

1. Paper Title

Regulatory Reform in the Mauritian Telecommunication Sector: A Vain Quest for Embedded Autonomy?

2. Author

First Names: Sandiren Jaganaden

Last Name: REDDI

Affiliation: University of Technology, Mauritius

Mailing Address: Impasse Nehru, St Paul, Phoenix, MAURITIUS

Telephone Number: +230 696 9181

Email Address: sandiren.reddi@gmail.com

3. Biography

LLB Hons – London School of Economics (2002), MA Politics – University of Nottingham (2003).

Part-time Lecturer in International Law/International Relations – University of Mauritius, August 2004

Lecturer in Law and Politics – University of Technology, Mauritius, August 2004

Lecturer in Law – DCDM Business School, Mauritius, January 2004-July 2004

Research Interests: Telecommunication Regulations and regulation of new technologies.

4. Abstract

This paper will evaluate regulatory reforms in the Mauritian Telecommunication Sector following the Information And Communication Technologies Act 2001. In particular this article will focus on the concept of ‘Embedded Autonomy’ and ‘regulatory/political capture’ and will investigate the extent to which this has been experienced in Mauritius. It will gauge the challenges of institutional design in creating the regulatory authority and framework and also obstacles that hamper the institution of regulatory autonomy. The paper will start with a brief outline of some of the major theoretical approaches to regulation and their implementation in a number of small island states before considering the Mauritian experience, through a brief historical analysis of Telecommunication Privatisation and Liberalisation and its impact and unintended effects on the Mauritian regulatory space before proceeding towards a critical analysis of the political and legal aspects of telecommunication regulation in the Country.

5. Keywords

Telecommunications, Regulations, Autonomy, Privatisation, Liberalisation

6. Paper

Introduction

Privatisation and liberalisation of the utilities sector tend to exemplify the shift in developing states from traditional state-dominated economies towards fully competitive economic structures. This trend stems normally from two factors; firstly, the belief that economies will thrive best under competitive conditions and, secondly, commitment to World Trade Organisations agreements. Inevitably, this change in economic structure creates some very complex policy issues for these developing states if only for the fact that such states are accustomed to government-control and regulation over their economies. This, coupled with globalisation of world economies, has furthered this reduction in the role of the state and, indeed, this idea of the 'diminished' or 'hollow' state has been widely put forward in the context of globalisation.(Evans, 1997), (Lodge, Stirton, 2002).

In developing states this dilemma between state control and the double processes of privatisation and liberalisation can be assessed through the analysis of one utility sector, the telecommunications sector. The importance of this sector as a looking-glass to investigate this shift in the economic structures of developing states cannot be underestimated. In many such states, this is the utility sector that has faced more changes and reforms than any other utilities. In fact, the reform of the telecommunication sector in developing states has been claimed to be the hallmark of this new economic perspective. (Grande, 1997). This claim has been particularly witnessed in Mauritius, a small developing island state in the Indian Ocean which has tried to fulfil its commitments to the World Trade Organisation (W.T.O) accords. Those reforms have obviously been accompanied by a diminishing role for the state and, simultaneously, the setting up of regulatory structures to ensure a level playing field for the emerging private telecommunication operators and to prevent any economic abuse by these operators – hence taking over the governmental function of protecting public interest. Crucial to the success of the regulatory structures is the idea of autonomy. Undeniably, autonomy is crucial for the functioning of any non-governmental body whose role is to take over governmental functions, especially if government has interests amongst the operators or is itself an operator within the telecommunications space.

The reasons for choosing the Mauritian Telecommunications sector are numerous. First of all, the technological developments in this sector are one of the few success stories on the African continent. Secondly, the paper draws on previous research model developed by Lodge and Stirton on Caribbean telecommunications and Mauritius seems to be a perfect comparison in relation to the common British colonial past and the presence of a monopolistic state-owned operator. Also, the political environment in Mauritius makes it very liable to regulatory capture by the political class. The other particularity of the Mauritian Telecommunication Sector is that it is not subject to the Competition Act or any fair trading body that might be set-up under this act, instead it has been the intention

of the Government to subject the Telecommunications to the control over an independent regulator. However, the Mauritian context does have its own limitations particularly in the fact that, compared to other states, the absence of a litigation culture, which means that the role of the regulator has rarely been legally challenged in tribunals or courts. The implication of this difference might be that the more informal arrangements or lobbying is more prominent in Mauritius than within the Caribbean context.

