the Government of India Act 1935, as did Bangladesh after it declared its independence from Pakistan.

⁶⁶India and Pakistan joined the International Monetary Fund (IMF) and the World Bank shortly after independence and regularly availed themselves of their support for economic reforms.

(b) Assessing the legitimacy and compatibility of South Asian competition transplants

Even though India, Pakistan and Bangladesh turned towards foreign models to develop their competition laws, they adopted distinct strategies and institutions for doing so. In this section I examine these strategies and institutions to understand whether the countries were focused only on creating compatibility or also on generating legitimacy and to assess the quality of compatibility and legitimacy they were actually able to generate.

(i) India: Competition Act 2002

When India adopted its modern competition transplant in 2002 it already had considerable understanding of monopolies. In 1969 it had enacted the Monopolies and Restrictive Trade Practices Act, modelled primarily on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. It had also regularly reviewed the law through governmental committees and had amended it from time to time to reflect India's economic aspirations and reality.⁶⁷ For instance, the law was amended in 1984⁶⁸ on the 1977 recommendations of the Sachar Committee⁶⁹ and was further amended in 1991 in pursuance of India's economic liberalisation programme. Both amendments were made through Acts of parliament.

After joining the WTO in 1995,⁷⁰ India became concerned with developing a domestic competition regime to avoid being infiltrated by international cartels.⁷¹ In 1999, the Indian government established a nine-member committee, the Raghavan Committee, comprising Indian government officials, experts and civil society representatives, to propose an appropriate competition law for the country. In 2000, after consulting with academics, representatives of chambers of industries and commerce, professional institutes, consumer organisations, experts, academics and government officials,⁷² and examining competition laws and reports of nearly 80 countries (including competition/antitrust laws of the EU, the UK, the US, and Japan), the Raghavan Committee submitted its report, and a draft competition law, to the government for its consideration.

The Indian government amended the draft law and tabled it before parliament, where it was evaluated by the relevant standing committee in consultation with representatives of financial institutions, chambers of industry and commerce, consumer organisations, professional institutes, experts, academics and relevant ministries. The law was finally enacted in January 2003 as the Competition Act 2002 (the Indian Act).⁷³

Shortly thereafter, the Indian Act was challenged before the Indian Supreme Court on the ground that it did not conform to the constitutional principle of separation of powers. However, the Supreme Court dismissed the matter on the government's assurance that it would amend the law.⁷⁴ This led to the enactment of the Competition (Amendment) Act 2007 (2007 Amendment Act) which was passed after due deliberation in parliament. In 2017 the Indian Act was amended once again, this time to replace the specialist competition appellate tribunal with the more generalist National Corporate Law Appellate Tribunal (NCLAT). This amendment was introduced through a summary process which did not entail parliamentary discussions.⁷⁵ Most recently, the Act was amended in 2023, also by the parliament, on the

⁶⁷S Chakravarthy 'Why India adopted a new competition law' (CUTS International, 2006) pp 5–12, https://www.cuts-cier.org/pdf/Why_India_Adopted_a_new_Competition_Law.pdf, (accessed 15 October 2025).

⁶⁸Ibid. India had adopted the Monopoly Control Act in pursuance of the recommendations of the Mahalonobis Committee Report 1964 and the Hazari Committee Report 1965.

⁶⁹A Kumar 'The evolution of competition law in India' in V Dhall (ed) *Competition Law Today: Concepts, Issues, and the Law in Practice* (Oxford: Oxford University Press, 2007) pp 486–489.

⁷⁰WTO 'Members and observers', http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 15 October 2025).

⁷¹SV Raghavan 'Report of High-Level Committee on competition policy and law' (2000) <https://the1991project.com/public-repository/report-high-level-committee-competition-law-and-policy-2000-chaired-s-v-s> (accessed 15 October 2025) para 1.22.

⁷²Chakravarthy, above n 67, p 21.

⁷³Ibid, p 22.

⁷⁴*Brahm Dutt v Union of India* (2005) 2 Supreme Court Cases 431, 435(h) and 436(a).

⁷⁵National Company Law Appellate Tribunal, <https://nclat.nic.in/about-NCLAT> (accessed 15 October 2025).

recommendation of the Competition Law Review Committee to address competition implications of India's growing digital economy.⁷⁶

It is evident from the preceding discussion that even though India consulted foreign models in developing its competition law, it engaged bottom-up, participatory institutions at each successive stage of deliberating, enacting and amending the Indian Act. Consultations with stakeholders, carried out first by the Raghavan Committee and later by relevant parliamentary standing committees, as well as the debates in parliament allowed India to adapt Western models in light of the tacit local knowledge and expertise of key stakeholders (if not of all members of the public) and to draft a law that was more compatible with the peculiarities of the Indian context. These institutions also aggregated the consent of stakeholders and elected public representatives and thereby conferred at least *functional legitimacy* on the Indian Act.

