

JUDICIAL ACTORS AS ECONOMIC REGULATORS

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ABSTRACT

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This DPhil thesis explores judicial activism in economic telecommunications regulation. It enquires into what factors explain its occurrence. Two debates in different strands of literature –and gaps in them– inspire the research. A first one is that various theories attempt to explain judicial activism, but no general agreement can be found on what factors actually have key explanatory power. The second gap is that the literature on regulation usually considers judicial actors as having a role in the enforcement or accountability stages of the regulatory process but largely ignore the role that they could have in the development of regulation.

Empirically, I analyse judicial activism in relation to economic telecommunications regulation through an exploratory comparative study. The two countries, Chile and the UK, are chosen because they have similarities and differences that made them interesting for a comparative project, such as having different legal systems (common and continental law) and having a different political history but similar approaches to regulating telecommunications (privatisation and liberalisation). Through a critical analysis of interviews and of final decisions made by judicial actors in both countries, I explore whether the factors the relevant literature argues explain judicial activism actually do explain judicial activism in the two case studies, whether other factors not found in the literature are important in explaining judicial activism, and – most importantly – how these factors interact.

Through the analysis based on the case studies I reach three main conclusions. First, that judicial activism is a jurisdiction specific phenomenon and different factors are found to explain it in each case. Second, the different factors that explain judicial activism – I argue – play different roles. Some are argued to act as enabling factors of judicial activism while others explain judicial activism in an immediate manner, which I call *direct drivers*. Finally, I argue that the findings of this thesis contribute to debates in different strands of literature, such as legal theory, and specifically descriptive accounts of adjudication.

For Ana

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TABLE OF CONTENTS

ABSTRACT	ii
Table of Statutes	ix
Table of Cases	xi
CHAPTER 1	1
An Exploratory Study in Judicial Activism	1
A. Research Context: Do judicial actors regulate?	5
B. Research Questions: Judicial activism and factors that explain it.....	10
C. Case study research design: An exploratory comparative qualitative methodology	12
1. Two different countries, the UK and Chile, facing similar regulatory dilemmas in the field of telecommunications	12
2. Data Collection and Analysis	14
D. Thesis Outline	17
CHAPTER 2	21
The Role of Judicial Actors in Economic Telecommunications Regulatory Policymaking.....	21
A. Chile and the UK: 30 Years of Liberalisation and Privatisation of Telecommunications	24
B. Regulatory Literature: The Overlooked Role of Judicial Actors in Regulation	29
C. Controlling a Slippery Term: Towards a Working Definition of Judicial Activism in the Context of Telecommunications Regulation	35
1. Historical Overview	35
2. A Chameleonic Term: The Different Meanings of Judicial Activism	39
3. A Working Concept of Judicial Activism for Economic Telecommunications Regulation.....	42
D. Key Factors that (could) Influence Judicial Activism in Economic Telecommunications Regulation	44
1. Institutional Factors: How do organizations work?	46
2. Internal Factors: What do Judges think?	58
E. Conclusions	62
CHAPTER 3	64

Mapping the Economic Telecommunications Regulation Landscape in Chile and the UK	64
A. Regulatory Framework and Market Structure	66
1. Differences in the Telecommunications Regulation Frameworks for Chile and the UK.....	66
2. The importance of Competition Law in Shaping Telecommunications Regulation in Chile and the UK	72
3. Similar Market Structures in Chile and the UK.....	76
B. Overview of key Institutions and their Regulatory Roles in Chile and the UK – implications for judicial activism	80
1. A brief introduction to the economic telecommunications regulation system in Chile in regards to the role that judicial actors play	81
2. Overview of the role judicial actors play in telecommunications regulation in the UK.	83
C. Institutions that Play a Role in the Development of Economic Telecommunications Regulation	85
1. Subsecretaria de Telecomunicaciones (SUBTEL) and Office of Communications (OFCOM): Two very different regulators	87
2. Competition Law Agencies: Competition and Markets Authority (CMA) and the Chilean Competition Agency (FNE).....	90
D. Judicial Actors and Procedures in Chile and the UK: Key Differences.....	93
1. Chile: The existence of only one appeal layer	94
a. The Chilean Competition Tribunal (Tribunal de Defensa de la Libre Competencia or TDLC): A hybrid judicial actor	94
b. The Chilean Supreme Court: The lonely Appeal Body	97
2. UK: Various Levels of Appeal and the Possibility of EU Intervention	100
a. Competition Appeal Tribunal (CAT).....	100
b. Higher Courts: Court of Appeals and Supreme Court	103
E. Conclusions: Differences that Do Not Explain Judicial Activism and Non-Activism.....	106
Chapter 4	108
Identifying and Explaining Judicial Activism in Economic Telecommunications Regulation in Chile	108
A. A word on methodology: Interviews	110

B.	Is the Judiciary Activist in Developing Telecommunications Regulation?	114
C.	Key Factors that Enable or Drive Judicial Activism.....	119
1.	Judicial culture in a time of change	120
2.	Economic policy views as drivers of judicial activism	127
3.	Indeterminate legal provisions: Enabling judicial activism	137
4.	Public opinion- The importance of the ‘will of the people’	144
5.	Change of leadership in the Supreme Court	149
D.	Conclusions: Judicial activism in Chile explained through the interactions of various factors.	155
CHAPTER 5		157
Judicial (non) Activism in Economic Telecommunications Regulation in the UK		157
A.	Overcoming Methodological Hurdles	159
B.	Activism and Non-Activism in the Development of Telecommunications Regulation	164
1.	Judicial non-activism in the apex of the judicial pyramid	165
2.	The CAT: a case of periods of judicial activism	168
C.	The Three Pillars of Judicial (Non) Activism in the UK	171
1.	A conservative judicial culture	172
2.	A (partly) unclear appeal structure.....	178
3.	Limited resources for Litigation and the impact on possible cases	184
D.	Other (less) Relevant Factors	188
1.	The uninterested public with no opinion	189
2.	The relative unimportance of economic policy views	191
E.	Conclusions	194
CHAPTER 6		196
An Empirical Concept of Judicial Activism and Factors that explain it: Some Conclusions from a Comparative Study.....		196
A.	Towards an Empirical Concept of Judicial Activism	198
1.	Working concept of judicial activism in the literature: a critique	198
2.	Differences between the working and empirical concept of judicial activism	202

B. Comparing Factors that Explain Judicial Activism in Chile and Judicial Non-Activism in the UK	210
1. Explaining judicial activism and non-activism in Chile and the UK.....	210
2. A classification of factors and their interaction.....	215
C. Main Conclusions from the case studies	222
CHAPTER 7	223
Conclusion: The Importance of Empirical Qualitative Studies About Judicial Activism.....	223
A. Overview of the Purposes, Research Questions and Main Findings of the Thesis	225
1. Back to the starting point: Framing the dissertation	225
2. An empirical concept of judicial activism and the explanatory role of factors: some conclusions of this thesis.	229
a) An empirical concept of Judicial Activism.....	230
b) Factors which explain judicial activism in Chile and the UK.....	232
c) The relationship between the different factors	235
B. Jurisdiction Specific Judicial Activism and Relationship with Jurisprudence of Adjudication: Some Contributions of this Thesis to Theory	241
1. Applicability of classification of factors to other areas of utilities regulation and other jurisdictions	242
2. The inapplicability of theoretical conclusions based on one jurisdiction (US) to others (in relation to judicial activism literature).	245
3. Confirming and denying claims of the jurisprudence of adjudication	251
C. Concluding remarks: Strengths and Contributions	258
APPENDIX: Reflections on methodology, fieldwork and data gathering	260
BIBLIOGRAPHY	266

Table of Statutes

Chile

<i>Código Civil de Chile</i> (Civil Code of Chile)	42, 204
Código de Procedimiento Civil (Law 1.552 of 1902)	102, 190
<i>Código del Trabajo</i>	41
Código Orgánico de Tribunales (Law 7.421 of 1943)	101, 102
<i>Constitución Política de la República de Chile de 1980</i> (Constitution of Chile). 31, 51, 101, 103, 127, 145	
DL 211 (Competition Act 1973)	75, 76, 78, 94, 95, 98, 99, 100, 102, 115, 147
DL 1762 Subsecretaria de Telecomunicaciones 1977	92
Ley General de Telecomunicaciones 18.168 of 1982 (Chilean General Law of Telecommunications)	24, 71, 73, 92
<i>Ley para la Defensa Permanente de la Democracia</i> (Law for the Permanent Defense of Democracy)	39

United Kingdom and European Union

Constitutional Reform Act 2005	108, 252
Commission Directive 88/301/EEC of 16 May 1988	54
Commission Directive 96/19/EC of 13 March 1996	54
Communications Act 2003 28, 58, 69, 87, 91, 104, 105, 106, 107, 109, 181, 183, 186	
Competition Act 1998	75, 78, 93, 96, 104
Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7 (Access Directive)	70
Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorization of electronic communications networks and services [2002] L108/11 (Authorisation Directive)	70

Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33(Framework Directive)	70, 183
Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51	70
Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector	70
Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997	72
Enterprise Act 2002	78, 86, 96, 104, 105
Enterprise and Regulatory Reform Act 2013	95, 96
Office of Communications Act 2002	91
Telecommunications Act 1984	24, 27, 28, 54, 69, 72, 80

Table of Cases

Chile

<i>Consulta de Subtel sobre participación de concesionarios de telefonía móvil en concurso público de telefonía móvil digital avanzada</i> Resolucion 27/2008 TDLC.....	136
<i>Consulta de Telefónica Móviles S.A., sobre aprobación de acuerdo de eventual toma de control de Bellsouth Comunicaciones S.A. (AGREGADAS Roles C N° 36-04, 39-04 y 43-04)</i> Resolucion 2/2005 TDLC,	77
<i>Consulta Dys Falabella</i> NC 199-07 - Consulta sobre Fusión de D&S y Falabella.	77
<i>Demanda de Voissnet S.A. contra Compañía de Telecomunicaciones de Chile S.A.</i> Sentencia 97/2010 TDLC.....	7, 34, 122, 232
<i>Demanda de Voissnet S.A. y requerimiento de la FNE en contra de CTC</i> Sentencia 45/2006 TDLC TDLC.....	147
<i>Fuentes, Vida de Fuenzalida vs. Cuadra Pinto, Dario (1957)</i> Court of Appeals of Santiago	39
<i>Instruccion de Character General N 2 (ICG N2)</i> NC N 386-10 TDLC.....	7, 232
<i>Reclamación de Telefónica España y otros contra Dict. 735</i> Resolución 368/92 CR, Comision Resolutiva.	7, 34, 122, 232
<i>Reclamación resolución 27/2008 Rol N° 4797/2008</i> Supreme Court of Chile.	138, 220
<i>Recurso de Reclamacion de NC 399-11 - Consulta de Organización Terpel Chile, relativa a la adquisición por parte de Quiñenco S.A. de los activos de las sociedades Petróleos Trasandinos S.A. y Operaciones y Servicios Terpel Limitada (2012)</i>	103
<i>Recurso de reclamación en contra de sentencia TDLC n°45/2006 Rol N° 6236-06</i> Supreme Court of Chile.	148
<i>Recurso de Reclamación Fusión Telefonica-Bellsouth</i> Rol 396-2005 Supreme Court of Chile.....	77, 130

United Kingdom and European Union

British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents) [2014] UKSC 42	171
<i>British Telecommunications Plc v Office of Communications (formerly Director General of Telecommunications)</i> [2004] CAT 8.	54
<i>British Telecommunications Plc v Office of Communications</i> [2011] EWCA Civ 245.....	106
British Telecommunications Plc v Office of Communications [2012] EWCA Civ 1051.....	185
<i>Duport Steels Ltd. and Others v Sirs and Others</i> [1980] 1 WLR 142 House of Lords.	37
<i>R. (on the Application of T-Mobile (Uk) Ltd) v The Competition Commission</i> [2003] ACD 72 Administrative Court	35
TalkTalk Telecom Group Plc v Office of Communications [2012] CAT 1.....	185
<i>The Number (UK) and Conduit Enterprises</i> Case C-16/10 Court of Justice	52
<i>The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications</i> Case C-302/94 Court of Justice.....	52, 97
<i>Vodafone and Others</i> Case C-58/08 Court of Justice.....	52, 97

United States

<i>Brown v Board of Education</i> 347 US 483 (1954) US Supreme Court.....	37
<i>Dred Scott v. Sandford</i> , 60 US 393 (1857) US Supreme Court	37
<i>Roe v Wade</i> 410 US 113 (1973) US Supreme Court.....	37

CHAPTER 1

An Exploratory Study in Judicial Activism

It is law –and not the personal politics of individual judges- that controls judicial decision making in most cases decided by the court of appeals.¹

The Law depends on what the judge had for breakfast.²

The great tides and currents which engulf the rest of men [sic] do not turn aside in their course and pass the judges by.³

‘Unlike my brother judge here, who is concerned with law,’ he once teased at a legal dinner, ‘I am concerned with justice.’⁴

The four quotes presented above present popular views -behind which there are theories- about what motivates judges in deciding cases. In many of these cases, judges engage in what has been called judicial activism.⁵ The first of the quotes represents what has been called the legalist or formalist view of adjudication. According to this view, the manner in which judges decide cases can be primarily explained by legal text and not by factors that are external to the legal system.

¹ Harry T Edwards, ‘Public misperceptions concerning the politics of judging: Dispelling some myths about the DC circuit’ 56 U Colo L Rev 619, 620.

² William H Rehnquist, ‘Remarks on the Process of Judging’ 49 Wash & Lee L Rev 263. This quote has been credited to Jerome Frank.

³ Benjamin N. Cardozo, *The nature of the judicial process* (Yale University Press ; Humphrey Milford ; Oxford University Press 1921) 168.

⁴ Obituary of Lord Denning in The Telegraph: <http://www.telegraph.co.uk/news/obituaries/law-obituaries/7315416/Lord-Denning-OM.html>

⁵ I rely here on my working concept of judicial activism which will be explained in greater detail in Section C.3 of Chapter 2 as: the practice of developing economic telecommunications regulation by judicial actors. It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a new meaning. Looking at this issue from another point of view, judicial actors do not create new economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

The other three quotes represent theoretical reactions to the formalist view of adjudication.

The second quote points towards the randomness of judicial decision-making, or that, in other words, judges are unpredictable and their decisions cannot therefore be explained by pointing towards a particular factor.

The third encapsulates a view that judges are part of the world like any other citizen, and therefore their decisions may be motivated by public opinion which permeates the judicial ranks.⁶ Finally, the fourth quote in which Lord Denning states that his concern is ‘with justice’ and not ‘with law’, points towards the most popular view about judicial decision-making in the last half century, that judges are politically motivated animals or ‘politicians in robes’. This is, because Lord Denning’s view or any other judge’s view of what justice is, will, of course, most likely depend on a particular political or at least policy views.

My DPhil thesis is inspired by these divergent views on what factors explain adjudication and therefore judicial activism. A review of the literature reveals that a great number of individual factors have been theorized to explain judicial activism with no real agreement to be found on the subject.⁷ This presents an interesting research puzzle as there seems to be room for trying to better understand what factors explain judicial activism.

⁶ In the same sense, see: Barry Friedman, *The will of the people : how public opinion has influenced the Supreme Court and shaped the meaning of the Consitution* (Farrar, Straus and Giroux 2009)

⁷ See Chapter 2, Section D.

The thesis is further inspired by what I perceived was a restricted view of the role judicial actors⁸ have in the development of regulation, in the regulation literature. Usually, they are portrayed as playing a role in the stages of enforcement or accountability but not in the development of regulatory policy.⁹ A review of decisions in Chile and the UK nevertheless shows that on some occasions they do have a role to play as a *regulator*. This is a second connected research puzzle that inspires my research. It seems particularly interesting therefore to perform a study of the role of judicial actors in the development of regulation and the factors that explain the role that they play, in a particular regulatory setting.

In regards to the methodology I chose to perform an exploratory comparative qualitative study which can be categorised as law in society research. I chose a comparative methodology because this may allow to better appreciate and analyse in different empirical settings what factors explain judicial activism and possibly understand why some factors are relevant in one scenario and not another. Additionally the comparison may allow for some level of abstraction or generalisation of the findings of the study, even if these findings need to be empirically challenged in order to better appreciate their usefulness.

As to the area of the law on which the research focuses, I chose telecommunications regulation. It is important to emphasize that it is not

⁸ The broader term 'judicial actor' has been chosen instead of 'courts' because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as 'courts' such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that will be looked at are the following: For the UK, it will be the CAT, the Court of Appeal, and the Supreme Court. For Chile it will be the Competition Tribunal, the Courts of Appeal, and the Supreme Court.

⁹ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation : theory, strategy, and practice* (2nd edn, Oxford University Press 2012).

innocuous which area is chosen as it is likely that different factors may explain judicial activism in different areas of the law. For example, it seems (at least initially) more likely that judges in general will have more politically clear views (which they may bring to their judicial decisions) on cases which are more ‘politically charged’ involving issues such as labour rights, euthanasia or prisoners’ rights, than in regards to energy law, water regulation or telecommunications law.

In this introductory chapter, I will first discuss the context in which the research takes place especially highlighting how the literature on regulation has overlooked the role that judicial actors have in determining regulatory policy (Section A). Then, the research questions of the thesis will be presented (Section B). Next, I will explain and justify the selection of the exploratory qualitative comparative methodology in further detail and why the two countries were chosen (Section C). Finally, I will give an overview of the different sections of the thesis (Section D).

A. Research Context: Do judicial actors regulate?

Chile and the UK were among the first countries to privatise and liberalise their utilities,¹⁰ telecommunications amongst them, and led the way in Latin America and Europe respectively when this policy was adopted throughout these continents. Both countries embraced similar general libertarian political economy ideas that were applied by the Thatcher government and the Pinochet dictatorship, but the design and implementation of the specific regulation was quite different.

The design of regulation introduced at that time, and in particular the division of responsibilities between the telecommunications regulator, the legislature and the judicial actors¹¹ has been a major factor shaping the evolution of regulatory practice in those two pioneering countries. The legislative framework of the UK provided for a significant portion of the telecommunication regulation to be contained in licences¹², giving the regulatory agency a wide discretion to

¹⁰ David M. G. Newbery, *Privatization, restructuring, and regulation of network utilities* (MIT Press 2000) 2.

¹¹ The broader term ‘judicial actor’ has been chosen instead of ‘courts’ because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily fall within a narrow understanding of the term ‘courts’ such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that will be looked at are the following: For the United Kingdom, it will be the CAT, the Administrative Court, the Court of Appeal, the Supreme Court and the Court of Justice. For Chile it will be the Competition Tribunal, the Courts of Appeal, the Supreme Court and the Constitutional Tribunal.

¹² In the context of telecommunications licenses are sometimes referred to as ‘contracts’ because especially in the early days of privatisation any modification to the license (mainly British Telecommunications’) was made by what actually was an agreement between the regulator and the private party, there was rarely an imposition. Tony Prosser, *Law and the regulators* (Clarendon Press 1997) 48; Anne Flanagan, ‘Authorization and Licensing’ in Ian Walden (ed), *Telecommunications law and regulation* (4th edn, Oxford University Press 2012), 277.

amend these licenses and thus shape the regulation of a specific utility operator.¹³ In Chile, the situation was different, as most of the telecommunications regulation was contained in legislation that severely limited the discretion of the telecommunications regulator to change or develop the specific regulation in the relevant license.¹⁴

Within this context, my interest lies in identifying and critically assessing the role that judicial actors have played in the regulatory regimes implemented in the two jurisdictions, and in particular, in the development of economic telecommunications regulation.¹⁵

As was pointed out already, regulation literature usually views judicial actors as playing a role at the stages of enforcing regulation¹⁶ or when regulators are held accountable.¹⁷ In the UK and Chile, this was the role originally envisioned for judicial actors; in Chile it was to enforce the licences under which telecoms operators provided their services, and in Chile to enforce legislation and limit the regulator's discretion.¹⁸ I suggest that this is an incomplete view. Judicial actors

¹³ Brian Levy and Pablo T. Spiller, 'A Framework for Resolving the Regulatory Problem' in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996) 6.

¹⁴ Brian Levy and Ingo Vogelsang, 'The United Kingdom: A pacesetter in regulatory incentives' in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996) 98.

¹⁵ It should be noted that the specific area which will be researched will be identified, for the purposes of this thesis, as 'economic telecommunications regulation'. This is to establish that it will focus on issues which can be characterized as 'economic' in nature, such as price regulation or market structure.

¹⁶ Ian Ayres and John Braithwaite, *Responsive regulation : transcending the deregulation debate* (Oxford University Press 1992) 35.

¹⁷ Baldwin, Cave and Lodge 345-347.

¹⁸ Levy and Spiller (n 13) 13.

can in some circumstances also play a different role in the regulatory process; in particular they can make a significant contribution to the development of regulatory policy.

Many regulatory policy decisions taken by ministerial departments or regulators can be challenged judicially and in these situations judicial actors may actually have the ‘final decision’ in relation to the specific policy to be adopted, if the legislature does not overrule the decision by passing legislation which invalidates the content of the ruling particularly in jurisdictions in which constitutional law provides for Parliamentary sovereignty.

Decisions by judicial actors in Chile in relation to economic telecommunications regulation illustrate that it is possible for a judicial actor to become a regulatory policymaker. Some decisions have addressed issues such as industry structure (involving the divestiture of monopolist telecommunications companies)¹⁹, requirements to share or provide access to facilities (in defining unbundling obligations)²⁰, or even decided the specifics of pricing policies (whether mobile companies can charge higher prices for calls made outside their own networks, that is, on-net/off-net pricing schemes).²¹

This has not been the case in the UK, for example, where judicial actors have apparently not had such an obvious and explicit role in shaping economic

¹⁹ *Reclamación de Telefónica España y otros contra Dict. 735* Resolución 368/92 CR, Comisión Resolutiva.

²⁰ *Demanda de Voissnet S.A. contra Compañía de Telecomunicaciones de Chile S.A.* Sentencia 97/2010 TDLC.

²¹ *Instrucción de Caracter General N 2 (ICG N2)* NC N 386-10 TDLC.

telecommunications regulation.²² This apparent contrast in the degree of interventionism presents an interesting empirical puzzle in light of the fact that both countries otherwise exhibit a number of similarities in their trajectories of telecommunications reform. It is especially interesting considering that Chile is a civil law jurisdiction in which judicial actors are usually not expected to develop the law, whilst the UK is a common law country where judicial actors have traditionally played a more active role in the development of the law.²³

How can this potential divergence be explained? More specifically, what factors shape a judicial actor's role in the development of regulatory policy and in telecommunications in particular? A national Constitution and rules regarding the jurisdiction of the judicial actors would be expected to be a first, significant factor. In practice, however, judicial actors appear to be influenced also by other factors.

The literature on judicial behaviour²⁴ analyses many additional factors and I will draw selectively on this theoretical literature in order to start to explain why judicial actors sometimes get involved in developing regulatory policy or engage in

²² A. I. Ogus, *Regulation : legal form and economic theory* (Hart 2004) (n 17) 115, states that: 'judicial review has nevertheless had a relatively small impact on regulation, a consequence no doubt of the Diceyan tradition of administrative law which concentrates on the protection of individual rights against illegitimate government interference and thereby largely shuns a functionalist concern with public purposes'.

²³ It should be noted though that in the UK there is also convergence of common and civil law jurisdictions also through EU law.

²⁴ See, for example: Kenneth M. Holland, *Judicial activism in comparative perspective* (St. Martin's Press 1991); Lawrence Baum, *Judges and their audiences : a perspective on judicial behavior* (Princeton University Press 2006) 7.

‘judicial activism’, a concept defined for the purposes of this research as the *practice of developing economic telecommunications regulation by judicial actors.*

B. Research Questions: Judicial activism and factors that explain it.

Against this background, this dissertation will address the following research questions:

1. In what way have judicial actors in the UK and Chile played a different role in the development of economic telecommunications regulatory policy? This involves mapping out and describing the role that judicial actors perform in each jurisdiction and how they have *developed* telecoms regulation.
2. Why have judicial actors in Chile engaged in judicial activism, acting as regulators —sometimes substituting their own judgement for that of the regulatory agency— while in the UK they have not?
3. How do certain factors, such as the manner in which the law is drafted (and how clear it is), policy views of the judges, the attitudes judges have towards their role (an aspect of judicial culture), and availability of resources for legal mobilization²⁵, shape whether judicial actors are activist in the development of telecommunications regulation in the UK and Chile. This refers to both how important each factor is in the two countries and how the different factors relate to each other, i.e., in synergistic or antagonistic fashion.

²⁵ Charles Epp refers to this as ‘support structure for legal mobilization’. By this he refers to the resources that different actors can allocate to litigation in order to further their policy preferences. Charles R. Epp, *The rights revolution : lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998).

During the research, special attention will be given to whether other factors, different from those researched in the relevant literature on judicial activism, influence the role that judicial actors play in the development of telecommunications regulation, such as, whether rapid technological developments are ‘disconnected’²⁶ from statutory regulation, ‘forcing’ judicial actors to act and regulate because existing legislative provisions do not yet take account of such new technological developments,²⁷ for example, Voice Over the Internet Protocol (VOIP).²⁸ If this is the case, these factors will be further researched and taken into account as part of the research question.

²⁶ Roger Brownsword, *Rights, regulation and the technological revolution* (Oxford University Press 2008) 160.

²⁷ The literature on law and technological developments has analysed how regulation is shaped by technological developments and how regulatory disconnection may yield way for judicial actors to act as regulators. See: *ibid*, 161; Roger Brownsword and Karen Yeung, *Regulating technologies : legal futures, regulatory frames and technological fixes* (Hart 2008), 26.

²⁸ Tal Ofek, ‘The problem of regulatory disconnection : the case of voice over internet protocol’ (D Phil, University of Oxford 2011) 7.

C. Case study research design: An exploratory comparative qualitative methodology

This thesis is based on an exploratory comparative case study consisting of two sub-cases. The two case studies consist of an in depth exploratory comparative analysis of the role played by judicial actors in the development of economic telecommunications regulation in Chile and the UK²⁹ from the 1980's—which marks the start of the current privatisation and liberalisation era of regulation for economic telecommunications— until September of 2015—when research for this dissertation concluded.

1. Two different countries, the UK and Chile, facing similar regulatory dilemmas in the field of telecommunications

There are good reasons to choose an explorative comparative study as the research method to analyse the role that judicial actors have played in the development of economic telecommunications regulatory policy. Firstly, a wider range of reasons for involvement of judicial actors in economic telecommunications regulation was assumed could be studied through a comparison. Of course more factors could possibly be studied in a single case study but by performing a comparative study

²⁹ It could be argued that the UK is not a particularly good case for research in this area because of the great influence that European Union (EU) regulation and the EU institutional structure may have over the local judicial actor's behaviour. This is a valid point, and it is clear that EU telecommunications policy and law have an impact on how regulation operates in the UK, but I believe there are good reasons to affirm that the EU structure does not explain, by itself, the low activism of British judicial actors.

I was able to research factors that were, for example, present in Chile and not in the UK.

Secondly, today's world is greatly marked by the information technology revolution, it has taken us to an 'Information Age'³⁰ which has changed the economy, the way in which we communicate and the way we work. Economic telecommunications regulation policy has, for better or worse, been an essential part of this information age as it governs crucial aspects which have made this 'revolution' possible such as access to the physical networks needed for information to be transmitted, and rules that have allowed different networks to interconnect. During this information age, most developed or developing countries have had to face the same regulatory policy dilemmas in similar periods of time.

This makes it a particularly interesting area for an explorative comparative study, especially when compared to other areas of economic regulation,³¹ such as energy or water, where countries usually face very different scenarios that may depend largely on the natural resources available even if they have common

³⁰ Manuel Castells, *The rise of the network society* (2nd edn, Wiley-Blackwell 2010).

³¹ By economic regulation I refer to: 'to ensure fair prices and product/service quality through maintaining competition between economic actors. In the absence of competitive market forces, as in the case of monopoly operators, legal regulation---often in the form of specific statutory obligations---directly regulates pricing, access, and quality standards. It is particularly significant in areas of monopoly operators, such as utilities, supplying telecommunications, electricity, gas, water, and transport services'. Bettina Lange, Regulation, in: Cane, Peter and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press 2008).

Furthermore, it can also be defined as: 'interventions which, among other things, impact on the structure of an industry (for example, by restricting the number of firms that be involved in the supply of a service, requiring separate entities to undertake different activities in a supply chain, or requiring that access to infrastructure facilities be provided to third parties) or which attempt to guide or control the behaviour of firms in terms of their decisions in respect of pricing, investment, quality and coverage of service, as well as the terms on which access is provided to other firms, including competitors'. Christopher Decker, *Modern economic regulation: an introduction to theory and practice* (Cambridge University Press 2014) 3.

problems with greenhouse gas emissions from fossil fuels or increasing scarcity of fossil fuels.

Thirdly, an exploratory comparative study involving the UK and Chile is novel and intends to contribute to the literature on comparative judicial activism for two reasons. First, the inclusion of Chile is particularly valuable in light of the fact, that most of the empirical research on judicial activism in this field focuses on the United States. Furthermore, it will also be a contribution to judicial activism literature, as most of this research has focused on the regulation of socio-political rights and not economic regulation. In fact, this area in particular (and economic regulation in general) has not been the object of any known study in regards to judicial activism.

It is also worth highlighting that the fact that there are significant differences between Chile and the UK (e.g., different legal system) and this is actually something which contributes in making the comparison richer. There have to be enough differences between the cases to draw out similarities and differences and these two case studies I believe fulfil this criteria. Finally, the jurisdictions were also chosen for practical reasons; language skills and access to data for the researcher were possible.

2. Data Collection and Analysis

The data to be used in this research was obtained primarily from two primary sources, legal documents and semi-structured elite interviews, as well as

secondary sources, such as relevant literature. The focus was on final economic telecommunications regulation cases decided by judicial actors

In regards to documents, the focus was on relevant cases which could help in determining how the different selected factors influence judicial activism. These were cases in which aspects of economic telecommunications regulation were litigated before the relevant judicial actors. As to the interviews, semi-structured interviews were conducted with relevant actors in the regulatory process such as judges, regulators, barristers, solicitors, public officials (of the regulators) and representatives of private parties involved (telecommunications companies). Twenty one interviews were carried out in Chile and sixteen in the UK. These are used in the thesis to understand how members of the 'legal complex'³² and other relevant actors view the different factors that may influence the behaviour of judicial actors. This was a number of interviews which was thought to be sufficient to acquire good information from the different groups of interviewees, especially considering that the total pool of possible of interviewees was not particularly large taking into account the limited number of companies that operate, that each country had only one regulator and the relatively small number of cases that are litigated.

³² The concept of 'legal complex', a term coined by Terence Halliday, Lucien Karpik and Malcolm Feeley, will be used to refer to the diverse legal occupations that were interviewed. All these actors have in common that they mobilize in relation to a particular issue (in this case Telecommunications regulation). The legal complex is constituted by judges, lawyers and other legally trained personnel who undertake legal work, including civil servants. Terence C. Halliday, Lucien Karpik and Malcolm Feeley, *Fighting for political freedom : comparative studies of the legal complex and political liberalism* (Hart 2007), 6-7.

The methodological approach taken in this dissertation is qualitative in nature as it is believed that it will yield a richer and deeper understanding of the importance of the different factors in shaping judicial activism and how the different factors interrelate. As such, the data was analysed through thematic coding.³³ This is a method of data analysis which allows for a good systematisation and organization of the data that will be collected which is mainly text: judicial decisions and transcripts of interviews.

Judicial actors have traditionally been understudied in their role as *regulators* although they are often an important actor in a regulatory regime or potentially could be one. Different factors influence the ability of judicial actors to act as regulatory policymakers, or said in another manner, whether they are ‘activist’. Many of these factors have been traditionally considered in an isolated manner, that is, focussed only on how one specific factor influences judicial activism (the main focus has been on policy preferences of judicial actors), but not jointly; this is, how judicial actors are influenced by a plurality of factors simultaneously. Addressing this issue in the context of a qualitative exploratory comparative socio-legal case study will allow for a deep and rich understanding of the role that judicial actors perform in relation to economic telecommunications regulatory policy, and why and how they become ‘regulators’.

³³ Flick, Uwe. An introduction to qualitative research. (Sage, 2009) 318.

D. Thesis Outline

To conclude, this thesis seeks to better understand the role that judicial actors play in the development of economic telecommunications regulation, what factors explain the role that judicial actors have, and how these factors interrelate with each other. For these purposes, this thesis is divided in a further six chapters and a total of seven including this one.

Chapter (2) analyses the legal and political science literature with reference to the following themes: the role of judicial actors in policymaking and the factors that such literature theorizes influences judicial decision-making and therefore judicial activism. In relation to the latter it identifies a series of factors such as the attitudes judges have towards their role (an aspect of judicial culture) or the manner in which legislation is drafted as potentially relevant for a comparison between Chile and the UK. My thesis aims to fill a gap identified in this literature in two senses: first because it compares two countries that are not usually studied and second because it also analyses an area not usually addressed by judicial activism literature; economic regulation. It also draws upon that literature to shape a working concept of judicial activism to use in the dissertation.

The following three chapters form the empirical core of the thesis. The main purpose of Chapter 3 is to map out and comparatively analyse the main institutions and legislation that shape the economic regulation of telecommunications in Chile and the UK in order to give appropriate context to the empirical data that will be presented in the subsequent Chapters of this thesis. For each country, an analysis of the various institutions that play a role in the

development of Telecommunications regulation is made, such as the relevant telecommunications and competition agencies. Then, the most important statutes are reviewed in order to better understand the broader policy and legal requirements set forth by the relevant legislature. A special focus is on procedure, the manner through which judicial actors are given power to intervene in the policymaking process, and is flagged as a possible factor that explains judicial activism.

Chapter 4 presents the findings from original qualitative empirical data regarding the role of judicial actors in the development of economic telecommunications regulation in Chile. The purpose of this chapter is threefold. First, to analyse whether judicial actors have a role in the development of economic telecommunications regulation. Second, the data is also used to shed light on the question if and which of the factors that were assumed as influencing judicial behaviour in Chapter 2, actually do play a role in explaining judicial activism. It is a key finding that only some of the factors hypothesized, on the basis of the literature review, to be significant do play a role, specifically the actual phrasing of the specific legal obligations, judicial culture, and economic policy views, whilst other factors that were not considered as relevant, also came up as important, specifically public opinion and leadership. Finally, a classification of the different factors is developed arguing that they play two different roles in explaining judicial activism.

Following on, Chapter 5 is a mirror of Chapter 4, but for the UK. It presents the findings from original qualitative empirical data regarding the role of judicial

actors in the development of economic telecommunications regulation in the UK. Three are the purposes of this chapter. First, to analyse whether judicial actors have a role in the development of economic telecommunications regulation. Second, the data is also used to shed light on the question if and which of the factors that were assumed as influencing judicial behaviour in Chapter 2, actually do play a role in determining activist behaviour. Finally, the typology of the different factors presented in Chapter 4 is further developed to take into account the data from the UK.

The last two chapters of the thesis make a complete analysis of the empirical data presented in Chapters 3, 4 and 5 and also present the conclusions and point towards key contributions of the thesis to different strands of literature.

In this way, Chapter 6 presents key conclusions from the comparison of the two case studies presented in the previous Chapters 3, 4 and 5. Specifically, three main issues are addressed. The first one is it outlines the development of an empirical concept of judicial activism based on the case studies of this thesis, and compares this to the working concept developed in Chapter 2. The second issue is it summarizes what factors appear to explain judicial activism and non-activism of judicial actors in Chile and the UK. Finally, I further develop the classification of factors that explain judicial activism as having two different roles. Some, I hold, act as *direct triggers* of judicial activism in a sense that they drive in a quite direct way judicial activism, others act as *enabling factors* in the sense that they open the door, they allow for direct driving factors to operate.

Finally, Chapter 7 presents and summarizes the main findings of the thesis. Then, puts forward some views about the generalisation of the findings of this thesis to other areas of economic regulation, such as energy law. After that, it discusses some potential implications of the main findings of the thesis for the literature on judicial activism. Lastly, it analyses the contributions the thesis can make towards the development of certain areas of the jurisprudence of adjudication, specifically in confirming or denying claims made in descriptive accounts about the role judges fulfil in adjudication.

CHAPTER 2

The Role of Judicial Actors in Economic Telecommunications Regulatory Policymaking

This chapter will argue that the traditional position regarding the role of judicial actors in the regulatory process which views them playing a role primarily in the later stages of the regulatory process, namely at the stages of enforcing regulation or when regulators are held accountable, is incomplete. I suggest that it is important to probe the hypothesis that judicial actors also do play a role at earlier stages in the regulatory process, in particular in the development of regulatory policy.

Chile and the UK were amongst the first countries in the world to liberalise and privatise their telecommunications industries. Although, at the time, governments in both countries generally agreed on the fundamental issues that had to be reformed, in order for these new policies (liberalisation and privatisation) to work, differences in their institutional structures made each country implement the policy in a different manner. British regulation was mainly contained in legislation while in Chile the telecommunications regulation was mainly found in licences issued by the telecommunications regulator to telecoms companies.¹ The first part of this chapter gives a brief overview of how the

¹ In the context of telecommunications licenses are sometimes referred to as ‘contracts’ especially because in the early days of privatisation any modification to the license (mainly British Telecommunications’) was made by what actually was an agreement between the regulator and the private party, there was rarely an imposition. Tony Prosser, *Law and the regulators* (Clarendon

liberalisation and privatisation policies were implemented in these two countries and will specifically focus on the role of judicial actors were designed to have.² It will be highlighted that even though judicial actors are assigned an important role in the liberalisation and privatisation policies, the legislative framework does not attribute to them a regulatory policy-making role, but instead perceives them as enforcers of contracts (licenses) in the UK and limiting administrative discretion in Chile.

The second part of this chapter will analyse the actors that the relevant regulatory literature traditionally identifies as involved in the development of economic telecommunications regulation.³ It will be argued that a very important participant, judicial actors, has received insufficient attention, in their capacity to develop regulation, even though they have the power to play a significant role in determining the content of it. Most regulatory processes contain provisions for review by judicial actors, and it is in this scenario in which they can, potentially, play a significant role as regulatory policymakers.⁴

Press 1997) 48; Anne Flanagan, 'Authorization and Licensing' in Ian Walden (ed), *Telecommunications law and regulation* (4th edn, Oxford University Press 2012) 277.

² The broader term 'judicial actor' has been chosen instead of 'courts' because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as 'courts' such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that will be looked at are the following: For the UK, it will be the CAT, the Court of Appeal, and the Supreme Court. For Chile it will be the Competition Tribunal, the Courts of Appeal, and the Supreme Court.

³ It should be noted that the specific area which will be researched will be identified, for the purposes of this thesis, as 'economic telecommunications regulation'. This is to establish that areas of telecommunications regulation which can be categorized as 'social regulation', such as policies ensuring universal access to telecommunications services, will not be the object of this thesis.

⁴ Although judicial review is probably the most important form through which Courts can review decisions and get involved in regulatory policymaking, it has also been noted, that in a lesser degree, Courts can also intervene through cases of claims of damages. Robert Baldwin and Christopher McCrudden, *Regulation and public law* (Weidenfeld and Nicolson 1987) 56.

My interest lies in understanding what factors explain why a judicial actor might decide to get involved in the development of regulatory policy in the context of economic telecommunications regulation. For this purpose, the third part of this chapter will draw upon the literature on judicial behaviour to shape a working concept of judicial activism, which will be a working concept for precisely identifying the situations in which judicial actors will be understood as engaging in judicial activism.

The final part of this chapter will also draw upon the judicial behaviour literature to review the different factors that, according to this literature, explain the conduct of judicial actors, and thus, for these purposes, its activist behaviour. These issues will not be explored in an abstract fashion, but rather in the specific context of a comparative analysis of two countries, Chile and the UK, which are considered to be the pioneers in the liberalisation and privatisation of their telecommunications industry approximately 30 years ago and whose judicial actors assumed to have had a different role in the development of economic telecommunications regulatory policymaking.

A. Chile and the UK: 30 Years of Liberalisation and Privatisation of Telecommunications

Approximately 30 years ago Chile and the UK were among the first countries to privatise and liberalise their utilities, telecommunications amongst them.⁵ In 1982, the Ley General de Telecomunicaciones 18.168 of 1982 (Chilean General Law of Telecommunications)⁶ was passed by the Chilean military *Junta*.⁷ This law set the basis for a new regulatory regime and contained a new institutional framework, which included rules on licensing of telecommunications operators, competition, quality of service, interconnection, price regulation, and penalties among others. Privatisation came later in 1987 when the public monopoly telecommunications company, *Compañía de Teléfonos de Chile* (CTC, now Telefónica CTC) was privatised.⁸

Two years after Chile, the British Parliament passed its own new telecommunications framework, the Telecommunications Act 1984. This statute also set the rules for a new regulatory regime in telecommunications ending British Telecommunications (BT) monopoly, introducing competition in the market, a licensing system, and creating a new regulator, the Director General of Telecommunications (DGT) and its office (OFTEL). The British privatisation

⁵ David M. G. Newbery, *Privatization, restructuring, and regulation of network utilities* (MIT Press 2000) 2.

⁶ Ley General de Telecomunicaciones 18.168 (Chilean General Law of Telecommunications).

⁷ *Junta* in this sense refers to ‘a military council that rules a country following a *coup d’état* before constitutional rule is restored. In Latin America juntas are normally formed by the chiefs of the army, air force, and navy’. Iain McLean and Alistair McMillan, *The concise Oxford dictionary of politics* (2nd edn, Oxford University Press 2003).

⁸ Ahmed Galal, ‘Chile: Regulatory specificity, credibility of commitment, and distributional demands’ in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996) 126.

process was faster though as BT was privatised in November 1984 through the sale of 50.2% of its shares just a few months after the Telecommunications Act 1984 was passed.

These two countries are generally considered as *pioneers* or *pacesetters* in the liberalisation and privatization process which started in the 1980's and continues until today throughout parts of the world. They were seen, by those in favour of privatisation and liberalisation, as the benchmark in Latin America and Europe respectively when this policy was adopted.

The Pinochet dictatorship and the Thatcher government agreed in general terms on the structural issues the reforms to be undertaken should address: shrinking down the state through privatisation, competition in the market, and clear regulation (reducing space for arbitrariness).⁹ Nevertheless, the implementation of these reforms was different in each country. A good example of how connected these two regimes were at the ideological level but still had differences in its implementation can be seen in an abstract of a letter sent by Margaret Thatcher replying to a letter sent by Friedrich Hayek in which he had told her about the economic progress made under the Pinochet dictatorship:

The progression from Allende's Socialism to the free enterprise capitalist economy of the 1980s is a striking example of economic reform from which we can learn many lessons. However, I am sure you will agree that, in Britain with our democratic institutions and the need for a high degree of consent, some of the measures adopted in Chile are quite

⁹ Mark Thatcher, *The politics of telecommunications : national institutions, convergence, and change in Britain and France* (Oxford University Press 1999) 144; Centro de Estudios Públicos (Santiago Chile), *"El Ladrillo" : bases de la política económica del gobierno militar chileno* (Centro de Estudios Públicos 1992). This book set the basis for the economic policies implemented by the Pinochet dictatorship in Chile.

unacceptable. Our reform must be in line with our traditions and our Constitution. At times the process may seem painfully slow. But I am certain we shall achieve our reforms in our own way and in our time. They will endure.¹⁰

The countries adopted regulatory policies in accordance with their particular legal structures as World Bank research in the 1990's showed.¹¹ Considering that the UK has a parliamentary political system in which the same party controls the executive and the legislature, statute based regulation by itself did not provide enough stability to regulate the new liberalised and privatised telecommunications. A change of the party in control of the executive and legislature would have meant that the laws governing the area could have been changed. Furthermore, even though the UK has strong independent judicial actors, in this situation they would have been powerless as the parliamentary sovereignty principle would not allow them to enforce the *original* statute or declare the new unconstitutional. Judicial actors in Chile nevertheless did have a strong history of duly enforcing contracts (in the case of telecommunications, licences) even against the government and even if the statute under which the licenses were issued was changed. As such, the UK gave a quasi- contract based system (licenses) a preeminent role in the regulation of its telecommunications.¹²

¹⁰ Cited in: Kenneth R. Hoover, *Economics as ideology : Keynes, Laski, Hayek, and the creation of contemporary politics* (Rowman & Littlefield 2003) 213.

¹¹ The importance of the regulatory framework and the relevant institutions that are part of that framework were considered of particular relevance for the World Bank which conducted a research project that analysed the privatisation process in five different countries: the UK, Chile, Argentina, Jamaica and the Philippines.