This paper will argue that the idea of autonomy has not been fully exercised in Mauritius. Political lobbies are still very reluctant to release their grip on regulatory institutions and this, to a great extent, influences on a lot of the decision making process. Extending the framework used by Lodge and Stirton on the reforms of Caribbean telecommunications in 2002, this article will assess the organisation structure, the institutional design and the *embeddedness* of the regulatory structure, and at the same time, evaluate the idea of regulatory autonomy and the extent to which the regulatory institution is subject to appropriation either through political or regulatory capture. In fact, in this context, the very concept of ‘independent regulator’ in Mauritius will be evaluated. The next section will give a brief overview of the modern history of the telecommunications sector and its major reforms. The subsequent sections will then discuss the extent to which the Caribbean model fits Mauritius

Modern History and Reform of the Mauritian Telecommunications Sector

While the story of telecommunications in Mauritius dates back to 1883, the corner stones in the modern era would start in 1985 with the incorporation of a state-owned private company under the Companies Act, the Overseas Telecommunication Services Company Ltd (OTS), which took over operations from Cable and Wireless, which had been controlling all international operations since the 1950’s while at the same time, local operations were controlled by Government through the Department of telecommunications. The next development in the modern history of Mauritian Telecommunications was in 1988 with the privatisation of the Department of Telecommunications into the Mauritius Telecommunications Services (MTS). A major turning point occurred in 1992 with the merging of MTS and OTS into Mauritius Telecom. This merger had the objective of improving the quality of service to meet the growing aspirations of the country for a fast and effective communication system. Simultaneously, another privately owned company Emtel has started to provide mobile phones using the Telephone Access Communication System (TACS) in 1989. Mauritius Telecom and Emtel did not compete directly until 1992 with the entry of a subsidiary of Mauritius Telecom, Cellplus Mobile Communications Limited with the exclusive right to operate the Global System Mobile (GSM) cellular mobile system until 1999.

On 15th February 1997, Mauritius made the commitment at the W.T.O Working group to open its telecommunications sector to competition and end up all monopolies and exclusive rights to domestic and international services by 2004. Along this perspective of liberalisation and privatisation, the Government agreed to sell 40% of Mauritius Telecom shares to France Telecom and in 2000, it set up the Mauritius Telecommunication

Authority to regulate the telecommunication space. In 2001, The Information and Communication Technologies Statute was enacted, under which the Information and Communication Technologies Authority (ICTA) was set up, taking over the functions of the M.T.A. From this period onwards, new operators started to emerge on the Mauritian Telecommunications market and while Mauritius Telecom still remained in a position of strong monopoly, it had to face competition in a number of areas, from Mobile Telecommunications, Internet Access and International calls. The setting up of the I.C.T.A was meant to be seen as the gradual decrease in state control over the telecommunications and under the ICT Act 2001, it enjoys considerable powers.

Institutional Framework of the I.C.T.A

According to research, the efficiency and credibility of the regulatory agent is vital to breed confidence within the industry and also to attract new participants within the regulatory space. From an institutional perspective this depends on the extent to which the regulator prevents two main problems, that is regulatory ‘capture’ – whereby one or more operators use the regulator to preserve their own interests and, secondly, the idea of ‘administrative expropriation’ – whereby the regulator’s policies prevent operators from at least breaking-even.¹ The idea of capture should also be extended to political capture, where the Government extends its control over the regulatory institution and thus the latter merely becomes a tool in the hands of the Government. As mentioned by Levy and Spiller (1996), investment in the sector depends not only if these problems are real but also depends significantly on the perception that these problems indeed do exist – that is the way the operators within the telecommunications space perceive the ability of the regulator to be able to create a fair and level playing field will influence their behaviour within this space and also influence new investments within the field.

The model used by Levy and Spiller focuses on three distinct areas of protection for the regulator against those pitfalls. These safeguards were divided into (1) substantive restraints on the discretion of the regulator (2) informal and formal constraints on changing the regulatory policies and (3) institutions giving protection to these constraints. The substantive restraints would be in the form of Constitutional and legislative controls, more precisely primary legislation controls that would limit the discretion of the regulator and also limit Government intervention within the regulatory structure. While the I.C.T Act 2001 is quite extensive, giving the I.C.T.A wide-ranging powers to regulate the sector, it is nevertheless crucial to point out that Mauritius suffers from the fact that it is based on a Westminster style democracy.