(ii) *Pakistan: three ordinances and an act*

In 1970, Pakistan, like India, had adopted the Monopolies and Restrictive Trade Practices Ordinance, also based primarily on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. However, unlike India, Pakistan had not regularly reviewed this law. It was only after joining the WTO that Pakistan's interest in monopolies was reignited.⁷⁷ In time, this led Pakistan to approach the World Bank for technical assistance to develop a new competition law and policy framework.⁷⁸

In 2006, in response to the request of the Pakistani government, the World Bank established a committee comprising World Bank officials, Pakistani economists, lawyers and academics, international consultants and chartered accountants, to advise on a new competition law and policy for the country.⁷⁹ In 2007, after a few months of deliberations and only two public meetings,⁸⁰ the World Bank-led team submitted its report and a draft competition law (that had been drafted by a Brussels based law firm) to the Pakistani government.⁸¹ In October 2007, the Pakistani government promulgated the draft law as the Competition Ordinance 2007 (the 2007 Ordinance) without any parliamentary debate.⁸² In 2009 the Pakistani Supreme Court directed the government to place the 2007 Ordinance before parliament failing which it would lapse after 120 days. However, instead of complying fully with the order of the Supreme Court, the Pakistani government promulgated the Competition Ordinance 2009 (the 2009 Ordinance) in November 2009 when the 2007 Ordinance lapsed, and when this lapsed in April 2010, it promulgated the Competition Ordinance 2010 (the 2010 Ordinance).⁸³ In August 2010, the government finally submitted a competition Bill for parliamentary scrutiny, which was enacted as the Competition Act 2010 (the Pakistani Act) after brief consultations with the relevant parliamentary standing committee.⁸⁴

⁷⁶Competition Commission of India 'Legal framework', <https://cci.gov.in/public/legal-framework/act> (accessed 15 October 2025).

⁷⁷See above n 70 and UNCTAD Annual Report 2002, p 22, https://unctad.org/system/files/official-document/edm20033_en.pdf (accessed 15 October 2025).

⁷⁸ED Manes 'A framework for a new competition policy and law: Pakistan' (The International Bank for Reconstruction and Development 2007) Acknowledgment.

⁷⁹Ibid.

⁸⁰The report refers to only two public consultations: one workshop in May 2006 and a Conference in Lahore in December 2006.

⁸¹J Wilson 'Crossing the crossroads: making competition law effective in Pakistan' (2011) 8 *Loyola University Chicago International Law Review* 105 at 111.

⁸²Ordinance no LII of 2007 dated 2 October 2007. Although ordinances only have a 120-day life under the Pakistani Constitution, the 2007 Ordinance was allowed to survive in pursuance of the Pakistan's Constitution (Amendment) Order 2007 until it was struck down by the Supreme Court in *Sindh High Court Bar Association v The Federation of Pakistan* PLD 2009 SC 879 (see para 22(vii)). Also see 'Voluntary peer review of competition law and policy – Pakistan' (UNCTAD, 2013) ch 1A, 2, para 7.

⁸³Ordinance no XLVI of 2009 promulgated on 26 November 2009 and Ordinance XVI of 2010 promulgated on 20 April 2010.

⁸⁴Wilson, above n 81, at 108–109.

It can be seen from the preceding outline that Pakistan engaged only top-down institutions and relied almost exclusively on the expertise of technocrats and foreign advisors in drafting the 2007 Ordinance, as well as promulgating the 2009 and 2010 Ordinances. While the limited interaction with stakeholders and the exclusion of parliamentarians from the adoption process allowed the government to retain control of the substance of the Pakistani competition law, it diminished the quality of its legitimacy and compatibility. Therefore, while the Pakistani competition transplant had superficial compatibility with the Pakistani context, it only had *formal legitimacy* and perhaps a small degree of *functional legitimacy* which prevented the law from being meaningfully accepted, understood and utilised in the country. This deficit was partially corrected by the limited stakeholder consultations carried out in enacting the Pakistani Act, but these could not overcome the gap created by the early lack of legitimacy and compatibility.