¹² Brian Levy and Pablo T. Spiller, 'A Framework for Resolving the Regulatory Problem' in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996)10. Once the license was issued it was very difficult for the regulator to change its terms unilaterally, thus being forced to bargain with

Chile, on the other hand, had a constitutional structure which allowed it to rely primarily on legislation.¹³ An ‘archetypal’ presidential system¹⁴ with multiple parties, none with enough strength to control the legislature, made statute based regulation much harder to change than in the UK. A strong independent judiciary was also able to provide a strong check on government power and even declare legislation unconstitutional.¹⁵

As such, the allocation of regulatory powers was different in each country. In Chile the legislature not only had the regulatory power in the design of the system but also retained it afterwards. Any major change to the system had to be passed through legislation and the regulator had limited powers to create or amend regulation that took the form of primary legislation.¹⁶ In the UK, it was different. Parliament set out the original structure but regulatory power was mainly allocated to the administrative agency (OFTEL), the Secretary of State for Trade and Industry (STI),¹⁷ and in some cases, the Monopolies and Merger Commission (MMC),¹⁸ all of which were involved in the process of amending licenses.¹⁹ This allocation of regulatory powers was nevertheless significantly

the licensee. Cosmo Graham, *Regulating public utilities : a constitutional approach* (Hart 2000) 33. Prosser (n 3), 300.

¹³ Levy and Spiller 6.

¹⁴ Ibid 12.

¹⁵ Ibid 13

¹⁶ Galal (n 8) 126.

¹⁷ Telecommunications Act 1984, Section 12.

¹⁸ Telecommunications Act 1984, Section 13.

¹⁹ Brian Levy and Ingo Vogelsang, ‘The United Kingdom: A pacesetter in regulatory incentives’ in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996) 98. Thatcher (n 9) 148.

altered when the Communications Act 2003²⁰ set out a new framework for telecommunications which implemented European Union (EU) law ²¹ and created a new unique regulator for the telecommunications sector, the Office of Communications (Ofcom). The UK changed the contract based license regime replacing it with a system of ‘General Conditions of Entitlement’ which are drafted by Ofcom under power granted by the Act and ultimately backed up by EU law.

Within the context of the regulatory regime described above, my interest concerns the role that judicial actors have played in the development of regulatory policy. As explained below, judicial actors are not usually considered in their capacity as regulators in economic telecommunications regulation. A good example of this is that in the original design of the relevant telecommunications regulation for liberalisation and privatisation, judicial actors were seen as playing a role mainly as enforcers of contracts (licenses) in the UK and limiting administrative discretion in Chile, but not as active ‘policymakers’. 30 years after the original policies were implemented it seems very interesting to evaluate and assess whether judicial actors have played a role as regulators, how this has potentially differed between the two countries and what role they have played in this capacity, as well as if and how this has changed throughout the 1980’s- 2015 period, and why.

²⁰ Communications Act 2003.

²¹ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

B. Regulatory Literature: The Overlooked Role of Judicial Actors in Regulation

Who regulates?²² If anyone reviews the literature on regulation searching for an answer to this question,²³ they would find that four main actors are usually acknowledged as taking part in the development of regulation: regulatory agencies, the legislature, ministerial departments, and private parties, such as regulated companies.

Regulators, narrowly understood, that is ‘an agent or agency of government authorized to control and channel conduct in a specified field’,²⁴ are the most obvious answer to the question presented above. They play a very important role²⁵ in regulatory policymaking²⁶, especially considering that some argue that we currently live in the age of the ‘regulatory state’.²⁷ In this regulatory state, regulatory policymaking, especially ‘classical’ or ‘command and control’

²² In this chapter I will not focus on the normative aspects of this issue, this is, who should regulate, but rather on the analytical issue of who regulates.

²³ Baldwin, Cave and Lodge discuss this issue under the general topic of which level of government offers the best location for regulation. Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation : theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 374

²⁴ Roger Brownsword, *Rights, regulation and the technological revolution* (Oxford University Press 2008).

²⁵ This affirmation must be qualified. It is a reference to the general role played by regulatory agencies currently and throughout different jurisdictions. Differences on the role and importance of regulators can be found between jurisdictions and in time. In the US, for example, agencies usually are independent and have full rule-making powers, whilst in the UK this role is more limited. See: A. I. Ogus, *Regulation : legal form and economic theory* (Hart 2004) 104

²⁶ For the purposes of this dissertation, the concept of regulatory policymaking will be understood as *the process through which rules or standards, which will govern a particular economic sector, are designed, drafted and put into effect*.

²⁷ Giandomenico Majone, ‘From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance’ 17 *Journal of Public Policy* 139

regulation,²⁸ has shifted towards specialised agencies and away from ministerial departments.

The legislature is another actor that is actively engaged in regulatory policymaking. Its role is particularly relevant in Britain. According to Ogus, ‘the primary source of regulatory law in Britain is parliamentary legislation’.²⁹ It can also be highlighted that even though most regulatory policymaking by the legislature uses the same techniques as regulators,³⁰ such as command based regulation, some regulatory instruments are actually monopolized by the legislature, such as taxes, an incentive based regulatory strategy.³¹

Ministerial departments have historically played an important role in regulatory policymaking. Through delegated legislation, specifically statutory instruments,³² they have been in the front line of regulation. In 2012, for example, to appreciate the relevance they have as ‘regulators’, the Executive issued 3003 statutory instruments in the UK, whilst Parliament passed only 44 acts.³³

²⁸ Bronwen Morgan and Karen Yeung, *An introduction to law and regulation : text and materials* (Cambridge University Press 2007) 123.

²⁹ Ogus (n 25) 104

³⁰ Baldwin, Cave and Lodge (n 23) 105-136; Morgan and Yeung (n 28) 80-113.

³¹ According to the Chilean Constitution, taxes can only be created by the Legislature. See: *Constitución Política de la República de Chile de 1980* (Constitution of Chile), article 65.

³² Ogus (n 25) 104

³³ Information obtained from: <http://www.legislation.gov.uk/>. It should be highlighted that these statutory instruments, as delegated legislation, have their ‘source’ in parliamentary acts.

Under different, and newer, forms or techniques of regulation, such as meta-regulation, self-regulation³⁴ or enforced self-regulation,³⁵ private parties also assume an important role in the development of regulation in a manner akin to regulators. For example, under enforced self-regulation, private parties are empowered to draft the regulation that will govern them, but this self-regulation can be later publicly enforced by governmental agencies.³⁶

One very important participant though receives very little attention in its regulatory policymaking capacity: judicial actors. They are mainly considered by regulatory literature as taking part in later stages of the regulatory process, that is, when regulators are held accountable³⁷ or when regulation is judicially enforced or reviewed for its legality.

Regarding their part in holding regulators to account, this is usually limited to assuming a control role in what Ogus calls ‘procedural accountability’, this is assuring that the procedures employed in the creation of policy are fair and impartial. Nevertheless, it is also considered that they may also have a role as part of the ‘substantive accountability’ controls; this is, ‘ensuring that the rules and decisions are themselves justifiable in terms of the public interest goals of the regulatory system in question’.³⁸ It is in this capacity in which the relevant

³⁴ Baldwin, Cave and Lodge (n 23) 147.

³⁵ Ian Ayres and John Braithwaite, *Responsive regulation : transcending the deregulation debate* (Oxford University Press 1992)

³⁶ Ibid, 101.

³⁷ Baldwin, Cave and Lodge (n 23) 345-347; Morgan and Yeung (n 28) 233-235; Great Britain. Better Regulation Task Force., *Economic regulators* (Better Regulation Task Force 2001) 14; A. I. Ogus and University of Manchester. Centre on Regulation and Competition., *Regulatory institutions and structures* (Centre on Regulation and Competition 2001) 19.

³⁸ Ogus (n 25) 111.

literature considers that judicial actors may actually have a role as regulatory policymakers. Baldwin, Cave and Lodge raise this point when discussing judicial review as an accountability mechanism:

Such review power comes at a price, however: it raises the possibility of judges being actively involved in developing regulatory decisions and policy. It raises the question whether judicial actors should defer to regulators' decisions and expertise in case of ambiguity or whether judicial actors should be actively engaged in scrutinizing decisions to the degree that they engage in fresh examinations of the merits of the decision.³⁹

Judicial actors are also considered as playing a role in the enforcement of regulation. For example, Ayres and Braithwaite, in their seminal work *Responsive Regulation*, assert that private parties are more likely to comply with regulation if the relevant agency operates an explicit 'enforcement pyramid'. This enforcement pyramid contains a wide array of enforcement sanctions which should be used gradually by the regulator in response to the attitude towards compliance with legal regulation displayed by the regulated, starting with persuasion or warning letters and escalating to civil and criminal penalties or even the revocation of the relevant license to operate.⁴⁰ Judicial actors play an important role in the 'higher' level of the pyramid, where harsher sanctions are utilized and their sole existence makes the threats used at the lower scale credible.

My thesis starts from the idea that judicial actors should be given greater attention in order to understand them as part of the process of *developing*

³⁹ Baldwin, Cave and Lodge (n 23) 345.

⁴⁰ Ayres and Braithwaite (n 35) 35.

regulatory policy. Many public policy decisions taken by the legislature, ministerial departments or regulators can be challenged judicially and in these situations judicial actors will actually have the definite decision in relation to specific policy decisions —if the legislature does not overrule the decision by passing legislation which invalidates the content of the ruling—. ⁴¹

In economic telecommunications regulation, judicial actors have played an important role in some jurisdictions. In Chile, for example, decisions of judicial actors have addressed issues such as industry structure (and sometimes involving the divestiture of monopolist telecommunications companies)⁴², requirements to share or provide access to facilities (in defining unbundling obligations)⁴³, or even decided the specifics of permissive pricing policies (whether mobile companies can charge higher prices for calls made outside their own networks, that is, on-net/off-net pricing schemes).⁴⁴

In the UK, judicial actors have not had a substantial impact on the development of telecommunications regulation,⁴⁵ although it is possible that they

⁴¹ This situation, in which the Legislature overturns a decision of a judicial actor, even though is possible is very unlikely. In the US the threat of reversal was once considered as a ‘restraint’ for judicial actors but it is now the consensus that in reality the situation is very unlikely and does not actually constrain the judicial actor. William N. Eskridge, Jr., ‘Overriding Supreme Court Statutory Interpretation Decisions’ 101 *The Yale Law Journal* 331. In this sense, in most cases the decision regarding a specific policy decision by a judicial actor is the final one and may in fact decide a specific policy.

⁴² *Reclamación de Telefónica España y otros contra Dict. 735* Resolución 368/92 CR, Comisión Resolutiva.

⁴³ *Demanda de Voissnet S.A. contra Compañía de Telecomunicaciones de Chile S.A.* Sentencia 97/2010 TDLC.

⁴⁴ *Instrucción de Caracter General N 2 (ICG N2)* NC N 386-10 TDLC

⁴⁵ John Angel, ‘The Telecommunications Regime in the United Kingdom’ in Ian Walden and John Angel (eds), *Telecommunications law and regulation* (2nd edn, Oxford University Press 2005) 77.

have played a role in a less obvious and visible manner. For example, judicial actors in the UK may actually play an important role by endorsing the choices of regulators or the executive by issuing decisions which carefully analyse and explicitly agree with the policy decision made.⁴⁶

Considering the significant role that judicial actors have (or theoretically could have) in the development of economic telecommunications regulation, it is interesting and important to understand how and why they engage in the development of telecommunications regulation. For this, I will first draw upon the concept of judicial activism, a concept that will be used to describe the situations in which judicial actors will be understood as being involved in the development of economic telecommunications regulation. Second, I will recur to the judicial behaviour literature to better understand when and why judicial actors decide to play a role in the development of telecommunications regulation and the different factors that may affect their involvement.

⁴⁶ For example, see: *R. (on the Application of T-Mobile (Uk) Ltd) v The Competition Commission* [2003] ACD 72 Administrative Court in which the Administrative Court agreed with the Competition Commission's decision after very careful and detailed analysis.

C. Controlling a Slippery Term: Towards a Working Definition of Judicial Activism in the Context of Telecommunications Regulation

1. Historical Overview

The concept of judicial activism, not the precise term, is not new and has actually been around for a long time.⁴⁷ In Bentham's work, for example, a critique of what can be loosely labelled as 'judicial legislation'⁴⁸ can be found. During the *Lochner Era* in the United States,⁴⁹ Cardozo,⁵⁰ Pound and other prominent scholars of the time⁵¹ discussed and analysed in great length the issue of 'judicial legislation'. In the United Kingdom, Professor Otto Kahn-Freund in 1943 was amongst the first scholars to use the term 'judicial legislation', in order to refer to a case in which the House of Lords set new rules for Divorce Law.⁵² Nevertheless, none of these authors used the term 'judicial activism' as such.

In the United States, the term was first used, surprisingly, not by a lawyer, judge or legal scholar, but by a journalist. In a 1947 edition of *Fortune* magazine,

⁴⁷ Keenan D. Kmiec, "The Origin and Current Meanings of "Judicial Activism"" (2004) 92 California Law Review 1441

⁴⁸ Ibid; H. L. A. Hart (ed) *Of laws in general* (Athlone Press 1970) 6.

⁴⁹ *Lochner v. New York*, 198 U.S. 45(1905). In this case, the Supreme Court of the United States struck down a New York state law which regulated the working hours of bakers in the state. The Court held that such law was aimed at regulating employment hindering contractual freedom. This case started the so called '*Lochner Era*' in which the US Supreme Court struck down most laws that attempted to regulate working conditions.

⁵⁰ Benjamin N. Cardozo, *The nature of the judicial process* (Yale University Press 1949).

⁵¹ Kmiec (n 47) 1444.

⁵² O. Kahn-Freund, 'Divorce Law Reform by Judicial Legislation' 6 The Modern Law Review 230.

the journalist Arthur Schlesinger Jr. used the term for the first time. In an article which provided an overview of the composition of the United States (US) Supreme Court for that term, he labelled part of the bench as ‘judicial activists’ and the other as ‘champions of self-restraint’.⁵³ Schlesinger not only used the term for the first time, he was also the first to use it in a negative manner as he used it to criticise the activist Justices of the Court. Regrettably, he did not give a definition of the term. The term was used in a judicial decision in the US for the first time many years later (1959) in *Theriot v Mercer*. In the United Kingdom⁵⁴, a judicial reference to the term is only found in 1980 by Lord Scarman in *Dupont Steels Ltd. and Others v Sirs and Others*.⁵⁵

As Easterbrook highlights the term ‘judicial activism’ can be characterized as being ‘notoriously slippery’.⁵⁶ This I believe is true for two main reasons. First, the term does not have a clear meaning because it may be employed to describe very different conducts (which will be analysed below). Second, the term can also be considered as ‘slippery’ because it is a value loaded⁵⁷ concept and thus opinions

⁵³ Stefanie A. Lindquist and Frank B. Cross, *Measuring judicial activism* (Oxford University Press 2009) 1; Kmiec (n 47) 1445.

⁵⁴ This first case was found by searching in Lexis Nexis: [“judicial activism” OR “judicial activist” OR “judicial activists”] on 12/03/2013. The information was corroborated by performing the same search on Westlaw.

⁵⁵ *Dupont Steels Ltd. and Others v Sirs and Others* [1980] 1 WLR 142 House of Lords. Lord Scarman stated that ‘Further, in our system the rule "stare decisis" applies as firmly to statute law as it does to the formulation of common law and equitable principles. Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning himself shows, have a genuine creative role. Great judges are in their different ways judicial activists.’

⁵⁶ Frank H. Easterbrook, ‘Do Liberals and Conservatives Differ in Judicial Activism Symposium: Activism’ (2002) 73 University of Colorado Law Review 1403.

⁵⁷ Lindquist and Cross (n 53).

of it vary greatly. Some view ‘activism’ as a good practice,⁵⁸ arguing that it protects citizens from abuses of the Executive whilst others argue that it is an undemocratic and sometimes counter-majoritarian⁵⁹ practice.

In the last 40 years judicial actors accused of being ‘activist’ have usually been those that have adopted more progressive⁶⁰ or liberal policy positions, and when the term is used, most people think of decisions such as *Roe v Wade*⁶¹ or *Brown v Board of Education*⁶² in the United States. Nevertheless, this has not been always the case historically. In numerous occasions activist judicial actors have embraced conservative values. Decisions such as the infamous *Dred Scott*,⁶³ which held that the US federal government could not regulate slavery and that African Americans were not citizens, is also a paradigmatic case of (conservative) judicial activism.

In a similar line, the Chilean judiciary for the greater part of the 20th century has been described as engaging in conservative judicial activism, actively protecting private property and freedom of contract but unwilling to protect citizen’s rights.⁶⁴ For example, in one case the Chilean judicial actors were very

⁵⁸ Rebecca L. Brown, ‘Activism is Not a Four-Letter Word Symposium: Activism’ 73 University of Colorado Law Review 1257.

⁵⁹ The term countermajoritarian was coined by Alexander Bickel and basically refers to the situation in which Courts overrule the decisions of politically accountable bodies. Alexander M. Bickel, *The least dangerous branch : the Supreme Court at the bar of politics* (Bobbs-Merrill 1962).

⁶⁰ Craig Green, ‘An Intellectual History of Judicial Activism’ ((2008-2009)) 58 Emory Law Journal 1195,1214.

⁶¹ *Roe v Wade* 410 US 113 (1973) US Supreme Court.

⁶² *Brown v Board of Education* 347 US 483 (1954) US Supreme Court.

⁶³ *Dred Scott v. Sandford*, 60 US 393 (1857) US Supreme Court .

⁶⁴ Lisa Hilbink, *Judges beyond politics in democracy and dictatorship : lessons from Chile* (Cambridge University Press 2007) 63.

activist in zealously protecting the contractual rights of a landlord, ignoring the core objective of a (then) recently approved law which sought to protect tenants from unreasonable charges and eviction.⁶⁵ On a different issue, the judicial actors were unwilling to perform an ‘activist’ interpretation to protect citizen’s basic rights, from a law, known as the *Ley Maldita* or ‘Damned Law’⁶⁶ that basically prohibited any activity related to the Communist Party or any other movement which promoted a form of government different to liberal democracy (opposed to socialist democracy). Judicial actors shielded themselves behind formalist reasons, such as that separation of powers barred them from examining the acts of the Executive.⁶⁷

In reality most will view activism as ‘good’ or ‘bad’⁶⁸ depending whether a particular decision coincides with their particular policy preferences. It is usually the case that those who accuse a judicial actor of being ‘activist’ do so simply because they do not agree with the policy set forth by that judicial actor. It has become a ‘code word used to induce public disapproval of court action’.⁶⁹

⁶⁵ *Fuentes, Vida de Fuenzalida vs. Cuadra Pinto, Dario (1957)* Court of Appeals of Santiago, cited by Hilbink (n 64) 66.

⁶⁶ *Ley para la Defensa Permanente de la Democracia* (Law for the Permanent Defense of Democracy) (1948).

⁶⁷ Hilbink (n 64) 69.

⁶⁸ The normative dimension of the term, even though is a very interesting topic, will not be developed further in this chapter.

⁶⁹ William Wayne Justice, ‘The Two Faces of Judicial Activism’ in David M. O’Brien (ed), *Judges on judging: views from the bench* (4th edn, SAGE/CQ Press 2013) 42.

As such, it seems important to review the different meanings of judicial activism given by the literature in order to start to set out a working definition to be used in the thesis.

2. A Chameleonic Term: The Different Meanings of Judicial Activism

As was stated above, the term judicial activism has been used to describe different conducts. Some of the meanings identified in the relevant literature are the following:⁷⁰

(1) *Invalidation of the arguably constitutional actions of other branches*- This may be considered as the broadest possible meaning for the term, and in general refers to the situation when a Judicial actor does not to ‘defer to decisions made by other governmental actors’⁷¹, for example, by striking down a piece of legislation.⁷² This is not only limited to striking down legislation enacted by the Legislature but can also be extended to secondary or delegated administrative regulation issued by the ministerial departments or regulatory agencies. In this respect, Graglia gives a very clear explanation of what this meaning entails: ‘By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices

⁷⁰ Kmiec (n 47) 1444; Lindquist and Cross (n 53) 32; Brice Dickson, ‘Judicial Activism in the House of Lords 1995-2007’ in Brice Dickson (ed), *Judicial activism in common law supreme courts* (Oxford University Press 2007), 366.

⁷¹ Lindquist and Cross (n 53) 32; John Patrick Hagan, ‘Patterns of Activism on State Supreme Courts’ (1988) 18 *Publius* 97.

⁷² Kmiec (n 47) 1463.

by other governmental officials or institutions that the Constitution does not clearly prohibit'.⁷³

(2) *Failure to adhere to precedent* In common law countries, Judges or judicial actors that do not adhere to precedents⁷⁴ have been labelled as judicial activists for their disposition to alter interpretative stability.⁷⁵ The willingness of judicial actors to destabilize precedent is similar to the case in which they do not defer to the decisions of other branches of government, with the difference that in this case they are overturning the decisions of previous judicial actors⁷⁶ instead of other branches of government.

This is a possible meaning of the term that in principle is mainly applicable to common law countries. Nonetheless, it is not unimaginable that in a civil law country a Supreme Court Judge could label a lower judicial actor that contradicts its decisions as being 'activist'.⁷⁷

(3) *Judicial 'legislation'* Judicial activism, in this sense, involves a positive decision to create new rules in a manner akin to the legislature. There is a generalized agreement that, at the very least, judicial actors engage in

⁷³ Ibid 1464.

⁷⁴ This was something that historically was not possible in British Law. Nevertheless, from 1966 the House of Lords was free to overrule its previous decisions. See: John Bell, *Policy arguments in judicial decisions* (Clarendon Press 1983) 3; D. J. Galligan, *Discretionary powers : a legal study of official discretion* (Clarendon Press 1986) 41.

⁷⁵ Hagan (n 71) 98.

⁷⁶ Lindquist and Cross (n 53) 36.

⁷⁷ For example in a civil law country like Chile this is formally the case in some areas such as labour law. The Supreme Court can have the function of 'unifying the jurisprudence' which could very much compared to the practice of establishing precedents in common law jurisdictions. See: *Código del Trabajo* (Chilean Labour Code), articles 483, 483-A, 483-B and 483-C.

‘supplementary and interstitial law-making, filling in the details of the statutory or customary law’.⁷⁸ This is true most significantly in common law jurisdictions but in continental law jurisdictions, this is also the case. Since statutes and codes are not designed to ‘meet every potential conflict’⁷⁹ judicial legislation can become a necessity, so that the law can be effective.

Former president of the United States George W. Bush publicly used this possible sense, stating that he planned ‘to appoint strict constructionists who would hew closely to the law rather than judicial activists’ whom he said were prone to ‘legislate from the bench’. He further added that ‘We want people to interpret the law, not try to make law and write law’.⁸⁰

(4) *Departures from accepted interpretive methodology*- Canons of interpretation in the common law world or rules of interpretation⁸¹ in the civil law system are usually seen as the tool that Judges should use to decide cases. Although for a long time these have been strongly argued to be unhelpful or even useless,⁸² judicial actors that stray far from using them may be accused of judicial activism.

This meaning is not very helpful as in most cases judicial actors will claim that they are using an interpretative legal methodology, even if they are doing so

⁷⁸ Martin M. Shapiro, *Courts, a comparative and political analysis* (University of Chicago Press 1981) 28.

⁷⁹ Ibid 29.

⁸⁰ Kmiec (n 47), cited in 1471.

⁸¹ In civil law countries the interpretation of statutes is usually performed using the interpretative method developed by Von Savigny. It involves four methods of interpretation: (1) grammatical, (2) systemic, (3) historical, and (4) teleological (or purposive/dynamic). See articles 19-24 of the *Código Civi de Chile* (Civil Code of Chile).

⁸² Karl N. Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed Symposium on Statutory Construction’ (1950) 3 *Vanderbilt Law Review* 395.

only as a formality. It is very difficult, using this criterion, to determine when a judge is actually being activist or not.

The four different meanings of ‘judicial activism’ presented above illustrate that there is no clear agreement in the relevant literature about what the term actually means. This conceptual disagreement makes it necessary to give a working definition of judicial activism for the purpose of this dissertation.

3. A Working Concept of Judicial Activism for Economic Telecommunications Regulation

Considering therefore that there is no conceptual clarity in regards to the concept of judicial activism, a working concept will be devised in order to use it throughout the thesis and compare it to what the empirical concept of judicial activism is found to be after the findings of the research are presented.

Judicial activism for this thesis can be described as a mixture of meanings (1), and (3). It is conceptualized as involving both the practice of judicial actors engaging in judicial legislation or disallowing policy choices made by the relevant telecommunications regulator or legislature.⁸³ Notwithstanding what is understood as constituting judicial activism, I will borrow Dickson’s definition,⁸⁴

⁸³ Kavanagh defines the term in a similar manner incorporating both highlighted meanings: ‘It refers to the extent to which the courts are willing to be creative in their adjudicative function (i.e. their willingness to develop the law and make new law) but also their willingness to stand up to the executive and the legislature, holding them firmly to constitutional principles rather than deferring to them in a supine way’. Aileen Kavanagh, ‘From Appellate Committee to United Kingdom Supreme Court’ in James Lee (ed), *From House of Lords to Supreme Court : judges, jurists and the process of judging* (Hart 2011) 40.

⁸⁴ Dickson defines judicial activism as ‘how willing judges are to develop the law’. Dickson (n 70) 367

and adapt it, as I believe it reflects in a simpler manner the core idea of the concept. As such judicial activism is conceptualized as the *practice of developing economic telecommunications regulation by judicial actors*.

It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a *new meaning*. Looking at this issue from another point of view, judicial actors do not create *new* economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

After reviewing the different meanings that can be given to the term ‘judicial activism’ and explaining how this term will be understood in this dissertation (the working definition), the following section will explore some factors that various theories of judicial behaviour have hypothesised as possibly explaining why judicial actors engage in judicial activism.

D. Key Factors that (could) Influence Judicial Activism in Economic Telecommunications Regulation

According to the once dominant theoretical view of judicial behaviour usually known as ‘legal formalism’, judicial adjudication involves a neutral and objective evaluation of legislation and logical reasoning to reach a conclusion in a particular case.⁸⁵ In the formalist vision of the law, the adjudicatory role of judicial actors is quite straightforward and mechanical; their role is only limited to applying the law to the specific facts of a case, calling ‘strikes and balls’ as current US Supreme Court Chief Justice Roberts famously stated in his confirmation hearing.⁸⁶ The decisions are to be the same regardless of the individual judge hearing a case.⁸⁷

Many believe that the legal world is not like this.⁸⁸ As Lord Reid has stated:

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame.

⁸⁵ Frank B. Nelson Cross, Blake J., ‘Strategic Institutional Effects on Supreme Court Decisionmaking’ (2001) 95 *Northwestern University Law Review* 1437, 1439

⁸⁶ Full text available at: <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS-2-3-1.pdf>.

⁸⁷ Tamanaha questions whether this view actually ever existed. He argues based on historical documents that legal formalism was actually never a predominant theory of adjudication and thus the ‘enemy’ of American realism actually never existed. Brian Z. Tamanaha, *Beyond the formalist-realist divide : the role of politics in judging* (Princeton University Press 2010).

⁸⁸ Richard A. Posner, *How judges think* (London : Harvard University Press 2008), 5. ‘But even legal thinkers who believe passionately that judges should be rule appliers and unbiased fact finders and nothing more do not believe that that’s how all or even most American judges behave all the time. Our judges have and exercise discretion. Especially if they are appellate judges, even intermediate ones, they are “occasional legislators”’.

Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales anymore.⁸⁹

One of the strongest theoretical opposition to the formalist view⁹⁰ came from what has been termed ‘american legal realism’.⁹¹ The US scholars that formed part of this movement believed, based on their empirical findings, that judges do not decide cases based on the law, but rather decide cases on what they believe broadly as ‘fair’, this is Judges, in reality, make their minds up about a case not just with reference to legal rules. Rules, laws and precedent are just post-hoc rationalizations for decisions made not based on legal reasons.⁹²

This movement famously argued that law is ‘indeterminate’. By this, they were referring to two aspects of indeterminacy. First, they meant that ‘the law was rationally indeterminate, in the sense that the available class of legal reasons did not justify a unique decision’. Second, ‘law is causally or explanatory indeterminate, in the sense that legal reasons did not suffice to explain why judges decided as they did’.⁹³

⁸⁹ Lord Reid, ‘The Judge as Law Maker’ (1972-1973) 12 *Journal of Society of Public Teachers of Law* 22.

⁹⁰ The review of the main arguments set forth by ‘American realists’ is only done to frame the discussion and point to a possible point of origin of the literature on judicial activism which is usually not explicitly recognized by the political scientists working in this area. It is not the purpose of this thesis to engage in a jurisprudential discussion regarding the role of American realists.

⁹¹ This was not the only ‘realist’ jurisprudential movement. What has been named Scandinavian Legal Realism has a very similar theory of adjudication. See: Alf Ross, *On law and justice* (University of California Press 1974) 108.

⁹² Martin P. Golding and William A. Edmundson, *The Blackwell guide to the philosophy of law and legal theory* (Blackwell, 2005) 51. Also: William Twining, *Karl Llewellyn and the realist movement* (Weidenfeld and Nicolson 1973).

⁹³ Golding and Edmundson, 51.

The realists, to different degrees, agreed that law and legal reasons are rationally indeterminate. As such the explanation of why judges decide a case the way they do should be searched for in a different place. In particular all realists endorsed in one way or another, a specific claim of how judges decide cases; judges decide cases responding primarily to the stimulus of the facts of the case, rather than to legal rules and reasons.⁹⁴

Following the realist view of adjudication various different theories of judicial behaviour have attempted to explain why judicial actors decide cases the way they do.⁹⁵ These various theories will not be fully reviewed here,⁹⁶ but rather the focus will be on those theories that analyse factors which are thought to be of particular importance and influence the activism of judicial actors in economic telecommunications regulation in the UK and Chile. For explanatory purposes these factors will be divided into two groups.⁹⁷

1. Institutional Factors: How do organizations work?

The first group which will contain the factors derived from theories of judicial behaviour which in general could be classified as *institutional*, this is, theories

⁹⁴ Ibid.

⁹⁵ Lee Epstein, William M. Landes and Richard A. Posner, *The behavior of federal judges : a theoretical and empirical study of rational choice* (Harvard University Press 2013) 28.

⁹⁶ Posner identifies nine different main theories that attempt to explain judicial activism. Posner (n 88) 19.

⁹⁷ As a clarification, the different factors were placed into these two groups by me. I do not intend to affirm that any of the authors that analyse these factors would agree with this classification.

that argue that the role of institutions⁹⁸ is key in understanding why judicial actors act in a certain manner and thus whether they engage in judicial activism or not.

In this section only the factors which are thought to be of particular relevance for economic telecommunications regulation and to the research methodology and methods chosen will be analysed. Other factors which could also be categorised as *institutional* will not be analysed for various reasons. For example, some such as federalism⁹⁹ are not applicable to either jurisdiction to be researched; and others such as popular influence¹⁰⁰ or the public opinion of the judiciary¹⁰¹ escape the scope and methods of research of this thesis as they require large scale surveys.

a) Judicial Independence

The first and most important institutional factor that explains the sheer possibility that a judicial actor could engage in judicial activism is judicial

⁹⁸ I refer to the broader understanding of 'institutions' given by what has been labelled as 'sociological institutionalism' which includes culture as an institution. Peter A. Hall and Rosemary C. R. Taylor, 'Political Science and the Three New Institutionalisms' 44 *Political Studies* 936, 947.

⁹⁹ Smithey Shannon Ishiyama and John Ishiyama, 'Judicial Activism in Post-Communist Politics' 36 *Law & Society Review* 719, 725.

¹⁰⁰ Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker Policy Making in a Democracy: The Role of the United States Supreme Court: Role of the Supreme Court Symposium, No. 1' (1957) 6 *Journal of Public Law* 279.

¹⁰¹ Kenneth M. Holland, *Judicial activism in comparative perspective* (St. Martin's Press 1991), 8; C. Neal Tate and Torbjörn Vallinder, *The global expansion of judicial power* (New York University Press 1995) 31.

independence.¹⁰² If a judicial actor is not independent, then the ‘rule of law’¹⁰³ would be an illusion and consequently the possibility of an active judiciary.

The notion that insulation from political pressure contributes to activism is ‘virtually axiomatic among many who study judicial politics’.¹⁰⁴ Although independent judges will not always choose to ‘substitute their own policy judgement for that of others’, they are in a ‘good position to assert themselves in policy-making against or in competition with the legislative and executive branches’.¹⁰⁵

Thus, while judicial independence does not assure judicial activism, the literature believes that it certainly is a necessary condition for it. Since judicial actors lack the power to fund or enforce their decisions, judicial power is highly contingent on the acceptance of other policy makers.¹⁰⁶

Judicial actors in Chile and the UK are both considered to be independent and thus this factor will not be useful in determining why judicial actors have behaved differently in these two jurisdictions. Nevertheless, this is a very important factor and thus worth mentioning because it is the factor that makes

¹⁰² Ceren Belge, ‘Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey’ 40 *Law & Society Review* 653. ‘By judicial independence, I mean the formal arrangements established to ensure judicial autonomy, such as the constitutionalization of appointment and removal procedures and arrangements for the tenure security of Judges’.

¹⁰³ Brian Z. Tamanaha, *On the rule of law : history, politics, theory* (Cambridge University Press 2004).

¹⁰⁴ Shannon Ishiyama and Ishiyama (n 99) 726.

¹⁰⁵ Tate and Vallinder (n 101) 32.

¹⁰⁶ Shannon Ishiyama and Ishiyama (n 99) 726.

the existence of judicial activism possible. In a way it is the factor that makes the ‘playing field’ where activism can occur, a reality.

b) Constitutional framework

The law can play a role as an influential factor in two different ways. First, it can play a role as the constitutional framework of the relevant jurisdiction that determines the role of the judicial actor in the development of economic telecommunications regulatory policy and degrees of its independence.

The Chilean constitution for example establishes quite a restricted role for judicial actors. Article 76 of the Constitution establishes that ‘Courts have the exclusive power to decide civil and criminal cases and execute what has been decided’.¹⁰⁷ As such, this Constitution views judicial actors playing the ‘traditional’ role of deciding a conflict between two parties, in what Shapiro calls the ‘triad of conflict resolution’.¹⁰⁸ It does not view judicial actors as a regulatory policymaker.

The UK has a political constitutional structure which is more complex than the Chilean, as the parliamentary sovereignty principle limits the role of judicial actors¹⁰⁹ and furthermore it includes the European Union (EU) structure. It is not

¹⁰⁷ *Constitución Política de la República de Chile de 1980* (Constitution of Chile), article 76.

¹⁰⁸ Shapiro (n 78) 1.

¹⁰⁹ Within the constitutional framework of the UK, special attention will be given to the role that the ‘ultra vires’ principle has for judicial review as it could be thought that this principle may explain why British judicial actors are less engaged in regulatory policymaking. This principle only allows judicial actors to review the exercise of agency discretion with reference to the provisions of the authorizing parliamentary statute, and thus not allow for merits review. Adam Tomkins, *Public law* (Oxford University Press 2003) 176. Nevertheless, for example, Craig argues that in reality it is quite difficult to distinguish merits based review from judicial review as most

so clear who decides economic telecommunications regulatory policy in the UK. One way of looking at this is to state that this policy is decided basically at the EU level and that its institutions, primarily the Commission, the Council, the European Parliament and the Court of Justice (which was formerly commonly known in English speaking countries as the ECJ) are empowered for this. Under this view, national British institutions, including its judiciary, do not have much power in shaping policy, except for the influence they can exert during the regulatory policymaking process at the European level. It is interesting to note that few British cases related to economic telecommunications regulation have been reviewed by the European Courts. British judicial actors have asked the ECJ for a preliminary ruling on only three occasions¹¹⁰ and the UK has never been taken by the Commission to the ECJ for failing to fulfil its obligations under EU telecommunications law.

Although telecommunications regulation at the European level and the decisions of the European Courts¹¹¹ greatly influence telecommunications regulation in the UK, I do not think that the existence of this institutional structure alone is sufficient to sustain the argument that British institutions (and

interventions by judicial actors can be justified arguing that they are ‘effectuating the intent of the legislature and simply intervening to determine the validity of the agency’s decision’. P. P. Craig, *Administrative law* (6th edn, Sweet & Maxwell 2008) 8. As such, the ultra vires principle would not necessarily be sufficient reason to explain the non-activist behaviour of British judicial actors.

¹¹⁰ See: *The Number (UK) and Conduit Enterprises* Case C-16/10 Court of Justice; *Vodafone and Others* Case C-58/08 Court of Justice; and *The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications* Case C-302/94 Court of Justice.

¹¹¹ According to Conant, the ECJ has also not played a significant role in the development of telecommunications regulatory policy because interested parties preferred to focus their efforts in the political arena. They believed that courts were too risky because they were unpredictable. Lisa J. Conant, *Justice contained : law and politics in the European Union* (Cornell University Press 2002).

judicial actors) are left without any power to shape economic telecommunications regulatory policy nor does it explain completely that judicial actors in the UK have apparently not been very activist. There are various reasons for this.

First, like any other body of law, EU regulation does not foresee every possible situation nor does it have legal language which makes it insusceptible to interpretation. EU Directives leave room for discretion to Member States in their implementation,¹¹² and it is in this stage where local judicial actors can be called upon to decide issues¹¹³ that could be at the core of economic telecommunications regulation. Some important issues are defined by Directives in rather unclear terms, and this could be due to poor drafting or a conscious decision to allow Member States to adopt policy suited to their own circumstances. For example, article 13 of Directive 2002/19/EC¹¹⁴ (the Access Directive), establishes that National Regulatory Authorities (NRA's) have the power to require telecommunications operators to charge wholesale prices for access to their networks which are 'cost oriented'. It is an important concept for telecommunications policy because the cost that operators charge for access has a significant impact on how competitive that specific market can be. As the concept

¹¹² P. P. Craig and G. De Búrca, *EU law : text, cases, and materials* (5th edn, Oxford University Press 2011) 106.

¹¹³ Although implementation could be assumed to be a task substantially different than regulatory policymaking, there are good reasons to assert that it is actually quite difficult to distinguish them. Implementation involves some addition to the primary act, and thus in a way has a 'legislative' nature. Ibid 1115-118.

¹¹⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

was quite unclear, Member States NRA's have interpreted it in different ways.¹¹⁵ These are cases in which local judicial actors usually have the power to review the decisions of local regulatory authorities and hence *develop* economic telecommunications regulatory policy.¹¹⁶

Second, economic telecommunications regulatory policy in the UK has not always had the EU framework governing it. The UK was the first country to liberalise its telecommunications, in 1984.¹¹⁷ The EU liberalisation process was much slower. It started in 1988 with the liberalisation of terminal equipment.¹¹⁸ Full liberalisation did not legally come until 1996 though with the liberalisation of voice telephony and infrastructures, which were the most important and sensitive areas.¹¹⁹ This means that for a significant number of years the economic telecommunications regulation was determined at Member State level (nationally).¹²⁰ In this period of time judicial actors could have had an important role in the *development* of economic telecommunications regulation, yet they

¹¹⁵ The disparity of interpretations eventually led the Commission to conduct a *public consultation on costing methodologies for key wholesale access prices in electronic communications*. See: http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/cost_accounting/index_en.htm

¹¹⁶ British judicial actors have done this, although not in what can be labelled as 'core' issues. For example, the Competition Appeal Tribunal (CAT) has interpreted EU regulation, specifically the Interconnection Directive, by deciding that radio base station (RBS) backhaul circuits are not interconnection products. See: *British Telecommunications Plc v Office of Communications (formerly Director General of Telecommunications)* [2004] CAT 8.

¹¹⁷ Telecommunications Act 1984.

¹¹⁸ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment.

¹¹⁹ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets .

¹²⁰ This was the case for example in regard to interconnection regulation before the Directive 97/33/EC (the Interconnection Directive) in which each Member State adopted a different approach. Emma McCormack, 'Access and Interconnection' in Ian Walden and John Angel (eds), *Telecommunications law and regulation* (2nd edn, Oxford University Press 2005).

apparently did not, and hence the UK's embeddedness in the EU legal system cannot be a reason in this instance for explaining what appears to be very limited judicial activism.

The constitutional and legal framework may significantly determine whether a judicial actor will be *activist* in either jurisdiction. I have asserted that the law could be important in two manners; one as the constitutional framework which was explained above, and a second one as the manner in which the specific contents of telecommunications law and regulation are drafted (specifically how indeterminate it is), which will be explained in a section below.

c) Judge's attitudes towards their role (an aspect of judicial culture)

Judicial culture can be researched through three basic lenses according to Bell:¹²¹ personal, institutional and external. The personal perspective focuses on the manner that particular judicial actors perceive their role and career. The institutional perspective looks at judicial actors as 'a collective and examines the way in which the structures of the career and organisation of judges, as well as legal processes, affect the judiciary as a social institution'.¹²² Finally, the external perspective analyses judicial actors by attempting to understand their social and political impact on the wider world.

¹²¹ John Bell, *Judiciaries within Europe : a comparative review* (Cambridge University Press 2006) 2-6

¹²² Ibid 2

In this thesis the personal lens will be used as a factor that may explain judicial activism. As such, **in practice judicial culture will be used as a shorthand for the attitudes judges have towards their role.**

The existing judicial culture in a certain jurisdiction may help in explaining judicial activism there. A qualitative study could be particularly effective in obtaining data that can illustrate how certain judicial actors think about their role, for example, in relation to the other state powers.¹²³ It is believed that qualitative empirical methods of data collection such as interviews will probably yield the most interesting accounts of how judicial actors actually view their role. Although access was thought to be difficult task, it was not impossible.¹²⁴

*d) Manner in which substantive Telecommunications Law is drafted
(and how clear it is)*

The second manner of understanding the law as a relevant factor that explains judicial activism is to understand how clear or determinate the substantive economic telecommunications law and regulation is, whether it originates in the legislature or the executive. As such, the content of the law becomes relevant in itself. Whether a judicial actor is activist could be influenced by the way in which

¹²³ Both in Chile and the UK specialist tribunals and commissions, such as the Chilean Competition Tribunal or the CAT, which are comprised of a mix of economic, legal and business experts, have a role in hearing cases. This may lead to them developing their own quasi-administrative culture distinct from the culture of the general judiciary.

¹²⁴ Even though access is thought to be difficult especially regarding Judicial Actors, I secured a position as visiting researcher in the Supreme Court of Chile starting in October 2013 which gave me very good access for interviews. This will be further explored in Chapter 4. In regards to the the UK, access was more difficult, but it was supplemented with other sources. This issue will be further explored in Chapter 5.

the substantive ‘law’ is drafted and the way in which legal obligations are framed. An unclear regulation may ‘force’ the judicial actor to enter into regulatory policymaking, for example.

In the case of telecommunications regulation, it is important to assess the relevant laws to determine their clarity, their indeterminacy and the role judicial actors may have in the interpretation of it. The Chilean Competition Law 1973 (as many competition laws) is an example of regulation, relevant to the telecommunications sector after liberalisation, which is so vague that judicial actors are in a way ‘forced’ to develop regulation. For example, article 3 of the Competition Law¹²⁵ establishes that any act which restricts competition will be penalised. This is such a vague statement that the Chilean Competition Court has been obliged, in time, through its decisions, to delimit what this means.¹²⁶

Another issue that should be analysed is whether the relevant telecommunications law establishes mechanisms which allow regulation to be reviewed by judicial actors, and thus potentially decide regulatory policy matters. For example, Sections 192 to 196 of the UK Communications Act 2003¹²⁷ establish the appeals mechanisms for decisions made by the Office of Communications (Ofcom) giving jurisdiction to the Competition Appeals Tribunal (CAT), except for pricing issues for which the Competition Commission has jurisdiction. The

¹²⁵ *Ley para la defensa de la libre competencia* (Chilean Competition Law), article 3.

¹²⁶ This is the case for many Competition Law statutes which have said to be a ‘blank check’ where much of the policy is left to be shaped by decisions. Frank H. Easterbrook, ‘Workable Antitrust Policy’ 84 *Michigan Law Review* 1696, 1702.

¹²⁷ Communications Act 2003, Sections 192-196.

decisions of the CAT and the Competition Commission can also be appealed to the Court of Appeals but ‘must relate only to a point of law arising from the decision of the Tribunal’.¹²⁸

Furthermore, as will be highlighted in the next factor, the availability of resources that a party may have can help it in better understanding the substantive law or in trying to pursue that Judicial Actors interpret it in a manner that is most favourable to their particular interests.

e) Availability (and allocation) of resources for legal mobilization

The main feature of this factor which is set forth in the work of Charles Epp,¹²⁹ is that the outcomes of judicial decisions are most fundamentally influenced by the divergent resources that different social actors can dedicate to litigation as repeat (and, thereby, probably strategic) players or as ‘one-shotters’ (those litigants that appear only once or very occasionally). Over time, these actors (repeat players) are able to mould jurisprudence (decisions) to their advantage.¹³⁰

Epp’s view rejects other accounts. However sympathetic the judiciary may be to other claims, those who are unable to finance such activities will not be able

¹²⁸ Ibid Section 196 (2) (b).