Indeed, substantive restraints on the discretion of the regulator would be applied ideally in a system where different institutions share legislative powers. Cherry and Wildman (1999) explain that one of the indirect ways by which government power is constrained in the U.S constitution is through a structure of separated powers and a system of checks

¹ B. Levy, ‘Comparative Regulation’, *A New Palgrave Dictionary of Economics and the Law*, (Macmillan Basingtoke, 1998) as quoted from M. Lodge and L. Stirton, ‘Embedding Regulatory Autonomy in Caribbean Telecommunications’, *Annals of Public and Cooperative Economics*, 73-4, 2002, p. 684

and balances among branches of government.² A more direct protection in the U.S constitution stems from the threat posed by the presence of a substantial majority in the legislative process. The concern here is that if left unchecked the majority has the ability to act arbitrarily and thus, in the U.S, a system was created that ‘would not only increase the cost of organising a majority through the indirect mechanisms...but place direct limitations on the exercise of government power in pursuing policy goals.’³ These direct limitations in the U.S Constitution basically impose certain judicially enforceable clauses that prevent government from performing certain actions and two such clauses are the *Takings Clause*⁴ which is used ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole’⁵; and the *Contract Clause*⁶, which prevents States from passing any laws that might infringe contractual obligations. Such direct and indirect protections are further complemented by the presence of an independent Judiciary which makes sure that those restraints on Government action are respected.

No such mechanisms can be found within the Mauritian Constitution that would limit Governmental action and also the idea of Separation of powers in Mauritius is not truly distinct. Clearly there is a definite overlapping between the executive and the legislative branches, hence, checks and balances are very limited, reduced primarily to parliamentary questions. More importantly, however, is the fact that despite being described as a Constitutional Democracy, the most powerful institution in Mauritius remains the Parliament, even more in times of substantial majority. In fact with a majority of three quarters or two thirds, Parliament can amend, modify or even suspend the constitution and the President cannot refuse assent to a bill seeking to do so. The implication of this is that the executive does exert a stronghold on many of the institutions, including the I.C.T.A.

Turning towards the I.C.T. Act 2001, it would seem that the function of the executive, in the person of the minister is limited. Only one clause of a general nature is addressed to the powers and functions of the minister with regards to the powers, functions and objects of the regulatory authority.⁷ However, the clause itself is widely formulated without any specific delimitation on the minister’s authority which could mean a double-edged sword since it would then depend on interpretation. The idea here is to prevent the authority from indulging into excessive regulation that might hinder the growth of the industry. It is believed that having a degree of legislative and executive control over the authority would prevent such abuses. In that respect, the I.C.T. Act 2001 can be said to be quite similar to the Jamaican Telecommunications Act 2000 with one major difference that the I.C.T. Act 2001 does not require I.C.T.A regulations to be subjected to positive affirmation of Parliament. This might seem a good indication of the independence of the

² B. A. Cherry and S. S. Wildman, ‘Institutional endowment as foundation for regulatory performance and regime transitions: the role of the US constitution in telecommunications regulation in the United States’, *Telecommunications Policy*, 23 (1999), p. 610

³ Ibid. p. 612

⁴ U.S. Constitution, 5th Amendment

⁵ *Armstrong v. United States*, 364 US 40 (1960), p. 49

⁶ U.S. Constitution, Article 1, Section 10.

⁷ Information and Communication Technologies Act 2001, Part III, Section 19

I.C.T.A vis-à-vis the legislative. On the other hand, the independence of the I.C.T.A with regards to the Government is debatable.

Indeed, as mentioned before, it is crucial that the regulatory authority be protected from administrative expropriation and political capture. The perception in Mauritius amongst the general public and the operators⁸ is that the regulatory authority is under government control. To begin with, in a Parliamentary debate, the Minister for I.C.T in an answer to the Leader of the Opposition, revealed that ‘creation of the regulatory authority itself emanates from any Government of the day. In the law itself, it is written that the regulator has to apply Government’s policy; it has to make policies in consultation with Government. So, regulators cannot operate independently of the Government.’⁹ While clearly, such an authority has to emanate from the enactment of a law by the Government; such declarations may make the perception of political capture of the regulatory authority more apparent in the eyes of other operators. This is even more accentuated when it is common knowledge that the Government and other para-statal bodies hold 60% of the shares of the incumbent operator that is Mauritius Telecom. In addition this belief has been accrued with the Telecommunication Order No. 4 of 2004 (TO42004) emanating from the I.C.T.A which required all operators to align the international tariffs on that of Mauritius Telecom, literally meaning that any operator that set a more competitive price than Mauritius Telecom was acting in illegality. This order was, however, disputed at the I.C.T tribunal (which has been set up under the I.C.T. Act 2001) and was quashed. The Tribunal held ‘that the issue of the TO42004 setting uniform tariffs for all IDD (International Direct Dialling) is contrary to the provisions of laws and has an anti-competitive effect on the IDD market.’¹⁰