(iii) Bangladesh: Competition Act 2012

Bangladesh inherited a number of laws when it gained independence from Pakistan in 1971, including the Pakistani Monopolies and Restrictive Trade Practices Ordinance 1970.⁸⁵ However, in its early decades Bangladesh remained focused on enhancing its GDP,⁸⁶ and largely ignored this law. After joining the WTO, Bangladesh once again considered regulating monopolies, but insisted that it should do so in a way that specifically addressed the country's economic priorities.⁸⁷

In 2004, a Bangladeshi think tank, in partnership with an Indian think tank and with support from the UK Department for International Development (DFID), launched a project to raise competition awareness in the country.⁸⁸ In 2006 the project reported that there was 'a consensus among stakeholders for an urgent need to regulate the market...'. It, therefore, called for 'a modern, independent, and transparent Competition Authority'⁸⁹ and an overarching competition law for Bangladesh.⁹⁰ This call was supported by the IMF and the World Bank, who were working for poverty reduction in Bangladesh at the time.⁹¹

In 2008 Bangladesh placed a competition Bill before parliament. However, it was not enacted, due to resistance by the business community who viewed it as a foreign intervention in the Bangladeshi economy and an attempt at intimidation by the government.⁹² In June 2012, the Bangladesh government, with the support of DFID and the International Finance Corporation (IFC), once again placed a competition Bill before the parliament as part of the government's wider agenda of enhancing its investment climate.⁹³ This time the Bill was enacted as the Competition Act 2012 (the Bangladeshi Act), however, instead of including provisions specifically addressing Bangladesh's economic concerns of inclusivity and eradication of poverty, the Act reflected a strong Indian influence,⁹⁴ and replicated several of the Western-inspired provisions on which the provisions of the Indian Act were based.

The strategy followed and institutions engaged by Bangladesh in adopting its competition transplant is a hybrid of the approaches followed by India and Pakistan. Like India, Bangladesh formally enacted its

⁸⁵Constitution of Bangladesh 1972, Art 149.

⁸⁶ODI Briefing Paper 'Bangladesh economic performance and prospects' (Overseas Development Institute, 1990) <https://cdn.odi.org/media/documents/6760.pdf> (accessed 15 October 2025).

⁸⁷Statement of the Honourable Minister for Commerce, Mr Amir K Mahmud Chowdhury, MP, at the WTO Competition Working Group Regional Seminar on Competition Policy and Multilateral Negotiations (Hong Kong: April 2002), <https://www.iprsonline.org/resources/competition.html> (accessed 15 October 2025).

⁸⁸Promoting competition policy and law in Bangladesh: a civil society perspective' (CUTS International, 2006) <https://cuts-cicier.org/pdf/BangladeshCAD.pdf> (accessed 15 October 2025).

⁸⁹Ibid, p 27.

⁹⁰Ibid, p 28.

⁹¹IMF Country Report No 05/410 'Bangladesh: poverty reduction strategy paper' (International Monetary Fund, 2005).

⁹²NH Tonmoy 'The absence of political will to implement competition policy in Bangladesh is a major obstruction of its rapidly growing economy' (2018) 2(3) Comparative Law Working Papers 7.

⁹³'Competition Law to relieve consumers of unhealthy business practice: Shafique' <https://today.thefinancialexpress.com.bd/print/competition-law-to-relieve-consumers-of-unhealthy-business-practice-shafique> (accessed 18 October 2025).

⁹⁴For instance, the terms 'combination' and 'enterprise' in s 2 of the Bangladeshi Act and 'deemed' anti-competitive affect and 'adverse effect on competition' in s 15 are identical to comparable provisions of the Indian Act.

Act through parliament; however, like Pakistan, it outsourced deliberations to foreign organisations and think tanks with only limited participation from domestic Bangladeshi think tanks. The Bangladeshi Act is, therefore, a worrying mix of lower order legitimacy and compatibility: given that it was enacted by parliament, it has *formal* and perhaps even a degree of *functional legitimacy*, but because the parliament lacks the depth for meaningful aggregation of consent and because there were no broad-based stakeholder consultations, it lacks *substantive legitimacy*. The Act also only has superficial compatibility due to the provisions of the Act being agreed upon through top-down institutions without obtaining and applying broad-based tacit knowledge from the Bangladeshi context.

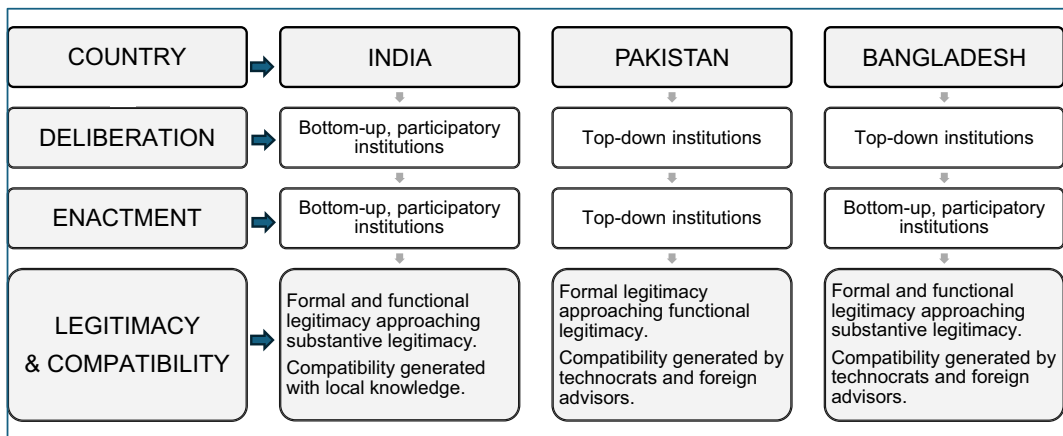


Figure 2. The adaptation and adoption of competition transplants in South Asia.