¹²⁹ Charles R. Epp, *The rights revolution : lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998). Epp calls what I have labelled as ‘availability of resources for legal mobilization’ as ‘support structure for legal mobilization’. They both attempt to conceptualize the same, this is, how much resources are made available or ‘invested’ in legal mobilization to try to reach a certain goal. I think that the use of ‘availability of resources’ uses words which could lead to less theoretical confusion than the words ‘support structures’.

¹³⁰ David Erdos, ‘Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand’ (2009) 34 Law & Social Inquiry 95.

to secure protection for their interests within the legal arena.¹³¹ As such, for this theoretical view judicial activism is primarily driven by the amount of resources that strategic players are willing to *invest* in promoting their particular interests. This is the vital factor.¹³²

This is a very interesting factor to analyse in relation to telecommunications regulation in the countries to be researched. If the history of telecommunications in these countries is looked at in Chile and the UK, both are characterized by having a single operator which once acted as a monopolist but which still has substantial power. In the UK it is British Telecommunications, and in Chile it is Telefonica CTC. Furthermore, even with the liberalisation of the markets, all of these markets have very few actors operating. As such, the telecommunications market has strategic players with very considerable resources and interest in having regulation that favours them.

It is further unclear what kind of 'real' opposition relevant NGO's are for these economic agents. New entrants into the market could constitute another group that could mobilize their interest through judicial channels. An example of such group is the European Competitive Telecommunications Association (ECTA) which 'supports the regulatory and commercial interests of new entrant telecoms operators, ISPs and suppliers of products and services to the communications industry'.¹³³

¹³¹ Ibid (n 130)

¹³² Galanter also makes this point. Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' 9 Law & Society Review 95.

¹³³ <http://www.ectaportal.com/en/ABOUT/Mission/>

2. Internal Factors: What do Judges think?

A second group of factors will be labelled as *internal*. This is, factors that are particular to each Judge or judicial actor, whether these may be due to the particular history of a judge or judicial actor or to particular views regarding policy issues. These factors can be attributed to what can generally be described as rational choice theories¹³⁴ of judicial behaviour.¹³⁵

a) Policy views (attitudinal model)

The attitudinal model¹³⁶ follows the legal realism tradition and holds in simple terms that judges decide cases depending on the relevant facts, and their ideological policy views and values. That is, judicial actors decide according to their own particular preferences considering the facts of each case. There is quantitative empirical evidence, particularly in regards to the US Supreme Court,

¹³⁴ According to Calhoun rational choice theories can be defined as ‘The analysis of human action on the basis of individual strategic choices, generally predicated on treating individuals as rational maximizers of their interests’. Craig J. Calhoun, *Dictionary of the social sciences* (Oxford University Press 2002)

¹³⁵ Nancy Maveety, *The pioneers of judicial behavior* (University of Michigan Press 2003) 126.

¹³⁶ Lawrence Baum, *Judges and their audiences : a perspective on judicial behavior* (Princeton University Press 2006) 7.

to support this model¹³⁷ in which the particular ideas, beliefs and values of Judges are the essential factors.

Even though the attitudinal model affirms that judicial actors decide cases according to their own preferences, it is also commonly accepted that they are constrained when making their decisions. That is, they vote according to their own preferences but within certain boundaries. Two constraints or boundaries are identified by the literature. The first one is the law. No matter how policy oriented a judge may be, most judges cannot and do not ignore the core of the applicable laws. The existence of a solid legalist core in judicial making even at the highest level must not be overlooked.¹³⁸ The second is political. Judges are aware that they make decisions in a scenario in which they do not hold the ‘sword or the purse’,¹³⁹ and as such should be aware that their decisions must be in tune with what the political system finds, at least, acceptable.¹⁴⁰ The next factor explains this second issue further.

Related to this factor it is also important to understand how institutions such as the Judiciary behave knowing that other institutions may limit their array of choices of action as will be further explained in the next factor.

¹³⁷ Jeffrey A. Segal and Albert D. Cover, ‘Ideological Values and the Votes of U.S. Supreme Court Justices’ 83 *The American Political Science Review* 557; Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, ‘Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation’ 90 *Virginia Law Review* 301.

¹³⁸ Posner (n 88) footnote 64.

¹³⁹ Alexander Hamilton and others, *The Federalist : or, The new Constitution* (2nd edn, Basil Blackwell 1987).

¹⁴⁰ See: Gerald N. Rosenberg, *The hollow hope : can courts bring about social change?* (2nd edn, London : University of Chicago Press 2008) and Aharon Barak and Yadin Kaufmann, *Judicial discretion* (Yale University Press 1989).

b) Strategic behaviour (institutional interaction)

Cross and Nelson¹⁴¹ argue that judicial actors act according to their preferences (like in the attitudinal model) but in a strategic manner considering the institutions that may interact with them. Epstein and Knight¹⁴² also argue in this manner: judges are primarily concerned with advancing their ideological preferences but do so with a strategic eye to the responses of other institutions. These may be the Congress, the president, the general public, state governments, private interest groups, attorneys, litigants or other entities.

A first strand¹⁴³ of the institutional model literature, primarily Eskridge's work,¹⁴⁴ focused on the interaction of the US Supreme Court with Congress, and specifically on the possibility of Congress reversing its decisions. A strategic Court would be aware of this risk and would act accordingly. There is weak evidence to support the hypothesis that the threat of congressional override actually constrains the Court. Even though Congress does sporadically override the Court, this does not seem to influence how the judicial actor acts in any way.

A second strand of the literature on the institutional model took things further pointing out that Eskridge only had identified the tip of a much larger

¹⁴¹ Cross (n 85).

¹⁴² Lee Epstein and Jack Knight, *The choices justices make* (CQ Press 1998).

¹⁴³ Cross (n 85) 1450.

¹⁴⁴ Eskridge.

‘iceberg’ of institutional influence on the judiciary.¹⁴⁵ The legislature has many tools beyond reversal of statutory interpretation to affect judicial doctrines. These tools include threatened impeachment, jurisdiction restrictions,¹⁴⁶ limiting the judicial actor’s powers and reducing the judicial actor’s resources. Restriction on the implementation of their decisions may also be important.¹⁴⁷

¹⁴⁵ Cross (n 85) 1459.

¹⁴⁶ Related to this is the literature regarding judicial specialization which does not link the issue to judicial activism. For an analysis of Court specialization see: Lawrence Baum, *Specializing the courts* (University of Chicago Press 2011).

¹⁴⁷ Cross (n 85).

E. Conclusions

In some jurisdictions judicial actors appear to play an important role in the development of economic telecommunications regulation. In Chile, for example, this has happened in an explicit manner whilst in the UK it appears that judicial actors do not play such an important role.

As was argued above, surprisingly though, some regulation literature does not give adequate consideration to the role that judicial actors can play in the development of regulatory policy. Usually, judicial actors are rather analysed only as having a role in a later stage of the regulatory process, at the stages of enforcing regulation or when regulators are held accountable.

In order to better understand what the reasons could exist for judicial activism in the development of economic telecommunications regulation, the literature on judicial behaviour has been drawn upon, and a working concept of ‘judicial activism’, has been proposed, which will be useful for the purposes of identifying cases in which judicial actors develop economic telecommunications regulation.

With regard to the judicial behaviour literature which analyses the factors that may affect the activism of certain judicial actors, it can be asserted that the literature is non-conclusive as to the impact of factors. As Dyevre states, ‘an overview of the literature suggests a fragmented field with competing theories making mutually exclusive claims about the way certain variables affect the jurisprudence of particular tribunals or the voting behaviour of particular

judges'.¹⁴⁸ The focus of this dissertation will thus not be on one single factor but rather on a group of factors which are believed to be specifically salient in determining judicial activism in the context of telecommunications regulation in Chile and the UK, such as the constitutional framework, substantive law, policy views of the judges, judicial culture, and availability of resources for legal mobilization. Furthermore, the use of qualitative empirical research methods will allow for a deeper, richer understanding on how the different factors influence judicial activist behaviour and how they interrelate.

¹⁴⁸ Arthur Dyevre, 'Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour' 2 *European Political Science Review* 297, 300.

CHAPTER 3

Mapping the Economic Telecommunications Regulation Landscape in Chile and the UK

This chapter has two main purposes. The first is to map out and comparatively analyse those institutions and procedures that are most directly related to the role that judicial actors play in the development of economic telecommunications regulation in Chile and the UK. This will provide context to the qualitative empirical data that will be discussed in the subsequent chapters of this dissertation. The relevant legal framework will be analysed as well as the institutions that have a role in the development of economic telecommunications regulation. A special focus is placed on procedure, the powers that judicial actors are given to intervene in the development of economic telecommunications regulation, and thus may engage in judicial activism.

Within this context, the second purpose of the chapter is to identify opportunities or *spaces* in which judicial actors may engage in judicial activism and differences between the regulatory systems of Chile and the UK which may explain potential differences of activism in the two countries. A series of differences are found to possibly be of importance, based on the analysis of the legal framework and related public policy documents, in determining different activist behaviour of judicial actors in each jurisdiction, such as the licensing

regime or the number of appeals levels, but none of these appear to be sufficient, if considered in isolation, to explain judicially active behaviour.

A. Regulatory Framework and Market Structure

In this section the relevant regulatory framework of economic telecommunications regulation (including competition law) and the market structure are mapped out in order to better understand the landscape in which judicial actors¹ can potentially engage in judicial activism.²

1. Differences in the Telecommunications Regulation Frameworks for Chile and the UK

The UK and Chile have a similar history regarding the regulation of telecommunications. Both countries were among the first to embrace free market regulatory regimes for the industry leaving behind their long standing public monopolies. They liberalised the market first, allowing for competition from the private sector and privatised their relevant publicly owned monopolies shortly

¹ The broader term ‘judicial actor’ has been chosen instead of ‘courts’ because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as ‘courts’ such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that are examined in Chile will be the Competition Tribunal and the Supreme Court, and for the UK it will be the CAT, the Court of Appeals and the Supreme Court.

² I rely here on my working concept of judicial activism explained in greater detail in Chapter 2 as: the practice of developing economic telecommunications regulation by judicial actors. It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a new meaning. Looking at this issue from another point of view, judicial actors do not create new economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

thereafter.³ These common trajectories have run along side by side from the early 1980's, but were especially close when these reforms were first adopted.

In historical terms, in Chile the same 'original' law of the modern era of regulation of Telecommunications still is in force. The Telecommunications Law in Chile (Law 18.168 of 1982), the *Ley General de Telecomunicaciones*, was passed during the Pinochet dictatorship and formed part of the general economic policy that was imposed in the country: liberalisation and privatisation.⁴ This is until now, the Telecommunications Law (1982), although it has gone through various amendments.

In the UK, in a similar fashion there is the Telecommunications Act 1984 which also was part of a wider liberalisation movement that included other utilities, such as gas and electricity as well, which gathered pace during the Thatcher government. It has been called 'the most significant landmark in recent UK telecommunications history'.⁵ Nevertheless, today the newer Communications Act 2003⁶ provides a regulatory framework which implements European Union

³ Michael Moran, *The British regulatory state : high modernism and hyper-innovation* (Oxford University Press 2003), 100; David M. G. Newbery, *Privatization, restructuring, and regulation of network utilities* (MIT Press 2000).

⁴ Manuel Gárate, *La revolución capitalista de Chile : 1973-2003* (Ediciones Universidad Alberto Hurtado 2012).

⁵ Ian J. Lloyd and David P. Mellor, *Telecommunications law* (2nd edn, Sweet & Maxwell, Thomson Reuters 2013), 15.

⁶ A reference here to the Communications Act 2003 also refers to the Telecommunications Act 1984 where it is relevant.

Law, specifically the Framework Directive,⁷ Authorisation Directive,⁸ Access Directive,⁹ Universal Service Directive¹⁰ and the Privacy and Electronic Communications Directive.¹¹

The regulatory frameworks cover similar grounds in both countries. In Chile, it has been stated that the law ‘regulates telecommunications in a generic manner and from a technical point of view’.¹² It regulates various issues, but in relation to economic telecommunications regulation,¹³ the most important aspects

⁷ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33(Framework Directive).

⁸ Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorization of electronic communications networks and services [2002] L108/11 (Authorisation Directive).

⁹ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7 (Access Directive).

¹⁰ Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51

¹¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] L201/37 (Directive on privacy and electronic communications)

¹² José Ignacio Ovalle Yrarrázaval, *Las telecomunicaciones en Chile* (Editorial Jurídica Conosur 2001), 22.

¹³ By economic regulation I refer to: ‘to ensure fair prices and product/service quality through maintaining competition between economic actors. In the absence of competitive market forces, as in the case of monopoly operators, legal regulation---often in the form of specific statutory obligations---directly regulates pricing, access, and quality standards. It is particularly significant in areas of monopoly operators, such as utilities, supplying telecommunications, electricity, gas, water, and transport services’. Bettina Lange, Regulation, in: Cane, Peter and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press 2008).

Furthermore, it can also be defined as: ‘interventions which, among other things, impact on the structure of an industry (for example, by restricting the number of firms that be involved in the supply of a service, requiring separate entities to undertake different activities in a supply chain, or requiring that access to infrastructure facilities be provided to third parties) or which attempt to guide or control the behaviour of firms in terms of their decisions in respect of pricing, investment, quality and coverage of service, as well as the terms on which access is provided to other firms, including competitors’. Christopher Decker, *Modern economic regulation: an introduction to theory and practice* (Cambridge University Press 2014) 3.

are: concessions, licenses and permits; how the telecommunications services should work; tariffs; and the rights to use the radio spectrum. In a similar fashion British regulation also has provisions regarding licensing (now general conditions), tariffs, interconnection and use of the radio spectrum.

An interesting difference can be found in how telecommunications service providers are authorized to operate in each country, i.e. the licensing regime. In Chile, the Telecommunications Law distinguishes three general types of authorizations needed to provide a telecommunications service: concessions, permits and licenses.¹⁴ According to the law, public service telecommunications, and intermediary services which are needed for the provision of telecoms services such as the installation of networks, need a concession to operate. These concessions are approved through a 'Supreme Decree', which is an administrative decision of the Ministry of Transport and Telecommunications acting upon instructions of the President. Satellite or cable television services need a permit, which is also an administrative decision but of the Undersecretary of Telecommunications. Finally, licenses are only needed for very local use of telecommunications, and these are also approved by a decision of the Undersecretary of Telecommunications.

In the UK things are different. Under the Telecommunications Act 1984, individual licenses were similar to what in Chile are still the 'concessions', this is, an individually negotiated contract between the government and a private party.

¹⁴ Ley General de Telecomunicaciones 18.168 of 1982 (Chilean General Law of Telecommunications), Articles 8 and 9.

Now, and following the Licensing Directive,¹⁵ the UK has a system in which everyone is generally authorized to operate in the Telecommunications market, but subject to what are called 'General Conditions of Entitlement' which set conditions for anyone providing electronic communications network or services.¹⁶ The exception to this general rule is that those parties that are found to have significant market power (SMP) may be subject to additional conditions.

This may be a key difference because one possible source of litigation and thus of possibility for judicial actors to be activist are disputes between the regulator and private parties regarding the conditions attached to the licenses (or concessions in the case of Chile). As this possibility currently does not exist in the UK (with the exception of parties with SMP), it may be possible that there could be less litigation than in Chile, and less opportunities for judicial actors to engage in judicial activism.

The regulation of tariffs is another area in which differences can be found. In Chile, as a general rule, there is freedom of the telecoms operator to establish the tariff (price). Nevertheless, in relation to those parts of the Telecommunications market in which there is insufficient competition, the tariff is regulated.¹⁷ In regards to how this regulated tariff is fixed, the Chilean system uses a unique type of yard stick regulation. Under this system, the regulator fixes

¹⁵ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services .

¹⁶ Ian Walden, John Angel and Ian Walden, *Telecommunications law and regulation* (2nd edn, Oxford University Press 2005), 186.

¹⁷ Ley General de Telecomunicaciones 18.168 of 1982 (Chilean General Law of Telecommunications), Articles 29, 30 and 30 A-K.

a price in relation to a theoretically efficient firm facing the same operating conditions that the regulated firm faces. This tariff is re-assessed every 5 years to reflect the long run incremental costs of the hypothetical efficient firm.¹⁸

In the UK tariffs (prices) are also regulated in those parts in which competition is insufficient such as the prices BT charges for interconnection with another carrier. Nevertheless, the UK uses a slightly different system to set its regulated prices. The formula that has been used is a price cap regulation, usually known as 'RPI-X', which means retail price index (inflation) minus an X (expected efficiency savings).¹⁹ Both of these types of price regulations are important because depending on the procedure through which they are set, they could determine whether there is more or less litigation and therefore whether judicial actors have opportunities to be activist.

Besides the specific telecommunications regulations, competition law is particularly important for economic telecommunications regulation as many issues related with prices and access, for example, can be directly regulated through competition law.

¹⁸ David Sappington, 'Price Regulation' in Martin Cave, Sumit Kumar Majumdar and Ingo Vogelsang (eds), *Handbook of telecommunications economics* (1st edn, Elsevier 2002) 233; Ahmed Galal, 'Chile: Regulatory specificity, credibility of commitment, and distributional demands' in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996).

¹⁹ Walden, Angel and Walden, n (16), 26; Decker, n (13) 115.

2. The importance of Competition Law in Shaping Telecommunications Regulation in Chile and the UK

Competition law is a relevant body of legislation (and case law) for most industries in Chile and the UK, but in regards to telecommunications it has become especially important as a form of regulation. New Zealand, for example, during the 1990's went as far as to opt to regulate the telecommunications sector completely through competition law.²⁰

Competition law has a particular relevance for economic telecommunications regulation both in Chile and the UK. It plays a central role in the content of economic telecommunications regulation as important issues are left to be decided by competition authorities or in some cases by competition and telecommunications authorities (this is the situation in the UK where OFCOM also has powers and duties with reference to competition law).²¹ Chile's and the UK's competition systems have certain similarities but also very important differences, which will be explained in the following paragraphs.

In Chile, competition was considered a cornerstone of the new economic regime that the Pinochet dictatorship imposed.²² As with many Competition

²⁰ Decker, n (13) 50.

²¹ See section C for more information on CMA's and OFCOM's competencies.

²² This was part of an economic plan that was planned before the *coup d'état* of 1973, a plan that proposed to radically overturn Chile's economy and received the name of the 'brick' (*el ladrillo*) because of how thick it was. Centro de Estudios Públicos (Santiago Chile), *"El Ladrillo": bases de la política económica del gobierno militar chileno* (Centro de Estudios Públicos 1992); Patricio Bernedo, *Historia de la Libre Competencia en Chile, 1959-2010* (Ediciones Fiscalía Nacional Económica ed, Fiscalía Nacional Económica 2013).

Laws,²³ DL 211 is vague in regards to which conducts it actually considers to be an infringement to competition, whether these may be cartels, abuse of dominant position or mergers. Article 3 of DL 211 describes in general terms what is considered as a competition infringement as: ‘any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects’.²⁴

The situation, in regards to the determinacy of the prohibited conduct is similar in the UK and in the EU. Paragraph 2 of the Competition Act 1998 states that: ‘Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.’

The vague nature of these provisions is important because it potentially opens the door for judicial actors to be activist, as they may be invited to interpret these norms in an activist manner. With regards to what is specifically interesting for the development of economic telecommunications regulation, two areas have particularly attracted competition law cases, mergers and unilateral conducts.

The DL 211 in Chile does not have a specific provision in regards to mergers (and acquisitions);²⁵ they are regulated under the general description of an

²³ Frank H. Easterbrook, ‘Workable Antitrust Policy’ 84 Michigan Law Review 1696. Easterbrook describes the competition statute as a ‘blank check’.

²⁴ *Ley para la defensa de la libre competencia* (Chilean Competition Law) DL 211- 1973, Article 3.

²⁵ Even though this is the case at the moment, a bill (Boletín 9950-03) that should be passed into legislation during 2016 introduces mandatory notification obligations for parties agreeing on a merger, if the operation surpasses certain thresholds of magnitude of the operation. These thresholds are not clear at the moment.

anticompetitive conduct of article 3 which states that any action that ‘prevents, restricts or hinders free competition or tends to produce such effects will be considered an infringement of the Competition Act 1973’. In this case the parties could be penalised after the merger, through an adversarial procedure, which might order the merger to be dissolved or to the ‘unscrambling of the eggs’.²⁶ As such, there is no mandatory pre-merger notification requirement,²⁷ but parties can request the review of the merger before it has been carried out, through a non-adversarial procedure called a ‘consult’. In this review, the Chilean Competition Tribunal named *Tribunal de Defensa de la Libre Competencia* (or TDLC) can approve the transaction (merger or acquisition), set conditions for its approval (remedies), or in very rare cases reject the transaction.²⁸ This has become a customary practice in all relevant mergers as the procedure has significant advantages. If the operation is approved and the parties comply with the conditions, if any, then there is no liability for them, and furthermore an adversarial procedure cannot be initiated.²⁹ They do run the risk of having the operation rejected. In this area, the TDLC has had an activist role by setting conditions which in fact have been new rules for that market.³⁰

²⁶ OECD, *Chile- Accession Report on Competition Law and Policy* (2010), 23.

²⁷ Ibid, 24.

²⁸ *Consulta Dys Falabella* NC 199-07 - Consulta sobre Fusión de D&S y Falabella. This was the first case in which the TDLC rejected a merger operation. It received great press attention because it was a merger between two of the biggest retail firms in the country.

²⁹ OECD, 24.

³⁰ *Consulta de Telefónica Móviles S.A., sobre aprobación de acuerdo de eventual toma de control de Bellsouth Comunicaciones S.A. (AGREGADAS Roles C N° 36-04, 39-04 y 43-04)* Resolución 2/2005 TDLC, and *Recurso de Reclamación Fusión Telefonica-Bellsouth* Rol 396-2005 Supreme Court of Chile.

In the UK, the situation is not very different as there is no mandatory pre-merger notification.³¹ Likewise, even though it is not mandatory ‘many companies involved in mergers and joint ventures nevertheless choose to notify their proposed or completed deals to the Office of Fair Trading [now Competition and Markets Authority], either for guidance or to pre-empt the risk of subsequently being ordered to unwind the deal after an investigation’.³² Any merger which is voluntarily notified to the CMA or which the CMA starts investigating on its own can be cleared or referred to the CMA Panel (which has the powers of the old Competition Commission). Any ‘aggrieved person’ may apply for judicial review of the decision taken by the CMA to the Competition Appeals Tribunal (CAT) according to Section 120 of the Enterprise Act 2002 provided they have ‘sufficient interest’.³³

In regards to monopolization or dominant practices, in Chile they also fall under the general description of article 3 of DL 211. Art. 3(b) gives examples of practices that could be considered as abuse of dominance: abusive prices, tying and dividing markets, whilst Art. 3(c) prohibits predatory or unfair competitive practices conducted in order to attain keep or increase a dominant position. These practices can be enforced either privately by affected parties or publicly by the FNE before the TDLC. In any case, only the FNE has investigative powers so in order for private parties to have a strong case, in most occasions they must convince the FNE to get involved. Most Telecommunications cases in which

³¹ Pieter J. Slot and Angus Charles Johnston, *An introduction to competition law* (1st English edn, Hart 2006), n (48), 179.

³² Ibid.

³³ Ibid, 201.

activist behaviour can be identified by judicial actors in Chile are related to unilateral conducts as will be explained below. As the TDLC has decided these cases, it has shaped, at least partially, Telecommunications policy in Chile.

In the UK, the situation is quite similar, with the exception that the Office of Communications (OFCOM) has the power to enforce the Competition Act 1998 in a similar manner as the Competition and Markets Authority (CMA), a situation that does not happen in Chile. Section 18 (1) of the Competition Act 1998 provides that ‘any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom’ and then lists in Section 18 (2) a series of examples of such conducts. These cases can be brought to the CMA or OFCOM by private parties or can be investigated by the CMA. Appeals from these decisions can be reviewed by the CAT.

There do not seem to be significant differences between how the relevant competition laws are structured that could explain why the TDLC apparently engages in judicial activism whilst the CAT does not in relation to economic telecommunications regulation.

3. Similar Market Structures in Chile and the UK

Initially, as in most other countries, telecommunications was dominated by a state monopoly, in Chile, the *Compañía de Teléfonos de Chile* or ‘CTC’. This monopoly

which controlled the local telephone market was privatised in 1987 and later sold to the Spanish telecommunications group Telefónica, and changed its name to this (now it is Movistar, still part of the Telefonica group). The long distance telephone market was also dominated by a monopoly, the *Empresa Nacional de Telecomunicaciones* or *ENTEL*, which was also privatised in 1986.

In the UK, the situation was similar. The telecommunications services were under the control of the state monopoly of the General Post Office (GPO), and after 1981 by British Telecommunications (BT), also a state monopoly, with the notable exception of the Hull City Council Telecommunications system which was the main provider of services in that city.³⁴ Unlike Chile, the GPO (BT) monopoly controlled both the local and long distance markets, and although splitting up BT into companies that focused on local services and long distance was discussed, this was never done.³⁵ In 1981, through the British Telecommunications Act 1981, BT's monopoly was partially put to an end by authorizing other networks to operate. This happened in 1982, when a second fixed network was licensed to operate, Mercury.³⁶ Nevertheless, true liberalisation of the market did not come until 1984 via the Telecommunications Act 1984 which also paved the way for the privatisation of BT, which finally occurred later that same year.³⁷ A major change in the industry came in 2006 when BT was split, after an undertaking with

³⁴ Helen Kemmitt and John Angel, 'The Telecommunications regime in the United Kingdom' in Ian Walden (ed), *Telecommunications law and regulation* (4th edn, Oxford University Press 2012), 97.

³⁵ Mark Thatcher, *The politics of telecommunications : national institutions, convergence, and change in Britain and France* (Oxford University Press 1999), 146.

³⁶ Lloyd and Mellor, n (5) 13.

³⁷ Kemmitt and Angel, n (34) 106.

OFCOM, into BT and Openreach, which from that date manages BT's local access network and wholesale business as a separate company from BT.

In regards to the companies that take part in the mobile telecommunications market, the story is quite similar between the two countries. The mobile telephone market which started growing very steadily during the 1990's in Chile originally had four competitors, three of which still remain in business today, and are now named Movistar (Telefónica), Claro and Entel. This number was increased to five after the 3G network auction in 2008, which saw Nextel and VTR entering the market. After that Mobile Virtual Network Operators (MVNOs) were allowed to enter the market, four more companies have started operations, most notably, Virgin Mobile. Although there seems to be plenty of competitors in this market right now, the reality is that most of the clients are customers of the three original operators.³⁸

In the UK the story is not very different. Originally two operators were in the market, Cellnet and Vodafone. The second generation network had four competitors, O2, Vodafone, Orange and T-Mobile, and after the 3G network auction that number was increased to five when Hutchinson (3 UK) entered the market, although now Orange and T-Mobile have merged into a single company, Everything Everywhere (EE). A big difference can be found in regards to Mobile Virtual Network Operators (MVNO's) though. Whilst in Chile there are currently

³⁸ According to an analysis performed by the Competition Tribunal based on public information, during 2012, the top three mobile phone operators concentrated more than 99% of the market. *Instrucción de Caracter General N 2 (ICG N2)* NC N 386-10 TDLC, 35-36.

only 4 operators, in the UK the number is much higher, more than 90.³⁹ Nevertheless, like in Chile most customers are concentrated on the network operators (the wholesale providers), although to a lesser degree than in Chile.

Although Chile and the UK are economies of different magnitude, as far as the composition of the Telecommunications Industry is concerned, they are very similar it seems as there is a similar level of competition in both the local landline services and the mobile market.

In the following sections the institutions⁴⁰ that intervene in the regulatory process of telecommunications regulation for each country will be mapped out and their interactions analysed in order to provide a clear picture of the regulatory framework in each country and especially of possible differences or similarities that could be of particular relevance for facilitating judicial activism.

³⁹ There are no official lists of MVNOs given by OFCOM, but third parties that list the companies state that there are more than 90 MVNOs. See: <http://www.telecompaper.com/research/mvno-list/united-kingdom>, last accessed on July 21, 2014.

⁴⁰ By organisation I am referring to the term in the following manner: 'An organized body of people with a particular purpose, as a business, government department, charity, etc.' Angus Stevenson and Oxford University Press., *Oxford dictionary of English* (3rd edn, Oxford University Press, 2011).

B. Overview of key Institutions and their Regulatory Roles in Chile and the UK – implications for judicial activism

If the regulatory frameworks in Chile and the UK are looked at superficially, they appear to be similar. Both have a regulator, a specialized tribunal and a superior Court that reviews decisions made by the specialized tribunal.⁴¹ In this sense, they are similar. Nevertheless, if we look at both regulatory frameworks in greater detail, there are significant differences as the different institutions that intervene, in relation to the role that judicial actors play, have different powers and competences, and therefore fulfil dissimilar roles.

Before going into greater detail on how the Chilean and British economic telecommunications regulation systems are set up, in relation to the role that judicial actors play, I will give a brief overview on how each regulatory system works, as a compass. In the subsequent sections, the different institutions mentioned below will be further scrutinized and the legal rules that govern them will be explored, along with the procedures that allow judicial actors to intervene and make decisions which could develop economic telecommunications regulation. As such, this section will only give general information in the hope that how each regulatory system works is better understood. Further details about the different institutions and their powers are given in Sections C and D of this Chapter.

⁴¹ There are other actors that could intervene, for example the High Court in the UK could intervene if a decision is challenged under judicial review and likewise the regular civil courts in Chile could also intervene, this is highly unusual. Nevertheless, as will be explained in further detail in Section C, the focus is on the organisations that are regularly involved in economic telecommunications regulation cases.

1. A brief introduction to the economic telecommunications regulation system in Chile in regards to the role that judicial actors play

The institutions that take part in the economic telecommunications regulation system in Chile regarding the role of judicial actors could be divided into, broadly speaking, two groups regarding their function. On the first group, which I will call the ‘traditional regulators’, there are two main ones: the specific telecommunications regulator called *Subsecretaria de Telecomunicaciones* (or SUBTEL), and the competition agency, *Fiscalia Nacional Economica* (or FNE).

Each of these organisations plays a different role in the development of regulation. The SUBTEL has a number of powers, amongst which it has the power to issue technical regulation,⁴² but that regulation generally refers to very technical issues without impact for economic regulation (although in some situations technical standards can create barriers to competition by imposing lower costs for compliance on incumbents than new market entrants).

The FNE acts as non-criminal prosecutor and does not have an adjudicatory role. As such, in relation to economic regulation of telecommunications, it has the power to request the opinion of the TDLC through a non-adversarial ‘consult’

⁴² By technical regulation I am referring to regulation that is specific to issues that are not related to economic regulation, such as specifications of, for example safety standards or symbols that must be used in equipment. These could of course have an impact on competition and therefore could be considered economic regulation, but their main purpose is technical in nature.

procedure or to accuse parties of infringing the competition law through an adversarial procedure.

The second group, which I will refer to as judicial actors, are those that review the decisions of the first level regulatory institutions or decide upon the requests of these. In Chile there are three, the TDLC, the Supreme Court and the Court of Appeals, although the Court of Appeals does not have importance in practice.⁴³

The TDLC has an adjudicatory role deciding issues that reach it either through the adversarial or non-adversarial procedure, which can be brought to them by the SUBTEL, the FNE or private parties. In this sense, the TDLC also acts as a regulatory agency. Its decisions have, in practice, regulated important aspects of economic telecommunications practice, such as the maximum spectrum allocation an operator can have or whether VOIP (voice over internet protocol) is a public telephone service.

The Supreme Court reviews decisions taken by the TDLC through an appeal called *reclamacion*, the scope of which is not absolutely clear, as will be explained in detail in Section D. In practice this appeal acts as a full merits review and thus the Supreme Court reviews everything the TDLC has done. In this way, the Supreme Court plays an important role, especially considering that in an important number of cases it overturns the TDLC's decisions.

⁴³ The Court of Appeals has the power to review decisions of SUBTEL if a party challenges such decision. Nevertheless, this in practice does not happen because SUBTEL does not make economic regulation decisions, it rather goes through the TDLC and through that route is the Supreme Court that intervenes.

As was anticipated, even though, if looked at superficially the Chilean system of economic telecommunications regulation in relation to the role judicial actors play seems similar to the British one, in reality it is very different as it will briefly be explained.

2. Overview of the role judicial actors play in telecommunications regulation in the UK.

The setup of the economic telecommunications regulation system in relation to the role judicial actors play is different in the UK, although it may seem very similar looked at from afar. As ‘traditional regulators’, the UK has one main one, the Office of Communications. OFCOM has ample regulatory powers (for example to ensure that a wide range of electronic communications services is available throughout the UK) which it uses, as well as acting as an adjudicatory body for disputes between operators (usually regarding pricing).⁴⁴

The biggest differences with Chile relate to the judicial actors that form part of the system. In the British system, there are three appeal layers whilst in Chile, there is only one. In the first layer, the Competition Appeal Tribunal (CAT) can review a decision taken by OFCOM, according to Section 192 of the

⁴⁴ Enterprise Act 2002. Also see: <http://media.ofcom.org.uk/speeches/2010/competition-law-and-the-communications-sector/>.

Communications Act 2003.⁴⁵ This right to appeal is an essential part of the European Telecommunications Framework, arising from the Framework Directive.⁴⁶ The review the CAT performs is a merits review, and it is not unusual for this judicial actor to overturn OFCOM's decisions.⁴⁷

The second layer is the responsibility of the Court of Appeals. A decision taken by the CAT can be brought to the Court of Appeals under Section 196 of the Communications Act 2003, but that review is only limited to points of law. Reviews to the Court of Appeals are less usual, but they do happen and CAT decisions do get overturned.

The UK Supreme Court is the final layer. Decisions made by the Court of Appeals can be further appealed to the UKSC, if leave to appeal is granted. The UKSC has discretionary jurisdiction and cases seldom make it here. Until today (May, 2016), only one case has made the trek up to the UKSC and in that case the UKSC effectively reversed the Court of Appeals decision.

In the following two sections the different entities that play a role in the development of economic telecommunications regulation, in relation to the part that judicial actors have, will be analysed for each country.

⁴⁵ The High Court could also theoretically intervene. Nevertheless, it is unusual for telecoms cases to go to the High Court. This is mainly because under s.192 Communications Act 2003 the Competition Appeal Tribunal has primary jurisdiction to hear the majority of Ofcom's telecoms decisions. There is a small set of telecoms decisions which are excluded from the Tribunal's jurisdiction – these are set out in Schedule 8 of the Communications Act 2003 – these can only be appealed to the High Court by way of judicial review.

⁴⁶ Framework Directive, Article 4.

⁴⁷ This was the case, for example in the only case in which the UKSC has decided an issue. The CAT overturned an OFCOM decision, the Court of Appeals overturned the CAT's decision and the UKSC reinstated what the CAT had decided, *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents)* [2014] UKSC 42.

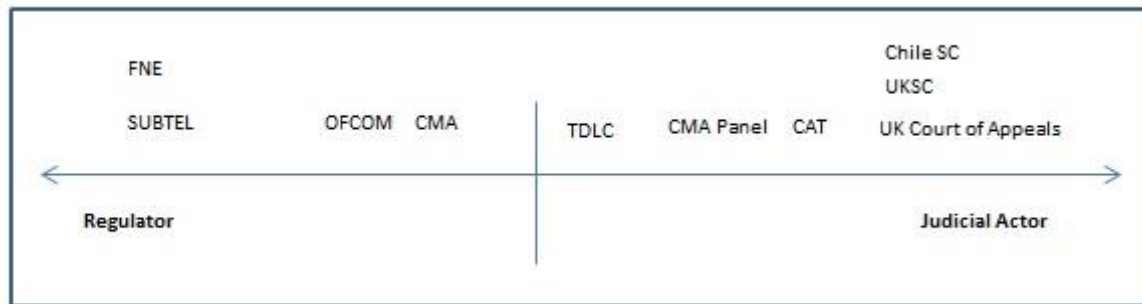
C. Institutions that Play a Role in the Development of Economic Telecommunications Regulation

In this section the focus will be on mapping out the most relevant institutions that are directly related to the role judicial actors have in the development of telecommunications regulation and examining the powers and roles they have.⁴⁸ As was explained before these institutions are divided into what I have labelled as traditional regulators and judicial actors.

All of these institutions are complex and it is not always straightforward to classify each of these as either ‘regulators’ or ‘judicial actors’. Many of them have concurrent regulatory and adjudicatory powers, although in most cases some functions seem more essential than others. It is important to emphasize that by placing a certain institution in the group of judicial actors, for example, I am not stating that they *do not* fulfil regulatory functions; the distinction is made only to highlight what their main function is usually understood to be. It is one of the purposes of this thesis to explore why in some cases institutions that are primarily understood to exercise adjudicatory functions, also engage in regulatory policymaking, but at last the core of the functions they perform, remains adjudicatory.

⁴⁸ Others organisations, such as, for example, the relevant legislatures and the EU legislatures, also play a role in the development of telecommunications regulation, but as the focus of this thesis is not how telecommunications regulation develops in a general manner but rather how judicial actors develop it, I will not go into greater details in regards to these other organisations. For example, in both countries regular civil courts could intervene in price regulation matters. For the English case, see: Slot and Johnston, (n 31) 234. Nevertheless, this does not happen, for example in Chile, because it is path both long and slow.

The following figure places each of these institutions in a continuum line in relation to how close they are to either ‘ideal’ function, and show where I am drawing the line between what will be understood as a regulator or judicial actor in this dissertation.



Although it is not possible to perform a direct cross cutting comparison between similar institutions in both jurisdictions, because in most cases they play different roles, where possible, similar ones are analysed comparatively, mostly to highlight how apparently similar institutions are in fact quite different.

In the following subsections the different institutions that have a role under which I have labelled as ‘traditional regulators’ will be analysed and some key differences will be identified. The first group will be the telecommunications regulators and then the competition authorities, which also play a role in regards to the development of economic telecommunications regulation.

1. Subsecretaria de Telecomunicaciones (SUBTEL) and Office of Communications (OFCOM): Two very different regulators

From a distance both countries seem to have an independent Telecommunications regulator; the UK has OFCOM whilst Chile has SUBTEL. A closer look reveals that there is a great difference in regards to their composition, powers and relation with other branches of Government. These differences have as a result that these institution do not play the same roles in regard to economic Telecommunications regulation.

The first main and major difference between the OFCOM and SUBTEL is that OFCOM has a higher degree of independence than SUBTEL. SUBTEL is an institution created in 1977 during the dictatorship by Decree Law 1762. It is part of the Ministry of Transport and Telecommunications, and as such it is integrally a part of the Executive. The head of this institution has the title of Undersecretary of Telecommunications, a position of the exclusive confidence of the President of the Republic.⁴⁹ It is, therefore, not an independent body, but rather (very) politically dependant.

On the other hand OFCOM is a statutory corporation created by the Office of Communications Act 2002 and derives its legal powers from the Communications Act 2003. As such, it is an independent regulator accountable directly to the Westminster Parliament and not to the Executive. Nevertheless,

⁴⁹ A person of the 'exclusive confidence' of the President is one that can both be named and removed by the President without the need to consult with other organisations of the State.

OFCOM is run by a board, whose members are appointed by the Secretary of State, who also appoints its Chief Executive.⁵⁰ As such, considering how its members are elected, although more independent than SUBTEL, its level of independence may not be as strong as other telecommunications regulators in other countries, such as the FCC in the United States, for example.⁵¹ In this line, the Government has stated that ‘regulators are responsible for regulating within the parameters of the framework set by government. Without a proper framework, there is a risk that the regulators’ decisions may be unconstrained or unaccountable’.⁵²

A second difference that can be found between the two institutions is regarding the duties and powers they have. SUBTEL has a considerable number of duties and powers, including the power to issue technical regulation, enforcement powers,⁵³ and even adjudicatory powers.⁵⁴ It even has wider policy powers, as it has the power to participate in the planning of the development of the telecommunications sector in the country.⁵⁵ The SUBTEL nevertheless has only played a relevant role in the development of telecommunications regulation

⁵⁰ Office of Communications Act 2002 s. 1 (1), (2) and (3). Lloyd and Mellor n (5) 73.

⁵¹ For example, in the election of Commissioners of the FCC in the US, its members are proposed by the President but ratified by Congress. This two stage nomination process isolates them from the Executive more than in the case of OFCOM or SUBTEL.

⁵² Green paper: ‘A Fair Deal for Consumers: Modernising the Framework for Utility Regulation’ (1998). Cited by Lloyd and Mellor n (5) 74. This Green Paper refers in general to the utilities regulators and in particular to OFTEL, one of OFCOM’s predecessors. The citation is still valid as OFTEL also was a statutory corporation.

⁵³ DL 1762 Subsecretaria de Telecomunicaciones 1977, letter c) and l) of article 6, and article 7. Ley General de Telecomunicaciones 18.168 of 1982 (Chilean General Law of Telecommunications), article 6.

⁵⁴ DL 1762 Subsecretaria de Telecomunicaciones 1977, article 7.

⁵⁵ Ibid, article 4 and letters a) and b) of article 6.

in Chile only in relation to minor issues, mainly very technical specifications. All major issues have been decided either by Congress or by judicial actors.

OFCOM on the other hand is a more powerful agency. It has similar powers to the SUBTEL, including the power to regulate, enforce and adjudicate. Nevertheless it has an additional very relevant power that SUBTEL does not have. In relation to economic telecommunications regulation it has the power to enforce the Communications Act 1998, and adjudicate competition law disputes, and thus may decide, for example, pricing issues that may arise.⁵⁶

Considering the above, SUBTEL and OFCOM could have very different roles regarding the development of economic telecommunications regulation. It seems that OFCOM has more independence to regulate and through its enforcement powers of the Competition Act 1998, more opportunities to decide economic regulation issues. Furthermore, these additional opportunities and possibly the closer relationship that OFCOM has with regulated parties may lead to more negotiated regulation which could reduce the likelihood of litigation.

This could be a *key* difference, a more *active* regulator, with a wider legal mandate, may mean that many technical, yet important, issues could be settled generating less uncertainty and a diminished likelihood for judicial actors to intervene. Nevertheless it could also be thought that more regulation could mean that there could be more challenges of the regulator's decision to the judicial actors

⁵⁶ Lloyd and Mellor, n (5) 165.

(appeal bodies), thus giving them more opportunities to intervene in an activist manner.

Alongside telecommunications regulators, competition agencies also play a relevant role in relation to the development of economic telecommunications regulation.

2. Competition Law Agencies: Competition and Markets Authority (CMA) and the Chilean Competition Agency (FNE)

There are various similarities and differences between the CMA and the FNE. The first difference is in regards to where they sit in relation to Government. The FNE is a decentralised public body with relative autonomy from the Executive. It is subject to the oversight of the President of the Republic through the Ministry of Economy, Development and Tourism.⁵⁷ The head of the agency is the ‘National Economic Prosecutor or NEP’ (*Fiscal Nacional Económico*), who is appointed by the President following a standardized selection process for high ranking public officials for a period of 4 years. Most of its autonomy is derived from the fact that although the NEP is selected by the President, it can only be removed with the acquiescence of the majority of the Supreme Court at the request of the Minister of Economy, Development and Tourism in representation of the President.⁵⁸

⁵⁷ DL 211, Article 33.

⁵⁸ Ibid

On the other hand the CMA is a non-ministerial government department.⁵⁹ The agency is governed by a Board composed of at least 5 members elected by the Secretary of State for Business, Innovation and Skills and who serve not more than 5 years.⁶⁰ The CMA is headed by the Chair of the Board and a Chief Executive. It could be said that it has a level of independence similar to the FNE, as even though the Board Members are elected by a Secretary of State, they can only be removed due to incapacity, misbehaviour, or failure to carry out his or her duties.⁶¹

One similarity can be found in their main tasks and purpose. The FNE's primary role is to investigate and act as a prosecutor requesting a decision from the TDLC if it finds that the Competition Law has been infringed in any way.⁶² It also has the duty to enforce the decisions of the TDLC, to issue reports upon the request of the TDLC in regard to specific cases if the FNE is not a party, and negotiates extrajudicial agreements with parties under investigation in order to protect competition.⁶³ The CMA's functions are very similar; to investigate mergers which could restrict competition, conduct market studies and investigations in markets where there may be competition and consumer

⁵⁹ A surprising feature of the British system, which marks a difference with the Chilean setup, was that even though from the Thatcher government onwards the UK embraced free market economy, privatising and liberalising sectors such as telecommunications; the competition law system was not modernised until 1998, almost 20 years after those structural economic reforms started. Andrew Scott, *The evolution of competition law and policy in the United Kingdom* (London School of Economics and Political Science, Law Department 2009).

⁶⁰ Enterprise and Regulatory Reform Act 2013, Schedule 4.

⁶¹ Ibid, Part 1, Section 7.

⁶² DL 211, Article 39.