The City Call case also tends to demonstrate a form of regulatory capture whereby one of the operators manages to use the regulator to further its interests, more probably due to a lack of technical expertise. Indeed in the City Call case, the defendant claimed that the reason behind aligning the tariffs on that of the incumbent operator is to allow the latter to provide for access deficit. As mentioned in the case, another way of doing so would be through the setting up of the Universal Service Fund and this has been provided for in the I.C.T Act 2001 but the regulator had not finalised the contributions to be made to this fund yet. While the Tribunal agreed that the problem of the incumbent operator should be dealt with to create fairness towards the latter, the I.C.T.A can not however abdicate from its role towards other operators and consumers and turn towards protecting the incumbent operator. In other words, the failure of the I.C.T.A to set up a viable Universal Service Fund cannot be a justification for the I.C.T.A to be unfair towards other operators so that the incumbent operator is allowed to recoup the access deficit cost.

This ruling also highlights another interesting feature in the telecommunication regulatory space in Mauritius. It has to be stressed that the City Call case is the first ever

⁸ Interviews conducted with a number of private operators, but anonymity preserved.

⁹ Mauritius Assembly Debate No. 32 of 7th September 2004,
<<http://mauritiusassembly.gov.mu/pnqs/2004/pnqs/pnqans07sept04.pdf>>

¹⁰ City Call Ltd v. ICT Authority, Cause No. 01/04/CC

case to be heard by the Tribunal and even before litigation in the telecommunication sector in Mauritius has been very sparse. While it can be affirmed that there is no litigation culture in the utility sector in Mauritius, it can, nevertheless, mean that disputes tend to be resolved through alternative or more informal means. This could imply a number of things, but more specifically it could mean that lobbying between operators, between operators and regulator or between operators and Government is very strong. In fact, a number of private operators¹¹ have complained to the I.C.T.A about the fact that the incumbent operator, Mauritius Telecom, is alleged to be carrying out economic dumping by setting the same tariff for its international phone card to both fixed lines and mobile lines.¹² However, Mauritius Telecom continues to charge the same tariff while the private operators continue to wait for a decision of the regulator. This reluctance to seize the I.C.T Tribunal demonstrates this lack of litigation culture as compared to many Caribbean countries.

Organisational Structure

Lodge and Stirton (2002) affirm that one of the key strategies in cementing the efficiency of the regulator both in reality and through perception involves the ‘recruitment and retention of technical expertise in competition with strong societal interests’.¹³ It is claimed that while Jamaica was successful in recruiting and retaining experts to operate the Office of Utilities Regulation, Trinidad and Tobago were not. The reason being that while efforts were made to recruit experts, namely a US-based consultant to act as Executive Director of the Regulated Industries Commission (RIC), his success was mitigated due to the fact it was claimed that his role ‘required knowledge of the local politics of regulation...’¹⁴ Similar to Trinidad and Tobago, the Government in Mauritius attempts to hold the regulatory institutions within their control through political appointments at the executive and managerial level of the institutions. So far, the current and previous chairmen have been perceived to be people close to the current Government which has been in place since 2000 and have been politically nominated without any local or international advertisement for the position. In fact, after the voluntary departure of the previous chairman, it was claimed in the press that he was forced out through pressure from the Government because of policy disagreements. Moreover, his replacement was decided by Cabinet and not the board of the I.C.T.A.¹⁵ While the merits of either individual is not disputed, for democratic and transparent purposes it would have been ideal that such nominations be done with more clarity and more independence. The government have been accused as well by the opposition to nominate only those close to them as members of the I.C.T.A.¹⁶ Here, as enunciated by Lodge and Stirton, it is vital that the regulatory authority manages to recruit and retain experts in the field so enhance its image of efficiency and also independence from the Government.