(c) Effect of legitimacy and compatibility on competition enforcement

The evaluation of the legitimacy and compatibility generated by the strategies and institutions through which India, Pakistan and Bangladesh adapted and adopted their respective competition transplants, has practical implications for the enforcement of these laws. This section evaluates the impact of legitimacy and compatibility in relation to three key enforcement goals.

(i) International recognition

A key goal of adopting competition transplants for India, Pakistan and Bangladesh was to gain international recognition or international legitimacy.⁹⁵ To this end it was arguably more important for these countries to ensure that their competition transplants were aligned with the Western models on which they were based,⁹⁶ than to require them to have compatibility and legitimacy in their domestic contexts. While this overarching priority could not prevent these countries from achieving the highest levels of domestic compatibility and legitimacy for their competition transplants, it certainly could not, and in certain instances, did not, compel them to do so.

Absent an imperative combined with the lack of clarity or awareness of the significance of compatibility and legitimacy, the three countries adopted their competition transplants through such strategies and institutions as were present and active in their contexts. India, for instance, had regularly reviewed its monopoly control regime and had a reasonable understanding of monopolies and the threats they posed.

⁹⁵See Section 2(b) above. Also see 'Voluntary peer review of competition law and policy of Bangladesh' (UNCTAD 2022) pp 2, 11, https://unctad.org/system/files/official-document/ditcclp2022d1_en.pdf (accessed 15 October 2025).

⁹⁶This is evident from a review of the core competition provisions (regarding anti-competitive agreements, abuses of dominance, and mergers) of the Indian, Pakistani and Bangladeshi Acts which – except for some adaptations for language – are based entirely on comparable provisions of EU, the UK and the US laws and the UNCTAD model law.

It also had a larger, more vibrant economy with many significant economic players who were interested in the likely impact of a competition transplant as well as a strong history of uninterrupted parliamentary democracy. India, therefore, not only had the incentive and perhaps even the domestic obligation, to adapt and contextualise its competition transplant in light of local knowledge but also had bottom-up, participatory institutions capable of aggregating both tacit knowledge and consent. Pakistan and Bangladesh on the other hand, had limited capacity, incentive and domestic obligation to seek domestic legitimacy and deep compatibility. The countries had younger parliaments whose operation had been interrupted by periods of military rule. They also had little or no experience of reviewing or adapting their anti-monopoly laws and had a practice of considering economic transplants through top-down institutions in light of the expertise of technocrats and foreign advisors. Pakistan had a further tradition of introducing economic reforms through ordinances and thereby bypassing parliamentary scrutiny and deliberations altogether.

However, the differences in the quality of the compatibility and legitimacy of their competition transplants did not have a bearing on the initial international recognition accorded to these countries for acquiring modern competition laws. Shortly after they had enacted their competition statutes, India, Pakistan and Bangladesh were inducted into the international competition community as members of the International Competition Network (ICN),⁹⁷ the OECD Global Forum on Competition,⁹⁸ and the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy.⁹⁹ Arguably, however, their continued recognition would depend on how the countries enforced their respective competition laws.

(ii) The quality of enforcement: comparing India and Pakistan

Another important goal for which these countries adopted competition transplants was to sanction and eliminate anticompetitive activities and thereby make their economies more efficient. While it was important, to this end, that the transplants had both deep compatibility and a higher order legitimacy in their domestic contexts, it would be the quality of legitimacy that would determine whether and to what extent the transplants would be voluntarily complied with.

Voluntary compliance may be measured in at least two ways. For instance, it may be measured by the quantum of fines that an undertaking pays in pursuance of orders of the relevant national competition authority. However, this measure is unlikely to provide an accurate picture because the enforcement pathways envisaged in the competition transplants allow the undertaking to challenge fines before second- and third-tier competition authorities where a large number remain pending to date. Another measure, more appropriate for present purposes, is the numbers of orders of the national competition authorities issued in response to complaints filed before them as compared to orders in matters of which the competition authorities had taken notice of their own accord.

A comparison of the orders of the Competition Commission of India (CCI) and the Competition Commission of Pakistan (CCP) in the first decade of their operations (2008–2017)¹⁰⁰ reveals a clear divergence between the numbers of orders issued in response to public complaints filed before them. In case of CCI, 75.6% of all its orders in this period proceeded from complaints received from the public, as compared to 7.32% passed in matters initiated by the CCI itself. On the other hand, only 32.5% of CCP's orders issued in the same period proceeded from complaints, whereas 62.5% were in respect of actions the CCP had initiated of its own accord.