⁶³ Ibid.

problems, investigate where there may be breaches of British or EU prohibitions against anti-competitive agreements and abuses of dominant positions, co-operate with sector regulators and encourage them to use their competition powers, and consider regulatory references and appeals.⁶⁴

A significant difference is found nonetheless. The existence of the CMA Panel within the CMA, which has taken on the powers of the Competition Commission and thus has an adjudicatory role in regards to certain competition law matters. In Chile, this is not the case, as the FNE is only a prosecutor with no powers to apply remedies to anticompetitive practices. It is unclear whether this is a facilitator of judicial activism.⁶⁵

⁶⁴ Competition Act 1998, Enterprise Act 2002, and Enterprise and Regulatory Reform Act 2013. These functions are as stated in the CMAs official webpage: <https://www.gov.uk/government/organisations/competition-and-markets-authority/about#report-issues-to-the-cma>, last accessed on July 23, 2014.

⁶⁵ It is also important to highlight that in principle it could be thought that the EU Competition Law system could be of importance for Telecommunications regulation in the UK. This is because EU Competition Law applies to undertakings present in the UK whose behaviour affects competition in the EU and not only in the UK. As such, corporations that operate in various markets, such as mobile companies could be subject to sanctions and regulations by the DG of Competition. Although these companies are subject to EU Law, in practice the DG Competition has interfered very little in internal matters of the UK and this has been mainly in the area of merger control, as the EU system has a mandatory merger notification system whilst the UK has a voluntary one. Case No COMP/M.5650 - T-MOBILE/ ORANGE

D. Judicial Actors and Procedures in Chile and the UK: Key Differences

In this section the main judicial actors that play a role in the development of economic telecommunications regulation in Chile will be presented and their main characteristics explained. For the case of Chile only two appeal bodies have a role (in practice)⁶⁶ in relation to economic telecommunications regulation, the TDLC and the Supreme Court, whilst in the UK three judicial actors could theoretically intervene primarily, the CAT, the Court of Appeals and the Supreme Court.⁶⁷

A very central issue regarding judicial activism is how cases reach judicial actors, as without cases, it is impossible for them to engage in activism. To better understand how cases reach the judicial actors, the relevant procedures will also be analysed with reference to the criterion of whether they explain judicial activism.

⁶⁶ The Court of Appeals could theoretically intervene as an appeal body in relation to SUBTEL's decisions. This does not happen in practice as all economic telecommunications regulatory decisions go through the TDLC and thus directly to the Supreme Court on appeal.

⁶⁷ The General Court and the Court of Justice could in principle also play an important role in 'developing' economic telecommunications regulation in the UK. Since in Telecommunications regulation, the EU member state law has to conform to EU law, these courts can interpret the law in a manner which may have a direct impact in the British regulatory framework for the economic regulation of telecommunications. It is interesting to note that in reality, the impact of these Courts has been very minimal, as only few British cases related to economic telecommunications regulation have been reviewed by the European Courts. British judicial actors have asked the ECJ for a preliminary ruling on only three occasions and the UK has never been taken by the Commission to the ECJ for failing to fulfil its obligations under EU telecommunications law. See: ; *Vodafone and Others* Case C-58/08 Court of Justice; and *The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications* Case C-302/94 Court of Justice.

1. Chile: The existence of only one appeal layer

- a. The Chilean Competition Tribunal (Tribunal de Defensa de la Libre Competencia or TDLC): A hybrid judicial actor

The TDLC, although a judicial actor, does not act as an appeal body like the CAT. As will be explained further below, the TDLC can be labelled as a hybrid, between a traditional regulator and a judicial actor. In most cases, and I highlight that this is its main function, it has jurisdiction⁶⁸ to act as a regular (first instance) Court deciding disputes that are brought to it either by the FNE or private parties. In other cases, it acts as a first level ‘regulator’, issuing instructions of general applicability. In both these capacities though, its decisions can create economic telecommunications regulation. This judicial actor was created by Law 19.911 of 2003 and it is the first professional Competition Court that Chile has, replacing the administrative ‘Commissions’ that had jurisdiction over competition issues until 2003.⁶⁹

A case can reach the TDLC regarding economic telecommunications regulation matters through three main paths. First, it can hear claims made by the FNE enforcing competition law. Second, it can hear claims by private parties as private enforcement is possible under the Chilean system. Finally, the TDLC

⁶⁸ Article 18, DL 211.

⁶⁹ The TDLC is considered to be professional because it is staffed by remunerated Judges with preferential dedication to the Tribunal. The composition of the TDLC is stable, this is, Judges are appointed for periods of 6 years. The Resolutive and Preventive Commissions which operated before were staffed by Judges that were called upon when there was a case and the composition was not permanent, and the Judges could all change from one case to another.

can also create regulation (called instructions of general applicability), but as it will be explained, this is rare.

Although the TDLC has the title of ‘Tribunal’ it must be clarified that in Spanish the word Tribunal is equivalent to Court and does not denote a different type of body with adjudicatory functions. For example, the Constitutional Court in Chile is named ‘*Tribunal Constitucional*’. Beyond the linguistic precision, the TDLC is considered also to be a Court, although a ‘specialist Court’, because it is subjected to the disciplinary jurisdiction of the Supreme Court according to article 5 of the Competition Law 1973. It is a part of the Judiciary and of its hierarchy. Nevertheless, the members of the TDLC are not part of the regular body of judges which is a civil service like body in which Judges enter the service early in their careers and advance in positions as years go by. It has its own budget, separate from the rest of the Judiciary.

The TDLC has two judges that are economists, two that must have a law degree and a President, who also should have a law degree. They become Judges of the TDLC through an open and public competition which is decided either by the Central Bank or the President of the Republic.⁷⁰ It is an interdisciplinary panel.

⁷⁰ DL 211, article 6. The Central Bank, seen as a very independent institution, is given an important role in selecting the Judges of the TDLC. The Bank directly appoints one economist and one of the attorneys of the TDLC, whilst it also prepares a shortlist of three candidates of the other economist and attorney position for the President of the Republic to decide. For the position of President of the TDLC, the Supreme Court prepares a shortlist of 5 candidates, from which the President selects one.

Regarding its powers, the TDLC has jurisdictional powers to decide disputes between private parties and accusations made by the FNE.⁷¹ It also has the power to rule on prospective or completed mergers, but there is no mandatory merger notification, the system is voluntary. In Chile this procedure is usually referred to as a ‘consult’.⁷² The ‘consult’ procedure can also be used to request the TDLC to rule on the legality of other operations or decisions, and the SUBTEL, for example, has used this procedure when it has been unsure if a certain decision complies with competition law.

One very particular power the TDLC has is the power to create regulation of general applicability (called ‘instructions of general character’ or ‘ICG’).⁷³ This very important exceptional power has only been used in three occasions though, and only one of which was related to the Telecommunications market.⁷⁴ In that occasion ICG number 2 ended the possibility for mobile telephone companies to charge differentiated tariffs depending on whether a phone call was made within its network or outside of it. Furthermore, the TDLC also has the power to recommend regulatory changes (‘recommendations’) to the Executive when it deems that a particular statute or regulation is contrary to competition law or when a change is needed to improve competition in a certain market.⁷⁵ These

⁷¹ Ibid, Article 18 number 1.

⁷² Ibid, Article 18, number 2.

⁷³ Ibid, Article 18, number 3. This is neither primary nor secondary legislation but specific regulation of general applicability that can be issued by this Tribunal.

⁷⁴ *Instruccion de Caracter General N 2 (ICG N2)*.

⁷⁵ DL 211, Article 18 number 4.

recommendations are only that and thus not binding for the Executive. The TDLC has issued these on 13 occasions.⁷⁶

b. The Chilean Supreme Court: The lonely Appeal Body

As it was briefly pointed out before, the Supreme Court (SC) could also play an important role in shaping economic telecommunications policy as it has the power to review the decisions taken by the TDLC. The Supreme Court is the only appeal body that reviews (almost all) decisions taken by TDLC, and thus plays a very central role in shaping economic telecommunications regulation.

With regards to its membership, the Chilean SC has 21 Justices,⁷⁷ 5 of which must not come from the ‘regular’ judiciary, which has a civil service like structure. Besides these members, the Court also has 12 *abogados integrantes* (attorney members).⁷⁸ These are renowned attorneys who are nominated tri-annually to supplement the work of the Justices considering that the Court has a large number of cases to deal with, and many other duties besides exercising jurisdiction.⁷⁹

⁷⁶ Information available at <http://www.tdlc.cl>, last accessed October 16, 2014.

⁷⁷ *Constitución Política de la República de Chile de 1980* (Constitution of Chile), Article 78.

⁷⁸ Código Orgánico de Tribunales (Law 7.421 of 1943). The institutions of the *abogados integrantes* has been greatly criticized, especially considering that they have no tenure and most of them remain active litigators whilst exercising their duties. For a review on this issue see: Sergio Verdugo and Carla Ottone, ‘Revisitando el debate sobre los abogados integrantes y la independencia del Poder Judicial’ 27 *Actualidad Jurídica* (Universidad del Desarrollo) 199.

⁷⁹ Supreme Court Justices are also part of the Elections Tribunal and Chair most Commissions within the Judiciary, for example.

The Chilean SC has such a large number of Justices (plus the attorney members) primarily because of its workload. This Court has mandatory jurisdiction and as such it cannot decide on which cases it will review.⁸⁰ Each of the four chambers⁸¹ of the Chilean Supreme Court hears and decides more than 2000 cases per year.

In regards to how cases reach the Supreme Court, decisions made by the TDLC can be reviewed by it through the special appeal called *recurso de reclamacion*.⁸² This is an appeal which is unique in the Chilean system and its limits are not clear. It is not exactly a *recurso de casacion*⁸³ in which a Court can only review either procedural issues or law infringements, but it is not a straightforward appeal or *recurso de apelacion* (appeal) in which the Court can conduct a full merits review.⁸⁴

⁸⁰ Although this is formally true, in practice the Supreme Court has some discretion because it can declare that an appeal has ‘manifestly a lack of legal grounds’. Article 782, Código de Procedimiento Civil (Law 1.552 of 1902).

⁸¹ The Law states that the Court can exercise its function *en banc* or divided in specialized chambers. Código Orgánico de Tribunales (Law 7.421 of 1943), Article 95. The exact division and subject matter each Chamber attends to is not a legal division, but is determined by the same Court as part of its auto-regulatory powers through an *auto-acordado*. The Supreme Court works as a matter of internal distribution, divided into four chambers which are specialized, although many cases could fall into more than one chamber. Each chamber has 5 or 6 Justices (and 3 ‘attorney members’), although Justices could integrate other chambers for specific cases. The first chamber is specialized in civil law, the second in criminal law, the third in public law, and the fourth in labour law (although it also takes some civil law cases). The third chamber is thus the main focus for this thesis as it decides all cases that are related to regulation and specifically economic telecommunications regulation.

⁸² DL 211, Article 27.

⁸³ The *recurso de casacion* can be either ‘*en el fondo*’ which means an error in law can be reviewed or ‘*en la forma*’ where an error in procedure may be reviewed. Código de Procedimiento Civil (Law 1.552 of 1902), Articles 764-768.

⁸⁴ See: Francisco Aguero and Santiago Montt, ‘Chile: The Competition Law System and the Country’s Norms’ in Eleanor M. Fox and M. J. Trebilcock (eds), *The design of competition law institutions : global norms, local choices* (Oxford University Press 2013), 173.

As the contours of this appeal are very much unclear, the Supreme Court has been free to determine these limits by itself, and these have changed over time. For example, in regard to mergers, initially the Court established that through the *reclamacion* it could only review the conditions that were given for the approval of a merger,⁸⁵ and as such it could not change the decision (approval or rejection), but recently this has changed, and the Court has established that besides reviewing the conditions for the merger approval, it can also review the main decision.⁸⁶

Cases can also reach the Supreme Court through other paths, but even though these are possible in theory, they are not used.⁸⁷ In relation to economic telecommunications regulation most cases arrive at the Court through the *recurso de reclamación*.

⁸⁵ *Recurso de Reclamación Fusión Telefonica-Bellsouth*, 22nd holding.

⁸⁶ *Recurso de Reclamacion de NC 399-11 - Consulta de Organización Terpel Chile, relativa a la adquisición por parte de Quiñenco S.A. de los activos de las sociedades Petróleos Trasandinos S.A. y Operaciones y Servicios Terpel Limitada (2012)*.

⁸⁷ For example, SUBTEL has the power to enforce the Telecommunications Law, as it was explained before. This involves an internal procedure in which an internal prosecutor of SUBTEL investigates and prosecutes whoever has infringed the Telecommunications Law. The Undersecretary of Telecommunications acts as the judge, and the accused parties are able to defend themselves and provide any evidence they deem pertinent for this purpose. The decisions of the Undersecretary can be appealed to the Court of Appeals of Santiago, which acts as a reviewing Court and the procedure there is the same as for the protection appeal (*recurso de protección*), which contemplates a fast resolution of the issue (as the protection appeal purpose is the emergency protection of certain fundamental rights). Cases can also reach the Supreme Court through the regular civil Courts but this also does not happen in practice. *Constitución Política de la República de Chile de 1980* (Constitution of Chile), Article 20. The *recurso de protección* is first decided by a Court of Appeals. The decision made by the Court of Appeals can be appealed to the Supreme Court.

As a generalist Court,⁸⁸ the Chilean Supreme Court lacks specific expertise, but nevertheless it has the responsibility of deciding various issues which may be considered highly technical, such as telecommunications regulation. As the highest Court in Chile, it has played a role in the development of telecommunications regulation, especially reviewing appeals (*reclamacion*) from the TDLC.

2. UK: Various Levels of Appeal

a. Competition Appeal Tribunal (CAT)

The CAT⁸⁹ is an important institution with regards to economic telecommunications regulation as the relevant sectorial regulation explicitly gives the CAT the power to intervene reviewing decisions of the CMA or OFCOM.⁹⁰ Like the Chilean TDLC, it is a relatively new judicial actor as it was created by the Enterprise Act 2002, which came into force in 2003, although before there were other judicial actors that fulfilled a similar role.⁹¹

The CAT is not really a regular ‘Tribunal’, as for example, it was not created nor regulated in the Tribunals, Courts and Enforcement Act 2007 which created a

⁸⁸ By generalist Court I mean one that can review a number of different subjects (i.e., telecommunications, energy, environment, constitutional), and is not specialized in a single one of them.

⁸⁹ Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012), 72.

⁹⁰ Sections 46 and 47 of the Competition Act 1998, and Section 192 of the Communications Act 2003.

⁹¹ Section 12 and Schedule 2, Enterprise Act 2002. There were various other judicial actors that were predecessors of the CAT and the CMA, such as the Monopolies and Restrictive Practices Commission (1949-1956), the Monopolies Commission (1956-1973), and the Monopolies and Mergers Commission (1973-1999).

new administrative law justice system, nor is it part of the regular Judiciary of the UK. It is thus a special adjudicatory body created by Section 2 of the Enterprise Act 2002.

With regards to its composition, its members are not only solicitors or barristers, but professionals with expertise in economics, business and accountancy. For each case that the CAT reviews, a Tribunal of three persons will be constituted by the President, one of whom must be a legally qualified chairman (the President or a person from the Tribunal's panel of chairmen) and two other members with expertise in law, economics, business or accountancy. It is an interdisciplinary panel.

As explained before, it is quite relevant to understand how cases reach judicial actors. The structure in the UK is different to Chile, because the agency (OFCOM) and the CMA (potentially) have adjudicatory powers whilst the FNE does not. As such, there are more layers of adjudication than in Chile. OFCOM (or the CMA) can decide issues which are either brought to them by private parties or through investigations initiated by them.

The main path that a case takes to reach a judicial actor in the UK is through appeals. For example, decisions made by OFCOM may be appealed to the CAT.⁹² The CAT decides general appeals directly whilst if the appeal raises issues of price control, said questions are referred to the CMA Panel.⁹³ These appeals

⁹² S. 192, Communications Act 2003. Lloyd and Mellor, n (5), 100.

⁹³ S. 193, Communications Act 2003.

should be decided ‘on the merits’.⁹⁴ This standard of review is not a usual one in the British legal system and thus the scope of it has been the subject of litigation.⁹⁵ It is not clear whether the CAT can perform a full merits review or if it should perform a review closer to judicial review standards. This until now is an unsettled issue to a point that the Department for Business, Innovation and Skills lead a consultation during 2013 regarding whether the standard of review should be changed to a clearer one.⁹⁶

This could be a key point, but I suggest that it is not. If the CAT is restricted only to perform judicial review of OFCOM’s decisions, then it could be expected that it will be substantially less judicially active, in the sense that it will have less opportunities to decide on factual issues of the cases and would be limited to reviewing only questions of law. Nevertheless, this type of argument has been contested in Administrative Law as the distinction between ‘law’ and ‘fact’ is not always clear.⁹⁷ I agree that the distinction is not clear, and in reality, the labelling of an issue as one of law, could actually be an example of a judicially active court, as it will allow itself to intervene even if the standard of review is judicial review. In this sense the distinction may be key for the case of the UK, a judicial actor

⁹⁴ S. 195 (2) *ibid*; Lloyd and Mellor, n (5), 102. Exceptionally OFCOM’s decisions could be reviewed under the general rules of judicial review. This happens with decisions specified in Schedule 8 of Communications Act 2003 which cannot be appealed in accordance with Section 192 provisions.

⁹⁵ See for example: *British Telecommunications Plc v Office of Communications* [2011] EWCA Civ 245.

⁹⁶ Innovation and Skills Department for Business, *Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform* (2013).

⁹⁷ P. P. Craig, *Administrative law* (6th edn, Sweet & Maxwell 2008), 269.

could be considered activist if interprets a certain issue as a point of law and not of fact, so it may intervene and possibly make an activist decision.

b. Higher Courts: Court of Appeals and Supreme Court

As it was briefly pointed out before, the higher courts, this is the Courts of Appeals and Supreme Court in the case of the UK, could play an important role in shaping economic telecommunications policy as they have the power to review the decisions taken by the CAT.

The role that these judicial actors play in the UK is quite different in comparison to Chile where its Supreme Court plays an important role; the Court of Appeals and the UK Supreme Court rarely get involved. Up to this date (May, 2015), for example, the UK Supreme Court has only resolved one case involving telecommunications regulation.⁹⁸

The Court of Appeals is the second most senior judicial actor in the UK and it has 38 Lord Justices of Appeal sitting in its two divisions, civil and criminal. Appeals under the Communications Act 2003 are reviewed by its civil division. The Court of Appeals has reviewed more cases related to economic telecommunications regulation than the UKSC.

⁹⁸ *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents)*

The UKSC is composed of 12 Justices, and a group of ‘judicial assistants’ provides them with technical support.⁹⁹ The size of the UKSC is smaller in comparison to Chile but a plausible explanation for this ‘smaller’ size is that the UKSC, unlike the Chilean SC, does not have mandatory jurisdiction, cases must be granted leave to appeal, and in fact it only decides between 40 and 60 cases a year.¹⁰⁰

The type of jurisdiction the relevant Supreme Courts have can be seen as a possible key difference. As was highlighted before the Chilean Supreme Court has mandatory jurisdiction, this is, it must review all cases that reach it, whilst the UK Supreme Court has discretionary jurisdiction, and can, in practice, choose the cases it takes. The differences in numbers is dramatic, while the UKSC only reviews between 60 to 80 cases a year, the Chilean Supreme Court reviews more than 8000 and the Chamber that reviews economic regulation cases (not only telecommunications) reviews more than 2000 cases per year. As such the Chilean Supreme Court has far more opportunities to decide economic telecommunications cases and thus more chances to be activist.

The UKSC like the Chilean SC is a generalist Court that decides on many different subject matters, and likewise, has the power to decide and shape economic telecommunications regulation. In regards to how cases reach these appeal level judicial actors, the Court of Appeals and the UKSC have jurisdiction

⁹⁹ Section 23, Constitutional Reform Act 2005.

¹⁰⁰ For the year 2013-2014, for example, the UKSC approved 35% of its petitions to appeal. This is only 81 cases. UK Supreme Court, *The Supreme Court: Annual Report and Accounts* (2014) 23.

over a competition related matter when a decision of the CAT is appealed on a point of law.¹⁰¹ The UKSC subsequently can also have jurisdiction if that Court of Appeals decision is further appealed, also on a point of law. It is very unusual that cases make it up this far.

¹⁰¹ Section 196, Communications Act 2003.

E. Conclusions: Differences that Do Not Explain Judicial Activism and Non-Activism

The main purpose of this chapter was to review and map out the judicial actors, and the main regulatory institutions and procedures that are most directly related to the role that judicial actors play in the development of economic telecommunications regulation in Chile and the UK. It seems that although, in general, both countries have apparently embraced a similar institutional structure: a regulator, telecommunications specific laws, a specialized judicial actor and the possibility to appeal cases to superior Courts, a closer look at the specific functions each of these institutions makes me conclude that the systems actually are quite different.

In this way, even though certain institutions may even have similar names (like both Competition Tribunals) they operate differently, as the comparison has shown. At each level, there are significant differences which should be taken into consideration. One significant difference which is flagged as potentially important in explaining judicial activism is that in the UK there are several appeal layers (from OFCOM to the CAT, the CAT to the Court of Appeals and from the Court of Appeals to the UKSC), whilst in Chile, there is only one (from the TDLC to the Supreme Court). It is not clear though how this impacts on the possible activism of judicial actors. It may be thought that more layers of appeal could be interpreted as more opportunities for activism or it may be thought that only one layer may be a more likely scenario for activism as that decision will go unchecked

further up. The data from available cases discussed in Chapter 4 and 5 points towards the second explanation as will be explained.

Even though differences are present, it is difficult to assess whether they are by themselves important in shaping activist behaviour. As pointed out before, some features of one jurisdiction may indicate at least that there may be more opportunities for activism, but in most cases, this is not absolutely clear. As such, it could be concluded that the regulatory framework, the procedures (in the sense that they allow judicial actors to decide cases) and the institutions involved in relation to the role that judicial actors may play in the development of economic telecommunications regulation, apparently do not clearly fully explain the possibility of activist behaviour. Other factors, identified in the literature review of Chapter 2, such as judicial culture, policy preferences of judges or the availability of resources for legal mobilisation, may also explain or better explain activist behaviour by judicial actors.

Chapter 4

Identifying and Explaining Judicial Activism in Economic Telecommunications Regulation in Chile

This chapter presents findings from the analysis of original qualitative empirical data regarding the role of judicial actors in the development of economic telecommunications regulation in Chile. The purpose of this chapter is threefold. First, to analyse whether judicial actors have had an activist role in the development of economic telecommunications regulation in Chile. Two sources of data are used, to answer this question: semi-structured interviews and final decisions issued by judicial actors and data from both of these sources support that they do play an activist role.

Second, the data is also used to shed light on the question of if and which of the factors that were assumed as explaining judicial behaviour in Chapter 2, actually do play a role in explaining activist behaviour. I argue that only some of the factors hypothesized, on the basis of the literature review to be significant, do play a role, specifically the manner in which legislation or regulation is drafted, judicial culture, and economic policy views, whilst other factors that were not considered as relevant, emerge as important, specifically public opinion and leadership.

Thirdly, a typology of the different factors is developed. Two types of factors are proposed, having each a different role in explaining judicial activism. First, I

identify factors that directly explain judicial activism which I call direct driving factors. Second, I identify factors that have a role in allowing direct driving factors to operate, and I label them as enabling factors. These key themes provide the basis for the comparison with the data gathered for the UK which will be presented in the following Chapter 5.

A. A word on methodology: Interviews

The main focus in this chapter will be on the analysis of 21 semi-structured interviews carried out in Chile from October 2013 to January 2014, although documents (mainly judicial decisions) have also been used. Five different groups of people were chosen to be interviewed.¹

The first group were judicial actors.² They make the decisions in courts and court like fora and thus could provide the best, closest insight into whether judges engage in judicial activism³ and what factors play a role in this. The focus was not on Judges in general but only on those that sit in the Competition Tribunal (*Tribunal de Defensa de la Libre Competencia* or “TDLC”) and in the Chilean Supreme Court.

The Competition Tribunal was chosen because it acts as a court of first instance in most relevant economic telecommunications regulation⁴ cases and the

¹ The interviews were conducted in Spanish, and the parts that are presented here were personally translated trying to stay as faithful to the original as possible.

² The broader term ‘judicial actor’ has been chosen instead of a term such as ‘courts’ because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as ‘courts’ such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that are examined in Chile will be the Competition Tribunal (TDLC) and the Supreme Court.

³ I rely here on my working concept of judicial activism explained in greater detail in Chapter 2 as: the practice of developing economic telecommunications regulation by judicial actors. It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a new meaning. Looking at this issue from another point of view, judicial actors do not create new economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

⁴ It should be noted that the specific area which will be researched will be identified, for the purposes of this thesis, as ‘economic telecommunications regulation’. This is to establish that areas of telecommunications regulation which can be categorized as ‘social regulation’, such as policies ensuring universal access to telecommunications services, will not be the object of this thesis.

Supreme Court acts as the appeal tribunal in those cases. There is no further appeal after the Supreme Court and as such, this body frequently makes the final decision in relation to specific issues in economic telecommunications regulation (although later legislation can change the rule).⁵

In addition, I also interviewed other members of the legal complex.⁶ This is due to various reasons. First, judges may not always be comfortable saying or revealing the real reasons of why they do things or they could act in a way in which they have never reflected about.

Furthermore, other members of the legal complex (not Judges or Justices) provide alternative views of whether judges are activist from the perspective of other key legal actors who have been involved in the relevant cases. It is also interesting to contrast the views these external actors have with what judges say they are doing and what other external actors believe judges are doing.

As such, interviews were carried out with three other groups of the legal complex. One of the groups was composed of internal counsel (in-house) of the different telecommunications companies. A second group were external counsel to the telecommunications companies. These were mainly high level specialized litigators that participate in most cases involving economic telecommunications

⁵ Article 27, *Ley para la defensa de la libre competencia* (Chilean Competition Law) DL 211- 1973.

⁶ The concept of 'legal complex', a term coined by Terence Halliday, Lucien Karpik and Malcolm Feeley, will be used to refer to the diverse legal occupations that were interviewed. All these actors have in common that they mobilize in relation to a particular issue (in this case Telecommunications regulation). The legal complex is constituted by judges, lawyers and other legally trained personnel who undertake legal work, including civil servants. Terence C. Halliday, Lucien Karpik and Malcolm Feeley, *Fighting for political freedom : comparative studies of the legal complex and political liberalism* (Hart 2007), 6-7.

regulation. Finally, four government officials were interviewed from the telecommunications and of the competition agencies. They provided a view on how the agencies interact with Courts and how the Court's activist (or non-activist) behaviour can affect their own behaviour.

Interviewees were asked about various topics regarding the role judicial actors play in relation to the development of economic telecommunications regulation. For example, they were asked whether they thought judicial actors played a role as *regulators*, whether they thought all judges shared the same judicial culture (attitudes towards their role), or whether they thought that public opinion influenced judicial decisions. More details regarding the questions asked is given below in each section that covers the specific factors that could explain judicial activism.

There was no time restriction regarding which decisions they could recall or referred to as this was thought to allow them to refer to those they thought were most important. This, of course, potentially has the disadvantage that some decisions of less relevance could be excluded. In general, nevertheless, most interviewees referred to similar important decisions of the last 10 years and left very few decisions unmentioned. The focus on the review of the decisions (as documents) was very similar and concentrated on the decisions of the last 10 years also, as 2004 marks the year in which the TDLC started operating which gave way to a complete new stage of involvement of judicial actors in economic regulation in general.

All of these interviews are used in the following sections to understand what interviewees understand judicial activism to be, if the interviewees believe that judicial actors have engaged in judicial activism, and what factors may explain that activist behaviour, if it exists.

B. Is the Judiciary Activist in Developing Telecommunications Regulation?

A preliminary question which must be answered before enquiring into which factors are particularly relevant in explaining activist behaviour is whether judicial actors are in fact activist. The empirical data gathered from interviews and judicial decisions tell us that, for the case of Chile, judicial actors do have an activist role.

It must be noted that due to the ‘value loaded’ nature of the term judicial activism and of how many different meanings it may have,⁷ this was not used in the interviews. It was thought that if the term was used then interviewees, especially Judges, would close up considering that during the period in which the interviews were being carried out, they had been accused of being activist by the press and lawyers, which were using the term in a negative manner.⁸ Instead, interviewees were asked about the role that judicial actors have played in the development of economic telecommunications regulation,⁹ which was a way that was thought to better transmit the core of the concept of judicial activism as it is

⁷ Stefanie A. Lindquist and Frank B. Cross, *Measuring judicial activism* (Oxford University Press 2009).

⁸ See, for example: <http://www.latercera.com/noticia/opinion/ideas-y-debates/2013/09/895-540465-9-los-peligros-del-activismo-judicial.shtml>, last accessed on June 2nd, 2014. This is an article on one of the two major newspapers (La Tercera) titled ‘*Los peligros del activismo judicial*’ (‘The dangers of judicial activism’).

⁹ Specifically, in Spanish, the interviewees were asked whether they thought judicial actors played a role as ‘*reguladores*’ (regulators) or in ‘*políticas públicas*’ (public policy). As in English both of these concepts, ‘regulator’ and ‘public policy’ also do not have a clear meaning in Spanish, and no working definition was given to the interviewees.

used in this dissertation. I purposely avoided suggesting that they were activist or that they did act as regulators in order to avoid skewed answers.

Considering the abovementioned, all but one of the interviewees believed, quite firmly, that ‘the Tribunal and the Supreme Court definitely play a role as regulators’¹⁰ and ‘fulfil a role in policymaking’.¹¹ A counsel for one of the telecommunications companies even suggested that ‘the great regulators of Telecommunications [policy] are the Tribunal [TDLC] and the Supreme Court’,¹² thus placing judicial actors as more significant regulators than the Legislative or the Executive Powers. It is noteworthy that interviewees from all five groups of interviewees agreed that judicial actors do play a role as regulators. It was expected that, at least Judges would hold on to the traditional formalistic rhetoric of their role as judicial decision makers; this is that ‘Judges are rule appliers and unbiased fact finders and nothing more’.¹³ Only one interviewee, a Justice, thought otherwise, stating that ‘there is no relation between the public policy making activities of economic regulation and the activities carried out by the judiciary’.¹⁴

But what do these interviewees mean when they say that Courts are ‘regulators’ or they ‘play a role in policymaking’? This is not a straightforward question to answer. A counsel for one of the companies stated that ‘judges in these

¹⁰ Interview with a former or current TDLC judge (2nd of December, 2013).

¹¹ Interview with a former or current TDLC judge (6th of November, 2013).

¹² Interview with a former or current in-house counsel for a Telecommunications company (December 4th, 2013).

¹³ Richard A. Posner, *How judges think* (London : Harvard University Press 2008), 5.

¹⁴ Interview with a former or current Supreme Court Justice (December 10th, 2013).

cases are like legislators’,¹⁵ but that only leaves open the question of what role does an institution that acts ‘like a legislator’ plays. A helpful answer was given by a Judge who said they ‘are more than mere law appliers’, thus pointing out that their role is not only a formalistic one, of just fitting the pieces in a jigsaw puzzle. Another stated that the role of the ‘judge is to determine, interpret vague concepts, imprecise terms’,¹⁶ but noting that ‘in cases in which there is more than one possible solution, the most important thing to know is where the limit is’.¹⁷ The limits are not clear though and it is difficult to assess what they are.

It was also highlighted that ‘there is an invisible line between exercising jurisdiction when the norm is vague and the world of politics. Most judges are conscious of this line’.¹⁸ One judge gave an example that illustrates the distinction: ‘In a case in the south of Chile, the Mayor of a City ordered some trees from the main square to be cut down so there would be space for commercial stalls during the summer holidays. I thought that this was a horrendous measure because they were very old beautiful trees, but I also knew that according to the law, the Mayor of the City has the power to decide that issue, and thus I could not do anything about it’.¹⁹

It does not seem an easy task thus to determine clear limits of what *regulating* (and thus activism) mean for the interviewees. Activism seems to be

¹⁵ Interview with a former or current in-house counsel for a Telecommunications company (October 22nd, 2013).

¹⁶ Interview with a former or current relator of the Supreme Court (January 10th, 2014).

¹⁷ Interview with a former or current Supreme Court Justice (November 6th, 2013).

¹⁸ Interview with a former or current Supreme Court Justice (November 6th, 2013).

¹⁹ Interview with a former or current Supreme Court Justice (November 6th, 2013).

between two possible meanings. First, what was labelled as the ‘mere application of the law’, and this does not seem too problematic, it refers to the cases in which, for example, a court sanctions a driver for going over the speed limit, as in cases like this the rule is clear and precise (for example, maximum speed of 60 kilometres per hour), and in most cases anyone going over that speed will be infringing the rule.²⁰ The other limit seems harder to identify nevertheless. If ‘regulating’ involves not going into the world of politics, it is very hard to determine what that actually means, as the term ‘politics’ can be understood in various ways.²¹ In the context of these interviews, it may mean that a judicial actor gets into the world of politics when they absolutely ignore the law going against the express meaning of the core of it (in other words, they ignore a case in which the application of a norm is clear).²² This is, to my best understanding, what Judges were referring to in the interviews.

²⁰ There are debates in the indeterminacy literature that query whether this is really determinate, i.e. is there a breach at 60,5 miles (e.g. could this be considered as ‘proportionate’ to sanction such a breach) or only at 61 etc.

²¹ The concepts of politics and policy should be distinguished here as they are used throughout the Chapter. The concept of politics as was highlighted is much contested and no single conceptual definition is predominant. In this chapter I will understand politics to be ‘the exercise of power in society’ and my impression is that most interviewees think that this exercise of power is performed by politically elected officials, by ‘politicians’. Policy will be understood as a ‘purposive course of action that an individual or group consistently follow in dealing with a problem’. Michael E. Kraft and Scott R. Furlong, *Public policy : politics, analysis, and alternatives* (4th edn, SAGE Publications 2013) 5.

²² H. L. A. Hart, *The concept of law* (2nd edn, Clarendon Press; Oxford University Press 1994), 126. It must be noted that, for example, scholars of the Critical Legal Studies movement question whether this core can actually be identified as they argue that all rules are indeterminate. This strong original indeterminacy claim is very rare today. Most scholars of the critical legal studies movement have adopted, to different degrees, a weaker version of the indeterminacy claim by stating that most rules are indeterminate or that a relevant number of rules are indeterminate (but not all). Mark Tushnet, ‘Survey Article: Critical Legal Theory (without Modifiers) in the United States’ [Blackwell Publishing Ltd.] 13 *Journal of Political Philosophy* 99; Duncan Kennedy, *A critique of adjudication (fin de siecle)* (Harvard University Press 1997); Mark Kelman, *A guide to critical legal studies* (Harvard University Press 1987) 46.

This is a difficult issue and although alternative meanings can be found for what interviewees mean by ‘regulating’, one of those is especially very difficult to determine adequately. As such, it can be quite possible that when the interviewees talk about ‘regulating’, ‘policymaking’ or the likes, they could be referring to slightly different things. Nevertheless, what is clear is that most did believe that judicial actors effectively play a role in policymaking by creating new rules.

In this sense, I suggest that they have played an activist role because they have made decisions on matters which are normally understood to be in the domain of policymakers. By this, I mean that they make decisions which involve opting for a particular policy, not just resolving a dispute regarding the implementation of a particular policy. For example, decisions have addressed issues such as industry structure (involving the divestiture of monopolist telecommunications companies),²³ requirements to share or provide access to facilities (in defining unbundling obligations),²⁴ or even decided the specifics of permissive pricing policies (whether mobile companies can charge higher prices for calls made outside their own networks, that is, on-net/off-net pricing schemes).²⁵

In the following sections I focus on presenting analysis of original data in regards to five factors that are relevant in explaining judicial activism.

²³ *Reclamación de Telefónica España y otros contra Dict. 735* Resolución 368/92 CR, Comisión Resolutiva.

²⁴ *Demanda de Voissnet S.A. contra Compañía de Telecomunicaciones de Chile S.A.* Sentencia 97/2010 TDLC.

²⁵ *Instrucción de Caracter General N 2 (ICG N2)* NC N 386-10 TDLC

C. Key Factors that Enable or Drive Judicial Activism

This section will analyse what can be labelled as the key factors that explain judicial activism from the interviewees' point of view. These five factors have been deemed *key* because all groups of interviewees identified them as relevant in explaining activist behaviour. Three of the factors that are classified here as *key* were identified as possibly relevant also in Chapter 2, specifically the substantive law (the actual phrasing of a specific legal obligation,), judicial culture, and the economic policy views of judges. The other two factors deemed *key*, this is the importance of public opinion and leadership inside the court, were not hypothesized as possibly relevant in light of the literature review.²⁶

It is also interesting to note in advance that I will argue that these key factors play different roles in explaining judicial activism. I will classify them as operating in two different manners. First, there are those that are directly linked to judicial activism, that have an immediate proximity to it and I will call them *direct driving* factors. Secondly, there are those that play a role as *enabling factors*, this is factors that make it possible for direct driving factors to operate. This classification will be further explored below in relation to each factor analysed and I highlight this here as it will also be a key issue that informs the analysis for the case of the UK in Chapter 5 and in the comparative Chapter 6.

²⁶ It must be highlighted here that two factors that were assumed as relevant in light of the literature review of Chapter 2, this is the constitutional structure and the availability of resources for legal mobilisation were not considered as relevant by most interviewees.

1. Judicial culture in a time of change

In light of the literature review, judicial culture was one of the factors assumed as relevant for explaining activist behaviour by judicial actors, and interviewees generally agreed with the assumption when asked if they thought it was a relevant factor. The judicial culture, especially in the past few years, may explain (at least in part) the activist behaviour of judicial actors in economic telecommunications regulation in Chile.

As has been pointed out, judicial culture is an ambiguous term, and thus it is necessary to review again how it is used here. According to Bell, the culture of a judiciary can be studied through three different lenses: personal, this is ‘how individuals perceive their role and careers’;²⁷ institutional, which ‘looks at the judiciary as a collective and examines the way in which the structures of the career and organization of judges, as well as legal processes, affect the judiciary as a social institution’;²⁸ and external, which ‘looks at the judiciary from the perspective of its impact in the wider world’.²⁹ For the purposes of this thesis, the personal lens has been primarily used and explained to the interviewees, as the manner in which Judges think about their role, of what it ought to be. Although this has the disadvantage of only portraying normative perceptions of the judicial role, it also allowed for a variety of answers from the interviewees that yielded

²⁷ John Bell, *Judiciaries within Europe : a comparative review* (Cambridge University Press 2006), 2.

²⁸ Ibid, 2.

²⁹ Ibid, 2.

interesting perspectives regarding how Judges see their role, and how the rest of the legal complex think Judges see their role.³⁰

A few words on how the literature has portrayed the Chilean judiciary may help to better frame this issue in the particular case of this country. In a study of the role of the Chilean Supreme Court from 1971 to 1980 (from the Allende government up to the middle of the Pinochet dictatorship), it was portrayed as engaging in the ‘most primitive sort of formalist legal positivism’.³¹ A public statement made by a member of the Court during that period can help to better grasp what it was thought the role of the Court was:

The mission of the Court is to defend the current legal order. We lack – as is evident – the power to alter the latter through interpretation (...) The renovation of the legal order can only be pursued through new legislation. Therefore the violation – directly or indirectly – of legality is unacceptable, because without law there is no justice (....) Judges ought to act strictly within the framework of existing legality.³²

After the fall of the Pinochet dictatorship, the reticence of the Court to engage in politically salient matters did not change, according to Couso:

Even as the Chilean state underwent dramatic political and economic shifts and international human rights law was partly reshaped by Pinochet-related litigation, the Chilean judiciary remained shy of

³⁰ This I think worked well during the interviews, as the interviewees seemed very open in their responses. Some started with shorter, straight to the point, monosyllabic answers, but all after a few minutes were relaxed and answered fully and enthusiastically to the questions.

³¹ Andrés Cuneo, ‘La Corte Suprema de Chile, sus percepciones acerca del Derecho, su rol en el sistema legal y la relación de éste con el sistema político’ in Universidad de Costa Rica (ed), *La administración de justicia en América Latina* (1980), cited by Javier Couso in: Javier Couso, Alexandra Huneeus and Rachel Sieder, *Cultures of legality : judicialization and political activism in Latin America* (Cambridge University Press 2010), 151.

³² Cuneo, cited by Couso, Huneeus and Sieder, 151.

controversy, ducking politically salient issues despite growing public demand.³³

In this way, at least until the first years of the 21st century, the Supreme Court had a very formalistic³⁴ stance regarding their role in adjudication and tried to evade politically relevant cases,³⁵ perhaps even seeing themselves as defenders of the ‘state’ and ‘state law’. The interviews conducted, nonetheless, depict a very different picture of what is going on today. The predominant view was that Judges were aware that they have a political role to play, within their jurisdictional role. By this I think they meant they had a role to play in policymaking. None of the interviewees saw a limited, formalist role for the Court, as the one portrayed above.

Some interviewees stressed that this political role is primarily played within the boundaries of the legal (and not political) world. As one Supreme Court Justice emphasizes ‘some members of the Court think it [the Court] should have a greater political role, but most do not go beyond the limits of the law’.³⁶ A Competition Tribunal Judge accentuates the point stating that they ‘operate as close as possible to the limits of their powers’.³⁷ Others, nevertheless, think that

³³ Javier Couso, ‘The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002’ in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the judiciary : the accountability function of courts in new democracies* (Frank Cass Pub. 2004).

³⁴ By formalism (also known as legalism) I’m referring to the doctrine that holds that the outcome of judicial decisions can be explained by the content of the law and nothing else.

³⁵ Some, nevertheless, would claim that in practice, even if the Court was publicly defending a formalist role, it would be inaccurate to sustain that they have only been activist in the past few years, as for example Hilbink has said that during a large portion of the 20th century they were enthusiastically engaging in conservative judicial activism. Lisa Hilbink, *Judges beyond politics in democracy and dictatorship : lessons from Chile* (Cambridge University Press 2007), 63.

³⁶ Interview with a former or current Supreme Court Justice (November 26th, 2013).

³⁷ Interview with a former or current Judge of the TDLC (December 2nd, 2013).

the Court has overstepped the boundaries of the 'legal world' already and are exercising their function in a purely political capacity, that it is 'becoming usual that Judges go a little beyond what their powers are,'³⁸ they are involved in developing public policy'.³⁹

This distinction takes the issue to a complicated matter of when can it be understood that judicial actors cross this imaginary line, from the 'legal world' into the pure political world in which they should not intervene because they do not have the powers to do so. It seems that many interviewees, especially Judges, think that politics⁴⁰ is relevant to their adjudicatory functions but their role is qualitatively different than the political role that the legislature, for example, plays. It may be interpreted that Courts think they have a political role to play, but within the limits set by the relevant legislation, whilst Congress is not constrained in this manner. Congress, under this view, can issue any type of regulation, being only constrained by Constitutional rules and the political consequences of its decisions, whilst Courts face the same constraints, but have to respect at least the parts of the law that are clear (i.e., not indeterminate) and can only do this when deciding a relevant case. For example, if under Chilean law there was a rule that states that 'there shall be no restriction on the amount of radio spectrum an operator can have for providing 3G internet services', then the

³⁸ I think that this interviewee is adopting a narrow view of the powers of the Court. Formally, the Chilean constitution in its article 76 sets out the role of the Court by stating that 'Courts have the exclusive power to decide civil and criminal cases and enforce what has been decided'. *Constitución Política de la República de Chile de 1980* (Constitution of Chile).

³⁹ Interview with a former or current government official (December 3rd, 2013).

⁴⁰ By politics here I am referring to a traditional concept which states that politics is: 'the practice of the art or science of directing and administering states or other political units'. Iain McLean and Alistair McMillan, *The concise Oxford dictionary of politics* (2nd edn, Oxford University Press 2003).

Supreme Court could not have set a 60 MHZ cap as it did in the ‘3G consult’ case, as it would be contravening a clear, precise rule, and it does not have the power to do so (See Subsection C (2) below).

Why has the Supreme Court changed from being very formalist⁴¹ to one that accepts that their policy views⁴² is a factor in its decision making process? Some think that it has been due to the pressures of the public (see Subsection C (4) below). It can be argued that the Court has aligned with public opinion and a strong civil society uprising, especially from 2010 onwards, against concentration in certain markets, abusive corporations, defective public services, and a defective democracy and Constitution inherited from the dictatorship. As an external counsel points out, ‘the Justices feel they have to make justice if they see that everything else is blocked by a political class that is not representative in reality’.⁴³

The judicial culture of the judiciary in Chile has gone through considerable changes in the last 10 years. It is not clear why these changes have occurred,⁴⁴ but it is very much agreed that those changes in judicial culture have occurred,⁴⁵ and

⁴¹ See n 34.