¹¹ Operators prefer to remain anonymous.

¹² The Mauritius Telecom international calling card Sezam charges the same price for calls made to fixed lines and mobile lines.

¹³ M. Lodge and L. Stirton, ‘Embedding Regulatory Autonomy in Caribbean Telecommunications’, *Annals of Public and Cooperative Economics*, 73-4, 2002, p. 682

¹⁴ Ibid. p. 683

¹⁵ L’Express Outlook, 12th October 2004, L’Express, 10th October 2004

¹⁶ Mauritius Assembly Debate No. 32 of 7th September 2004

Embeddedness of the Regulatory Authority

Embeddedness of the Regulator within the regulatory space is closely linked with the perception that the actors within that space has towards the authority through the strength of the ties the regulator entertains with these actors (Granovetter, 1973). Ideally, for a perfect *embeddedness*, the regulator should have weak ties with all the actors as this would enable to be independent enough from these actors. Having strong ties with certain actors would normally mean an overlapping of interest and that would prevent the regulator from operating in full independence. *Embeddedness* basically means the extent to which ongoing systems of social relations foster confidence and relations within that space. In the context of telecommunications, it is important that inter-organisational relations are strengthened between regulator and operators and between public interest group and the regulator. What is meant here is that there should be an active participation between the different interest groups within the telecommunications sector, that is consumers, operators and government. As purported by the study of Caribbean Telecommunications by Lodge and Stirton, a strong *embeddedness* is demonstrated by a number of factors. Firstly, there should be multiple competing providers within one sector; there should be enough mechanisms present for consumers and operators to voice out their concerns, opinions and recommendations. This idea of *embeddedness* seems to have been successful in Jamaica as claimed by Lodge and Stirton, with the development of informal ties between the Office of Utilities Regulation, the executive and the operators. On the downside, this research also pointed out factors that showed a weak *embeddedness* that is the reliance over a charismatic leadership at the OUR and the control exerted by the minister. In Trinidad and Tobago and Barbados, there were strong ties between Government and the main operator and, in Trinidad and Tobago especially, there was a lack of authority when it came to the chief executive of the RIC.

Comparatively, the I.C.T.A has one good sign of *embeddedness* in the sense that there is a specific government department that deals with telecommunications and is not shared between other utilities, however, from a general point of view it can be said that the Mauritian regulator suffers from weak *embeddedness*. First of all, there is a distinct lack of mechanisms that would allow different interest groups, namely consumer interest groups to participate in the policy making process, to voice out their concerns or make their opinion or choice heard. The perceived legitimacy of the regulator has been weakened after the departure of the former chairman due to alleged political pressure. This demonstrates that there exists a strong tie between government and the regulator and that the executive, through the minister, remains a powerful and influential figure that can dictate the direction of policies devised by the regulator.

In addition to that, the inability to recruit experts in the field of regulation, which is exemplified by the fact that some dominant members on the executive and managerial board are politically nominated and have been alleged to have close ties with the present government, prevents independent operators from building trust in the efficiency and fairness of the regulator. Moreover, so far there has not been any indication that the regulator has been able to balance the views of different operators as demonstrated by the

City Call case, and the ongoing confusion concerning the Mauritius Telecom international calling card. It gives the impression of a lot of hesitation on the part of the regulator and that it entertains too strong ties with the incumbent operator.

Conclusion

The purpose of this paper has been to show the pitfalls regulatory structures in small developing states can face while embarking on the double processes of privatisation and liberalisation through the use of the telecommunications reform in Mauritius. It is believed that the Mauritian sector provides many similarities with the Caribbean experience. The Mauritian experience provides interesting insights into how an inadequacy in constitutional and legislative framework might make the regulator prone to political capture and administrative expropriation. Secondly, this paper also shows how the political institutions in Mauritius still try to hold the regulatory institution within their grasp and are very much involved in shaping the policy decision of the regulator. Another point highlighted by this paper is the need for the regulator to consolidate ties with all the actors within the regulatory space as that will be crucial in creating an environment of trust between regulator and operators and consumer organisations. Finally it has to be stressed that the I.C.T.A. was set-up only in 2002 and has been relatively successful in fulfilling the Mauritian obligations with regards to W.T.O accords but it will definitely benefit with a strengthening of the institutional framework and with a re-organisation of the human resources within the regulator.

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