⁹⁷International Competition Network 'Members', <https://www.internationalcompetitionnetwork.org/members/> (accessed 15 October 2025).

⁹⁸OECD 'Global forum on competition', <https://www.oecd.org/en/networks/global-forum-on-competition.html> (accessed 15 October 2025).

⁹⁹Both Pakistan and Bangladesh invited the UNCTAD Voluntary Peer Review of Competition Law and Policy; India regularly engages in conferences and meetings organised by the UNCTAD.

¹⁰⁰The CCI did not commence operations until the Indian Act was amended by the 2007 Amendment Act, while the CCP commenced operations immediately after the promulgation of the 2007 Ordinance.

Table 1. CCI and CCP orders initiated on complaints and *suo motu*¹⁰¹

Year	Total enforcement orders		Cases initiated <i>suo motu</i>		Cases initiated on complaints	
	CCI	CCP	CCI	CCP	CCI	CCP ¹⁰²
2008	0	3	0	3	0	0
2009	0	9	0	5	0	4
2010	5	8	0	5	3	2
2011	33	8	1	5	24	3
2012	31	2	3	1	21	1
2013	21	4	0	3	17	0
2014	22	0	4	0	14	0
2015	26	1	2	1	23	0
2016	8	2	0	1	7	1
2017	18	3	2	1	15	2
TOTAL	164	40	12	25	124	13
Percentage	100%	100%	7.32%	62.5%	75.6%	32.5%

The higher number of orders issued in response to complaints filed in India also indicates a higher number of complaints filed and a greater acceptance of the competition transplant by the Indian public as well as a recognition of its merits. This, in turn, reflects the higher order legitimacy generated by India by engaging relatively more bottom-up, participatory institutions in deliberating and enacting the Indian Act. Conversely, the limited public uptake of the Pakistani Act, as reflected in the limited number of complaints filed before the CCP, indicates its weaker legitimacy. This was due to legitimacy and compatibility gap created by the 2007, 2009 and 2010 Ordinances being introduced exclusively through top-down institutions which did not aggregate either knowledge or consent from the public which was only partly remedied by the enactment of the Pakistani Act through parliament.

(iii) *The curious case of the Bangladeshi Act*

The process through which the Bangladeshi Act was enacted seemed to offer a double advantage. It was expected to be compatible with the Bangladeshi context, having been adapted with the support of both Bangladeshi and Indian think tanks as well as foreign advisors. It was also expected to have a higher order legitimacy that would invoke voluntary compliance, having been enacted through democratic institutions. Cumulatively these advantages suggested that the Bangladeshi Act would be seamlessly translated into action in its context.

However, these expectations remain unfulfilled as the Bangladeshi Act is still to be meaningfully enforced even a decade after its enactment. By the end of 2022 the Bangladesh Competition Commission (BCC) had taken up only 12 cases, all in respect of anticompetitive agreements, eight (66.6%) of which had been initiated in response to public complaints. The BCC had also commenced one investigation in an abuse of dominance matter and it had not cleared any mergers.¹⁰³

¹⁰¹The discrepancy between the total orders of the CCI and CCP is due to cases transferred to them from the anti-monopoly authorities, and cases initiated on the basis of government references.

¹⁰²This total does not include cases initiated by CCP on the basis of informal complaints.

¹⁰³See UNCTAD, above n 95, at 26.

The lack of competition enforcement in Bangladesh despite its seeming adoption advantages confirms that while compatibility created by top-down institutions may be sufficient for a transplant to generate international recognition, it is not capable of making the transplant understood, utilised and applied in the domestic context. It also suggests that the mere enactment of a transplant through democratic institutions is not a guarantor of the aggregation of public consent and therefore of legitimacy, unless these institutions have the expertise and the capacity to meaningfully aggregate consent.

Comparing the Bangladeshi strategy for enacting the Act to that of India suggests that a higher order legitimacy can only be achieved if consent from the public is aggregated through extensive engagement with the public, carried out by a wide range of bottom-up, participatory institutions employed at each of the successive stages of adoption. On the other hand, comparing the Bangladeshi experience with the Pakistani experience suggests that while the promulgation of the 2007, 2009, and 2010 Ordinances in Pakistan through top-down, exclusive institutions conferred a degree of formal legitimacy that allowed the transplant to command compliance, Bangladesh's attempt to enact the laws through weak and inexperienced bottom-up, participatory institutions left it unable to either command or warrant compliance. Finally the review of the Bangladeshi experience confirms the combined value and significance of deep compatibility and a higher order legitimacy in ensuring that a transplant is translated into action.