⁴² See next section for a detail analysis of the policy views of judges as factor that explains judicial activism.

⁴³ Interview with a former or current external litigation counsel of a Telecommunications company (December 3rd, 2013).

⁴⁴ The Chilean literature on the judiciary is very limited and none has made an analysis of this possible change.

⁴⁵ José Francisco García García and Sergio Verdugo Ramírez, *Activismo judicial en Chile : hacia el gobierno de los jueces?* (1. edn, 2013).

the Court has now drifted afar from the formalistic positions it once had regarding its role.⁴⁶

A good example of how the judicial culture of the Supreme Court, specifically, has changed in the last 10 years, can be found in the manner in which it interprets its powers to review mergers. Although only one of the two cases below refers to Telecommunications regulation, it is important to show how the Court has transited from a cautious stance in which great deference was given to the decisions of a ‘specialized’⁴⁷ lower judicial actor like the TDLC, to a position in which deference is a mere possibility.

In early 2004, just as the TDLC was just starting to function, Telefonica Moviles S.A. (Telefonica), a Spanish telecommunications notified the TDLC of the prospective acquisition of Bellsouth Comunicaciones S.A. and Bellsouth S.A. (Bellsouth), which would merge both companies (Telefonica and Bellsouth). At the time, Telefonica was the second mobile telephone operator in Chile, whilst Bellsouth was the third and the merger would catapult Telefonica to number one, and would reduce market participants from four to three.

The TDLC decided⁴⁸ to approve the merger but, since it also believed that the operation raised various risks to the competition in that market, the approval

⁴⁶ See Section C (4) regarding public opinion for a possible answer to possible changes in judicial culture in the past 10 years.

⁴⁷ By specialized here I’m referring to a judicial actor that focuses on one particular area of the law, in this case competition law. This is different from a ‘generalist’ judicial actor, such as the Chilean Supreme Court that decides issues from very different areas of the law.

⁴⁸ *Consulta de Telefónica Móviles S.A., sobre aprobación de acuerdo de eventual toma de control de Bellsouth Comunicaciones S.A. (AGREGADAS Roles C N° 36-04, 39-04 y 43-04)* Resolucion 2/2005 TDLC.

was subjected to a series of conditions to be fulfilled by the merging companies. The case was brought to the Supreme Court through a *recurso de reclamacion*, but the appeals were dismissed in a 3-2 decision. Most importantly, for this section, the Supreme Court held that it had powers to review the conditions set by the TDLC when approving a merger, but it did not have the power to review the decision of the TDLC to approve the merger. It held that ‘the decision to approve a merger was non-appealable’.⁴⁹ In this way, it seems that the Supreme Court effectively determined the limits of its review and jurisdiction

In 2012 two companies in the wholesale and retail petrol market, Terpel and Quiñenco, requested the permission of the TDLC, through a non-adversarial consult, to merge. The TDLC in a 3-2 did not approve the merger arguing that it would cause the concentration in that market to be too high.

Both companies appealed the decision to the Supreme Court via a *recurso de reclamación*. Under the logic of the Bellsouth-CTC Merger set forth by the Supreme Court, this is, that it can only review the conditions set for a merger approved by the TDLC, and not the approval or rejection in itself, then the Court would have had to declare that there was no right to appeal in this case. Nevertheless, the Court did not do this. In early 2013, it reversed the decision of the TDLC, approving the merger, and what is most noticeable; it also set specific conditions for the merger to go forward.⁵⁰

⁴⁹ 14th y 15th holding of Supreme Court decision. *Recurso de Reclamación Fusión Telefonica-Bellsouth* Rol 396-2005 Supreme Court of Chile.

⁵⁰ Consulta de Organización Terpel Chile, relativa a la adquisición por parte de Quiñenco S.A. de los activos de las sociedades Petróleos Trasandinos S.A. y Operaciones y Servicios Terpel Limitada (2012). *Recurso de Reclamacion de NC 399-11* Supreme Court of Chile.

These two cases which were decided only 8 years apart from each other are a very good illustration of the ‘new’ stance the Supreme Court has. It went from a very narrow understanding of its role to an extensive one. Although this is a unique example (the Court has not done this in another case), I believe it is a good example of how the Court in some cases is not necessarily a deferential Court, especially regarding ‘technical’ decisions.⁵¹

In regards to what function this factor fulfils, I argue that judicial culture is an *enabling* factor as it is not a direct driver of judicial activism but rather may create the conditions for direct driving factors to operate. In this case, the *new* judicial culture enables judicial actors to engage in judicial activism. In the next section, a factor that benefits from judicial culture as an enabling factor will be analysed: the influence of economic policy views in judicial decisions.

2. Economic policy views as drivers of judicial activism

In Chapter 2, it was noted that the policy views of the different judicial actors were assumed as an important factor that could influence judicial activism. The theory, portrayed primarily today in the ‘attitudinal model’ of Segal and Spaeth, holds that judges decide cases depending on the relevant facts, and their ideological

⁵¹ I state that these are ‘technical’ decisions because they were taken by the TDLC, a specialist judicial actor, in regard to an analysis of a merger, which usually involves the handling of very complex economic data.

policy views and values.⁵² From the data gathered through the interviews, the ‘attitudinal model’ does have explanatory power regarding how judicial actors decide cases; most interviewees agreed on this.

Many of the interviewees thought that in the Supreme Court ‘there are different visions of economic policy; they are people and have their ideas’.⁵³ In the Competition Tribunal this was also the case, as one Judge stated, ‘the Judges have different political economic views and that is very patent in the case of mergers’.⁵⁴ As such, it is believed that in regard to both the Court and the TDLC, economic policy views (preferences) do play a role.

Considering that most interviewees agree that policy preferences do play a role in how cases are decided, it is interesting to enquire into what economic policy views Justices and Judges actually embrace. A few thought that the Court has some members which are conservative and pro-business.⁵⁵ As one Supreme Court Justice stated, ‘some think that a good business will eventually benefit society’⁵⁶ whilst another pointed out that ‘it cannot be ignored that if a person has dedicated

⁵² Jeffrey A. Segal and Albert D. Cover, ‘Ideological Values and the Votes of U.S. Supreme Court Justices’ 83 *The American Political Science Review* 55 Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the attitudinal model* (Cambridge University Press 1993).

⁵³ Interview with a former or current external litigation counsel of a Telecommunications company (December 13th, 2013).

⁵⁴ Interview with a former or current Judge of the TDLC (November 6th, 2013).

⁵⁵ Here I’m referring to the concept of economic conservatism, which can be conceptualized as the rejection of ‘governmental efforts to redistribute power, income, and various social goods—which reflects their antipathy toward government involvement in the private lives of citizens in the name of increased social and economic egalitarianism’. H. Michael Crowson, ‘Are All Conservatives Alike? A Study of the Psychological Correlates of Cultural and Economic Conservatism’ [Routledge] 143 *The Journal of Psychology* 449.

⁵⁶ Interview with a former or current Justice of the Supreme Court (November 19th, 2013).

their whole life to being a counsel to the Banking industry, defending it, it is difficult that when they arrive at the Court, they will not keep on doing that'.⁵⁷

Nevertheless, the majoritarian view is different; it favours a bigger state and distrusts large corporations. One Justice explicitly recognized that he is 'a statist',⁵⁸ whilst another said that he does not believe in the Chicago school of economics type of arguments anymore: 'when people talk about the cup which overflows (trickles down economics),⁵⁹ in reality the only thing that happens is that the cup gets bigger when more profit is made, the cup never overflows and the benefits never trickle down, no one is satisfied with their profit'.⁶⁰ In this way they express a view which would justify state intervention.

The view from the private sector is similar. A litigator pointed out that 'Justice Muñoz (the current President of the Court) seems not to have the best idea of big corporations and can be very interventionist',⁶¹ and another one thinks that 'some of the Justices are biased and think that companies can only grow

⁵⁷ Interview with a former or current Justice of the Supreme Court (November 18th, 2013).

⁵⁸ Interview with a current or former Supreme Court Justice (November 6th, 2013).

⁵⁹ Trickle-down theory is defined as: A claim that accumulation of wealth by the rich eventually results in the improvement of the life quality of the poor. John Black, *A dictionary of economics* (2nd edn, Oxford University Press 2003).

⁶⁰ Interview with a current or former Supreme Court Justice (November 18th, 2013).

⁶¹ Interview with a current or former external litigation counsel for a Telecommunications company (December 10th, 2013).

‘organically’,⁶² this is that companies should grow increasing the size of their current operations, and not through mergers or acquisitions’.⁶³

A major theme that was highlighted by many interviewees was the importance of consumer protection as an economic policy goal. One Justice put it bluntly, ‘I usually decide a case searching for the best solution for the consumer’.⁶⁴ An internal counsel highlighted that there has been a turn towards consumer protection as a very relevant issue, ‘Justices think that we are past the point in which we thought that the main purpose of the economy was to let the companies grow, and in this phase the emphasis is in having a more balanced relationship with consumers’.⁶⁵ In the same line, a litigator emphasized, in a dismissive manner, that consumer protection is a good argument to present to the Court: ‘if you bring them the "whining" of the consumers that is something that the Supreme Court does listen to’.⁶⁶ This was highlighted as a very relevant point in cases involving telecommunications, especially mass telecommunications in which

⁶² Organic growth, also known as ‘internal growth’, refers to ‘the means by which a business can grow using its own resources. A business will grow by increased market penetration at the expense of its competitors, by new product development, and by market development through seeking new applications and markets for existing products or services. All these means utilize a firm's core competencies and while some may have a relatively short lead time (e.g. market penetration) others, notably product development, can involve significant lead times and development costs. Firms that have a successful record of innovation are usually more successful at internal growth, whereas others favour greater reliance on external growth’. Jonathan Law, *A dictionary of business and management* (5th edn, Oxford University Press 2009).

⁶³ Interview with a current or former external litigation counsel for a Telecommunications company (December 13th, 2013).

⁶⁴ Interview with a current or former Supreme Court Justice (November 19th, 2013).

⁶⁵ Interview with a former or current in-house counsel for a Telecommunications company (October 22nd, 2013).

⁶⁶ Interview with a current or former external litigation counsel for a Telecommunications company (December 10th, 2013).

the general public may be affected and where the Justices themselves are ‘also consumers’.⁶⁷

Why does the Supreme Court specially focus so much on the protection of consumers, as it seems that the interviewees believe that this supersedes any other interest or policy goal? One governmental official thinks that ‘the fight for the protection of consumers is today what basic human rights were during the dictatorship,⁶⁸ and as the Supreme Court, as an institution, now feels “ashamed” of what their role was during the dictatorship, they are trying to make things up in this way’.⁶⁹ Another interviewee thinks that this responds to a more general shift in civil society, one that demands more protection for its citizens and less for big corporations.⁷⁰ Whatever the reason may be, it is quite clear that, at least for the interviewees, consumer protection, which in the telecoms context is primarily related to prices paid by consumers, has turned into a very relevant, if not the most relevant factor for judicial actors in deciding telecommunications regulation cases.

The own policy preferences of the different Judges and Justices seem to effectively influence decisions according to the interviewees. Although a few think there are some conservative enclaves, the majority seem to have turned away from the protection of big corporations and towards the consumers in economic policy.

⁶⁷ Interview with a former or current in-house counsel for a Telecommunications company (December 13th, 2013).

⁶⁸ In this interview, the interviewee refers to the issue of human rights because during the dictatorship Courts were asked to intervene to protect defenceless individuals from human rights violation and they did nothing in most cases. See: Hilbink (n 35).

⁶⁹ Interview with a former or current government official (January 9th, 2014).

⁷⁰ Interview with an external counsel for a Telecommunications Company (December 3rd, 2013).

The underlying assumption here made by judicial actors is that consumer interests are usually misaligned with the interests of big corporations. This may be true in some situations but not always as short term lower prices may hinder investments in research and development which could make for better and cheaper products in the future.⁷¹ My impression is that most interviewees were usually referring to short term consumer interest and also that judges do not have the economic theory knowledge to foresee that not in all cases the protection of short term consumer interests is in the consumers' best interest.

A good example which illustrates the importance policy preferences⁷² have in how a decision is taken can be found in the *Consulta de Subtel sobre participación de concesionarios de telefonía móvil en concurso público de telefonía móvil digital avanzada (Resolución 27-2008)*⁷³, also known as the '3G Consult'.

In 2007 the Telecommunications regulator (SUBTEL) was about to call for tenders⁷⁴ for the radio spectrum that was to be used for the third generation of

⁷¹ Although not explicitly treated, it can be inferred from most interviews that it was believed that judicial actors focus primarily in what has been called short-term consumer welfare, this is for example, lower prices, without a real consideration of 'long-term' consumer welfare which entails that companies should be able to price their products at a level which allows it to stay in the market and to develop new products, which in the 'long-run' is beneficial to consumers. Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012) 20-21; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' CLES Working Paper Series 3/2013 < <http://ssrn.com/abstract=2235875> or <http://dx.doi.org/10.2139/ssrn.2235875> > accessed May 26, 2015. 18.

⁷² By policy preference I'm referring to the situation in which a subject has an array of policy options to choose from, but favours one of them.

⁷³ *Consulta de Subtel sobre participación de concesionarios de telefonía móvil en concurso público de telefonía móvil digital avanzada* Resolución 27/2008 TDLC.

⁷⁴ As a general rule the concessions given by the SUBTEL are free. Exceptionally, in case that there are more interested parties than what SUBTEL can give them part of the spectrum, the assignments are made according to the best economic offers. Ricardo Paredes, 'Regulación Económica en Chile: La Opción por un Enfoque No Estructural' in Felipe Larrain and Rodrigo Vergara (eds), *La Transformación Económica en Chile* (Centro de Estudios Públicos 2000), 167.

mobile telecommunications technology or ‘3G technology’, and it saw this as the opportunity to bring more competition into a market which only had three competitors at the time. Nevertheless, it was unsure if it could exclude or restrict the participation of the incumbents in the call for tenders and decided to request the opinion of the TDLC through a non-adversarial procedure or ‘consult’.⁷⁵

The call for tenders was for the 1710-1755 and 2110-2155 MHZ spectrums, and therefore a total of 90 MHZ was available for the new competitors or the incumbents. As the procedure in consults allows interested parties to submit their views to the TDLC, various actors argued in favour of an exclusion or restriction for the incumbents to participate in the process. The main points raised were that the market was utterly in need of more competitors, and that the three incumbents were able to provide 3G coverage through their current spectrum and they were doing so already in fact. The incumbents, on the other hand, argued that it would be unconstitutional to exclude them from the auction, that they were the only ones that could really make the investments needed for those spectrums to be used for 3G service, and that the relevant market in this case was not mobile telephony but broadband internet.

The TDLC decided the case in 2008 and held that according to the Telecommunications Law of 1982, the incumbents could not be excluded nor restricted from participating in the process, as that law provided for equal access to permits and concessions, and as such made an interpretation of this regulation.

⁷⁵ This issue can be flagged as an opportunity for judicial activism because the regulation was not clear. On one hand, the general rule is that any party can request the allocation of part of the spectrum whilst competition law could favour that more competitors enter the market.

However, the TDLC believed that under the Competition Law, their participation could be restricted.

The TDLC, nonetheless, decided not to exclude the incumbents from participating in the process.⁷⁶ It did require SUBTEL to fulfil three conditions in order to proceed with the call for tenders: (1) That mobile numeric portability had to be implemented before the 3G network started to operate; (2) That the spectrum be divided in as many blocks of MHZ as technically permitted, allowing only one block to be allocated to each participant in a first instance; and (3) The terms and conditions of the tender process should be written in a manner that would not exclude new participants because of lack of installed capacity or because the time constraints for implementing the technology would make their participation impossible.

The decision was appealed through various appeals (*recurso de reclamación*) to the Supreme Court and in a 3-2 vote, it drastically changed the decision made by the TDLC.⁷⁷ In relation to the first condition set by the TDLC, it held that the implementation of the mobile numeric portability would affect the rights of the future operators of the 3G services; such a condition would make the beginning of the operation of the 3G network an uncertainty. The Court believed that the prompt solution for this uncertainty did not necessarily depend solely on the regulator and the operators, but also in other factors. As such it overturned

⁷⁶ *Consulta de Subtel sobre participación de concesionarios de telefonía móvil en concurso público de telefonía móvil digital avanzada.*

⁷⁷ *Reclamación resolución 27/2008 Rol N° 4797/2008 Supreme Court of Chile.*

the decision of the TDLC and declared that the mobile numeric portability would not be a condition for the operation of the 3G network.⁷⁸

It then referred to the second condition. Taking into account the concentration in the market and considering that for the TDLC the availability of spectrum was an entry barrier, it held that what was needed for competition in that market was a restriction in the amount of spectrum each operator could have. In this way, it also overturned the decision of the TDLC and set a cap of 60 MHz per operator. The existing operators could participate of the new 3G market, but if they were allocated part of this spectrum they would have to auction off any part of their spectrum superior to 60 MHz.

This is an interesting case because the Supreme Court got involved into an issue that involved making decisions about policy preference and also factual issues: the likelihood that number portability could be implemented and the creation of a 60 MHz cap, which has a tremendous impact in how the mobile telecommunications market works in practice. This has meant that the largest operators are not able to expand and has made it possible for new competitors to enter the market.

Although this decision started with a non-contentious consult made by the telecommunications regulator (SUBTEL), the Court could have only given guidance, by for example, stating that there should be some kind of restriction on

⁷⁸ Even though the Supreme Court judgement was in the spirit of the previous TDLC decision which sought to open up the market to competition, it can still be qualified as an activist decision as the Court is making a factual assessment of a very specific technical issue which apparently the TDLC, as a specialized tribunal is better qualified to do.

the participation of the incumbents in the call for tenders, and left the details of that restriction to the specialized agency. It would be very rare for a court to be this vague but it is possible for it to do this.

It is a mystery why the Court decided to set a cap at 60MHZ and not at 50 or 70 MHZ, as in the decision it does not justify the choice. The only answer that can be imagined is that the 60 MHZ cap was already set in the Bellsouth/Telefonica (CTC)⁷⁹ merger, and the Court is somehow deferring to the TDLC's decision. If this is the case, then the mystery is why it did not respect the TDLC's decision regarding the participation of incumbents in the 3G call for tenders.

Considering the explained above, it seems that, for the case of Chile, preference for a specific economic policy (the economic policy views) may be one factor for explaining judicial activism. This factor acts in a very direct and immediate manner in relation to the decision to engage in judicial activism and it is closer to this than judicial culture for example, which although is also a key factor, functions more as an *enabler* of judicial activism. I argue therefore that the specific policy views of judges may act as an immediate and *direct driver* of judicial activism. Other key factors may also act as enablers, and the manner in which legal provisions are drafted, which will be analysed in the next section is one such factor.

⁷⁹ Consulta de Telefónica Móviles S.A., sobre aprobación de acuerdo de eventual toma de control de Bellsouth Comunicaciones S.A. (AGREGADAS Roles C N° 36-04, 39-04 y 43-04).

3. Indeterminate legal provisions: Enabling judicial activism

Another factor that was identified in Chapter 2 as a possible factor shaping judicial activism was the substantive telecommunications law in itself. It was an assumption that the manner in which the legal provisions were drafted, especially their indeterminacy, might have an influence on how much latitude judicial actors had to engage in activist behaviour.

As it will be explained below, a clear conclusion can be reached from the interviews conducted; the indeterminacy of the law is a key factor in explaining judicial activism. Nevertheless, I argue that it is a factor that does not operate as a *direct driver factor* but rather as an *enabling factor*. As such it is factor that in most cases enables direct driving factors to operate. In a way, it opens the door to judicial activism but it does not influence the decision of whether to walk through that door.

The concept of indeterminacy is not unequivocal. For this thesis it will be understood as what Endicott calls 'legal indeterminacy', this is 'when a question of law, or of how the law applies to the facts, has no single right answer'.⁸⁰ It is widely discussed whether it is at all possible for rules to be determinate, or even whether a *core* of a legal rule can actually be identified.⁸¹ Many believe that by their nature, all rules are indeterminate to some level due to the 'indeterminacy

⁸⁰ Timothy Andrew Orville Endicott, *Vagueness in law* (Oxford University Press 2000), 9. For a view on different meanings of vagueness, see: Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental law : text, cases & materials*, 763.

⁸¹ D. J. Galligan, *Discretionary powers : a legal study of official discretion* (Clarendon Press 1986) 69.

of language and the subjective and contingent nature of the interpretation of the fact situations to which rules are to be applied'.⁸²

Notwithstanding the very interesting jurisprudential debate around the topic of indeterminacy, for the purpose of this thesis, I will assume the position that it is possible for some rules to be more determinate than others, which is something that interviewees also identified as possible. As such, a rule will be more precise or determinate when, in most cases and to most people, the application of the rule is clear; for example if a rule in the Telecommunications Law establishes that 'the maximum a Telecommunications operator can possess of the radio spectrum is a total of 60 MHZ', whilst it would be indeterminate if the rule holds that 'the maximum a Telecommunications operator can possess of the radio spectrum shall not be detrimental to competition in that market'.

From the interviews conducted it is clear that most of the interviewees thought that the manner in which the law was drafted, and how indeterminate it is, influences the behaviour of Courts. As a Supreme Court Justice stated 'in a case where I think option A is the right answer [in political terms], but there's no doubt that option B is the legally correct answer, then I will decide B, but if the legal rule in question is vague then my interpretation will obviously be influenced by my political view and I will argue in favour of A'.⁸³ This abstract explanation is a great example of how two factors at different levels interact. The interviewee clearly identifies that in order to make decision based on his political views (a

⁸² Julia Black, 'Talking about regulation' Public Law 77, 90.

⁸³ Interview with a former or current Supreme Court Justice (November 6th, 2013).

direct driving factor) the rule in question must be to some level indeterminate (an enabling factor). Of course, it may be the case that the person could interpret the rule to be more indeterminate than others may think it actually is in order to make the decision which is politically correct for her or him, but even in this fictional scenario the Justice recognizes that there *may be* a legally correct answer.

A group highlighted the differences that could be found when deciding cases of civil law⁸⁴ in regard to economic regulation cases. Civil law cases mostly refer to contracts, property and torts and the dispute usually involves two different parties that are in disagreement regarding their responsibilities, the applicable rule or the interpretation of a particular rule. Economic regulation cases, on the other hand more often refer to issues that set legal obligations for a wider range of people, specifically to the interpretation of rules or what the applicable rule is, which may have an impact in the regulation of telecoms service. One Supreme Court Justice stated that ‘the vision is different when we are dealing with a civil case; for example, we are more bounded by legal norms and the rights of parties in these cases’,⁸⁵ whilst a private litigator highlighted that ‘economic regulation, in general, is vaguer than the civil law regulation. The civil law regulation is like a straightjacket, it leaves very little room to move’.⁸⁶

⁸⁴ Civil law is used in this case as it is understood in Continental Law countries, this is, as ‘private law, as opposed to public law, military law, and ecclesiastical law.’ E. A. Martin, A dictionary of law (5th edn, Oxford University Press 2003).

⁸⁵ Interview with a former or current Supreme Court Justice (November 19th, 2013).

⁸⁶ Interview with a former or current external litigation counsel for a Telecommunications company (December 13th, 2013).

In this case, the comparison with civil law regulation is informative. This view that presents the civil law as more rigid, I believe is correct. As the civil law is contained in a code, it is a major part of legal education, has had an extensive development in Chile since the first Civil Code was promulgated in 1855, it follows a long standing French civil law tradition, and is one of the most academically developed areas,⁸⁷ the legal complex feels that there is less freedom for innovation and creative interpretation. This situation is very different from Telecommunications regulation (and Competition Law), in which there is less academic commentary, the area is quite new, and rules are far less precise than those from the Civil Code. As such case law is, in relative terms, more important in this area because judicial actors are usually dealing with situations that have not been explored before either through judicial decisions or academic commentary.

Another issue emphasized by interviewees was a sort of ‘obligation to decide’ in cases in which the legislation was indeterminate. A Supreme Court Justice stated that ‘in these cases [economic regulation], if the legislator is ambiguous and leaves a margin, giving flexibility to judges, we have to decide’.⁸⁸ This ‘obligation to decide’ statement could be argued to be a different dimension of activism, one that is not driven by personal convictions but rather as a sort of ‘guardian’ of the legal system, to assure that it is clear.

⁸⁷ In relation to the importance of legal scholars, see: John Henry Merryman and Rogelio Perez-Perdomo, *The civil law tradition : an introduction to the legal systems of Europe and Latin America* (3rd edn, Stanford University Press 2007), 56.

⁸⁸ Interview with a former or current Supreme Court Justice (November 6th, 2013).

It should be noted that those that viewed indeterminate legal provisions as an opportunity to introduce their own preferred policy views to the decision, were the same that argued that an ‘obligation to decide’ arises when there are indeterminate legal provisions. Although under Chilean constitutional law, judicial actors do actually have an ‘obligation to decide’, this decision could perfectly be to refer the issue back to the Legislature or a body within the Executive, and not necessarily one that creates a new rule.⁸⁹

Interestingly, a formalistic view on the nature of adjudication, -that judicial adjudication involves a neutral and objective evaluation of legislation and logical reasoning to reach a conclusion in a particular case⁹⁰- was largely absent from the interviews conducted. Although, one interviewee stated that the ‘democratic state is founded on the basis that an organ, the judiciary, resolves disputes and that ‘there’s no relation of the public policy making activities of economic regulation and the activities carried out by judiciary’,⁹¹ no one else affirmed something like this. In this way, a realist view⁹² of the judicial role is predominant within the

⁸⁹ Constitución Política de la República de Chile de 1980 (Constitution of Chile), Article 74 states that: ‘Once its intervention is requested in legal form and within its jurisdiction, it will not be able to excuse itself from exercising its authority, even if there is no law that resolves the legal dispute that was presented for its decision’.

⁹⁰ Frank B. Nelson Cross, Blake J., ‘Strategic Institutional Effects on Supreme Court Decisionmaking’ (2001) 95 *Northwestern University Law Review* 1437, 1439.

⁹¹ Interview with a former or current Supreme Court Justice (December 10th, 2013).

⁹² By ‘realism’ or ‘legal realism’, I am referring to the American legal realism which believed, based on their empirical findings, that judges do not decide cases based on the law, but rather decide cases on what they believe broadly as ‘fair’, this is Judges, in reality, make their minds up about a case not just with reference to legal rules. Rules, laws and precedent are just post-hoc rationalizations for decisions made not based on legal reasons. Martin P. Golding and William A. Edmundson, *The Blackwell guide to the philosophy of law and legal theory* (Blackwell 2005) 51.

judiciary and that is noteworthy as the Chilean judiciary has embraced formalist views of the law for long periods of time.⁹³

A look at the relevant decisions also confirms what most interviewees are affirming, indeterminacy is a relevant factor in *enabling* activist behaviour. An interesting case which illustrates the importance of vague legal provisions is *Demanda de Voissnet S.A. y requerimiento de la FNE en contra de CTC*, also known as ‘Voissnet I’.⁹⁴ Voissnet, a company in the business of providing IP telephone services (voice over the internet protocol or VOIP) accused CTC (now Telefonica) of performing a series of anticompetitive acts abusing its dominant position in order to affect its IP telephone business. Specifically Voissnet accused CTC, among other things, of (a) entering into contracts in which clients could not install equipment in CTC modems without their authorization; (b) blocking of IP addresses in which Voissnet services were given; and (c) agreeing contracts with ISP (internet service providers) in which they were prohibited from having IP telephone services.

CTC argued that it had the constitutional (property) right to use its network in any way it seemed fit, as it had made the relevant investments. Voissnet was acting as parasite on its network, enjoying the benefits from it without any of the investments. It also argued that the access to internet was not only possible through broadband and telephone lines but also through other technologies that were emerging (WiMAX for example) and thus CTC did not have a dominant

⁹³ See the next section for more details.

⁹⁴ This case is known as Voissnet I, because years later Voissnet presented another case which is known as ‘Voissnet II’.

position in that market. Furthermore, CTC held that IP telephony was a public telephone service and thus should be subject to regulation, the same way all the other public telephone services are.

Two legal provisions which can be characterized as ‘indeterminate’ were at the centre of the dispute. First, the concept of ‘public service telecommunications service’ of the Telecommunications Law 1982 was under dispute as said law does not give a definition of it. The consequence of a service being considered of ‘public service’ was that it would have to comply with a series of rules which services that are not ‘public’ do not have to comply with. The second provision was the concept of anticompetitive behaviour of article 3 of the DL 211 which is the provision used to prosecute any anticompetitive infringement, including unilateral conducts.

The TDLC decided in favour of Voissnet.⁹⁵ What is most interesting nevertheless from a regulation point of view were two issues: First, it held that IP telephone services were not a ‘public telephone service’ and thus should not be subject to regulation as long as there was no explicit rule which makes that possible. The TDLC in this way gave an interpretation of what ‘public telephone services’ is, which is a concept used in the Telecommunications Law. Second, it held that CTC abused its dominant position and regulated the access to its essential facilities in order for IP telephone services to be given. Two vague provisions thus were interpreted by the TDLC.

⁹⁵ Demanda de Voissnet S.A. y requerimiento de la FNE en contra de CTC Sentencia 45/2006 TDLC TDLC.

CTC presented an appeal through a *recurso de reclamacion*. Even though the Supreme Court coincided with the TDLC in the abuse of dominant position finding and confirmed the decision in that part giving Voissnet access to CTC's network, it ordered that the rationale and analysis of whether the IP telephone services was a public telephone service to be removed from the decision as it held that the TDLC did not have the power to interpret the Telecommunications Law and thus determine whether a particular service was a 'public telephone service'.⁹⁶ This decision therefore limited the power of the TDLC to interpret the Telecommunications Law 1982 and thus the scope for judicial activism. Nevertheless, this has been the only time the Supreme Court has done this.

Indeterminacy was argued to be an enabling factor as it opens up the door for activism. In the next section another factor will be analysed, which under certain conditions may drive activism if enabling factors, such as indeterminacy, are present.

4. Public opinion- The importance of the 'will of the people'

Public opinion⁹⁷ was a factor that was not initially considered in Chapter 2 as a relevant factor, not because it was thought as unimportant, but because of

⁹⁶ Recurso de reclamación en contra de sentencia TDLC n°45/2006 Rol N° 6236-06 Supreme Court of Chile.

⁹⁷ By public opinion I'm referring to it in its plainest meaning, this is 'what most people think about something' P. H. Collin, *Dictionary of politics and government* (3rd edn, Bloomsbury 2004). Nevertheless it must be noted that in general it is 'an ill-defined concept, used in many ways, but perhaps most generally it refers to the approval or disapproval of publicly observable positions and behaviour, as expressed by a defined section of a society, and (usually) measured through opinion

perceived technical difficulties in determining how judicial decisions are actually influenced by public opinion.⁹⁸ Although this still is the case, it is very fascinating nonetheless to analyse, through this qualitative study, the interviewees' views on the issue as most thought that it *does* play a role of some importance.

The question of whether public opinion has an influence in activist judicial decisions is not a settled issue. The literature, mainly from the United States, argues that their Supreme Court is responsive to national majorities.⁹⁹ Some quantitative studies have also supported that there is a relation between what the public thinks and the decisions of that Court,¹⁰⁰ but outside the specific case of some courts in the US, the topic has not been researched in much depth.

The interviewees were asked about public opinion in two different senses. The first sense refers to public opinion in regard to particular cases, this is how public opinion pressures Courts in very specific situations; for example should company X be allowed to merge with company Y. A second sense refers to public opinion in a more general manner, not directly related to a particular case, for

polls'. John Scott and Gordon Marshall, *A dictionary of sociology* (3rd rev. edn, Oxford University Press 2009).

⁹⁸ For the case of Chile this would have meant to have conducted polls to determine the public opinion on a certain issue in order to compare the results with what judicial actors have decided.

⁹⁹ Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker Policy Making in a Democracy: The Role of the United States Supreme Court: Role of the Supreme Court Symposium, No. 1' (1957) 6 *Journal of Public Law* 279; Barry Friedman, *The will of the people : how public opinion has influenced the Supreme Court and shaped the meaning of the Consitution* (Farrar, Straus and Giroux 2009).

¹⁰⁰ William; Sheenan Mishler, Reginald; Norpoth, Helmut; Segal, Jeffrey, 'Popular Influence on Supreme Court Decisions' (1994) 88 *The American Political Science Review* 711, and Kevin T. McGuire and James A. Stimson, 'The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences' 66 *The Journal of Politics* 1018.

example, how does the general public view the treatment that corporations should get or deserve.

There were opposing views in relation to the role of public opinion (in the first sense) in judicial decisions. Most members of the Supreme Court and the TDLC coincided in holding that they were *not* influenced by public opinion. One competition tribunal judge exemplified this by stating that ‘the TDLC is completely immune to public opinion’,¹⁰¹ whilst a Supreme Court Justice argued that the ‘Court is not generally reactive to public opinion’.¹⁰² An important issue that did not come up in the interviews relates to how the Judges know what the public opinion is. The most plausible answer is that they acquire knowledge through diffuse and personal channels such as the press, conversations and personal experience. There is no public record that the judiciary performs or buys detailed public opinion studies.

The counsel for the telecommunications companies argued the point the other way around; Courts were thought to be ‘obviously influenced by public opinion’¹⁰³ and specifically the Supreme Court is believed to be ‘very aligned with public opinion’.¹⁰⁴ Nevertheless, a distinction was made by some between the Supreme Court and the Tribunal. As one internal counsel states, ‘the Supreme Court may be influenced by public opinion, the Tribunal not’, a view which was

¹⁰¹ Interview with a former or incumbent Judge of the Competition Tribunal (November 6, 2013).

¹⁰² Interview with a former or incumbent Justice of the Supreme Court (November 18, 2013).

¹⁰³ Interview with a former or current in-house Counsel of a telecommunications company (December 4, 2013).

¹⁰⁴ Interview with a former or current in-house Counsel of a telecommunications company (October 22, 2013).

shared by an external counsel that stated that his ‘impression is that for the Tribunal, everything slides off them, they only worry about the technical. In regard to the Supreme Court, it’s more difficult to know’.¹⁰⁵ This point towards a differentiation between the two; the TDLC is seen as more worried about technical issues and insulated from political events whilst the Supreme Court is seen as an entity which is permeable to them.

Looking at public opinion in the second, more general sense, there was substantially more agreement in regards to how much public opinion was important for the Court. One Supreme Court Justice stated that ‘the public cannot be ignored because when you exercise this function, hold this position, you are representing the people and they hold the sovereignty’.¹⁰⁶ The rest of the legal complex also believed the same, they think that ‘in the end, there’s permeability, they are people that live in the real world and are affected by it’, and that ‘the Court feels it can be the voice of the people’.¹⁰⁷ The political views of the public are thus considered to be of importance to judicial actors by most of the members of the legal complex.

As mentioned above there were very different views on the impact of public opinion in specific cases between those that are part of the Judiciary and the rest of the legal complex. It was not particularly surprising that Judges would defend

¹⁰⁵ Interview with a former or current external litigation counsel of a telecommunications company (December 3, 2013).

¹⁰⁶ Interview with a former or incumbent Justice of the Supreme Court (November 18, 2013).

¹⁰⁷ Interview with a former or current in-house Counsel of a telecommunications company (October 22, 2013). It should be noted that the rules of the Court do not give any formal role to the opinion of the public in regards to judicial decision-making.

that they are not influenced in specific cases by the public as admitting this would be conceding that the decisions they make are not their own but are actually largely determined by external pressures (such as public opinion).

What is noteworthy is that even Judges admit that public opinion, in the second sense, influences their decisions. This is in a way aligned with what the US literature establishes, this is, that judicial actors are responsive to public opinion but it is nonetheless quite astonishing that they would admit to this expressly. The expected response would have been a formalistic account of their role (i.e, 'we just apply the law and in that public opinion has no role to play'). This honest account can be the reflection of either a very mature, reflective judiciary that recognizes the external factors that influence their decisions or a judiciary that is not accustomed to being interviewed regarding their role and thus has not developed a clear 'party line' to answer these questions. My impression is that the latter is more likely. The judiciary in Chile is not used to being the subject of academic enquiry and thus has probably not reflected on how to best represent itself to researchers.

What can be concluded is that public opinion does play a relevant role as a factor that influences judicial activism in a general manner. I argue that it is a direct driver of judicial activism and this is clear by interviews that thought that public opinion *directly* influences the decisions judicial actors make. A factor which I argue fulfils a similar function as a direct driver, leadership, will be analysed in the following section.

5. Change of leadership in the Supreme Court

Another factor that was not considered as relevant in light of the literature review of Chapter 2 but that according to the interviews does have great importance is leadership inside the Court. By leadership here I'm referring specifically to intellectual leadership, of guiding the Courts decision towards a certain direction, not to a formal position (such as being the President) within the Court. Court leadership has been highlighted by the relevant literature as a factor in changing a Court's position in specific issues or in changing the political role it plays in a specific jurisdiction. For example, it has been attributed to the leadership of a few Justices of the Indian Supreme Court, the activist role it has played in protecting the poor and in promoting an agenda of social egalitarianism.¹⁰⁸ In Mexico, the radical shift of their Supreme Court from being a subservient organisation of the dominant party to playing an activist role in the development of a growing body of individual rights, has been accredited to a group of three judges.¹⁰⁹

The issue of whether leadership in the TDLC and the Supreme Court been relevant in Chile is thus important to assess. Most interviewees did not seem to think this was a great issue in the TDLC, and most of their answers focused in the Supreme Court and specifically in the Third Chamber of the Court (as this is the Chamber that decides on economic telecommunications regulation cases). The

¹⁰⁸ Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds), *Consequential courts : judicial roles in global perspective* (2013), 263.

¹⁰⁹ Monica Castillejos-Aragon, 'The Transformation of the Mexican Supreme Court' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds), *Consequential courts : judicial roles in global perspective* (2013).

period considered is in the post-Pinochet years in which an explicit intrusion of the Executive in judicial affairs and thus judicial independence has not been an issue.¹¹⁰

According to various interviewees leadership has been very relevant in what direction the third chamber has taken when deciding economic regulation cases. It seems that the last 10 to 15 years of history of the third chamber of the Court, in relation to decisions of economic telecommunications regulation, can be divided into two *eras* marked by the leadership of two Justices.

The first period can be characterized as a period in which legalistic reasons of any kind were given not to intrude in the economy, and to protect private property and entrepreneurship. As a Supreme Court relator states, ‘the position then was that if the decision had been taken by a technical body then the Supreme Court should not interfere in that decision. The Supreme Court would go no further’.¹¹¹ This period was led by Ricardo Galvez, a very conservative Justice which was seen as partial to Pinochet in his years in the Court of Appeals.¹¹² Things changed after Galvez retired in 2008. The leadership of the third chamber was taken over by Sergio Muñoz, the current President of the Court, and Pedro

¹¹⁰ We will not consider for the purposes of this analysis the Court as it was during the Pinochet dictatorship as a point of comparison for what is now as the comparison would be unfair. The Justices during that period were either chosen to be ‘lapdogs’ of the dictatorship or were subdued internally because of fear of repression. During those days leadership was an issue deeply interrelated with the government.

¹¹¹ Interview with a former or current Supreme Court relator (January 10th, 2014).

¹¹² <http://www.elmostrador.cl/pais/2005/12/21/ministro-enrique-tapia-fue-elegido-nuevo-presidente-de-la-corte-suprema/>, accessed march 5th, 2014. This is a newspaper note which tells the story of a disputed election for the President of the Court in which Galvez lost, and where Munoz played a relevant role in articulating his defeat.

Pierry, a well-known public law scholar and they have steered the decisions of this chamber, which decides most telecommunications regulation cases, in the opposite direction, towards an unfriendly terrain for large corporations. As one litigator puts it: ‘now if you go the Supreme Court representing a big company you start at a disadvantage’.¹¹³

Even though Court leadership was not initially considered as a relevant factor in determining whether a judicial actor engages in activism, it seems that it is in fact relevant, at least for the Chilean case. I must underline again that I’m not referring to a formal leadership. The President of the Chilean Supreme Court changes every two years, and although it is formally the leader of the Court during that period, in reality it is more of an administrative and diplomatic role. When I talk here about leadership I mean intellectual leadership. Many interviewees agreed that the strong shift in direction in the last few years, against big enterprises and in favour of consumers and the State (favouring the regulator for example) is due, at least in part, to the leadership exercised by two Justices (Pierry and Muñoz) inside the third chamber of the Court. What is quite astonishing is that being that all chambers of the Court sit in panels of five Justices; these two judges by themselves cannot control the outcome of the decisions. Nevertheless, I believe that they are able, through their intellectual leadership to convince other to vote in favour of the decision they believe is right.

¹¹³ Interview with a former or current external litigation counsel of a Telecommunications Company (December 3rd, 2013).

Although the literature in Chile regarding judicial behaviour is scarce, some have argued that certain strong personal leaderships have influenced the change in the past few years specially pointing to Justice Muñoz.¹¹⁴ This issue has even been brought up during recent discussions regarding the nomination to the Supreme Court of Judge Cerda, one of the few judges that stood up to Pinochet, and considered to be the intellectual left-wing leader within the judiciary. His recent confirmation as a Supreme Court Justice has led some to argue that with Justice Muñoz, Brito, and Pierry, this could be the start of a ‘new Supreme Court’ that could enthusiastically engage in judicial activism, although most of these comments have originated from conservative think tanks.¹¹⁵ It is worth noting that the nomination process involves the participation of the three branches of government. The Judiciary proposes five names, the Executive chooses one and the Legislature has to confirm the appointment. Traditionally the confirmation stage was quite depoliticized but in recent years this has changed, the process has become quite political and in practice what has happened is that the two major coalitions are taking turns in choosing Supreme Court Justices. This may open the door for more activism as judges with stronger (or more openly stronger) policy preferences are entering the court.

In a similar fashion to the last factor analysed (public opinion), leadership in the Supreme Court does appear to play a relevant role as a factor that influences judicial behaviour. Likewise I argue that this is a factor that plays a role as a

¹¹⁴ García García and Verdugo Ramírez, 64, 171. Although it is a book dedicated to judicial activism, they do not give a specific definition for judicial activism.

¹¹⁵ <http://www.latercera.com/noticia/opinion/ideas-y-debates/2014/04/895-575626-9-la-nueva-corte-suprema.shtml>, last accessed on May 2, 2014.

direct driver of judicial activism. This is because interviewees stated that they thought that leadership was directly related to a shift in the Courts decisions in the last few years in relation to how companies with substantial market power are treated. Whilst before the Court treated these companies, to some extent, with deference and protected them, now the situation is almost the inverse, and the Court seems to distrust them and favours the State and smaller competitors or consumers.

In this part of the chapter factors that were identified as *key* to explaining judicial activism in Chile were analysed. I have argued that they could be classified as driving factors such as leadership, policy views and public opinion. These factors have in common that they depend largely on individuals and the decisions they may take. As such, it could be thought that in two identical scenarios a direct driving factor will only trigger an activist decision if the particular person (or possibly a panel) makes the decision engage in judicial activism.

Factors can also be enabling factors such as judicial culture and the manner in which the specific legal provisions are drafted. These two factors in a way are more stable than direct driving factors, they do not change from one day to another nor do they depend of the decision of particular person in a specific case. The relationship between these two types of factors, enablers and drivers, is to some extent picked up by the relevant literature although a formal classification is not proposed. Neal Tate, for example, argues that even if a significant number of

‘facilitating’ conditions exist (I called them enabling factors), the personal will of judges to participate in policy-making is necessary.¹¹⁶

¹¹⁶ C. Neal Tate and Torbjörn Vallinder, *The global expansion of judicial power* (New York University Press 1995) 33.

D. Conclusions: Judicial activism in Chile explained through the interactions of various factors.

This chapter presented an analysis of original qualitative data in relation to key factors shaping judicial activism in economic telecommunications regulation in Chile. It first tackled the question of whether judicial actors in Chile were engaging in judicial activism, and most thought that they did. Thereafter the different factors that were assumed as important in light of the literature review of Chapter 2 were analysed.

A number of themes that have emerged from the analysis of the data can be highlighted as relevant. The first relates to the concept of judicial activism. Most interviewees, I conclude, are referring to what can be identified as a *political* dimension of judicial activism when they referred to the regulating or public policymaking role of judicial actors. By political I mean here not party politics or the likes but political because they see an expanded role for the judiciary. Nevertheless the contours of what judicial activism is in this dimension are not clear as it seems to be a grey area between what was called the *mere application of the law* and a purely political function.

A second theme that emerged is in relation to the factors that explain judicial activism. Not all factors assumed as relevant in light of the (mainly US based) literature review of Chapter 2 were actually important whilst others, such as public opinion and leadership, which were not considered emerged as

relevant.¹¹⁷ This leads to the conclusion that for the case of Chile the available literature does not explain satisfactorily what factors may explain judicial activism.

A very interesting third theme, also related to the factors that explain judicial activism, is that they operate in different manners in explaining the behaviour of judicial activism. I argued that they could be divided into playing roles in two different manners. First, there are those that are considered to be *direct* drivers of judicial activism, whilst in second place there are those that are considered to be *enabling* factors.

These three emerging themes are very relevant as they provide key issues that will likewise be analysed for the case of the UK in Chapter 5 and in the comparative analysis of later chapters.

¹¹⁷ I must highlight that the US literature does not refer in specific to the Chilean case. This literature was reviewed in Chapter 2 in order to find factors that were theorized as relevant for determining judicial activism in general and test if they could explain judicial activism in Chile.

CHAPTER 5

Judicial (non) Activism in Economic Telecommunications Regulation in the UK

This chapter presents findings based on an analysis of original qualitative empirical data regarding the role of judicial actors in the development of economic telecommunications regulation in the UK.

The purpose of this chapter is threefold. First, the chapter analyses whether judicial actors have a role in the development of economic telecommunications regulation. Two sources of data are used to answer this question: semi-structured interviews and final decisions issued by judicial actors. The key finding in regards to this question is that the Competition Appeal Tribunal is considered as being activist but only during some periods whilst other judicial actors, the Court of Appeals and the United Kingdom Supreme Court, are usually not considered as being activist.

Second, the data is also used to shed light on the question of whether the factors that were discussed as possible influences on judicial behaviour in the literature review presented in Chapter 2, actually can explain judicial activism or non-activism. I argue that three main factors constitute the pillars of judicial non-activism in the UK for the Court of Appeals, the United Kingdom Supreme Court and for some periods the Competition Appeal Tribunal in regards to economic

telecommunications regulation; these are judicial culture, the appeal and review structure and the costs of litigation. Additionally, these factors are argued to have different roles in explaining judicial activism, and are classified as either having a role as enabling or direct driving factors of judicial activism.

Finally, these key themes provide the basis for the comparative analysis in relation to Chile which will be presented in the following Chapter (6).

A. Overcoming Methodological Hurdles

The main focus in this chapter will be on the analysis of judicial decisions of the Competition Appeal Tribunal (CAT), the Court of Appeals and the United Kingdom Supreme Court (UKSC) and sixteen semi-structured interviews carried out in the UK from February 2015 to April 2015 in order to assess if judicial actors¹ in the UK have been engaged in judicial activism.²

The data gathered in the UK differs in two significant ways from the data gathered in Chile. In relation to interviews, access in the UK was more difficult than in Chile. This can be explained mainly because in Chile, a smaller country, I was part of the specific legal community, most of the people that I interviewed were at least acquaintances of someone I knew and in relation to Judges, and therefore I had close contacts to reach them. In the UK the situation was different, I was an outsider. Nevertheless, I performed 16 interviews. Although this is a slightly lower number than for the chapter on Chile (21), the data gathered provides interesting insights and I was able to cover most of the relevant actors.³

¹ The broader term 'judicial actor' has been chosen instead of 'courts' because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as 'courts' such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that are examined in the UK are the CAT, the Court of Appeals and the Supreme Court.

² I rely here on my working concept of judicial activism explained in greater detail in Chapter 2 as: the practice of developing economic telecommunications regulation by judicial actors. It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a new meaning. Looking at this issue from another point of view, judicial actors do not create new economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

³ Furthermore, I was able to reach data saturation, this is no significant new information came out in the last few interviews.

Access to judges was extremely difficult, but I was able to interview judicial assistants of the UKSC nevertheless to cover those actors.⁴

The second difference, which potentially address the smaller number of interviews, is that in the UK judicial decisions are in general drafted in a manner which allows for a much richer understanding of the thought process of Judges and Justices. In Chile, judicial decisions usually cite a specific law and state a decision based on that law, but the thought process and reasoning are usually absent, which makes it impossible (most of the time) to know from the decision itself what the reasoning process was. This is an issue picked up by Lord Bingham in regards to France, saying that decisions are ‘expressed briefly, with minimal reasoning’.⁵ Chile, another continental law country, follows that style of judicial decision making. In this way, the more reasoned judgements of British judicial actors supplement the interviews performed as they allow for a deeper understanding of the thought process which lead to a particular decision.

In relation to the interviews, four different groups of people were chosen. A difference that can be flagged up at this point is that unlike in relation to some of the factors researched in Chile, all these groups agreed generally about the issues that were discussed, such as whether a particular judicial actor engaged in judicial activism.

⁴ Although access to judicial assistants is not equal to judges, these judicial assistants work closely with Justices of the Supreme Court and have detailed inside knowledge of how the UKSC works and also of Justices personal views and opinions.

⁵T. H. Bingham, *The rule of law* (Penguin 2011) 44.

As explained above judges were not interviewed due to access problems (but their judicial assistants were). Nevertheless, I believe that the four groups of professionals chosen are complimentary and give a rich account of judicial activism in relation to economic telecommunications regulation.⁶ These members of the legal complex⁷ provide views from different angles of whether judges are activist from the perspective of key legal actors who have been involved in the relevant cases.

The first group were judicial assistants (current or former) of the UKSC. These assistants play an important role in the Supreme Court, as they are, as their title states ‘assistants’ to the most senior members of the judiciary in the UK. Although the information specific to telecommunications they could give was limited, because the UKSC has only decided one case in this area, they did provide

⁶ It should be noted that the specific area researched is identified the purposes of this thesis, as ‘economic telecommunications regulation’. This is to establish that it will focus on issues which can be characterized as ‘economic’ in nature, such as price regulation or market structure.

By economic regulation I refer to: ‘to ensure fair prices and product/service quality through maintaining competition between economic actors. In the absence of competitive market forces, as in the case of monopoly operators, legal regulation---often in the form of specific statutory obligations---directly regulates pricing, access, and quality standards. It is particularly significant in areas of monopoly operators, such as utilities, supplying telecommunications, electricity, gas, water, and transport services’. Bettina Lange, Regulation, in: Cane, Peter and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press 2008).

Furthermore, it can also be defined as: ‘interventions which, among other things, impact on the structure of an industry (for example, by restricting the number of firms that be involved in the supply of a service, requiring separate entities to undertake different activities in a supply chain, or requiring that access to infrastructure facilities be provided to third parties) or which attempt to guide or control the behaviour of firms in terms of their decisions in respect of pricing, investment, quality and coverage of service, as well as the terms on which access is provided to other firms, including competitors’. Christopher Decker, *Modern economic regulation: an introduction to theory and practice* (Cambridge University Press 2014) 3.

⁷ The concept of ‘legal complex’, a term coined by Terence Halliday, Lucien Karpik and Malcolm Feeley, will be used to refer to the diverse legal occupations that were interviewed. All these actors have in common that they mobilize in relation to a particular issue (in this case Telecommunications regulation). The legal complex is constituted by judges, lawyers and other legally trained personnel who undertake legal work, including civil servants. Terence C. Halliday, Lucien Karpik and Malcolm Feeley, *Fighting for political freedom : comparative studies of the legal complex and political liberalism* (Hart 2007), 6-7.

extremely interesting insights into the general manner and processes which the Supreme Court Justices go through in deciding cases.

The second group were internal counsel of the different telecommunications companies. These were solicitors from the main mobile network operators. These solicitors, in general, are in charge of the 'day to day' running of the companies and specifically in the relations with the Office of Communications (OFCOM). The third group were external counsel, mainly from large law firms that have a specialized telecommunications group and litigators specialized in telecommunications. These act as external litigation counsel to the different telecommunications companies. This group includes external litigation solicitors and barristers instructed by the internal counsel to represent the different companies or government agencies before the Competition Appeal Tribunal (CAT), the Court of Appeals and the Supreme Court. Finally, the fourth group were officers and former officers from the telecommunications regulator, OFCOM.

The interviews focused on the work of the interviewees in relation, mostly, to economic telecommunications regulation cases. There was no time restriction regarding which decisions they could recall or referred to as this was thought to allow them to refer to those they thought they were most important. Additionally, it is worth highlighting that the focus on the review of the decisions (documents) was very similar but concentrated on the decisions of the last 12 years (2003), the year in which both the CAT and OFCOM started functioning.⁸

⁸ Although this is the case, as was noted in Chapter 3, the Office of Telecommunications (OFTEL) was created in 1984.

All of these interviews, and judicial decisions, are used in the following sections to better understand what interviewees believe judicial activism is, whether interviewees believe that judicial actors have been judicially activist and what factors play a role in explaining activist behaviour.

B. Activism and Non-Activism in the Development of Telecommunications Regulation

A preliminary question that needs to be answered, before enquiring into which factors are particularly relevant in explaining activist (or non-activist) behaviour, is whether judicial actors are in fact activist. In order to answer this question, I will divide the answer into the CAT on one hand and the Court of Appeals and the Supreme Court (UKSC) on the other. I do this because, in general the Court of Appeals and the UKSC are not perceived as being activist by interviewees whilst the CAT, in some periods is perceived to have been. Many interviewees highlighted this difference, for example by stating that they ‘would distinguish between the CAT and the other courts’.⁹

It must be noted that due to the ‘value loaded’ nature of the term judicial activism¹⁰ and because it has many different meanings,¹¹ this term was not used in the initial parts of the interviews. It was thought that if the term was used then interviewees may possibly react to it; losing focus of the question that was being asked. Instead, interviewees were asked about the role that judicial actors have played in the development of economic telecommunications regulation, how deferential they thought judicial actors were (to regulators and specialized courts), and what factors they thought influenced judicial decisions in this area. No working definition of these concepts was given to the interviewees. Interviewees

⁹ Interview with an external solicitor, March, 2015.

¹⁰ Stefanie A. Lindquist and Frank B. Cross, *Measuring judicial activism* (Oxford University Press 2009).

¹¹ Stefanie A. Lindquist and Frank B. Cross, *Measuring judicial activism* (Oxford University Press 2009).

were nevertheless asked at the end of the interviews what they thought judicial activism meant (in the context of economic telecommunications regulation) if they had brought the term up during the interview, which marks a difference to the questions presented to interviewees in Chile.

1. Judicial non-activism in the apex of the judicial pyramid

The Court of Appeals and the Supreme Court are considered by interviewees to have no role in the development of economic telecommunications regulation and could therefore be considered that they do not engage in judicial activism. Some interviewees highlighted this point by stating, for example, that they ‘don’t think the courts have any real role in creating or producing the content of it [economic telecommunications regulation], they just apply whatever regulation there is’¹², that ‘in general the courts have very little role’¹³ or that ‘Courts don’t see themselves as having a role in telecommunications policy.’¹⁴

These answers are related to what has been referred to as the ‘judicial legislation’ element of judicial activism. This refers to the cases in which judicial actors make decisions which not just have an unintended relatively minor impact in economic telecommunications regulation but rather they have an impact on the regulatory policy itself; it involves issues of regulatory preference. Although many interviewees emphasized that they thought courts played no role in policymaking,

¹² Interview with a Barrister that has acted for a Telecommunications company, March, 2015.

¹³ Interview with a senior OFCOM solicitor, February, 2015.

¹⁴ Interview with a senior OFCOM solicitor, February, 2015.

none was very clear about what they thought policy means and how this concept can be differentiated from regulation, interpretation or adjudication.¹⁵

It is interesting to note that when asked about the role judicial actors have in the development of economic telecommunications regulation, most interviewees in general talked about this ‘judicial legislation’ dimension. One former judicial assistant of the Supreme Court for example stated that ‘if there appears to be a hole, I don’t think the courts would fill that void, they would simply say so’¹⁶ whilst an OFCOM officer added that ‘the courts don’t see themselves as having a role in telecoms policy’ and that they ‘are quite careful, particularly recently, to separate questions which are policy and say that is OFCOM’s job. If it is a matter of regulatory preference, they say that is something they will not get involved in’.¹⁷

As such, most interviewees highlighted that there is a distant relation between policymaking and what is perceived as the ‘proper role’ of the judiciary which in general is seen as ‘only interpreting the law’,¹⁸ using a ‘black letter law approach’.¹⁹ This reflects that there is a perception that judicial actors in general

¹⁵ Although these three concepts could be considered to be different, I believe that most interviewees used them interchangeably. I did not ask this directly so it is only my impression. If these concepts are looked at as different ones, one way of understanding them as different could be to state that adjudication is the less “expansive” role a Judge can take (for example applying a rule which is very clear to a particular situation), interpretation can be taken to be more expansive (for example choosing amongst different established interpretations to a particular rule) whilst regulation could be seen as the most expansive (for example, creating a new interpretation for a rule in a manner such that it amounts to a new rule which the policymaker had not decided about).

¹⁶ Interview with a former UKSC judicial assistant, March 2015.

¹⁷ Interview with a senior OFCOM solicitor, February, 2015.

¹⁸ Interview with a solicitor of a Telecommunications company, March 2015.

¹⁹ Interview with a former judicial assistant, March 2015.

act in a restrained manner and shy away from what they may perceive as policymaking and thus the judicial activism.

Moreover, those interviewees that were asked directly to explain what they understood judicial activism meant, also referred directly to this specific element of activism. For example one judicial assistant highlighted that judicial activism in her view was ‘having a policy role, taking the law beyond simply applying facts to the law, it is giving a view’²⁰ whilst another one thought that activism meant the ‘willingness to apply a purposive interpretation to statutes, to stretch the language of statutes to achieve what they perceive to be the purpose of statutes’.²¹

A review of a decision of the Court of Appeals and the UKSC exemplify well and confirm the views of interviewees, they are not focused in having a role in policy issues. In *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents)* [2014] UKSC 42,²² the only decision taken by the UKSC in relation to economic telecommunications regulation, the Court strongly opposed the view taken by the Court of Appeals which held that ‘dispute resolution is a form of regulation in its own right’.

Although the Court of Appeals and the UKSC in general are considered as not being activist, the situation with another judicial actor, the CAT, is different.

²⁰ Interview with a former judicial assistant, February 2015.

²¹ Interview with a former judicial assistant of the UKSC, March, 2015.

²² *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents)* [2014] UKSC 42.

2. The CAT: a case of periods of judicial activism

Unlike the Court of Appeals and the UKSC, the CAT is considered by some interviewees as being activist, but only during certain periods of time. As was pointed out in Chapter 3, the CAT is a relatively new judicial actor which started operating in 2003 and reviews most decisions made by OFCOM which is also a relatively new organisation, created also in 2003. The appeal structure as a factor which may play a role in judicial activism will be analysed in greater detail in the following Section C (2).

The possibility that the CAT could engage in judicial activism, assuming a role as a regulator, is not something new as the British government has been worried about this possibility in the past. For example, this concern was highlighted in a 2013 consultation process that was aimed at amending the current appeal structure of decisions taken by OFCOM and other regulators. In that document the government emphasized its concern by stating that ‘there is a risk that appeals become the de facto route for decision-making, with appeals bodies being asked to make detailed regulatory judgements, effectively becoming a second regulator.’²³

Interviewees nevertheless highlighted that such judicial activist behaviour was present only in parts of the CATs history. As one solicitor stated ‘initially the CAT was quite activist, no one knew how the system was supposed to work’ and it had a ‘we know better attitude towards OFCOM’.²⁴ Other interviewees highlighted

²³ Innovation and Skills Department for Business, *Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform* (2013) 10.

²⁴ Interview with a former OFCOM officer, March 2015.

that initially the CAT was not deferential at all towards OFCOM and was constantly seeking to find the 'best' possible solution and could overturn OFCOM even if their decision was not particularly wrong.

Gradually over time the attitude of the CAT has changed 'towards a point where they defer towards the regulator unless there is some clear evidence that something has gone wrong'²⁵, and the attitude now is that the 'CAT no longer says that OFCOM has to get optimal solution, it just has to get to a solution that is broadly right where they haven't misdirected themselves.'²⁶ As such, the CAT has taken an approach to decision-making similar to that of the Court of Appeals and the UKSC.

There are two very noteworthy aspects that can be pulled out from the general perceptions expressed by interviewees in regards to the activist nature of the CAT. The first one that has already been highlighted, is that judicial activism is an aspect of judicial decision-making which is not static, but which rather can change in time. A judicial actor that is activist in one moment of time is not necessarily activist in the future or was not necessarily activist in the past.

The second is that when interviewees refer to activism in relation to the CAT, they talk about activism in a slightly different manner than when they refer to the non-activism of the Court of Appeals and the UKSC. There is a reference to non-deference to other branches of government. When asked what they thought

²⁵ Interview with a former OFCOM officer, April 2015.

²⁶ Interview with a solicitor for Telecommunications company, March 2015.

activism meant in this context, interviewees highlighted implicitly this element of activism.

A former OFCOM solicitor stated that by activism he ‘means the degree to which the Tribunal feels it ought to defer to the regulator on matters which fall within the regulators responsibility but which the Tribunal is also required to have a view of its own in light of the merits review’²⁷ or ‘how willing or unwilling is a particular judge to listen to evidence that is on the boundary where OFCOM actually got something wrong or if the Judge just has a different view about the probative value of particular evidence or the significance of particular facts’.²⁸

After exploring the question of whether judicial actors in the UK engage in judicial activism it seems important, in the next section, to explore the factors that explain judicial activism and non-activism.

²⁷ Interview with a solicitor a former OFCOM solicitor, March 2015.

²⁸ Ibid

C. The Three Pillars of Judicial (Non) Activism in the UK

In this section, the main factors that were found to explain a general lack of judicial activism or non-activism of British judicial actors will be presented. I must highlight that not all judicial actors fit this explanation at all times. The main judicial actor in regards to economic telecommunications regulation litigation is the CAT and was explained before, although it has generally been deemed as being non-activist, during some periods it has been perceived to play an activist role.

I identify three main factors that have a role in explaining this divergent outcome: the attitudes judges have towards their role (an aspect of judicial culture), the resources for litigation, and the appeal and review structure. These are what I call the ‘pillars’ of judicial non-activism in the UK.

As in Chapter 4, I argue that these key factors play two different roles in explaining judicial activism. First, there are those that are directly linked to judicial activism, that have an immediate proximity to it and I will call them *direct driving* factors. The others, are those that play a role as what I call *enabling factors*, this is factors that make it possible for direct driving factors to operate. This classification will be further explored below in relation to each factor analysed and I highlight this here as it will also be a key issue that informs the analysis for the comparative Chapter 6.

1. A conservative judicial culture

Judicial culture was one of the factors considered relevant in parts of the literature discussed in Chapter 2 in explaining activist behaviour by judicial actors. Interviewees agreed significantly in regards to the impact of this factor. A division must be made nonetheless which has already been highlighted before; most interviewees thought that the ‘regular’ judiciary, this is the Court of Appeals and the UKSC should be separated from the CAT as they were perceived to have different cultures. One interviewee highlights that ‘there is greater variation [of views] in the CAT than in the Court of Appeals and the reason for that variation is very simple, different makeup of members of the tribunal with some of them being judges and other economists or business experts’²⁹ whilst another pointed out that ‘the Tribunal sits with economics trained people in the panel and as a result they are more willing to get stuck into expert questions, which the [regular] Courts will go nowhere near.’³⁰

It is interesting to stop here and analyse briefly how the British judiciary has been portrayed in the relevant literature. The English literature in regards to judicial behaviour (and activism) is considerably more developed than the Chilean literature on the subject, but it is worth noting that it is not particularly abundant when compared to the literature in the United States. This is important to highlight in order to acknowledge that the English literature is rather limited in the study of judicial behaviour.

²⁹ Interview with an external counsel for Telecommunications companies, March 2015.

³⁰ Interview with a former UKSC judicial assistant, March 2015.

The literature can be clustered into, broadly speaking, two different groups. First, studies on judicial behaviour which could be labelled as descriptive whether they are of doctrinal nature such as Dickson³¹ or historical such as Stevens.³² The second group could be labelled as more political science oriented. In this group we find critical (Marxist) studies of the judiciary such as the work of Griffith,³³ qualitative empirical studies such as Paterson's work,³⁴ and more quantitative empirical studies such as those of Robertson³⁵ or Hanretty.³⁶

It is not easy to find a common thread in all this literature as, even though their common subject of study is the judiciary, their approaches and what they study in particular within the judiciary is very different. As such, for example Paterson's research on the House of Lords is primarily focused on how the Lords behave and interact with each other, government, parties and other courts but does not go into detail as to the outcome of the cases or any ideological trends, for instance.³⁷

³¹ Brice Dickson, 'Judicial Activism in the House of Lords 1995-2007' in Brice Dickson (ed), *Judicial activism in common law supreme courts* (Oxford University Press 2007).

³² Robert Bocking Stevens, *The English judges: their role in the changing constitution* (Hart 2002).

³³ J. A. G. Griffith, *The politics of the judiciary* (5th edn, Fontana 1997).

³⁴ Alan Paterson, *The law lords* (Macmillan 1982); Alan Paterson, *Final judgment : the last law lords and the Supreme Court* (Hart 2014).

³⁵ David Robertson, *Judicial discretion in the House of Lords* (Clarendon Press 1998); David Robertson, 'Judicial ideology in the House of Lords: A jurimetric analysis' 12 *British Journal of Political Science* 1.

³⁶ Chris Hanretty, 'Haves and Have-Nots before the Law Lords' 62 *Political Studies* 68 Chris Hanretty, 'The decisions and ideal points of British Law Lords' 43 *British Journal of Political Science* 703.

³⁷ It should be noted nevertheless that in the *Law Lords* Paterson does enquire into issues such as 'fairness' in decision-making but such issues are not at the core of his book and theoretical account about judicial decision-making.

A common theme that can be found though in different studies is that judicial actors in the UK are not considered as conservative in regards to their role. That is, they do not see themselves as having a limited role in regards to issues that could be labelled as *policy* related. In this way Stevens for example asserts that courts have not been shy in deciding (and in fact regulating) moral and social issues:

The courts also showed a willingness to reshape some aspects of the welfare state, taking on issues about how far local health authorities were entitled to take cost into account in paying for certain treatments or how far financial considerations could be taken into account by local authorities in closing nursing homes.³⁸

Although he points out that this is a somewhat recent trend of becoming ‘engaged in moral issues such as turning off life support systems, which an earlier generation of judges would have eschewed’.³⁹

In a similar manner Dickson also highlights that in certain areas of law judges have not been at all conservative (in relation to their role) and in fact have made significant developments in the law:

(...) they have also been actively developing the law by abandoning outdated principles and adapting the law to modern conditions. But the record is patchy. In some areas (eg tortious liability for psychiatric injuries, and the law on homicide) they have been unadventurous, even though there are few if any statutory barriers to their changing established rules.⁴⁰

Robertson, in a different manner, highlights that the Law Lords, in a way usually assume a regulatory policymaking role:

A phrase one hears over and over again when the Law Lords discuss their work, either in private, or even in their interjections, and questions

³⁸ Stevens (n 32) 74.

³⁹ Ibid 73.

⁴⁰ Dickson (n 31) 414.

during oral arguments is ‘how can we make this work’? They react to statutory construction in terms of finding definitions that ‘will make the statute work’; they deal with claims against public institutions, the police, education authorities, housing authorities, in terms of facilitating the overall functioning of those bodies. (...) Throughout every area of law there is this emphasis on fine tuning social institutions to facilitate their general working.⁴¹

Interviewees had different views than those portrayed by the literature although it should be stressed that none of the literature refers specifically to judicial decisions made by the CAT, the Court of Appeals and or the UKSC in relation to economic telecommunications regulation or even economic regulation in general. Some interviewees thought that judges (speaking in a generic manner) had a conservative approach towards their role. One interviewee pointed out that ‘in general they apply a black letter approach. If [a case] creates a problem, it is for Parliament to sort it out, not for the judges’⁴² whilst another stated that ‘they are quite conservative about what they considered to be the proper remit of the rule of law’.⁴³

It was not absolutely clear what interviewees meant when they used the term ‘conservative’ but in general I can conclude that the conservative approach was mainly explained as a reluctance of judicial actors to get involved in issues related to ‘policy’, which for the judges I believe is assuming a rule creating (quasi legislative) or regulatory policymaking role. It is therefore not a political ideological conservatism.

⁴¹ Robertson (n 35) 20.

⁴² Interview with a former UKSC judicial assistant, March 2015.

⁴³ Interview with an external telecommunications solicitor, April 2015.

It is interesting to enquire into the reasons given by interviewees of why judicial actors act in a ‘conservative’ manner. One explanation was that interviewees thought they did not want to get involved in policy because judicial actors thought they lacked the necessary expertise. An external solicitor for a telecommunications company stated that ‘the legal culture recognizes that they are not best placed to engage in market based economic decision making’⁴⁴ whilst another emphasized that ‘because of the importance of economic evidence [in telecommunications cases], appellate tribunals are very reluctant to overturn decisions which have been made either by the specialist regulator or by a specialist tribunal which is reviewing the work of a specialist regulator’.⁴⁵

This respect for expert decision apparently is not particular to telecommunications regulation but rather seems a general approach by the Court of Appeals and the UKSC by which decisions of regulators and ‘expert tribunals’ should be respected. As such, for example, Baroness Hale has emphasized the need of superior courts to respect the decisions of specialized tribunals many times. Although this has never been said specifically in a telecommunications regulation context, the general principle can be argued to apply to this area of law also as it is similarly a ‘complex area of law’. She has stated for example in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 that:

30. (...) This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of

⁴⁴ Interview with an external telecommunications solicitor, April 2015.

⁴⁵ Interview with a former UKSC judicial assistant, March 2015.

caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right (...)

In the particular area of economic telecommunications regulation, an interviewee highlights that Parliament recognizes the technical limitations of Courts by stating that ‘in the UK there is an appreciation of the limits of the technical competence and knowledge Judges can have and this is explicitly recognized as price control matters fall within the ambit of the CMA Panel’.⁴⁶ This refers to the rule that gives the CMA Panel jurisdiction when the CAT decides that an issue is related to price control.⁴⁷

Other interesting explanations pointed towards wider reasons. One of them was that English judicial actors are conservative because ‘there is a greater political consensus, cross partisan consensus, that wants UK regulators to appear effective and Courts are very aware that cutting the ground underneath regulators making them look foolish or ineffective is generally politically not well seen’.⁴⁸ Courts are perceived to be part of this consensus and thus are very careful in not undermining regulators excessively. This is an interesting view because it places Courts as part of the political system rather than in a purely judicial control role.

Another reason given was that ‘the UK business in general does not encourage litigation’.⁴⁹ This view, that businesses are generally not keen on litigating nevertheless takes us to a ‘chicken or egg’ situation because it is very difficult to determine whether the business culture actually influenced the judicial

⁴⁶ Interview with a former senior officer for a Telecommunications company, April 2015.

⁴⁷ Section 193, Communications Act 2003.

⁴⁸ Interview with a former senior officer for a Telecommunications company, April 2015.

⁴⁹ Interview with a former senior officer for a Telecommunications company, April 2015.

culture or whether the ‘conservative’ judicial culture actually created a business culture that is averse to litigation. One solicitor believes that the latter is more likely, she states that ‘the more you have a history of the judiciary being like that [conservative], the more businesses are reluctant to go down a particular route of challenge because there are few stories of successful challenges in that particular sector’.⁵⁰

In regards to what function this factor fulfils, I argue that judicial culture is (or could be) an *enabling* factor as it is not a direct driver of judicial activism but rather may create the conditions for direct driving factors to operate. In this case, the *conservative* judicial culture does not enable judicial actors to engage in judicial activism. In the next section, the appeal structure which determines under which circumstances judicial actors may intervene will be reviewed.

2. A (partly) unclear appeal structure

One factor that was not considered as relevant in light of the literature review that can be found in Chapter 2, was the appeal structure of the telecommunications regulation regime. The difference in the structures between Chile and the UK was (nevertheless) flagged as a potential difference that could explain judicial activism in Chapter 3.⁵¹

There are two separate issues that are worth exploring in greater detail, and again the CAT must be separated from other judicial actors. The first is

⁵⁰ Interview with an external solicitor for a Telecommunications company, April 2015.

⁵¹ See page 97 *infra*.

related to the appeal of OFCOM's decisions. The English legislation implemented the EU Framework Directive and in Section 195(2) of the Communications Act 2003 which considered the principle contained in Article 4 of that Framework Directive which mandated Members States to introduce a rule in their national legislation by which parties would have a right to an appeal in which the merits had to be considered.⁵²

This was quite new for English legislation and its legal community and according to some interviewees there was no real clarity about what appeal on the merits actually meant.⁵³ The issue of what 'on the merits' actually means has been a continually disputed aspect in many cases. As Read and Townsend point out, 'barely an appeal hearing [before] the Competition Appeal Tribunal seems to take place without someone raising the perennial argument as to what exactly is an "appeal on the merits", the test set out by statute for such appeals'.⁵⁴ Initially, an interviewee pointed out that 'in the early years you saw relatively little litigation

⁵² Article 4, number 1: Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise. Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33(Framework Directive).

⁵³ The uncertainty regarding this issue is still very present and this can be seen in the fact that the Government has tried to amend the appeal structure and delimit what the appeal 'on the merits' means for quite some time through public consultations, none of which have actually reformed this structure. The most recent attempt was done through a consultation in which the government proposed that the 'appeal on the merits' rule should be taken closer towards a judicial review type of standard. Department for Business n (

⁵⁴ Graham Read Townsend and John, 'Reforming Communications Act appeals: a new ERRA?' Communications Law 47.

when the industry was coming to grips to what OFCOM was and how it acted'⁵⁵ but that tendency shifted a few years after and the number of appeals went up significantly. During this increase of appeals 'the standard of review [employed by the CAT] was that OFCOM should have gotten *the* right answer and not *a* reasonable answer amongst possibilities'.⁵⁶

This type of approach by the CAT is thought to have 'incentivized litigation' as 'companies saw litigation as a second go'⁵⁷ if OFCOM's decision was not exactly how they thought it should have been. This is a period where the CAT is considered to have been activist, although it should be emphasized that it was only temporarily activist.

This tendency changed through the years (although a single event cannot be pinpointed as the turning point) and the CAT started being more deferential to OFCOM and went from trying to impose *the* right decision it thought OFCOM should have taken, to a position to where it just looks at whether OFCOM 'got a solution that is broadly right and they haven't misdirected themselves, even if the CAT thinks there is a better solution'.⁵⁸ As one interviewee said, 'in a number of recent cases, the CAT has recognized that there is an area where OFCOM has discretion and therefore there's no reason to overturn their decisions'.⁵⁹

⁵⁵ Interview with a senior OFCOM officer, February 2015.

⁵⁶ Interview with a former OFCOM solicitor, February 2015.

⁵⁷ Interview with a senior OFCOM officer, February 2015.

⁵⁸ Interview with an external legal counsel for the Telecommunications companies, March 2015.

⁵⁹ Interview with a senior OFCOM officer, February 2015.

There are three different reasons for this according to interviewees. The first is that within the period in which the CAT was ‘activist’, OFCOM started making better decisions, more robust decisions legally and a natural consequence of that was that the CAT was unable to interfere as much. One solicitor pointed out that the ‘CAT is increasingly deferential because OFCOM has gotten better’.⁶⁰

The second reason perceived by interviewees was that the CAT started to think that they were getting too many cases, ‘there were too many telecoms cases and they were taking too long to resolve and what started out as a role of discipliner of OFCOM, [led] operators to presume that they could appeal everything that OFCOM said and the CAT was not able to cope with that’.⁶¹ This point was also seen by another interviewee as an institutional fatigue issue (for the CAT), because ‘the first time they found it interesting, challenging, but by the third time the attraction starts to wear thin and they [the CAT] may start to think that they have better things to spend their limited time and resources on’ (other cases presumably).⁶²

Finally, some believe that the change in activist behaviour of the CAT was because the Court of Appeals ‘reprimanded’ the CAT for being too interventionist. In *Floe*

⁶⁰ Interview with an external legal counsel for a Telecommunications company, April 2015. See for example as a deferential judgment: *TalkTalk Telecom Group Plc v Office of Communications* [2012] CAT 1. Section 118, ‘For the reasons we have given, it is our unanimous conclusion that OFCOM reached the correct decision when it concluded, in the WBA Charge Control Decision, that there had been no material change within the meaning of section 86(1)(b) of the 2003 Act between the date of the WBA Market Power Determination and the WBA Charge Control Decision’. Also: *British Telecommunications Plc v Office of Communications* [2012] EWCA Civ 1051.

⁶¹ Interview with an external legal counsel for a Telecommunications company, April 2015.

⁶² Interview with a former senior officer of a Telecommunications company, April 2015.

Telecom Ltd v Office of Communications [2009] EWCA Civ 47, the Court of Appeals stated that:

(...) that a specialist tribunal established to adjudicate on disputes should ensure it was not pressured by parties or interveners or critics to yield to the temptation of giving generous general advice and guidance on matters it was not intended, qualified or equipped to do, since more harm than good could be done by deciding more than was necessary for the adjudication of the actual dispute (...) ⁶³

The uncertainty regarding how this appeal ‘on the merits’ rule works has thus taken the CAT during some periods to be considered more ‘activist’. Nevertheless, the explanation of why this rule has been interpreted in different manner is even more important and that links back to judicial culture. It seems that although, at times, the CAT has fallen out of the natural ‘conservative’ path of the English judiciary, for various reasons it has now fallen back in line.

The second issue is regarding the review of the decisions made by the CAT further up the appeal structure. As was explained in Chapter 3, parties can request the Court of Appeals to review CAT’s decisions but this is an appeal that is not on the merits but rather ‘on a point of law’. ⁶⁴ Court of Appeals decisions can then be appealed, also on a point of law, to the UKSC but this rarely happens. Only one case has been decided by the UKSC. ⁶⁵

Most interviewees agreed that the appeal structure was one of the reasons that explained non-activism of judicial actors. One interviewee stated that ‘you

⁶³ *Floe Telecom Ltd (In Administration) v Office of Communications* [2009] EWCA Civ 47, Bus LR [2009] 1116.

⁶⁴ S. 196, Communications Act 2003.

⁶⁵ *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others (Respondents)*

wouldn't expect most cases to go on appeal on a point of law, it will be only be those cases in which you might believe that the CAT got a point of law wrong and of course you can't really bring those appeals in practice unless your advisors tell you that there is a possibility for success'.⁶⁶

Furthermore, others point towards additional 'burdens' that must be supported if a party wants a decision of the CAT reviewed. An OFCOM officer explains it like this: 'At the CAT there is no permission stage so you have a right to appeal. For every stage after that there is the need to ask for permission and you need to convince the court that there is an appeal to be made'.⁶⁷ In this way the appeal structure makes it harder for cases to reach the Court of Appeals and the UKSC both because of the nature of the appeal (an appeal on a point of law is narrower than an appeal on the merits) and because there is a need to justify the appeal to the Court of Appeals and the UKSC whilst this is not necessary before the CAT.

This factor can be classified as an enabling factor as an appeal structure that is permissive of appeals, this is that allows or even encourages appeals will create the possibility that more cases reach the upper parts of the judicial pyramid and therefore there will more opportunities for judicial activism to occur.

Furthermore, the decision to appeal or not is further influenced by the costs that a party that brings an appeal has to incur in and therefore the resources that can be allocated to litigate is also an important factor.

⁶⁶ Interview with an external counsel for a Telecommunications company, April 2015.

⁶⁷ Interview with a senior OFCOM officer, February 2015.

3. Limited resources for Litigation and the impact on possible cases

A factor that was considered as potentially relevant in Chapter 2 in explaining judicial activism was the resources parties could have to mobilize their interests in Courts. Following Charles Epp's theory which holds that the outcomes of judicial decisions are most fundamentally influenced by the divergent resources that different social actors can dedicate to litigation as repeat (and, thereby, probably strategic) players. Over time, these actors, in theory, are able to mould jurisprudence to their advantage.⁶⁸

The main explanation given by interviewees coincides to a point with Epp's theory; they stated that economic regulation litigation was expensive, it involved hiring high level economists and barristers, and smaller companies were simply not in a position to do this. A former judicial assistant asserted in this sense that economic regulation litigation 'is extremely expensive and risky',⁶⁹ whilst another highlighted that 'litigation in England is disgustingly expensive'.⁷⁰

Two related issues were flagged by a considerable number of interviewees. First, the impact of how expensive litigation is in the UK in making it available to

⁶⁸ David Erdos, 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand' (2009) 34 Law & Social Inquiry 95.

⁶⁹ Interview with a former judicial assistant of the UKSC, March 2015. In this quote I think the interviewee is saying that litigation is risky because there is a high chance of losing the appeal.

⁷⁰ Interview with a former judicial assistant of the UKSC, March 2015. Furthermore, taken this principle to another area of law (environmental law), it could be argued that the UK is even in breach of international obligations of access to justice such as those contained in the Aarhus Convention.

only a reduced number of entities and second, the effect of cost shifting rules in the willingness of parties to litigate.

In relation to the first point, it is important to highlight this characteristic of the English system which is absent in Chile. Only companies with ‘deep pockets’ are able to litigate in the UK. As one interviewee emphasized, ‘a relatively small number of companies have deep pockets and willingness to bring appeals. Bringing an appeal is not cheap. In the CAT it can be more expensive than the other courts because of the expert witness evidence and long cross-examinations’.⁷¹ Small companies, which in the case of Chile were one of the driving forces of litigation which led to judicial actors deciding on regulatory policy issues, generally do not appear in litigation at this level. According to an interviewee, ‘there’s a natural limit on the number of parties that can bring an appeal because of the cost’.⁷²

The second issue that was commented on by various interviewees was the role that the rule that regulates who pays the legal fees of the winning party has. In the UK, the legal fees of the winning party are paid by the party that loses, this is usually known elsewhere as the ‘English rule’.⁷³ This apparently has had a very significant impact on the decision parties take to litigate, especially in economic

⁷¹ Interview with a senior officer at OFCOM, February 2015.

⁷² Interview with a senior officer at OFCOM, February 2015.

⁷³ Avery Wiener Katz and Sanchirico Chris William, ‘Fee Shifting’ in Gerrit de Geest and Chris William Sanchirico (eds), *Procedural law and economics: Encyclopedia of law and economics* (Second edn, Edward Elgar 2012) 271; Herbert M Kritzer, ‘English Rule, The’ 78 ABAJ 54.

regulation cases in which the legal and professional fees are extremely high.⁷⁴ One UKSC judicial assistant highlights the point by stating that ‘it [litigation] is extremely expensive and risky as well. Because there is cost shifting, if you win you get your costs from the other side, but if the issue goes to court it is rare that you are sure you will win. Even big companies avoid it’.⁷⁵

This marks a significant difference with Chile. In Chile, the legal rule in this matter states that the losing party pays the legal fees of the winning party only if the losing party did not have ‘plausible reason to litigate’.⁷⁶ In practice, it is very rare, at least in economic telecommunications regulation cases, that this is applied and thus each party runs with the burden of its litigation costs.

What happens apparently in the UK is that litigation is driven mainly by the ‘bigger companies’ with deep pockets.⁷⁷ Smaller companies and NGO’s are in fact priced out of litigating.

This factor can be classified as an enabling factor as the high cost and risk of litigating influences on decisions of parties to litigate. Whether there is more or

⁷⁴ There are access to justice issues associated with the English rule. See, for example: Sherman, Edward F. "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice." *Tex. L. Rev.* 76 (1997): 1863.

⁷⁵ Interview with a former UKSC judicial assistant, March 2015.

⁷⁶ Article 144, Código de Procedimiento Civil (Law 1.552 of 1902).

⁷⁷ In OFCOM’s submission to the Department of Business, Innovation and Skills consultation on regulatory and competition appeals, they highlight that: The costs of regulatory appeals can be considerable, and appear to be increasing. Many of the appeals of Ofcom’s ex ante regulatory policy decisions are akin to large-scale commercial litigation, with multiple parties each with extensive solicitor and counsel teams, as well as scores of expert witnesses. The effect of a costs award against a regulator such as Ofcom if it loses an appeal can have a significant chilling effect on its future policy decision-making, in particular complex and controversial decisions that are in the consumer interest but not necessarily in the commercial interests of incumbent operators. See: <https://www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform>.

less litigation should have an impact on the number of cases that reach judicial actors and it is a relatively safe assumption to make that if there are more cases in courts there is more chances for them to engage in judicial activism and the opposite should be true if there are less cases ligated before courts.

D. Other (less) Relevant Factors

There are other factors that must be mentioned but which apparently have less bearing on explaining activist (and non-activist) behaviour of judicial actors in the UK than the three pillar of non-activism explained in the previous section. These are worth mentioning because all of them were identified as key factors in explaining judicial activism in Chile and as such it is interesting to understand why interviewees in the UK thought that these played a less relevant role in determining judicial activism. An understanding of them is necessary in order to perform the comparative analysis in the next chapter (Chapter 6).

Five factors were identified as being *key* in explaining judicial activism in Chile: judicial culture, public opinion, the manner in which the specific manner in which telecommunications regulation is drafted (and its indeterminacy especially), leadership and the specific personal policy views judges could have. Of those five, only one (judicial culture) was also identified as a key factor in explaining judicial non-activism in the UK although it was important precisely because the attitudes judges have towards their role (their judicial culture) is different. As such, four *key* factors for the case of Chile were thought to have no relevant importance in determining judicial activism or non-activism in the UK. Two of those factors, leadership and the manner in which telecommunications regulation is drafted, will not be reviewed here as interviewees and documents gave very little information as to their relevance or irrelevance in explaining judicial activism. The other two, and their relative importance in explaining judicial non-activism will be reviewed below.

1. The uninterested public with no opinion

Public opinion was a factor that was not initially considered in Chapter 2 as a relevant factor, not because it was thought as unimportant, but because of perceived technical difficulties in determining how judicial decisions are actually influenced by public opinion.⁷⁸ Nevertheless, since public opinion was considered to be relevant for the case of Chile,⁷⁹ it is necessary to make a reference to this factor for the UK.

In the UK, all interviewees expressed quite strongly that they thought that public opinion ‘plays no role’⁸⁰, that ‘it is very unlikely that this [public opinion] is relevant’⁸¹, and that is ‘pretty clear that they [Judges] are just there to hear the legal case as pleaded by the particular parties and will not be influenced by press comment or public comment’.⁸²

Interviewees also provided their thoughts regarding the reasons that could explain why public opinion is irrelevant for judicial decision-making in economic telecoms regulation in the UK. They emphasized a lack of interest of two groups. The first was that economic telecoms regulation cases are perceived to hold no interest for politicians, which is one group that could raise the public profile of a

⁷⁸ This would have meant to have conducted polls to determine the public opinion on a certain issue in order to compare the results with what judicial actors have decided.

⁷⁹ See Chapter 4, Section C (4).

⁸⁰ Interview with an external solicitor for a telecommunications company (April, 2015).

⁸¹ Interview with a senior OFCOM officer (February, 2015).

⁸² Interview with an external solicitor for a telecommunications company (April, 2015).

case and get the public interested in it. One former advisor from a telecoms company noted that ‘I can’t think of a decision the CAT has looked at that politicians would care about’.⁸³

Litigation in this area was also thought not to be of interest to the public, and this was thought to be because in many cases ‘litigation is between bigger companies and usually about how money is shared between them’⁸⁴ and because ‘economic regulation is really difficult to understand’.⁸⁵

The reasons of why there is a lack of interest of the public and politicians point first towards a perceived need of expertise to understand economic telecoms regulation, an expertise most people are thought to lack and therefore are unable to critically engage with litigation in this area. Second, there is a perception that, at least part of the litigation, involves disputes among private companies that have no impact in the public. Although these reasons may be true, it is interesting to note that politicians or interest groups are unable to ‘translate’ the importance of some litigation on economic telecoms regulation to the general public so everyone can understand it.

It is interesting to note that this is a very different scenario to the one found in Chile where public opinion was thought to influence judicial decisions. The reasons that may explain this ‘distance’ from the public with decisionmaking in

⁸³ Interview with a former advisor for a telecommunications company (April, 2015).

⁸⁴ Interview with a former OFCOM senior officer (March, 2015).

⁸⁵ Interview with an external solicitor for a telecommunications company (April, 2015).

economic telecoms regulation could be thought to stem out from the three factors already highlighted as the pillars of judicial non-activism in the UK.

Litigation seems to be less accessible than in Chile and that may be a reason why the public does not have an opinion on these cases. Nevertheless, it is interested to note that this is not the only factor which was relevant in Chile that is not important in the UK. In fact the policy views of judges seem to have no role in explaining judicial activism and non-activism in the UK, but for different reasons than public opinion, as will be explained in the following section.

2. The relative unimportance of economic policy views

The policy views of the different judicial actors were also assumed to be an important factor that could influence judicial decision-making. As has been explained in Chapter 2, the theory, portrayed primarily today by the ‘Attitudinal Model’ of Segal and Spaeth,⁸⁶ holds that judges decide cases depending on the relevant facts, and their ideological policy views and values. From the data gathered through the interviews it can be affirmed that the ‘attitudinal model’ does *not* have explanatory power, in general, regarding how judicial actors decide economic telecommunications regulation cases in the UK, although this statement should be qualified because some interviewees think that this does not hold true

⁸⁶ Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the attitudinal model* (Cambridge University Press 1993); Jeffrey Allan Segal and Harold J. Spaeth, *The supreme court and the attitudinal model revisited* (Cambridge University Press 2002).

for the UKSC where in some cases, the policy views of Justices do matter. As such a distinction between the UKSC and other judicial actors should be done.