3. Broader implications of the South Asian experience

The challenges faced by India, Pakistan and Bangladesh in adapting, adopting and enforcing their competition transplants are not unique. Developing countries around the world with institutions of varying democratic depth and particular preferences for adoption strategies continue to encounter similar struggles in aggregating tacit knowledge and consent from their contexts and thereby meaningfully enforcing not only competition but all economic transplants. This section draws upon the post-enactment experiences of India, Pakistan and Bangladesh to explore strategies that host countries may adopt to enhance the legitimacy of their transplants and thereby their compatibility levels, to bring about the hoped-for economic transformation.

(a) Enhancing domestic legitimacy (and compatibility) post-adoption

The possibility of enhancing legitimacy of a transplant post-adoption arises from the fact that borrowing and transplanting does not end at enactment and continues even as countries interpret and enforce their economic transplants. However, whether or not this continued borrowing enhances legitimacy (and compatibility) depends on the institutions that the country engages in this regard.

(i) The legislature and amendments to the transplants

Amendments to statutory transplants may enhance legitimacy when they are made through bottom-up, participatory institutions, and diminish it when they are introduced through top-down institutions. This process also enhances compatibility when the bottom-up, participatory institutions are capable of aggregating tacit local knowledge as much as consent.

The role of the legislature in enhancing legitimacy may be observed in both India and Pakistan. India improved the legitimacy of the Indian Act twice: first, when it introduced the 2007 Amendment Act to change the selection process for members of the CCI and to introduce the Competition Appellate Tribunal; and secondly in 2023, when it amended the Act to address issues related to the digital economy. Both amendments were introduced through bottom-up and participatory democratic institutions that engaged stakeholders at several different stages of the deliberation and enactment process.¹⁰⁴ Similarly,

¹⁰⁴In 2018, the Indian Ministry of Corporate Affairs established the Competition Law Review Committee, which submitted its report in 2019. In February 2020, the Ministry introduced the Competition (Amendment) Bill 2020, a revised version of which was enacted in 2023.

Pakistan reduced the legitimacy deficit of its competition regime brought about by transplanting the 2007, 2009 and 2009 Ordinances through top-down institutions, when it enacted the Pakistani Act through bottom-up and participatory democratic institutions.¹⁰⁵

However, India also deepened its legitimacy deficit when it introduced a seemingly small change in the institutions engaged for the amendment. For instance, the 2017 amendment to the Indian Act, which replaced the specialist Competition Appellate Tribunal established by the 2007 Amendment Act with the generalist NCLAT, though approved by parliament, had been introduced as part of a money Bill, which could be and was enacted without extensive parliamentary scrutiny or stakeholder consultations.¹⁰⁶

Bangladesh has not amended its Act since adoption. However, rather than suggesting that this has allowed Bangladesh to maintain the legitimacy of the Bangladeshi Act as it was at the time of adoption, it indicates a possible reduction in legitimacy due to the prolonged absence of stakeholder engagement with the Act.

(ii) Enforcement and the role of the executive

The most impactful strategy for enhancing the legitimacy of competition or other economic transplants is their enforcement, provided that it is carried out in accordance with the norms of due process.¹⁰⁷ The positive impact of enforcement is also evident in the case of competition transplants in India and Pakistan.

Once they started issuing orders,¹⁰⁸ the CCI and the CCP were able to engage members of the public beyond those addressed in specific orders as well as other authorities in their countries and were also able to clarify competition principles and due process norms relevant to competition proceedings.¹⁰⁹ This allowed both CCI and CCP to gain recognition and acceptance in their respective contexts, which in turn improved the general understanding of competition principles among stakeholders in their countries and thereby bolstered the legitimacy as well as compatibility of their competition transplants.

Conversely, CCB's hesitant foray into enforcement has prevented it from taking advantage of this important opportunity for enhancing the legitimacy of the Bangladeshi Act.

(iii) The power of judicial endorsement

General courts in a country can intervene in the operations of competition transplants either as final appellate authorities or in the exercise of their constitutional powers of judicial review. Whilst competition authorities, as well as aggrieved parties, do not always welcome such interventions because they delay the final resolution of the matter, these nevertheless play a critical role in bringing the transplant into alignment with the pre-existing legal system of the host country and thereby bolstering its credibility.

The Supreme Courts in both India and Pakistan, in exercise of their appellate as well as constitutional jurisdictions, have played a positive role in enhancing the legitimacy and compatibility of their competition transplants. The constitutional jurisdiction of the Indian Supreme Court was invoked shortly after the Indian Act was enacted by a petition challenging the Act's constitutionality.¹¹⁰ Although the Supreme Court dismissed the petition, it set in motion a chain of events which culminated in the

¹⁰⁵See Section 2(b)(ii) above.