For the most part interviewees agreed that at the CAT level, economic policy views (their ideological policy views and values) do not influence their decisions. An experienced former executive of a Telecommunications company, for example, stated that ‘in my personal experience, I can’t think of a case where the panel composition was influential to the outcome’,⁸⁷ whilst a solicitor highlighted that ‘there’s no discernible right/left bend between the different members of the CAT’.⁸⁸ Interviewees did highlight that what could be found at the CAT was a ‘willingness to be sceptical vs deferential to the regulator’⁸⁹ and therefore there is ‘always concern about the panel because some judges are more interventionist than others’.⁹⁰ This issue nevertheless does not point towards an importance of ideological policy views but rather is a confirmation that the CAT, in some cases, can be considered to be an activist judicial actor.

The situation of the UKSC is different. Interviewees stated that for this judicial actor ideological policy views were important. A former UKSC judicial assistant for example argued that ‘some Judges [Justices] clearly have a more liberal or conservative approach’⁹¹, whilst another added that ‘judges have certain philosophical predispositions; some are born liberal, others conservative, and some

⁸⁷ Interview with a former Telecommunications company executive, April 2015.

⁸⁸ Interview with an external solicitor for a Telecommunications company, March 2015.

⁸⁹ Ibid

⁹⁰ Interview with an external solicitor for a Telecommunications company, April 2015.

⁹¹ Interview with a former UKSC judicial assistant, March 2015.

may lean either way'.⁹² Another former judicial assistant even went as far as saying that for 'very few judges I wouldn't know in what they would go in a particular case' and that 'some of the judges reasoned backwards; they would reach a conclusion they wanted (ideologically) and would reason back from that'.⁹³

As such, it can be concluded that for the UKSC, the specific policy views of Justices do matter. Nevertheless, this conclusion should not be qualified because when pressed about economic telecommunications regulation or economic regulation cases, interviewees were less certain about the role policy views played. Some thought that the predominant view regarding the importance of economic policy views was only 'confined to social issues in the UK'.⁹⁴ By this, I think the interviewee was referring to areas of social regulation such as labour or discrimination law.

⁹² Interview with a former UKSC judicial assistant, March 2015.

⁹³ Interview with a former UKSC judicial assistant, February 2015.

⁹⁴ Interview with a former UKSC judicial assistant, March 2015.

E. Conclusions

The content of this section is considerably different than the one presented on Chapter 4 for Chile. Here, I point out the reasons that were identified through the review of interview transcripts, literature and judicial decisions that could explain a *lack* of judicial activism, or non-activism, and not why courts were being judicially active like in Chile.

As such, this Chapter presented an analysis of original qualitative data in relation to key factors shaping judicial non-activism in economic telecommunications regulation in the UK. It first tackled the question of whether judicial actors in the UK were engaging in judicial activism, and most interviewees held that –most of the time– they were not. Thereafter the different factors that were assumed as important in light of the literature review of Chapter 2 and of Chapter 4 were analysed.

A number of themes that have emerged from the analysis of the data can be highlighted as relevant. A first theme that emerged is in relation to the factors that explain judicial non-activism. Three factors were identified as the pillars of judicial non-activism in the UK, none of them identified as such by the relevant (mainly US based) literature reviewed in Chapter 2.⁹⁵ This makes us conclude initially that for the UK the available literature does not explain satisfactorily what factors may explain judicial activism, although it should be clarified that no literature found tackled the topic of judicial non-activism specifically.

⁹⁵ I must highlight that the US literature does not refer in specific to the UK. This literature was reviewed in Chapter 2 in order to find factors that were theorized as relevant for determining judicial activism in general and test if they could explain judicial activism in the UK.

A very interesting second theme, already highlighted in the previous chapter, is that factors are argued to have different roles in explaining judicial activism. Some, and in fact all of the factors found to be relevant for judicial non-activism in the UK, can be identified as enabling (or in this case non-enabling factors) as they either allow or not direct driving factors to operate.

These two emerging themes are very relevant as they provide key issues that will likewise be analysed in the concluding chapters of the thesis.

CHAPTER 6

An Empirical Concept of Judicial Activism and Factors that explain it: Some Conclusions from a Comparative Study

This chapter highlights key conclusions from the comparison of the two case studies presented in the previous Chapters 3, 4 and 5. Specifically, three main issues are addressed. The first one is to outline how the theoretical notion of judicial activism found in the literature review of Chapter 2 relates to the empirical findings of this thesis as to how judges in the UK and Chile make judicial decisions in economic telecommunications regulation. An empirical concept of judicial activism based on the case studies of this thesis, is thus developed.

The second issue is to present, based on the comparative study of the thesis, what factors appear to explain judicial activism and non-activism of judicial actors in Chile and the UK. I argue that certain key factors are found for the case of Chile, but not for the UK, which explains why judicial actors in Chile are activist whilst in the UK they are not.

Finally, the third issue is to make a generalization of the findings of thesis in relation to how the different factors that explain judicial activism are related. Here, I argue that most factors that are suggested in the literature as explanations for judicial activism can to some extent explain judicial activism, but fulfil different roles. Some, I hold, act as *direct triggers* of judicial activism in a sense that they drive in a quite direct way judicial activism, others act as *enabling*

factors in the sense that they open the door, they allow for direct driving factors to operate.

A. Towards an Empirical Concept of Judicial Activism

1. Working concept of judicial activism in the literature: a critique

In Chapter 2 I highlighted that the relevant literature on judicial activism has rarely given a precise definition of judicial activism and in fact the term is used in many divergent manners to describe a broad range of conducts.

As Bradley Canon highlights,¹ even in a book dedicated exclusively to the study of judicial activism and in which notable authors such as United States Judge Learned Hand, United States Supreme Court Justice Robert Jackson, Justice John Marshall and Alexander Bickel wrote, only one of them made an attempt to define it; a political scientist by the name of Glendon Shubert who stated that the ‘Court is activist when its decisions conflict with those of other policymakers’.²

I summarized the range of different meanings of judicial activism to four key ones. First, the term is used to refer to the invalidation of the arguably constitutional actions of other branches by judges (Shubert’s view). This refers to the situation when a judicial actor does not ‘defer to decisions made by other governmental actors’.³ In this respect, Graglia gives a very clear explanation of what this meaning entails, by stating that it is ‘quite simply and specifically, the

¹Bradley C. Canon, ‘Defining the Dimensions of Judicial Activism’ 66 *Judicature* 236, 237.

² Ibid

³ Stefanie A. Lindquist and Frank B. Cross, *Measuring judicial activism* (Oxford University Press 2009) 32; John Patrick Hagan, ‘Patterns of Activism on State Supreme Courts’ (1988) 18 *Publius* 97.

practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit'.⁴

A second meaning highlighted in Chapter 2 was that in common law countries, judicial actors⁵ that do not adhere to precedents⁶ have been labelled as judicial activists for their disposition to alter interpretative stability.⁷ The willingness of judicial actors to destabilize precedent is similar to the case in which they do not defer to the decisions of other branches of government, with the difference that in this case they are overturning the decisions of previous judicial actors⁸ instead of other branches of government.

Another meaning of judicial activism also highlighted is to use the term as akin to judicial legislation. In this sense, it involves a positive decision to create new rules in a similar manner to the legislature. This may be sometimes different than the previous meaning because creating new rules does not necessarily entail overturning previous precedents. Nevertheless, it is possible for both forms of activism to coexist in the cases in which a decision which overturns a precedent also creates a new rule. There is a generalized agreement that, at the very least,

⁴ Keenan D. Kmiec, "The Origin and Current Meanings of "Judicial Activism"" (2004) 92 California Law Review 1441 1464.

⁵ The broader term 'judicial actor' has been chosen instead of 'courts' because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as 'courts' such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that are examined in Chile will be the Competition Tribunal and the Supreme Court, and for the UK it will be the CAT, the Court of Appeals and the Supreme Court.

⁶ This was something that historically was not possible in English Law. Nevertheless, from 1966 the House of Lords was free to overrule its previous decisions. See: John Bell, *Policy arguments in judicial decisions* (Clarendon Press 1983) 3; D. J. Galligan, *Discretionary powers : a legal study of official discretion* (Clarendon Press 1986) 41.

⁷ Hagan (n 3) 98.

⁸ Lindquist and Cross (n 3) 36.

judicial actors engage in ‘supplementary and interstitial law-making, filling in the details of the statutory or customary law’.⁹ This is true most significantly in common law jurisdictions but in civil law jurisdictions, this may also be the case. Since statutes and codes are not designed to ‘meet every potential conflict’¹⁰ judicial legislation can become a necessity, so that the law can be effective.

Finally, judicial activism has also been linked with departures from accepted interpretative methodology. In this sense, canons of interpretation in the common law world or rules of interpretation¹¹ in the civil law system are usually seen as the tool that judicial actors should use to decide cases. Although for a long time these have been seen as unhelpful or even useless as it is perceived that they are very malleable,¹² judicial actors that stray far from using them, through teleological methods for example, may be accused of judicial activism. This meaning is not very helpful as in most cases judicial actors will claim that they are using an interpretative legal methodology, even if they are doing so only as a formality. It is very difficult, using this criterion, to determine when a judge is actually being activist or not.

The four different meanings of ‘judicial activism’ presented above illustrate that there is no clear agreement in the relevant literature about what the term

⁹ Martin M. Shapiro, *Courts, a comparative and political analysis* (University of Chicago Press 1981) 28.

¹⁰ Ibid 29.

¹¹ In civil law countries the interpretation of statutes is usually performed using the interpretative method developed by Von Savigny. It involves four methods of interpretation: (1) grammatical, (2) systemic, (3) historical, and (4) teleological (or purposive/dynamic). See articles 19-24 of the *Código Civil de Chile* (Civil Code of Chile).

¹² Karl N. Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed Symposium on Statutory Construction’ (1950) 3 *Vanderbilt Law Review* 395.

actually means. For the purposes of the empirical work, in order to operationalize the term ‘judicial activism’, I developed a working definition of judicial activism.

The working concept of judicial activism attempts to incorporate several of the meanings found in the literature review. As such, judicial activism was conceptualized as involving the practice of judicial actors engaging in judicial legislation or disallowing policy choices made by the relevant telecommunications regulator or legislature, in the area of economic telecommunications regulation.¹³ In a simpler manner I summarized the definition as the *practice of developing economic telecommunications regulation by judicial actors*.¹⁴

It was necessary to clarify what the term *develop* meant in that scenario. It was understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a *new meaning*. Looking at this issue from another point of view, judicial actors do not create *new* economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

¹³ Kavanagh defines the term in a similar manner incorporating both highlighted meanings: ‘It refers to the extent to which the courts are willing to be creative in their adjudicative function (i.e. their willingness to develop the law and make new law) but also their willingness to stand up to the executive and the legislature, holding them firmly to constitutional principles rather than deferring to them in a supine way’. Aileen Kavanagh, ‘From Appellate Committee to United Kingdom Supreme Court’ in James Lee (ed), *From House of Lords to Supreme Court : judges, jurists and the process of judging* (Hart 2011) 40.

¹⁴ This was done following a definition given by Dickson who defines judicial activism as ‘how willing judges are to develop the law’. Brice Dickson, ‘Judicial Activism in the House of Lords 1995-2007’ in Brice Dickson (ed), *Judicial activism in common law supreme courts* (Oxford University Press 2007).

An issue that can be concluded from the divergent meanings found in the literature is that those meanings are not grounded in empirical studies on how the concept is used by relevant actors.¹⁵ In this sense, an issue which was unknown initially was whether judicial activism has different meanings in different jurisdictions or even in different areas of the law. This could happen for different reasons, for example, if perceptions or expectations held by judges or relevant actors (the legal profession in general) about the judicial role are different.

The working definition used in Chapter 2 then fulfilled the function of distilling a definition that was amenable to empirical research, but in itself was not grounded in empirical data. It was one of the outcomes of my critical literature review, and it fulfilled the function of being a benchmark for comparing and analysing what has been found in regards to the empirical definition of judicial activism in this dissertation. This is the definition that can be extracted from the findings of the comparative research of this thesis which will be explored below.

2. Differences between the working and empirical concept of judicial activism

Based on the findings of Chapters 3, 4 and 5, I conclude that although the working concept is not wrong, it is incomplete. The empirical concept of judicial activism is more complex than the concepts or meanings given by the relevant literature. In fact, the key contribution of the empirical concept of judicial activism is that it

¹⁵ By relevant actors I refer to judicial actors and other users of the judicial system that interact with judicial actors such as barristers, solicitors and internal counsel for telecommunications companies in this case.

helps in identifying *dimensions* and *characteristics* of judicial activism (for the case studies of this thesis). By a *dimension* of the concept I am referring to certain features that are foundational or part of the nature of the concept, this is, they are features that are central to the meaning of judicial activism. A *characteristic* is used to refer to a feature of judicial activism that is not part of the nature of the concept, it is therefore less significant and it does not define what activism is, but rather is a feature that varies according to a particular empirical context.

Although there are certain differences in regards to what dimensions of the empirical concept of judicial activism are found in each country, from the comparison it can be concluded that the empirical concept of judicial activism is a complex one.

The key dimension, which can be identified in both countries, is the *political* dimension of judicial activism. My conception of a political dimension is similar to some of the meanings of judicial activism identified in the literature review of Chapter 2 and especially to the working concept developed. Specifically, it relates to the policymaking function fulfilled by the judiciary. As such, for example in Chile, interviewees stated that ‘the Tribunal and the Supreme Court definitely play a role as regulators’¹⁶ and ‘fulfil a role in policymaking’,¹⁷ whilst in the UK interviewees said that ‘in general the courts have very little role [in

¹⁶ Interview with a former or current TDLC judge (2nd of December, 2013).

¹⁷ Interview with a former or current TDLC judge (6th of November, 2013).

polycymaking]¹⁸ or that ‘Courts don’t see themselves as having a role in telecommunications policy’.¹⁹

It is interesting to note that although in both jurisdictions there is a clear reference to the political dimension, this is done from opposing directions. In the case of Chile, it is with the use of positive affirmations (i.e., judges fulfil a political role) whilst in the UK it is with negative one (judges do not fulfil a political role). As such, in both cases interviewees are clearly referring to the same dimension of judicial activism, the political one, but from their own perspectives based on what occurs in each jurisdiction. In Chile, judicial actors are considered to engage in policymaking, whilst in the UK, they are not.

This dimension is outward looking, in the sense that it is related to how the judiciary interacts with the other branches of government. It relates to what is the proper role judges ought to have within the state and how that role fits in with the roles that, the usually called political branches of government traditionally play. It is not therefore political in a particular ideological sense, understanding ideological as particular normative policy positions which therefore do not include what role judicial actors believe they should have in policymaking.

The second dimension found, but only for Chile, is what I will call the *duty* dimension of judicial activism. By this I mean that judicial actors view judicial activism as a particular duty they have to fulfil. As one Chilean judge, already

¹⁸ Interview with a senior OFCOM solicitor, February, 2015.

¹⁹ Interview with a senior OFCOM solicitor, February, 2015.

cited, puts it, ‘in these cases [economic regulation], if the legislator is ambiguous and leaves a margin, giving flexibility to judges, we have to decide’.²⁰

This dimension, unlike the political dimension, is inward looking, in the sense that its purpose appears to be to keep a certain coherence and completeness of the legal system and specifically here in economic telecommunications regulation. Judicial actors in this sense feel that they *ought* to fill in the holes or unclear passages of economic telecommunications regulation but not because they seek, in a certain sense, to fulfil functions that are usually exercised by the political branches of government (as they do when acting in the *political* dimension referred to before) but because they think that if they do not do it, then the system will lack coherence and completeness. This may perhaps also signal to a professional type of duty, as judges are part of the legal profession, they may also be seeking to maintain coherence in the law.

The duty dimension was only found in Chile. This can be explained to a point because, as was explained in Chapter 5, in the UK the separation of powers is taken in a stricter manner than in Chile by judicial actors in the sense that they are reluctant to fulfil any function which may be closer to policymaking. In Chile this is not the case, the separation of powers is interpreted more laxly and this allows for judicial actors to engage in judicial activism when they think they have a duty to do it. In this way, already in this comparative study of only two countries, it can be suggested that an empirical concept of judicial activism is different in

²⁰ Interview with a former or current Supreme Court Justice (November 6th, 2013).

both countries, as for the UK there is only one dimension of the concept whilst for Chile two dimensions can be identified.²¹

Although as has been highlighted the political and duty dimensions are different in the sense that one is outward looking and the other inward looking, they are also similar and closely related because it could be argued that both are actually reflections of what judges perceive to be their professional duty. In the political dimension, judges may believe that, in some circumstances, it is their role within the political system to make (or not make, as in the UK) regulatory policy decisions whilst in regards to the duty dimension, as mentioned, think that it is their role to keep the legal system whole or complete.

The empirical concept of judicial activism for Chile and the UK in relation to economic telecommunications regulation also has certain characteristics. A first characteristic which can be identified is that the concept, in this particular study, is time bound. At one moment in time a judicial actor can be considered to be activist whilst later on he/she can be non-activist. This is a characteristic that can be found both in Chile and the UK. For the case of Chile, for example, the Supreme Court which traditionally has been portrayed as engaging in the ‘most primitive sort of formalist legal positivism,’²² in the last few years has taken a strong turn

²¹ It could be argued that as this duty dimension is only found in Chile, then it should not be categorized as a dimension but rather as a characteristic of the concept, as it may not be part of the nature of it. This is not the situation because, for the case of Chile, this is actually part of the nature of the concept of judicial activism for that country (and it is not for the UK).

²² Andrés Cuneo, ‘La Corte Suprema de Chile, sus percepciones acerca del Derecho, su rol en el sistema legal y la relación de éste con el sistema político’ in Universidad de Costa Rica (ed), *La administración de justicia en América Latina* (1980), cited by Javier Couso in: Javier Couso, Alexandra Huneeus and Rachel Sieder, *Cultures of legality : judicialization and political activism in Latin America* (Cambridge University Press 2010), 151.

and now it is thought that ‘the Tribunal and the Supreme Court definitely play a role as regulators’²³ and ‘fulfil a role in policymaking’.²⁴

Likewise, in the UK, the Competition Appeals Tribunal (CAT) was only considered to be engaging in judicial activism during certain periods of time. Specifically, interviewees thought that ‘initially the CAT was quite activist, no one knew how the system was supposed to work’.²⁵ Over time the judicial activism of the CAT has declined ‘towards a point where they defer towards the regulator unless there is some clear evidence that something has gone wrong’.²⁶

Another characteristic which follows from the previous one is that changes in judicial activism over time are not triggered by the same causes. That is, judicial activism changes for different multiple reasons over time. For example, for the case of Chile explained before, changes in judicial activism are related more with leaderships in the Supreme Court and changes in ideological positions of judicial actors. In the UK changes in judicial activism can be better explained because of increasing clarity in rules as the system matured. (the CAT in particular).

Considering these dimensions and characteristics, the empirical concept can be summarized as a complex, multidimensional concept with certain characteristics, which may be present at one moment of time for different reasons.

²³ Interview with a former or current TDLC judge (2nd of December, 2013).

²⁴ Interview with a former or current TDLC judge (6th of November, 2013).

²⁵ Interview with a former OFCOM officer, March 2015.

²⁶ Interview with a former OFCOM officer, April 2015.

Notwithstanding the empirical concept of judicial activism explored above, the empirical concept of judicial non-activism should also be mentioned as in the UK judicial actors were found to be non-activist. One possible way of addressing this is to argue that judicial non-activism is the opposite of judicial activism or the absence of the dimensions and characteristics that are distinctive of judicial activism. In this manner, the empirical concept of judicial non-activism would entail the practice of adjudication in which neither the political dimension nor the duty dimension are present and which does not change over time.

Another possible way (although inevitably related) of addressing the empirical concept of judicial non-activism would be not to take the empirical concept of judicial activism as a starting point but rather build an independent one. In this sense, considering the case studies of this thesis, this practice would certainly have a political dimension, albeit a different one. In this case, the political dimension would entail a conservative attitude towards what role judges ought to have in regards to regulatory policymaking and by conservative here I am referring to the fact that judges in the UK mostly believe that judicial activism is not part of their role.

Furthermore, this empirical concept of non-activism would also have the characteristic of being time bound, as for the case of the UK, even though judicial actors are predominantly non-activist, in some situations already mentioned,²⁷ they can be activist.

²⁷ See Chapter 5, Section B (2).

Considering the concepts of judicial activism and non-activism, the question of what factors explain why judicial actors are either activist or non-activist becomes relevant as this allows for a more comprehensive understanding of the phenomena of judicial activism. It is not clear though, whether the empirical concept is present (in this form) in other areas of economic regulation and other jurisdictions as will be explored in the final chapter.

B. Comparing Factors that Explain Judicial Activism in Chile and Judicial Non-Activism in the UK

1. Explaining judicial activism and non-activism in Chile and the UK

In the literature review carried out in Chapter 2 different factors which were thought to be of particular relevance for judicial activism in the context of economic telecommunications regulation were identified and analysed. These factors, already explained, were judicial culture, the specific manner in which telecommunications regulation is drafted, the availability of resources for litigation and the specific policy views judicial actors have.²⁸

An important note to make is that although in the literature factors are usually found in a neutral form, for example as *leadership*, in order for that factor to explain judicial activism and non-activism it must actually be looked at in a non-neutral form. This is, it should be identified as, for example, a leadership that is favourable (or unfavourable) to judicial activism. The neutral form does not help in explaining judicial activism or non-activism. This will be explored in relation to each of the factors analysed below.

²⁸ Other factors, which are analysed in the literature, were not considered for various reasons in the empirical research. For example, some such as federalism were not applicable to either jurisdiction to be researched and others such as popular influence or the public opinion of the judiciary escaped the scope and methods of research of this thesis as it was thought that they required large scale surveys. Smithey Shannon Ishiyama and John Ishiyama, 'Judicial Activism in Post-Communist Politics' 36 *Law & Society Review* 719, 725; Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker Policy Making in a Democracy: The Role of the United States Supreme Court: Role of the Supreme Court Symposium, No. 1' (1957) 6 *Journal of Public Law* 279; Kenneth M. Holland, *Judicial activism in comparative perspective* (St. Martin's Press 1991), 8; C. Neal Tate and Torbjörn Vallinder, *The global expansion of judicial power* (New York University Press 1995) 31.

Judicial culture (the attitudes judges have towards their role) was identified in the literature as one of the possible factors that could explain judicial activism. In Chile, a non-conservative approach by judicial actors to their role was found to be a key factor in explaining judicial activism, although that has not always been the case. At least until the first years of the 21st century, the Supreme Court had a very formalistic²⁹ stance regarding their role in adjudication and tried to evade politically relevant cases.³⁰ Perhaps it even saw itself as defenders of the ‘state’ and ‘state law’. The interviews conducted, nonetheless, depicted a very different picture of what is going on today. The predominant view was that Judges were aware that they have a political role to play, a role to play in policymaking. None of the interviewees saw a limited, formalist role for the Court, as the one portrayed above. In contrast, interviewees classified the English judiciary as having a conservative judicial culture regarding their role. As such, one interviewee pointed out that ‘they are quite conservative about what they consider to be the proper remit of the rule of law’.³¹

The lack of precision in the drafting of the telecommunications laws was also identified, in second place, as a relevant factor that could explain judicial activism. As such, the content of the law becomes relevant in itself. Whether a judicial actor is activist could be influenced by the way in which the substantive

²⁹ By formalism (also known as legalism) I’m referring to the doctrine that holds that the outcome of judicial decisions can be explained by the content of the law and nothing else.

³⁰ Some, nevertheless, would claim that in practice, even if the Court was publicly defending a formalist role, it would be inaccurate to sustain that they have only been activist in the past few years, as for example Hilbink has said that during a large portion of the 20th century they were enthusiastically engaging in conservative judicial activism. Lisa Hilbink, *Judges beyond politics in democracy and dictatorship : lessons from Chile* (Cambridge University Press 2007), 63.

³¹ Interview with an external telecommunications solicitor, April 2015.

law is drafted and the way in which legal obligations are framed. In the case of telecommunications regulation, it was considered important to assess the relevant laws to determine their clarity, their indeterminacy and the role judicial actors may have in the interpretation of it. This factor is also thought to play a role in explaining judicial activism as an enabling factor.

Thirdly, the availability (and allocation) of resources for legal mobilization was also found in the literature review and thought to be a relevant factor in explaining judicial activism.³² It is interesting to highlight here that for Chile it was a factor that was not considered as relevant by most interviewees and no distinguishable pattern of importance could be found in the analysis of the decisions. Nevertheless, for the UK, this was quite a relevant factor explaining judicial non-activism. Two related issues were flagged by a considerable number of interviewees. First, the impact of expensive litigation in making it available to only a reduced number of entities and second, the effect of cost shifting rules³³ in the willingness of parties to litigate.

³² Charles R. Epp, *The rights revolution : lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998). Epp calls what I have labelled as ‘availability of resources for legal mobilization’ as ‘support structure for legal mobilization’. They both attempt to conceptualize the same, this is, how much resources are made available or ‘invested’ in legal mobilization to try to reach a certain goal. I think that the use of ‘availability of resources’ uses words which could lead to less theoretical confusion than the words ‘support structures’.

³³ In the UK, the legal fees of the winning party are paid by the party that loses, this is usually known elsewhere as the ‘English rule’. See: Avery Wiener Katz and Sanchirico Chris William, ‘Fee Shifting’ in Gerrit de Geest and Chris William Sanchirico (eds), *Procedural law and economics: Encyclopedia of law and economics* (Second edn, Edward Elgar 2012) and Herbert M Kritzer, ‘English Rule, The’ 78 ABAJ 54.

In fourth place, the specific (personal) policy views that judicial actors have was considered as a relevant factor.³⁴ For the case of Chile, most of the interviewees thought that this factor was key in explaining judicial activism, as they stated that in the Supreme Court ‘there are different visions of economic policy; they are people and have their ideas’.³⁵ In the Competition Tribunal this was also the case, as one Judge stated, ‘the Judges have different political economic views and that is very patent in the case of mergers’.³⁶ As such, it was thought that in regard to both the Court and the TDLC, economic policy views (preferences) do play a role. For the UK, on the other hand, the case was quite different as for the most part interviewees agreed that at the CAT level, economic policy views do not influence their decisions. An experienced former executive of a Telecommunications company, for example, stated that ‘in my personal experience, I can’t think of a case where the panel composition was influential to the outcome’,³⁷ whilst a solicitor highlighted that ‘there’s no discernible right/left bend between the different members of the CAT’.³⁸

³⁴ Lawrence Baum, *Judges and their audiences : a perspective on judicial behavior* (Princeton University Press 2006) 7; Jeffrey A. Segal and Albert D. Cover, ‘Ideological Values and the Votes of U.S. Supreme Court Justices’ 83 *The American Political Science Review* 557; Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, ‘Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation’ 90 *Virginia Law Review* 301.

³⁵ Interview with a former or current external litigation counsel of a Telecommunications company (December 13th, 2013).

³⁶ Interview with a former or current Judge of the TDLC (November 6th, 2013).

³⁷ Interview with a former Telecommunications company executive, April 2015.

³⁸ Interview with an external solicitor for a Telecommunications company, March 2015.

Summary: Factors that explain Judicial Activism in Chile and Non-Activism in the UK

For the case of Chile, it was concluded from the analysis of the interviews conducted and final decisions taken by the Competition Tribunal and the Supreme Court that three of the five factors considered to be relevant in the literature and used in the interviews were actually key in explaining judicial activism in this particular empirical setting. These were a non-conservative judicial culture (attitudes towards their role as judges which allow judicial activism), the unclear (or incomplete) drafting of economic telecommunications regulation and the policy preferences of judges. Nevertheless, two further factors were found to be relevant in explaining judicial activism in Chile which were not identified as such by the literature review. These were the leadership exercised by some Justices in the Supreme Court which had a favourable view of judicial activism and second, the opinion of the public which expressed particular policy preferences.

In the UK the situation for judicial decision-making was different. Rather than finding factors that explain judicial activism, the research found factors that explain judicial non-activism. In this way the judicial culture (attitudes which believed that engaging in judicial activism was not part of their role), the partly unclear appeal structure and (enormous) resources needed for litigation were the factors found to better explain judicial non-activism.

Considering all these factors in isolation, as has been argued, is not sufficient, empirically, to adequately explain judicial activism. It is sufficient to assert that some are present in Chile and others in the UK and therefore they

ought to explain in some way why judicial actors are activist in Chile and why they are not-activist in the UK. Nevertheless, there is no explanation so far of what role all these factors play in explaining judicial activism. In this way, it is necessary to understand how these various factors relate. As such, a classification of factors, based on the empirical data of this thesis, and how they relate to each other, will be further explored below.

2. A classification of factors and their interaction

As highlighted above, although the literature is abundant in trying to find specific factors that explain judicial activism, most of these studies lack empirical research that sustain the role those specific factors have in explaining judicial activism.

A conclusion that can be reached from the empirical data gathered related to factors is that empirically, it is not possible to point to one particular factor that actually explains judicial activism. The reality is more complex; although certain factors will have a more obvious direct impact in explaining judicial activism, other factors will have a less visible role in explaining judicial activism. In this manner, as was anticipated in Chapters 4, judicial activism can only be explained as a complex interaction between various factors which fulfil different roles.

On the one hand there are those that are directly linked to judicial activism, that have an immediate proximity to it and I call them *direct driving* factors. They are factors that are direct triggers of judicial activism in the sense that a decision that is judicially activist can be explained in a direct manner because this factor

exists. For example, the already mentioned decision of the Supreme Court of Chile in regards to the ‘3G Auction’ case in which it held that there was a need for competition in that 3G Telecommunications market and thus there should be restriction in the amount of spectrum each operator could have, and set a cap of 60 MHZ per operator.³⁹ This decision is one in which a direct trigger of the decision was a particular policy view which the majority of the Court held.

In regards to which factors were considered as *direct drivers* of activism, for the case of Chile, three factors were identified as such. The most obvious one was the specific policy views of judicial actors as these are particular views which a judge may or not use in making a decision depending on other factors (enabling factors as will be explained below). Furthermore, two less obvious factors were also identified, this is public opinion as interviewees believed that judicial actors were *directly* influenced by it in making decisions and leadership inside the Supreme Court as interviewees stated that they thought that leadership was directly related to a shift in the Courts decisions in the last few years in relation to how companies with substantial market power are treated. For the case of the UK, as judicial actors were found to be non-activist generally it is more difficult to assert which factors act as direct driving factors. All factors found to explain non-activism are actually classified as non-enabling factors as will be explained below.

On the other hand there are those that play a role as *enabling factors*, this is factors that make it possible for direct driving factors to operate and in a way set forth the necessary conditions for direct driving factors to operate. In a

³⁹ *Reclamación resolución 27/2008 Rol N° 4797/2008* Supreme Court of Chile.

negative manner they do not allow direct driving factors to operate. This negative operation of enabling factors can be seen clearly in the UK in relation to its judicial culture. As has already been cited in this chapter, a former UKSC judicial assistant points out that ‘in general they apply a black letter approach. If [a case] creates a problem, it is for Parliament to sort it out, not for the judges’.⁴⁰ In this way the prevailing judicial culture in a way blocks the possibility of direct driving factors operating or in other words, the lack of enabling factors does not allow for direct driving factors to operate.

A summary of the factors and what role they have in relation to judicial activism can be found in the following table:

Enabling factors	Direct driving factors
Attitudes judges have towards their role (judicial culture that allows judicial activism)	Determined policy preferences
Specific content of economic telecommunications regulation is not clear	Leadership that is amicable judicial activism
	Public opinion that expresses policy views

In relation to non-activism in the UK, it can be better explained due to the lack of enabling factors (or rather, the existence of non-enabling factors) and thus the impossibility for direct driving factors to operate. These non-enabling factors are actually the opposite of some of the factors categorized as *enabling* for judicial activism.

⁴⁰ Interview with a former UKSC judicial assistant, March 2015.

As such, in the UK, three non-enabling factors were found in this particular empirical study to explain judicial non-activism:

- The attitudes judges had towards their role (a judicial culture that is not amenable to judicial activism);
- The availability of resources for litigation (it is expensive to litigate); and
- The appeal structure.

A closely related issue is how the two types of factor relate. It is important to underline that there have been almost no attempts to set out an account of how the various factors relate to each other, and how their interaction may help in explaining judicial activism. One of the few exceptions to this is Neal Tate who relates two types of factors, arguing that even if a significant number of ‘facilitating’ conditions exist (these are I believe what I call enabling factors), the personal will of judges to participate in policy-making is necessary.⁴¹ He thus relates what I call enabling and direct driving factors, as will be explained below, but besides the phrase quoted there is no further substantial analysis on the interaction of factors, at least found in my literature review.⁴²

⁴¹ Tate and Vallinder (n 28) 33.

⁴² I would like to highlight also in this respect that quantitative accounts of judicial activism have not been very convincing, in my opinion, in analysing the complex interaction of more than one factor in explaining judicial activism. A good example of this, I think is a recent book by Epstein, Posner and Landes in which the authors present what they label as a ‘more realistic’ model, which can be basically described as a rational choice model of judicial behaviour. This model locates judges as participants of a labour market (the judicial labour market), where they are considered to be employees or agents of the government, which in this model acts as their principal. A judge which operates in such a market can be considered as being motivated and constrained, as any other worker, by benefits and costs, and as any rational worker will seek higher benefits than costs. One important benefit of course is the income the judge receives but other non-pecuniary benefits

The relationship between direct driving and enabling factors and how it may better explain judicial activism, based only on the information gathered for this thesis, can be seen in the following table and the explanation that follows:

	Direct driving factor (-)	Direct driving factor (+)	Multiple direct driving factors (+)
Enabling factor (-)	JA very unlikely	JA unlikely	JA unlikely
Enabling factor (+)	JA unlikely	JA likely	JA very likely
Multiple enabling factors (+)	JA unlikely	JA very likely	JA most likely

It is extremely important to highlight that the table above does not attempt to portray or develop a model of how the different factors interact. As the study of this thesis is basically exploratory in nature and limited to only two case studies, the purpose is more modest; to explain how the factors in the context of this particular study interact.

Based on the information gathered for this thesis I argue that if no enabling factors exist (-), even if there are multiple direct driving factors (+), it is extremely

also influence their behaviour, such as tenure, the intrinsic interest of the work, power or prestige, and pride or self-esteem that the job confers on the judge. Amongst the most important costs that can constrain the behaviour of a judge are the foregone value of leisure, effort aversion (the desire for a 'quiet life'), the expenditure of energy in working, adverse working conditions, threat of reversal by higher Courts, professional criticism or public opinion. These various benefits and costs, which will also depend on the particularities of the specific Court in which a judge sits, are employed as inputs for what the authors call the 'judicial utility function', a formula which can be used to better understand the behaviour of judges. This formula is tested in three tiers of the United States judiciary. Lee Epstein, William M. Landes and Richard A. Posner, *The behavior of federal judges : a theoretical and empirical study of rational choice* (Harvard University Press 2013).

unlikely for judicial activism (JA) to occur. Likewise, if there are multiple enabling factors but no direct driving factors, it will be unlikely that JA will be present.

Additionally, I argue that the more enabling and direct driving factors there are, the more likely for judicial activism occur, and as such situations where multiple direct driving factors and multiple enabling factors exist are the most likely scenario in which judicial activism would be found.

An abstract explanation given by a Chilean Supreme Court Justice, already cited in the thesis, illustrates very well how enabling and direct driving factors interact:

in a case where I think option A is the right answer [in political terms], but there's no doubt that option B is the legally correct answer, then I will decide B, but if the legal rule in question is vague then my interpretation will obviously be influenced by my political view and I will argue in favour of A.⁴³

The interviewee clearly identifies that in order to make decision based on his political views (a direct driving factor) the rule in question must be to some level indeterminate (an enabling factor). Of course, it may be the case that the person could interpret the rule to be more indeterminate than others may think it actually is in order to make the decision which is politically correct for her or him, but even in this fictional scenario the Justice recognizes that there *may be* a legally correct answer. Nevertheless, it must be highlighted that even if all enabling factors are present for driving factors to operate, that does not mean that necessarily there will be judicial activism, in fact the presence of enabling factors only creates the

⁴³ Interview with a former or current Supreme Court Justice (November 6th, 2013).

necessary conditions for direct driving factors to operate but does not dictate the outcome.

C. Main Conclusions from the case studies

The main focus of this Chapter was to explore some of the main issues which can be concluded from comparing the two case studies presented in the previous Chapters 3, 4 and 5. Three main conclusions can be drawn.

Firstly, the empirical concept of judicial activism was found to differ from the working concept presented in the thesis and from the different meanings found in the literature. The empirical concept was found to be a complex multidimensional concept which could change over time for different reasons. This empirical concept of judicial activism is particular to each jurisdiction.

Second, an explanation to why judicial actors were found to be activist in Chile and non-activist in the UK was explored. For this, the main conclusion is that some key factors which can be labelled as enabling factors were present in Chile whilst in the UK they were not present or were found in a negative manner (as disabling factors in a sense).

Third, a typology of how the different factors found in this empirical study which explain judicial activism interact with each other is proposed. In this sense, I argue that these factors operate at two different levels. In the one hand there are those which I label as *direct triggers* of judicial activism in a sense that they are the direct cause of judicial activism. On the other there are those called *enabling factors* in the sense that they open the door or allow for direct driving factors to operate.

CHAPTER 7

Conclusion: The Importance of Empirical Qualitative Studies About Judicial Activism

This concluding chapter brings together the different themes which have been developed in the thesis, such as the development of an empirical concept of judicial activism and the factors found to explain judicial activism in the particular contexts of Chile and the UK. The chapter also highlights the main findings and relates these to theoretical accounts of judicial activism and adjudication. For this, the chapter is divided in two main sections.

The first section of this concluding chapter (Section A), will go back to the starting point of the thesis and give an overview of its purposes and research questions. Afterwards, the key findings of this thesis will be summarized. Here the focus will be on the development of an empirical concept of judicial activism, the factors that were found to explain empirical practices of judicial activism in Chile and the UK and analyse how these different factors are related.

The second section (Section B) will discuss some potential implications of the main findings of the thesis for the literature on judicial activism in which the problems with making generalisations over case studies that have focused primarily on the United States will be highlighted. Then, I will briefly refer to some contributions that the case studies of the thesis can make towards the development of legal theory, specifically in confirming or denying claims made in

descriptive accounts about the role judges fulfil in adjudication. Finally, I will put forward some views about the generalisation of the findings of this thesis to other areas of economic regulation, such as energy law.

A. Overview of the Purposes, Research Questions and Main Findings of the Thesis

1. Back to the starting point: Framing the dissertation

The original purpose of this thesis was to analyse the role that judicial actors¹ play in the development of economic telecommunications regulation² in Chile and the UK and what factors explain the different roles that these judicial actors have adopted. In this manner, the thesis sought to address the following research questions:

1. In what way have judicial actors in the UK and Chile played a different role in the development of economic telecommunications regulatory policy? This

¹ The broader term ‘judicial actor’ has been chosen instead of ‘courts’ because it allows the inclusion of bodies that exercise judicial functions but which may not be necessarily considered as ‘courts’ such as tribunals like the Competition Appeal Tribunal (CAT). The exact judicial actors that are examined in Chile will be the Competition Tribunal and the Supreme Court, and for the UK it will be the CAT, the Court of Appeals and the Supreme Court.

² By economic regulation I refer to: ‘to ensure fair prices and product/service quality through maintaining competition between economic actors. In the absence of competitive market forces, as in the case of monopoly operators, legal regulation---often in the form of specific statutory obligations---directly regulates pricing, access, and quality standards. It is particularly significant in areas of monopoly operators, such as utilities, supplying telecommunications, electricity, gas, water, and transport services’. Bettina Lange, Regulation, in: Cane, Peter and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press 2008).

Furthermore, it can also be defined as: ‘interventions which, among other things, impact on the structure of an industry (for example, by restricting the number of firms that be involved in the supply of a service, requiring separate entities to undertake different activities in a supply chain, or requiring that access to infrastructure facilities be provided to third parties) or which attempt to guide or control the behaviour of firms in terms of their decisions in respect of pricing, investment, quality and coverage of service, as well as the terms on which access is provided to other firms, including competitors’. Christopher Decker, *Modern economic regulation: an introduction to theory and practice* (Cambridge University Press 2014) 3.

involved mapping out and describing the role that judicial actors perform in each jurisdiction and how they have ‘developed’ telecoms regulation.

2. Why have judicial actors in Chile engaged in judicial activism,³ acting as regulators —sometimes substituting their own judgement for that of the regulatory agency— while in the UK they have not or have done so in a less visible manner?
3. How do certain factors, such as the precise drafting of the law, policy views of the judges, the attitudes judges have towards their role (an aspect of judicial culture), and availability of resources for legal mobilization⁴, shape whether judicial actors are activist in the development of telecommunications regulation in the UK and Chile. This refers to both how important each factor is in the two countries and how the different factors relate to each other, i.e. in synergistic or antagonistic fashion.

As already stated, Chile and the UK were among the first countries to privatise and liberalise their utilities,⁵ telecommunications amongst them, and led the way in Latin America and Europe respectively when this policy was adopted

³ I rely here on my working concept of judicial activism explained in greater detail in Chapter 2 as: the practice of developing economic telecommunications regulation by judicial actors. It is necessary to clarify what develop means in this scenario. It will be understood that judicial actors develop economic telecommunications regulation only when they create new telecommunications regulation, and this includes the cases in which interpreting an existing unclear rule, judicial actors give it a new meaning. Looking at this issue from another point of view, judicial actors do not create new economic telecommunications regulation, for example, when they confirm an already existing settled interpretation in relation to a certain rule.

⁴ Charles Epp refers to this as ‘support structure for legal mobilization’. By this he refers to the resources that different actors can allocate to litigation in order to further their policy preferences. Charles R. Epp, *The rights revolution : lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998).

⁵ David M. G. Newbery, *Privatization, restructuring, and regulation of network utilities* (MIT Press 2000) 2.

throughout these continents. Both countries embraced similar general libertarian political economy ideas that were applied by the Thatcher government and the Pinochet dictatorship which were captured in the relevant regulations.

A question that has not been frequently asked is was what role judicial actors play in the design of that regulation, as judicial actors are normally not studied in their regulatory capacity. In fact, the regulation literature usually views judicial actors as playing a role at the stages of enforcing regulation⁶ or when regulators are held accountable.⁷ In the UK and Chile, this was the role originally envisioned for judicial actors with regard to economic telecommunications regulation; in the UK it was more specifically to enforce the licences under which telecoms operators provided their services, and in Chile to enforce legislation and limit the regulator's discretion.⁸

As chapters 3, 4, 5 and 6 show, such a view is incomplete. Judicial actors can in some circumstances also play a different role in the regulatory process; in particular they can make a significant contribution to the development of regulatory policy.

Decisions by judicial actors in Chile in relation to economic telecommunications regulation illustrate that it is possible for a judicial actor to

⁶ Ian Ayres and John Braithwaite, *Responsive regulation : transcending the deregulation debate* (Oxford University Press 1992) 35.

⁷ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation : theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 345-347.

⁸ Brian Levy and Pablo T. Spiller, 'A Framework for Resolving the Regulatory Problem' in Brian Levy and Pablo T. Spiller (eds), *Regulations, institutions, and commitment : comparative studies of telecommunications* (Cambridge University Press 1996), 13.

become a regulatory policymaker. Some decisions have addressed issues such as industry structure (and sometimes involving the divestiture of monopolist telecommunications companies),⁹ requirements to share or provide access to facilities (in defining unbundling obligations),¹⁰ or even decided the specifics of pricing policies (whether mobile companies can charge higher prices for calls made outside their own networks, that is, on-net/off-net pricing schemes).¹¹ These are decisions where, although appear to be the application and development of competition law and telecommunications regulation, it can be argued that they actually go a step further and make decisions that involve choosing a particular policy. This has not been the case in the UK, where judicial actors have not had such a role in shaping economic telecommunications regulation.¹² In this jurisdiction, judicial actors have had less opportunities to engage in judicial activism as less cases have been litigated and on those occasions in which they have, they have been reluctant to engage in judicial activism.

This apparent contrast in the degree of interventionism was thought to be an interesting empirical puzzle in light of the fact that both countries otherwise exhibit a number of similarities in their trajectories of telecommunications reform and the regulation of telecoms. It was also held that this was especially interesting

⁹ *Reclamación de Telefónica España y otros contra Dict. 735* Resolución 368/92 CR, Comision Resolutiva.

¹⁰ *Demanda de Voissnet S.A. contra Compañía de Telecomunicaciones de Chile S.A.* Sentencia 97/2010 TDLC.

¹¹ *Instrucción de Caracter General N 2 (ICG N2)* NC N 386-10 TDLC.

¹² A. I. Ogus, *Regulation : legal form and economic theory* (Hart 2004) 115, states that: 'judicial review has nevertheless had a relatively small impact on regulation, a consequence no doubt of the Diceyan tradition of administrative law which concentrates on the protection of individual rights against illegitimate government interference and thereby largely shuns a functionalist concern with public purposes'.

considering that Chile is a civil law jurisdiction in which judicial actors are usually not expected to develop the law, whilst the UK is a common law country where judicial actors have traditionally played a more active role in its development.

As such, this raised the question of how this potential divergence could be explained. More specifically, the question of what factors shape a judicial actor's role in the development of regulatory policy and in telecommunications in particular, also arose. In relation to this question, it was further explained that the literature on judicial behaviour¹³ analyses various factors which are purported to explain why judicial actors sometimes engage in judicial activism, and thus develop regulatory policy. Following on from this, the main findings of the thesis, which are related to the question presented here, will be explored in the next section.

2. An empirical concept of judicial activism and the explanatory role of factors: some conclusions of this thesis.

In this concluding chapter it seems important (and adequate) to review the main findings of the thesis. These are clustered into three groups: an empirical concept of judicial activism, the role that certain factors play in explaining judicial activism and the interaction of these factors (how they relate to each other).

¹³. See, for example: Kenneth M. Holland, *Judicial activism in comparative perspective* (St. Martin's Press 1991); Lawrence Baum, *Judges and their audiences : a perspective on judicial behavior* (Princeton University Press 2006) 7.

a) An empirical concept of Judicial Activism

The first main finding of this thesis relates to the development of an empirical concept of judicial activism. In Chapter 6, the (an) empirical concept of judicial activism found in this thesis was argued to be different from the concepts or meanings of judicial activism given by the relevant literature. In fact, I argued that the key contribution of the empirical concept of judicial activism found in the thesis is that it allows to appreciate the complexity of the concept and to identify some empirical *dimensions* and *characteristics* of judicial activism.¹⁴

The research enables me in particular to identify one central dimension of the empirical concept which I label as the *political* dimension. This dimension, which was identified in both countries, relates to the policymaking function fulfilled by the judiciary.

This dimension was argued to be outward looking, in the sense that it is related to how the judiciary interacts with the other branches of government. It relates to what is the proper role judges think they ought to have within the state and how that role fits in with the roles that, the usually called political branches of government –the executive and legislature in both countries– traditionally play.

Another dimension, only found in Chile, is what I label as the *duty* dimension of judicial activism. By this I mean that judicial actors view judicial activism as a particular duty they have to fulfil, especially if the other branches of

¹⁴ See page 206.

government do not legislate or regulate in a clear manner. As one Chilean judge puts it, ‘in these cases [economic regulation], if the legislator is ambiguous and leaves a margin, giving flexibility to judges, we have to decide’.¹⁵

This dimension is inward looking, in the sense that its perceived purpose is to keep a certain coherence and completeness of the legal system and specifically in economic telecommunications regulation. Judicial actors in this sense act because they believe they *ought* to fill in the holes or unclear passages of economic telecommunications regulation but not because they seek, in a certain sense, to fulfil functions that are usually exercised by the political branches of government (as they do when acting in the *political* dimension referred to before) but because they think that if they do not do it, then the legal system will lack coherence and completeness.

With regard to characteristics of the concept of judicial activism, a first one is that the concept, in this particular empirical setting, is time bound. At one moment in time a judicial actor can be considered to be activist whilst later on he/she can be non-activist. This is a characteristic that can be found both in Chile and the UK. For the case of Chile, for example, the Supreme Court which traditionally has been portrayed as engaging in the ‘most primitive sort of formalist legal positivism,’¹⁶ has taken a strong turn in the last few years and now

¹⁵ Interview with a former or current Supreme Court Justice (November 6th, 2013).

¹⁶ Andrés Cuneo, ‘La Corte Suprema de Chile, sus percepciones acerca del Derecho, su rol en el sistema legal y la relación de éste con el sistema político’ in Universidad de Costa Rica (ed), *La administración de justicia en América Latina* (1980), cited by Javier Couso in: Javier Couso, Alexandra Huneeus and Rachel Sieder, *Cultures of legality : judicialization and political activism in Latin America* (Cambridge University Press 2010), 151.

it is thought that ‘the Tribunal and the Supreme Court definitely play a role as regulators’¹⁷ and ‘fulfil a role in policymaking’.¹⁸

Another characteristic which follows from the previous one is that changes in judicial activism over time are not triggered by the same causes. This is, judicial activism changes for different and thus multiple reasons over time. For example, for the case of Chile explained before, changes in judicial activism are thought to be related more with leaderships in the Supreme Court and changes in ideological positions of judicial actors whilst for the UK changes in judicial activism can be better explained because of better clarity in rules regarding how a new system worked (the CAT in particular). Considering these dimensions and characteristics, the empirical concept can be summarized as a complex concept with certain characteristics, which may be present at one moment of time for different reasons. The presence or absence of these dimensions or characteristics explain whether judicial activism takes place or not.

b) Factors which explain judicial activism in Chile and the UK

The second main finding of this thesis is that different factors explain judicial activism in Chile and the lack of it or non-activism in the UK. Moreover, only some

¹⁷ Interview with a former or current TDLC judge (2nd of December, 2013).

¹⁸ Interview with a former or current TDLC judge (6th of November, 2013).

of the factors that are argued in the relevant literature to explain judicial activism have a role in relation to the case studies of this thesis.

An important note to make is that although in the literature factors are usually found in a neutral form, for example as *leadership*, but in order for that factor to explain judicial activism and non-activism it must actually be looked at in a non-neutral form. This is, in the leadership factor example, for this factor to explain judicial activism (or the lack of it) it should be identified as a leadership that is favourable (or non-favourable) to judicial activism. The neutral form does not help in explaining judicial activism or non-activism.

For the case of Chile, it was concluded from the analysis of the interviews conducted and final decisions taken by the Competition Tribunal and the Supreme Court that three of the five factors considered to be relevant in the literature review of Chapter 2 and discussed during the interviews were actually key in explaining judicial activism in this particular empirical setting. These were the attitudes judges have towards their role (judicial culture that allows judicial activism), the specific content of economic telecommunications regulation which is not clear and the policy preferences of judges. Nevertheless, two further factors were found to be relevant in explaining judicial activism in Chile which were not identified as such by the literature review. These were the leadership exercised by some Justices in the Supreme Court that is amicable to judicial activism and second the opinion of the public which expresses particular policy views.

In the UK the situation for judicial decision-making was different. Rather than finding factors that explain judicial activism, the research found factors that

explain judicial non-activism. In this way the attitudes judges have towards their role (judicial culture that is not favourable to judicial activism), the partly unclear appeal structure and the exorbitant resources needed for litigation were the factors found to better explain judicial non-activism.

The focus was only on factors that were identified from the literature review and assumed to be significant and therefore some other factors were considered to be irrelevant.

It is therefore possible that some factors discussed in the literature, such as federalism or the public opinion of the judiciary (not the public opinion in regard to a particular issue) which were assumed as being irrelevant or not within the scope of the research methods of the thesis, or factors not discussed in the literature, could have been important in explaining judicial activism.

Although this is a possibility (and the risk of only choosing some factors), during the process of data gathering and especially during the interviews, special attention was paid to the importance of other factors which were not assumed to be relevant initially. In fact, an open-ended question was used during the interviews asking interviewees what other factors they thought were relevant in explaining judicial activism or the lack of it.

In this manner, two factors found to be important in Chile were not part of the factors initially assumed as relevant (leadership and public opinion). In this way, the risk of not considering a relevant factor was attenuated but not eliminated.

c) The relationship between the different factors

The third main finding and argument of the thesis is that the different factors shaping judicial activism can be categorized according to the different function they fulfil in relation to judicial activism (and non-activism). This categorisation of factors, I argue, allows for a better understanding of the complexity of judicial activism and the role different factors have in explaining it.

As was argued in Chapter 6, a conclusion that can be reached from the empirical data gathered related to factors is that, empirically, it is not possible to identify one particular factor that actually explains judicial activism (and non-activism). The reality is more complex; although certain factors will have a more obvious and direct impact in explaining judicial activism, other factors will have a less visible –yet important– role.

In this manner, as was anticipated in Chapters 4, 5 and 6, judicial activism and non-activism can be explained as a complex interaction between factors which fulfil different functions. These factors are classified as fulfilling two different functions, either as *enabling* or *direct driving* factors.

Direct driving factors are directly linked to judicial activism. They are factors that are direct triggers of judicial activism in the sense that a decision that is judicially activist can be explained in a direct manner because this factor exists. In other words, these factors are very intimately linked to judicial activism to an extent that without that factor, it would be unlikely for the judicially activist decision to occur.

Three factors were identified as direct drivers of judicial activism in Chile. The most obvious one was the specific policy views of judicial actors as these are particular views which may or not explain the behaviour of a judge in making a decision depending on other factors (enabling factors as will be explained below). Furthermore, two less obvious factors were also identified, this is public opinion (which manifested a particular policy view) as interviewees believed that judicial actors were *directly* influenced by it in making decisions and leadership inside the Supreme Court as interviewees stated that they thought that leadership (which favoured judicial activism and expressed a particular policy view) was directly related to a shift in the Court's decisions in the last few years in relation to how companies with substantial market power are treated.

For the UK, as judicial actors were found generally to be non-activist, generally, it is not possible to point towards direct driving factors. Certain factors were found to explain non-activism but all of them can be categorized as *non-enabling factors* as will be further explained below.

As was anticipated, there are also factors that play a role as *enabling factors*, this is factors that make it possible for *direct driving* factors to operate or in other words set forth the necessary conditions for them to operate. For Chile, a number of factors were found to have a role enabling factors, such as, for example, the attitudes judges have towards their role (a judicial culture that allows judicial activism) or the manner in which the specific telecommunications regulation is drafted (it must be unclear).

A summary of the factors and what role they have in relation to judicial activism can be found in the following table:

Enabling factors	Direct driving factors
Attitudes judges have towards their role (judicial culture that allows judicial activism)	Policy preferences
Specific content of economic telecommunications regulation is not clear	Leadership of the court that is amicable to judicial activism
	Public opinion that expresses policy views

In relation to non-activism in the UK, it can be better explained due to the lack of enabling factors (or in other words, the existence of non-enabling factors) and thus the impossibility for direct driving factors to operate. These non-enabling factors are actually the opposite of some of the factors categorized as *enabling* for judicial activism.

As such, in the UK, three non-enabling factors were found in this particular empirical study to explain judicial non-activism:

- The attitudes judges had towards their role (a judicial culture that is not amenable to judicial activism);
- The availability of resources for litigation (it is expensive to litigate, lack of economic interests pushing for litigation); and

- The appeal structure (which makes it difficult for cases to reach the higher levels of the judiciary hierarchy).

This operation of non-enabling factors can be seen clearly (in the UK) in relation to the attitudes judges have towards their role. As a former UKSC judicial assistant points out, if [a case] creates a problem, it is for Parliament to sort it out, not for the judges'.¹⁹ In this way the prevailing judicial culture in a way blocks the possibility of direct driving factors operating or in other words, the lack of enabling factors does not allow other factors to shape judges' approach to be relevant.

A closely related issue is how the two types of factor relate. The relationship between direct driving and enabling factors and how it may better explain judicial activism, based only on the information gathered for this thesis, can be seen in the following table and an explanation follows:

	Direct driving factor (-)	Direct driving factor (+)	Multiple direct driving factors (+)
Enabling factor (-)	JA very unlikely	JA unlikely	JA unlikely
Enabling factor (+)	JA unlikely	JA likely	JA very likely
Multiple enabling factors (+)	JA unlikely	JA very likely	JA most likely

It is extremely important to highlight (again) that the table above does not attempt to portray or develop a model of how the different factors interact. As the study of

¹⁹ Interview with a former UKSC judicial assistant, March 2015.

this thesis is basically exploratory in nature and limited to only two case studies, the purpose is more modest; to explain how the factors in the context of this particular study interact.

Based on the information gathered for this thesis I argue that if no enabling factors exist (-), even if there are multiple direct driving factors (+), it is extremely unlikely for judicial activism (JA) to occur. Likewise, if there are multiple enabling factors but no direct driving factors, it will be unlikely that JA will be present.

Additionally, I argue that the more enabling and direct driving factors there are, the more likely for judicial activism occur, and as such situations where multiple direct driving factors and multiple enabling factors exist are the most likely scenario in which judicial activism would be found.

An abstract explanation given by a Chilean Supreme Court Justice, also discussed Section C.3 in Chapter 4, illustrates very well how enabling and direct driving factors interact:

in a case where I think option A is the right answer [in political terms], but there's no doubt that option B is the legally correct answer, then I will decide B, but if the legal rule in question is vague then my interpretation will obviously be influenced by my political view and I will argue in favour of A.²⁰

The interviewee clearly identifies that in order to make a decision based on his political views (a direct driving factor) the rule in question must be to some level indeterminate (an enabling factor). Of course, it may be the case that the person could interpret the rule to be more indeterminate than others may think it actually

²⁰ Interview with a former or current Supreme Court Justice (November 6th, 2013).

is in order to make the decision which is politically correct for her or him, but even in this fictional scenario the Justice recognizes that there *may be* a legally correct answer. Nevertheless, it must be highlighted that even if all enabling factors are present for driving factors to operate, that does not mean that necessarily there will be judicial activism, in fact the presence of enabling factors only creates the necessary conditions for direct driving factors to operate but does not dictate the outcome.

This classification of factors and the manner in which they interact is only a generalization from the two case studies of this thesis and thus the applicability of these to other areas of law and other jurisdictions should be treated with caution. This issue will be further analysed below.

B. Jurisdiction Specific Judicial Activism and Relationship with Jurisprudence of Adjudication: Some Contributions of this Thesis to Theory

In this section I will highlight some of the contributions the findings of the thesis can make towards different strands of literature. First, I will analyse if the classification into *enabling* and *direct driving* factors could possibly be extended to explain judicial activism in other areas of economic regulation. This is an important, alas initial approximation, as it allows to enquire into whether the proposed classification could have a wider application than just this thesis. Second, I will highlight how inapplicable (mostly) the conclusions from literature from one particular country (the United States) is to other countries based on the empirical research of this thesis. This highlights the importance of jurisdiction specific studies which may reflect more adequately the complexity of judicial activism. Finally, the conclusions from this thesis will be used to explain how studies in judicial activism can interact with jurisprudential analysis of adjudication and specifically how empirically studies may help in confirming or questioning certain claims made by legal theory in relation to adjudication.

1. Applicability of classification of factors to other areas of utilities regulation and other jurisdictions

An interesting question to ask is whether the factors found to explain judicial activism and non-activism and the classification of factors developed in the thesis could explain judicial activism in other areas of economic regulation of utilities, and in other jurisdictions. It is important to ask this question because it relates to whether the classification of factors developed could have a wider application or if they are just applicable for this particular area of law (economic telecommunications regulation) and for these two particular jurisdictions.

Of course, a definitive empirical answer can only be given by performing further research in different areas of utilities regulation and on different jurisdictions. Nevertheless, the following paragraphs will engage in a careful analysis in which I will attempt to give an informed preliminary answer, based on the data analysed for this thesis, and by taking into account how other areas of utilities regulation are different from telecoms.

Economic telecommunications regulation has many similarities with other areas of economic regulation (utilities mainly) such as gas, electricity and water. Among the main similarities is that they are all (at least in some parts) natural monopolies, require large sums of investments in immobile assets and have displayed economies of scale.²¹

²¹ Decker (n 2) 313.

There are considerable differences nonetheless. For instance, all other utilities involve a one way transportation of a raw product (whether it is produced like electricity or extracted like water or gas) to the end consumer through pipelines.²² In telecommunications networks it is different, the *product* involves a two way interconnection between specific parties.²³ Furthermore, another difference is that in all other utilities the product is largely homogenous (electrons, gas or water within a particular geographical area)²⁴ whilst in telecommunications the product can be very heterogeneous mainly in terms of ‘reliability, capacity quality and speed of carriage or transmission’.²⁵ A final difference that is worth highlighting is that telecommunications technology (which may need particular regulation) has developed at a much faster pace than technology in other utilities, especially in the last twenty years.

In this sense, it is interesting to enquire into how these differences may affect judicial activism, and whether they may have an effect on the factors that explain judicial activism.

The highlighted differences, I think, suggest that judicial activism may be more likely in telecommunications regulation rather than in the other mentioned utilities. This is due to two main reasons. First, the homogeneity of the product in the case of all other utilities could make litigation less likely as there will be few

²² Ibid

²³ Ibid

²⁴ I mean that they are homogenous but usually within a particular geographical setting. Water, for example, can vary greatly in quality depending on this factor but within a certain geographical area usually the product is quite homogenous.

²⁵ Decker (n 2).

disputes regarding the quality of the product, for example or how quality should be regulated.

The main difference nevertheless is in regards to the pace at which technology advances in telecommunications in relation to other utilities. The constant innovations in the area of telecommunications make it difficult for regulators to be up to date and as such, it may be more likely that litigation will arise in relation to how these technological improvements should be regulated.

It should be noted that an increase or higher likelihood of litigation does not necessarily entail judicial activism although it increases the possibilities of it occurring. As such, considering the information gathered for the thesis and the main similarities and differences found between the telecommunications and other utilities, the question of the applicability of the classification of factors to the other areas of economic regulation, will be analysed.

In regards to whether the factors that explain judicial activism in Chile and non-activism in the UK could explain judicial activism and non-activism in other areas of utilities regulation, a first preliminary anticipation is that it seems very likely that the same factors would help in explaining these practices. This is a likely scenario because nothing from the materials gathered indicates that judicial activism and non-activism in each country is especially linked to factors related specifically to economic telecommunications regulation but it rather relates with reasons that are more generally applicable, possibly to other areas of economic regulation.

As was explained above, the key factors that explain judicial activism in Chile are a changing judicial culture, strong leaderships of the Court, public opinion and non-conservative policy views, whilst judicial non-activism in the UK can be primarily explained due to a conservative judicial culture, a partly unclear appeal structure and high expenses needed to litigate. These reasons are not linked or are not specific to economic telecommunications regulation but rather are more general in nature.

In regards to the classification of factors, it could be argued that the separation of them into *enabling* and *direct driving* factors will most likely work in relation to any area of economic regulation and in any jurisdictions but in the sense that it may be able to explain judicial activism once the different factors and how they operate are researched in relation to each country or area of economic regulation.

Of course, in each country and in other areas of law there may be other factors that operate and behave in different manners, but I think that all of the factors explored in the literature and additional ones that could be researched may play one of the two roles which were explained (as drivers or enablers) and this could, in turn, help to explain judicial activism or non-activism.

2. The inapplicability of theoretical conclusions based on one jurisdiction (US) to others (in relation to judicial activism literature).

The English language literature on judicial activism is primarily focused on one jurisdiction, the United States, and as such it is a frequently referred to reference

in studies of judicial activism in other countries.²⁶ I question whether this is a correct approach as in light of the materials analysed for economic telecoms regulation in Chile and the UK, the US literature does not adequately explain judicial activism (and non-activism) in these countries.

The findings of this thesis show a more complex explanation for judicial activism and non-activism. I do not suggest that the US literature should be ignored, but I suggest it is important to be cautious and consider that each jurisdiction has its own complexities which are most likely different from the US. Although that literature can be used, studies that *test* US findings in other jurisdictions may not allow for a complete understanding of judicial activism in that jurisdiction and may start from the wrong hypotheses.

It is interesting to try to understand why the US literature does not adequately reflect the reasons that explain judicial activism in Chile and the UK (and possibly other countries). For one part it seems that some of the most distinguishable features of US courts are not found in Chile and the UK. For this, it is necessary to divide the analysis between the US Supreme Court and lower courts (trial courts and Court of Appeals).

Most studies of judicial activism in the US have focused on analysing the role that policy preferences (attitudes) play in explaining judicial activism in the

²⁶ There are numerous examples of studies of judicial activism in other countries but the concentration of studies in the US is considerably larger and has had more academic impact than studies in other countries. Some international and comparative studies not focused in the US can be found in: Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, *Consequential courts : judicial roles in global perspective* (2013).

US Supreme Court.²⁷ The most well-known research regarding this topic relates to what is labelled as the *attitudinal model*.²⁸ This theory which follows the legal realism tradition holds in simple terms that judges decide cases depending on the relevant facts, and their ideological policy views and values.²⁹ That is, judicial actors decide according to their own particular preferences considering the facts of each case. Various subsequent studies provide ample quantitative empirical evidence to support this model³⁰ in which the particular ideas, beliefs and values of Judges are the essential factors in explaining judicial activism.

The Supreme Court of the United States, nevertheless, is substantially different from the UKSC and the Chilean Supreme Court. First, it is a constitutional court whereas the UKSC does analyse constitutional issues but is confined in its powers through the doctrine of parliamentary sovereignty (although the doctrine of Parliamentary Sovereignty has been qualified e.g. through the UK's membership of the European Union)³¹ and the Chilean Supreme Court shares constitutional review with the Chilean Constitutional Tribunal.³²

²⁷ Brian Z. Tamanaha, *Realistic socio-legal theory : pragmatism and a social theory of law* (Clarendon Press 1997), 220.

²⁸ Baum (n 13) 7.

²⁹ See Chapter 2, Section D. (2) b.

³⁰ Jeffrey A. Segal and Albert D. Cover, 'Ideological Values and the Votes of U.S. Supreme Court Justices' 83 *The American Political Science Review* 557; Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, 'Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation' 90 *Virginia Law Review* 301.

³¹ See for example: Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Bloomsbury Publishing 2008).

³² From 2005, the Constitutional Court is empowered to perform constitutionality review both *ex ante* when required by the Constitution for laws that require a high quorum of approval and *ex post* in case a private party believes that a particular law or part of a law is inapplicable because it is unconstitutional (called 'Inapplicability for being Unconstitutional'). Nevertheless, the

Second, the US Supreme Court is widely understood to be a very political court in a double sense. Justices are chosen in a politically charged process in which their own political (policy views) are scrutinized thoroughly by the US Congress,³³ and it is assumed that the Court will have a relevant role in developing public policy.³⁴ The UKSC and the Chilean Supreme Court are different. The process by which Justices are chosen is less politicized in the UK as Justices are chosen by a selection committee composed of senior lawyers and non-legally qualified persons whose decision is then ratified by Prime Minister and the Queen,³⁵ whilst in the Chilean Supreme Court Justices have normally followed a career within the judiciary and are chosen by the President with the approval of Congress.³⁶

The US Courts of Appeals (and lower courts) nevertheless are different from the US Supreme Court. Most studies have concluded that in these courts policy preferences (attitudes) are not factors that explain judicial activism well.³⁷ In fact, even though most research has focused in proving this negative fact, some studies have pointed to other factors that explain the decisions taken by these Courts such

Supreme Court still has power to review *amparo* and *protección*, which are emergency claims that can be made by private parties in case their fundamental rights are being infringed.

³³ Jeffrey Allan Segal and Harold J. Spaeth, *The supreme court and the attitudinal model revisited* (Cambridge University Press 2002), 178.

³⁴ Roger Cotterrell, *The sociology of law : an introduction* (2nd edn, Butterworths 1992), 240.

³⁵ Section 25 to 31 of Constitutional Reform Act 2005.

³⁶ Article 32 N° 8 and 78 Constitution of the Republic of Chile of 1980. This is not a political appointment *per se*, as judges are chosen by the President but from a list of three or five candidates which is selected either by the relevant Court of Appeals (for lower courts) or the Supreme Court (for Court of Appeals judges).

³⁷ Tamanaha (n 27) 220.

as the law itself³⁸ and aversion to the risk of their decisions being overridden by their superiors.³⁹

In a sense these *lower* courts are similar to Chilean and British Courts because for both jurisdictions the law in itself, and how clear it is, is a factor that (partially) can explain judicial behaviour. In other aspects, US Courts are nevertheless different from the Chilean ones. In this manner, it could be argued that the jurisdiction label may not be so meaningful as it is necessary to distinguish between different layers in the court hierarchy. Nevertheless, I believe that the jurisdiction is important, even with the caveat expressed before, because significant differences can be found between different jurisdictions (even if similarities are also found).

Considering the above, a conclusion that can be reached is that it is very likely that particularities or differences may be found for every jurisdiction (but also allowing for differences in relation to different courts in the court hierarchy) that is researched, and therefore is not just the US that is different but rather that every jurisdiction is likely to be different. In fact, the case studies of this thesis show that judicial activism (and non-activism) is different (*sui generis*) and driven by different factors in Chile and the UK.

Perhaps, therefore, it would be more precise to characterize judicial activism as *jurisdiction specific*. This is, that for every jurisdiction, judicial

³⁸ Frank B Cross and Emerson H Tiller, 'Judicial partisanship and obedience to legal doctrine: Whistleblowing on the federal courts of appeals' 107 The Yale Law Journal 2155, 2156.

³⁹ Lee Epstein, William M. Landes and Richard A. Posner, *The behavior of federal judges : a theoretical and empirical study of rational choice* (Harvard University Press 2013).

activism will manifest in a different manner and therefore country specific studies may be primarily useful to compare the practice of judicial activism in different countries.

This raises the question of whether it is possible to construct wider conceptions of judicial activism that apply to whole legal families,⁴⁰ this is jurisdictions sharing common legal institutions and historical roots, or by geographical areas, for example. The answer on the basis of the analysis in this thesis is that it is not likely. I have already explained that judicial activism in the US is different from judicial activism in the UK, and since both form part of the so called Anglo-American legal family,⁴¹ it is possible to conclude that at least in that *legal family*, there is not a uniform conception of judicial activism.

Regarding geographical areas, I have no empirical data to rely on. Nevertheless, for example, it can be argued that for the case of South America, which is a very homogenous continent in language and legal system, my impression is that because of serious differences in economic progress, corruption and the ideology of the governments, it is very likely that empirical studies would not find significant common grounds.

Compare Chile and Argentina, for example. Argentina is a country which is usually identified as substantially more corrupt than Chile.⁴² This level of

⁴⁰ Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (Oxford University Press, USA 1992) 63.

⁴¹ Ibid, 187.

⁴² For example, the corruption perception index of Transparency International of 2015 places Chile in the 23rd place (number 1 being the less corrupt country) whilst Argentina is place number 107 out of a total of 167 countries. See: <http://www.transparency.org/cpi2015#results-table>.

corruption is understood to have penetrated the judiciary.⁴³ As such, it is unlikely that judicial activism as it is found in Chile (this is judicial actors making decisions because of their particular policy views or because they believe it is their duty to do so) will be found in Argentina, because in this country many judicial decisions will be political, but not in the *policy* sense identified for Chile but in a more party political sense or even in an outright corrupt manner.

It is an interesting topic nevertheless to carry out further research on whether there might be a geographically specific concept of judicial activism. It may be that in South American there may not be one but it is of course possible that one could exist for other geographical areas.

3. Confirming and denying claims of the jurisprudence of adjudication

This thesis has also implications for thinking about the connection that may exist between socio-legal research and legal theory and more precisely the contributions that the former can make to the development of the latter. Galligan makes precisely this point and highlights that socio-legal research *can* make a contribution to legal theory. He states that:

If, in the course of law-and-society research, matters are revealed that are sufficiently general across legal systems, then legal theory may find them relevant for its own purposes. There is no reason, in principle, against research in law-and-society being informative as to the nature of law, despite its main purpose being to advance the understanding of law in society. It could bring to light matters of interest to legal theory in the form of a novel generalization or hypothesis about law, so that

⁴³ Transparency international report on corruption in judiciaries gives a detailed account of how the Argentinian judiciary is perceived as corrupt. http://www.transparency.org/whatwedo/publication/global_corruption_report_2007_corruption_and_judicial_systems.

legal theory should be modified to account of it. Alternatively, on the basis of law-and-society research, current concepts and ideas could be confirmed or questioned. For, as noted before, the concepts and ideas of legal theory are founded on generalizations about the world, even if they are not expressed in that way; and being generalizations about the world, they are dependent on accurately reflecting what happens in the world.⁴⁴

In a similar spirit, as Tamanaha points out, ‘to find out how judges believe they make decisions they must be asked that specific question and given the opportunity to provide a reflective answer’, and he adds that ‘under those circumstances judges tend to give quite realistic accounts’.⁴⁵ In this manner, qualitative studies on judicial activism can make great contributions to theories of adjudication by providing original data regarding the role judges have (or think they have) in adjudication.

Nevertheless, legal theory, it seems, has tended to largely ignore socio-legal research of judicial activism. This attitude by legal theorists is particularly baffling as research regarding adjudication is an extended area of empirical studies. Considering that both theoretical debates and empirical research has focused on common law countries (mainly US), there does not seem to be a good reason not to take into account this empirical research.

A topic regarding the theory of adjudication that has been at the centre of legal theory debates for the last 40 years, this is the role that judges have in deciding *easy* and *hard* cases, will be briefly examined in order to show how socio-legal research may contribute to further developing legal theory and more

⁴⁴ D. J. Galligan, *Law in modern society* (Oxford University Press 2007) 19.

⁴⁵ Tamanaha n (27) 229.

precisely how the socio-legal research of this thesis can contribute to that debate. It must be strongly emphasized that it is not the purpose of the following paragraphs to give a detailed account or make a contribution to the theoretical debate about the role of judges on *easy* and *hard* cases –or whether they even exist-

Easy cases is a topic that for the most part has received only a small part of the academic attention that *hard* cases have received.⁴⁶ I will begin by analysing how legal theory has treated the role of judges in *easy* cases and if that characterisation fits with the information available from empirical studies on judicial behaviour.

In general *easy* cases have been described as those in which the creative role of judicial actors is not needed as the solution to the legal problem which the judge faces is rather obvious and non-controversial. Dworkin, for instance, gives little attention to these type of cases but when he does, it is precisely to point out that they present little problem for judges. He states that ‘questions of law are sometimes very easy for lawyers and even for non-lawyers. It goes “without saying” that the speed limit in Connecticut is 55 miles an hour and that people in Britain have a legal duty to pay for food they order in a restaurant. At least it goes without saying except in very unusual circumstances’.⁴⁷

⁴⁶ William Lucy, ‘Adjudication’ in Jules L. Coleman, Scott Shapiro and Kenneth Einar Himma (eds), *The Oxford handbook of jurisprudence and philosophy of law* (Oxford University Press 2002) 209.

⁴⁷ Ronald Dworkin, *Law's empire* (Fontana 1986) 353.

A more detailed account of *easy* cases is given by MacCormick, who gives great attention to the issue in *Legal Reasoning and Legal Theory*. MacCormick defends two essential claims regarding *easy* cases:

First, that easy cases exist when there is no dispute about the relevant facts or the applicable law (it is clear, unambiguous and undoubtedly relevant to the case in question). Secondly, that decisions in easy cases are capable of deductive justification.⁴⁸

Raz also makes a distinction similar to that of *easy* and *hard* cases although he calls them *regulated* and *unregulated* cases. He highlights that:

Regulated cases are those which fall under a common law or statutory rule which does not require judicial discretion for the determination of the dispute (rules referring to what is reasonable or just, etc., do require such discretion). A dispute is regulated if questions of the form: 'In this case should the court decide that p?' have a correct legal answer. It is unregulated if some of these questions do not have a correct legal answer, i.e. if there is a gap in the law applying to the case.⁴⁹

These three accounts agree –with different emphases– that judicial actors have very little room to manoeuvre in these cases as the law in this scenario of *easy* or *regulated* cases is very much clear. Additionally, they also have in common that there is no reference in any of them to empirical studies which may support, contradict or problematize the theoretical accounts.

⁴⁸ Lucy (n 46) 209. MacCormick defines deductive arguments as 'an argument which purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the "premises" of the argument. A deductive argument is valid if, whatever may be the content of the premises and the conclusion, its form is such that its premises do in fact imply (or entail) the conclusion. By that is meant that it would be self-contradictory for anyone to assert the premises and at the same time deny the conclusion. Neil MacCormick, *Legal reasoning and legal theory* (Clarendon Press 1978) 21-22.

⁴⁹ Joseph Raz, *The authority of law : essays on law and morality* (Oxford University Press 1979) 181; Lucy (n 46).

The last observation is particularly noteworthy as most empirical research on judicial activism (and judicial behaviour in general) actually supports the view theorized by the three cited authors that in certain cases, where the law is clear, there is no room for judicial actors to create or develop the law.⁵⁰ This may therefore be one of the cases in which, in Galligan's words, 'concepts and ideas can be confirmed'.⁵¹

More specifically, the information gathered for this thesis also confirms, to an extent, previous empirical studies on judicial behaviour and the general assumptions presented by legal theorists. In fact, the specific manner in which economic regulation is drafted acts as an *enabling* factor. As such, in those cases in which the regulation (or legislation) is clear, judges will have no room to create or develop the law whilst in the cases in which the regulation is vague, judges may intervene and their political views may become important.

It is important to highlight that the contrary situation nevertheless, this is when the law is not clear, does not necessarily entail that judges will be activist. This is because the manner in which the law is drafted is an enabling factor which therefore allows for judicial activism to occur, but a direct driving factor must exist in order for a judicially activist decision to actually exist. As such, when the law is not clear judges may be activist or not, in which case they may simply for example, defer the issue to the regulator or ask Parliament to clarify the issue (in the UK).

⁵⁰ Tamanaha (n 27) 208, 210.

⁵¹ Galligan (n 44) 19.

In relation to *hard* cases, these are characterized most obviously as those not being *easy* or where ‘one or other conditions is lacking’.⁵² For MacCormick:

Hard cases arise when courts face one or other of three problems which ensure that there is doubt as to the applicable law. The first is the problem of relevancy: is there an applicable proposition of law in this case? The second, that of interpretation: which from a range of apparently applicable propositions of law, or which from a range of competing interpretations of an apparently applicable proposition of law, applies in this case? The third, which is simply a variation of the second, is the problem of classification: does the apparently applicable proposition of law actually apply to the facts of this case?⁵³

For Raz, *hard* cases (which he calls unregulated cases) occur when ‘the law applying to them has gaps’⁵⁴ or when the relevant law is riddled with ‘intended or unintended indeterminacy of language and intention’⁵⁵ or when cases fall ‘under two conflicting rules’.⁵⁶

It is when judges are faced with these type of *hard* cases that they exercise discretion, taking discretion to be what Dworkin calls *strong* discretion, this is ‘those instances of decision-making in which there are no applicable rules or standards.’⁵⁷ At this point empirical studies on judicial behaviour should become relevant as some of them precisely study what explains judicial decisions. Nevertheless, legal theory largely ignores these empirical studies, and as such an incomplete picture of adjudication in hard cases is painted.

⁵² Lucy (n 46) 213.

⁵³ Ibid; MacCormick (n 48) 65.

⁵⁴ Lucy (n 46) 214; Raz (n 49) 181.

⁵⁵ Lucy (n 46) 214; Raz (n 49) 193.

⁵⁶ Lucy (n 46) 214; Raz (n 49) 193.

⁵⁷ Lucy (n 46) 215; Ronald Dworkin, *Taking rights seriously* (Harvard University Press 1978) 31-34.

A good example of this is MacCormick's analysis of the role of judges when facing *hard* cases:

MacCormick categorizes the reasons judges do and should use to close the gap [in hard cases] as coherence, consistency, and consequentialist considerations. Judges deploy such considerations in order to solve the problems of relevancy, interpretation, and classification that define hard cases. Consequentialist, coherence and consistency considerations constitute the realm of 'second order justification', the realm in which judges have to choose a relevant proposition of law to apply in the instant hard case.⁵⁸

Some of the reasons (factors for this thesis) which MacCormick points to as explaining judicial decisions can be assimilated to factors can usually be found in empirical studies of judicial behaviour. For example, consequentialist considerations can be directly related to the factor that I refer to as the policy preferences of judges. Nevertheless, these reasons given by MacCormick do not necessarily give a complete picture of the reasons (factors) that explain judicial activism as some factors such as public opinion or leadership are completely ignored.

If the purpose of legal theory is to give abstract accounts of legal phenomena that may be applicable to most modern legal systems, then it is necessary that empirical studies regarding judicial behaviour to be taken into account. Without them the picture will always be incomplete. As such the accounts given by legal theorists can be actually questioned.

⁵⁸ Lucy (n 46) 217; MacCormick (n 48) 101.

C. Concluding remarks: Strengths and Contributions

This thesis embarked on an exploratory empirical study of judicial activism in Chile and the UK in the specific area of economic telecommunications regulation. The main findings of the thesis have already been explored in this concluding chapter, so in this final brief section I will highlight some of the perceived strengths and contributions of this thesis as well as point towards further research in the area.

Chapter 1 starts with some quotes about judicial decision-making, some of which point towards the randomness or the ideology driven nature of judicial activism. One contribution of this thesis is that it raises the idea that judicial activism could be explained, talked about and studied in a more abstract and structured manner, not just as a (perhaps) arbitrary decision by a judge.

Another interesting idea worth pointing out is that institutional approaches towards understanding judicial activism may not adequately explain this conduct. In fact, differences such as the nature of the legal system (civil vs common law), political history (dictatorship vs democracy for large periods), were not found to be particularly relevant in the thesis in explaining judicial activism. Role related factors such as leadership and the attitudes judges had towards their role were better at explaining the decisions of judges considered to be judicially activist.

With more qualitative research on the subject which could point towards more factors that explain judicial activism and the role those factors have (like the classification of factors presented here), a possible research path is to move towards quantitative studies which could confirm or deny the validity of the classification of factors, for example.

Although judicial activism is and will probably remain a *slippery term*, this should not discourage further research on the subject nor should it be sufficient reason to abandon the term. Judicial activism is such a powerful concept that people react, sometimes, in very passionate manner towards it and as such it is a concept which I believe deserves to be explored further in order to have even more clarity about its boundaries and what factors explain its occurrence.

APPENDIX: Reflections on methodology, fieldwork and data gathering

The purpose of this section is, to critically assess, with the benefit of hindsight, the methodology, the data gathering methods and the fieldwork carried out in both countries, highlighting what worked, what did not, and what could have been done differently.

A comparative case study consisting of two cases was proposed as the methodology for the thesis. The two case studies entailed a comparative analysis of the role played by judicial actors in the development of economic telecommunications regulation in Chile and the UK from the 1980's—which marks the start of the current privatisation and liberalisation era of regulation for economic telecommunications—until September of 2014—when empirical research for this dissertation concluded.

Various reasons were given to choose a comparative study as the research methodology. Firstly, a wider range of reasons for involvement of judicial actors in economic telecommunications regulation was assumed could be studied through a comparison. Of course more factors could possibly be studied in a single case study but by performing a comparative study I was able to research factors that were, for example, present in Chile and not in the UK.

This was in fact a good reason as it actually allowed for more factors that explain judicial activism -or the lack of it- to be examined. The scope of the analysis would

have been more limited had the study focused in only one of the two countries. For example, if the thesis had just focused in the UK, there would have not been any analysis of factors like leadership or public. This of course opens up the door for further research as it seems (absolutely) reasonable to expect that if further jurisdictions are studied the scope for other factors that may explain judicial activism could also be expanded.

Secondly, today's world is greatly marked by the information technology revolution, it has taken us to an 'Information Age'⁵⁹ which has changed the economy, the way in which we communicate and the way we work. Economic telecommunications regulation policy has, for better or worse, been an essential part of this information age as it governs crucial aspects which have made this 'revolution' possible such as access to the physical networks needed for information to be transmitted, and rules that have allowed different networks to interconnect. During this information age, most developed or developing countries have had to face the same regulatory policy dilemmas in similar periods of time.

It was thus argued that these features made it a particularly interesting area for a comparative study, especially when compared to other areas of economic regulation, such as energy or water, where countries usually face very different scenarios that may depend largely on the natural resources available (even if they have common problems with greenhouse gas emissions from fossil fuels or increasing scarcity of fossil fuels).

⁵⁹ Manuel Castells, *The rise of the network society* (2nd edn, Wiley-Blackwell 2010).

Thirdly, it was also argued that a comparative study involving the UK and Chile would contribute to the literature on comparative judicial activism for two reasons. The inclusion of Chile was assumed to be particularly valuable in light of the fact that most of the empirical research on judicial activism in this field focuses on the United States and that there is very little literature regarding the Chilean judiciary. This is in fact true, as the literature on judicial activism (and judicial behaviour) in regards to Chile is effectively scarce and has mostly focused on the Constitutional Court and in issues, such as that are generally not related directly to judicial activism.⁶⁰ Furthermore, it was also thought it would be a contribution to judicial activism literature in general as most of this research has focused on the development of (regulation) of socio-political rights and not economic regulation.

Regarding the qualitative empirical data gathered for this thesis, it was obtained from two primary sources: documents (official law reports, final decisions and public policy documents) and semi-structured qualitative interviews, as well as secondary sources, such as relevant literature on judicial activism in Chile, the UK and comparative works.

The most interesting data was primarily obtained from interviews. These were carried out with relevant actors in the regulatory process such as judges, regulators, barristers, solicitors, and internal counsel of telecommunications companies. They took place during two different periods in which fieldwork was

⁶⁰ Lisa Hilbink, *Judges beyond politics in democracy and dictatorship : lessons from Chile* (Cambridge University Press 2007); Druscilla L. Scribner, 'The Judicialization of (Separation of Powers) Politics: Lessons from Chile' [2010] 2 *Journal of Politics in Latin America* 71.

carried out. The two experiences in Chile and the UK were quite different and I believe this may have had an impact on the quality of the data collected.

In Chile, I secured a position as a research visitor within the Supreme Court and stayed there for approximately two months during November and December of 2013. During this period I carried out interviews with Supreme Court Justices, TDLC judges, external and internal counsel for the telecommunications companies and public servants.

One big advantage regarding most of the interviewees that were practicing lawyers, was that, as a local lawyer, part of the legal community, I knew some of them or I had good connections to most. This helped greatly both in setting up the interviews and when interviews were conducted as there was quite a trusting atmosphere. There was of course a risk of capture as there could be a lack of critical distance to views of interviewees but I think this did not happen. I developed good relations with the persons with which I interacted more (the Research Division of the Court) but with the Justices themselves I only had interaction during the interviews.

Interviews and contacts with Supreme Court justices was harder as they are naturally more reserved and I did not have good direct contacts to set up interviews with them. The research post I had there helped greatly nevertheless as it facilitated contacts that otherwise would have been difficult to make.

Furthermore, in relation to how the interviews were carried out, two ideas worked well. First, I decided not to carry out the interviews too close to arrival to the Supreme Court, but to wait some weeks so my face was a bit familiar. This I think

helped, when the interviews were held, to create a more trusting atmosphere. Second, as I had no experience in conducting interviews, I also thought that it would be good to start with what I assumed were going to be the less interesting interviews (those that I thought would be less open based on informal information I gathered about them and from how often they appeared to speak in public) and work my way up to the most interesting interviews so when I got to these, I would have more practical experience. This worked mostly well but in regards to some interviews I was wrong (some early ones yielded very interesting material for example) and I was only able to do it because I had beforehand relative certainty of who I was going to interview.

In the UK things were different as I was a complete outsider and had no connections with practicing solicitors, barristers, internal counsel for the telecommunications companies and less so with judges. It was difficult to even get the contact details of some of the prospective interviewees and I had to rely on publicly available records on the internet (Linkedin, law firms' webpages, and even sending messages through *contact us* webpages) with the exception of very few contacts I was able to get directly from one of my supervisors and from DPhil classmates.

Although my experience in carrying out interviews was limited, for the interviews in the UK, at least I had the experience of the interviews carried out in Chile. Notwithstanding this, interviews in the UK were harder and I always felt that I was not able to get interviewees to be as open and sometimes as blunt as they were in Chile. Of course, this is only a perception I have on how interviews developed

and it is perfectly feasible that regardless of who the interviewer was, interviewees would have given the same answers.

Nevertheless, if I were to do the data gathering again, it would probably be a good idea to try to get a visiting research post (or similar) within, for example, OFCOM or the CAT, as that would have perhaps allowed me to gain the *insider* status I had in Chile and that I did not have in the UK. In Chile I always felt very confident that I was in similar footing regarding knowledge of the system and the cases as most of the interviewees whilst in the UK I did not, and this idea of being able to have a *visiting researcher* post could have helped.

Additionally, documentation related to the relevant cases was thought to help in determining how the different selected factors influence judicial activism. The list of documents that was going to be examined were final judicial decisions, case transcripts, interim decisions, *amicus curiae*, legislation, records of parliamentary debates regarding the relevant legislation, official speeches and interviews of judges.

In practice, besides the final judicial decisions, the other documents mostly either did not exist. For example, there wasn't any case where *amicus curiae* were presented, official speeches and interviews of judges never related to economic telecommunications regulation cases. Legislation, proposal of legislation nevertheless did give some interesting insights, such as perceived problems in the appeals structure in the UK.

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