¹⁰⁶Although it is arguable whether such a material amendment could be made through a money Bill, the matter has not been challenged before Indian courts.

¹⁰⁷K Murphy et al 'Nurturing regulatory compliance: is procedural justice effective when people question the legitimacy of the law?' (2009) 3 Regulation & Governance 1.

¹⁰⁸The CCI commenced enforcement early in 2009, while the CCP was issuing orders immediately after the promulgation of the 2007 Ordinance.

¹⁰⁹For India, see *Competition Commission of India v Steel Authority of India Ltd* (2010) 10 SCC 744 and *Excel Crop Care Ltd v CCI* (2017) 8 SCC 47; for Pakistan, see *Islamabad Feeds (Pvt) Ltd v Federation of Pakistan etc* WP 4942/2020 decided 16 September 2021 and *LPG Association of Pakistan v Federation of Pakistan* 2021 CLD 214.

¹¹⁰*Brahm Dutt*, above n 74.

enactment of the 2007 Amendment Act and the creation of an independent Competition Appellate Tribunal to hear appeals from the CCI. Similarly, the constitutional jurisdiction of the Pakistan Supreme Court was invoked in a petition that challenged all ordinances promulgated in a certain period and led to the Supreme Court directing the government to place the 2007 Ordinance before parliament, which eventually culminated in the enactment of the Pakistani Act.¹¹¹ Further, the Supreme Courts in both countries have decided several matters in exercise of their appellate jurisdictions, and have thereby clarified the provisions of their respective Acts and enhanced the quality of their legitimacy and compatibility.¹¹²

Unlike India and Pakistan, superior courts in Bangladesh have not as yet engaged with the Bangladeshi Act either in their constitutional or appellate jurisdictions. This means that to date the Bangladeshi Act has remained unable to benefit from the legitimating effect of endorsement or guidance from the country's pre-existing legal system.

(b) Impact of enhanced legitimacy on compatibility and international recognition

The experience of competition transplants in India and Pakistan suggests that the enhanced legitimacy of these transplants, whether through amendments, enforcement or judicial intervention, had a corresponding positive impact on the compatibility of these transplants with their contexts. The combined effect of the enhanced legitimacy and compatibility made it possible for these competition transplants to be better understood, applied and utilised in their contexts, as evident from the steady increase in the total number of orders issued by the CCI and the CCP in the first decade of their operations.¹¹³

The enhanced legitimacy and compatibility of the Indian and Pakistani Acts also boosted their international recognition. The Indian Act had an already higher order original legitimacy and compatibility. Therefore, when enhanced through democratically executed amendments, steady enforcement and supportive judicial interventions, it afforded the Indian Act, and the CCI, a higher degree of international visibility and prominence. The Pakistani Act had a weaker order legitimacy and compatibility as compared to the Indian Act. However, when remedied post-adoption, it allowed CCP to be acknowledged internationally for its efforts in meaningfully enforcing the Pakistani Act.¹¹⁴

In contrast, Bangladesh's inability to enhance its legitimacy prevented it from deepening the compatibility of the Bangladeshi Act or enhancing its international recognition. This meant that, at best, its legitimacy and compatibility remained at the levels they were at when the Bangladeshi Act was first enacted. However, it is more likely that all these values deteriorated as the Act remained unutilised for a prolonged period.

(c) The effect of unresolved tensions in host country legal systems

Several developing countries are also former colonies whose legal systems are based on historic colonial transplants. This means that when they adopt modern economic transplants they introduce them into legal systems that are themselves based on transplants.¹¹⁵ This compounding of transplants complicates the legitimacy and compatibility deficit generated by the process through which the countries adopt their

¹¹¹*Sindh High Court Bar Association*, above n 82.

¹¹²See for instance *LPG Association of Pakistan v Federation of Pakistan* 2021 CLD 214, in which – after a delay of nearly 11 years – the Lahore High Court dismissed more than 90 constitutional challenges against the Pakistani Act. The matter is pending appeal in the Pakistan Supreme Court.

¹¹³Darr, above n 13, ch 4.

¹¹⁴India has been an OECD Key Partner since 2007 and has observer status at the OECD Competition Committee. The CCP is involved with the OECD Global Forum on Competition and also participates in its competition committee. In 2021 the CCP was also awarded a three-star ranking by the Global Competition Review for effective enforcement actions, successful dawn raids, and legal victories among others: 'CCP awarded three-star rating by global competition review', https://cc.gov.pk/home/func_three_star_rating (accessed 15 October 2025).

¹¹⁵See Section 2(c) above.

modern economic transplants and increases the risk of their failure. It also places a greater onus upon developing countries to off-set the compounded deficit through strong bottom-up, participatory institutions.

The formal legal systems of India, Pakistan and Bangladesh were based on colonial laws that had been imposed by the British without aggregation of knowledge or consent from the local population.¹¹⁶ This had not only created a legitimacy and compatibility deficit but had also driven a wedge between the transplanted formal legal system and the organic informal legal institutions that it had failed to fully displace. Therefore, while the formal legal system could command obedience – often by the use of force – it could not shape local behaviour, which continued to be informed by the informal legal institutions that were more fully aligned with the values and ideology of the population.¹¹⁷ The tension between the formal and informal institutions persisted even after the countries gained independence. In an extreme form it manifested itself in the inability of these countries to uphold the rule of law, while in less extreme but nevertheless critical forms it is evident, for instance, in the struggle for dominance between the formal constitutional institution of separation of powers and the informal domestic institution of supremacy of the executive derived from the rule of kings and entrenched by the power of colonial officers in British India.

The proclivity for an enlarged role for the executive is evident from the provisions of the Indian Act, which as it was first enacted contained provisions that authorised the executive to appoint, remove and re-appoint the chairperson and members of the CCI¹¹⁸ and thereby effectively subordinated the operations of the CCI to the executive. A similar tilt towards the executive may also be observed in comparable provisions of the Pakistani and Bangladeshi Acts, which also allow the executive the exclusive power to appoint, remove, and re-appoint their members.¹¹⁹ However, India was able to counter the pull of its informal institutions through strong bottom-up, participatory institutions which allowed the Act to be challenged before the Indian Supreme Court and later to be amended and brought into alignment with the formal principle of separation of powers.¹²⁰ There was no such counterforce in either Pakistan, where top-down institutions dominated the law reform process, or in Bangladesh, where the bottom-up, participatory institutions were both young and weak. Therefore, the inability of the formal institutions to displace the organic, informal institutions allowed the executive to maintain a hold over the CCP and CCB. This rendered the CCP excessively cautious and prevented it from exercising the full range of its powers¹²¹ and held the CCB back from properly commencing operations.

Conclusion

This paper identifies the legitimacy gap in borrowed laws and makes a case for bridging it by examining and comparing the Indian, Pakistani and Bangladeshi experiences of adopting and enforcing modern competition transplants. However, its findings are equally relevant for all countries that acquire not just competition transplants but indeed any economic transplants in the hope of improving their growth and development outcomes and do so often without a corresponding internal demand for such transplants. The paper cautions against the view that economic transplants are so easily transportable that they may be adopted with only minimal adjustments for context and argues that for a transplant to be voluntarily

¹¹⁶Ibid.

¹¹⁷Sacco, above n 27, refers to these hidden informal institutions as ‘cryptotypes’ or linguistic and behavioural patterns which may be implicit in the context and influence the convictions of ‘interpreters’, broadly defined.

¹¹⁸Section 9 of the Indian Act (before the 2007 Amendment Act as per n 100) and s 10(1) of the Act.

¹¹⁹Section 14(2) read with proviso to s 14(5) of the Pakistani Act and s 17 of the Act; s 7(2) and 7(6) of the Bangladeshi Act.

¹²⁰*Brahm Dutt*, above n 74. Also see s 9(1) of the Indian Act as amended by the 2007 Amendment Act.

¹²¹Although the CCP initially addressed cartels and abuses of dominance, in time it came to focus almost entirely on deceptive marketing practices. This trend is gradually shifting once again: see Competition Commission of Pakistan ‘All orders’, <https://cc.gov.pk/home/orders> (accessed 15 October 2025).

obeyed and yield economic benefits, it is imperative that it be deeply compatible with, and have legitimacy in, its adoptive context.

The paper further emphasises that legitimacy and compatibility are qualitatively distinct. Compatibility relates to the commonalities between the transplant and the host country context and may be created through the adaptation of a blueprint by top-down or bottom-up participatory institutions. However, legitimacy is the positive perception of the transplant and stems from the often context-dependent consent conferred on it by the public through bottom-up, participatory institutions. Therefore, while legitimacy and compatibility may overlap when both are generated through bottom-up, participatory institutions, the fact that compatibility is a product of knowledge while legitimacy is that of belief and perception, the presence of one does not automatically imply that of the other.

Finally, the paper seeks to emphasise that there is a legitimacy gap in all transplants, whether economic or otherwise, simply because all transplants are inherently disconnected from their adoptive contexts. The reason, perhaps, that the gap is not as noticeable in respect of non-economic transplants is because they are not as prevalent and are not always expected to deliver quantifiable results. However, this neither diminishes the importance of legitimacy nor the responsibility of governments for overcoming the gap. As the discussion suggests, legitimacy is desirable not only for the quantifiable results that a transplant may yield but also, and more importantly, for laying the foundation for voluntary compliance with the law and for the harmonious interaction between the transplanted law and the pre-existing legal system of the adopting country.